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COMMENTS

Predicate Offenses and Jury Agreement Under the Continuing Criminal Enterprise Statute

Cyrus Amir-Mokri†

Congress enacted the Continuing Criminal Enterprise ("CCE") statute1 in 1970 as part of the Drug Abuse Control and Prevention Act. The CCE statute was designed to fight those in "the business of trafficking in the prohibited drugs on a continuing, serious, widespread, supervisory, and substantial basis."2 As set forth in the statute, CCE offenses are (1) predicate offenses violating specified drug laws (2) as part of a "continuing series" of such violations (3) occurring while the defendant was acting in concert with five or more other people (4) whom the defendant organized or managed and as a result of which the defendant (5) obtained substantial income.3

Although Congress never defined the phrase "continuing series,"4 the circuits now agree that a "continuing series" of drug violations has occurred when a defendant has committed three predicate offenses.5 The circuits disagree, however, over whether

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1 This statute provides, in part, that a person is engaged 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 chapter or 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 USC § 848(c) (1988).


5 See, for example, Young, 745 F2d at 747 (the leading case supporting this proposi-
jurors must unanimously agree on the specific predicate offenses the defendant committed. Some circuits have held that a jury must specifically agree as to each of the predicate offenses, reasoning that the Sixth Amendment's requirement of a unanimous verdict in a federal jury trial\(^6\) includes a requirement of jury unanimity on each of the predicate offenses. Conversely, some circuits have found no constitutional problem with requiring the jury to agree only that the defendant committed the requisite number of offenses. The argument against specific jury agreement on each of the predicate offenses focuses on legislative purpose, emphasizing Congress' desire to combat and punish drug lords.

This Comment argues that both interpretive approaches to the CCE's "continuing series" element have serious flaws. A reading that the text and structure of the CCE statute indicate that the jury must specifically agree on the three predicate offenses best comports with the constitutional standards outlined in the Supreme Court's recent statements on verdict specificity in *Schad v Arizona*.\(^7\) Part I of this Comment first discusses *United States v Gipson*\(^8\) and its progeny, recent federal appellate court cases addressing the problem of verdict specificity and the Sixth Amendment unanimity requirement. Part I also examines *Schad v Arizona*, which criticizes this application of the Sixth Amendment to verdict specificity problems and recharacterizes the constitutional issue as one of due process. Part II of this Comment reviews the conflict among the circuits over the proper interpretation of the CCE statute and the required level of verdict specificity in CCE cases. Part III of this Comment examines the text and structure of the CCE statute, arguing that the CCE "continuing series" element is best read as requiring specific jury agreement. Part III criticizes reliance on the Sixth Amendment unanimity requirement to mandate greater verdict specificity; instead, Part III argues that a reading of the "continuing series" element requiring verdict specificity is consistent with the due process standards outlined in *Schad*. By contrast, an interpretation that does not require verdict specificity may encounter constitutional difficulties.

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\(^{7}\) 111 S Ct 2491 (1991).

\(^{8}\) 553 F2d 453 (5th Cir 1977).
I. THE PROBLEM OF VERDICT SPECIFICITY

Federal courts have addressed the problem of factual disagreement among jurors and its relation to a unanimous verdict in many different contexts.\(^9\) A 1977 Fifth Circuit case, *United States v Gipson*,\(^{10}\) was the first and, for a long time, the leading case on this issue.\(^{11}\) Drawing on the Sixth Amendment’s requirement of jury unanimity in federal jury trials,\(^{12}\) the *Gipson* court concluded that the Sixth Amendment requires a jury to agree upon more than whether a defendant violated a statute.\(^{13}\) Under *Gipson*, jurors must agree on the essential factual and theoretical issues presented in the case.\(^{14}\)

The Supreme Court’s recent decision in *Schad v Arizona*,\(^{15}\) however, casts serious doubt on *Gipson*’s precedential value. Not only did *Schad* characterize verdict specificity as a due process rather than a Sixth Amendment concern,\(^{16}\) but it also criticized the “conceptual groupings” test the *Gipson* court applied to determine the appropriate level of verdict specificity.\(^{17}\) Despite these criticisms, however, *Schad* did not explicitly overrule *Gipson*.

This Part discusses *Gipson* and its progeny, the main precedents used by courts holding that juries must unanimously agree on the specific CCE predicate offenses. This Part then discusses *Schad* and its effect on the *Gipson* analysis.

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\(^{10}\) 553 F2d 453 (5th Cir 1977).


\(^{12}\) See note 6 and accompanying text.

