IN THE SUPREME COURT OF THE UNITED STATES

SAFARA ECHO SHORTMAN,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTIONS PRESENTED FOR REVIEW

21 U.S.C. § 841(a)(1) of the Controlled Substances Act makes it "unlawful for any person knowingly or intentionally - - to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance..." The structure of § 841(a)(1) indicates that Congress defined separate and distinct crimes in § 841(a)(1) where each crime is dependant on different particularized facts. *Id.* This petition presents following questions regarding the interpretation and application of § 841(a)(1):

1. Does 21 U.S.C. § 841(a)(1) permit the Government to charge a continuing offense of possession with intent to distribute a controlled substance based on facts that establish the defendant relinquished possession of the same controlled substance by distributing it to another person?

   a. Are facts that a person distributed a controlled substance to another person legally sufficient to establish a factual basis for a guilty plea on a charge for a continuing offense, the possession of the same controlled substance with intent to distribute it to another under 21 U.S.C. § 841(a)(1)?

   b. If the Court resolves the questions presented in Petitioner's favor, is plain error relief justified?

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No. _____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, SAFARA ECHO SHORTMAN (hereinafter Shortman) respectfully prays that a writ of certiorari issue to review the unpublished memorandum of the United States Court of Appeals for the Ninth Circuit entered on December 8, 2022, affirming her conviction for possession with intent to distribute fifty grams or more of actual methamphetamine.

OPINION BELOW

On December 8, 2022, the Ninth Circuit entered an unpublished memorandum affirming Shortman's conviction for possession with intent to distribute fifty grams or more of actual methamphetamine pursuant to 21 U.S.C. § 841(a)(1). The memorandum is attached in the

Appendix (App.) at pages 1-7.[1] The Ninth Circuit denied a petition for rehearing and suggestion for rehearing en banc on February 15, 2023. App. 8.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28, United States Code, Section 1254(1).

RELEVANT STATUTORY PROVISIONS & FEDERAL RULES

Title 21, United States Code, Section 802 states in pertinent part:

> **(8)** The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.
>
> **(11)** The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term "distributor" means a person who so delivers a controlled substance or a listed chemical.

21 U.S.C. §§ 802(8) and (11).

Title 21, United States Code, Section 841 states in pertinent part:

> **(a) Unlawful acts**
>
> ....it shall be unlawful for any person knowingly or intentionally--
>
> **(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance....

21 U.S.C. § 841(a)(1).

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[1] The memorandum reversed Shortman's conviction for conspiracy to possess with intent to distribute fifty grams or more of actual methamphetamine Count I of the indictment. Her conviction on Count II, charging possession with intent to distribute fifty grams or more of actual methamphetamine was affirmed. App. 2-3 and 6.

Rule 11of the Federal Rules of Criminal Procedure states in pertinent part:

> **(b) Considering and Accepting a Guilty or Nolo Contendere Plea.**
>
> > **(3) Determining the Factual Basis for a Plea.** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

Fed. R. Crim. P. § 11(b)(3).

Rule 52 of the Federal Rules of Criminal Procedure states in pertinent part:

> **(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. § 52(b).

STATEMENT OF THE CASE

Shortman was charged in a two count indictment with conspiracy to possess with intent to distribute fifty grams or more of actual methamphetamine in Count I, and with possession with intent to distribute fifty grams or more of actual methamphetamine in Count II. App. 10. She pleaded guilty to both counts and was sentenced to ten years on each count to run concurrently to each other. Shortman appealed her convictions to the Ninth Circuit Court of Appeals.[2]

On appeal, Shortman claimed that the facts submitted in support the factual basis for her guilty plea were legally insufficient to establish a continuing offense in § 841(a)(1), the

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[2] Shortman first filed a motion to vacate, set aside or correct sentencing under 28 U.S.C. § 2255, claiming that her attorney failed to file an appeal after she inquired about an appeal. The district court denied the motion. Shortman filed an appeal to the Ninth Circuit. The Ninth Circuit granted a certificate of appealability and later vacated her judgment. Her case was remanded to the district court for an evidentiary hearing on the claim defense counsel failed to file an appeal upon a request. The Government did not oppose the district court's entry of an amended judgment which allowed Shortman to file the direct appeal which is now before the Court in this petition.

