No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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ARVIN TERRILL CARMEN,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Introduction.

The Court in *Rutledge v. United States*, held that the "in concert" element of a continuing criminal enterprise (CCE) under 21 U.S.C. § 848 "signifies mutual agreement in a common plan or enterprise" which "requires proof of a conspiracy that would also violate [21 U.S.C.] § 846" and "conspiracy as defined in § 846 does not define a different offense from the CCE offense defined in § 848." 517 U.S. 292, 300 (1996). Therefore, a § 846 conspiracy is a lesser included offense of a § 848 CCE. *Id. Rutledge* noted that to convict a defendant of a CCE under § 848, "the defendant must ... commit a series of substantive violations." *Id.* at 298 n.7. Subsection 848(c) requires that "a continuing series of violations [must be] ... undertaken by [the defendant] in concert with five or more other persons with respect to whom [the defendant] occupies a position of organizer, a supervisory position, or any other position of management." 21 U.S.C. § 848(c)(2)(A).

The question presented here is:

Can each of the controlled substance act violations that make up "a continuing series of violations" in a CCE prosecution pursuant to 21 U.S.C. § 848(c) rest on a finding that the defendant and five or more other persons *were part of an agreement* to commit the continuing series of violations?

LIST OF THE PARTIES AND RELATED CASES

The parties to this petition for writ of certiorari are the Petitioner, Arvin Terrill Carmen; and the Respondent, United States of America.

There are no related cases to this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Arvin Terrill Carmen (hereinafter Carmen), respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the district court's order denying his motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's memorandum decision is not reported and is included in the Appendix. App. 1-4. The district court's order is also included in the Appendix. App. 6-10.[1]

JURISDICTION

The Court of Appeals entered judgment on December 24, 2024. App. 1. The order denying the petition for rehearing and suggestion for rehearing en banc was denied November 26, 2025. App. 5. A motion to extend time to file this petition was granted to April 25, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253(c). The district court had jurisdiction under 28 U.S.C. § 2255.

RELEVANT STATUTORY PROVISION

Section 848 of Title 21, United States Code, defines a "Continuing Criminal Enterprise" as follows:

> For the purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

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[1] *See, Carmen v. United States*, 2022 WL 256286 (E.D. WA2022), *aff'd,* 2024 WL 5205751 (9th Cir. Dec. 24, 2024).

(1) he violates any provision of this subchapter or subchapter II the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c); App. 31-32.

INTRODUCTION

Carmen is serving a 50-year term of imprisonment after a jury found him guilty of engaging in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848, charged in Count 1 of the indictment.[2] App. 13, 29-30. The jury also found Carmen guilty of conspiracy to distribute oxycodone hydrochloride (pain pills) in violation of 21 U.S.C. § 846, charged in Count 2 of the indictment. App. 13-15, 30.

The indictment alleged that the CCE and the conspiracy occurred during same period - "no later than the year 2008 ... and continuously thereafter up through and including January 25, 2013." App. 13. Therefore, Count 1 and Count 2 alleged the same agreement. *Id.*[3]

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[2] 21 U.S.C. § 848(a) imposes increased penalties on CCE convictions.

[3] Although the indictment alleged 30 substantive violations of the Controlled Substance Act, Carmen was not charged in any of the substantive violations in Counts 3 through 32. App. 15-23.

The conspiracy in Count 2 alleged that Carmen did "combine, conspire and agree together with" 61 codefendants and others to distribute pain pills. App. 13-15. The jury found that the conspiracy in Count 2 constituted one of the predicate violations in "a continuing series of violations" under § 848(c)(2). App. 29.

The jury also found that there was "a continuing series of violations" of the Controlled Substances Act (CSA), including distribution of pain pills in violation of 21 U.S.C. § 841(a)(1), possession with intent to distribute pain pills in violation of § 841(a)(1) and use of a communication facility in furtherance of drug trafficking crime in violation of 21 U.S.C. § 843(b). The jury found that each of these violations of the CSA occurred "[t]hree or more times." App. 29-30.

After the Ninth Circuit affirmed Carmen's convictions on direct appeal,[4] he timely filed a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255. He claimed trial counsel was ineffective for failing to object to the second element of Jury Instruction No. 7 (Instruction 7). He claimed Instruction 7 in "defining the term acting in concert[,] improperly included the phrase 'were part of an agreement' which inappropriately expanded the possible violation conduct to include a conspiracy rather than remaining limited to 'joint action' as required by the [CCE] statute." App. 9.

The second element of Instruction 7 states:

> **Second**, Defendant CARMEN committed the violations together with five or more other persons.

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[4] *See, United States v. Tones*, 759 F. App'x 579 (9th Cir. 2018) (consolidated appeal).

> The Government does not have to prove that all five or more of the other persons operated together at the same time, or that Defendant CARMEN knew all of them. The Government must prove beyond a reasonable doubt, however, that Defendant CARMEN and at least "five or more other persons" were part of an agreement *or* joint action to commit the continuing series of violations of the federal narcotics violations.

App. 28 (emphasis added). Instruction 7 includes two alternative ways the jury could find CSA violations that constitute "a continuing series of violations:" (1) "CARMEN and at least 'five or more other persons' *were part of an agreement*; *or* (2) "CARMEN and at least 'five or more other persons' *were part of ... joint action* to commit the continuing series of violations...." *Id.* (emphasis added).

Using the disjunctive language in defining the "in concert with" element permitted the jury to find Carmen guilty of the CCE simply if he were part of an agreement in "a continuing series of violations" with "at least five or more other persons." *Id.* Instruction 7 did not require the jury to find Carmen committed any substantive CSA violations "in concert with five or more other persons" that made up "a continuing series of violations" as required in § 848(c)(2)(A). The "agreement" part of the instruction allowed the jury to find the other substantive violations alleged to have been committed by conspiracy, even though only one conspiracy-related violation was submitted to the jury for consideration. App. at 29.

The question to be resolved is whether Instruction 7 improperly permitted the jury to convict Carmen of the CCE by simply finding that he "and at least 'five or more other persons' were part of an agreement (a conspiracy) ... to commit the

continuing series of violations...." *Id.* Instruction 7 did not require the jury to find that Carmen actually committed any of the other substantive CSA violations that are listed in the first element of Instruction 7 and in the special findings of the verdict form as required in § 848(c)(2)(A). App. 27, 29-30. *See, Rutledge v. United States*, 517 U.S. 292, 298, 298 n. 7 (1996) ("[a] CCE requires proof of a number of elements that need not be established in a conspiracy," including that the defendant "commit a series of substantive violations.").

Although the district court agreed that the second element of Instruction 7 overly inclusive, it denied Carmen's motion. App.9-10. The district court concluded that the third element in Instruction 7 and the special findings in the verdict form that required the jury to unanimously find Carmen had a leadership role with at least five or more other persons, "cured" any defect in the definition of "in concert with" in the second element of Instruction 7. App. 9, 28, 30.

The district court, however, granted a certificate of appealability. App. 9-10, The court concluded "that jurists of reason may differ with the Court's conclusion regarding use of the disjunctive in the definition of in 'concert with' in Instruction No. 7." *Id.*

The Ninth Circuit affirmed the district court's order denying Carmen's § 2255 motion. App. 1-4. The Ninth Circuit said:

> The "plain meaning of the phrase 'in concert' signifies mutual agreement in a common plan or enterprise." *Rutledge v. United States*, 517 U.S. 292, 300 (1996). The jury instructions were consistent with that meaning. Conspiracy is a lesser included offense of engaging in a continuing criminal enterprise, as § 848

> also requires that the defendant, *inter alia*, commit a series of substantive violations, act as a supervisor or organizer of the criminal enterprise, and obtain a substantial income. *Id.* at 299 n.7. Read as applying § 848's "in concert" element only, the challenged portion of the instruction appears consistent with the "mutual agreement" meaning ascribed to that element by *Rutledge*.

