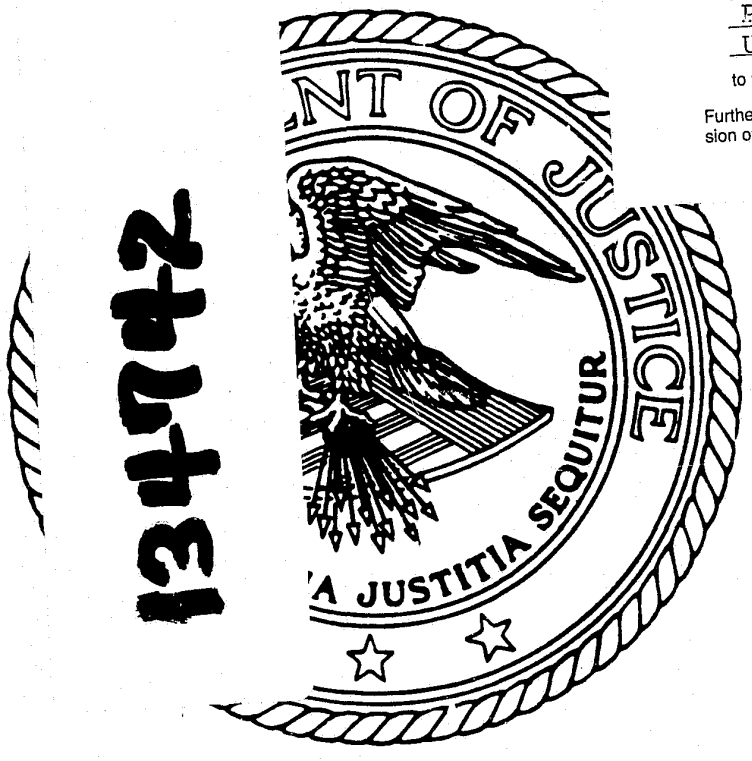
U.S. Department of Justice
Criminal Division

Narcotic and Dangerous Drug Section Monograph:

Criminal Prosecution Under the Continuing Criminal Enterprise Statute - Section 848 of Title 21. United States Code



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PREFACE

The Continuing Criminal Enterprise Statute is the strongest statutory weapon in the arsenal of the federal drug prosecutor. The statute carries a maximum penalty of life imprisonment without opportunity for parole, a maximum fine of $100,000, and the forfeiture of the proceeds and property connected with the conduct of the enterprise. There has been a dramatic increase in the use of the Continuing Criminal Enterprise statute in recent years. An unpublished study of the use of the Continuing Criminal Enterprise statute in federal drug prosecutions conducted by our section and the Drug Enforcement Administration disclosed that from the passage of the statute in 1970 to May, 1980 85 indictments have been returned by grand juries charging a Continuing Criminal Enterprise violation. In fiscal years 1981 and 1982 alone there have been close to 100 Continuing Criminal enterprise indictments across the country. This increase may reflect a growth in the number of criminal organizations trafficking in narcotics and dangerous drugs. But the increase also reflects a growing determination on the part of prosecutors and investigative agencies to direct their energies toward the investigation and prosecution of those at the higher levels of the drug traffic.

The Congress in passing the Continuing Criminal Enterprise statute intended to provide prosecutors with a means of reaching the organizers, managers and supervisors of major drug trafficking organizations. The statutory vehicle that Congress designed introduced a number of new elements that have been the subject of court opinions rendered in the last twelve years. In this monograph the Narcotic and Dangerous Drug Section has strived to analyze those judicial decisions and to bring to prosecutors and agents a reference source to be used in the practical application of the Continuing Criminal Enterprise Statute. We hope that you find this monograph a useful guide in the investigation and prosecution of major drug traffickers.

We acknowledge the contribution of the District of New Jersey in permitting us to use as a resource in the preparation of this Monograph their paper entitled "21 U.S.C. §848 Continuing Criminal Enterprise: A Summary of Existing Case Law" written in 1975.

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I. LEGISLATIVE HISTORY OF THE CONTINUING CRIMINAL ENTERPRISE STATUTE

The continuing criminal enterprise statute, 21 U.S.C. 848, was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970.1/ The statute is directed at any person who "occupies a position of organizer, a supervisory position, or any other position of management" in a narcotic producing and distributing enterprise, and provides for the most severe penalties of any federal criminal statute directed at drug-related activities currently in force. Under the Act convicted offenders must be sentenced to a minimum of ten years imprisonment with no possibility of parole. In addition the court may impose a life sentence without parole and fines totalling $100,000. Moreover under §848 all profits and assets which have afforded the defendant a source of influence over the illegal enterprise are subject to forfeiture. 2/ The statute reads in part:

Continuing Criminal Enterprise

Penalties; Forfeitures

(a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a

1/ Hereafter referred to as "the Act".
2/ 21 U.S.C. §848(a)(2). A discussion of the forfeiture provisions of this Act can be found at pp. 57 - 59 of this monograph. The criminal forfeiture provisions of the Continuing Criminal Enterprise statute are also discussed in a Department of Justice publication entitled Criminal Forfeitures Under the RICO and Continuing Criminal Enterprise Statutes. Those interested in forfeiture practice under these statutes should refer to this manual for further guidance.

term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States. -

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

* * *

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207) shall not apply.

When originally introduced the continuing criminal enterprise provision of H.R. 18583 3/ was merely a sentencing alternative which could be invoked on motion of the government

3/ H.R. 18583 and its sister bill, S. 3246, were the results of extensive hearings on reforming the federal narcotics laws. The House version was ultimately enacted into law as the Comprehensive Drug Abuse Prevention and Control Act of 1970.

after the defendant had been convicted of an independent violation of the statute and after the government had proven by a preponderance of the evidence at an independent hearing that the defendant had been involved in extensive, continuing violations of the federal narcotics laws. At this hearing the defendant had the burden of proving that any substantial income he had acquired had not been derived from illegal narcotics-related activities. Additionally, the government was free to incorporate hearsay in a post-trial, pre-sentencing report, leaving the defendant nc opportunity to cross-examine the declarant. Such features raised serious constitutional questions and led to the amendment of H.R. 18583. This amendment added a new section to the Act incorporating the enhanced penalties of the old sentencing provision into "a new and distinct offence with all its elements triable in court." 4/ Passage of the Act, thus, gave birth to a new statutory creature, the continuing criminal enterprise statute, 21 U.S.C. §848.

As the legislative history illustrates, Congress had two purposes in mind when it adopted §848. These were: (1) to severely punish major traffickers of illegal drugs who conducted their activities through an organized group of individuals; and (2) to deter prospective criminal entrepreneurs. The authors of the Act explained:

4/ "Additional Views" of members of the House Interstate and Foreign Commerce Committee, incorporated into H.R. REP. NO. 91 - 1444, 91st Cong., 2d Sess. 3, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4566, 4651.

> This section ... is the only provision of the bill providing minimum mandatory sentences, and is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation. 5/

This intent to deter narcotics trafficking is also evidenced by the forfeiture provision of the Act. 21 U.S.C. §848(A)(2) provides that, upon conviction under the Continuing Criminal Enterprise Statute, a defendant shall forfeit to the United States all interest in and profit obtained by the enterprise. The expansive reach of the forfeiture provision of §848 demonstrates that Congress intended to prevent unindicted members of drug rings from continuing the illegal enterprise after its organizers, managers, or supervisors had been convicted under the statute. 6/ Equally evident is the intent of Congress "to strip illicit drug organizations of all profits and property, and thereby create an additional obstacle to such activity." 7/ In total, §848 and its legislative history embody a clear congressional mandate to deter and eradicate major distribution operations of controlled substances. 8/

5/ H.R. REP. NO. 1444, 91st Cong., 2d Sess. reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4566, 4576.
6/ S. REP. NO. 91-617, 91st Cong. 1st Sess. 78-79 (1968).
7/ United States v. Long, 654 F.2d 911 (3d Cir. 1981) citing H.R. REP. NO. 1444 at 4575-76.
8/ H.R. REP. NO. 1444 at 4570.

II. ELEMENTS OF THE OFFENSE

In determining whether a prospective defendant should be indicted for engaging in a continuing criminal enterprise the facts of the investigation should be analyzed carefully to determine whether the elements of the offense are established. These elements are defined in subsection (b) of the statute:

> Continuing criminal enterprise defined
>
> (b) For purpose of subsection (a) of this section, 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 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.

Generally subsection (b) requires proof of five elements in order to sustain a §848 prosecution. First, the defendant's conduct must constitute a felony violation of federal narcotics law. 21 U.S.C. §848(b)(1). Second, that conduct must take place as part of a continuing series of violations. 21 U.S.C. §848(b)(2). Third, the defendant must undertake this activity in concert with five or more persons. 21 U.S.C. §848(b)(2)(A). Fourth, the defendant must act as the organizer, supervisor or manager of this criminal enterprise. 21 U.S.C. §848(b)(2)(A). Fifth, the defendant must obtain substantial income or

resources from this enterprise. 21 U.S.C. 848(b)(2)(B). 9/ These separate elements, and their proof, are discussed in greater detail below.

A. Section 848(b)(1) - "The punishment for which is a felony"

Section 848(b)(1) provides that an individual engages in a continuing criminal enterprise when, inter alia, "he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony ...." Thus, subsection (b)(1) of the Act specifically predicates proof of a continuing criminal enterprise on proof that the individual defendant has committed a felony violation of federal narcotics law.

At the outset this requirement limits those felonies which can serve as predicate to a continuing criminal enterprise prosecution. Under §848(b)(1) only felony violations of subchapters I and II of the Comprehensive Drug Abuse Prevention and Control Act 10/ can provide the foundation for this charge. Therefore other criminal activity, even if closely related to a drug trafficking scheme, cannot be used to establish a continuing criminal enterprise. See United States v. Phillips, 664 F.2d 971, 1014 (5th Cir. 1981), cert. denied, U.S. , 102 S.Ct. 2965 (1982).

A felony violation of federal narcotics laws can be established in a number of ways. The most common understanding

9/ See United States v. Lurz, 666 F.2d 69, 75 (4th Cir. 1981), cert. denied, U.S. , 102 S.Ct. 1642 (1982).
10/ These subchapters are found at 21 U.S.C. §§801-966.

of the term "violation" contemplates a substantive violation of subchapters I or II or; more simply, actual commission of a felony under subchapters I or II. However, acts in furtherance of a continuing criminal enterprise need not have been committed by the defendant himself to qualify as violations of §848(b)(1). It is sufficient for purposes of the Act that the defendant has conspired to commit a felony violation of subchapters I or II. United States v. Middleton, 673 F.2d 31, 33 (1st Cir. 1982).

Moreover, once a conspiracy is charged and proven, the defendant may be held responsible for substantive acts committed by other co-conspirators in furtherance of the common criminal scheme. Under the vicarious liability rule announced by the United States Supreme Court in Pinkerton v. United States, 328 U.S. 640, 646-47, (1946), the act of one co-conspirator in furtherance of an unlawful plan is the act of all. In Jeffers v. United States, 432 U.S. 137 (1977), the Court opened the door for application of Pinkerton to §848 cases by interpreting the "in concert with" language of the statute as encompassing the agreement required to prove conspiracy.

At least one court has already acknowledged this relationship. In United States v. Michel, 588 F.2d 986, 999 (5th Cir. 1979), the court held "Pinkerton and its progeny equally applicable to defendants charged with either conspiracy to violate the drug laws or a section 848 continuing criminal enterprise." Thus, under Michel, once a §848 defendant has been proven a member of a conspiracy, any substantive offense or act committed by his fellow conspirators in furtherance of the

conspiracy may be used against him as a violation of "any provision of this subchapter or subchapter II ... the punishment for which is a felony." 21 U.S.C. §848(b)(1).

Furthermore, these overt acts may be proven as part of a continuing criminal enterprise prosecution even if they have not been pleaded in the indictment as separate substantive offenses. See United States v. Bergdoll, 412 F.Supp. 1308, 1318 (D. Del. 1976), (United States may prove felony violations beyond those set forth in the indictment as part of its proof of a "continuing series of violations").

Accordingly, either actual commission of a felony or conspiracy to commit a felony will serve under the Act to satisfy the requirements of §848(b)(1).

B. Section 848(b)(2) - "Continuing series of violations."

Subsection (b)(2) further defines the crime of engaging in a continuing criminal enterprise by requiring that the violation be "part of a continuing series of violations." The most extensive discussion of the terms "continuing" and "series" is found in United States v. Collier, 358 F.Supp. 1351, 1355 (E.D. Mich. 1973), aff'd, 493 F.2d 327 (6th Cir. 1974), cert.denied, 419 U.S. 831, (1974).

In defining the term "continuing" the court relied in part on a dictionary definition but looked also to United States v. Midstate Horticultural Company, 306 U.S. 161, 166 (1939), which defined a "continuing offense" as "a continuous,

unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." The meaning adopted by the Collier court was as follows:

> To remain in existence or in effect; last; endure; ... not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences.

Id. at 1355.

As for the term "series," the court in Collier relied on a combination of dictionary definitions, common usage and state law 11/ to define "series" as "three or more related transactions." Id. at 1355. Subsequent cases have adopted this definition and have required proof of three or more related violations in order to establish a "continuing series of violations" under 21 U.S.C. §848(b)(2). 12/

This seems, however, to be a rather limited, mechanical approach to the Act. While the phrase "continuing series of violations" undoubtedly calls for proof of repetitious criminal conduct, there is nothing in the text or legislative history of §848 which supports the conclusion that three related violations must be proven in order to demonstrate a "series of violations." If Congress had intended to place such limitations on the Act, it could have done so explicitly. In fact, in several other particulars Congress did very specifically define the type of

11/ The only legal authority cited was a securities case, Tarsia v. Nick's Laundry, 239 Or. 562, 399 P.2d 28 (1965).

