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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 BREYER delivered the opinion of the Court.

A federal criminal statute forbids any "person" from "engag[ing] in a continuing criminal enterprise." 84 Stat. 1264, 21 U. S. C. §848(a). It defines "continuing criminal enterprise" (CCE) as involving a "violat[ion]" of the drug statutes where "such violation is a part of a continuing series of violations." §848(c). We must decide whether a jury has to agree unanimously about which specific violations make up the "continuing series of violations." We hold that the jury must do so. That is to say, a jury in a federal criminal case brought under §848 must unanimously agree not only that the defendant committed some "continuing series of violations" but also that the defendant committed each of the individual "violations" necessary to make up that "continuing series."

I

The CCE statute imposes a mandatory minimum prison term of at least 20 years upon a person who engages in a "continuing criminal enterprise." §848(a). It says:

> "[A] person is engaged in a continuing criminal enterprise if–

> "(1) he violates any provision of [the federal drug laws, *i.e.,*] 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 [the federal drug laws, *i.e.,*] 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 [or supervisor or manager] and
> >
> > "(B) from which such person obtains substantial income or resources." §848(c).

In 1994 the Federal Government charged the petitioner, Eddie Richardson, with violating this statute. The Government presented evidence designed to show that in 1970 Richardson had organized a Chicago street gang called the Undertaker Vice Lords, that the gang had distributed heroin, crack cocaine, and powder cocaine over a period of years stretching from 1984 to 1991, and that Richardson, known as "King of all the Undertakers," had run the gang, managed the sales, and obtained substantial income from those unlawful activities. The jury convicted Richardson.

The question before us arises out of the trial court's instruction about the statute's "series of violations" requirement. The judge rejected Richardson's proposal to instruct the jury that it must "unanimously agree on which three acts constituted [the] series of violations." App. 21. Instead, the judge instructed the jurors that they "must unanimously agree that the defendant committed at least three federal narcotics offenses," while adding, "[y]ou do not . . . have to agree as to the particular three or more federal narcotics offenses committed by the defendant." *Id.,* at 37. On appeal, the Seventh Circuit upheld the trial judge's instruction. 130 F. 3d 765, 779 (1998). Recognizing a split in the Circuits on the matter, we granted cer-

tiorari. Compare *United States* v. *Edmonds*, 80 F. 3d 810, 822 (CA3 1996) (en banc) (jury must unanimously agree on which "violations" constitute the series), with *United States* v. *Hall*, 93 F. 3d 126, 129 (CA4 1996) (unanimity with respect to particular "violations" is not required), and *United States* v. *Anderson*, 39 F. 3d 331, 350–351 (CADC 1994) (same). We now conclude that unanimity in respect to each individual violation is necessary.

II

Federal crimes are made up of factual elements, which are ordinarily listed in the statute that defines the crime. A (hypothetical) robbery statute, for example, that makes it a crime (1) to take (2) from a person (3) through force or the threat of force (4) property (5) belonging to a bank would have defined the crime of robbery in terms of the five elements just mentioned. Cf. 18 U. S. C. §2113(a). Calling a particular kind of fact an "element" carries certain legal consequences. *Almendarez-Torres* v. *United States*, 523 U. S. 224, 239 (1998). The consequence that matters for this case is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. *Johnson* v. *Louisiana*, 406 U. S. 356, 369–371 (1972) (Powell, J., concurring); *Andres* v. *United States*, 333 U. S. 740, 748 (1948); Fed. Rule Crim. Proc. 31(a).

The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad* v. *Arizona*, 501 U. S. 624, 631–632 (1991) (plurality opinion); *Andersen* v. *United States*, 170 U. S. 481, 499–501 (1898). Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might

conclude he used a gun. But that disagreement– a disagreement about means– would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force. See *McKoy* v. *North Carolina*, 494 U. S. 433, 449 (1990) (Blackmun, J., concurring).

In this case, we must decide whether the statute's phrase "series of violations" refers to one element, namely a "series," in respect to which the "violations" constitute the underlying brute facts or means, or whether those words create several elements, namely the several "violations," in respect to *each* of which the jury must agree unanimously and separately. Our decision will make a difference where, as here, the Government introduces evidence that the defendant has committed more underlying drug crimes than legally necessary to make up a "series." (We assume, but do not decide, that the necessary number is three, the number used in this case.) If the statute creates a single element, a "series," in respect to which individual violations are but the means, then the jury need only agree that the defendant committed at least three of all the underlying crimes the Government has tried to prove. The jury need not agree about which three. On the other hand, if the statute makes each "violation" a separate element, then the jury must agree unanimously about which three crimes the defendant committed.