App. 2-3.

The Ninth Circuit also agreed with the district court that the third element in Instruction 7 and the special findings in the verdict form "cured" any defect in the second element of Instruction 7, reasoning that both "required the jury to find that Carmen 'acted as an organizer, supervisor or manager of the five or more [other] persons ... in furtherance of the [CCE].'" App. 3. The Ninth Circuit stated: "We ... agree with the district court that 'any overbreadth in the definition of 'in concert with' was cured by detailed language' in other portions of the jury instructions that independently required such conduct." *Id.* (quoting App. 9).

The district court and the Ninth Circuit's rationale is flawed. The third element of Instruction 7 relating to the defendant's role is distinct from the "in concert" element in section 2 of Instruction 7. The second element of Instruction 7 allowed the jury to find that Carmen committed the requisite number of CSA violations constituting "the continuing series of violations" if the jury simply found he "and at least 'five or more other persons' *were part of an agreement* ... to commit the continuing series of violations." App. 28 (emphasis added). The jury was not required to conduct a detailed review of the evidence to determine if Carmen actually committed specific substantive violations of the Controlled Substances Act

(CSA) "in concert with five or more other persons" for which the jury could then determine if Carmen "occupie[d] a position of organizer, a supervisory position, or any other position of management." 21 U.S.C. § 848(c)(2)(A).

The Court has rejected to an interpretation of § 848 that permits "a jury to avoid discussion of the specific factual details of each violation." *Richardson v. United States*, 526 U.S. 813, 819 (1999). In *Richardson*, the Court held that each individual violation making up a series of violations are separate elements of a CCE on which the jury must be unanimous. *Id.* at 824. Such interpretation requires a jury to "focus on the specific factual detail" from evidence to identify specific substantive violations the may constitute "a series of violations." *Id.* at 819. In this case, allowing the jury to convict Carmen based on a conspiracy type agreement to commit the series of violations, permitted the jury to avoid discussing specific details of the evidence to determine if Carmen committed the requisite number substantive CSA violations "in concert with five or more other persons" as required in § 848(c)(2).

In *Rutledge*, the Court held that "a guilty verdict on a § 848 charge necessarily includes a finding that the defendant also participated in a conspiracy violative of § 846, conspiracy is therefore a lesser included offense of CCE." 517 U.S. at 307. The logical extension of this principle is this - any agreement between two or more persons to violate any substantive provision of the CSA is subsumed by a jury's guilty verdict on the CCE charge. If true, how is it then that a defendant may be convicted of a CCE simply on a finding that the defendant "and at least five or

more other persons were part of an agreement" to commit CSA violations that constitute "a continuing series of violations"?

The jury was also allowed to avoid identifying any person or persons, if any, that consisted of "five or more other persons" who participated "in concert with" Carmen in specific substantive violations of the CSA for which the jury could then determine if Carmen "occupie[d] a position of organizer, a supervisory position, or any other position of management" as required under § 848(c)(2)(A). *See, Richardson*, 526 U.S. at 819. Given the conspiracy in Count 2 listed 61 coconspirators, Instruction 7 permitted the jury to convict Carmen of the CCE based on the sheer number coconspirators alleged in the agreement in Court 2, without the jury finding Carmen committed any substantive CSA violations "as part of a continuing series of violations ... in concert with five or more other persons" as required in § 848(c). App. 13-15 and 28.

This case presents the Court an ideal opportunity to establish uniform application of § 848 among the lower federal courts. A CCE conviction should not rest on finding the defendant, with five or more other persons, were part of an agreement to commit a series of substantive CSA violations. Resolution to the contrary would permit a jury to avoid finding that the defendant actually committed any substantive violations of the CSA "in concert with five or more other persons."

If the Court resolves the question as Carmen seeks, such resolution would establish that Carmen's trial counsel's performance was constitutionally deficient for failing to object to the overly broad language in the second element of

Instruction 7. *Strickland v. Washington*. 466 U.S. 668, 687 (1984) (the support a claim of ineffective assistance of counsel, "the defendant must [first] show that counsel's performance was deficient.").

Then it must be determined if the deficient performance prejudiced Carmen's defense. *Id.* ("Second, the defendant must show that the deficient performance prejudiced the defense."). To determine whether prejudice is established requires consideration of "the totality of evidence before the judge or jury." *Id.* at 695. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have a reasonable doubt respecting guilt." *Id.*

This petition contains a detailed recitation of the evidence at Carmen's trial. Should the Court resolve the question presented favorably and determine trial counsel's performance was constitutionally deficient under *Strickland*, there is a reasonable probability that "the factfinder would have a reasonable doubt, respecting [Carmen's] guilt." *Id.*

STATEMENT OF THE CASE

A. Underlying Trial Evidence.

The government's case against Carmen centered around a number of gang members from Los Angeles, California, the Eight Trey Gangster Crips (Eight Treys), who between the years 2008 and 2013, migrated to Spokane, Washington, to unlawfully sell oxycodone pain pills for profit. (3-ER-354-429; 4-ER-446-529; 21-ER-

4471).[5] The government relied heavily on the testimony of two gang members who were also charged in Count 1 with the CCE, namely, Gilbert Madison and Sharita Horn. Madison and Horn's testimony established that other gang members traveled to Spokane to conduct their own pill businesses and to make their own profit. Their testimony established that the illegal trafficking by members of the gang had six different phases. The evidence also established that Carmen did not organize, supervise or manage the other Eight Treys who traveled to Spokane to sell pills throughout the period alleged in the indictment.

A. Gilbert Madison (3-ER-354-429; 4-ER-446-600; 5-ER-616-763).

Phase 1 – "taxation without representation." (4-ER-568)

Madison (Lil Sidewinder) testified Kevin Miles (Nino/No) contacted him in the Summer of 2009 because he believed Carmen (School Boy)[6] had "a lock" on the "pill hustle" in Spokane. [3-ER-376]. Miles was an associate member of the Eight Treys. He learned that Carmen had the ability to make two to three times more profit in the "pill hustle" in Spokane, as compared to Los Angeles. *Id.* at 375-76, 378.

Miles reached out to Madison for help in getting involved in the pill "hustle" in Spokane. (3-ER-372-76). Miles was already in the "pill hustle" in Los Angeles

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[5] There were 21 total excerpts of record file with the Ninth Circuit. They are referenced in this petition as "1-ER" through "21-ER."

[6] Members of the Eight Trey Gangster Crips referenced each other by their individual nicknames, "monikers." This petition identifies the individual gang members by their birth names and, in some instances, followed by their moniker.

(LA) and wanted to get a footing in Spokane. Miles wanted Madison to travel to Spokane. *Id.* at 377-78.

Madison contacted Carmen who also wanted Madison to come to Spokane because of Madison's contacts in LA. Because Madison could not travel to Spokane at first, Carmen requested Glen Turner (YD) to come to Spokane.

Miles paid for Turner's travel expenses. *Id.* at 379-80. Madison's testimony did not establish that Turner and Carmen distributed pills together after Turner arrived in Spokane. *Id.* at 379-81. In fact, Madison testified that Turner came to Spokane with Miles's pills. (4-ER-575). During this period, Turner was "working for Miles," not Carmen. *Id.* at 576. DEA Agent Sullivan's investigation established that Turner was Miles's associate. (3-ER-258-59).

In the Summer of 2009, Madison and others were selling pills for Carmen, but he did not name the others and gave no details. *Id.* at 381. Madison also identified other Eight Treys that were "freelance," selling pills "on their own." *Id.* Madison testified that "when [he] first came [to Spokane,] [Carmen] didn't know" that Mile's provided pills for Madison to sell. *Id.* at 385. Madison came to Spokane "with [Miles's] money [and] [he] was backing [Madison] financially." *Id.* (4-ER-572).

