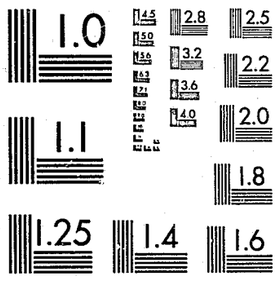

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Criminal prosecution of drug traffickers under the continuing criminal enterprise statute in federal courts of the United States of America*

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ABSTRACT

The continuing criminal enterprise statute, 21 United States Code 848, which was enacted in 1970 to deal, *inter alia*, with suppression of illicit traffic in drugs, contains a mandatory minimum sentencing provision of not less than 10 years and up to life imprisonment following conviction. It also contains a provision to seek forfeiture of the profits obtained by the defendant from the criminal enterprise. When drug-trafficking organizations move their finances abroad, it becomes difficult to identify assets in order to seek forfeiture. Therefore, the successful prosecution of major drug traffickers, under this statute, requires the co-operation of the institutions concerned and of courts in other countries in order to obtain the necessary evidence. Such co-operation is facilitated by a bilateral mutual judicial assistance treaty, when it exists.

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Introduction

In this article is discussed the continuing criminal enterprise statute, 21 United States Code (U.S.C.) 848, which is the most important federal criminal statute in the United States of America directed at illegal drug traffickers and their organizations. The statute was enacted in 1970 as part of a comprehensive legislative scheme to deal with drug abuse prevention and control. It is the only statute in the federal drug laws that contains a mandatory minimum sentencing provision of not less than 10 years and up to life imprisonment following conviction. A number of convicted persons are currently serving life sentences under this statute.

The continuing criminal enterprise statute also contains a provision enabling the United States to seek forfeiture of the profits obtained by the

* This paper was published in the United States in a more extensive format, with appropriate citation to legal authorities and appendix of forms, as a monograph for prosecutors of federal criminal cases. With several exceptions, the citations to legal authorities in the United States have been deleted for this publication.

defendant from the criminal enterprise and the defendant's interest in the enterprise. As drug-trafficking organizations move their finances out of the United States to other countries – either to launder those funds and thereby hide their financial interest, or to invest the funds in assets out of the United States – it becomes increasingly difficult for prosecutors and investigators to identify assets in order to seek forfeiture as part of the criminal case. As a result, it has become necessary for prosecutors to seek the co-operation of private institutions and the courts in other countries to obtain evidence of violations of the laws of the United States.

In the past, prosecutors have relied on the letters rogatory process as the vehicle for requesting assistance from the courts in other countries. Because of the need to obtain evidence from abroad prior to seeking indictment, however, prosecutors prefer to utilize provisions of a bilateral mutual judicial assistance treaty when such an agreement is in force between the United States and the other country. The treaty agreement process is not only more efficient but also attentive to the evidentiary requirements of prosecution in the requesting state. Greater exchange of evidence in these investigations will enable more successful prosecutions of major drug traffickers under this statute.

I. Legislative history of the continuing criminal enterprise statute

The continuing criminal enterprise statute, 21 U.S.C. section 848, was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (hereinafter referred to as the Act). The statute is directed at any person who "occupies a position of organizer, a supervisory position, or any other position of management" in a drug-producing and drug-distributing enterprise, and provides for one of the most severe penalties of any federal criminal statute currently in force. Under the Act, convicted offenders must be sentenced to a minimum of 10 years' imprisonment with no possibility of parole. In addition, the court may impose a life sentence without parole and fines totalling $US 100,000.[1] Moreover, all profits and assets that have afforded the defendant a source of influence over the illegal enterprise are subject to forfeiture.

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 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

[1] All dollars referred to are United States dollars.

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 15 July 1932 (D.C. Code, sections 24-203 to 24-207, shall not apply".

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

"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."

The expansive reach of the forfeiture provision of section 848 *(a)* (2) 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. 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. In total, section 848 and its legislative history embody a clear congressional mandate to deter and eradicate major illicit distribution operations of controlled substances in the United States.