12/ United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert.denied, U.S. , 102 S.Ct. 2965 (1982); United States v. Fry, 413 F. Supp. 1269, 1272 (E.D. Mich 1976), aff'd, 559 F.2d 1221, (6th Cir. 1977), (citing Collier); United States v. Bergdoll, 412 F.Supp. 1308, 1317-18 (D. Del. 1976). But see United States v. Lurz, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, U.S. , 102 S.Ct. 1642 (1982).

conduct required to violate §848. 13/ Congress chose, however, to frame this subsection of the Act in general terms. Moreover, it seems that this language was left indefinite by design. During Congressional hearings on the Comprehensive Drug Abuse Prevention and Control Act one point of objection to §848 was this statutory reference to "continuing series of violations." Those objecting to this language argued that, as framed, the Act was too vague to be fairly enforced. 14/ Congress considered these objections, but elected to leave the statutory text unchanged.

Thus, neither the text nor the legislative history of §848 supports the conclusion that a specific number of violations must be proven to demonstrate a "series of violations." While in most instances proof of this element of the offense will follow from demonstrating a series of related violations, this need not always be the case. In appropriate factual settings, it may be possible to demonstrate a series of violations without mechanical adherence to the "rule of three" announced in Collier. 15/ However, given the popularity of this rule with the courts, it would be prudent for a prosecutor to be prepared to prove three related violations as part of the government's proof in any §848 prosecution.

13/ See, for example, 21 U.S.C. §848 (b)(2)(A) which requires that the defendant act "in concert with five or more other persons" in the criminal enterprise.

14/ H.R. REP. NO. 1444, 91st Cong. 2d Sess. reprinted in [1970] U.S. CONG. & AD. NEWS 4651. The question of whether this language renders the Act subject to constitutional attack is discussed at page 34 infra.

15/ But see United States v. Valenzuela, 596 F.2d 1361, 1369 n.8 (9th Cir. 1979) which raises, but does not answer, the question of whether two acts would be sufficient to establish "a continuing series."

Nor should this language be read to require proof of a massive drug trafficking operation as part of every continuing criminal enterprise prosecution. Quite the contrary, in some cases a single effort to import and distribute drugs may meet the requirements of §848(b)(2).

This principle is illustrated by United States v. Bergdoll, 412 F.Supp. 1308 (D. Del. 1976). Bergdoll involved a conspiracy to import and distribute a single shipment of marihuana. The entire criminal enterprise alleged in the indictment spanned only five days. Yet, despite the limited scope of this operation, the court held that it could be characterized as a continuing criminal enterprise under 21 U.S.C. §848.

In adopting this position the court specifically considered, and rejected, the argument that §848 applied only to the prosecution of large scale drug traffickers. Rather the court concluded that, as long as the strict requirements of §848 were met, a continuing criminal enterprise prosecution could proceed against this relatively small drug trafficking operation. Accordingly, while most case arising under §848 have, in fact, involved large scale drug distribution networks, §848 prosecutions have been sustained in several instances involving comparatively minor operations. 16/

16/ See, for example, United States v. Collier, 493 F.2d 327 (6th Cir.), cert.denied, 419 U.S. 831 (1974) which affirmed a §848 conviction in a case involving a single transaction, the importation of eight kilograms of cocaine.

Finally, at least one circuit has concluded that proof of a prior felony conviction may be used to establish one (or more) of the requisite three violations without offending the Double Jeopardy Clause. In United States v. Lurz, 666 F.2d at 76, the Court of Appeals for the Fourth Circuit noted that the statutory definition of a continuing criminal enterprise is divided into two parts: The first part, subsection (b)(1), requires that the defendant must have violated the federal narcotics laws; the second part, subsection (b)(2), requires that the violation must have been part of a continuing series of violations. The court concluded:

> The first element is the gravamen of the offense, and the others merely constitute a series of aggravating factors which, when present, require a greater punishment .... Thus there is a crucial difference between using evidence of a prior conviction to prove the first element of a continuing criminal enterprise, which Jeffers forbids, and using it to prove the other elements, which is precisely what Congress intended.

Id.

Thus, "... the fact that prior convictions comprise one element of an offense does not offend the double jeopardy clause, as long as the prior convictions are used for the limited purpose ... of showing the need for more severe punishment." Id.

C. Section 848(b)(2)(A) - "in concert with five or more other persons."

The offense of engaging in a continuing criminal enterprise is further defined in subsection(b)(2)(A) which states in part that the series of violations must be committed "in concert with five or more other persons." This is the only element of §848 which has been defined by the United States Supreme Court. In Jeffers v. United States, 432 U.S. 137 (1977), the Court reasoned that the "in concert" language required proof of an agreement between the defendant and each of the five (or more) others identical to the kind of agreement necessary to establish a conspiracy. The Court concluded that conspiracy was a lesser included offense of §848. 17/ This decision has had the effect of requiring proof of such agreements in all §848 cases. As is the case with proof of a conspiracy, an agreement may be demonstrated by direct evidence or it may be inferred from circumstantial evidence.

One additional point should be made with respect to this subsection of the Act. Case law clearly indicates that the defendant need not act in concert with the five or more others at the same time in order to violate §848. 18/

17/ The double jeopardy implications of Jeffers v. United States are discussed at page 45 of this monograph.

18/ United States v. Phillips, 664 F.2d 971, 1034 (5th Cir. 1981), cert. denied, U.S. , 102 S.Ct. 2965 (1982); United States v. Mannino, 635 F.2d 110 (2d Cir. 1980); United States v. Barnes, 604 F.2d 121, 157 (2d Cir. 1979), cert.denied, 446 U.S. 907 (1980); Michel, 588 F.2d at 1000 n. 14; United States v. Bolts, 558 F.2d 316 (5th Cir.), cert.denied sub nom. Hicks v. United States, 454 U.S. 930 (1977), United States v. Sperling, 506 F.2d 1323, 1344 (2d Cir.1974), cert.denied, 420 U.S. 962 (1975).

As the Court of Appeals for the Second Circuit stated in United States v. Sperling, "As to this element of the offense, the statute requires only that the persons charged must have been acting in concert with five or more persons." 506 F.2d at 1344. Nor do these five individuals have to act in concert in the same state or district. The requirement of concerted action is not narrowly proscribed in terms of time or place. See United States v. Fry, 413 F.Supp. 1269 (E.D. Mich. 1976), aff'd, 559 F.2d 1221 (6th Cir. 1977). 19/

D. Section 848(b)(2)(A) - "a position of organizer, a supervisory position, or any other position of management"

In addition to requiring that the defendant commit the violation "in concert with five or more other persons," §848(b)(2)(A) requires that the defendant occupy "a position

19/ United States v. Fry is discussed in greater detail at Section III. C. infra.

of organizer, a supervisory position, or any other position of management" with respect to these other persons. These additional elements have caused many to refer to §848 as "the kingpin statute," a title which is not entirely accurate. Although Congress undoubtedly was targeting the kingpins of major drug rings when it enacted the continuing criminal enterprise statute, it by no means intended to limit its reach to one kingpin per drug ring. As the Court of Appeals for the Fourth Circuit stated in United States v. Lurz, 666 F.2d at 80: "the definition of the crime speaks in terms of 'any person,' §848(a)(1), and of 'a person,' §848(b) ...[T]here is no indication that [the statute] can be applied to only one dominant participant in a conspiracy."

Congress did not intend that the government be required to prove that the defendant was the sole ringleader. United States v. Phillips, 664 F.2d at 1034. Since the language of the statute is in the disjunctive form, "the government's burden is only to show that [the defendant] organized, supervised, or managed at least five other persons." United States v. Mannino, 635 F.2d at 116. That the defendant "organized," "supervised," or "managed," may be proven by circumstantial evidence of conduct in accordance with the everyday meaning of those words. Id. at 117. Finally, it is not necessary that the superior-subordinate relationships existed at the same moment, Id. at 116, or that these relationships were all of the same type, Id.; United States v.Phillips, 664 F.2d at 1034.

E. Section 848(b)(2)(B) - "substantial income or resources"

The final element which must be established under the continuing criminal enterprise statute is set forth in §848(b)(2)(B). This subsection requires that the defendant derive "substantial income or resources" from the continuing series of violations. In answering a vagueness challenge, the Court in Collier noted that the phrase "substantial income" was common in tax statutes and had been held to be not unconstitutionally vague. The court went on to define "substantial" as "of real worth and importance; of considerable value; valuable." 358 F.Supp. at 1355 20/ This general definition has afforded prosecutors great latitude in proving this element of the crime and has supported §848 convictions in cases involving relatively small sums of drug money. For example, in United States v. Losada, 674 F.2d 167, 173 (2d Cir.), cert.denied, U.S. , 102 S.Ct. 2945 (1982) the court noted:

> Even if we were to accept the $2000 figure suggested by [the defendant] as his income from cocaine sales, that is not so insignificant as to render the statute inapplicable. ... Suffice it to say that neither the statute nor the cases establish a minimum amount of "income or resources" required to make §848 applicable. (emphasis in original)

20/ Black's Law Dictionary (4th Ed. 1951).

Judicial decisions construing the phrase "income or resources" have also afforded the prosecution great latitude in establishing §848 violations. In United States v. Jeffers, 532 F.2d 1101, 1116-17 (7th Cir. 1976), aff'd, in part, vacated in part on other grounds, 432 U.S. 137 (1977), the court upheld the trial judge's instruction that substantial income "... does not necessarily mean net income... [but] could mean gross receipts or gross income." The court explained:

> The courts have not taken the "substantial income" requirement as setting a definite amount of profits that must be proven to obtain a conviction for engaging in a continuing criminal enterprise. Nor do we think this would be a proper interpretation of the statute. The "substantial income" requirement should be interpreted as a guide to the magnitude of the criminal enterprise. Congress did not seek to punish small-time operators under this section. It sought to punish only those who obtained "substantial income or resources" from a continuing series of drug violations. Certainly, this can be established by substantial gross receipts or substantial gross income as in Sisca and Manfredi. Examined in this light, and keeping in mind the extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits, the definition of income as "gross income or gross receipts" was entirely proper.

Id. at 1117

In United States v. Thomas, 632 F.2d 837 (10th Cir.), cert.denied, 449 U.S. 960 (1980) the court echoed Jeffers and upheld a jury instruction which had emphasized cash flow rather than net income. The court reasoned that "to set up a definition [of substantial income or resources] in terms of net income would be unreasonable. A business can be carried on even though a profit is not realized." Id. at 847.

Accord, United States v. Bolts, 558 F.2d at 321 (the defendant's inability to pay his bills was "not necessarily relevant to the question whether he obtained substantial income or resources from the criminal enterprise").

Proof that the §848 defendant derived substantial income or resources from the illegal enterprise can be based on both direct and circumstantial evidence. 21/ Direct evidence may, of course, include prior statements of the defendant or a co-conspirator indicating receipt of substantial income or resources from the enterprise. Such statements may be offered as admissions of the defendant, as statements of a co-conspirator, or through other sources, such as court-ordered electronic surveillance. Because of difficulties inherent in obtaining such direct evidence, however, the government must in many instances rely on circumstantial evidence.

Various forms of circumstantial evidence have been identified and used for the purpose of proving the substantial income or resources element of §848. Federal income tax returns and

21/ United States v. Chagra, 669 F.2d 241 (5th Cir. 1982); United States v. Phillips, 664 F.2d at 1035; United States v. Webster, 639 F.2d 174, 182 (4th Cir. 1981); United States v. Thomas, 632 F.2d at 847; United States v. Gantt, 199 U.S. App. D.C. 249, 265, 617 F.2d 831, 847 (D.C. Cir. 1980); United States v. Bolts, 558 F.2d at 321; United States v. Jeffers, 532 F.2d at 1116-17; United States v. Sisca, 503 F.2d 1337, 1346 (2d Cir.) cert.denied, 419 U.S. 1008 (1974); United States v. Manfredi, 488 F.2d 588, 603 (2d Cir. 1973), cert.denied, 417 U.S. 936 (1974).

return information can be used to prove this element of the offense.

This data can be obtained under 26 U.S.C. §6103(i)(1) which provides for disclosure of such information to federal officers for non-tax-related criminal investigations. Upon application by the Attorney General, the Deputy Attorney General, an Assistant Attorney General, a United States Attorney, or any other designated federal prosecutor, a federal district court judge or magistrate may issue an ex parte order to turn over such information if it is determined "on the basis of the facts submitted by the applicant" that: (1) a specific criminal act has been committed; (2) the tax return or return information is or may be relevant to a matter relating to the commission of the act; and (3) the information sought cannot reasonably be obtained from other sources. For an example of the use of this type of evidence, see United States v. Barnes, 604 F.2d at 145-147.

Three other kinds of circumstantial evidence which can be used to prove this element of the §848 offense were identified in United States v. Sisca, 503 F.2d at 1346. They are: (1) evidence of the defendant's position in the drug network; (2) the quantity of narcotics involved; and (3) the amount of money that changed hands. In United States v. Kirk, 534 F.2d 1262, 1278 (8th Cir. 1976), cert.denied, 433 U.S. 907 (1977), the court noted that during the twenty days in which a wiretap was conducted, the defendant "received and made an incredible number of calls involving suppliers, distributors, and buyers" and that he had

sent agents to New York and California. Based on this evidence of the defendant's position in the organization, the court permitted the inference that he received "substantial income or resources." The court also permitted this inference to be based on evidence that the defendant dealt in large quantities of a controlled substance. 22/

Finally, evidence that large amounts of money changed hands can be used to establish this element of the crime as in United States v. Gantt, 199 U.S. App. D.C. 249, 617 F.2d 831 (D.C. Cir. 1980) where the government's chief witness testified that he saw money in amounts ranging from $2500 to $6000 being turned over to the defendant. The defendant argued that this testimony was based on "pure speculation," but the court held that it was both admissible and supportive of the inference that the defendant received substantial income from his illegal enterprise. Id. at 847. Accord, United States v. Kirk, 534 F.2d at 1278; United States v. Bolts, 558 F.2d at 321 ("testimony showed substantial amounts of money passing through the hands of the parties to the transactions").