After Madison arrived in Spokane, he learned that Carmen would tax him and others between $5.00 and $15.00 per pill that he and the others sold. (3-ER-383). Carmen did not ("strong arm") the others to pay a tax. (4-ER-567-68) ("no arm

got twisted to pay the taxes.").[7] Carmen simply "provided a safe way" the other Eight Trey dealers could sell their own pills "without getting apprehended." *Id.* at 568. Carmen provided Madison a way to "avoid financial strife." *Id.* at 566. Carmen never "taxed [Miles]" because Miles came to Spokane after Joseph Shorts (uncharged) started the "big house." *Id.* at 567; *see also*, "the 'big house,'" *infra.*

Madison established that Carmen did not instruct other Eight Trey dealers how to sell their drugs; Carmen did not set prices for pills the other dealers sold; Carmen did not dictate the manner of payment; and Carmen did not control the other dealers' customers.[8]

Madison testified that "everybody got their own ... terminology on what they use to call the pills" such as "[s]kittles, beans, opanas 2, bananas." (4-ER-468). Carmen did not provide the lingo or language for dealers to use. *Id.*[9] Madison offered no specific details on actual sales by Carmen, nor did he offer any specifics on the other Eight Treys who were taxed by Carmen.

Phase 2 - the "big house"

In October or November 2009, several pill dealers met to discuss Carmen's taxation, including Madison, Miles, Turner, Donald Lynch, Shorts, Mayo (uncharged) and Harry Johnwell (Peanut). (3-ER-385-86). All except Madison

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[7] *See, e.g., United States v. Jones*, 801 F.2d 304, 309 (8th Cir. 1986) (use of force to collect drug proceeds is indicative of CCE activity).

[8] *See, Jones*, 801 F.2d at 309 (defendant instructed on language to use when referring to drugs over the phone, set the prices for resale, "dictating whether the sales would be cash or credit," and directing who the underlings "could sell the drugs to.)

[9] *See,* footnote 8.

decided to "leave School boy alone," "not be taxed" and move to the "big house," a six-bedroom home in Spokane rented by Shorts. (3-ER-387-90). These dealers could use Short's phone to contact customers. Shorts had as many customers as Carmen. *Id.* at 390.

Madison established that the other Eight Trey dealers were working for themselves. Carmen did not direct the other dealers' sales, price, nor did he control their customers or operations.

Phase 3 – Eight Trey pill dealers "co-existing."

When Madison chose not to live in the "big house," he resided with Carmen. Madison explained that he "could sell [his own] pills through [Carmen's] fades at a faster rate."[10] *Id.* Carmen did not tax Madison. *Id.*

At times when Carmen was attending college classes, he would call Madison to meet customers at various places and Madison would either sell Carmen's pills or sell his own pills. *Id.* at 391. Madison's testimony established that he and Carmen had a partnership during this period. Madison and Carmen's partnership lasted about a month or two before Madison returned to LA in December 2009. Madison returned to LA to help Carmen and Miles find sources of pills in LA. *Id.* at 390-92; (4-ER-585). Neither directed Madison's activities in LA. *Id.*

In "the early stages" from "2008 to 2010," there were multiple "crews" selling pills in Spokane. (4-ER-572). Although Madison did not consider his association with Carmen as a "crew" - they "were working together." *Id.* at 573. He said that

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[10] "Fade" is a customer who buy pills from the dealer. (5-ER-617).

these other "crews" were "co-existing." *Id.* at 572. "They have their plugs [and] Carmen has his plugs." *Id.* 572-73.[11]

Nocomie Moore had a crew that included Katriel Bulley (Ra Ra) (uncharged), Roderick Govan (D3) (uncharged) and other Eight Treys not charged in the indictment. (4-ER-573-74). Miles had a crew that included Madison and Turner. Turner eventually recruited Donald Lynch (Young Moe/Flossy), who in turn, brought his partner, Deandre Meighan (Flacco), to Spokane. *Id.* at 574-77. Lynch had his own "plugs." *Id.* at 577. Meighan's girlfriend, Ashley Arredondo, also sold pills with Meighan. *Id.* at 578.

From the "big house," Shorts provided a service to Miles, Johnwell, Mel (uncharged), Turner, and Lynch. Shorts "offered a way of selling pills..." "Everybody came up [to Spokane] with their own pills under the assumption that [Shorts] would get rid of them for him," *Id.* at 578.

Phase 4 - "a pause for a moment."

There is a gap in Madison's testimony about Carmen between early 2010, after Madison returned to LA, through mid-2011. During that period, Madison and Carmen had a falling out, therefore, "there was a pause for a moment where [Carmen] and [Madison] didn't see eye to eye... [and] [they] didn't do the business at hand." (3-ER-399). Carmen eventually reached out to Madison to "rekindle[]" their relationship. *Id.* 399. Carmen asked for help in selling his pills. *Id.* at 397-98.

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[11] "Plug" is the individual dealer's source of pills. (3-ER-231).

In mid-2011, Madison sent Richard Haynes (Tiny Sodi/TS) to Spokane to work with Carmen and to run his own business. *Id.* at 397-400. Madison and Carmen split R. Haynes's travel expenses. *Id.* 398.[12] Madison was providing R. Haynes with pills, "a little over a year." *Id.* at 411.[13] R. Haynes had access to 10,000 pills a month. *Id.* Carmen wanted in on the pills Madison provided to R. Haynes. *Id.*

Madison testified that R. Haynes was the person Madison was dealing with "until [Carmen] was able to come to LA." *Id.* at 412. Carmen moved back to LA "around Christmas of 2011." *Id.* Carmen wanted to find "a doctor ... a main source." *Id.* At this time, Mercede's Reeves moved Carmen's pill in Spokane. *Id.* at 413.

Phase 5 - the "free-for-all."

After R. Haynes arrived, Alex James (Tiny Menace), Maurice Shelmon (Young Ant), Tahei Moore (Baby Football) and Inaliel Lisbey (Tiny Football) all came to Spokane to help R. Haynes run his business. *Id.* at 401-02. Madison explained that, after R. Haynes arrived in Spokane, the "pill game" "opened wide open." *Id.*

In 2011, Lisbey got into the pill game in Spokane after Lynch "brought him in." *Id.* at 405. Lisbey did not need to speak to Carmen for permission to come to Spokane because "he hooked up with TS [R. Haynes]" who was "his own individual." *Id.*

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[12] "R. Haynes" is used for Richard Haynes and "T. Haynes" is used for Tyemar Haynes, both charged in the Indictment. App. 11.

[13] Madison also testified that he was providing pills to Nocomie Moore and Carmen wanted Madison to "deal with him." *Id.* at 411-12.

Lisbey, a North Side Eight Trey, and other Norther Siders were involved with Lisbey's "pill game." *Id.* 402-05. Other "north siders" came to Spokane to sell pills. *Id.* 402-05. Between 2011 and 2013," everybody started coming up." *Id.* at 406. "[I]t blew up ... it was a free-for-all." *Id.*

B. Sharita Horn (6-ER-1007-29; 7-ER-1049-1239; 8-ER-1264-1471;9-ER-1495-1517).

Phase 6 - "crews" and "independent contractors."

In May 2011, R. Haynes recruited Sharita Horn (School Girl/Star) and offered her $500.00 to travel to Spokane with pills to assist him. (6-ER-1018-20). David Colbert (Bone) provided Horn with the pills. *Id.* at 1018. Haynes' girlfriend, Terrai Traylor, took Horn to the airport. *Id.* at 1020.

R. Haynes instructed Horn on what to do when she arrived in Spokane. *Id.* at 1022; (8-ER-1332). R. Haynes, Carmen and Horn went to an apartment where Horn gave the pills to R. Haynes. (6-ER-1022); (8-ER-1332). R. Haynes paid Horn. *Id.* at 1023. Carmen was not present as he had previously left the apartment before the exchange. (6-ER-1022-23); 8-ER-1334).