II. Elements of the offence

In determining whether a prospective defendant should be indicted for engaging in a continuing criminal enterprise, the facts of the investigation should be analysed carefully to determine whether the elements of the statute have been met. 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 21 U.S.C. section 848 prosecution. First, the defendant's conduct must constitute a felony violation of the federal drug laws (848 *(b)* (1)). Secondly, that conduct must take place as part of a continuing series of violations (848 *(b)* (2)). Thirdly, the defendant must undertake this activity in concert with five or more persons (848 *(b)* (2) (A)). Fourthly, the defendant must act as the organizer, supervisor or manager of this criminal enterprise (848 *(b)* (2) (A)). Fifthly, the defendant must obtain substantial income or resources from this enterprise (848 *(b)* (2) (B)). These separate elements, and their proof, are discussed in greater detail below.

A. 21 U.S.C. section 848 (b) *(1) – "the punishment for which is a felony"*

Section 848 *(b)* (1) specifically bases proof of a continuing criminal enterprise on proof that the individual defendant has committed a felony violation of the federal drug laws.

This requirement limits those felonies that can serve as predicates to a continuing criminal enterprise prosecution. Under section 848 *(b)* (1) only felony violations of the subchapters I and II of the Comprehensive Drug Abuse Prevention and Control Act 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.

A felony violation of federal drug laws can be established in a number of ways. The most common understanding of the term "violation" contemplates a substantive offence under subchapters I or II or, more simply, actual commission of a felony under subchapters I or II. Acts in furtherance of a continuing criminal enterprise, however, need not have been committed personally by the defendant to qualify as violations of section 848 *(b)* (1). It is sufficient for purposes of the Act that the defendant conspired to commit a felony violation of subchapters I or II.

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 section 848 cases by interpreting the "in concert with" language of the statute as encompassing the agreement required to prove a conspiracy.

At least one court has already acknowledged this relationship and 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, once a section 848 defendant has been proven a member of a conspiracy, any substantive offence or act committed by his fellow conspirators in furtherance of the conspiracy may be used against the defendant as a violation of "any provision of this subchapter or subchapter II ... the punishment for which is a felony" (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 offences. Accordingly, either actual commission of a felony or conspiracy to commit a felony will serve under the Act to satisfy the requirements of section 848 *(b)* (1).

B. 21 U.S.C. 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". In defining the term "continuing", one 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 offence" 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 court construing section 848 adopted the following definition:

> "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."

As for the term "series", the same court relied on a combination of dictionary definitions, common usage and state law to define "series" as "three or more related transactions". Courts in 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 section 848 *(b)* (2).

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 section 848 that 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 a limitation on the Act, it could have done so explicitly. In several other particulars Congress did very specifically define the type of conduct required to violate section 848.

Thus, neither the text nor the legislative history of section 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 offence 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". Given the popularity of this rule with the courts, however, it would be prudent for a prosecutor to be prepared to prove three related violations as part of the Government's proof in any section 848 prosecution.

This langugage should not be read, however, to require proof of a massive drug trafficking operation as part of every continuing criminal enterprise prosecution. On the contrary, in some cases a single effort to import and distribute drugs may meet the requirements of section 848 *(b)* (2). This principle is illustrated by one case that involved a conspiracy to import and distribute a single shipment of marijuana. The entire criminal enterprise alleged in the indictment spanned only five days. Yet, despite the limited temporal scope of this operation, the court held that it could be characterized as a continuing criminal enterprise under section 848.

C. 21 U.S.C. section 848 (b) *(2) (A) – "in concert with five or more other persons"*

The offence 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 section 848 that 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 lesser included offence of section 848. This decision has had the effect of requiring proof of such agreements in all section 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 section 848.

As the Court of Appeals for the Second Circuit stated in *United States* v. *Sperling:* "As 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 restricted in terms of time or place.

D. 21 U.S.C. 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", section 848 *(b)* (2) (A) requires that the defendant occupy "a position 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 section 848 as the kingpin statute, a title that is not entirely accurate. Although Congress undoubtedly was targeting the kingpins of major drug rings when it enacted the continuing criminal enterprises statute, it by no means intended to limit its reach to one kingpin per drug ring. As one court of appeals has stated: "the definition of the crime speaks in terms of 'any person', section 848 *(a)* (1), and of 'a person', section 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. 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. That the defendant "organized", "supervised", or "managed", may be proven by circumstantial evidence of conduct in accordance with the everyday meaning of those words. Finally, it is not necessary that the superior-subordinate relationships existed at the same moment, or that these relationships were all of the same type.

