SUPREME COURT OF THE UNITED STATES

No. 97–8629

EDDIE RICHARDSON, PETITIONER *v.*
UNITED STATES

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

[June 1, 1999]

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR and JUSTICE GINSBURG join, dissenting.

The evidence in this case established that petitioner was the head of a sophisticated, well-entrenched, successful drug distribution enterprise. It had sales of hundreds of kilograms of heroin and cocaine over a period of years in Chicago. The jury found that petitioner was engaged in a "continuing criminal enterprise" (CCE).

Title 21 U. S. C., subchapter I, §848(c) defines a person as engaged in a CCE 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." 84 Stat. 1266.

We are concerned with subparagraph (2), which by its

terms requires the Government to establish the following elements if it is to prove a CCE: (1) that the violation is part of a continuing series of violations of the drug laws; (2) that the continuing series is undertaken by the accused in concert with five or more other persons; (3) that the accused occupied a position of organizer, supervisor, or manager, with respect to those other persons; and (4) that the accused obtained substantial income or resources from the continuing series of violations.

The Court today reasons that the first enumerated element in the subparagraph is not an element at all; instead, it is shorthand for some number of other elements corresponding to the individual violations in the series. The jury must therefore be unanimous not as to whether there was a continuing series of violations but rather as to each of the individual violations making up some subset of the continuing series. The Court does not decide how many elements this portion of the statute contains, although it assumes without deciding that three will do. *Ante*, at 4. The Court gives no satisfactory explanation for confining its holding to the continuing series phrase, while assuming nonunanimity as to the specifics of the other elements in the same subparagraph. Nor does the Court attempt to explain how a jury is supposed to make sense of the other elements– like deriving substantial income from the series– now that the series has in effect been replaced with a few discrete violations.

The consequences of the Court's decision go well beyond the jury instruction the Court discusses. The Court's decision of necessity alters the manner in which the Government must frame its indictment and design its trial strategy. The elements of the offenses charged must be set forth in the indictment, see *Hamling* v. *United States*, 418 U. S. 87, 117 (1974), so henceforth when the Government indicts it must choose three or more specific violations and allege those, despite its ability to show that the CCE

involves hundreds or thousands of sales. This is a substantial departure from what Congress intended. I submit my respectful dissent.

I

The Government procured a two-count indictment against petitioner. The CCE charge is in Count II and the Government, in my view, charged precisely what Congress said it should. Count II was as follows:

> "1. From in or about 1984, to and including October 1991, at Chicago and elsewhere in the Northern District of Illinois, Eastern Division,
>
> EDDIE RICHARDSON,
> also known as 'Hi Neef' and 'Chief,' and
> CARMEN TATE
> also known as 'Red' and 'Redman,'
>
> defendants herein, did engage in a continuing criminal enterprise by committing a continuing series of felony violations of Section 841(a)(1) of Title 21, United States Code, which continuing series of violations was undertaken by defendants in concert with at least five other persons with respect to whom defendants occupied a position as organizer, a supervisory position, and some other position of management, and from which continuing series of violations defendants obtained substantial income and resources.
>
> "2. The continuing series of violations undertaken by defendants EDDIE RICHARDSON and CARMEN TATE included:
>
> "a. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE

> RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed cocaine and cocaine base and possessed cocaine and cocaine base with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1).
>
> "b. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed heroin and possessed heroin with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1).
>
> "In violation of Title 21, United States Code, Section 848." App. 11–12.

By holding that the Government must in addition allege three or more discrete violations, thus pinning a case involving thousands of transactions on just three of them, the Court misunderstands the whole design and purpose of the statute.

We begin on common ground, for, as the Court acknowledges, it is settled that jurors need not agree on all of the means the accused used to commit an offense. *Schad* v. *Arizona*, 501 U. S. 624 (1991), confirmed this principle. In my view, Congress intended the "continuing series of violations" to be one of the defining characteristics of a continuing criminal enterprise, and therefore to be a single element of the offense, subject to fulfillment in various ways. The important point is not just that the violations occurred but that they relate to the enterprise and demonstrate its ongoing nature, hence the requirement of a "continuing" series. Evidence that the accused

supervised a ring that engaged in thousands of illegal transactions is more probative of the continuing nature of the enterprise than evidence tending to show three particular violations.

Nowhere in the text of the statute or its legislative history does Congress show an interest in the particular predicate violations constituting the continuing series. Rather, the CCE offense is aimed at what Congress perceived to be a peculiar evil: the drug kingpin. The Court's observation that there is a tradition requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law, *ante*, at 5, simply restates the question presented. The Court has made clear in an earlier case that Congress did not "inten[d] to substitute the CCE offense for the underlying predicate offenses in the case of a big-time drug dealer," but rather intended "to permit prosecution for CCE in addition to prosecution for the predicate offenses." *Garrett* v. *United States*, 471 U. S. 773, 785, 786 (1985). The CCE statute provides a specific remedy to combat criminal organizations, in large part because of the perceived inadequacies of prior law. *Id.*, at 782–784. By treating the CCE offense like a simple recidivism statute, the Court's opinion does not conform to the statutory purpose.