The next day, Horn saw R. Haynes pack money in a bag. (8-ER-1335). Carmen was not present. *Id.* Horn then returned to LA and gave the cash to R. Haynes' girlfriend, Traylor. (6-ER-1024-25); (8-ER-1336).

On her second trip, Horn gave James the pills. (6-ER-1027): (8-ER-1337-38). She met Carmen and Mercedes Reeves the next day at an apartment. (6-ER-1027); (8-ER-1338-39). Reeves put money in a bag to take back to LA to give to R. Haynes.

(6-ER-1028); (8-ER-1340-41). There were no discussions about pills and she had "[j]ust casual conversation" with Carmen. *Id.* at 1029.

Horn traveled to Spokane about "once a month." (6-ER-1026). Either R. Haynes, David Colbert (Bone) or Traylor would provide her with the pills, depending on whether R. Haynes was in LA or in Spokane. *Id.*; (7-ER-1070). If R. Haynes was in LA, Horn would deliver the pills to James. (6-ER-1027).

When Carmen visited Horn at her apartment, they "casually talked[,] [t]alked about pills - [h]ow much they were going for." (7-ER-1070-71). Carmen, however, was not present when Haynes told her how much profit he could make from the pills she brought to Spokane. *Id.* at 1071-72,

While in Spokane, Horn watched Carmen and Haynes sell their pills for a period of time. (7-ER-1082-83). In the Summer of 2011, she helped both R. Haynes's and Carmen sell pills, making $2.00 per pill. *Id.* at 1079-80. She stayed with R. Haynes at his girlfriend's apartment. *Id.* at 1080. Horn did not give any specific details about specific narcotic violations committed by Carmen. (7-ER-1075-82).

Near the end of 2011, Horn began bringing her own pills to sell. *Id.* at 1083. She stayed with R. Haynes in his apartment. She used his cell phone to contact his customers to sell pills. *Id.* at 1083-84. As her business grew, she and R. Haynes began staying in hotels, and then moved into another apartment. *Id.* at 1086-87. Carmen would visit "just to hang out[,] ... drink[,] ... smoke marijuana [and] play video games." *Id.* 1091-92.

R. Haynes, James and Horn stayed at this first apartment and "a lot of other co-conspirators females that came up [to Spokane] for R. Haynes at the time...." *Id.* at 1089. R. Haynes and Horn stored pills and money in the second apartment. *Id.* at 1092-93. Carmen would stop by just to visit. *Id.* at 1092.

In October 2012, Horn and R. Haynes moved their operation to a house "off Mission and Lacey" in Spokane. (8-ER-1283 and 1363). Besides R. Haynes and Horn, James, Lisbey and Bobby Wines (T Crazy) used the Lacey home to store their money and drugs. (8-ER-1283).

Like Madison, Horn testified that certain Eight Treys "hung together" in Spokane as a "crew" and some Eight Treys operated as "independent contractors" in the "pill hustle." (8-ER-1351-56). These pill dealers "made their individual money." *Id.* at 1349. The dealers kept their sources and customers from the other dealers "[b]ecause that's how each dealer they made their money." (7-ER-1049-51).

"Nocomie Moore had her own crew," including Bulley (uncharged) and Govan (uncharged). (8-ER-1351). Moore was "a pretty big player" in the pill game. *Id.* at 1352. Horn knew that Miles had his own crew. *Id.* Turner had his own crew. *Id.* She knew that Lynch "made a lot of money on selling pills." (7-ER-1053).

Horn's crew included R. Haynes, James, Colbert, Wines and James Ward. *Id.* at 1053-54, 1058. Shelmon had a "lose crew." (8-ER-1356).

Horn hung out with Donald Wright and described him as an "independent contractor." *Id.* at 1054-55. Lisbey was an "independent contractor." (8-ER-1355).

Johnwell was an "independent contractor." *Id.* at 1355-56. Rufus Warnock (Bam) was an "independent contractor." (7-ER-1058 and 8-ER-1373).

Although Horn and Reeves were good friends, Reeves worked solely with Carmen. (8-ER-1362). Horn conducted her business for herself and helped R. Haynes in his business. *Id.* Horn's testimony did not tie the other "crews" nor the "independent contractors" to Carmen. Nor did she offer specific details that established specific narcotics violations committed by Carmen with any of the separate crews nor with any of the independent contractors.

The government called two witnesses who bought pills from Carmen, Brandon Werner and Daniel Hunka. Werner and Hunka were independent purchasers of pills, independent from each other, independent from the other Eight Trey distributors, and both independently sold the pills they purchased. Their testimony established that neither were tied together nor did they act "in concert" with each other with Carmen. Neither one of them was organized, supervised or managed by Carmen.

C. Brandon Werner (unindicted) (9-ER-1565-1625).

To begin with, Werner's testimony about when he obtained pills from Carmen is questionable. He had a difficult time remembering dates. (9-ER-1569).

Carmen's trial counsel established that Werner did not meet Carmen until the end of 2010 or early 2011. *Id.* at 1616. Werner testified that he first met Carmen in community college at the end of 2010. *Id.* Werner could not remember dates, stating, "it's kind of hazy so I don't remember all the dates." *Id.*

If Werner had not met Carmen until the end of 2010 or early January 2011, then Werner's testimony about obtaining pills from Carmen or Reeves prior to that time in the Summer of 2010 is not true, and the only person Werner could have bought pills from before Werner's first arrest in early 2010 was Miles who Werner set up to be arrested by law enforcement.

Werner testified he met Carmen through a friend. *Id.* at 1568-70. He began receiving from 2 to 5 pills from Carmen. *Id.* Eventually, Carmen started fronting him pills.[14] *Id.* Werner started getting about five to ten pills at a time, and then it progressed to "20 at a time." *Id.* at 1573. Sometimes he would receive pills from Reeves. *Id.* at 1574. This relationship lasted about six months. *Id.*

Werner said that one time Carmen got upset because he learned Werner bought pills from another source and told Werner to "[j]ust go through him." *Id.* at 1574-77. Carmen found out Werner bought pills from Miles and told Werner not to go to other people.[15] *Id.* 1578. Nonetheless, Werner continued to buy pills from Miles.

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[14] "Fronting" is when the dealer provides the buyer the drugs for redistribution on credit with an agreement the buyer would pay for the drugs after resale. *Jones*, 801 F.2d at 308. In *Jones* the government agreed that "evidence of fronting drugs, without more, would be insufficient to support the 'control' element of the CCE statute. *Id.*; *see also, United States v. Possick*, 849 F.2d 332, 336 (8th Cir. 1988) (same); *United States v. Ward*, 37 F.3d 243, 248 (6th Cir. 1994) ("We agree with the Eighth Circuit that 'the mere 'fronting' of cocaine alone is insufficient to support a finding of a managerial relationship....'") (quoting *Possick*, 849 F.2d at 336) (citing *Jones*, 801 F.2d at 308).

[15] This testimony is unreliable because Miles had been set up by Werner, arrested and no longer dealing when Werner met Carmen at the end of 2010 or early 2011. (9-ER-1616).

Sometime in early 2010, Werner was arrested selling pills. *Id.* at 1580. He made an agreement with State law enforcement that he could avoid going to jail if he cooperated. *Id.* at 1580-81. Werner said he first tried to set Carmen up with a controlled buy, but he could not reach him. [16] *Id.* at 1583. Werner was able to set up Miles by conducting two controlled buys for law enforcement. *Id.* at 1583-84. Miles was arrested. *Id.* at 1585.

