No. 97-8629

# In the Supreme Court of the United States

OCTOBER TERM, 1998

EDDIE RICHARDSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "continuing series of violations" required for conviction for conducting a continuing criminal enterprise in violation of 21 U.S.C. 848.

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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (J.A. 48-77) is reported at 130 F.3d 765.

### JURISDICTION

The judgment of the court of appeals was entered on November 14, 1997. The petition for rehearing was denied on January 7, 1998. The petition for a writ of certiorari was filed on April 7, 1998, and was granted on October 5, 1998. J.A. 78. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was

convicted of conspiring to possess with intent to distribute and conspiring to distribute crack cocaine, powder cocaine, and heroin, in violation of 21 U.S.C. 846. Petitioner was also convicted of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. He was sentenced to life imprisonment. The court of appeals affirmed. J.A. 48-77.

1. In 1970, petitioner formed a street gang in Chicago, Illinois, known as the Undertaker Vice Lords. The gang was organized hierarchically, with five groups of members called "generations." Each generation had members of approximately the same age who joined the gang at approximately the same time. Each generation also had its own "King" and "Prince." Petitioner was the "King of all the Undertakers" and a "Universal Elite" within the "Vice Lord Nation." Petitioner not only controlled the gang, but also oversaw the distribution of heroin, crack cocaine, and powder cocaine. Petitioner and co-defendant Carmen Tate permitted only members of the Undertakers and others granted permission by them to sell drugs in the Undertakers' territory. J.A. 50.

Petitioner's gang prepared and packaged the drugs in established locations. From there, runners delivered the drugs to particular drug "spots," and the workers then sold the drugs. Petitioner and Tate established a system of gang rules and enforced them through punishments called "violations." The violations ranged from being barred from selling, to being beaten with bricks, bottles or ax handles, to being stabbed or shot, to being killed. J.A. 50-51.

Between 1984 and 1990, petitioner and the Undertakers were primarily engaged in the sale of brown heroin. Johnnie Chew, who ran one of petitioner's heroin "spots," testified that, from the winter of 1987 to

the end of 1988, the Undertakers sold approximately 25 kilograms of brown heroin. Co-defendant Lennel Smith stated that, between 1985 and 1988, he made approximately $50,000 selling brown heroin for petitioner. J.A. 51.

In the fall of 1988, petitioner and the Undertakers began to distribute white heroin. Petitioner provided to one of his sellers, Michael Sargent, $40,000 to $60,000 worth of white heroin three times a week. Another seller, Sectric Curry, told a government agent that he made more than $50,000 selling drugs for petitioner and Tate. A third seller, Nate Hall, told a government agent that he made approximately $60,000 selling drugs for petitioner and Tate. Between 1998 and 1990, the Undertakers sold more than 100 kilograms of white heroin. J.A. 51-52.

In November 1990, the Undertakers branched into the distribution of crack cocaine. Tate and Andre Cal "cooked" a quarter kilogram of cocaine into crack two to three times per week during a ten month period. During that period, the Undertakers sold more than 25 kilograms of crack. Petitioner and Tate also oversaw the distribution of powder cocaine. The conspiracy was uncovered when an agent of the Bureau of Alcohol, Tobacco, and Firearms began making small drug purchases from low-level members of the gang, who then cooperated with the government. J.A. 52-53.

2. In March 1994, petitioner and others were charged with conspiring to distribute controlled substances, in violation of 21 U.S.C. 846. J.A. 49. Petitioner and Tate were also charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. J.A. 49. The latter charge is at issue here.

A person engages in a continuing criminal enterprise if:

> (1) he violates any provision of this subchapter or subchapter II of this chapter 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 of this chapter —
>
> > (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). The indictment charged that petitioner's "continuing series of violations" included repeated instances in which petitioner distributed and possessed with the intent to distribute cocaine, cocaine base, and heroin. J.A. 11-12.

After a trial, the district court instructed the jury that, in order to find petitioner guilty of engaging in a continuing criminal enterprise, the government was required to prove:

> First, that the defendant committed a continuing series of at least three or more of the federal narcotics offenses alleged in Count 2 and at least one of the federal narcotics offenses occurred after the date of March 24, 1989;
>
> Second, that the defendant committed the offense acting in concert with five or more other persons;

> Third, that the defendant acted as an organizer, supervisor, or manager of five or more other persons; and
>
> Fourth, that the defendant obtained substantial income or resources from the offenses.

J.A. 34. The district court further instructed the jury that the the federal narcotics offenses that it could consider in determining whether petitioner engaged in a continuing criminal enterprise include "one, possession of a controlled substance with intent to distribute it, or, two, distributing or causing to be distributed, or aiding and abetting the distribution of, a controlled substance." J.A. 35.

With respect to the "continuing series" element, the court instructed the jury that "[y]ou must unanimously agree that the defendant committed at least three federal narcotics offenses. You do not, however, have to agree as to the particular three or more federal narcotics offenses committed by the defendant." J.A. 37. The court rejected an instruction proposed by Tate that would have required the jury to "unanimously agree on which three acts constituted [the] series of violations." J.A. 21. Petitioner objected to the district court's failure to give that instruction. J.A. 25.

In closing argument, government counsel explained how the government had proven that petitioner had engaged in a series of violations as follows:

> What we are talking about in this case is literally thousands of independent drug transactions. Every time an individual $20 bag of heroin was sold, every time an individual $10 bag of rock cocaine was sold, that is a separate drug crime. And you literally had

> a series of thousands, and you can rely upon any of those three in reaching your verdict.