The continuing series element reflects Congress' intent to punish those who organize or direct ongoing narcotics-related activity. As the Court said in *Garrett*: "A commonsense reading of this definition [of 'engaged in a continuing criminal enterprise'] reveals a carefully crafted prohibition aimed at a special problem. This language is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." *Id.*, at 781. As part of that statutory design, the continuing series element of the offense aims to punish those whose persistence and organization establish a successful, ongoing criminal operation. The continuing series element, as a consequence, is

directed at identifying drug enterprises of the requisite size and dangerousness, not at punishing drug offenders for discrete drug violations.

The remaining elements of the CCE definition likewise target drug kingpins. With respect to the requirement of action in concert with five or more other persons, every Court of Appeals to have considered the issue has concluded that the element aims the statute at enterprises of a certain size, so the identity of the individual supervisees is irrelevant. See, *e.g.*, *United States* v. *Harris*, 959 F. 2d 246, 255 (CADC 1992) *(per curiam)* (panel including Ruth Bader Ginsburg and Clarence Thomas, JJ.); *United States* v. *Garcia*, 988 F. 2d 965, 969 (CA9 1993); *United States* v. *Moorman*, 944 F. 2d 801, 803 (CA11 1991); *United States* v. *English*, 925 F. 2d 154, 159 (CA6 1991); *United States* v. *Linn*, 889 F. 2d 1369, 1374 (CA5 1989); *United States* v. *Jackson*, 879 F. 2d 85, 88 (CA3 1989); *United States* v. *Tarvers*, 833 F. 2d 1068, 1074–1075 (CA1 1987); *United States* v. *Markowski*, 772 F. 2d 358, 364 (CA7 1985). As for the remaining elements, it is undisputed that the jury need not agree unanimously on whether the defendant was a supervisor as opposed to an organizer or other manager, because the leadership role is what matters. It should be equally apparent that the jury need not agree unanimously on which income or resources the defendant received from the CCE, because what matters is that there be substantial income from the continuing series, without regard to the form in which it arrives.

The Court assumes that other elements of the statute can be fulfilled without juror unanimity as to the means of fulfillment, and offers nothing more than the conclusory assertion that these other elements "differ in respect to language, breadth, [and] tradition" from the continuing series element. *Ante*, at 10. Not only does the Court fail to provide any analysis that might explain how the elements differ, it also ignores the point that they are the

same in the one respect that counts for the statute's purposes, namely, that they are all ways of ensuring that the accused directs schemes of sufficient size, duration, and effectiveness to warrant special punishment, without regard to the particulars of the schemes.

It is easy enough to understand that a drug distribution organization should have five or more other persons to come within the condemnation of the statute. It is likewise easy to understand that the organization should generate substantial income for its leaders as a requirement for conviction. Once the continuing series has been replaced with three individual violations, however, the remaining elements become difficult for the jury to apply. The Court's unnecessary atomization of the continuing series element disrupts Congress' careful concentration on the ongoing enterprise and replaces it with a concentration on perhaps three violations picked out of the continuing series.

The Court seems to proceed on the assumption that any three small transactions involving a few grams will establish the requisite series. That is not so. In my view, the necessary consequence of the Court's ruling is that the three specific crimes must themselves be the ones, in the words of the statute, "from which [the accused] obtains substantial income or resources." 21 U. S. C. §848(c)(2)(B). Just any three will not do. This significant new burden will make prosecutions under the CCE statute remarkably more difficult. Three small transactions will probably not generate substantial income, and it is unlikely that each transaction will involve five or more other persons. Or there might be different views among the jurors as to which transactions netted substantial income and as to which were undertaken in concert with five or more others. It is disruptive of the statutory purpose to require the Government at the outset to isolate just three or more violations and then relate all the other parts of

the CCE definition to just these offenses. Yet that is what the Court appears to require. As a consequence, the statute might not even reach businesses (like petitioner's) which depend for their success upon a high volume of relatively small sales, unless there is jury unanimity on 20 or 30 discrete transactions. It is all but inconceivable that Congress intended, in effect, to exempt such businesses from coverage by this unwarranted emphasis on individual transactions. It is the enterprise as a whole that must be examined, and the continuing series of violations relates to the entire scope of the operations.