Werner entered treatment in June or July 2010, about a week after Miles's arrest. *Id.* He relapsed about a month after his discharge. *Id.* at 1585-86. He testified that Carmen contacted Werner and they met at the Burlington Coat Factory. *Id.* at 1586.[17] He said Carmen introduced Werner to "Swag" (R. Haynes) and gave Werner four phone numbers and said he could deal with Haynes. *Id.* at 1586-87.

Carmen told Werner he "wasn't going to deal with pills anymore." *Id.* 1588. Werner never called the phone numbers for R. Haynes. *Id.* at 1588-89.

Sometime in summer 2010, Werner "ran into Reeves and Horn at the mall. *Id.* at 1589.[18] They exchanged phone numbers and he started buying pills again. *Id.* at 1589-90. He also started receiving pills from R. Haynes and Shelmon after calling and ordering them from Horn. None of Werner's activities with Horn, R. Haynes or Shelmon involved Carmen. *Id.*

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16 *See,* footnote 15.

17 *See,* footnote 15.

18 Horn testified that Reeves worked solely with Carmen. *Id.* at 1362. Therefore, Werner's testimony received any pills from Reeves in Summer 2010 is not believable because he did not meet Carmen until late December 2010 or early January 2011. (9-ER-1616).

Werner testified he dealt with Reeves for a while, however, Reeves got upset at Werner for calling Horn.[19] *Id.* at 1591. As a result, Werner stopped buying pills from Reeves. *Id.* Reeves never fronted Werner pills. *Id.* at 1594.

In 2012, Werner started receiving pills from "Chill," after Horn introduced Chill to Werner. *Id.* at 1592. Chill never fronted Werner pills, but Horn did. *Id.* at 1594. Again, none of the activities with Chill, Horn and Werner involved Carmen.

D. Daniel Hunka(10-ER-1882-1972).

Hunka testified that he started obtaining pain pills for resale from Moore, Bulley (uncharged) and Govan (uncharged). Carmen was not connected to Moore's group. Hunka bought exclusively from Moore's group in April through June 2011. (10-ER-1891). He then met Sasha and started buying pills from her. *Id.* at 1892-93.

After two months of buying pills from Sasha, she introduced Hunka to Carmen. This was near the end of the Summer of 2011. *Id.* 1893-94. Hunka started buying pills from Carmen "probably once every three, four days." *Id.* at 1896. Sometimes he bought the pills from Reeves. Hunka's arrangement with Carmen and Reeves lasted "a few weeks." *Id.* at 1897.

Hunka established a short-term buyer-seller relationship with Carmen and Reeves near the end of Summer 2011. *Id.* Carmen never "fronted" pills for Hunka, and he never directed Hunka's resale of pills.[20]

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[19] *See*, footnote 18.

[20] The Fifth Circuit joined "the other circuits that have held expressly that a buyer-seller relationship, *by itself*, *i.e.*, in the absence of some other indicia of management, supervision or organization, is insufficient to establish liability under

Eventually, Hunka found out that the phone used by Sasha and Carmen belonged to R. Haynes. *Id.* Consequently, when Hunka tried to get a price reduction from R. Haynes, Carmen said, "if you my fade, I would do it; but you're not my fade." *Id.* at 1901.

Hunka established that R. Haynes' phone was monitored by Carmen or James when Haynes was in California. *Id.* at 1901, 1904-95, 1923-24, 1946. From the Summer of 2011 to August 2012, Hunka used R. Haynes's phone to buy pills. *Id.* at 1902-03. Hunka testified he "dealt with Swag [R. Haynes] ... the whole time." *Id.* at 1903.

Hunka testified that R. Haynes "was his primary source." *Id.* at 1945. Again, Hunka learned that the phone used by Sasha and Carmen was R. Haynes's "fade phone." *Id.* Hunka also testified that he was buying pills, not only from R. Haynes and his group, but also from Moore and her group from April 2011 through August 2012. *Id.* at 1047. In other words, Haynes's group, with his fade-phone, was not the exclusive source of pills for Hunka's operation. Hunka established he had "two sources" of pills during this period. *Id.*

Hunka's testimony, at best, established that Carmen was helping R. Haynes. He did not organize, supervise nor control any of Hunka's illegal activities.

Hunka was arrested in August 2012. (10-ER-1911). After his release from jail, his sources were Chill and Shelmon. *Id.* at 1911-12.

E. The Couriers.

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the CCE statute." *United States v. Bass*, 310 F.3d 321, 328 (5th Cir. 2002) (emphasis in original).

The government attempted to establish that Carmen organized, supervised or managed a courier system to obtain his pills. Madison testified that Reeves would "run back and forth from Spokane to various cities: Idaho, Arizona, Los Angeles ... to obtain pills ... bring weapons to [LA]" and bring money. (3-ER-413). The prosecutor asked Madison whether "Reeves ha[d] anything to do with the couriers." *Id.* Madison said "[s]ometimes she would ... meet the (sic) and either grab pills and she would sell them ... and come to LA with the money when [Carmen] was down here." *Id.*

The prosecutor than asked Madison about "Scrapp."[21] (3-ER-414). Madison described Jefferson as Carmen's girlfriend. He testified that she would buy pills from sources in LA and "[r]ecruit couriers." *Id.* at 415. Although the government attempted to establish that Jefferson worked solely for Carmen, testimony by the actual couriers painted a different picture. The evidence established that Jefferson was an independent pill broker who supplied pills to Carmen, R. Haynes and T. Haynes, and her activity was not organized, supervised or managed by any of them.

Salimah Glass testified that Jefferson offered her money to travel to Spokane with pills. (5-ER-770-71). Glass does not remember the year but remembered it started in the month of December. *Id.* at 771. Glass brought pills to Spokane every two to three months for a total of five trips. *Id.* at 781. Jefferson gave Glass the pills each time except one time. *Id.* Reeves picked up the pills and the luggage from Glass on each trip. *Id.* at 782. Reeves would return Glass's luggage. *Id.* When Glass

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[21] "Scrapp" is Joeisha Jefferson, charged as defendant 21. (5-ER-769).

returned to LA, Jefferson would pick up the Glass's luggage and return it to Glass later. *Id.* at 783. Glass was paid $500.00 for each trip. *Id.*

Kendra Brown testified that Jefferson offered her money to take pills to Spokane and bring money to LA. (5-ER-786-92. On Brown's first trip, Jefferson took Brown to R. Haynes's home, took Brown's luggage to R. Haynes and then placed the luggage in Jefferson's car. *Id.* at 793-94. Brown delivered the pills to T. Haynes (Outlaw) who paid Brown $500.00. She returned the money packed in her bag by T. Haynes to a guy named Hap in Las Vegas. *Id.* at 801.

Brown later broke from Jefferson and helped Colbert buy pills for R. Haynes. *Id.* at 791. Brown only met Carmen once and "there was no drug talk." (6-ER-851). Brown saw "Jefferson with large amounts of money" only then "[e]ither [she was] going to pick up pills or picking up money for TS [R. Haynes]." *Id.* at 843-45. Every intercepted phone call played during Brown's testimony at trial involved either R. Haynes or Colbert, not Carmen. *Id.* at 826-38.

Tinoah Bragg testified that she was recruited by Porsha Marcus to bring pills to Spokane and take money back to LA. (6-ER-889-90 and 893). Marcus was one of R. Haynes's girlfriends and was a courier for R. Haynes. (7-ER-1137-38). Besides her courier services for R. Haynes, Marcus recruited "other girls" for R. Haynes and made flight plans to Spokane. *Id.* at 1138.

On Bragg's first trip to Spokane in October 2011, Colbert provided her with the pills. (6-ER-891-92). When she arrived in Spokane, she gave Reeves the pills.

Reeves paid her $250.00 and Colbert paid her $250.00 upon her return to LA. *Id.* at 894-95. Colbert took Bragg's luggage and returned it later. *Id.* at 895.[22]

During Bragg's second trip to Spokane, she met with Reeves again. *Id.* at 896. On her third trip, Braggs met with James, a member of R. Haynes's and Horn's crew. *Id.* at 896-99; (3-ER-401-02); (8-ER-1356).