J.A. 31. Petitioner was subsequently convicted of engaging in a CCE violation.

3. The court of appeals affirmed. J.A. 48-77. Relying on its decision in *United States* v. *Kramer*, 955 F.2d 479 (7th Cir.), cert. denied, 506 U.S. 998 (1992), the court of appeals held that the jury was not required to agree unanimously on the identity of the predicate drug offenses that constitute the "series." J.A. 71-72.

## SUMMARY OF ARGUMENT

The CCE statute requires proof that the defendant committed a federal felony drug violation that was a part of a "continuing series" of federal drug violations, undertaken with five or more persons supervised by the defendant and from which the defendant obtained substantial revenue. The "continuing series" element requires that the jury unanimously agree that a "continuing series" was proved, but it does not require unanimous jury agreement on the identity of the drug violations that make up the series.

In *Schad* v. *Arizona*, 501 U.S. 624 (1991), this Court made clear that, under the Constitution, a valid conviction does not require that jurors agree on the probative force of particular items of evidence or on the particular means a defendant used to commit an element of a crime. Rather, unanimous jury agreement that the essential elements were established is sufficient to satisfy the Constitution. The inquiry under *Schad* thus requires a court to ask, first, whether the legislature intended proof of a particular fact to be an element of a crime, or, alternatively, merely a means for proving an element. Second, a court must ask whether the legislature's designation of a fact as a "means"

transgresses constitutional norms of rationality and fairness.

Here, all relevant factors indicate that Congress intended the "continuing series" to be an element of a CCE violation, but did not intend to require unanimous juror agreement on which violations formed the series; those violations are merely a means of proving the "continuing series" element. The statutory text focuses on the defendant's leadership of, and extraction of revenues from, a continuing course of illegal drug activity in concert with a group of five or more persons. It uses the term "continuing series," but does not require identification of particular violations, thus indicating that juror agreement on the ultimate issue of a "continuing series" is sufficient to satisfy the statute.

The background, purposes, and structure of the CCE statute reinforce that conclusion. The CCE statute was designed to combat major drug activity by organized enterprises. It therefore targets the leaders of drug enterprises, rather than particular drug violations. When ongoing drug activity is proved, the "continuous series" element is thus met. The same approach applies to each of the "enterprise" elements–that the defendant act in concert with five or more persons; that he be an organizer, supervisor, or manager; and that he acquire "substantial income or resources." Each enterprise element can be satisfied in a variety of ways and with a variety of factual predicates, but jurors need only agree on the ultimate conclusion that the element was proved, rather than the particular means by which it was proved.

The Constitution permits Congress to construct the CCE statute in that manner. There is nothing irrational in Congress's decision to make the commission of any of a number of federal drug violations, related to

one another and undertaken by a group acting under the defendant's supervision, sufficient to constitute a "continuing series." This is not a case in which Congress has lumped together disparate crimes, with no ostensible function (except to evade unanimity requirements). Rather, the CCE statute's elements make clear its focus on the overall drug enterprise.

In *Schad*, the plurality found it particularly relevant to ask whether the treatment of a particular fact as a means (rather than an element) accorded with historical and present practice. But the plurality also recognized that history would afford less guidance in cases of modern statutes lacking common-law roots. The CCE statute is a response to a modern problem, and its constitutionality is not called into question by its novelty. It is notable, moreover, that to the extent that the "continuing series" element resembles state-law "course of conduct" offenses, the States have not required unanimity as to the acts composing the course of conduct. *Schad* also found it relevant to ask whether the specified alternative means showed "moral equivalence." In this case, all of the means to show the series were felony distribution and possession-with-intent-to-distribute offenses, which readily satisfy a moral equivalence test. Even in cases involving more disparate drug offenses, the CCE statute's focus is on the series of violations by a drug trafficking organization, rather than the individual predicate acts. Given that focus, the Constitution does not require unanimous juror agreement on each predicate drug violation.

## ARGUMENT

### THE JURY NEED NOT REACH UNANIMOUS AGREEMENT ON WHICH PREDICATE DRUG OFFENSES CONSTITUTE THE "CONTINUING SERIES OF VIOLATIONS" REQUIRED UNDER THE CCE STATUTE

The CCE statute makes it a crime to engage in a "continuing criminal enterprise." 21 U.S.C. 848(a). A defendant engages in a continuing criminal enterprise when (1) the defendant violates any provision of subchapters I or II of Title 21, which define narcotics offenses, that is punished as a felony; (2) "such violation is a part of a continuing series of violations" of those subchapters; (3) the defendant commits the series of violations in concert with five or more other persons; (4) the defendant acts as an organizer, supervisor, or manager of those five or more persons; and (5) the defendant obtains substantial income or resources from the series of violations. 21 U.S.C. 848(c).

This case concerns the second element—the requirement that the government establish a "continuing series of violations." With respect to that element, the district court instructed the jury that it "must unanimously agree that the defendant committed at least three federal narcotics offenses," but that it need not agree "as to the particular three or more federal narcotics offenses committed by the defendant." J.A. 37. Petitioner contends that the district court erred in giving that instruction. Specifically, he argues that the district court was required by the Sixth Amendment and the Due Process Clause to instruct the jury that it must unanimously agree on the particular narcotics offenses that make up the series. As we demonstrate below, the district court did not err in refusing to give that instruction.