E. 21 U.S.C. section 848 (b) *(2) (B) – "substantial income or resources"*

The final element that must be established under the continuing criminal enterprise statute is set forth in section 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, one court 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". This general definition has afforded prosecutors great latitude in proving this element of the crime and has supported section 848 convictions in cases involving relatively small sums of drug money.

Judicial decisions in the United States construing the phrase "income or resources" have also afforded the prosecution great latitude in establishing section 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."

In a subsequent court decision, a jury instruction was upheld that 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.

Proof that the section 848 defendant derived substantial income or resources from the illegal enterprise can be based on both direct and circumstantial evidence. 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 a court-authorized 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 section 848. Federal income tax returns and return information can be used to prove this element of the offence. This data can be obtained under the section of the United States federal tax statute that 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: a specific criminal act has been committed; the tax return or return information is or may be relevant to a matter relating to the commission of the act; and the information sought cannot reasonably be obtained from other sources.

Three other kinds of circumstantial evidence can be used to prove this element of the section 848 offence. They are: evidence of the defendant's position in the drug network; the quantity of narcotics involved; and the amount of money that changed hands.

Finally, evidence that large amounts of money changed hands can be used to establish this element of the crime. In one case, the Government's chief witness testified that he saw money in amounts ranging from $2,500 to $6,000 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.

Often the proceeds from illegal drug trafficking are used immediately to purchase valuable real estate and items of personal property. Such transactions, however, cannot preclude a judicial determination that the defendant received substantial income or resources from his participation in the illegal enterprise. In one case an appellate 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. 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.

Another common practice in the business of illicit 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. In a federal prosecution in New York the defendant had accepted narcotics on consignment but had not at that point 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". 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 re-distribution on a bi-weekly basis to support the inference that this "consignment debt" actually reflected a substantial profit.

Similarly, in another case 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 marijuana in his possession. Secondly, 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". Finally, the court referred to evidence that 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..."

Taken together, these court decisions constitute a clear rejection of the "consignment debt" defence and reflect a more realistic view of the economics of drug trafficking. Moreover, the decisions appear to support the proposition that a showing of substantial anticipated income may satisfy the requirements of section 848 *(b)* (2) (B).

F. Scienter

Discussion of the relationship of scienter to section 848 is found in *United States* v. *Manfredi*, 488 F. 2d 588, at 602—03 (2d Cir. 1973). 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 section 848] is only that which [the defendant] knows is wrongful and contrary to law... Prerequisite to conviction under section 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."

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

III. Frequent defence arguments in 21 U.S.C. section 848 cases

An important part of the pre-trial preparation in any criminal prosecution consists of efforts to anticipate and, wherever possible, negate potential defence arguments. Since defences that can be raised in a criminal prosecution are limited only by the facts attending that case and the imagination of defence counsel, it is not possible for any text to identify, much less discuss, every possible defence that may be raised to a criminal

charge. Accordingly, the purpose of this section is simply to identify certain frequently presented defences in section 848 prosecutions and to describe the present state of the law with respect to those defences.

A. Constitutionality of section 848—"Void for vagueness"

One frequent defence asserted in section 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.

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, to date no court has dismissed an indictment brought under the Act on the grounds that the language of section 848 is unconstitutionally vague on its face. Indeed, 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". This is very important premise because, in the context of a section 848 prosecution, it significantly limits the availability of this defence. 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 defence counsel to argue vagueness on the basis of a specific factual record. In many section 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 one federal prosecution in Los Angeles, California, the defendant, a principal in a Mexican heroin smuggling ring, challenged the constitutionality of section 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' were too indefinite to provide the basis for his conviction".

The United States Court of Appeals for the Ninth Circuit rejected those arguments and affirmed the defendant's conviction. In reaching that conclusion the Court refused to examine those phrases in the abstract. Instead the Court insisted that section 848 must be considered as a whole and in the context of the entire Act. Adopting that perspective, the Court concluded that the language of section 848 provided the defendant with sufficient notice of the illegality of his conduct. Other courts have

consistently adopted that 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" were not unconstitutionally vague.

B. Joinder and severance

A continuing criminal enterprise is, by definition, an undertaking that involves a variety of criminal acts and several different parties (848 *(b)* (2) and *(b)* (2) (A)). Therefore it is not surprising to discover that continuing criminal enterprise prosecutions are typically multi-defendant, multi-count proceedings. Because continuing criminal enterprise prosecutions frequently involve large numbers of defendants, each of whom is charged with a variety of offences, questions regarding joinder and severance of both defendants and offences are common in these cases.