Bragg testified that the courier operation was R. Haynes's operation and Marcus was his recruiter, meaning "she would get girls to do this for him." (6-ER-902-93). Couriers Antoinette Sanchez, Triviah Robinson and Traylor were all recruited or organized by Marcus or by R. Haynes to transport pills to Spokane. (6-ER-921-22, 962-63, 975-84).

Sanchez made a total of three trips to Spokane between April 2012 through October 2012. *Id.* at 921-22, 943-48, 949. Robinson made her first trip in the fall of 2012. *Id.* 960-67. She made a total of five trips to Spokane between October 2012 through January 2013. *Id.* at 968-70. Traylor started helping R. Haynes bring pills to Spokane by 2012. *Id.* at 780-81. Traylor's last trip was in October 2012. *Id.* at 985.

Erika Woods was a girlfriend of R. Haynes. (7-ER-1139). She would also pick up pills for R. Haynes in LA. *Id.* at 1139-40. Woods once tried to take cash back to LA for R. Haynes, but it was seized at the airport. *Id.* at 1140. R. Haynes told Horn the money seized was $100.000.00. *Id.* Woods did not work with Carmen.

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[22] Recall, both Madison and Horn testified that Colbert worked for R. Haynes and was in Horn's crew at the Lacey house. (3-ER-416); (7-ER-1053-54, 1058). Thus, Reeves was likely just assisting R. Haynes obtain the pills that were transported to Spokane by Bragg.

F. Cell Phone Intercepts.

At trial, the jury heard numerous phone call intercepts that occurred between August 2012 and October 2012. The calls do not establish a cohesive, coordinated and continuous scheme by Carmen as an organizer, supervisor or manager of the activity of others charge in the indictment. *See*, (6-ER-989-99;15-ER-3207-11; 16-ER-3255-79; 16-ER-3289-93; 16-ER-3295-3303; and 16-ER-3329).

Law enforcement intercepted calls between August 12, 2012, through October 9, 2012, between R. Haynes and his courier, Traylor. (6-ER-989-99). The phone call at 15-ER-3207-11 is a call between Carmen and R. Haynes in August 2012. Carmen explains to R. Haynes that he has located a doctor. *Id.* at 3210. He also discussed prices that varied for a bottle of pills. *Id.* Detective Myers indicated it was a matter "that's still under investigation." *Id.*

The phone call at 16-ER-3255-79, is between R. Haynes and Carmen on September 26, 2012. Sergeant Myers testified there was confusion as to "what is actually being said." *Id.* at 3255-56. R. Haynes explains that "he missed an opportunity" because "it's already in the air." *Id.*

Another call occurred between R. Haynes and Cobert on September 27, 2012. *Id.* at 3257. Another phone call involved R. Haynes and James on September 28, 2012. Another call involved R. Haynes and Lisbey. *Id.* at 3262. And, another call involved Erika Woods and R. Haynes. *Id.* 3263.

Other calls took place between Carmen and Jefferson between September 19 and 20, 2012. Carmen and Jefferson spoke of having "a courier sent up." *Id.* at 3272.

Meyers did not know if the courier was supposed to go to Spokane or to Seattle. *Id.* Another call was about a courier on her way up and not painting a car. *Id.* at 3272. On the last call on September 20, 2012, Meyers believed it referenced "[f]lights and where to go," with no other detail. *Id.*

September 25, 2012, was a call between Jefferson and Carmen about the cost of a flight, putting money on a card and how much money to give a courier. *Id.* at 3274. Another call between Carmen and Jefferson referenced a hotel. *Id.* at 3275.

September 26, 2012 was a call between Carmen and "Grandpa." about a quantity of 120 pills and a type of oxycodone pill. *Id.* at 3276. Another call with R. Haynes, Carmen expressed distrust of Jefferson and that he needed money to pay for pills from Grandpa. *Id.* at 3276-77. In another call, Carmen appeared to be asking R. Haynes for some money and R. Haynes offered to have Colbert handle the matter. *Id.* at 3277. Following that, Carmen asked Jefferson to contact Colbert to get some cash to pay Grandpa. *Id.* at 3278. Then Carmen speaks to Grandpa about payment. *Id.* at 3278-79.

Phones calls in 16-ER-89-93 on October 15, 2012, includes a call between Jefferson and Carmen discussing "Old Boy" and said something "about 'three racks," meaning "it's $3,000 to do whatever they're going to do." *Id.* at 3289. Another call that day, Colbert informed Carmen that he had just gone to the airport to pick someone up and drop someone off. *Id.* at 3290.

On a call on October 17, 2012, Reeves was informing Carmen that she had 2 or 230 and R. Haynes is going take 100, then she would fly to LA. On October 18,

2012, is a call Carmen and Jefferson where she says she is acting as a middle person for another unknown person for pills. *Id.* at 3292-93.

In the first call in 16-ER-3295-3303 on October 19, 2012, between Carmen and Jefferson, they discuss prices and what some other person is charging for 200 pills. Carmen will send two people for himself and R. Haynes. *Id.* at 3206-97. In another call, Carmen is upset Jefferson is telling him they have pills but "not having them in hand." *Id.* at 3298. Carmen talks to another unknown male, generally about types of pills. *Id.* at 3298-99. In a call between Carmen and "Grandpa," they discuss peoples' preference for certain pills. *Id.* at 3301.

On October 20, 2012, is a call between Ivan and Carmen where Ivan offers Carmen Percocet pills, and Carmen did not want them. *Id.* at 3302. On October 22, 2012, Carmen talks to Jefferson about meeting in some valley in California. *Id.* at 3302-03. In the call in 16-ER-3329, Carmen tells R. Haynes he needs some pills.

The phone calls occurred between August 2012 and October 2012. This is the period where Madison and Horn established that Carmen and Reeves's activities were separate from Haynes's and Horn's activities. The phone call establishe some coordination between Carmen, R. Haynes, Colbert, Jefferson and Reeves's activities, but these activities establish conspiracy, but do not prove that Carmen committed predicate substantive narcotics violations that constitute a series of continuing violations with at least five or more persons in an organizational, a supervisory or any type of managerial position as § 848 requires.

These facts establish that, while Carmen was involved in trafficking pain pills in Spokane, the activities of other Eight Treys were conducted independent of Carmen throughout the period charge in Count 1 and Count 2. An absence of facts that show Carmen committed separate violations of the CSA "in concert with five or more persons" who he organized, supervised or managed, establishes that the failure of trial counsel to object to Instruction 7 prejudiced his defense.

REASONS FOR GRANTING THE WRIT

Resolution of the question as to whether each of the CSA violations makeup "a continuing series of violations" in a CCE prosecution under § 848 can rest on a finding that the defendant and at least five or more other persons were part of an agreement to commit the continuing series of violations is an important question of federal law that has not been, but should be, resolved by the Court; the Ninth Circuit's decision departs from important principles laid down by the Court in previous decisions; and resolution of the question will promote uniformity among the lower federal courts.

I. The Ninth Circuit's Decision Departs From This Court's Articulation Of The "In Concert" Element In *Rutledge* And Allowed The Jury To Bypass The "Specific Factual Details" Required Under *Richardson*.

In *Garrett v. United States*, the Court held that "Congress intended separate punishments for the underlying substantive predicates and for [a] CCE offense." 471 U.S. 773, 795 (1985). This is because "Congress intended to create separate offenses" between substantive CSA violations and a CCE offense. *Id.* at 794.