### A. *SCHAD* V. *ARIZONA*, 501 U.S. 624 (1991), SUPPLIES THE FRAMEWORK FOR ANALYZING PETITIONER'S UNANIMITY CLAIM

1. "In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of *federal* jury trial." *Johnson* v. *Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring); *United States* v. *Gaudin*, 515 U.S. 506, 509-510 (1995); see Fed. R. Crim. P. 31(a).[1] There is no requirement, however, that jurors reach agreement on the underlying facts that support each element of an offense. Different jurors may rely on different pieces of evidence and may reach different conclusions concerning the manner in which a defendant committed an offense, as long as the jurors unanimously arrive at the same ultimate conclusion that the government has proven each of the element of the offense.

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[1] In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), the Court held that the Constitution does not require jury unanimity in a state trial. Five Justices in that case, and in its companion case, *Johnson*, *supra*, however, concluded that the Constitution requires jury unanimity in a federal trial. *Johnson*, 406 U.S. at 369-371; (Powell, J., concurring in the judgment); *id.* at 382-383 (Douglas, J., dissenting); *id.* at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting); *id.* at 414 (Stewart, J., dissenting); see also *Andres* v. *United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."); 2 J. Story, *Commentaries on the Constitution of the United States*, 541 n.2 (4th ed. 1873) (Sixth Amendment right to trial by jury includes a unanimity requirement); 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769); (describing trial by jury as including a unanimity requirement), cf. *United States* v. *Lopez*, 581 F.2d 1338 (9th Cir. 1978) (Kennedy, J.) (holding that the "jury unanimity required by Federal Rule of Criminal Procedure 31 cannot be waived by the defendant").

*Schad* v. *Arizona*, 501 U.S. 624 (1991), explicates those basic principles. Before *Schad*, it was well established that an indictment did not need to specify which overt act was the means by which an offense was committed. For example, in *Andersen* v. *United States*, 170 U.S. 481 (1898), the Court sustained a capital conviction of murder against challenges based on a claim that the indictment was duplicitous because it charged that death occurred through both shooting and drowning. The Court explained that it was immaterial to the validity of the conviction whether death was caused by one means or the other. *Id.* at 500. Similarly, in *Borum* v. *United States*, 284 U.S. 596 (1932), the Court sustained the capital conviction of three co-defendants for first-degree murder under a count that failed to specify which of the three did the actual killing.

In *Schad*, the Court derived from the cases holding that the government was not required to specify in the indictment the means by which an offense is committed the additional principle that the jury need not agree on those means. The four-Justice plurality stated that "[w]e have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." 501 U.S. at 631 (plurality opinion). Instead, the plurality explained, "[i]n these cases, as in litigation generally, 'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" *Id.* at 631-632 (citation omitted).

In his concurring opinion, Justice Scalia agreed with that aspect of the plurality's decision. He stated that

"it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." 501 U.S. at 649 (Scalia, J., concurring in part and concurring in the judgment). That rule, Justice Scalia concluded, "is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict." *Id.* at 650. Justice Scalia explained that "[w]hen a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her." *Ibid.* Thus, a majority of the Court in *Schad* concluded that jurors need not agree on which of various alternative means the defendant used to commit an offense.

2. As the plurality in *Schad* explained, the question whether a particular fact is a necessary element of an offense, or merely one means for proving an element, is primarily a question of statutory interpretation. 501 U.S. at 635-636 (plurality opinion). The plurality expressly rejected the view of the dissent in that case that "whenever a statute lists alternative means of committing a crime, the jury must indicate on which of the alternatives it has based the defendant's guilt," on the ground that it "rests on the erroneous assumption that any statutory alternatives are ipso facto independent elements defining independent crimes * * * and therefore subject to the axiomatic principle that the prosecution must prove independently every element of the crime." *Ibid.* Because "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or sepa-

rate crimes," the plurality explained, "[t]he question whether statutory alternatives constitute independent elements of the offense * * * is a substantial question of statutory construction." *Ibid.*

3. While legislative intent is the principal consideration in deciding the facts about which a jury must be unanimous, *Schad* also establishes that there are limits to that power. The plurality stated that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." 501 U.S. at 633. Justice Scalia agreed that "one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process." *Id.* at 650. Similarly, Justice Scalia observed that the Court "would not permit * * * an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." *Id.* at 651. The problem with such statutes is that they violate the due process norms of "fundamental fairness" and "rationality," *Schad*, 501 U.S. at 637 (plurality opinion).

The plurality in *Schad* concluded that it was impossible to establish a single test for determining the limits of a legislature's power to define the elements of an offense. 501 U.S. at 637. It did, however, offer three general considerations. First, because decisions about what facts are necessary to constitute the crime, and what facts are mere means "represent value choices more appropriately made in the first instance by a legislature," a court must give the legislature's choice great deference. *Id.* at 638. Second, when the legis-

lature's way of defining a crime has a long history or is in widespread use, it would be difficult to challenge, while a "freakish" definition without an analogue in history would be subject to greater scrutiny. *Id.* at 640. Third, if two means could rationally be perceived as reflecting equal degrees of blameworthiness, it would support the legislature's judgment to treat them as means rather than elements, but if the two means could not be reasonably viewed as morally equivalent, the legislature's choice would be more suspect. *Id.* at 643. Ultimately, a legislature's definition of the elements of the offense "is usually dispositive." *Id.* at 639 (internal quotation marks omitted).