Often the proceeds from illegal drug trafficking are immediately used to purchase valuable real estate and items of personal property. Such transactions, however, cannot prevent a judicial determination that the defendant received substantial

22/ Accord, United States v. Chagra, 669 F.2d at 257; United States v. Phillips, 664 F.2d at 1035; United States v. Webster, 639 F.2d at 182; United States v. Gantt, 617 F.2d at 847; United States v.Jeffers, 532 F.2d at 1116-17; United States v. Sisca, 503 F.2d at 1346; United States v. Manfredi, 488 F.2d at 603.

income or resources from his participation in the illegal enterprise. In United States v. Chagra, 669 F.2d at 256, the court was faced with the argument that evidence of the defendant's purchase of expensive private real estate should not have been admitted by the trial court because there was no evidence connecting these purchases to the alleged drug enterprise. In rejecting this argument the court held that the defendant's ability "to finance lavish personal expenditures without having a legitimate source of income" was sufficient proof that he derived substantial income or resources from the illegal enterprise. Id. at 257. The court explained:

> Where a defendant is on trial for a crime in which pecuniary gain is the usual motive for or natural result of its perpetration and there is other evidence of his guilt, evidence of the sudden acquisition or expenditure of large sums of money by the defendant, at or after the time of the commission of the alleged offense, is admissible to demonstrate the defendant's illegal obtention [sic] of these funds ... even though the government does not specifically trace the source of those funds to the illegal acts charged against the defendant....

Id. at 256

See also, United States v. Losada, 674 F.2d at 173; United States v. Barnes, 604 F.2d at 147. The court also noted that although the funds for such acquisition may have been lawfully obtained, this goes to the weight of the evidence and not to its admissibility. United States v. Chagra, 669 F.2d at 256.

Another common practice in the illegal business of drug trafficking is to accept drugs from a supplier on consignment under an agreement to pay the purchase price at a later date after they have been resold. Such a practice could pose a

problem in establishing the substantial income or resources element of §848, for technically there is no present transfer of cash or other valuable consideration. In United States v. Sisca, 503 F.2d at 1346, the court was faced with this very argument. The defendant had accepted narcotics on consignment but had not yet received any money from their resale. At trial he argued that the transaction represented a consignment debt or an operational deficit and, as such, could not constitute "substantial income or resources." In rejecting this argument the court noted that "in the context of this record, it indicates a substantial anticipated profit." Id. The court pointed to the defendant's own admission that the heroin was worth $170,000 and his acknowledgement that he had been making large purchases for redistribution on a bi-weekly basis to support the inference that this "consignment debt" actually reflected a substantial profit.

Similarly, in United States v. Chagra, 669 F.2d 241 (5th Cir.1982), the court held that the evidence of substantial income was sufficient to sustain a conviction, despite the fact that the defendant owed a consignment debt to his distributor. The court based its conclusion on three factors. First, the evidence revealed that the defendant had significant quantities of cocaine and marihuana in his possession. Second, the court noted that the defendant had outstanding contracts to sell large quantities of these drugs. According to the court these outstanding contracts provided the defendant with "a substantial amount of accounts receivable". Id. at 257, citing United States v. Sisca.

Finally the court referred to evidence which demonstrated that the defendant financed a large scale narcotics operation and lavish personal expenditures without any legitimate source of income. According to the court "[t]his evidence, considered separately or together, is sufficient to support the jury's conclusion that [the defendant] obtained substantial income or resources from [t]his operation ..." Id.

Taken together, Sisca and Chagra constitute a clear rejection of this "consignment debt" defense. Thus, both Chagra and Sisca reflect a more realistic view of the economics of drug trafficking. Moreover, Chagra and Sisca appear to support the proposition that a showing of substantial anticipated income may satisfy the requirements of §848(b)(2)(B).

F. Scienter

Discussion of the relationship of scienter to §848 is found in United States v. Manfredi, 488 F.2d at 602-03. In that case, the defendant argued that the continuing criminal enterprise statute was so vague that it failed adequately to warn him of the criminal nature of his conduct. The court rejected this argument and explained:

> The conduct reached [by §848] is only that which [the defendant] knows is wrongful and contrary to law... Prerequisite to conviction under §848 is the commission of a series of felonies, each involving specific intent; that [the defendant] did not suspect that his conduct was criminal and violative of law would be risible.

Id. Thus, the court refused to impose a requirement of scienter independent of or in addition to that necessary to prove the predicate crimes. 23/

III. DRAFTING THE INDICTMENT

A. General Considerations

It is currently the policy of the United States Department of Justice to require that the United States Attorney consult with the Narcotic and Dangerous Drug Section of the Criminal Division prior to commencing any continuing criminal enterprise prosecution. U.S.A.M. §9-2.133(d). As part of this policy the Criminal Division requests that the United States Attorney not go forward with a continuing criminal enterprise prosecution without the approval of the Division. In conducting its review of §848 cases the Section determines whether the prosecutor has sufficient evidence to support the issuance of an indictment and alerts the prosecutor to issues which may arise in the course of the prosecution.

This policy serves a threefold purpose. First it permits the Department to monitor the progress of all prosecutions under the Act. In addition, by pooling information on all §848

23/ In reaching the decision, the Manfredi court referred to the language of the Supreme Court in Screws v. United States, 325 U.S. 91, 102 (1945):

> But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law.

prosecutions, this policy enables Assistant United States Attorneys to benefit from the experience obtained in other successful prosecutions. Finally, this policy allows the Department to protect the integrity of the Act by guaranteeing that all prosecutions under §848 meet the requirements prescribed by statute. Consistent with this policy, the Criminal Division requests that the United States Attorney consult with the Narcotic and Dangerous Drug Section prior to dismissing any continuing criminal enterprise counts contained in an indictment, pursuant to a plea-bargain agreement or otherwise.

Generally an indictment under §848 need only track the statutory language and state, in approximate terms, the time and place of the alleged crime. 24/ Therefore an indictment will not be considered insufficient because it has failed to specify, by name, those persons with whom the defendant has acted in concert. United States v. Sperling, 506 F.2d at 1344. Nor is a §848 indictment insufficient when it fails to specify each offense constituting the "continuing series of violations" required under 21 U.S.C. §848(b)(2). United States v. Sperling, 506 F.2d at

24/ United States v. Tramunti, 513 F.2d 1087, 1113 (2nd Cir.), cert.denied, 423 U.S. 832 (1975); United States v. Sperling, 506 F.2d 1323, 1344 (2nd Cir. 1974), cert.denied, 420 U.S. 962 (1975). See, e.g., United States v. Jeffers, 532 F.2d at 1113; United States v. Johnson, 575 F.2d 1347, 1356 (5th Cir. 1978), cert.denied, 440 U.S. 907 (1979). There may be some confusion on this point in the Fourth Circuit. In United States v. Lurz, 666 F.2d 69, 78 (4th Cir. 1981), cert.denied, U.S. 102 S.Ct. 1642 (1982) the court indicated that a §848 indictment need only trace the statutory language. But United States v. Howard, 590 F.2d 564, 566 (4th Cir.), cert.denied, 440 U.S. 976 (1979) may be read as requiring greater specificity in an indictment.

1344; United States v. Bergdoll, 412 F.Supp. at 1318. These offenses, even if not all specified in the indictment, may be proven as part of the government's case at trial. United States v. Bergdoll, 412 F.Supp. at 1318.

A number of cases have suggested, however, that a bill of particulars may be needed to further define an indictment which merely tracks the language of §848. 25/ The purpose of a bill of particulars is to reduce surprise at trial; provide the defendant with sufficient information regarding the offense charged to enable him to prepare a defense; and protect the defendant from any possible double jeopardy. United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978), cert.denied, 441 U.S. 962 (1979). A bill of particulars may not, however, serve as a generalized tool for the discovery of the evidence, witnesses or theories which the prosecution intends to rely upon at trial. Id. In a §848 prosecution such a bill may be sought in order to identify other parties to the continuing criminal enterprise; 26/ to establish the dates of the alleged violations; 27/ or to determine what

25/ See United States v. Howard, 590 F.2d at 566; United States v. Johnson, 575 F.2d at 1356-57; United States v. Sperling, 506 F.2d at 1344.
26/ See, e.g. United States v. Hawkins, 661 F.2d 436, 451-52 (5th Cir.), cert.denied, U.S. , 102 S.Ct. 2274 (1982) (held bill of particulars not needed when indictment itself contained sufficient information to identify co-conspirators); United States v. Johnson, 575 F.2d at 1357; but see United States v. Howard, 590 F.2d at 566, (bill of particulars naming co-conspirators should be granted); United States v. Sperling, 506 F.2d at 1344.
27/ See United States v. Johnson, 575 F.2d at 1357.

financial information the government intends to present at trial. 28/

The decision to grant or deny a motion for bill of particulars rests in the sound discretion of the trial judge. 29/ This discretion extends not only to the question of whether a bill should be granted, but also to the scope and specificity required by the bill of particulars. 30/ The trial court is granted great latitude in making these determinations and the rulings of a trial court in this regard may be set aside only upon a showing of abuse of discretion. 31/

An example of the form of indictment used in a §848 prosecution can be found in Appendix B of this monograph.

B. Drafting the Indictment - The Forfeiture Provision

A novel feature of the punitive scheme established by the continuing criminal enterprise statute is the forfeiture provision found at 21 U.S.C. §848(a)(2). This section provides that any person convicted under §848 shall forfeit to the United States all profits obtained by him in the enterprise and any interest in, claim against or property right affording a source of influence over the enterprise.

28/ See United States v. Jeffers, 532 F.2d at 1113-14 (held motion denied where government informed defense counsel generally of the types of evidence it intended to produce).
29/ Id.; Rule 7(f) Fed. R. Crim. Proc.
30/ United States v. Tramunti, 513 F.2d at 1113-14.
31/ Id; United States v. Jeffers, 532 F.2d at 1113-14.

With the enactment of this provision, and a parallel provision in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1963, Rule 7 of the Federal Rules of Criminal Procedure was amended. This amendment provided that: "No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." Rule 7(c)(2) Fed. R. Crim. Proc. Thus Rule 7, as amended, requires that the United States provide notice, in the indictment, of the extent of defendant's property holdings subject to forfeiture under 18 U.S.C. §1963 and 21 U.S.C. §848. 32/

Under Rule 7(c)(2) the forfeiture paragraph of an indictment need only "allege the extent of the interest or property subject to forfeiture." In United States v. Grammatikos, 633 F.2d 1013 (2d Cir. 1980), the Court of Appeals held that this requirement was satisfied by a forfeiture paragraph "pleaded in the bare bones statutory language...." Id. at 1024. 33/ In reaching this conclusion the Court noted that the purpose of Rule 7(c)(2) was

32/ The Advisory Committee Notes on Rule 7(c)(2) specifically indicate that this provision was added to provide procedural implementation for the forfeiture provisions of 18 U.S.C. §1963 and 21 U.S.C. §848. There may be some dispute regarding the applicability of this Rule to other forfeiture provisions. Compare United States v. Hall, 521 F.2d 406 (9th Cir. 1975), (applying Rule 7(c)(2) to a forfeiture under 18 U.S.C. §545) with United States v. Brigance, 474 F.Supp. 1177 (S.D. Tex. 1979).

33/ See United States v. Bergdoll, 412 F.Supp. 1308, 1318-19 n. 17 (D. Del. 1976); see also United States v. Davis, 663 F.2d 824, 833 (9th Cir. 1981).

merely to provide persons facing charges under 18 U.S.C. §1963 and 21 U.S.C. §848 with notice that the United States would seek forfeiture. Id. An indictment which simply indicated that all of the defendant's interests in the illicit enterprise were sought satisfied this notice requirement. Id. To the extent that the defendant needed further information to prepare a defense to this forfeiture, he could obtain such information with a bill of particulars.

When drafting the forfeiture paragraph of an indictment one further point deserves consideration. In United States v. Hall, 521 F.2d 406 (9th Cir. 1975) the Court of Appeals, in a smuggling prosecution, indicated that failure to comply with Rule 7(c)(2) could result in dismissal of the indictment. This conclusion seems incorrect. A more appropriate remedy for a violation of Rule 7(c)(2) would appear to be denial of a judgment of forfeiture, not dismissal of the indictment. United States v. Brigance, 474 F.Supp. 1177 (S.D. Tex. 1979). Moreover, subsequent Ninth Circuit opinions have cast doubt upon the continuing validity of Hall. See United States v. Davis, 663 F.2d at 833; United States v. Bolar, 569 F.2d 1071 (9th Cir. 1978), (distinguishing Hall).

However, as a result of the Hall decision, the Department of Justice advised prosecutors that all indictments brought under 18 U.S.C. §1963 or 21 U.S.C. §848 should contain a forfeiture provision, even if the United States did not intend to seek forfeiture. 34/ Thus, while the result reached in Hall seems

34/ U.S.A.M. 9-100.280 at pp. 37-38.

questionable on a number of grounds, prudence continues to dictate that all indictments under the continuing criminal enterprise statute contain a forfeiture paragraph. A form of forfeiture paragraph is contained in Appendix B of this monograph.

C. Venue Considerations

In federal criminal prosecutions the question of proper venue assumes a constitutional dimension. The United States Constitution provides that "[t]he trial of all crimes ... shall be held in the State where the said crimes shall have been committed ..." 35/ and guarantees to each criminal defendant "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..." 36/ This constitutional requirement is presently incorporated in Federal Rule of Criminal Procedure 18 which provides that "[e]xcept as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed." Thus proper venue is a prerequisite to any federal criminal prosecution.

Generally venue questions present few problems in the context of a criminal prosecution. Establishing that an offense was committed in the district in which the government is attempting to prosecute is typically a routine task. Prosecutions under the continuing criminal enterprise statute can, however, provide an exception to this general rule.

35/ U.S. CONST. art. III, §2, cl. 3.
36/ U.S. CONST. amend. VI.

Narcotics trafficking is, by its nature, both an interstate, and an international activity. Materials produced in Asia and Latin America are smuggled into this country for distribution throughout the United States. Accordingly prosecutions under §848, which is directed against large scale traffickers, frequently involve proof of interstate drug distribution networks. The interstate nature of this criminal activity may, in many instances, present the prosecutor with questions regarding where a §848 prosecution can properly be maintained.

The leading case dealing with this question is United States v. Fry, 413 F.Supp. 1269 (E.D. Mich. 1976), aff'd, 559 F.2d 1221 (6th Cir. 1977). Fry involved the multi-defendant prosecution of an interstate marihuana distribution network. This network was based in Southern California. The indictment brought against these defendants alleged that, from this base in California, tonnage quantities of marihuana were repackaged and shipped in hundred pounds lots to locations in Michigan, Kansas, Colorado, Pennsylvania and New England.