A

When interpreting a statute, we look first to the language. *United States* v. *Wells*, 519 U. S. 482, 490 (1997). In this case, that language may seem to permit either interpretation, that of the Government or of the petitioner, for the statute does not explicitly tell us whether the individual violation is an element or a means. But the language is not totally neutral. The words "violates" and

"violations" are words that have a legal ring. A "violation" is not simply an act or conduct; it is an act or conduct that is contrary to law. Black's Law Dictionary 1570 (6th ed. 1990). That circumstance is significant because the criminal law ordinarily entrusts a jury with determining whether alleged conduct "violates" the law, see *infra,* at 7–8, and, as noted above, a federal criminal jury must act unanimously when doing so. Indeed, even though the words "violates" and "violations" appear more than 1,000 times in the United States Code, the Government has not pointed us to, nor have we found, any legal source reading any instance of either word as the Government would have us read them in this case. To hold that each "violation" here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not.

The CCE statute's breadth also argues against treating each individual violation as a means, for that breadth aggravates the dangers of unfairness that doing so would risk. Cf. *Schad* v. *Arizona*, *supra*, at 645 (plurality opinion). The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. The two chapters of the Federal Criminal Code setting forth drug crimes contain approximately 90 numbered sections, many of which proscribe various acts that may be alleged as "violations" for purposes of the series requirement in the statute. Compare, *e.g.*, 21 U. S. C. §§842(a)(4) and (c) (1994 ed. and Supp. III) (providing civil penalties for removing drug labels) and 21 U. S. C. §844(a) (Supp. III) (simple possession of a controlled substance) with 21 U. S. C. §858 (endangering human life while manufacturing a controlled substance in violation of the drug laws) and §841(b)(1)(A) (possession with intent to distribute large quantities of drugs). At the same time, the Government in a CCE case may well seek to prove that a defen-

dant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

Finally, this Court has indicated that the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition. *Schad* v. *Arizona,* 501 U. S., at 632–633 (plurality opinion); *id*., at 651 (SCALIA, J., concurring) ("We would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday . . ."). We have no reason to believe that Congress intended to come close to, or to test, those constitutional limits when it wrote this statute. See *Garrett* v. *United States*, 471 U. S. 773, 783–784 (1985) (citing H. R. Rep. No. 91–1444, pt. 1, pp. 83–84 (1970)) (in making CCE a separate crime, rather than a sentencing provision, Congress sought increased procedural protections for defendants); cf. *Gomez* v. *United States*, 490 U. S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"); *Ashwander* v. *TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring).

B

The Government's arguments for an interpretation of "violations" as means are not sufficiently powerful to overcome the considerations just mentioned, those of language, tradition, and potential unfairness. The Government, emphasizing the words "*continuing series*," says that the statute, in seeking to punish drug kingpins, focuses upon the drug business, not upon the particular violations that constitute the business. Brief for United States 18–19. The argument, however, begs the question. Linguistically speaking, the statute punishes those kingpins who are involved in a "continuing series of *violations*" of the drug laws. And Congress might well have intended a jury to focus upon individual violations in order to assure guilt of the serious crime the statute creates. Emphasizing the first two words in the passage does not eliminate the last.

Nor can the Government successfully appeal to a history or tradition of treating individual criminal "violations" as simply means toward the commission of a greater crime. The Government virtually concedes the absence of any such tradition when it says that 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.'" *Id.*, at 18. The closest analogies it cites consist of state statutes making criminal such crimes as sexual abuse of a minor. State courts interpreting such statutes have sometimes permitted jury disagreement about a "specific" underlying criminal "incident" insisting only upon proof of a "continuous course of conduct" in violation of the law. *E.g.*, *People* v. *Gear*, 19 Cal. App. 4th 86, 89–94, 23 Cal. Rptr. 2d 261, 263–267 (1993) (continuous sexual abuse of a child); *People* v. *Reynolds*, 294 Ill. App. 3d 58, 69–71, 689 N. E. 2d 335, 343–344 (1997) (criminal sexual assault of a minor and aggravated sexual abuse of a minor); *State* v. *Spigarolo*, 210 Conn. 359, 391–392, 556 A. 2d 112, 129 (1989) (commit-

ting an act likely to impair the health or morals of a child); *Soper* v. *State*, 731 P. 2d 587, 591 (Alaska App. 1987) (sexual assault in the first degree). With one exception, see Cal. Penal Code Ann. §288.5(a) (West Supp. 1998), the statutes do not define the statutory crime in terms that require the commission of other predicate crimes by the defendant. The state practice may well respond to special difficulties of proving individual underlying criminal acts, *People* v. *Gear*, *supra*, at 90–92, 23 Cal. Rpt. 2d, at 263–265, which difficulties are absent here. See *infra*, at 9–10. The cases are not federal but state, where this Court has not held that the Constitution imposes a jury unanimity requirement. *Johnson* v. *Louisiana*, 406 U. S., at 366 (Powell, J., concurring). And their special subject matter indicates that they represent an exception; they do not represent a general tradition or a rule. *People* v. *Gear*, *supra*, at 89–92, 23 Cal. Rptr. 2d, at 263–265.