\(^{13}\) *Gipson*, 553 F2d at 459-60.

\(^{14}\) Id.

\(^{15}\) 111 S Ct 2491 (1991).

\(^{16}\) Id at 2496.

\(^{17}\) Id at 2499.
A. *United States v Gipson* and Its Progeny

In *United States v Gipson*,\(^8\) the defendant was charged with violating Title 18, Section 2313 of the United States Code, which provides that

> whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle or aircraft moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined ... or imprisoned ... or both.\(^9\)

During deliberations, the jury was uncertain whether it was required specifically to agree on exactly which one of several acts proscribed by the statute the defendant committed.\(^10\)

The trial court instructed the jury that if all jurors found that the defendant committed any of the acts, then there would be a unanimous verdict, "even though there may have been disagreement within the jury as to whether it was receiving or storing or what."\(^11\) The defense objected to this instruction, contending that it violated the defendant's right to a unanimous verdict.\(^12\) Thus, the question on appeal was whether a defendant's right to a unanimous jury verdict requires all jurors to substantially agree on the facts of the *actus reus* element of an offense where a criminal statute permits several ways of satisfying that element.\(^13\)

The Fifth Circuit held that a jury instruction sanctioning a non-unanimous verdict would be "infirm, both under [Section 31(a) of the Federal Rules of Criminal Procedure] and the Sixth Amendment ..."\(^14\) To add substance to its Sixth Amendment arguments, the *Gipson* court relied heavily on the rhetoric of due process. For example, the court suggested that the reasonable doubt standard, a component of due process, and the unanimity requirement, associated with the Sixth Amendment's guarantee of a jury trial, had similar consequences. Echoing language used by the Supreme Court in *In re Winship*,\(^15\) which held that every

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\(^8\) 553 F2d 453 (5th Cir 1977).
\(^9\) Id at 455. For the statutory text, see 18 USC § 2313 (1988).
\(^10\) Id at 455-56.
\(^11\) Id at 456.
\(^12\) Id at 456.
\(^13\) Id at 457.
\(^14\) Id.
fact necessary to constitute a crime must be proven beyond a reasonable doubt, the Gipson court stated that both the reasonable doubt standard and the unanimity requirement impress "on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." According to this position, the function of the unanimity rule is to require jurors to substantially agree as to what acts a defendant performed before determining whether he is guilty of the crime charged.

The court noted that in the absence of such a requirement, uncertainty could exist about whether a defendant has even committed a crime. For example, three jurors could have concluded that the defendant received the vehicle, three could have believed he concealed it, another three could have thought he sold it, and so on. In such a situation, the jury clearly would not have reached a "subjective state of certitude on the facts in issue," even though every juror would have concluded that the defendant had violated the statute.

To determine the constitutionally required level of verdict specificity, the Gipson court adopted a test that divided the actus reus elements of the statute into "conceptual groupings." The actus reus elements of the statute in Gipson were divided into two different conceptual groupings: the first consisted of "receiving, concealing, and storing," and the second consisted of "bartering, selling, and disposing." If the jury were to agree unanimously that the defendant had committed any act within one of these groupings, then, according to the Gipson court, the Sixth Amendment unanimity requirement would be satisfied.

A number of other circuits have accepted the overall approach of Gipson, agreeing that, at least for federal cases, the jury must unanimously agree on important factual and theoretical premises. For example, in United States v Peterson, the Second Circuit reaffirmed its previous statement that a jury must reach "unanimity with respect to each 'specification' in each count of an indictment." The Sixth Circuit has also adopted

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26 Id at 364.
27 Gipson, 553 F2d at 457, quoting Winship, 397 US at 364.
28 Gipson, 553 F2d at 457-58.
29 See id at 458 n 8 for a similar hypothetical.
30 Id at 458.
31 Id.
32 768 F2d 64 (2d Cir 1985).
33 Id at 67, relying on United States v Natelli, 527 F2d 311, 324-25 (2d Cir 1975).
Gipson's "conceptual groupings" test to determine the level of requisite verdict specificity.\(^{34}\)

Some courts have required an even higher level of verdict specificity than that articulated in Gipson. One example is the Third Circuit's decision in United States v Beros.\(^{35}\) In Beros, two counts of an indictment alleged four separate and distinct theories of criminal activity; moreover, each of the two counts enumerated "several acts upon which a finding of guilt could be predicated."\(^{36}\) The Beros court faced the question of whether jury unanimity was required as to the act that would serve as a predicate to a finding of guilt.\(^{37}\)