possession with intent to distribute methamphetamine as charged in Count II.[3] An offer of proof submitted to support the factual basis for Shortman's guilty pleas stated:

> In the fall of 2017, Agents received information from a confidential informant that the defendant, Safara Shortman, was distributing large quantities of methamphetamine. Through use of the confidential informant, agents purchased one ounce of methamphetamine from Shortman on October 26, 2017. On November 1, 2017, agents conducted another controlled purchase of one ounce of methamphetamine. On November 9, 2017, agents conducted a third controlled purchase for two ounces of methamphetamine. Laboratory tests were conducted on several of these purchases. Each time, the methamphetamine tested more than 95% pure.

App. 14-15.

The Government did not present any facts that established Shortman possessed additional quantities of methamphetamine after she relinquished possession of the drugs she distributed to the informant during each of the three separate controlled purchases. *Id.* The facts set out in the offer of proof are identical to the facts outlined by the prosecutor at Shortman's change of plea hearing. App. 19.[4] These are the same facts included in the presentence investigation report as the facts underlying her conviction on Count II.[5]

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[3] Fed. R. Crim. P. § 11(b)(3) requires the district court to find a factual basis for a guilty plea before entering judgment. *See*, page 2, *supra.*

[4] At the change of plea hearing, Shortman told the magistrate, "I was in possession of more than 50 grams of methamphetamine." She also indicated she intended to "[d]istribute it" to other people. App. 23. Neither the offer of proof nor the prosecutor's recitation of facts at the change of plea hearing established that Shortman possessed any methamphetamine after she completed the three exchanges with the informant. App. 14-15 and 19.

[5] Filed under seal in the Ninth Circuit. (DktEntry 8 at 4-5, ¶¶ 8-10).

Under § 841(a)(1), it is "unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). The statute sets out different drug trafficking offenses that are dependant on separate and distinct illegal acts. In other words, the act of distributing a drug is separate from possessing a drug before it is distributed with the intent to distribute the drug.

Case law from several circuits, including the Ninth Circuit, support the proposition that once a defendant has distributed a controlled substances to another person, that defendant no longer possesses the illegal drug. Therefore, the defendant's conduct must be charged as a distribution offense under § 841(a)(1), and may not be charged as the continuing offense in § 841(a)(1) - possession with intent to distribute a controlled substance.

The Ninth Circuit in *United States v. Mancuso*, 718 F.3d 780, 793 (9th Cir. 2013), held that "separate acts of distribution of controlled substances are distinct offenses under 21 U.S.C. § 841(a), as opposed to a continuing crime, and therefore *must be charged in separate counts*." (citing *United States v. Lartey*, 716 F.2d 955, 967 (2d Cir. 1983)) (emphasis added). The Third Circuit in *United States v. Rowe*, 919 F.3d 752, 759 (3d Cir. 2019), relied on *Mancuso*, holding that "'separate acts of distribution of controlled substances are distinct offenses under 21 U.S.C. § 841(a), as opposed to a continuing crime[,]'" and therefore, "separate acts of distribution may not be combined and prosecuted as 'part of a single continuing scheme.'" *Id.* at 759 n. 3 (quoting *Mancuso*, 718 F.3d at 793).

United States v. Elliot, 849 F.2d 886, 890 (4th Cir. 1988), concluded that the government may not charge two completed distributions of the same controlled substance, to the same

person, at the same place, ten days apart, "as a single offense under § 841(a)(1)." *Id.* The Fourth Circuit explained, charging a continuing offense under those facts "undermine Congress' intent to deter ongoing drug trafficking by narrowly defining the unit of prosecution as each discrete act of delivery." *Id.*

On appeal, Shortman maintained that the facts set out in the offer of proof, the facts presented by the prosecutor at the change of plea hearing, and the facts in the presentence investigation report, did not establish a factual basis for her guilty plea to possession with intent to distribute methamphetamine. In other words, once she gave the informant the drugs, she dispossessed those drugs; and without any facts that she possessed additional drugs beyond those drugs she gave to the informant, Shortman's guilty plea was not supported by a legally sufficient factual basis as required under Fed. R. Crim. P. § 11(b)(3). Shortman asserted that the district court committed plain error by accepting her guilty plea without a legally sufficient factual basis.