4. Applying its analysis, the plurality in *Schad* upheld the constitutionality of an Arizona statute that permitted a jury to convict a defendant of first-degree murder without requiring unanimity on whether the defendant engaged in premeditated murder or felony-murder. The first inquiry—whether the legislature intended for the two forms of murder to be independent crimes or alternatives means for proving the same crime—had been authoritatively resolved by the Arizona Supreme Court. That court had held that, under Arizona law, premeditated murder and felony murder were merely different "means" of committing a single offense, and that state-law determination was binding on the Court. 501 U.S. at 637. In resolving the second inquiry—whether the legislature's choice was consistent with due process—the plurality deemed it significant that Arizona's definition of premeditated murder and felony murder as alternative means was supported by both history and contemporary practice. *Id.* at 640-643. The plurality also found it important that the two means could reasonably be viewed as moral equivalents when, as was true in that case, the

felony is a robbery. *Id.* at 643-644. Justice Scalia concurred in the judgment on the ground that history alone was sufficient to uphold the constitutionality of Arizona's choice. *Id.* at 651-652.

### B. THE CCE STATUTE MAKES THE PREDICATE DRUG OFFENSES ALTERNATIVE MEANS BY WHICH THE "CONTINUING-SERIES" ELEMENT MAY BE SATISFIED, NOT INDEPENDENT ELEMENTS OF THE OFFENSE

Under the analysis in *Schad*, the first question in resolving petitioner's unanimity claim is one of statutory construction. If Congress viewed the predicate drug offenses as mere alternative means of engaging in a "continuing series of violations," jurors need only agree that the defendant committed the requisite series, without having to agree on which predicate offenses it comprised. If Congress viewed each of the requisite number of predicate offenses as a separate element of a CCE offense, however, jurors must agree on which particular predicate offenses the defendant committed. Ordinary principles of statutory construction lead to the conclusion that Congress intended for the predicate drug offenses to be alternative means for satisfying the continuing series element.

1. The CCE statute provides that the government must prove that a CCE defendant engaged in a "continuing series" of drug offenses. That statutory text focuses on whether a defendant has engaged in a continuing course of illegal conduct, not on the identity of any particular predicate offense. Accordingly, the text of the Act imposes a requirement of jury agreement only on the question whether defendant has engaged in a continuing series, leaving individual jurors free to find a continuing series based on the same,

overlapping, or entirely different predicate offenses. As Judge Garth has stated, "[t]he plain reading and meaning of the CCE statute does not require the identification of the particular predicate acts as an element of the CCE offense. Therefore, the jury need not have unanimously agreed on the same three predicate acts constituting the 'continuing series.'" *United States* v. *Edmonds*, 80 F.3d 810, 837 (3d Cir.) (Garth, J., concurring in part and dissenting in part), cert. denied, 516 U.S. 999 (1996); accord, *United States* v. *Hall*, 93 F.3d 126, 129 (4th Cir. 1996) ("Under the plain meaning of this section, as long as each juror is satisfied in his or her own mind that the defendant committed acts constituting the series, the requisite jury unanimity exists"), cert. denied, 117 S. Ct. 1087 (1997).

The statute's coverage of a broad array of drug offenses underscores that conclusion. Congress did not confine the list of eligible predicate offenses to a narrow subset of drug offenses. The government may rely on proof of any drug offense. 21 U.S.C. 848(c)(2) ("such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter"). Nor has Congress limited the acts that may constitute proof of the series to offenses for which a defendant has been convicted. A series may consist of drug offenses for which the defendant has never been separately charged. See, *e.g.*, *United States* v. *Rosenthal*, 793 F.2d 1214, 1226-1227 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Markowski*, 772 F.2d 358, 361-362 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986). Congress did not even define the number of predicate acts required to constitute a "series." Some circuits require proof of at least three predicate acts (*United States* v. *Fernandez*, 822 F.2d 382, 384-385 (3d Cir.), cert. denied, 484 U.S. 963 (1987); *United States* v.

*Ricks*, 802 F.2d 731, 737 (4th Cir.) (en banc), cert. denied, 479 U.S. 1009 (1986); *United States* v. *Young*, 745 F.2d 733, 750-752 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985)), while one circuit requires proof of only two. *United States* v. *Baker*, 905 F.2d 1100, 1104 (7th Cir.), cert. denied, 498 U.S. 876 (1990). "The broadness with which Congress defined a 'continuing series of violations' indicates that the exact identities of the predicate offenses necessary for a jury to find a 'continuing series' * * * are not essential facts constituting an element of the offense." *Edmonds*, 80 F.3d at 837 (Garth, J., concurring in part and dissenting in part); see also *United States* v. *Canino*, 949 F.2d 928, 946 n.6 (7th Cir. 1991), cert. denied, 504 U.S. 910 (1992) ("The expansive breadth of culpable offenses suitable for CCE treatment diminishes our need to ascertain precisely what acts each juror finds attributable to the defendant, and instead permits us to focus on whether the jury is convinced that the defendant performed these conspiratorial acts with the required frequency.").