After *Garrett*, the Court recognized that "the 'essence' of a conspiracy offense 'is in the agreement or confederation to commit a crime.'" *United States v. Felix*, 503 U.S. 378, 389-90 (1992) (*quoting United States v. Bayer*, 331 U.S. 532, 542 (1947)). Thus, "'the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself.'" *Felix*, 503 U.S. at 390 (*citing Bayer*, 331 U.S. at 542; and *Garrett*, 471 U.S. at 778).

The Court then held the "in concert" element in 18 U.S.C. § 848 "signifies mutual agreement in a common plan or enterprise" and that § 846 conspiracy is a lesser included offense of a § 848 CCE. *Rutledge*, 517 U.S. at 300. A CCE offense differs from a § 846 conspiracy in that beyond the agreement, a defendant under a § 848 CCE "must ... commit a series of substantive violations." *Id.* at 298 n. 7.

In the context of this case, *Rutledge*, *Garrett* and *Felix* teach that when a conspiracy is charged in an indictment that also includes as CCE charge, the substantive offenses that underly the conspiracy are separate and distinct offenses from the conspiracy. Significantly, *Rutledge* observes that the elements in § 848(c) require the government to prove that the defendants committed a series of substantive controlled substance violations to sustain a conviction for engaging in a CCE, unlike a conspiracy violation where guilt is established solely on proof of an agreement. 517 U.S. at 300 n. 7.

Instruction 7 was flawed because it permitted the jury to find that Carmen committed all three or more of the CSA violations constituting "a continuing series

of violations" if he was part of a conspiratorial agreement "with at least five or more other persons." The jury was not required to find Carmen actually committed any specific substantive CSA violations to convict Carmen of the CCE count.[23]

The Court later in *Richardson* rejected CCE jury instructions that allowed a jury to void discussion on "the specific factual details of each violation" of a CCE. Such instructions could result in a "cover up [of] wide disagreement among jurors about just what the defendant did, or did not do." *Richardson*, 526 U.S. at 819. If CCE instructions do not require the jury "to focus on the specific factual details, [the jury] will fail to do so, simply concluding from testimony, say, of bad reputation, that where there's smoke there is fire." *Id.*

Instruction 7 did what *Richardson* rejected when the Court held that each substantive violation of the CSA are separate elements that requires jury unanimity on each individual substantive violation. *Rutledge*, 526 U.S. at 824. Instruction 7 allowed the jury to avoid discussion of specific details to determine if Carmen actually committed any substantive CSA violations "in concert with five or more other persons" as required in § 848(c). It allowed the jury to convict Carmen on finding that he and "five or more other persons *were part of an agreement* ... to commit the continuing series of CSA violations." App. 28 (emphasis added).

II. The Ninth Circuit's Decision Creates Tension With The Third Circuit's Decision In *United States v. Fernandez* and The Seventh Circuit's Decision in *United States v. Baker*.

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[23] The jury found that one of the predicate violations included the conspiracy charged in Count 2. App. 29.

In *United States v. Fernandez*, Carlos Fernandez appealed from his conviction for engaging in a CCE. 822 F.2d 382, 383 (3d Cir. 1987). Fernandez argued that the instructions to the jury instructions allowed a jury to find the CCE was committed "if the defendant and five or more other people were part of an agreement to commit violations of the federal drug laws the 'five or more others' element of the statute would be satisfied because such a charge *would permit conviction on the basis of the defendant's participation in the agreement itself, rather than on the continuing series of violations undertaken by him.*" *Id.* at 386 (emphasis added).

The Third Circuit rejected this argument as misconstruing the charge to the jury and the elements required by the statute. *Id.* The court quoted the relevant portion of the jury instruction:

> The third requirement is that the defendant committed these violations in concert with five or more other persons. This does not mean that five or more persons must have participated with the defendant in committing each violation of the continuing series, or even that five or more persons were involved in committing each violation of the continuing series, or even that five or more persons were involved in committing any one of the offenses that is part of a series of offenses constituting the continuing criminal enterprise.
>
> Moreover, it is not required that all five persons were present at the same time or at the same place, and it is not required that the defendant had personal contact with each of the five or more persons.
>
> ... it is sufficient that the government proves beyond a reasonable doubt that, *during the course of the commission of continuing series of violations, the defendant and five or more other people were part of an agreement to commit violations of the federal drug law.*

> If you determine that the defendants acted in concert with five or more persons when committing the series of violations, you must then turn to the fourth element of the offense.

Id. (emphasis added). The court concluded that this instruction aligned with the statutory requirements for a CCE.

The instruction did not collapse the two elements "in the manner put forth by Fernandez." *Id.* In other words, the instruction still required the jury to find the defendant committed "a continuing series of violations" as required under § 848(c)(2) *and* then determine whether the "continuing series of violations" were committed by "the defendant and five or more other people." *Id.*

In contrast, Instruction 7 collapsed the element requiring the jury to find "a continuing series of violations" with the "in concert with five or more other persons" element of § 848 into one finding. Instruction 7 explicitly allowed the jury to conclude that the "continuing series of violations" element was satisfied by "agreement *or* [by] joint action." App. 28 (emphasis added).

Third Circuit subsequently decided *United States v. Russell*, 134 F.3d 171, 175 (3rd Cir. 1998). There, the defendant was charged with conspiracy to distribute controlled substances, a CCE, and money laundering. While the United States presented evidence of multiple substantive offenses which might have qualified as predicates, the CCE jury instruction was erroneous because it did not instruct the jury that they must unanimously agree on which substantive violations constituted the requisite predicate violations. *Id.* at 177. Arguing harmless error, the United States reasoned the conviction for conspiracy "is the 'functional equivalent' of a

finding of unanimity on the continuing criminal enterprise charge..." *Id.* at 182. The Third Circuit rejected this argument, stating, "[t]he jury returned a unanimous verdict on the conspiracy charge, but we can only conclude from this that the jury agreed that Russell was guilty of that one predicate offense." *Id.*

Here, the error in the jury instruction has the same effect as the United States' argument that was rejected in *Russell.* The difference is that for Carmen, the erroneous jury instruction allowed the jury to find the requisite number of violations that constituted "a series of violations" based on a conspiracy theory when only one conspiracy was charged and proven. App. 29

The Seventh Circuit's decision in *United States v. Baker,* 905 F.2d 1100 (7th Cir. 1990), drives home the point. In *Baker*, the defendant was convicted of a CCE where the jury instructions permitted the jury to find a conspiracy count was one of three predicate violations. *Id.* at 1103. The defendant claimed that since conspiracy cannot count as a predicate violation under § 848, the evidence was insufficient since the jury's verdict rested on just two substantive violations. *Id.* at 102-03. The Seventh Circuit observed that "[i]f a conspiracy is not a proper predicate offense, and if three [violations] is the minimum, the conviction may not stand." *Id.* at 103.

The Seventh Circuit recognized that "[s]even courts of appeals have held that a drug conspiracy may count toward the three" violations. *Id.*[24] However, it

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[24] Listing *United States v. Middleton,* 673 F.2d 31, 33 (1st Cir.1982); *United States v. Young,* 745 F.2d 733, 750-52 (2d Cir.1984); *Fernandez,* 822 F.2d at 384-85; *United States v. Ricks,* 802 F.2d 731, 737 (4th Cir.1986) (in banc); *United States v. Schuster,* 769 F.2d 337, 345 (6th Cir.1985); *United States v. Hall,* 843 F.2d 408, 410-11 (10th Cir.1988); *United States v. Brantley,* 733 F.2d 1429, 1436 n. 14 (11th

concluded that since conspiracy is a lesser included offense of a CCE, then it makes no sense that conspiracy should count as a predicate violation for a CCE offense. *Id.* The Seventh Circuit wrote: "[t]reating a conspiracy—a crime that *always* exists when the prosecutor establishes the "concert" with five or more others—as a predicate whittles the "series" down to a minimum of two substantive crimes." *Id.* (emphasis in original).