The Ninth Circuit rejected Shortman's argument, stating, "*Mancuso* only held that the government may not aggregate multiple, distinct acts of distribution into one count of distribution." App. at 2. The Ninth Circuit further concluded that *Mancuso* "did not undermine the government's discretion to charge conduct that meets the elements of both distribution and possession with intent to distribute as the latter instead of the former; indeed, *Mancuso* itself affirmed the defendant's conviction for possession with intent to distribute." *Id.*

The Ninth Circuit's decision ignores the structure of § 841(a)(1) that defines separate illegal acts within a continuum of conduct related to drug trafficking, i.e., the manufacture, the possession with intent to manufacture, distribute, or dispense, and ending with the distribution. Within that structure, when a person has distributed a controlled substance to another, the

distributor no longer possesses the controlled substance distributed.

Without evidence of additional drugs being possessed after the drugs are dispossessed by a distribution, a drug dealer no longer possesses any controlled substance with intent to distribute. Evidence establishing that a person distributed a controlled substance to another does not support a legal factual basis for a guilty plea to a continuing offense of possession with intent to distribute the drugs that were already distributed. The Ninth Circuit's decision here runs contrary to the proper interpretation and application of § 841(a)(1).

The Court is urged to grant certiorari to resolve the questions presented.

REASONS FOR GRANTING THE WRIT

1. Resolution of the question of whether 21 U.S.C. § 841(a)(1) permits the Government to charge a continuing offense of possession with intent to distribute a controlled substance on facts that establish the defendant relinquished possession of the same controlled substance by distributing it to another person is an important question of federal law that has not, and should be, resolved by the Court.

"Federal crimes ... 'are solely creatures of statute.'" *Dowling v. United States*, 473 U.S. 207, 213 (1985) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)). "Federal crimes are defined by Congress ... [and] this Court must give effect of Congress' expressed intention concerning the scope of conduct prohibited." *United States v. Kozminski*, 487 U.S. 931, 939 (1988) (citing *Dowling*, 473 U.S. at 213-14).

"[W]hen assessing the reach of a federal criminal statute," the Court pays "close head to language, legislative history, and purpose in order to strictly determine the scope of the conduct the enactment forbids." *Dowling*, 473 U.S. at 213. Out of "respect for the prerogatives of Congress in defining federal crimes" the Court acts with restraint and "typically find[s] a 'narrow interpretation' appropriate" *Id.* (quoting *Williams v. United States*, 458 U.S. 279, 290 (1982)).

Decisions from federal courts of appeals, including the Ninth Circuit, that have interpreted § 841(a)(1) conclude that a person's multiple acts of distributing a controlled substance must be charged in separate counts. Such multiple acts are not continuing offenses like the offense of possessing a controlled substance with intent to distribute it under § 841(a)(1).

The *Elliott* decision from the Fourth Circuit addresses the proper scope of the separate offenses defined in § 841(a)(1). 849 F.2d at 888-90. In *Elliott*, the defendant maintained that he was subjected to double punishment after the district court imposed consecutive terms of imprisonment on two separate convictions for delivery of preludin, a controlled substance. *Id.* at 888. Since the two deliveries were made to the same person at the same location, the defendant argued that the two deliveries should have been charged and punished as a single offense under § 841(a)(1), even though the two deliveries occurred ten days apart. *Id.*

To resolve the issue, the Fourth Circuit endeavored to define "[t]he allowable unit of prosecution" under § 841(a)(1). *Id.* at 889. The Fourth Circuit observed that the definition of "distribute" in 21 U.S.C. § 802(11) is "'to deliver,' and the term 'deliver' is in turn defined [in § 802(8)] as the 'actual, constructive, or attempted transfer of a controlled substance.'" *Id.* The Fourth Circuit concluded that Congress' use of the "more precise terms 'deliver' and 'transfer' suggests that Congress intended the statute to criminalize individual acts, rather than a continuous course of conduct." *Id.*

As to any ambiguity in § 841(a)(1), the Fourth Circuit reviewed Congressional history, writing,

> our examination of the statute's history convinces us that Congress did not intend the unit of prosecution under § 841(a)(1) to be so broad. Section 841(a)(1) was enacted as part of the Comprehensive