Fry was charged in the Eastern District of Michigan under a two count indictment. Count I alleged that the defendant supervised the operations of this drug network and charged him with violations of 21 U.S.C. §§841(a)(1) and 846. Count II asserted that the defendant was engaged in a continuing criminal enterprise in violation of 21 U.S.C. §848.

Fry filed a motion to dismiss this indictment, alleging that venue did not lie in the Eastern District of Michigan. As framed by the court, the issue raised by this motion was "whether, on

a charge of continuing criminal enterprise in violation of 21 U.S.C. §848, venue lies in the Eastern District of Michigan where defendant himself neither set foot nor personally committed a component crime in this district during the course of the enterprise[?]" Id. at 1270. The court answered this question in the affirmative, concluding that venue would lie over this defendant despite the fact that he did not actively engage in criminal activity in Michigan.

At the outset the court noted that §848 contains no venue provision. Therefore the court concluded that the locus delecti of the offense must be determined from the nature of the crime alleged and the location of the acts constituting that crime, Id. at 1271. In this case the court characterized the crime as the "operation of an enterprise, an on-going narcotics distribution business which, by its amorphous nature, may or may not span many months, many states, or involve many people." Id. at 1272. Given the breadth of this criminal enterprise the court recognized that the locus delecti of the offense could not be narrowly defined. Accordingly the court held that:

> It is enough, to confer venue on a district, that one of the "continuing series" of criminal acts constituting the enterprise occur there. In other words, venue under §848 may be in any district in which a narcotics violation which was part of the criminal enterprise occurred.

Id. at 1273

Given this definition of the locus delecti the court had little difficulty determining that venue was proper in the Eastern District of Michigan. In this case the indictment

against Fry alleged that he was a part of a conspiracy which conducted criminal activities in Michigan. The indictment also alleged specific overt acts taken by co-conspirators in Michigan. Thus, according to the court, the indictment established a sufficient nexus between the criminal enterprise and Michigan to establish venue there.

The court in Fry also considered the "continuing offense" venue statute, 18 U.S.C. §3237, as a basis for asserting venue over this case. That statute provides that: "[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed." Emphasizing the interstate nature of this criminal enterprise, the court concluded that the commission of overt acts in Michigan constituted the "completion" of the criminal enterprise and justified the exercise of venue under 18 U.S.C. §3237.

The decision in United States v. Fry constitutes a clear recognition of the interstate character of drug trafficking. Recognizing this, Fry establishes venue guidelines which ensure that constitutional venue requirements are not woodenly construed in a way which unduly restricts criminal prosecution. United States v. Fry holds that proper venue for a §848 prosecution is coterminous with the scope of the criminal enterprise, as described in the indictment. Such a definition guarantees a

criminal defendant his constitutional right to trial "in the State where [his] crimes shall have been committed" 37/ without hamstringing efforts to prosecute interstate criminal enterprises.

IV. FREQUENT DEFENSE ARGUMENTS IN §848 CASES

An important part of the pretrial preparation in any criminal prosecution consists of efforts to anticipate and, wherever possible, negate potential defense arguments. The defenses which can be raised in a criminal prosecution are limited, however, only by the facts attending that case and the imagination of defense counsel. It is not possible, therefore, for any text to identify, much less discuss, every possible defense which may be raised to a criminal charge. Accordingly, the purpose of this section is simply to identify certain frequently presented defenses in §848 prosecutions and to describe the present state of the law with respect to those defenses.

A. Constitutionality of §848 - "Void for Vagueness"

One frequent avenue of defense in §848 prosecutions has been to challenge the constitutionality of the Act itself. This challenge focuses on the language of the Act and argues that this language is so vague that it does not afford the defendant with sufficient notice that his conduct might violate the law. Therefore, defendants argue, the Act is unconstitutionally vague on its face.

37/ U.S. CONST. art. III, §2, cl. 3.

This challenge has met with little success in the courts. While several courts have commented that the continuing criminal enterprise statute could have been drafted with greater precision, 38/ to date no court has dismissed an indictment brought under the Act on the grounds that the language of §848 is unconstitutionally vague on its face. 39/

Quite the contrary, several courts have begun their consideration of this question with the premise that a vagueness challenge can only "be examined in light of the facts of the case at hand." 40/ This is a very important premise because, in the context of a §848 prosecution, it significantly limits the availability of this defense.

38/ See United States v. Manfredi, 488 F.2d 588, 603 (2d Cir. 1973), cert.denied, 417 U.S. 936 (1974), ("the statute might have been more artfully drawn, but no language has occurred or has been suggested to us that better express [sic] the Congressional purposes.").

39/ Constitutional challenges to the vagueness of this language have been rejected by the following courts: The United States Court of Appeals for the Second Circuit, United States v. Manfredi, 488 F.2d at 603; the United States Court of Appeals for the Fourth Circuit, United States v. Webster, 639 F.2d 174, 182 (4th Cir. 1981), cert.denied, U.S. , 102 S.Ct. 307 (1982); the United States Court of Appeals for the Fifth Circuit, United States v. Cravero, 595 F.2d 406, 410-11 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977); The United States Court of Appeals for the Sixth Circuit, United States v. Collier, 493 F.2d 327 (6th Cir. 1974); the United States Court of Appeals for the Eighth Circuit, United States v. Kirk, 534 F.2d at 1277-78; the United States Court of Appeals for the Ninth Circuit, United States v. Valenzuela, 596 F.2d 1361, 1366 (9th Cir.), cert.denied, 444 U.S. 865 (1979). See also, United States v. Holman, 490 F.Supp. 755, 758 (E.D. Pa. 1980).

40/ United States v. Valenzuela, 596 F.2d at 1367; United States v. Kirk, 534 F.2d at 1277. See also, United States v. Mazurie, 419 U.S. 544 (1975).

The language of 21 U.S.C. §848, when viewed in the abstract, is cast in very broad terms. As a practical matter, however, the conduct which the Act proscribes is typically very dramatic and pervasive. As previously noted, the continuing criminal enterprise statute is directed against large scale drug trafficking. Therefore, by tying a vagueness challenge to the facts of a particular case, the law forces defense counsel to argue vagueness on the basis of a specific factual record. In many §848 prosecutions this record will contain compelling evidence of extensive criminal activity. Accordingly, it is not surprising to find that challenges to the constitutionality of the Act, as applied in individual cases, have also generally proven unsuccessful.

For example, in United States v. Valenzuela, 596 F.2d 1361 (9th Cir.), cert.denied, 444 U.S. 865 (1979), the defendant, a principal in a Mexican heroin smuggling ring, challenged the constitutionality of §848 as applied in his case. Defendant's constitutional challenge to the Act was broad-based, with the defendant contending that "the phrases 'continuing series of violations,' 'undertaken ... in concert' 'organizer, a supervisory position, or any other position of management' and 'substantial income or resources' are too indefinite to provide the basis for his conviction." Id. at 1367.

The United States Court of Appeals for the Ninth Circuit rejected these arguments and affirmed the defendant's conviction. In reaching this conclusion the court refused to examine these

phrases in the abstract. Instead the court insisted that §848 must be considered as a whole and in the context of the entire Act. Id. Adopting this perspective the Court concluded that the language of §848 provided the defendant with sufficient notice of the illegality of his conduct. Id. at 1368.

Other courts have consistently adopted this view and held, in a variety of factual contexts, that the phrases "continuing series", "undertaken ... in concert," "organizer, a supervisory position or any other position of management" and "substantial income or resources" are not unconstitutionally vague. 41/

B. Joinder and Severance

A continuing criminal enterprise is, by definition, an undertaking which involves several different parties and a variety of criminal acts. 21 U.S.C. §848(b)(1) and (b)(2)(A). Therefore it is not surprising to discover that continuing criminal enterprise prosecutions are typically multi-defendant,

41/ See United States v. Webster, 639 F.2d 174 (4th Cir. 1981), cert. denied, U.S. 102 S.Ct. 307 (1982), (rejecting constitutional challenge to the phrase "substantial income or resources"); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977), (rejecting constitutional challenge to the phrases "continuing series", "a position of organizer" and "substantial income or resources"); United States v. Kirk 534 F.2d 1262, 1277 (8th Cir. 1976), cert. denied, 433 U.S. 907 (1977), (rejecting constitutional challenge to the phrases "a position of organizer" and "substantial income or resources"); United States v. Collier, 493 F.2d 327, 329 (6th Cir.), cert. denied, 419 U.S. 831, (1974), (rejecting constitutional challenge to the phrases "continuing series" and "substantial income or resources.") See also United States v. Sisca 503 F.2d at 1345 (rejecting general constitutional vagueness challenge). See generally Jeffers v. United States, 432 U.S. 137, (1977), (discussing the phrase "undertaken ... in concert")

multi-count proceedings. 42/ Because continuing criminal enterprise prosecutions frequently involve large numbers of defendants, each of whom is charged with a variety of offenses, questions regarding joinder and severance of both defendants and offenses are common in these cases.

In federal court joinder of both offenses and defendants is governed by Rule 8 of the Federal Rules of Criminal Procedure. Rule 8 provides as follows:

> RULE 8. Joinder of Offenses and of Defendants
>
> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

Once offenses or defendants are joined in an indictment, their severance may be obtained only by court order. Rule 14 of the Federal Rules of Criminal Procedure governs severance practice in federal criminal prosecutions, and provides that: "If it appears that a defendant or the government is prejudiced by a joinder [of offenses or defendants] the court may order ...

42/ The classic example of this is United States v. Phillips 664 F.2d 971 (5th Cir. 1981), cert.denied, U.S. , 102 S.Ct. 2965, (1982) in which twelve defendants were indicted on a 36 count indictment.

separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." Rule 14, Fed. R. Crim. Proc.

In considering a Rule 14 motion to sever, the trial court weighs the defendant's right to a fair trial against the public's interest in the efficient administration of justice. United States v. Phillips, 664 F.2d at 1016. The Court must determine whether joinder of offenses and defendants would so prejudice the jurors that they would be unable to consider each defendant and each charge individually. Id. In making this determination the trial court is afforded considerable discretion. United States v. Lurz, 666 F.2d at 77; United States v. Holland, 494 F.Supp. 918, 923 (D. Md 1980). Rulings made by a trial court in this area are subject to review only for an abuse of discretion and upon a showing of compelling prejudice. United States v. Lurz, 666 F.2d at 77; United States v. Phillips, 664 F.2d at 1016.

In §848 cases questions of prejudicial joinder often arise in one of two contexts. First, in several cases, defendants not charged with any violation of the continuing criminal enterprise statute have moved to sever their trial from that of a co-defendant who is so charged. 43 / These defendants have argued that they would be prejudiced by the trial of their case as part of a larger continuing criminal enterprise prosecution.

43/ United States v. Lurz, 666 F.2d 69 (4th Cir.), cert.denied, U.S. , 102 S.Ct. 1642 (1982); United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert.denied, U.S. , 102 S.Ct. 2965 (1982)

The second situation in which prejudicial joinder has become an issue involves those cases in which an individual defendant is charged both with operating a continuing criminal enterprise and with numerous other violations of federal narcotics laws. In these cases the defendant has moved for severance of the §848 count from the other substantive offenses, arguing that trial of the §848 charge would prejudice the jury in its consideration of these other offenses. 44/

Both of these situations were present in United States v. Lurz. In Lurz the indictment brought against the individual defendants proceeded on two counts. Count I charged each of the 23 defendants with conspiracy to manufacture, distribute and possess PCP, in violation of 21 U.S.C. §§841(a)(1) and 846. Count II charged two of the defendants with operating a continuing criminal enterprise. At trial these latter two defendants were convicted under both Counts I and II of the indictment. In addition several other defendants were convicted under Count I alone.

On appeal defendant Lurz, who had been convicted on both counts, argued that the trial court erred in refusing to sever the conspiracy count from the continuing criminal enterprise charge. Lurz pointed out that part of the government's proof at trial on the §848 count consisted of evidence that he had been

44/ See United States v. Lurz, 666 F.2d 69 (4th Cir.), cert.denied, U.S. , 102 S.Ct. 1642 (1982); United States v. Crisp, 563 F.2d 1242 (5th Cir. 1977); United States v. Jeffers, 532 F.2d 1101 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977); United States v. Holland, 494 F.Supp. 918, 923-24 (D. Md. 1980).

convicted of conspiracy to manufacture PCP in Florida. At trial the United States used this prior conviction to demonstrate that the defendant's conduct was part of a "continuing series of violations." 21 U.S.C §848(b)(2). According to Lurz, introduction of this prior conspiracy conviction as part of the continuing criminal enterprise prosecution prejudiced the jurors in their consideration of the conspiracy charge pending against him.

The court rejected this argument. Noting that joinder of these offenses was proper under Rule 8(a), Federal Rules of Criminal Procedure, the court held that severance would only be appropriate upon a substantial showing of prejudice by the defendant. United States v. Lurz, 666 F.2d at 77. In this case the district court had determined that the joinder of these offenses was not prejudicial. The Court of Appeals concurred in this finding, holding that the district court's exercise of its discretion was not unreasonable. 45/

The court also addressed a prejudicial joinder question raised by several co-defendants of Lurz's. These individuals, who had been charged under Count I of the indictment, argued that the trial of their cases was prejudiced by the evidence introduced as proof of the continuing criminal enterprise. The trial court had denied motions to sever filed by these defendants, indicating that any prejudice resulting from a joint trial could be avoided by appropriate cautionary instructions to the jury.

45/ Accord, United States v. Crisp, 563 F.2d at 1244-45; United States v. Holland, 494 F.Supp. at 922-23.

The Court of Appeals affirmed this trial court ruling. In this case the court indicated that the trial instructions given to the jury insulated the defendants from any undue prejudice. Given these instructions, the court concluded that the jury could "compartmentalize" the evidence and consider each defendant separately. Id. at 80. 46/

The conclusions reached by the court in United States v. Lurz are consistent with those of by a number of other courts which have dealt with these joinder questions. 47/

With respect to the issue of joinder of defendants, these cases have ultimately turned on whether the jury can consider each defendant and each charge separately. The cases that have considered this question generally have concluded that, with cautionary instructions, jurors can separately consider each defendant and offense. See United States v. Lurz, 666 F.2d at 80; United States v. Phillips, 664 F.2d at 1017. Therefore these cases have refused to allow severance of defendants in a continuing criminal enterprise prosecution.