2. The background to the CCE statute further supports the conclusion that the predicate offenses are means of satisfying the continuing-series element rather than distinct elements themselves. Congress enacted the CCE statute as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. After considerable study, Congress found that "[d]rug abuse in the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions." H.R. Rep. No. 1444, 91st Cong., 2d Sess., pt. 1, at 6 (1970). Congress concluded that drug enforcement laws of the past had been "for the most part, ineffective in halting the increased upsurge of drug abuse throughout our United States," and that new approaches were therefore

needed. 116 Cong. Rec. 33,630 (1970). The CCE statute represented one such innovative approach, designed to "add a new enforcement tool to the substantive drug offenses already available to prosecutors." *Garrett* v. *United States*, 471 U.S. 773, 784 (1985). The statute sought to reach "not the lieutenants and foot soldiers" in a drug ring, but the "top brass," *id.* at 781. To accomplish that end, the statute departed significantly from common-law models and prior drug laws, creating a new crime keyed to the concept of a "continuing criminal enterprise."

In defining a "continuing criminal enterprise" by reference to a "series of violations" of the drug laws, Congress was not interested in punishing drug kingpins for individual drug offenses. As this Court has observed, "Congress [did not] intend[ ] to substitute the CCE offense for the underlying predicate offenses in the case of a big-time drug dealer," but rather "to permit prosecution for CCE in addition to prosecution for the predicate offenses." *Garrett*, 471 U.S. at 785. The function of the "series" element is to effectuate Congress's intent to impose enhanced punishment on those who direct *ongoing* criminal activity. The "continuing series" element "identifies a drug enterprise which is effective and persistent—qualities which, according to Congress, warrant the enhanced punishment provided by the CCE statute." *United States* v. *Canino*, 949 F.2d at 947.

Because the "series" element is directed at identifying drug enterprises with the requisite continuity and not at punishing drug offenders for discrete drug violations, the identity of the particular violations comprising the "series" is irrelevant. Once each juror finds beyond a reasonable doubt that the CCE defendant committed the requisite number of predicate offenses,

establishing that he participated in a connected series of narcotics activities with sufficient frequency, the purpose of the "series" element is vindicated; there is no need for the jurors to agree on which predicate acts constitute the "series." As the Seventh Circuit explained in *Canino*, "[t]he point of the CCE statute is to impose special punishment on those who organize and direct a significant number of larger-scale drug transactions; the exact specification by unanimous jury consent of any particular three of a greater number of offenses is irrelevant to any theory about why punishment should be enhanced for such uniquely antisocial activity." 949 F.2d at 948.

3. Our interpretation of the series element is consistent with the structure of the Act as a whole. In particular, other elements of the offense do not require jury unanimity at the level sought by petitioner, and it would be unusual for the series element alone to require such unanimity.

With respect to the "five or more persons" element, the courts of appeals have uniformly held that, while the jury must unanimously agree that the defendant acted in concert with five or more persons, they need not agree on the identity of those persons. See *United States* v. *Tipton*, 90 F.3d 861, 885-886 (4th Cir. 1996), cert. denied, 117 S. Ct. 2414 (1997); *United States* v. *Rockelman*, 49 F.3d 418, 421 (8th Cir. 1995); *United States* v. *Harris*, 959 F.2d 246, 254-257 (D.C. Cir.), cert. denied, 506 U.S. 932 (1992); *United States* v. *Moorman*, 944 F.2d 801 (11th Cir. 1991) (per curiam), cert. denied, 503 U.S. 1007 (1992); *United States* v. *English*, 925 F.2d 154, 159 (6th Cir.), cert. denied, 501 U.S. 1210 (1991); *United States* v. *Linn*, 889 F.2d 1369, 1374 (5th Cir. 1989), cert. denied, 498 U.S. 809 (1990); *United States* v. *Jackson*, 879 F.2d 85, 88 (3d Cir. 1989); *United States* v.

*Tarvers*, 833 F.2d 1068, 1074 (1st Cir. 1987); *United States* v. *Markowski*, 772 F.2d at 364. But *cf. United States* v. *Jerome*, 942 F.2d 1328, 1331 (9th Cir. 1991) (holding that unanimity instruction required where some individuals named by the prosecution as among those whom the defendant supervised could not legally qualify as such).

In reaching that conclusion, those courts have sought to implement Congress's purpose of targeting large-scale drug trafficking enterprises. Given that overriding purpose, those courts have concluded that the five-or-more-persons requirement focuses "upon the size of the enterprise—set at a floor of five—rather than upon the particular identities of those who make up the requisite number." *Tipton*, 90 F.3d at 885. See also, *e.g.*, *Harris*, 959 F.2d at 254; *Markowski*, 772 F.2d at 364. Proof that the defendant acted in concert with five or more persons "establishes that the organization in which the defendant played a leadership role was sufficiently large to warrant the enhanced punishment provided by the CCE statute." *Jackson*, 879 F.2d at 88. Accordingly, "[s]o long as each juror believe[s] that [the defendant] supervised enough people, the jury [is] entitled to convict." *Markowski*, 772 F.2d at 364.

Just as the five-or-more-persons requirement focuses on the size of the enterprise rather than on the identity of the particular persons managed by the CCE defendant, so too does the "series" requirement focus on the continuity of the enterprise rather than on the identity of the predicate drug offenses. There is no more need for juror unanimity as to the underlying facts in the latter context than in the former.