In fact, federal criminal law's treatment of recidivism offers a competing analogy no more distant than the analogy the Government offers. See *Garrett* v. *United States, supra,* at 782 (the statute originated in a "recidivist provision . . . that provided for enhanced sentences"). If one looks to recidivism, one finds that commission of a prior crime will lead to an enhanced punishment only when a relevant factfinder, judge, or jury has found that the defendant committed that specific individual prior crime. Where sentencing is at issue, the judge, enhancing a sentence in light of recidivism, must find a prior individual conviction, United States Sentencing Commission, Guidelines Manual §§4A1.1, 4B1.1 (Nov. 1998) which means that an earlier fact-finder (*e.g.*, a unanimous federal jury in the case of a federal crime) found that the defendant committed the specific earlier crime, §§4A1.2(a)(1), 4B1.2(c). Where a substantive statute is at issue, for example, a statute forbidding a felon's possession of a firearm, 18 U. S. C. §922(g) (1994 ed. and Supp. III),

the relevant precondition, namely that the gun possessor be a felon, means at a minimum that an earlier factfinder (*e.g.*, a unanimous federal jury in the case of a federal crime) found that the defendant in fact committed that earlier individual crime. The Government's interpretation is inconsistent with this practice, for it, in effect, imposes punishment on a defendant for the underlying crimes without any factfinder having found that the defendant committed those crimes. If there are federal statutes reflecting a different practice or tradition, the Government has not called them to our attention, which suggests that any such statute would represent a lesser known exception to ordinary practice. Cf. *Schad* v. *Arizona*, 501 U. S., at 633 (plurality opinion) ("[I]t is an assumption of our system of criminal justice . . . that no person may be punished criminally save upon proof of some illegal conduct").

Neither are we convinced by the Government's two remaining significant arguments. First, the Government says that a jury-unanimity requirement will make the statute's crime too difficult to prove– to the point where it is unreasonable to assume Congress intended such a requirement. But we do not understand why a unanimity requirement would produce that level of difficulty. After all, the Government routinely obtains the testimony of underlings– street-level dealers who could point to specific incidents– as well as the testimony of agents who make controlled buys or otherwise observe drug transactions. Such witnesses should not have inordinate difficulty pointing to specific transactions. 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"?

The dissent, but not the Government, argues that the prosecution will now have to prove that the defendant derived substantial income or resources from, and that 5 persons were involved with, the specific underlying crimes

the jury unanimously agrees were committed. See *post*, at 7. To the extent the dissent suggests that those other statutory requirements must be satisfied with respect to *each* underlying crime, it is clearly wrong. Those requirements must be met with respect to the *series*, which, at a minimum, permits the jury to look at all of the agreed-upon violations in combination. Even if the jury were limited to the agreed-upon violations, we still fail to see why prosecutions would prove unduly difficult. The dissent writes as if it follows from its reading that conviction under the CCE statute depends on specific proof of specific sales to specific street level users. See *post*, at 9. That is not true. A specific transaction is not an element of possession with intent to distribute under 21 U. S. C. §841. It would be enough to present testimony, like that of Michael Sargent partially recounted by the dissent, showing that the defendant supplied a runner in his organization with large quantities of drugs on or about particular dates as alleged in an indictment. And one need only examine Sargent's testimony to dispel any fears about fading memories. He testified that he received from Richardson large quantities of heroin three times a week; he was able to specify the location where Richardson gave him the drugs; he was able to recall precisely how the heroin was packaged when Richardson gave it to him. Tr. 1399–1401. Though he was not pressed to be specific, he even testified that he started receiving drugs from Richardson sometime in the beginning of 1989. Tr. 1382. Given the record in this case, we find it hard to believe the Government will have as hard a time producing evidence sufficient to support a CCE conviction as the dissent suggests.

Second, the Government points to a different portion of the statute, which requires a defendant to have supervised "five or more other persons." 21 U. S. C. §848(c)(2)(A). The Government says that no one claims that the jury

must unanimously agree about the identity of those five other persons. It adds that the jury may also disagree about the brute facts that make up other statutory elements such as the "substantial income" that the defendant must derive from the enterprise, §848(c)(2)(B), or the defendant's role in the criminal organization, §848(c)(2)(A). Assuming, without deciding, that there is no unanimity requirement in respect to these other provisions, we nonetheless find them significantly different from the provision before us. They differ in respect to language, breadth, tradition, and the other factors we have discussed.

These considerations, taken together, lead us to conclude that the statute requires jury unanimity in respect to each individual "violation." We leave to the Court of Appeals the question of whether to engage in harmless error analysis, and if so, whether the error was harmless in this case.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.