With respect to severance of offenses, several courts have noted that a continuing criminal enterprise is made up of a series of substantive violations of federal narcotics law. See United States v. Crisp, 563 F.2d at 1244-45, United States v. Holland, 494 F.Supp. at 922-23. Since proof of these lesser offenses is part of the proof of a §848 violation, these courts have indicated that joinder of these offenses is not unduly prejudicial. Id. These courts, therefore, have refused to allow

46/ Accord, United States v. Phillips, 664 F.2d at 1016-17.
47/ See footnotes, 44-46 supra.

severance of these offenses from the continuing criminal enterprise prosecution. Id. 48/

In response to the argument that such joinder is prejudicial, these cases have held that "trial together of the conspiracy and continuing criminal enterprise charges could have taken place without undue prejudice to [defendant's] Sixth Amendment right to a fair trial. If the two charges had been tried together, it appears that [defendant] would have been entitled to a lesser included offense instruction." Jeffers v. United States, 432 U.S. 137, 153 (1977), quoted in, United States v. Holland, 494 F.Supp. at 923.

Finally, if a defendant does obtain a severance of these lesser offenses from the §848 charge he may not later raise double jeopardy as a bar to the prosecution of these lesser offenses. See, Jeffers v. United States, 432 U.S. 137 (1977). "There is no violation of the Double Jeopardy Clause when [a defendant] elects to have the two offenses tried separately and persuades the trial court to honor his election." Id. at 152

C. Double Jeopardy

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice

48/ But see, United States v. Jeffers, 532 F.2d 1101 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977),

put in jeopardy of life or limb." 49/ It is important at the outset to recognize that the Double Jeopardy Clause does not serve as a restraint on the legislature. Legislatures remain free under this clause to define crimes and fix punishments. Rather what the Double Jeopardy Clause does is limit the discretion of courts and prosecutors.

There are two component parts to this constitutional guarantee. First, it protects a criminal defendant from successive prosecutions for the same offense. In addition, however, the Double Jeopardy Clause prohibits the imposition of multiple punishments on a defendant for a single offense.

Much double jeopardy analysis turns on the definition of an "offense." The Fifth Amendment merely guarantees that no person shall be placed twice in jeopardy "for the same offense." It in no way prohibits successive prosecution or multiple punishment of a defendant for different offenses. Moreover, statutory crimes need not be identical to constitute "the same offense" for double jeopardy purposes. Rather, under the Double Jeopardy Clause cumulative punishment of two crimes is appropriate only when each offense requires proof of a fact which the other does not. Blockburger v. United States, 284 U.S. 299 (1932). In other words, the Double Jeopardy Clause forbids successive prosecutions or multiple punishment when proof of one offense necessarily involves proof of all of the elements of a second offense. This rule effectively prohibits successive prosecution or multiple

49/ U.S. CONST. amend. V

punishment of greater and lesser included offenses. Brown v. Ohio, 432 U.S. 161 (1977).

Double jeopardy questions often arise in §848 prosecutions. The recurrence of these questions is hardly surprising. In part they are a product of the text of the Act itself. Section 848, by its express terms, requires proof of a series of felony violations of federal narcotics law as part of the proof of a continuing criminal enterprise. 21 U.S.C. §848(b)(1) and (2). Moreover, the Act requires a showing that the defendant has acted "in concert" with others. 21 U.S.C. §848(b)(2)(A). These provisions of the Act raise questions regarding whether conspiracy or substantive federal narcotics violations are lesser included offenses of §848.

The relationship between these offenses, and the double jeopardy implications of this relationship, were discussed in Jeffers v. United States, 432 U.S. 137 (1977). Jeffers involved the prosecution of a drug distribution network in Gary, Indiana. The petitioner, Garland Jeffers, was charged in two separate indictments with conspiracy to import heroin in violation of 21 U.S.C. §846 and operating a continuing criminal enterprise in violation of 21 U.S.C. §848. Prior to trial the United States moved to join these two indictments in a single proceeding. The defendants opposed this motion, arguing that joinder of these offenses would be unduly prejudicial. The district court granted the defendants' request, denied the government's motion to join, and tried these indictments separately.

Jeffers was convicted at each trial and given the maximum possible sentence for each offense. 50/ It was further ordered that these two sentences run consecutively. Thus, at the conclusion of these two trials, Jeffers faced punishment in the form of life imprisonment without parole and fines totalling $125,000.

On appeal Jeffers argued that consecutive prosecution of this §846 conspiracy and the §848 continuing criminal enterprise violated the prohibition against double jeopardy because conspiracy was a lesser included offense of §848.

Justice Blackmun's plurality opinion did not ultimately reach this question. In the view of the plurality, Jeffers waived any double jeopardy claim he might have possessed when he elected to proceed with separate trials. Id. at 152. It is clear, however, from both the plurality opinion and the dissent of Justice Stevens that at least eight members of the Court construed §848(b)(2)(A) as requiring proof of an agreement between the defendant and others. Construed in this way, a §846 conspiracy is a lesser included offense of §848. Thus successive prosecutions of a single offense under both statutes would offend the Double Jeopardy Clause.

50/ For the §846 conspiracy Jeffers was sentenced to 15 years imprisonment; 3 years of special parole; and was ordered to pay a $25,000, fine. For the §848 conviction Jeffers was sentenced to life imprisonment without parole and was fined $100,000.

The Court then went on to consider the question of cumulative punishment. At the outset the Court considered whether Congress intended to punish §846 and §848 violations cumulatively. After reviewing the text of the Act and its legislative history, the Court concluded that the penalty structure contained in §848 was comprehensive and left no room for pyramiding penalties from other sections of the Act. Thus the court held that Congress did not intend to permit cumulative penalties for violations of §848 and other provisions of the Act. Having reached this conclusion, the Court did not determine whether such cumulative penalties violated the Double Jeopardy Clause.

Following Jeffers, courts have generally been in accord that conspiracy is a lesser included offense of a §848 continuing criminal enterprise. 51/ They have also followed Jeffers in holding that Congress did not intend to permit cumulative punishment under §848 and other provisions of the Comprehensive Drug Abuse Prevention and Control Act. 52/ Therefore, these cases have generally prohibited successive prosecution or cumulative punishment of defendants under §848 and other provisions of the federal narcotics law when these criminal activities have arisen out of a single criminal enterprise. 53/

51/ United States v. Johnson, 575 F.2d at 1354; United States v. Michel, 588 F.2d at 1001; United States v. Stricklin, 591 F.2d at 1123-24; see also, United States v. Webster, 639 F.2d at 182.
52/ See United States v. Chagra, 669 F.2d at 261-62.
53/ See footnotes 51 and 52, supra

For the most part these courts have not distinguished between conspiracy and substantive drug offenses in conducting this double jeopardy analysis. In fact, at least one court has expressly extended Jeffers to substantive acts committed as part of a continuing criminal enterprise. In United States v. Middleton, 673 F.2d 31 (1st Cir. 1982) the Court of Appeals held that these substantive acts were lesser included offenses of §848. Therefore the court barred successive prosecutions of a defendant for a §848 violation and a substantive offense which could have served as a predicate act in the §848 prosecution.

There are several reasons why this result seems incorrect. Jeffers itself does not compel this conclusion. Jeffers dealt with the relationship between §846 (conspiracy) and §848. According to Jeffers, the "concerted action" requirement of §848 makes conspiracy a necessary element in every continuing criminal enterprise prosecution and precludes cumulative punishment under both statutes.

Construed in this way, a continuing criminal enterprise is nothing more than a specific type of conspiracy. As a general rule prosecution of both a conspiracy and the substantive offenses committed as part of that conspiracy is permitted under the Double Jeopardy Clause. See e.g., Gusikoff v. United States, 620 F.2d 459 (5th Cir. 1980); United States v. Chases, 558 F.2d 912 (9th Cir.), cert.denied, 434 U.S. 1036 (1977). If, as Jeffers implies, a continuing criminal enterprise is simply one form of conspiracy, then cumulative punishment for operating the enterprise and committing substantive offenses should be allowed under the Double Jeopardy Clause.

In reaching a contrary conclusion, the Court in Middleton emphasized that these substantive offenses "serve as predicates for a conviction under §848." United States v. Middleton, 673 F.2d at 33. Admittedly, a §848 prosecution involves proof of a "continuing series of violations" of federal narcotics laws. A "continuing series" is usually demonstrated by proof of three or more substantive offenses. However, the fact that these substantive offenses serve as predicates to a §848 prosecution does not necessarily lead to the conclusion that double jeopardy prohibits separate punishment of them. See generally, United States v. Lurz, 666 F.2d 69 (4th Cir. 1981), cert. denied, U.S. 102 S.Ct. 1642 (1982), (use of a prior conviction to prove a predicate offense does not violate double jeopardy).

A useful analogy can be drawn here to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et. seq (RICO). Like §848, RICO requires proof of several predicate crimes as part of any prosecution. Yet it is clear that cumulative punishment of these underlying predicates and the RICO violation does not violate double jeopardy. See United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981) and cases cited therein. If such cumulative punishment is permitted under RICO, there seems little reason why it should be proscribed by §848.

Similarly, Jeffers should not be read to mean that trial of a defendant for conspiracy to import or distribute drugs in all cases bars subsequent trial and punishment under §848. Nor does it mean that trial of a defendant for operating a continuing criminal enterprise insulates that defendant from any subsequent prosecution for substantive narcotics offenses. Quite the

contrary, several cases have conceded that the Double Jeopardy Clause does not bar successive narcotics prosecutions when those prosecutions are based on factually distinct criminal conduct. As the United States Court of Appeals for the Fifth Circuit stated in United States v. Stricklin, 591 F.2d 1112, 1124 (5th Cir.), cert.denied, 444 U.S. 963 (1979) "[t]he attachment of jeopardy to one conspiracy count under §846 does not insulate a defendant from prosecution for conducting a continuing criminal enterprise in violation of §848 if the government has evidence of a separate conspiracy with which to satisfy the 'in concert' element of §848."

This conclusion was echoed by the First Circuit Court of Appeals in United States v. Chagra, 653 F.2d 26 (1st Cir. 1981), cert.denied, U.S. , 102 S.Ct. 1252 (1982). In Chagra the defendant had been convicted of operating a continuing criminal enterprise in the Western District of Texas. The defendant was subsequently indicted on charges of conspiracy to import marihuana into Massachusetts. While these two criminal enterprises took place during the same period of time, the actions and parties involved in the Texas prosecution differed from those named in the Massachusetts indictment.

The defendant contended that prosecution of this Massachusetts conspiracy charge would violate double jeopardy, because this contemporaneous conspiracy was a lesser included offense of the continuing criminal enterprise.

The Court of Appeals disagreed, holding that the two prosecutions did not involve "the same offense." The court noted that the transactions at issue were factually distinct; that the

Massachusetts violations were not used at the Texas trial; and that there was no evidence that the charges were deliberately separated in order to give the government a second opportunity to prosecute the defendant. Given these facts, the court concluded that a second prosecution would not violate the policies underlying the Double Jeopardy Clause.

Accordingly Chagra and Stricklin indicate that the United States may conduct successive prosecutions of a §848 defendant, without offending the Double Jeopardy Clause, when it demonstrates that those prosecutions involve factually distinct conduct. The burden of proving that the conduct was not part of a prior narcotics prosecution rests on the United States, however. United States v. Middleton, 673 F.2d 31 (1st Cir. 1982).

Finally when considering double jeopardy problems in the context of §848 prosecutions it is important to keep in mind the definition of lesser included offenses. Double jeopardy questions only arise when proof of one charge necessarily demands proof of all of the elements of another offense. The Double Jeopardy Clause does not, however, bar the United States from charging a defendant with several distinct criminal violations arising out of a single narcotics trafficking scheme. For example, in United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert.denied, U.S. , 102 S.Ct. 2965 (1982) several defendants argued that a prior conviction for aiding and abetting in the importation of marihuana barred a subsequent §848 prosecution arising out of the same transaction. The court

rejected this argument, holding that a charge of aiding and abetting was not a lesser included offense of §848. The fact that each offense arose out of the same transaction was, in the court's view, irrelevant. As long as each charge required proof of some element distinct from the other, the Double Jeopardy Clause was not offended by successive prosecutions. Id. at 1009-10.

The Phillips court reached the same conclusion with respect to the defendants' argument that RICO charges, 18 U.S.C. §1962, were lesser included offenses of 21 U.S.C. §848. Since each statutory offense required proof of a fact that the other did not, cumulative punishment for both RICO and continuing criminal enterprise charges did not violate the Fifth Amendment. Id. at 1013.

D. Sentencing Issues

One unique feature of the sentencing scheme established by 21 U.S.C. §848 can be found at subsection (c) of that Act. This subsection provides that: "in the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207) shall not apply." This subsection of the Act has the effect of denying any defendant convicted under §848 release from imprisonment prior to the expiration of his sentence.

This feature of the Act, which effectively denies convicted defendants any possibility of parole, has been challenged on both statutory and constitutional grounds. To date, however, no court has struck down this aspect of §848's sentencing scheme.

Constitutional challenges to this punitive scheme have proceeded on two distinct theories. Defendants have argued that this absolute bar on parole either violates the Equal Protection Clause or constitutes "cruel and unusual" punishment prohibited by the Eighth Amendment. See United States v. Bergdoll, 412 F.Supp. at 1313-14; United States v. Collier, 358 F.Supp. 1356-57. The gravamen of these two constitutional challenges is essentially the same. Each of these challenges is premised on the idea that an absolute bar on parole in some way offends the constitution.

Yet it is clear that there is no constitutional right to parole. Rather parole is entirely contingent upon either the grace of the restraining authority or some specific statutory entitlement. United States v. Chagra, 669 F.2d at 264. Accordingly, every court which has considered these constitutional claims has, quite correctly, rejected them summarily. United States v. Bergdoll, 412 F.Supp. at 1314; United States v. Collier, 358 F.Supp at 1356-57.