In addition, the individual violations making up a continuing series may not always be easy to prove with particularity. The Court assures us that "witnesses should not have inordinate difficulty pointing to specific transactions." *Ante*, at 10. It then asks the rhetorical question: "Or, if they do have difficulty, would that difficulty in proving individual specific transactions not tend to cast doubt upon the existence of the requisite 'series'?" *Ibid.* Quite apart from the point already mentioned that the continuing series must relate to the elements of action in concert and receipt of substantial income, the answer to that question is "no." The evidence in this case so demonstrates.

Petitioner was the founder and leader of a gang called the Undertaker Vice Lords. The evidence indicated that petitioner operated what might be called a chain drugstore in Chicago, selling various kinds of drugs, including white and brown heroin, powder cocaine, and rock or crack cocaine, at various established locations or "spots." Several gang members pleaded guilty, cooperated with the Government, and testified at petitioner's trial. The following are but a few examples of the testimony offered against petitioner. Johnnie Chew, who ran a brown heroin distribution spot for the gang in 1987 and 1988, estimated that the gang sold a "frame"– 25 packs, each con-

taining 25 bags worth $25 apiece– every three to four days. Michael Sargent testified that, while he was in charge of a white heroin distribution spot, Richardson supplied him with $40,000 to $60,000 worth of heroin three times a week. Joseph Westmoreland estimated the Undertakers were collecting about $20,000 to $30,000 per day selling white heroin from 1988 to 1990. Andre Cal admitted cooking a quarter kilo of powder cocaine into crack cocaine two to three times a week for 10 months in the early 1990's. Several other gang members admitted to earning $50,000 to $60,000 each selling drugs for the gang on a regular basis. To suggest that Congress intended, in the face of devastating testimony like this, to allow petitioner to escape a CCE conviction because the witnesses did not describe any specific, individual transaction out of thousands (many of which are more than a decade old) is to misunderstand the nature of the crime Congress sought to prohibit.

State course-of-conduct crimes provide an analog to the federal CCE statute. A crime may be said to involve a continuing course of conduct because it is committed over a period of time, like kidnaping, harboring a fugitive, or failing to provide support for a minor. In such cases, the jury need not agree unanimously on individual acts that occur during the ongoing crime. See generally, *e.g.*, B. Witkin & N. Epstein, California Criminal Law §2942, p. 245 (2d ed., Supp. 1997) ("A unanimity instruction is not required when the crime charged involves a continuous course of conduct . . . such as failure to provide, child abuse, contributing to the delinquency of a minor, and driving under the influence"). States have also chosen to define as continuous some crimes that involve repeated conduct where the details of specific instances may be difficult to prove, as in cases of child molestation or promoting prostitution. See, *e.g.*, *People* v. *Adames*, 54 Cal. App. 4th 198, 62 Cal. Rpt. 2d 631 (1997) (continuous sex-

ual abuse of a child); *People* v. *Reynolds*, 294 Ill. App. 3rd 58, 689 N. E. 2d 335 (1997) (criminal sexual assault and aggravated sexual abuse of a minor); *State* v. *Molitor*, 210 Wis. 2d 416, 565 N. W.2d 248 (App. 1997) (repeated sexual intercourse with underage partner); *State* v. *Doogan*, 82 Wash. App. 185, 917 P. 2d 155 (1996) (advancing prostitution and profiting from prostitution). The CCE offense has some attributes of both of these categories: To the extent the CCE offense aims to punish acting as leader of a drug enterprise, it targets an ongoing violation. To the extent it relies on there being a series of violations, it may be susceptible to difficulties of proof which make it reasonable to base a conviction upon the existence of the series rather than the individual violations. As in this very case, the transactions may have been so numerous or taken place so long ago that they cannot be recalled individually.

Having failed to confront the acknowledged purpose of the statute, the Court invokes the principle of constitutional doubt. Just last Term we warned that overuse of the doctrine risks aggravating the friction between the branches of Government "by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres* v. *United States*, 523 U. S. 224, 238 (1998). As discussed in Part II, *infra*, the CCE statute in my view passes constitutional muster. Yet the Court today interprets the statute in a way foreign to Congress' intent without discussing any possible constitutional infirmity other than to say that it has "no reason to believe that Congress intended to come close to, or to test," the limits on the definition of crimes imposed by the Due Process Clause when it wrote the CCE statute. *Ante*, at 6.