Although the Seventh Circuit held that conspiracy may not count as a predicate violation in the "series of violations" required under § 848, it reconciled its holding with the other circuits who held to the contrary. The court held that the jury must find the defendant committed at least two substantive violations of the CSA to support a CCE conviction, stating:

> Judges should tell juries that a series may be established by *two* or more *substantive* drug offenses, and that a

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Cir.1984). *Baker*, 905 F.2d at 1103. These cases were decided pre-*Rutledge*. 517 U.S. 292 (1996).

Circuit decisions remain inconsistent after *Rutledge* on whether a conspiracy conviction qualifies as a predicate violation in "a continuing series of violations" under § 848(c). *See, United States v. Ziskin*, 360 F.3d 934, 948 (9th Cir. 2003) (conspiracy qualifies as a CCE predicate violation); *United States v. Van Nguyen*, 602 F.3d 886, 899 (8th Cir. 2010) *abrogated on other grounds, Honeycutt v. United States*, 581 U.S. 443 (2017) (same); *United States v. Moore*, 651 F.3d 30, 80 (D.C. Cir. 2011), *aff'd sub nom on other grounds. Smith v. United States*, 568 U.S. 106 (2013) (same); *United States v. Coles*, 558 F. App'x 173, 181 (3d Cir. 2014) (same); *but see, Kramer v. United States*, 797 F.3d 493, 496 (7th Cir. 2015) ("our decision in *Baker* made clear that a section 846 charge could not be counted as one of the section 848 'continuing series' offenses.").

> conspiracy does not count toward this minimum. The lesser included conspiracy does not count for reasons we have explained; an unrelated conspiracy does not count because it cannot be part of the "continuing" series with the five subordinates; thus no inchoate offense should be included in the "series" to which § 848(c)(2) refers.
>
> This brings us into harmony in result, although not in exposition, with the seven other circuits that set a minimum of three violations and allow the included conspiracy to serve as one.

Id. at 1104-05 (emphasis in original).

Baker establishes that, even if a conspiracy qualifies as one of the predicate violations in "a continuing series of violations" under § 848(a)(2), the jury must be clearly instructed that a defendant facing a CCE charge must have committed at least two substantive violations of the CSA that that also satisfied the "in concert with five or more other persons" element. *Id.* This, Instruction 7 did not do.

III. The Review Of The Record Required Under *Strickland* Demonstrates The United States Used The "Where There is Smoke There Must be Fire" Approach Prohibited Under Richardson, Undermining Confidence in the Outcome of Carmen's Trial in Violation of His Right to Effective Assistance of Counsel.

With the flaw in the second element of Instruction No. 7, the jury could have found Carmen committed all of the crimes listed in Instruction 7 and in the Special Findings in the verdict form only on the theory that he was "part of an agreement" to commit those crimes. App. 28 and 29-30. The jury was not required to find specific instances where Carmen committed the requisite number of substantive violations "in concert with five or more other persons." What is not clear from the evidence, nor from the special findings in the verdict form, is whether jury found

Carmen actually committed at least two other substantive predicate narcotics violations "in concert with five or more other persons," beyond his involvement in the conspiracy in Count 2 that listed 61 other coconspirators.

The prejudice here is that the jury was allowed to find Carmen committed the requisite CSA violations on a conspiracy theory, without having to find specific instances in which Carmen actually committed any of the substantive violations with the required number of other persons. From a detailed review of the trial testimony, "there is a reasonable probability absent the errors, the factfinder would have had a reasonable doubt." *Strickland*, 466 U.S. at 695. "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.*

Defense counsel argued that there were multiple conspiracies among the Eight Treys, stating, "they're all separate." (21-ER-4374); and (20-ER-4250-60). The jury heard the government state that "[t]here just has to be five that were part of that overall agreement or joint action to commit continuing series" to find Carmen guilty of CCE. (20-ER-4213) (emphasis added). The government continually argued that Carmen was culpable because he created "the structure" which others used to distribute their pills. (20- ER-4198-99, 4201-03, 4210, 4213-16, 4218, 4222, 4225-27, 4229-30). *See, United States v. Jerome*, 942 F.2d 1328, 1331 (9th Cir. 1991) (creating a system to distribute does not establish a CCE). Instruction 7 permitted the government to argue Carmen's guilt on improper legal standards.

IV. This Case Provides An Important Issue And Gives The Court An Excellent Vehicle To Answer The Question Presented.

This case presents an important question. Individuals convicted of engaging in a CCE face serious penalties. 21 U.S.C. § 848(a). The Court has instructed that a conspiracy offense is a lesser included offense of a CCE. *Rutledge*, 517 U.S. at 307. A conspiracy, an agreement between two or more persons to commit a substantive offense, is distinct and a separate offense from the underlying predicate substantive offense. *Garrett*, 471 U.S. at 794; *Felix*, 503 U.S. at 390. The Court held that a jury deciding whether a defendant is guilty of engaging in a CCE must find that the defendant committed separate violations of the CSA, wherein they must be unanimous on each individual substantive violation. *Richardson*,526 U.S. at 824. The Ninth Circuit's decision in this case departs from these principles.

The Ninth Circuit's decision deviates from sister circuit decisions relevant to the question: the "in concert with" element of § 848 is satisfied only if the jury is instructed that that it must find that the defendant committed a "series of [substantive CSA] violations ... in concert with five or more other persons." *Fernandez*, 822 F.2d at 386; *Baker*, 905 F.2d at 1104-05. Instruction 7 allowed the jury to avoid this finding. App. 28. Other circuit court decisions are not entirely cohesive in their application of § 848 since *Rutledge*. *See*, n. 24, *supra*.

Most recently, the Court noted: "*Garrett* '[] adhered to our understanding that legislatures have traditionally perceived a qualitative difference between *conspiracy-like crimes and the substantive offenses* upon which they are predicated.'" *Barrett v. United States*, 607 U.S.--, 146 S. Ct. 482, 496 n. 14 (2026) (emphasis added). *Barrett* did not involve this principle. *Id.*

This case, however, directly impacts *Garrett's* principle. Instruction 7 permitted the jury to find that Carmen committed "a continuing series of violations ... in concert with five or more other persons" on "*conspiracy-like*" conduct, without having to find he committed any other substantive violations of the CSA.

The fact that the Ninth Circuit did not publish this decision should make no difference. It remains available for citation. Fed. R. App. P. 32.1 (a court may not restrict citation to "unpublished" dispositions "issued on or after January 1, 2007.").

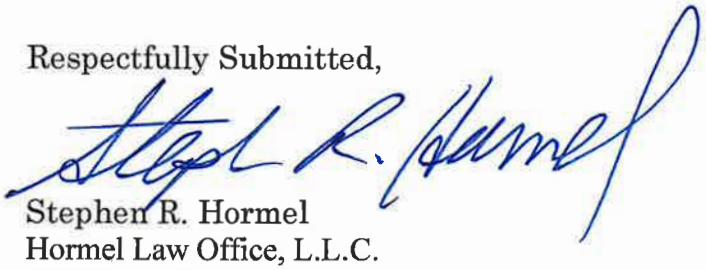
This case presents an ideal vehicle to address the long-standing problem of circuit courts reaffirming their decisions regarding the requirements of proving a CCE made prior to this Court's decisions in *Rutledge* and *Richardson*. And this is a rare petition on the question despite the entrenched splits and confusion in the lower courts, likely because habeas petitioners do not have a right to appointed counsel and face significant hurdles in raising these errors on their own. Petitioner here had counsel at the habeas stage and in this Court. Therefore, this case is an ideal vehicle for the Court to resolve an important question of federal law, that has not, but should be, resolved by this Court since *Rutledge*. Resolution of the question promotes uniformity among the lower federal courts in the application of § 848.

CONCLUSION

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

Dated this 21st day of April, 2026.

Respectfully Submitted,



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