Recognizing the weakness of these constitutional challenges, a number of defendants have elected to contest §848(c)'s prohibition of parole on statutory grounds. Section 848(c), which was enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act, specifically provides that "[i]n the

case of any sentence imposed under this section . . . section 4202 of Title 18 . . . shall not apply." At the time of the enactment of §848(c), 18 U.S.C. §4202 governed the eligibility of prisoners for parole. Thus, this reference in §848(c) had the effect of denying parole to those convicted under the continuing criminal enterprise statute.

In 1976, however, 18 U.S.C. §4202 was repealed as part of a recodification of federal parole laws. The provisions of §4202 were then recodified as part of 18 U.S.C. §4205. The text of 21 U.S.C. §848 remained unchanged, however.

Therefore, the 1976 recodification of the Parole Act led to an inconsistency in the text of §848(c). Seizing upon this inconsistency several defendants have argued that the 1976 repeal of 18 U.S.C. §4202 implicitly repealed §848(c) as well. See United States v. Chagra, 669 F.2d at 262-66; United States v. Valenzuela, 646 F.2d 352, 354 (9th Cir. 1980).

No court has accepted this argument. Instead the courts have consistently concluded that "Congress' failure to modify §848(c) when enacting the 1976 Parole Act was simply an accidental oversight of no consequence." United States v. Chagra, 669 F.2d at 263. 54/ This conclusion seems almost certainly correct. The legislative history of §848 evinces a clear Congressional intent to deter narcotics trafficking. In order to achieve this objective Congress imposed severe sanctions for any violation of the Act. One part of this punitive scheme was a

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54/ Johnson v. Williford, 682 F.2d 868 (9th Cir. 1982); United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1980)

prohibition on parole for those convicted of operating a continuing criminal enterprise.

Congress did not choose to repeal this provision of the Continuing Criminal Enterprise Act when it recodified the federal parole laws. Moreover, in recodifying these Parole provisions, Congress specifically indicated that "[n]othing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law". 18 U.S.C. §4205(h). Therefore, it would seem that the prohibition on parole effected by §848(c) remains undisturbed by the recodification of the parole laws. See United States v. Chagra 669 F.2d at 262-66.

One final point should be made on this topic. Section 848(c)'s bar on parole may not, in every case, be absolute. In fact one court has concluded, in an unusual factual situation, that a defendant convicted under §848 may remain free on parole prior to the expiration of his prison sentence.

In Johnson v. Williford, 682 F.2d 868 (9th Cir. 1982), the plaintiff was convicted of operating a continuing criminal enterprise in violation of 21 U.S.C. §848. Following his conviction the plaintiff received a sentence of imprisonment of 15 years. Three years later, after several reviews of his institutional conduct, the Parole Commission released the plaintiff from imprisonment. The Commission took this action despite the fact that a sentence under §848 is clearly not subject to parole. The plaintiff remained on parole for some fifteen months before this error was discovered. Upon discovery

of this error the plaintiff's parole was revoked and he was returned to prison.

Following revocation of his parole, Johnson petitioned for a writ of habeas corpus. This writ was granted by the district court and the United States appealed. On appeal, the judgment of this district court was affirmed. The Court of Appeals concluded that the United States was estopped from enforcing §848(c) by its own misconduct in initially permitting Johnson's release. The court also concluded that, under these circumstances, returning Johnson to prison would violate due process.

Johnson appears to be an aberrational decision in several respects. Undoubtedly it involves an unusual set of facts. Moreover, the Johnson court's application of the equitable doctrine of estoppel seems questionable in several respects. 55/ However to the extent that other courts elect to follow Johnson, defendants in this unique situation will be able to frustrate the policies embodied in 21 U.S.C. §848(c).

55/ The Johnson court indicated that the government could be estopped only if such an estoppel did not threaten the public's interests. In enacting §848 Congress determined that parole for those convicted of operating a continuing criminal enterprise was contrary to the public's best interests. The Johnson court chose to ignore this Congressional determination. Relying instead on the Parole Commission's conclusion that Johnson was no longer a threat to society the court concluded that his continued parole did not harm the public.

Such reliance is particularly ironic since it was the Parole Commission's mistake which lead to Johnson's improper premature release.

V. FORFEITURE UNDER 21 U.S.C. §848

In enacting 21 U.S.C. §848 Congress intended to create a powerful deterrent against large scale narcotics trafficking. In addition Congress adopted §848 with an eye toward providing prosecutors with a multi-faceted tool for proceeding against drug distribution networks. Congress attempted to achieve these goals by providing §848 with a punitive scheme directed against both the criminal enterprise and its individual participants. By arming this Act with severe penalties; including extended terms of imprisonment, heavy fines and a prohibition on parole, Congress intended to both punish and deter individuals engaged in drug trafficking. By providing the Act with a forfeiture provision, Congress took the additional step of stripping the enterprise itself of all illicit profits and property. Criminal forfeiture under 21 U.S.C. §848(a)(2) provides the prosecutor with a new and powerful weapon to be used in combatting large scale narcotics traffickers. Forfeiture denies criminal enterprises use of many of their economic resources; reduces the profit motive behind many drug trafficking schemes; and provides the United States with additional revenues.

Yet, despite its clear benefits, forfeiture has been pursued in relatively few prosecutions. A recent unpublished Department of Justice study indicated that, in 107 RICO and continuing criminal enterprise prosecutions, forfeiture of assets was sought in only 33 cases. 56/

56/ A Ten Year Assessment of the Use of RICO/CCE in Federal Drug Prosecutions at 33 (October 1981)

In the past several years, however, an increasing emphasis has been placed on the forfeiture provisions of the Act. Asset seizures by the United States have increased dramatically. 57/ Investigators and prosecutors have developed new techniques to aggressively pursue illegal narcotics profits. 58/ Forfeiture investigations and prosecutions have assumed a greater sophistication. Thus, criminal forfeiture has begun to assume the significance which Congress intended it to have when §848 was enacted.

Litigation of criminal forfeitures presents a number of legal issues not typically found in criminal prosecutions. For example, the prosecutor must be aware of the fact that a defendant may attempt to frustrate any forfeiture by disposing of assets. To prevent this disposition of these assets the prosecutor may have to seek a restraining order or performance bond. See 21 U.S.C. §848(d). Similarly the prosecutor must tailor his proof to conform with the scope of the forfeiture provision. In this regard questions may arise concerning the forfeitability of assets which are jointly held by the defendant and third parties.

In other instances assets held by the defendant may have been sold or otherwise transferred to third parties. The prosecutor must determine whether these assets are properly subject to forfeiture. The prosecutor must also make some determination regarding the rights of innocent third parties who

57/ See A Ten Year Assessment of the Use of RICO/CCE in Federal Drug Prosecutions, at 44 (Total assets seizures in 1980 of $94,000,000 as compared to $13,000,000 in 1979).
58/ Id. at 44-52.

have purchased these assets. Finally, disposition of forfeited property will often present the prosecutor with a host of questions.

The investigation and litigation of criminal forfeitures under both RICO and the Continuing Criminal Enterprise statutes has been discussed at length in a United States Department of Justice publication entitled, Criminal Forfeitures under the RICO and Continuing Criminal Enterprise Statutes. 59/ This publication canvasses the law in this area, highlighting a wide range of issues which frequently arise in this litigation. It also provides forms for indictments, restraining orders and special verdicts in criminal forfeiture cases. In sum, this publication is an indispensible guide for anyone interested in the litigation of criminal forfeitures.

Because the topic of criminal forfeiture has been thoroughly discussed in a previous Department of Justice publication, we will not review the issues raised by these forfeiture provisions in this monograph. We will instead urge those interested in criminal forfeiture under 21 U.S.C. §848 to obtain a copy of Criminal Forfeitures Under the RICO and Continuing Criminal Enterprise Statutes.

59/ The authors of this publication are David B. Smith Esq., Narcotic and Dangerous Drug Section FTS 724-7123 and Edward C. Weiner, Esq. The current text of this publication was prepared in November, 1980. It is anticipated that a revised text will be published in the Spring of 1983. Those interested in obtaining this text or in discussing problems arising in the area should contact David Smith at FTS 724-7123.

APPENDICES

APPENDIX A: Text of 21 U.S.C. §848.

APPENDIX B: Sample forms of Indictment, including forfeiture paragraphs.

APPENDIX C: Form of motion for restraining order, affidavit and form of order, In the Matter of the Application of the United States for a Restraining Order, Misc. No. 1435 (District of Arizona, 1982).

APPENDIX D: Sample form of Jury Instruction on issue of guilt.

APPENDIX E: Jury instructions regarding forfeiture of assets and special verdict form, United States v. Bradford F. Burt, No. CR 80-36-R (Central District of California 1980).

APPENDIX F: Judgment of forfeiture, United States v. Bradford F. Burt, No. CR 80-36-R (Central District of California 1980).

APPENDIX G: Table of Cases.

APPENDIX A

§848. Continuing criminal enterprise
Penalties; forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States--

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, 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 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.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

Jurisdiction of courts

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

APPENDIX B

COUNT I

That from in or about the month of January, 1976, and continiung thereafter up to and including the date of the filing of this indictment, in the Northern District of Florida and in divers other districts,

JOHN DOE,

defendant herein, unlawfully, willfully, knowingly and intentionally did engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 841(a)(1), 843(b), 846, 952 and 963, which violations were part of a continuing series of violations of said statutes undertaken by said defendant in concert with at least five other persons, with respect to whom the defendant occupied a position of organizer, supervisor, or manager, and from which continuing series of violations the defendant obtained substantial income and resources to which the United States is entitled for forfeiture, including all profits obtained by the defendant, JOHN DOE, arising from his participation in this enterprise, and any of his interest, property, and contractual rights of any kind affording a source of influence over this enterprise, including but not limited to a yacht described and identified as the "Sun Chaser III," in violation of Title 21, United States Code, Section 848.

COUNT

Beginning in or about the month of November, 1976, and continuing thereafter through in or about May, 1980, in the Middle District of Florida and elsewhere,

JOHN SMITH

MARY SMITH

DAVID ROE

defendants herein, knowingly and intentionally did engage in a continuing criminal enterprise in that they did violate Title 21, United States Code, Sections 841, 846 and 952 which violations were part of a continuing series of violations of said statutes undertaken by the said defendants in concert with a least five other persons, with respect to whom each defendant occupied a position of organizer, supervisor, or manager, which violations include three or more of the violations set forth in Counts 1 through 16 of this indictment, and from which continuing series of violations the defendants obtained substantial income or resources, in violation of Title 21, United Staes Code, Section 848.

FORFEITURE

Upon conviction of defendant JOHN SMITH, of engaging in a continuing criminal enterprise as set forth in this Count (Count), in violation of Title 18, United States Code, Section 848, the United States is entitled to forfeiture of, and the defendant will forfeit to the United States all profits and proceeds of profits obtained by him in such enterprise, and shall forfeit his interest in, claim against, any and all property and contractual rights of any kind affording a source of influence over such enterprise, including but not limited to the following described property, profits and proceeds of profits, interest, claims, and contractual right of JOHN SMITH, to wit:

A 1973 Towncraft housetrailer, 12' x 52', Serial Number 1536, located at Duclay Mobile Home Park, Blanding Boulevard, Jacksonville, Florida.

Any stock, financial, or other ownership interest of JOHN SMITH in Marlborough Mortgage, Ltd., Grand Turk, Turks and Caicos Islands, British West Indies.

Any stock, financial or other ownership interest of JOHN SMITH in Canadian Tire, Ltd.

All assets, including, but not limited to real property, personalty, and money of the following businesses: Sunshine Center Carwash and Laundry, Jacksonville, Florida; Sunshine Service Station, Jacksonville, Florida; and Sunshine Paint Company, Jacksonville, Florida.

APPENDIX C

A. MELVIN McDONALD
United States Attorney
District of Arizona

BILLIE A. ROSEN
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Phoenix, Arizona 85025
Telephone: (602) 261-3953

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR A RESTRAINING ORDER FOR 6121 EAST CALLE TUBERIA, PHOENIX, ARIZONA; 4902 EAST TIERRA BUENA, PHOENIX, ARIZONA; BUSH WACKER'S INC. dba BUSHWACKER'S HAIR SALON, 6768 DOUGLAS AVENUE, DES MOINES, IOWA; 1205 NORTH 48th STREET, PHOENIX, ARIZONA; LOT 232 PLAT 5, TOWN AND COUNTRY SUBDIVISION RECORDS OF MILLER COUNTY, MISSOURI; and LOT F UNIT 1, BLOCK 1, TRES PIEDRES, RECORDS OF TAOS COUNTY, NEW MEXICO	MISC. NO. 1435 GOVERNMENT'S MOTION FOR RESTRAINING ORDER

The United States of America, by and through its Attorneys undersigned, moves this Honorable Court pursuant to Section 848(d) of Title 21, United States Code, and Section 1651 of Title 28, United States Code for:

1. The entry of an Order enjoining, prohibiting, and restraining for a period of ninety (90) days Ronald Eugene Cunningham, Ellie Faria (Cunningham), Lexter Michael Kehoe, Kelly

Darlene Kehoe, Rolla Maxwell Bishop, Kenneth Joseph Rodgers, William Chenosky, and Marty Crowder, their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, from selling, assigning, pledging, distributing, encumbering, or otherwise disposing of, or removing from the jurisdiction of this Court or removing from any checking or savings account or safe deposit box, all or any part of their interest, direct or indirect, in the following property without prior approval of this Court upon notice to the United States and an opportunity for the United States to be heard, except as otherwise provided:

6121 East Calle Tuberia
Phoenix, Arizona
Further described as Lot 65, Jokake Villa Unit Three, according to Book 91 of Maps, page 26, records of Maricopa County, State of Arizona, including but not limited to all buildings, structures, fixtures, furnishings, and appurtenances.

4902 East Tierra Buena
Phoenix, Arizona
Further described as Lot 412, Roadrunner Estates East Unit Five, according to Book 199 of Maps, page 42, records of Maricopa County, State of Arizona, including but not limited to all buildings, structures, fixtures, furnishings, and appurtenances.