Petitioner's general approach would not only require agreement on the identity of the persons with whom a person acts in concert, it would also lead to unwar-

ranted unanimity requirements with respect to other elements of the CCE offense. For example, the CCE statute requires that the defendant "occup[y] a position of organizer, a supervisory position, or any other position of management" in the enterprise. 21 U.S.C. 848(c)(2)(A). The terms "organizer," "supervisory position," and "other position of management" are used disjunctively, so that it is only necessary that the government establish one of those relationships between the defendant and the persons with whom he acts in concert. *United States* v. *Butler*, 885 F.2d 195, 200 (4th Cir. 1989). The relationships are not coextensive. A supervisor exercises "some degree of control" (*id.* at 201) or "some type of influence" (*United States* v. *Possick*, 849 F.2d 332, 336 (8th Cir. 1988)) over those he supervises. By contrast, an "organizer" does not necessarily exercise such control. Rather, an "organizer" "can be defined as a person who puts together a number of people engaged in separate activities and arranges them . . . in one essentially orderly operation or enterprise." *Butler*, 885 F.2d at 201 (quoting 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 58.21 (1977)). A person can therefore be a supervisor without being an organizer and *vice versa*.

Under petitioner's general approach, when the government introduces evidence that the defendant played both an organizational and supervisory role in the enterprise, the jury would be required to agree unanimously on which of those roles he played. If some jurors believed that the defendant occupied only the position of organizer and others believed he occupied only the position of supervisor, the jury would not be entitled to return a guilty verdict even though all jurors agreed that he occupied a management position. There is no basis in the text or history of the statute, however,

for concluding that Congress intended such an incongruous result.

Another element of the offense is that the defendant must have derived "substantial income or resources" from his drug violations. 21 U.S.C. 848(c)(2)(B). Under petitioner's approach, the jury would be required to agree on the identity of the property that the defendant received before it could convict. For example, if some jurors believed the defendant obtained cash, and others believed he obtained automobiles, the jury would have to acquit. Again, there is no basis for concluding that Congress would have intended such an unusual result.

Petitioner's general approach is misguided. Under the CCE statute, the jury need only agree that the defendant acted in concert with five or more persons; it need not agree on the identity of those persons. The jury need only agree that the defendant was a supervisor, organizer, or other manager; it need not agree on which one. The jury need only agree that the defendant obtained substantial resources; it need not agree on the identity of those resources. And finally, the jury need only agree that the defendant engaged in a series of violations; it need not agree on the identity of particular ones.

When construed in that way, the continuing-series element operates in the same way as other federal offenses that involve a continuous course of criminal conduct. For example, the offense of possession with the intent to distribute a controlled substance is an offense that involves ongoing criminal conduct. The government's evidence in such a case may show that a defendant possessed the controlled substance he received at different places and at different times. To convict such a defendant, the jurors need only agree that the defendant possessed the illegal substance with

the intent to distribute it. They need not reach agreement on when and where the defendant possessed the illegal substance. *United States* v. *Ferris*, 719 F.2d 1405, 1406-1407 (9th Cir. 1983) (in case in which evidence showed various acts of possession in different places over a two-month period, jury was not required to be unanimous on the particular time and place of possession).

4. Petitioner's contrary rule could lead to results that are demonstrably at odds with Congress's purpose of "punishing a defendant whom the jury is convinced was involved in a related series of drug activity with relevant frequency." *Canino*, 949 F.2d at 948 n.7. For example, suppose the government introduced evidence that a CCE defendant engaged in four predicate drug offenses, and six jurors believed beyond a reasonable doubt that the defendant participated in offenses one through three and that he probably participated in offense four, and six jurors believed beyond a reasonable doubt that he participated in offenses two through four and that he probably participated in offense one. If the jurors were required to agree on which three predicate offenses composed the "series," then they would have to acquit the defendant, even though they agreed beyond a reasonable doubt that the defendant engaged in a continuing series of drug offenses. *Ibid.*

To take another example closer to this case, suppose the evidence showed that the CCE defendant headed a drug organization that engaged in numerous street-corner drug transactions daily over an extended period of time, but in which there was no evidence of the facts pertaining to any particular drug transaction. On such evidence, each juror could readily conclude that the defendant participated in a "series of violations," but might not be willing to conclude that any particular,

identifiable transaction took place. Under petitioner's approach, the defendant might well escape conviction. Congress could not have intended for drug kingpins to be able to avoid CCE liability in such circumstances.

5. Petitioner's arguments for requiring jury unanimity on the particular predicate offenses that constitute a continuing series are unsound.

a. Petitioner argues (Br. 16) that the first element of the offense—that the defendant "violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony" (21 U.S.C. 848(c)(1)) necessarily requires jury unanimity on a particular violation. From that premise, petitioner then argues that the continuing-series element should be interpreted in the same way. Petitioner's initial premise is incorrect. The first element is satisfied by proof of a violation of "any provision" of the relevant portions of Title 21. Because of the breadth of that requirement, and its failure to focus on any particular violation of law, jurors may base their conclusions on different predicate acts, as long as they all agree that the defendant committed a violation of one of the drug laws. That interpretation is also consistent with the general purpose of the CCE provision—which is not to punish particular violations, but to provide a unique remedy against those who operate continuing drug businesses and substantially profit from them.