> Drug Abuse Prevention and Control Act of 1970. One of the principal purposes of that Act was to strengthen the penalties for drug trafficking, in order to deter individuals from engaging in that activity. H.R.Rep. No. 1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4566, 4575 ("The price for participation in this traffic should be prohibitive. It should be made too dangerous to be attractive."). Section 841(a)(1) helped accomplish this goal by making illegal not only the actual sale of controlled substances, as had its predecessor, but also the participation in any aspect of the chain of their distribution-from manufacture to delivery. *See United States v. Pruitt*, 487 F.2d 1241, 1245 (8th Cir.1973). For this reason, several courts have concluded that Congress intended each distinct act of delivery to be a separately punishable offense under § 841(a)(1), even though it may have been only one of several such deliveries made in the course of consummating a single sales transaction. *See, e.g., United States v. Mehrmanesh*, 682 F.2d 1303, 1306-07 (9th Cir.1982) ("It seems unlikely that Congress intended to expand the scope of section 841(a)(1) to include all participants in the chain of distribution, while at the same time limit the scope of a single offense under the section only to those acts which are reasonably construed as constituting a distinct transaction between a buyer and seller."); *limited, United States v. Palafox*, 764 F.2d 558 (9th Cir.1985) (*en banc*). *See also United States v. Smith*, 757 F.2d 1161 (11th Cir.1985); *United States v. Weatherd*, 699 F.2d 959 (8th Cir.1983); *United States v. McDonald*, 692 F.2d 376 (5th Cir.1982).

Elliott, 849 F.2d at 889-90. *Elliott* stressed that to treat two deliveries of a controlled substance occuring at the same place, ten days apart, as a single offense because the same buyer and seller were involved "would undermine Congress' intent to deter ongoing drug trafficking by narrowly defining *the unit of prosecution as each discrete act of delivery.*" *Id.* at 890 (emphasis added).

The Second Circuit's *Lartey* decision is consistent with *Elliott*. In *Lartey*, the defendant similarly claimed that multiple punishments imposed for multiple acts of distribution violated double jeopardy since the multiple distributions should be considered "a single continuing crime." 716 F.2d at 967. The Second Circuit rejected that claim, stating, "[t]he law ... makes

each unlawful transfer [of a controlled substance] a distinct offense." *Id.* *Lartey* observed that "[c]ourts resolving this issue have uniformly held that separate unlawful transfers of controlled substances are separate crimes under § 841, even when these transfers are part of a continuous course of conduct." *Id.*

The Ninth Circuit's decision in *Mancuso* is consistent with both *Elliot* and *Lartey.* In fact, *Mancuso* relied primarily on *Lartey* to conclude: "separate acts of distribution of controlled substances are distinct offenses under 21 U.S.C. § 841(a), as opposed to a continuing crime, *and therefore must be charged in separate counts.*" 718 F.3d at 793 (emphasis added).

In the memorandum, the Ninth Circuit observed that *Mancuso* upheld the defendant's conviction for possession with intent to distribute a controlled substance. App. 2-3. Therefore, the Ninth Circuit concluded, Count II in this case properly charged Shortman with a continuing offense of possession with intent to distribute methamphetamine based on her three separate and distinct distributions of methamphetamine occurring days apart from each other. *Id.*. The Ninth Circuit concluded that federal prosecutors had discretion to charge either a distribution or a possession with intent to distribute a controlled substance under the facts of this case. *Id.*

The memorandum ignored the precise issue addressed in *Mancuso*. The memorandum never addressed the issue raised by Shortman relating to an insufficient factual basis to support her guilty plea to the continuing offense charged against her in Count II.

In *Mancuso*, the defendant claimed that evidence of multiple distributions at trial on the count alleging possession with intent to distribute heroin resulted in a constructive amendment and the indictment was duplicitous by charging several different offenses in a single count. *Mancuso*, 918 F.3d at 791-92. *Mancuso* concluded that neither a constructive amendment nor a

duplicitous charge occurred because the relevant count charged only one violation and charged a "continuous offense." *Id.* The legal issue raised and addressed in *Mancuso* is much different than the questions presented in this petition. The defendant in *Mancuso* did not challenge the sufficiency of evidence.