Bushwacker's Inc., d/b/a Bushwacker's Hair Salon
6768 Douglas Avenue
Des Moines, Iowa
Including but not limited to equipment, machines, and devices, vehicles, furniture, contracts, accounts receivable, shares of stock or other evidence of ownership or interest in such property, or any entity

having any right, title or interest in such property.

1205 North 48th Street
Phoenix, Arizona
Further described as Lot 7, Delano Place, according to Book 11 of Maps, page 26, records of Maricopa County, State of Arizona, including but not limited to all buildings, structures, fixtures, furnishings, and appurtenances.

Lot 232, Plat 5, Town and Country Subdivision, Records of Miller County, State of Missouri.

Lot F, Unit 1, Block 1, Tres Piedres, Records of Taos County, State of New Mexico.

2. That Ronald Eugene Cunningham, Ellie Faria (Cunningham), Lexter Michael Kehoe, Kelly Darlene Kehoe, Rolla Maxwell Bishop, Kenneth Joseph Rodgers, William Chenosky, and Marty Crowder, their agents, servants, employees, attorneys, family members, and those persons in active concert and participation with them be ordered to obtain prior approval of the Court, as described in paragraph 1, supra, except: (1) as to expenditures for the normal business operation of Bushwacker's Inc., d/b/a Bushwacker's Hair Salon, including purchase of supplies and equipment and payments of all business salaries, obligations, notes, and liabilities, in the amount of which said salaries, obligations, notes, and liabilities existed at the date and time of service of this Motion except as to the salary or income of Ronald Eugene Cunningham, if any, from this business, which salary or income shall be placed as accrued in an interest bearing account in a financial institution selected by the Court,

which account shall be in the name of the Clerk of the United States District Clerk for the District of Arizona, for the period of ninety (90) days from the date of this Order; and (2) as to expenditures for the normal and average upkeep and maintenance of the real property set forth in paragraph 1, supra, including gardening, heat, air-conditioning, pool maintenance expenses, and similar expenditures.

3. In support hereof, movant alleges and asserts as follows:

A. This proceeding is an action under Title 21, United States Code, Section 848(d) and Title 18, United States Code, Section 1651.

B. Under Title 21, United States Code, Section 848(d), this Court has jurisdiction to enter such restraining orders or prohibitions as it shall deem proper.

C. Ronald Eugene Cunningham and Lexter Michael Kehoe are currently principal subjects in an on-going investigation into their cocaine trafficking organization.

D. Sufficient evidence has been discovered to date to charge Ronald Eugene Cunningham and Lexter Michael Kehoe with violation of Title 21, United States Code, Section 848, engaging in a continuing criminal enterprise, which statute provides for forfeiture of profits obtained in the continuing criminal enterprise and any interest in, claim against, or property or contractural rights of any kind affording a source of influence over such enterprise.

E. In particular, the United States alleges that the Declaration of Billie A. Rosen, Assistant United States Attorney, District of Arizona, attached hereto and incorporated herein in full, sets forth sufficient facts to demonstrate that the United States is likely to prevail at a trial on the merits in this case.

F. The United States anticipates that the investigation will be completed and that a proposed indictment will be submitted to the Grand Jury within ninety (90) days from the date of this Order.

G. The targets of this investigation, in particular, Ronald Eugene Cunningham and Lexter Michael Kehoe, are aware of the pending investigation and are aware that profits and property obtained in violation of 21 U.S.C., Section 848 may be subject to forfeiture, in that search warrants were executed on February 23, 1982, at 6121 East Calle Tuberia, Phoenix, Arizona (the residence of Ronald Eugene Cunningham) and 4902 East Tierra Buena, Phoenix, Arizona, (the residence of Lexter Michael Kehoe).

H. The United States may suffer irreparable harm if a restraining order is not entered, as set forth in the Declaration of Billie A. Rosen, as Ronald Eugene Cunningham and Lexter Michael Kehoe, and their agents may sell, alienate, encumber, transfer or otherwise place the property beyond forfeitable condition, and are currently attempting to sell, alienate, encumber, transfer or otherwise place the property beyond forfeitable condition, and thereby frustrate the ends of public justice.

WHEREFORE, the United States respectfully prays that this Honorable Court enter such Order.

A. MELVIN McDONALD
United States Attorney
District of Arizona

BILLIE A. ROSEN
Assistant U.S. Attorney

A. MELVIN McDONALD
United States Attorney
District of Arizona

BILLIE A. ROSEN
Assistant United States Attorney
4000 United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025
Telephone: (602) 261-3953

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR A RESTRAINING ORDER FOR 6121 EAST CALLE TUBERIA, PHOENIX, ARIZONA; 4902 EAST TIEPRA BUENA, PHOENIX, ARIZONA; BUSHWACKER'S INC. dba BUSHWACKER'S HAIR SALON, 6768 DOUGLAS AVENUE, DES MOINES, IOWA; 1205 NORTH 48TH STREET, PHOENIX, ARIZONA; LOT 232 PLAT 5, TOWN AND COUNTRY SUBDIVISION, RECORDS OF MILLER COUNTY, MISSOURI; AND LOT F UNIT 1 BLOCK 1, TRES PIEDRES, RECORDS OF TAOS COUNTY, NEW MEXICO.	MISC NO. 1435 EZIC DECLARATION

I, Billie Anita Rosen, being an Assistant United States Attorney, do hereby depose and state:

1. That I have been an Assistant United States Attorney assigned to the District of Arizona for the past three years. I am the principal Assistant United States Attorney assigned to the investigation of Ronald Eugene Cunningham and Lexter Michael Kehoe, et al.

2. That Ronald Eugene Cunningham and Lexter Michael Kehoe have been managing, supervising, and organizing a cocaine distribution organization purchasing and financing the purchase of kilogram and multi-kilogram quantities of cocaine in Florida and elsewhere since at least 1979.

3. That Ronald Eugene Cunningham and Lexter Michael Kehoe arranged for the distribution of and distributed this cocaine in Arizona, Iowa, and elsewhere.

4. That witnesses have stated and provided specific examples that Ronald Eugene Cunningham and Lexter Michael Kehoe demonstrated supervision, management, and/or organization over at least five other members of this cocaine distribution organization, including, but not limited to:

a. Richard Castro

b. John Buckroyd

c. Reuel Couch

d. Ronald Wood

e. Thomas Allegretto

f. Michael Paul Wedeking

g. James Davis

5. That the investigation, including but not limited to, review of business records and the results of the execution of search warrants on February 23, 1982, at 6121 East Calle Tuberia, Phoenix, Arizona; 4902 East Tierra Buena, Phoenix, Arizona; 6801 East Camelback #A201, Scottsdale, Arizona; and 7500 East Pleasant

Run, Scottsdale, Arizona, has revealed that Ronald E. Cunningham and Lexter Michael Kehoe have purchased the following assets utilizing monies gained from the sale of cocaine:

a. On November 4, 1979, a 1971 Mercedes Benz, purchased with $11,700.00 cash in Kansas City, Missouri. This vehicle was placed in a nominee's name by Cunningham.

b. On May 23, 1980, Ronald E. Cunningham purchased 6121 East Calle Tuberia, Phoenix, Arizona. The residence originally was purchased under a nominee owner. In January, 1982, the residence was deeded from the nominee to Cunningham. The original purchase price was $151,000.00 and the down payment paid by Cunningham included the 1971 Mercedes Benz valued at $15,000.00 and an additional $13,000.00 cash.

c. On July 28, 1980, Ronald E. Cunningham purchased a 1980 Porsche 911 Targa from Des Moines, Iowa, Mazda. Cunningham traded a 1977 Mercedes Benz and paid a balance of about $17,000.00 in cash. The trade-in was purchased by Cunningham from Chris Clark, Des Moines, Iowa. The 1980 Porsche was registered under nominee ownership.

d. On May 4, 1981, Ronald Cunningham purchased Bushwackers, Inc. in Des Moines, Iowa. Cunningham paid $5,000.00 cash.

e. On June 15, 1981, Lexter Michael Kehoe purchased a 1981 Audi 5000. Kehoe paid $16,102.46. Kehoe had the vehicle registered by a nominee.

f. On June 8, 1981, Cunningham purchased a 1981 Porsche 911 S.C. Targa for $36,351.20. The car was purchased through Scottsdale Porsche Audi and registered in a nominee owner's name.

g. On June 23, 1981, Cunningham purchased a 1981 Audi 5000 from Scottsdale Porsche Audi, Scottsdale, Arizona. Cunningham paid $21,725.90 for the vehicle and placed the vehicle under nominee registration.

h. On July 23, 1981, Cunningham purchased a 1981 Porsche 911 Targa from Bob Lewis Porsche Audi in Tucson, Arizona. Cunningham traded in the 1981 Audi and paid a balance of $19,000.00 in cash.

i. During this period, Kehoe purchased from Cunningham the 1981 Porsche 911 S.C. Targa purchased by Cunningham on June 8, 1981, for an undetermined amount of cash and assumption of the note. The vehicle was again registered in a nominee's name.

j. On August 24, 1981, Cunningham paid $16,000.00 for a 1981 BMW 320i. The vehicle was purchased from Linda BMW in Scottsdale, Arizona.

k. On September 18, 1981, Cunningham purchased a 1981 Ferrari 308 GTSi from Grand Touring Cars LTD in Scottsdale, Arizona. Cunningham paid $26,437.55 in cash and traded the 1981 Porsche 911 Targa purchased in Tucson, Arizona.

l. In November, 1981, Kehoe purchased 4902 East Tierra Buena, Phoenix, Arizona, for $88,500.00.

m. In January, 1982, Cunningham traded the 1981 Ferrari for property at 1205 North 48th Street, Phoenix, Arizona, a lot in Taos County, New Mexico, and a lot in Miller County, Missouri.

6. Statements from witnesses have revealed that Ronald Cunningham and Lexter Kehoe purchased and resold at least one kilogram of cocaine every three to four weeks between late 1979 and January, 1982. Kehoe and Cunningham sold their cocaine for $1,650.00 to $2,200.00 per ounce, as current prices and quality dictated. The average gross profit per kilogram was approximately $100,000.00. This would mean average gross profit of $1,500,000.00 per year.

7. Internal Revenue Service records indicate Ronald Cunningham has not filed income tax returns for the prior five years. Investigation reveals that all of Cunningham's assets purchased since late 1979 have been purchased with drug proceeds. Cunningham has had no known legitimate employment since at least prior to late 1979. Internal Revenue Service records indicate Kehoe has not filed a tax return for 1980. IRS records indicate Kehoe has filed returns indicative of taxable income of only $13,506.00 for 1978 and only $15,944.00 for 1979. Kehoe has had no known legitimate employment since at least late 1979.

8. Investigation has also revealed that Ronald Cunningham has cash available in his home, checking account, and savings account in the amount of $42,530.00. Cunningham has expensive

jewelry appraised at about $12,000.00. Kehoe has jewelry appraised at about $5,000.00.

9. The investigation has revealed that Ronald Eugene Cunningham and Lexter Michael Kehoe are attempting to liquidate their assets to avoid confiscation by the United States government. Cunningham has reduced the asking price on his residence from $239,900.00 to $173,000.00 and is attempting to sell the six-unit investment property, employing subterfuge in advertising to enhance the possibility of a quick sale. Lexter Michael Kehoe has quick claim deeded his residence to the realtor who was involved in the nominee purchase of Cunningham's residence and instructed the realtor to sell the property. The realtors involved are the same utilized by Cunningham and Kehoe for the purchase/attempted sale of all real property identified to date. Since the execution of the search warrants on February 23, 1982, Kehoe has moved to Des Moines, Iowa.

BILLIE A. ROSEN
Assistant U.S. Attorney

SUBSCRIBED and sworn to before me this 17th day of March, 1982.

Notary Public

My Commission Expires:
My Commission Expires Jan. 23, 1985

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR A RESTRAINING ORDER FOR 6121 EAST CALLE TUBERIA, PHOENIX, ARIZONA; 4902 EAST TIERRA BUENA, PHOENIX, ARIZONA; BUSHWACKER'S INC. dba BUSHWACKER'S HAIR SALON, 6768 DOUGLAS AVENUE, DES MOINES, IOWA; 1205 NORTH 48th STREET PHOENIX, ARIZONA; LOT 232 PLAT 5, TOWN AND COUNTRY SUBDIVISION RECORDS OF MILLER COUNTY, MISSOURI; and LOT F UNIT 1 BLOCK 1, TRES PIEDRES, RECORDS OF TAOS COUNTY, NEW MEXICO	MISC. NO. 1435 EHC ORDER

This matter having come before the Court on Motion of the United States of America for a temporary restraining order pursuant to Sections 848(a) and (d) of Title 21, United States Code, which provides for jurisdiction to enter restraining orders and take such other actions as the Court shall deem necessary in connection with any property or other interest subject to forfeiture pursuant to Section 848(a)(2) of Title 21, United

States Code and considering the Declaration of Billie A. Rosen, Assistant United States Attorney, District of Arizona;

This Court finds that, if this Court fails to enter this Order as prayed for by the United States, that Ronald Eugene Cunningham and Lexter Michael Kehoe, and their agents, servants, employees, attorneys, and those in active concert or participation with them, might place certain property beyond the jurisdiction of this Court or otherwise detrimentally affect the Government's interest in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States by defeating the jurisdiction of this Court over such property.

This Court further finds that the United States has alleged sufficient facts to conclude that the United States is likely to prevail at a trial on the merits.

IT IS HEREBY ORDERED that Ronald Eugene Cunningham, Ellie Faria (Cunningham), Lexter Michael Kehoe, Kelly Darlene Kehoe, Rolla Maxwell Bishop, Kenneth Joseph Rodgers, William Chenosky, and Marty Crowder, their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby ordered and enjoined from selling, assigning, pledging, distributing, encumbering, or otherwise disposing of, or removing from the jurisdiction of this Court or removing from any checking or savings account or safe deposit box, all or any part of their interest, direct or indirect, without prior approval of this Court upon notice to the

United States and an opportunity for the United States to be heard, except as otherwise provided herein, including all interest in the following property:

6121 East Calle Tuberia
Phoenix, Arizona
Further described as Lot 65, Jokake Villa Unit Three, according to Book 91 of Maps, page 26, records of Maricopa County, State of Arizona, including but not limited to all buildings, structures, fixtures, furnishings, and appurtenances.