Relying on the Sixth Amendment, the Beros court suggested that in order to protect the innocent, a jury must unanimously agree on the specific acts that constitute the charged offense. The court reasoned that just as the Sixth Amendment "requires jury unanimity in federal criminal cases on each delineated offense that it finds a defendant culpable, . . . it must also require unanimity regarding the specific act or acts which constitutes that offense."\(^{38}\) The Beros court opined that unanimity over specific acts would create a certainty about the verdict, in the absence of which "the unanimity requirement would provide too little protection in too many instances."\(^{39}\) The reasoning of Beros clearly extended the scope of Gipson's protection. As the Beros court itself noted, the Gipson court was concerned with unanimity as to underlying theories of guilt, whereas the concern in Beros was unanimity over the acts predicate to a finding of guilt on the theories.\(^{40}\)

B. Schad v Arizona

In Schad v Arizona,\(^{41}\) the defendant had been convicted of first-degree murder, a judgment affirmed by the Arizona Supreme Court. The relevant Arizona statute defined first-degree murder as "wilful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpe-

\(^{34}\) See United States v Duncan, 850 F2d 1104, 1110-13 (6th Cir 1988).
\(^{35}\) 833 F2d 455 (3d Cir 1987).
\(^{36}\) Id at 461.
\(^{37}\) Id at 460.
\(^{38}\) Id at 461.
\(^{39}\) Beros, 833 F2d at 461.
\(^{40}\) Id at 460.
\(^{41}\) 111 S Ct 2491 (1991).
Thus, either "premeditated" murder or felony-murder could constitute first-degree murder. The prosecution advanced the theories of both premeditated murder and felony-murder, but the jury was not instructed to choose between the two. The jury convicted the defendant of first-degree murder. The Supreme Court thus faced the question of "whether a first-degree murder conviction under jury instructions that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional."\(^{43}\)

The defendant challenged the conviction on Sixth Amendment unanimity grounds. Writing for the plurality, however, Justice Souter recharacterized the problem as "one of the permissible limits in defining criminal conduct" by the state.\(^{44}\) As such, the issue dealt not so much with jury unanimity as with the constraints that the Fourteenth Amendment's Due Process Clause imposes on a state's ability to define crimes. Justice Souter's recharacterization of the issue as one of due process represents *Schad's* first major refinement of the approach first adopted in *Gipson*.

Ultimately, Justice Souter concluded that jurors need not agree upon the exact means by which the defendant committed the crime.\(^{45}\) Nevertheless, Justice Souter stated that the Fourteenth Amendment's Due Process Clause does set limits upon how states may define crimes.\(^{46}\) "Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses," Justice Souter continued, "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."\(^{47}\) The problem, therefore, was to draw the line delineating where the Due Process Clause requires a state to recognize alternate means of committing a crime as separate offenses.\(^{48}\)

*Gipson*, of course, drew this line at the point where various acts enumerated in a statute can be divided into different "con-

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\(^{42}\) Id at 2495.

\(^{43}\) Id at 2494.

\(^{44}\) Id at 2496.

\(^{45}\) *Schad*, 111 S Ct at 2497.

\(^{46}\) Id at 2497-98.

\(^{47}\) Id.

\(^{48}\) Id at 2498.
ceptual groupings.” Justice Souter, however, found Gipson’s “conceptual groupings” test unpersuasive, arguing that it was too indeterminate to serve as a reliable standard.49 “Conceptual groupings may be identified at various levels of generality, and [there is] no a priori standard to determine what level of generality is appropriate.”50

Justice Souter also dismissed the “maximum verdict specificity” approach reminiscent of the Beros court’s position and adopted by the dissent in Schad.51 According to Justice Souter, it is erroneous to assume that “any statutory alternatives are ipso facto independent elements defining independent crimes under state law, and therefore subject to the axiomatic principle that the prosecution must prove independently every element of the crime.”52 To support his conclusion that the “means” of committing a crime should not automatically be equated with “elements” or “separate crimes,” Justice Souter reasoned that legislatures often define crimes to take into account alternate means of commission.53 Moreover, Justice Souter continued, in cases involving state criminal statutes, the Supreme Court is “not free to substitute [its] own interpretations of state statutes for those of a State’s courts.”54 Because the Arizona Supreme Court had decided that the statute in question did not include two separate elements but merely outlined two means of committing the crime of first-degree murder, the Supreme Court could not second-guess their interpretation.55