The law from the various circuit decisions interpreting the language and structure of § 841(a)(1) establish that a person's act of distributing a controlled cannot support a charge of the continuing offense of possession with intent to distribute the same controlled substance. Under this interpretation then, the facts before the district court to support Shortman's guilty plea were legally insufficient to support her guilty plea to Count II.

The Ninth Circuit decided this case in a manner contrary to circuit decisions, the structure of § 841(a)(1) and the Congressional history for § 841(a)(1). Resolution of the questions are important to promote uniformity among the lower federal courts in interpreting § 841(a)(1), and to instruct federal prosecutors on the proper use of § 841(a)(1) when making charging decisions.

a. Facts that establish a person distributed a controlled substance to another person are not legally sufficient to establish a factual basis for a guilty plea on a charge of a continuing offense, the possession of the same controlled substance with intent to distribute it to another under 21 U.S.C. § 841(a)(1).

Mancuso did not address, nor resolve, the question of whether facts that establish a distribution of a controlled are legally sufficient to support a factual basis on a guilty plea to possession with intent to distribute the same controlled substance. *Mancuso* and the other circuit cases support the conclusion that a distribution of a controlled substance does not support a factual basis for a guilty plea to a continuing offense of possession of the same controlled substance with the intent to distribute it, after the drugs have been distributed.

The Third Circuit's decision in *Rowe* drives home the point. In *Rowe*, the defendant was indicted on one count of distributing, and on one count of possession with intent to distribute, 1000 grams or more of heroin in violation of § 841(a)(1). *Id.* 756 and 759. At trial, the defendant conceded to distributing, on one occasion, nearly 200 grams of heroin. *Id.*

The only contested issue at trial was whether the defendant distributed or possessed with intent to distribute 1000 grams or more of heroin, or whether the offenses involved 100 grams or more of heroin. *Id.* 756-57.[6] A jury convicted the defendant on both counts and found both that he distributed or possessed with intent to distribute 1000 grams or more of heroin, and that he distributed or possessed with intent to distrbute100 grams or more of heroin. *Id.* at 758.

The government's theory on drug quantity rested on aggregating a series of separate distributions of heroin by the defendant that were over 100 grams each. When the quantities from each distribution were added together, the amount totaled more than 1000 grams of heroin. *Id.* at 757-58. The district court denied the defendant's post-trial motion to limit the quantity of heroin to 100 grams or more. *Id.* at 758. The defendant appealed on the question of "whether the evidence was sufficient to allow a jury to find that Rowe violated § 841(a) by distributing 1000 grams or more of heroin, or by possessing with intent to distribute 1000 grams of more of heroin." *Id.* 759.

Rowe set out clearly the difference between the offense of distributing a controlled substance from the continuing offense of possession with intent to distribute a controlled

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[6] If the jury found that one of the offenses involved at least 1000 grams of heroin, the mandatory minimum ten-year prison sentence applied pursuant to 21 U.S.C. § 841(b)(1)(A)(i). If the jury found that the offense involved at least 100 grams of heroin, the five-year mandatory minimum prison sentence applied under § 841(b)(1)(B)(i). *Id.* at 759.

substance. Relying in part on *Mancuso*, Third Circuit stated:

> Under 21 U.S.C. § 802(11), distribution occurs when a controlled substance is delivered. Delivery is "the actual, constructive, or attempted transfer of a controlled substance." 21 U.S.C. § 802(8). Our sister circuits have held that "[t]he plain language of [§ 841(a)] indicates" that "each unlawful transfer [is] a distinct offense." *United States v. Lartey*, 716 F.2d 955, 967 (2d Cir. 1983). *See United States v. Mancuso*, 718 F.3d 780, 793 (9th Cir. 2013); *see also United States v. Elliott*, 849 F.2d 886, 889 (4th Cir. 1988) ("The more precise terms 'deliver' and 'transfer' suggest that Congress intended the statute to criminalize individual acts, rather than a continuous course of conduct."). We agree with their reasoning and hold that "separate acts of distribution of controlled substances are distinct offenses under 21 U.S.C. § 841(a), as opposed to a continuing crime." *Mancuso*, 718 F.3d at 793.