There is no indication that Congress had any concerns about the statute's constitutionality. The Court seems to imply the contrary by citing *Garrett* for the proposition

that Congress "sought increased procedural protections for defendants" in making CCE a separate crime, *ante*, at 6 (paraphrasing *Garrett*, 471 U. S., at 783–784). Taken in context, the passage from *Garrett* supports neither the Court's reading of the statute nor its invocation of constitutional doubt. *Garrett* held the Double Jeopardy Clause did not bar prosecution for the CCE offense after a prior conviction for one of the underlying predicate offenses. The passage in question discussed the debate in Congress over whether to impose enhanced punishments for drug kingpins by means of a separate offense or by means of a sentencing factor. The House Report cited by the Court noted that an amendment by Representative Dingell "made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court." H. R. Rep. No. 91–1444, pt. 1, p. 84 (1970). That is of course true, but it begs the question presented in this case, namely, whether the existence of a series is itself an element, or whether the individual offenses in that series are elements. To say that the jury must agree unanimously on the elements provides no guidance in determining what those elements are. The competing provision from Representative Poff, moreover, which would have treated engaging in a CCE as a sentencing factor, was also adopted, with the result that "both approaches are contained in the statute." *Garrett, supra,* at 784 (citing 21 U. S. C. §§848, 849, 850). There is thus no reason to think Congress thought it necessary for the jury to agree on which particular predicate offenses made up the continuing series before an enhanced punishment may be imposed.

II

In my view, there is no due process problem with interpreting the continuing series requirement as a single element of the crime. The plurality opinion in *Schad*

spoke of "the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution." 501 U. S., at 637. Rather, our inquiry is guided by "due process with its demands for fundamental fairness and for the rationality that is an essential component of that fairness." *Ibid.* (citation omitted). Our analysis of fundamental fairness and rationality, by necessity, is contextual, taking into account both the purposes of the legislature and the practicalities of the criminal justice system. In the CCE context, the continuing series element advances the goals of the statute in a way that is neither unfair nor irrational: It is a direct and overt prohibition upon drug lords whose very persistence and success makes them a particular evil.

The CCE statute does not in any way implicate the suggestion in *Schad* that an irrational single crime consisting of, for instance, either robbery or failure to file a tax return would offend due process. See *id.*, at 633, 650. Although the continuing series may consist of different drug crimes, the mere proof of a series does not suffice to convict. The Government must also prove action in concert with five or more persons, a leadership role for the defendant with respect to those persons, and substantial income or resources derived from the continuing series. The presence of these additional elements distinguishes the CCE statute from a simple recidivism statute, notwithstanding the Court's attempt to draw an analogy between the two. See *ante*, at 8–9.

The Court cites *Garrett* for the proposition that the CCE statute originated in a "recidivist provision . . . that provided for enhanced sentences." *Ante*, at 9. In fact, the point the Court was making in *Garrett* was that Congress rejected the simple recidivist provision in favor of the current definition of a CCE, which, as the Court in *Garrett* took pains to point out, "is not drafted in the way that a recidivist provision would be drafted" but instead uses

"starkly contrasting language." 471 U. S., at 781–782 (comparing the CCE definition of §848 with the recidivist provision incorporated into §849).

One could concede, *arguendo*, that if Congress were to pass a habitual-offender statute the sole element of which was the existence of a series of crimes without a requirement of jury unanimity on any underlying offense, then the statute would raise serious questions as to fairness and rationality because the jury's discretion would be so unconstrained. The statute before us is not of that type, for the various elements work together to channel the jury's attention toward a certain kind of ongoing enterprise. We should not strike down this reasonable law out of fear that we will not be able to deal in an appropriate manner with an unreasonable law if one should confront us. The CCE statute does not represent an end run around the Constitution's jury unanimity requirement, for Congress had a sound basis for defining the elements as it did: to punish those who act as drug kingpins. There are many ways to be a drug kingpin, just as there are many ways to commit murder or kidnaping.

With regard to the fundamental fairness of the alternative means of satisfying the continuing series element, the plurality opinion in *Schad* indicated that the Court should look to see whether the alleged predicate offenses making up the series in each particular case are morally equivalent. The alternative means of fulfilling an element "must reasonably reflect notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether." 501 U. S., at 643. The proper question is not whether the blameworthiness is comparable "in all possible instances"; rather, the question is whether one means of fulfillment "may ever be treated as the equivalent" of another, and in particular whether the alternative means presented in a

given case may be so treated. *Id.*, at 643, 644. The continuity itself is what Congress sought to prohibit with the series element, so it makes no difference if the violations in the series involve comparable amounts of drugs.

In the absence of any reason to think Congress' definition of the CCE offense was irrational, or unfair under fundamental principles, or an illicit attempt to avoid the constitutional requirement of jury unanimity, there is no constitutional barrier to requiring jury unanimity on the existence of a continuing series of violations without requiring unanimity as to the underlying predicate offenses.

* * *

Petitioner is just the sort of person at whom the CCE statute is aimed. Where witnesses have testified they sold drugs on a regular basis as part of an enterprise led by the defendant, it is appropriate for the jury to conclude that a continuing series of violations of the drug laws has taken place. Neither Congress' intent nor the Due Process Clause requires the result the Court reaches today, which rewards those drug kingpins whose operations are so vast that the individual violations cannot be recalled or charged with specificity. I would affirm the judgment of the Court of Appeals.