After rejecting the “conceptual groupings” and “maximum verdict specificity” tests, Justice Souter turned to due process ideas of “fundamental fairness” and “rationality” to determine the constitutionality of Arizona’s law.56 Justice Souter looked to “history and widely shared practice as concrete indicators of what fundamental fairness and rationality require.”57 Finding that many states have murder statutes akin to Arizona’s, and that

49 Schad, 111 S Ct at 2498.
50 Id at 2499. Using the Gipson statute to illustrate, Justice Souter suggested that all six of the proscribed acts could also be categorized as one “conceptual” group: “trafficking in stolen vehicles.” Id at 2499, quoting Manson v State, 101 Wis 2d 413, 438, 304 NW2d 729, 741 (1981) (Abrahamson concurring).
51 Schad, 111 S Ct at 2499.
52 Id.
53 Id.
54 Id.
55 Schad, 111 S Ct at 2499.
56 Id at 2500.
57 Id at 2501.
murder has been defined similarly throughout the republic's history and at common law, Justice Souter concluded that the Arizona statute met contemporary and historical standards of fairness and rationality.\textsuperscript{58} Thus, the Arizona statute as applied did not run afoul of constitutional standards.

\section*{II. CCE Predicate Offenses and Jury Agreement}

In the CCE context, the problem of specific jury agreement has arisen in relation to both the "five or more others" and the "continuing series" statutory elements. While the courts generally agree that unanimity is not required as to the identity of the persons under the "five or more others" element,\textsuperscript{59} the courts sharply disagree over whether specific agreement is required as to the "continuing series" element.

In \textit{United States v Echeverri},\textsuperscript{60} the Third Circuit held that the jury must unanimously agree on the predicate offenses the defendant committed.\textsuperscript{61} The defendant was convicted of operating a continuing criminal enterprise and of committing two substantive drug violations, including a conspiracy in violation of Title 21, Section 846 of the United States Code.\textsuperscript{62} During the trial, the defendant had requested a jury instruction regarding the "continuing series" element of the CCE charge requiring the jury to agree unanimously on each of the three acts constituting the "continuing series."\textsuperscript{63} The trial court had declined to adopt

\textsuperscript{58} Id at 2502. Although Justice Souter relied primarily on a historical test, he noted that neither history nor current practice is necessarily dispositive. \textit{Schad}, 111 S Ct at 2502. Justice Scalia criticized the plurality on this very point, contending that "it is precisely the historical practices that define what [process] is ‘due’." Id at 2506 (Scalia concurring).


\textsuperscript{60} 854 F2d 638 (3d Cir 1988).

\textsuperscript{61} Id at 642.

\textsuperscript{62} Id at 641. This statute provides that any person who attempts to conspire to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

\textsuperscript{63} \textit{Echeverri}, 854 F2d at 642.
this instruction, and on appeal the Third Circuit held that the refusal constituted reversible error.\(^6\)

To support its conclusion, the *Echeverri* court asserted that defendants are entitled to have unanimous jury agreement on all essential elements of a crime.\(^5\) While the plain language of the statute does not provide for "three predicate offenses," federal courts have generally defined the "continuing series" element to require "three predicate offenses."\(^6\) The *Echeverri* court went one step further and read the judicial elaborations of "continuing series" as essential elements of the offense, stating that it failed to see a "rational basis for distinguishing between essential elements appearing on the face of the statute and those that have been judicially recognized based on statutory interpretation."\(^6\)

The *Echeverri* court further supported its position by suggesting that specific jury agreement is constitutionally mandated. The *Echeverri* court deemed the case before it indistinguishable from *Beros.*\(^6\) As such, the Third Circuit reiterated its position that the Sixth Amendment requires a jury to agree on the essential acts that constitute the various elements of a charged offense. As confirmation of its position, the court cited language from *Gipson* stating that there be "substantial agreement" amongst jurors as to exactly what acts the defendant committed.\(^6\)

Thus, the *Echeverri* court indicated that "in either case, congressional intent is the touchstone."\(^7\) The court seemingly implied that Congress intended that juries in CCE cases specifically agree on the predicate offenses involved. The *Echeverri* court, however, set forth no evidence to support its contention, nor did it discuss the statute's legislative history or purpose.

Several other circuits have agreed with the Third Circuit that the defendant possesses a right to jury unanimity on the predicate offenses constituting a CCE offense.\(^7\) For example, in

\(^{64}\) Id.

\(^{65}\) Id at 643.

\(^{66}\) Id at 642-43.

\(^{67}\) Id at 643.