Rowe, 919 F.3d at 759. *Rowe* also adopted *Mancuso*, noting "separate acts of distribution may not be combined and prosecuted as 'part of a single continuing scheme' under § 841." *Id.* at 759 n. 3 (quoting *Mancuso*, 718 F.3d at 793).

Rowe further held that "[p]ossession with intent to distribute is actual or constructive possession over a controlled substance ... by a defendant who 'ha[s] in mind or plan[s] in some way' to 'deliver or transfer possession or control' of the controlled substance to another." *Rowe*, 919 F.3d at 760 (citing *United States v. Crippen*, 459 F.2d 1387, 1388 (3d Cir. 1972) (per curium)); Third Circuit Model Criminal Jury Instruction § 6.21.841-5. "'Constructive possession requires 'the power and the intention at a given time to exercise dominion or control over a thing.'" *Rowe*, 919 F.3d at 760 (quoting *United States v. Benjamin*, 711 F.3d 371, 376 (3d Cir. 2013) (quoting *United States v. Garth*, 188 F.3d 99, 112 (3d Cir. 1999)). "Proof that a defendant associated with a person who controls a drug is insufficient to prove constructive possession." *Rowe*, 919 F.3d at 760.

The Third Circuit concluded "that possession of 1000 grams of heroin begins when a defendant has the power and intention to exercise dominion and control over all 1000 grams, *and ends when his possession is interrupted by a complete dispossession or by a reduction to less than 1000 grams*." *Rowe*, 919 F.3d at 760 (emphasis added). Application of these principles leads to the conclusion that the facts before the district court did not support a factual basis for Shortman's guilty plea to possesssion with intent to distribute methamphetamine since the facts established that Shortman dispossessed herself of those drugs when she gave them to the informant during the controlled sales.

When Shortman dispossessed herself of the methamphetamine during the three sales to the informant, she no longer possessed those quantities set out in the offer of proof submitted to support her guilty plea. App. 14-15. According to *Mancuso*, *Rowe*, *Lartey* and *Elliott*, Shorman's three separate sales of drugs to the informant could only be charged as three distinct offenses of unlawful distribution of a controlled substance pursuant to the language, structure and Congressional history of § 841(a)(1).

In order to sustain the conviction on Count II, in the manner charged, there should have been evidence that Shortman possessed additional quantities of methamphetamine independent of, and beyond, those quantities Shortman dispossessed on October 26, November 1 and November 9, 2017 after she gave the drugs to the informant. *See*, *e.g.*, *United States v. Gore*, 154 F.3d 34, 47 (2d Cir. 1998) ("There was no evidence demonstrating additional quantities of drugs in Wells's possession at that time or at any point in time before the distribution to Taft. Therefore, this is the paradigmatic case where possession with intent to distribute merges into distribution."). There were no such facts presented to the district court to support Shortman's

guilty plea to Count II.

If the Court resolves the question in favor of Shorman, then the Court is requested to resolve the question of whether her guilty plea to possession of methamphetamine with intent to distribute methamphetamine was supported by a legally sufficient factual basis as required under Fed. R. Crim. P. 11(b)(3). The facts establishing three separate sales of methanmphetamine from Shortman to an informant are not sufficient to support a factual basis for a guilty plea to a possession with intent offense in § 841(a)(1), should the Court grant this petition and adopt Shortman's position.

b. If the Court resolves the questions presented in Petitioner's favor, plain error relief is justified.

Should the Court hold that the factual basis was legally insufficient to support Shortman's guilty plea to Count II, then plain error relief is justified in this case. Rule 52(b) permits federal appellate courts to grant relief for "pain errors." Fed. R. Crim. P. 52(b). The rule states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Id.*; and *United States v. Olano*, 507 U.S. 725, 731 (1993). To obtain relief under a plain error standard, a defendant must establish the following: (1) "that there was indeed an 'error;'" (2) "the error must be 'plain' ... 'clear' ... or 'obvious'" and (3) "the plain error [must] 'affec[t] substantial rights'" *Id.* at 732-34. If these components for plain error are present, the a defendant may obtain relief only if the Court finds that "a plain forfeited error affecting substantial rights ... 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (quoting *United States v. Atkinson*, 297 U.S. 157 (1936)).