Even if petitioner's premise is correct and the jury must agree on a particular violation to satisfy the first element, it would not follow that the jury would have to be unanimous on the other predicates in the series. The argument in favor of concluding that the first element requires agreement on a particular violation is that the first element refers to a "discrete" violation by the defendant, Pet. Br. 16 n. 27. That focus on an individual

crime committed by the defendant might be thought to require unanimous agreement by the jury on a particular violation. But the continuing-series element addresses joint, ongoing, and lucrative conduct consisting of repeated violations "undertaken" by the defendant "in concert with" five or more underlings. 21 U.S.C. 848(c)(2)(A). The focus is therefore not on individual action of the defendant in committing a crime, but in his leadership of a successful criminal enterprise. See *Rutledge* v. *United States*, 517 U.S. 292, 298 & n.7 (1996) ("in concert with" element requires proof of a drug conspirary plus additional elements). Accordingly, the rationale for requiring the jury to agree on the defendant's particular violation in Section 848(c)(1) has no application to the continuing-series element in Section 848(c)(2).[2]

b. Petitioner next argues that, because jury unanimity would be required if the predicate offenses were charged as separate crimes, it would be anomalous not to require such unanimity in a CCE conviction. That argument, however, ignores the specific purpose of the "continuing-series" requirement. As we have explained, the "continuing-series" element is directed at identifying drug enterprises with the requisite continuity. It therefore makes perfect sense to require jury unanimity only on the question whether there is a

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[2] This case does not present the question whether the jury must agree on a particular violation in order to satisfy Section 848(c)(1). Petitioner did not raise any objection directed to that element in the district court; he did not raise any issue on appeal directed to that element; and the question that has divided the circuits and on which this Court granted certiorari concerns whether unanimity on particular offenses is required to satisfy the "continuing-series" element.

continuing series of violations, and not on the particular violations that underlie the series.

c. Finally, petitioner argues that the legislative history shows that jury unanimity is required on the particular predicates underlying a series. In particular, petitioner relies on Representative Eckhardt's statement that he supported the CCE statute rather than an alternative that would have made the provision a sentencing enhancement, because he favored a jury determination on "every element of the continuing criminal offense." 116 Cong. Rec. 33,631 (1970). That comment, however, simply begs the question presented in this case concerning whether the predicates are elements of the offense or simply means of proving the "continuing-series" element. It provides no guidance in resolving that issue.

### C. CONGRESS'S DETERMINATION TO MAKE THE PREDICATE DRUG OFFENSES ALTERNATIVE MEANS OF SATISFYING THE "CONTINUING-SERIES" ELEMENT, RATHER THAN SEPARATE ELEMENTS THEMSELVES, IS CONSTITUTIONAL

Because the ordinary sources of statutory construction show that Congress intended the predicate offenses to be means of proving the continuing-series element, and not elements in themselves, the only remaining question is whether Congress's choice is constitutional.

1. The CCE statute readily satisfies constitutional standards. The CCE statute does not remotely resemble a statute that permits any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering to suffice for conviction (*Schad*, 501 U.S. at 633), or a crime consisting of either robbery or failure to file a tax return (*id.* at 650

(Scalia, J., concurring in part and concurring in the judgment)), or a statute that would permit an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday (*id.* at 651). The common element of those hypothetical statutes is that it is difficult to see a rational purpose for them—other than "circumvention of otherwise applicable jury-unanimity requirements." *Edmonds*, 80 F.3d at 835 (Alito, J., concurring in part and dissenting in part).

The CCE statute is fundamentally different. The structure of the statute reveals that difference. Under the Act, the government must do more than show that the defendant has engaged in predicate violations; the government must prove that the defendant acted in concert with five or more persons, that he acted as a supervisor or organizer of such persons, and that he derived substantial revenues from the violations. "The presence of these additional elements supports the view that the CCE statute represents an effort to define a distinct type of criminal activity." *Edmonds*, 80 F.3d at 836 (Alito, J., concurring in part and dissenting in part).

The background of the CCE statute strongly reinforces that conclusion. As previously discussed, that background shows that Congress concluded that "a new type of criminal activity was growing in importance and that a new type of criminal statute, keyed to the organizational scope of that activity, was needed." *Edmonds*, 80 F.3d at 836 (Alito, J., concurring in part and dissenting in part). Congress therefore had "a rational and legitimate basis for crafting the particular combination of elements required under 21 U.S.C. § 848(c)(2)." *Ibid.* That is sufficient to sustain the constitutionality of the statute. See *Schad*, 501 U.S. 637 (plurality opinion) (due process demands "fundamental fairness" and "rationality").

2. Examination of historical and contemporary practice, as well as the moral equivalence of the alternative means, leads to the same conclusion. See *Schad*, 501 U.S. at 637 (plurality opinion). The CCE statute is not based on any longstanding and widely accepted model. But, as the plurality noted in *Schad*, "history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots, than in cases * * * that deal with crimes that existed at common law." *Id.* at 640 n.7. The reason is "obvious." *Ibid.* As law enforcement needs change, "legislative bodies must have the freedom, within constitutional limits, to devise new ways of responding to those changes, including the creation of new crimes that are not closely modelled on any common law antecedents." *Edmonds*, 80 F.3d at 835 (Alito, J., concurring in part and dissenting in part). CCE, like the RICO statute that was enacted at roughly the same time, see 18 U.S.C. 1961 *et seq.*, creates a novel remedy to combat criminal organizations, in large part because of the inadequacies of prior law. See *United States* v. *Turkette*, 452 U.S. 576, 588-590 (1981) (RICO); *Garrett*, 471 U.S. at 782-784 (CCE).