\(^{70}\) Id.

\(^{71}\) See *United States v Lowry*, 947 F2d 942, 1991 WL 216443, *5* (4th Cir 1991)(unpublished disposition), cert denied, 112 S Ct 1563 (1992), 112 S Ct 1954 (1992); *United States v Wint*, 940 F2d 664, 1991 WL 139701, *3* (6th Cir 1991), cert denied, 112 S Ct 346 (1991). In both cases, the issue was whether a specific unanimity instruction was required. Because the defendants had in both instances already been convicted of three
*United States v Hernandez-Escarsega,* the Ninth Circuit, echoing language from *Gipson,* required that the jury substantially agree as to "the [principal] factual elements underlying a specified offense." The court stated that the Sixth Amendment unanimity requirement mandated more than a general, "conclusory agreement" by the jurors that the statute had been violated.

In *United States v Canino,* however, the Seventh Circuit rejected the *Echeverri* court’s position outright, holding that jurors need not specifically agree on the identity of the predicate offenses. The *Canino* court questioned the Third Circuit’s reliance on the *Gipson* line of cases, arguing that the CCE statute is very different from the one at issue in *Gipson.* Looking to the statutory language, the *Canino* court noted that the CCE statute, unlike the one at issue in *Gipson,* does not include different classes of offenses. The CCE statute merely states that one who engages in a "continuous series of violations" of the federal drug laws will be punished. The court therefore concluded that

the expansive breadth of culpable offenses suitable for CCE treatment diminishes [the] need to ascertain precisely what acts each juror finds attributable to the defendant, and instead permits [one] to focus on whether the jury is convinced that the defendant performed these . . . acts with the required frequency.

In contrast to the Third Circuit, the Seventh Circuit declined to regard the "three predicate offenses" that courts have required to find a "continuing series" as separate and essential elements, each requiring jury unanimity. Instead, the *Canino* court found

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[72] 886 F2d 1560 (9th Cir 1989).
[73] Id at 1572, quoting *United States v Ferris,* 719 F2d 1405 (9th Cir 1983).
[74] Id at 1572, quoting *Ferris,* 719 F2d at 1407.
[76] Id at 947.
[77] Id at 946 n 6.
[78] Id.
[79] *Canino,* 949 F2d at 946 n 6.
that the plain language of the CCE statute did not require specific agreement.

The Canino court modeled its interpretation of the "continuing series" element after the manner in which the circuits have construed the "five or more others" element of the CCE statute. In the case of the "five or more others" element, the Third Circuit and other courts have primarily been concerned with the size of the groups, not with the identity of the individuals involved. Applying this same line of reasoning to predicate offenses, the CCE statute would only require that the defendant be engaged in a "continuing series of violations," and the exact violations would therefore be irrelevant.

Furthermore, unlike the Echeverri court, the Canino court relied heavily on congressional purpose and intent to support its position. According to the Canino court, the CCE statute was meant to impose "special punishment on those who organize and direct a 'continuing' drug distribution system." A specific unanimity requirement would only result in "unjustified acquittals frustrating the important policy goals of the CCE." The Canino court did not subsequently consider whether its reading of the statute could pose constitutional difficulties. The Canino court merely concluded that the "constitutional requirement of juror unanimity in federal criminal offenses is satisfied when each juror in a CCE trial is convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed two predicate offenses."

III. THE REQUIREMENT OF SPECIFIC JURY AGREEMENT

This Part argues that the best construction of the CCE statute requires specific jury agreement as to the individual predicate acts constituting the "continuing series." Furthermore, this Part contends that such a reading of the statute best comports

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80 Id at 947.
81 See United States v Jackson, 879 F2d 85, 88-89 (3d Cir 1989); United States v Markowksi, 772 F2d 338, 364 (7th Cir 1985). The Jackson court found "no logical reason" why a jury must unanimously agree as to the identity of the "five or more others." The court distinguished Echeverri, asserting that whereas three predicate offenses are necessary to constitute a "continuing series," the identities of the five underlings are "peripheral to the statute's other primary concern, which is the defendant's exercise of the requisite degree of supervisory authority over a sizeable enterprise." Jackson, 879 F2d at 88-89.
82 Canino, 949 F2d at 947.
83 Id at 948.
84 Id.
with constitutional standards. This Part first discusses the problems involved in interpreting the CCE statute, arguing that both the text and the structure of the statute suggest that specific jury agreement is required. This Part then considers whether the Sixth or the Fifth Amendment is the appropriate constitutional standard applicable to this problem. After concluding that the Fifth Amendment Due Process Clause provides the appropriate analytic standard, this Part concludes that a reading of the CCE statute that mandates specific jury agreement as to the three predicate offenses constituting a "continuing series" best avoids potential constitutional problems.