The Court has further outlined what a defendant who claims a Rule 11 violation occurred during a guilty plea proceeding must establish to obtain plain error relief.[7] *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004). *Dominguez-Benitez* instructs:

> a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is "sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, *supra*, at 694, 104 S.Ct. 2052; *Bagley*, supra, at 682, 105 S.Ct. 3375 (opinion of Blackmun, J. (internal quotation marks omitted)).

Id. at 83. Shortman meets all the criteria needed to justify relief under the plain error standard.

As set out above, the circuit decisions, including the Ninth Circuit's *Mansuco* decision, clearly establish that multiple acts of distribution of a controlled substance must be charged in separate counts in an indictment when the facts rest on separate acts of distributing a controlled substance under § 841(a)(1). *See*, *Mancuso*, *Rowe*, *Lartey* and *Elliott*, *supra*. The case law, the structure and Congressional history, clearly establish that a continuing offense of possession with intent to distribute a controlled substance may not be brought under § 841(a)()1) if underlying facts establish that the controlled substance had already been distributed by the accused to another person. *Elliott*, 849 F.2d at 889-90 (analyzing the Congressional history and interpretation of § 841(a)(1)). The district court's finding of a factual basis under Rule 11(b)(3) was error, and that error is plain.

Should the Court resolve the questions in favor of Shortman, the factual basis presented to support her guilty plea to possession with intent to distribute methamphetamine based on the

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[7] Here, Shortman claims a violation of Rule 11(b)(3), *supra*.

three completed distributions affected Shortman substantial rights to be tried and convicted only on charges properly brought under § 841(a)(1). Under these circumstances, it is also clear that had Shortman understood the legal and factual requirements for a valid guilty plea, she would not have pleaded guilty to Count II.

The Court previously instructed:

> in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.

McCarthy v. United States, 394 U.S. 459, 467 (1969); *see also*, *United States v. Broce*, 488 U.S. 563, 570 (1989) (A guilty "plea 'cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts'") (quoting *McCarthy*, 394 U.S. at 466).

If Shortman's "conduct does not actually fall within the charge" of possession with intent to distribute a controlled substance, then Shortman's guilty plea could not be voluntarily or knowingly made in relation to the factual basis required to support the plea. *McCarthy*, 394 U.S. at 467). This establishes "the probability of a different result [] 'sufficient to undermine confidence in the outcome' of the proceeding." *Dominguez-Benitez*, 542 U.S. at 83 (internal quotations in original) (citations omitted).

The plain error here justifies relief. The plain error affected Shortman's substantial rights and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" during the guilty plea process. *Olano*, 507 U.S. at 736 (quotation in original) (citation omitted). Shortman requests that her conviction on Count II be vacated.

c. This case provides an ideal vehicle for resolving an important question of federal law relating to the correct interpretation and application 21 U.S.C. § 841(a)(1).

This case presents the Court with the opportunity to address the proper scope and application of § 841(a)(1). The various cases from the circuits do not address this precise issue, however, each of the circuit decisions support the interpretation of § 841(a)(1) presented by Shortman in this petition. The Ninth Circuit's memorandum decided this case in a manner that runs contrary to circuit decisions on the subject, and runs contrary to the language, structure and Congressional history of § 841(a)(1).

The Court should take the opportunity to resolve the questions presented and address the scope and application of § 841(a)(1). The facts of this case offer the Court an effective means to address the important questions of federal law that have not, but should be, resolved by the Court.

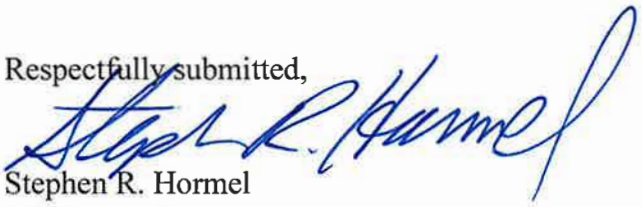
Resolution of the questions will aid the lower federal courts and federal prosecutors in future proceedings that involve similar facts on the proper application of § 841(a)(1). Resolution of the questions will aid defense counsel and the accused in understanding the law in relation to the facts when with offenses charged under § 841(a)(1).

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 5th day of May, 2023.

Respectfully submitted,



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