Moreover, there is nothing "freakish" about the "continuing-series" element itself. *Schad*, 501 U.S. at 640 (plurality opinion). Numerous state laws prohibit course-of-conduct offenses, without requiring unanimity on each feature that satisfies that element. For example, California makes it unlawful for a person who resides in the same house as a minor child to engage in three or more acts of sexual abuse of the child over a three-month period. Cal. Penal Code § 288.5(a). In prosecutions for that offense, the jury is not required to reach agreement on the particular underlying acts of sexual abuse. *Id.* § 288.5(b). See *People* v. *Gear*, 23 Cal.

Rptr. 2d 261, 263-266 (Ct. App. 1993) (upholding constitutionality of the California Act, on the ground that, in a course-of-conduct offense, a jury need not reach agreement on the specific underlying acts), cert. denied, 511 U.S. 1088 (1994). Other course-of-conduct offenses similarly do not require jury unanimity on the particular acts underlying the illegal course of conduct. See, *e.g.*, *People* v. *Reynolds*, 689 N.E. 2d 335, 343-344 (Ill. App. Ct. 1997) (in prosecution for sexual assault and aggravated sexual abuse of a minor, jury was not required to agree on the specific incidents of sexual interaction where the prosecution proceeded on the theory that the defendant engaged in a continuous course of conduct); *State* v. *Spigarolo*, 556 A.2d 112, 129 (Conn.) (in prosecution for engaging in acts likely to impair the health or morals of a minor child, the jury was not required to reach unanimous agreement on the specific acts of sexual abuse underlying the offense where the prosecution proceeded on the theory that the defendant's conduct was in the nature of a continuing offense), cert. denied, 493 U.S. 933 (1989).[3] The

[3] See also *People* v. *Gunn*, 242 Cal. Rptr. 834, 838 (Ct. App. 1987) (in prosecution for harboring a known felon, jury was not required to agree on which of three acts constituted harboring when the prosecution charged that all three acts were part of a continuing course of conduct); *People* v. *Ewing*, 140 Cal. Rptr. 299, 300-301 (Ct. App. 1977) (in prosecution which alleged that the defendant engaged in a course of child abuse between two designated dates, the jury was not required to agree on the particular acts of child abuse); *People* v. *White*, 152 Cal. Rptr. 312, 317 (Ct. App. 1979) (in prosecution alleging that defendant procured a place in which a woman engaged in prostitution over a five-month period, the jury was not required to agree on any particular act of prostitution as long as it agreed that at least one such act took place); *People* v. *Lowell*, 175 P.2d 846, 848-849 (Cal. Dist. Ct. App. 1946) (in prosecution alleging that the defendant contributed to the

continuing-series element of a CCE offense has some similarities to course-of-conduct offenses, and those analogues in criminal law support its consistency with constitutional requirements.

The series element also satisfies the moral equivalence test. In analyzing the question of reasonable "moral equivalence," the question is not whether all possible predicate offenses are morally equivalent. Rather, the question is whether the predicate offenses charged in this case may reasonably be viewed as morally equivalent. *Schad*, 501 U.S. at 644 (plurality opinion). Here, the district court instructed the jury that the federal narcotics offenses that it could consider for purposes of determining whether petitioner engaged in a continuing criminal enterprise include "one, possession of a controlled substance with intent to distribute it, or, two, distributing or causing to be distributed, or aiding and abetting the distribution of, a controlled substance." J.A. 35. Those two offenses—possession of a controlled substance with an intent to distribute, and distribution—may reasonably be viewed as moral equivalents. Moreover, those offenses, together with unlawful importation offenses and conspiracy offenses are the offenses most likely to be used to satisfy the series element, and all of those offenses may reasonably be viewed as morally equivalent.

Even in those instances in which individual predicate drug offenses may differ in blameworthiness, as would be the case if a simple possession offense were charged as one of the predicates, it is important to recognize

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delinquency of a minor through various acts, including several acts of sexual abuse, the jury was not required to agree on a particular act that caused delinquency).

that the CCE statute does not target predicate offenses individually. Rather, the function of the "continuing-series" requirement is to establish that the group that defendant headed engaged in drug violations with sufficient frequency to denote the existence of a continuing criminal enterprise. For that purpose, the relative seriousness of the offenses is immaterial; it is the continuity of the criminal enterprise that counts. As Judge Garth explained in his dissenting opinion in *Edmonds*, "Congress has * * * determined that regardless of the exact identity or seriousness of the predicate acts constituting the 'continuing series,' a defendant is equally blameworthy so long as he has engaged in multiple related drug-related offenses" and the other elements of the CCE offense are proven. 80 F.3d at 841. Indeed, "a specific unanimity instruction to the jury would do nothing to change the fact that a defendant could be convicted for CCE regardless of whether the jury found that he engaged in a series of first-time simple possession offenses or whether the jury found that he engaged in a series of more serious crimes such as distributing large quantities of drugs." *Ibid.*

In sum, Congress reasonably decided to make predicate offenses alternative means of satisfying the "continuing-series" element, rather than elements themselves. That choice is fully consistent with the Constitution.[4]

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[4] Petitioner argues (Br. 28) that any error in instructing the jury on the series element was not harmless. The court of appeals did not decide that issue, and this Court may, in any event, clarify the proper form of harmless-error analysis in *Neder* v. *United States*, No. 97-1985 (to be argued Feb. 23, 1999). Accordingly, if this Court resolves the circuit conflict at issue in this case by agreeing with petitioner on the degree of unanimity required to

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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establish the series element, it should remand to the court of appeals to allow that court to evaluate the harmless-error issue in the first instance.