A. Reading the CCE Statute's "Continuing Series" Element

Two ways exist to approach jury specificity and the CCE "continuing series" element. One reading of the statute requires jurors to agree only that a defendant committed three predicate offenses without requiring them to agree on the specific offenses involved. As the Canino court noted, one would read "continuing series" to refer only to the "frequency" of actions, not to specific drug violations. Because the statutory text makes no reference to "three predicate offenses," jurors need not agree on anything except the fact that there was a "continuing series" of drug violations.

A second reading of the "continuing series" element considers each of the three predicate offenses as separate elements of the CCE offense. Under this approach, jurors must agree that a defendant committed three specific offenses before they can convict her. Although both readings seem plausible, the second approach is more faithful to both the text and the structure of the CCE statute.

Without any judicial elaboration, the statutory text suggests that at least one predicate act must be shown with certainty. The first part of the CCE statute provides that

a person is engaged in a continuing criminal enterprise if...he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony...\textsuperscript{66}

\textsuperscript{66} United States v Canino, 949 F2d 928, 946 n 6 (7th Cir 1991).

\textsuperscript{66} 21 USC § 848(c).
The statute continues by providing that, in addition, the violation in the first part must be "part of a continuing series of violations . . . ." Therefore, the prosecution must prove that the defendant committed a substantive drug violation and that the violation was part of a continuing series of such violations. At the very least, then, the jury must find that a defendant committed one specific predicate offense.

The best reading of the statute additionally requires jurors to agree on the other offenses that constitute the "continuing series." It is illogical to interpret one part of the statute to require specific agreement over one predicate act, an act which is to be considered part of the "continuing series," but to interpret "continuing series" not to require specific agreement over the other predicate acts. Such an interpretation would suggest that a "continuing series" can be shown even if a jury agrees on only one predicate offense. Given that the first substantive drug violation is no different from other predicate acts (since these other acts must also be substantive drug offenses), the statute should be read symmetrically: certainty over one predicate offense must mean certainty over others constituting the series.

An inquiry into the meaning of "continuing series" similarly suggests that specific jury agreement is required. The phrase "continuing series" is not self-defining. In interpreting the phrase, however, the circuits almost invariably agree that a "continuing series" consists of three predicate offenses. The phrase "continuing series" has thus acquired a specific meaning, and courts should therefore ask what it would require to prove that there is a "continuing series."

Common sense suggests that the prosecution cannot succeed in proving a "continuing series" of violations where it cannot convince a jury that a defendant has committed three particular predicate acts. If jurors disagree over the predicate acts, then the predicate acts themselves have not been individually proven. And because a "series" depends on individual predicate acts, proving a "series" would require certainty about these offenses. Thus, to invert the Canino holding, proof of a series would result only if each predicate act is proven beyond a reasonable doubt, not if

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87 Id.
88 See note 5 and accompanying text. The only exception is the Seventh Circuit. See United States v Baker, 905 F2d 1100 (7th Cir 1990) (holding that two predicate offenses suffice to constitute a continuing series). However, as the Baker court suggested, the disagreement is really more over form than over substance. Id at 1105.
each juror believes beyond a reasonable doubt that the defendant committed three predicate acts. Once the judicial elaboration of “continuing series” is accepted, proving the existence of a “continuing series” requires specific jury agreement over the predicate acts.

The structure of the CCE and related drug statutes also suggests that courts should require specific jury agreement. Each “predicate act” of a CCE “continuing series” is a violation of a substantive drug law. Therefore, given their nature as substantive drug crimes, the predicate offenses are not merely “alternate means of committing a crime” or “underlying acts” in the sense in which these terms are used in Gipson and its progeny. If a defendant is charged with violating one of these drug laws, a jury must return a unanimous verdict in order to convict. If a defendant is charged with violating one of these drug laws, a jury must return a unanimous verdict in order to convict. It would be odd to require a lesser standard when the context shifts to the CCE’s “continuing series.”

Furthermore, the Supreme Court has concluded that, in enacting the CCE statute, it is “indisputable that Congress intended to create a separate CCE offense.” Thus, the CCE offense is not a substitute for the underlying predicate offenses, and separate prosecution for both CCE and the predicate offenses is permissible. The very separateness of the CCE crime from the individual predicate offenses suggests that the state must clearly establish these predicate offenses as a prerequisite to a showing of a CCE violation. Under this conception, a CCE offense is a dependent variable, relying on the establishment of certain premises, three predicate offenses, before it can be proven.