4902 East Tierra Buena
Phoenix, Arizona
Further described as Lot 412, Roadrunner Estates East Unit Five, according to Book 199 of Maps, page 42, records of Maricopa County, State of Arizona, including but not limited to all buildings, structures, fixtures, furnishings, and appurtenances.

Bushwacker's Inc., d/b/a Bushwacher's Hair Salon
6768 Douglas Avenue
Des Moines, Iowa
Including but not limited to equipment, machines, and devices, vehicles, furniture, contracts, accounts receivable, shares of stock or other evidence of ownership or interest in such property, or any entity having any right, title or interest in such property.

1205 North 48th Street
Phoenix, Arizona
Further described as Lot 7, Delano Place, according to Book 11 of Maps, page 26, records of Maricopa County, State of Arizona, including but not limited to all buildings, structures, fixtures, furnishings, and appurtenances.

Lot 232, Plat 5, Town and Country Subdivision, Records of Miller County, State of Missouri.

Lot F, Unit 1, Block 1, Tres Piedres, Records of Taos County, State of New Mexico.

IT IS FURTHER ORDERED that prior approval of the Court, is unnecessary only: (1) as to expenditures for the normal business operation of Bushwacker's Inc., d/b/a Bushwacker's Hair Salon, including purchase of supplies and equipment and payments of all business salaries, obligations, notes, and liabilities, in the amount of which said salaries, obligations, notes, and liabilities existed at the date and time of service of this Motion except as to the salary or income of Ronald Eugene Cunningham, if any, from this business, which salary or income shall be placed as accrued in an interest bearing account in a financial institution designated by this Court, that is, The First Interstate Bank

which account shall be in the name of the Clerk of the United States District Court for the District of Arizona, for the period of ninety 90 days from the date of this Order, unless otherwise extended or ordered by this Court; and (2) as to expenditures for the normal and average upkeep and maintenance of the real property set forth above, including gardening, heat, air-conditioning, pool maintenance expenses, and similar expenditures.

IT IS FURTHER ORDERED that this Order shall be effective for a period of ninety (90) days from the date of this Order except that, upon Motion of any of the interested parties named

herein, this Court will set this matter for hearing as to the duration of this Order.

EARL H. CARROLL

UNITED STATED DISTRICT JUDGE

Date: 18 MAR 1982

A TRUE COPY.
Certified this 17 day of [illegible] 19__
W. J. Turnipseed, Clerk
By _____ Deputy Clerk

APPENDIX D

GOVERNMENT'S REQUEST NO. _____

INSTRUCTION ON CONTINUING CRIMINAL ENTERPRISE

COUNT -- Continuing Criminal Enterprise

1. Read Count ____

2. Elements of Offense and Definition of Terms Used

The essential elements of the offense charged in Count II, each of which elements the government must prove by evidence that convinces you beyond a reasonable doubt in order to establish the guilt of the defendant _____, as to such offense, are as follows:

First: That the defendant, _____, committed the so-called conspiracy offense charged in Count _____ or the so-called offense of possessing cocaine with the intent to distribute same, as charged in any of Counts _____, or the so-called offense of distributing cocaine as charged in any of Counts _____ or any combination of these offenses; and

Second: That the violation of any of the offenses charged in the above named counts by the defendant _____ are part of a continuing series of violations by him of the federal narcotics laws; and

Third: That the defendant _____ undertook to commit such a series of offenses in concert with five or more persons; and

Fourth: That the defendant _____ occupied the position of organizer or supervisor or any other position of management with respect to such five or more persons in said undertaking; and

Fifth: That the defendant _____ obtained substantial income or resources from said continuing series of such violations.

I will now discuss in more detail and define for you the meaning of certain terms used in the statute and in these instructions relating to the five elements of the so called "continuing criminal enterprise" offense charged in Count _____.

The first element under this Count is the determination by you beyond a reasonable doubt that defendant _____ _____ is guilty under any of Counts _____ _____ according to the instructions I have previously given you under those Counts. If you determine that defendant _____ is guilty of any of these Counts, you must determine next the second element of Count _____, namely, whether the violation or violations are a part of a continuing series of violations of the federal drug laws.

I charge you that the term "series" generally means "three or more" and that the term "continuing" means, "enduring, subsisting for a definite period or intended to cover or apply to successive, similar occurrences." Thus,

you must find beyond a reasonable doubt that defendant _____ committed three or more successive violations of the federal drug laws, over a definite period of time with a single or substantially similar purpose.

Thus, you must find beyond a reasonable doubt that defendant _____ is guilty as charged in any of Counts _____, and that the conduct charged in any of these counts together with additional violations of the drug laws constituted a total of three or more violations of the federal drug laws committed over a period of time with a single or similar purpose. This will consititute a finding that defendant _____ engaged in a continuing series of violations.

The third requirement is that defendant _____ _____committed these violations in concert with five or more persons. It is not required that the five or more persons be engaged with the defendant _____ in the commission of the continuing series of violations at the same moment or that all five were present at the same time or that all five were present at the same place. It is not required that defendant _____ acted in concert with five or more persons in the commission of any single offense that is one of the series of offenses constituting the continuing criminal enterprise. For purposes of this element, it is sufficient if it is proven that during the course of the commission of the continuing

series of violations, defendant _____ supervised a total of five or more persons.

The fourth requirement is that you find beyond a reasonable doubt that defendant _____ occupied a position of organizer, a supervisory position or any other position of management. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one operation or enterprise. A supervisory position can be defined as meaning one who manages or directs or oversees the activities of others.

The fifth requirement is that the defendant _____ _____ obtained substantial income or resources from the continuing series of violations of the federal drug laws.

The term "substantial" means "of real worth and importance; of considerable value; valuable." [Black's Law Dictionary].

The term "income" can include money or other property received or acquired from the transactions in violation of the drug laws.

Substantial income does not necessarily mean net income. From what I have already said, it would follow that the phrase "substantial income" in this kind of charge should be construed as far as possible in an objective manner. That is, in order to support a conviction under

Count _____ you must find that defendant _____ _____received what any reasonable person would consider to be considerable or ample funds from engaging in a continuing violation of the drug laws.

Put differently it would insufficient to support any conviction here if all you were to determine was that although defendant _____ was guilty of committing a series of violations, he obtained only occasional moderate sums of money from these violations.

APPENDIX E

COURT'S INSTRUCTION NO. _____

GOVERNMENT'S PROPOSED INSTRUCTION NO. _____

Title 21, United States Code, Section 848, the continuing criminal enterprise statute, provides as follows concerning forfeiture:

"(2) Any person who is convicted under [this statute] of engaging in a continuing criminal enterprise shall forfeit to the United States --

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise. "

Title 21, United States Code, Section 848(a)(2).

COURT'S INSTRUCTION NO. _____

GOVERNMENT'S PROPOSED INSTRUCTION NO. _____

Now, members of the jury, in view of your verdict that defendant Bradford J. Burt is guilty of carrying out the continuing criminal enterprise as charged in Count 12, you have one more task to perform. Under the Federal Narcotics Laws, any person who is convicted of violating Title 21, United States Code, Section 848, the Continuing Criminal Enterprise Provision as charged in Count 12 of the Indictment, may be required to forfeit the profits and property obtained by him from his enterprise.

In this case the Government has alleged that certain profits and properties are allegedly owned by the defendant, Bradford J. Burt; and that these profits and property were obtained by him as a result of his illicit continuing narcotics enterprise. The portion of Count 12 alleging these properties is as follows:

[At this time read paragraph 2 of Count 12 to the end.]

These profits and properties are all listed on a form which I will hand to the foreman.

Now, it is your duty, as I have said, to determine what property, if any, that is listed on the special form, shall be forfeited. As to each item you must first determine whether the Government proved beyond a reasonable doubt that Bradford J. Burt owned such property or such interest as the Government alleges.

Your decision must also be unanimous on this point. If you find that the defendant does own such property, then you must next determine whether that property is subject to forfeiture. You must find that a particular item is subject to forfeiture if you unanimously agree that the Government has proved beyond a reasonable

Form OBD-183
2-76 DOJ

doubt either that the property was purchased with profits obtained by Burt from operating the continuing criminal enterprise or that the property is property which gave Burt a source of influence over the enterprise.

If you unanimously agree that a specific item of property is property owned by Burt which was purchased with his profits from operating the continuing criminal enterprise, or is property owned by Burt which gave Burt a source of influence over the enterprise, check the box that is marked "Yes."

If you unanimously agree that an item of property is not of such character, then check the box marked "No."

SPECIAL VERDICT FORM

ITEM 1 ALLEGED SUBJECT TO FORFEITURE:

1. Certain real property vested in the names of Gonzo Corporation located in the County of San Bernardino, California and described as follows:

The west half of the southwest quarter of the southeast quarter of the northeast quarter of section 10 township 9 north rang. 3 west, being five acres more or less. Parcel number 488-081-35 having a property address as 34930 Mountain View, Hinkley, California, and filed in the office at the County Recorder of San Bernardino County, October 9, 1978.

We the jury find Item 1 is subject to forfeiture. YES ☐

NO ☐

ITEM 2 ALLEGED SUBJECT TO FORFEITURE:

2. All assets derived from the divestiture by Bradford J. Burt of the properties known as 860 Panorama Road, Palm Springs, California, specifically, $47,322.97 that was the partial proceeds from the sale of the Panorama Property on June 28, 1979 and which was returned to defendant Bradford J. Burt by his attorney Gary Scherotter by two checks dated June 29, 1979 payable to Bradford J. Burt. These properties are further legally described as:

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Form CSD-183
12-8-76 DOJ

PARCEL 1:

Lot 15 of Little Tuscanny, unit #2, as shown by map of file in book 19, page 28 of maps, Riverside County records.

PARCEL 2:

That portion of the southwest quarter of section 3, township 4 south, range 4 east, San Bernardino base and meridian as shown by U. S. Government survey described as follows:

Beginning at the southwest corner of lot 14 of Little Tuscanny as shown my map of file in book 18, page 96 of maps, Riverside County records;

Thence westerly on the northerly line of Panorama Road, as shown on said map, 217.14 feet to the southeast corner of lot 15 of Little Tuscanny no. 2, as shown by map on file in book 19, page 28 of maps;

Thence northerly along the easterly line of said lot 15, 221.23 feet to the northeast corner of said lot 15, said point being the southwest corner of the parcel of land conveyed to Frank C. Adams and Anna V. Adams by deed recorded March 6, 1937 in book 312, page 565 of official records;

Thence south 81° 53' east on the southerly line of said parcel so conveyed, 283. 58 feet to a point on the westerly line of said lot 14;

Thence southerly on the westerly line of said lot 14 to the true point of beginning.

We the jury find Item 2 subject to forfeiture. YES ☐

NO ☐

FOREMAN

Form OBD-183
12-4-76 DOJ

APPENDIX F

ANDREA SHERIDAN ORDIN
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division
KATHLEEN P. MARCH
Assistant United States Attorney
1400 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-6681

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRADFORD J. BURT, aka Brad Burton, aka Bob Davis, Defendant.	NO. CR 80-36-R ORDER OF FORFEITURE

WHEREAS, in the Indictment in the above-entitled case, plaintiff sought forfeiture to the United States of America of specific property of the defendant Bradford J. Burt, also known as Brad Burton and Bob Davis, pursuant to 21 U.S.C. §848;

AND WHEREAS, on May 6, 1980, the jury returned special verdicts of forfeiture as to all such property, more specifically described in Count Twelve of said Indictment;

AND WHEREAS, by virtue of said special verdicts, the United States is now entitled to, and it should, pending possible appeal herein, reduce the said property to its possession and/or to notify any and all potential purchasers and transferees thereof of its interest therein;

VJL:mid

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the title and interest to all of the hereinafter described property, whether real, personal and/or mixed, of the defendant Bradford J. Burt, also known as Brad Burton and Bob Davis, be, and it is hereby vested in the United States of America, and shall be safely held by the United States, and not be alienated, sold or converted pending possible appeal herein and further Order of this Court.

2. That a copy of this Order may be recorded in every County in which any of the hereinafter described real property is located and, when recorded, shall be notice to any potential trasferee or transferees of the interest of the United States of America therein.

3. That a copy of this Order may be recorded or lodged in the Office of the Secretary of State, State of California, and, when recorded, or lodged, shall be notice to any potential transferee or transferees of the interest of the United States of America in the furniture, fixtures and equipment, located at 34930 Mountain View Road, Hinkley, California.

4. That the property which is the subject of this Order is as follows:

That certain real property vested in the names of Gonzo Corporation/Brad Burton, located in the County of San Bernardino, California and described as follows:

The west half of the southwest quarter of the southeast quarter of the northeast quarter of section 10 township 9 north rang. 3 west, being five acres more or less. Parcel number 488-081-35 having a property address as 34930 Mountain View, Hinkley, California, and

filed in the office at the County Recorder of San Bernardino county, October 9, 1978.

DATED: This 27 day of May, 1980.

MANUEL L. REAL

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ANDREA SHERIDAN ORDIN
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

Kathleen P. March by [illegible]
KATHLEEN P. MARCH
Assistant United States Attorney

Form CSD-183
12-8-76 DOJ

TABLE OF CASES

Acknowledgment

We wish to gratefully acknowledge the encouragement and assistance which we received from the entire staff of the Narcotic and Dangerous Drug Section during the preparation of this monograph. We wish to particularly acknowledge the assistance of Dana Biehl, who first proposed that a Section 848 monograph be prepared; Edward S.G. Dennis, Jr., who sponsored the project from its inception; and David Smith, Gary Schneider and Amy Rudnick, who reviewed this document and provided valuable editorial suggestions.

We also wish to thank Annabelle Noaker and Maria Nicholson for their tireless efforts on the preparation of this monograph.

NOTE

This monograph is designed to provide attorneys in the field with practical information regarding the Continuing Criminal Enterprise Statute, 21 U.S.C. §848. Any views expressed herein are solely those of the authors. This monograph is not intended to create or confer any rights, privileges or benefits on any parties. Nor is it intended to have the force of law or of United States Department of Justice directive. See United States v. Caceres, 440 U.S. 741 (1979).

Fifth Circuit

Court of Appeals

District Court