To justify its reading of the CCE statute, the Canino court analogized to the way the courts have interpreted the “five or more others” element. Given that the predicate offenses are separately defined statutory crimes and therefore should be considered separate elements, a clear difference exists between the structures of the “five or more others” and “continuing series” elements. As such, the analogy between the two elements does not hold.

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89 FRCrP 31(a).
91 Id at 785.
92 On one level, the analogy seems to hold. If proof of a “continuing series” requires certainty about particulars, then so must proof of the existence of “five or more others.” If one accepts this argument, as the Canino court noted in its criticism of Jackson, it would be difficult to reconcile the position taken by this Comment and the courts’ decisions concerning the “five or more others” element. Canino, 949 F2d at 946.
As analyzed by the Canino court, relying on legislative purpose to resolve the CCE statute’s requirements is similarly problematic. An argument resting on legislative purpose is not determinative because no specific indication exists in the legislative record that Congress ever considered the issue of CCE verdict specificity. Moreover, as an empirical matter, the Canino court’s fear that a greater level of verdict specificity would lead to unjustified acquittals and frustration of congressional purpose may be exaggerated. In fact, one could raise the opposite concern: the lack of specific agreement among jurors may result in increased and questionable convictions instead of additional acquittals. Moreover, the Canino court itself suggested that the existence of the drug rings are to be “evidenced by proof of the defendant’s commission of a threshold number of criminal drug violations—a ‘continuing series.’” If the evidence is strong enough (as the Seventh Circuit suggested in Canino it should and will be) to show the commission of at least three predicate offenses beyond a reasonable doubt, it is difficult to believe that juries would routinely acquit drug offenders.

B. Constitutionality

This Section argues that the Sixth Amendment does not provide the appropriate framework to assess the constitutionality of verdict specificity. This Section also examines the constitutionality of a specific jury agreement requirement for the CCE “continuing series” element in light of Schad v Arizona and concludes that Schad’s understanding of the CCE statute conforms with constitutional standards. By contrast, a reading not requiring specific jury agreement may encounter constitutional difficulties.

1. The Sixth Amendment approach.

In concluding that a jury must unanimously agree as to the predicate offenses constituting the CCE “continuing series,” the Echeverri court largely relied on the rhetoric and logic of Gipson.
and Beros. Echeverri therefore suggests that verdict specificity is required by the Sixth Amendment. Reliance on the Sixth Amendment, however, is problematic.

The Gipson court's discussion of the Sixth Amendment raises conceptual difficulties when it uses the rhetoric of Fifth Amendment due process to support its Sixth Amendment argument. The Gipson court stressed the ideas of "certitude about facts" and "protection" of the individual, rhetoric taken from Justice Brennan's majority opinion in In re Winship, which held that the Fourteenth Amendment's "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, however, did not concern the Sixth Amendment's requirement of jury unanimity. Unless jury unanimity and due process are coextensive—a proposition difficult to maintain in view of the Supreme Court's decision in Johnson v Louisiana—Gipson's argument cannot be accepted.

Stripped of due process rhetoric, an argument based solely on the Sixth Amendment right to a unanimous jury does not communicate the level of specificity at which a jury must agree. If jury unanimity alone were the criterion, it would be impossible to decide between the two seemingly equally plausible readings of the CCE statute. The Sixth Amendment unanimity requirement only indicates how many jurors must agree on the verdict. It does not indicate what the agreement should include. Thus, in the "continuing series" context, jurors could unanimously agree that a "continuing series" of violations occurred, or they could unanimously agree as to the three predicate offenses constituting the "series." Therefore, as Justice Souter noted in Schad, the problem of verdict specificity is better characterized as one of due process, not one of jury unanimity.

The Gipson court's "conceptual groupings" test is similarly problematic. As Justice Souter stated in Schad, the test is inde-
terminate and can be applied at several levels of generality.\textsuperscript{101} As such, the level of verdict specificity derived from a "conceptual groupings" test is based upon a highly difficult and largely arbitrary decision.

2. \textit{Schad} and due process.

The basic problem in \textit{Schad} was to outline the "permissible limits in defining criminal conduct."\textsuperscript{102} Justice Souter noted that due process limits the state's ability to decide "what facts are indispensable to proof of a given offense."\textsuperscript{103} Thus, Justice Souter described the challenge as finding

the point at which differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses.\textsuperscript{104}

To determine the "point" at which different "means" of commission must be considered separate elements of a crime, the \textit{Schad} plurality settled on a "fundamental fairness" and "rationality" test involving an inquiry into how states have historically defined murder.\textsuperscript{105} As applied in \textit{Schad}, the inquiry concentrated on whether premeditation and felony-murder had historically been treated as separate elements of first-degree murder. The petitioner had argued that the two elements had to be treated as independent because they are inherently separate offenses; therefore, the jury must agree as to one or the other.\textsuperscript{106} The \textit{Schad} plurality's historical inquiry suggested that states have traditionally defined premeditation and felony-murder as alternate means of committing the offense of first-degree murder, not as separate offenses. The Court therefore concluded that the jury need not specifically agree as to whether the first-degree murder was premeditated or felony-murder.

Differences between the CCE statute and the Arizona law at issue in \textit{Schad} suggest that the Supreme Court's approach in \textit{Schad} may not conclusively control the CCE "continuing series" problem. Nevertheless, the \textit{Schad} opinion provides a basic frame-
work for analyzing the constitutionality of the readings of the CCE statute.

With regard to verdict specificity, Schad's key point is that due process analysis requires a distinction between acts that are the “means” of committing a crime and “means” that, as separate offenses, are separate elements. Whereas in Schad the Court was obliged to defer to Arizona's interpretation of the statute, under which felony-murder and premeditated murder are not separate elements, here Congress has already defined CCE predicate acts as violations of substantive drug laws defined by the 1970 Drug Abuse Control and Prevention Act. Congress's definition makes clear that predicate offenses are “separate crimes” as this phrase is understood by Schad. Thus, although the predicate offenses represent “alternate means” of committing a CCE violation, the notion of “alternate means” in the CCE context should not be confused with the way it is used and understood in cases like Schad and Gipson.

By structuring the CCE statute such that separately defined offenses are predicates to a finding of guilt, Congress has indicated that the prosecution must make a clear showing of substantive drug violations. This understanding of the CCE statute does not risk violating the constitutional standard announced by the Schad plurality. By contrast, a reading that would treat the predicate offenses as “means” would be inconsistent not only with the Schad plurality's standard, which is based on the alternate means/separate offenses distinction, but also with the maximum verdict specificity standard espoused by the four dissenters.

Because Congress has been clear on its definition of predicate acts as separate offenses, no reason exists to engage in a "fundamental fairness" inquiry. Relying on Schad, however, the D.C. Circuit recently conducted such an inquiry in United States v Harris, in which the court held that a jury need not agree on the identities of the “five or more others.” The obvious distinction between the “five or more others” and “continuing series” elements, however, is that “five or more others” does not consist of “separate offenses”; therefore, no Schad concern arises. Thus, the Harris court was justified in making its “fundamental fairness” inquiry. Such an inquiry is not required in the “continuing

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107 See note 1 and accompanying text.
109 Id at 254-56.
series” context, however, because the “continuing series” and “five or more others” elements should be governed by different interpretive considerations.\(^\text{10}\)

**CONCLUSION**

Both the text and the structure of the CCE statute suggest that a jury must specifically agree on the requisite predicate offenses before a finding of guilt can ensue. The text clearly requires a showing of at least one predicate offense. Furthermore, this predicate offense must exist as part of a “continuing series” of violations. Reading the statute to suggest that the jury must agree on one specific predicate offense, but that other predicate offenses do not require such agreement, would be awkward. Moreover, it is impossible to prove a “series” if the particulars constituting the “series” cannot be proven. Additionally, because each predicate offense is statutorily defined as a substantive drug offense, a unanimous jury would be required to convict someone charged with violating one of these laws. Thus, it would be anomalous to require a higher standard of proof for “predicate acts” individually than when presented in the CCE context.

Requiring specific jury agreement on the predicate offenses also accords with the language of the plurality in *Schad v Arizona*, which outlines constitutional standards for reading the level of required verdict specificity into a statute. The *Schad* plurality distinguished between acts as “alternate means” of committing a crime and as “separate elements” or offenses. If acts are separate elements of an offense, then *Schad* suggests that a jury must agree specifically as to each element. Because the predicate offenses are clearly separate offenses, there should be specific agreement. Allowing general agreement would fall short of the minimum standards acceptable to both the plurality and the dissent in *Schad*.

\(^{10}\) See note 92 and accompanying text.