In federal court, joinder of both offences and defendants is governed by Rule 8 of the Federal Rules of Criminal Procedure. Once offences or defendants are joined in an indictment, their severance may be obtained only by order of the court. 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 offences or defendants) the court may order ... separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires". 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. The court must determine whether joinder of offences and defendants would so prejudice the jurors that they would be unable to consider each defendant and each charge individually. 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.

In section 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. These defendants have argued that they would be prejudiced by the trial of their case as part of a larger continuing criminal enterprise prosecution.

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 the federal drug laws. In these cases the defendant has moved for severance of the section 848 count from the other substantive offences, arguing that trial of the section 848 charge would prejudice the jury in its consideration of these other offences.

Both of these situations were present in a federal prosecution wherein 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 phencyclidine (PCP) in violation of 21 U.S.C. sections 841 *(a)* (1) and 846. Count II charged two of the defendants with operating a continuing criminal enterprise. At trial the 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, one of the defendants 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. He pointed out that part of the Government's proof at trial on the section 848 count consisted of evidence that he had been convicted of conspiracy to manufacture PCP in Florida. At trial, the prosecution used this prior conviction to demonstrate that the defendant's conduct was part of a "continuing series of violations" (848 *(b)* (2)). According to the defendant, 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 offences was proper under the Federal Rules of Criminal Procedure, the court held that severance would only be appropriate upon a substantial showing of prejudice by the defendant. In this case, the district court had determined that the joinder of these offences was not prejudicial. The Court of Appeals concurred in this finding, holding that the district court's exercise of its discretion was not unreasonable.

The Court also addressed a prejudicial joinder question raised by several co-defendants. These individuals, who had been charged under count 1 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.

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.

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 offence. Therefore these cases have refused

to allow severance of defendants in a continuing criminal enterprise prosecution.

With respect to severance of offences, several courts have noted that a continuing criminal enterprise is made up of a series of substantive violations of the federal drug laws. Since proof of these lesser offences is part of the proof of a section 848 violation, these courts have indicated that joinder of the offences is not unduly prejudicial. The courts, therefore, have refused to allow severance of the related substantive offences from the continuing criminal enterprise prosecution.

Finally, if a defendant does obtain a severance of these lesser offences from the section 848 charge he may not later raise the defence of double jeopardy as a bar to the prosecution of these lesser offences. The United States Supreme Court has held that there is no violation of the double jeopardy clause when a defendant elects to have the two offences tried separately and persuades the trial court to honour his election.

C. Double jeopardy

The double jeopardy clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb". 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 offence. In addition, however, the double jeopardy clause prohibits the imposition of multiple punishments on a defendant for a single offence.

Much double jeopardy analysis turns on the definition of an "offence". The Fifth Amendment merely guarantees that no person shall be placed twice in jeopardy "for the same offence". It in no way prohibits successive prosecution or multiple punishment of a defendant for different offences. Moreover, statutory crimes need not be identical to constitute "the same offence" for double jeopardy purposes. Rather, under the double jeopardy clause cumulative punishment of two crimes is appropriate only when each offence requires proof of a fact that the other does not. In other words, the double jeopardy clause forbids successive prosecutions or multiple punishment when proof of one offence necessarily involves proof of all of the elements of a second offence. This rule effectively prohibits successive prosecution or multiple punishment of greater and lesser included offences.

Double jeopardy questions often arise in section 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 the federal drug laws as part of the proof of a continuing criminal enterprise (848 *(b)* (1) and *(b)* (2)). Moreover, the Act requires a showing that the defendant has acted "in concert" with others (848 *(b)* (2) (A)). These provisions of the Act raise the question of whether conspiracy of substantive federal drug violations are lesser included offences of section 848.

The relationship between these offences, 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. section 846 and operating a continuing criminal enterprise in violation of 21 U.S.C. section 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 offences 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 offence. 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 section 846 conspiracy and the section 848 continuing criminal enterprise violated the prohibition against double jeopardy because conspiracy was a lesser included offence of section 848.

The opinion of the Supreme Court did not ultimately reach this question. Jeffers was deemed to have waived any double jeopardy claim he might have possessed when he elected to proceed with separate trials. It is clear, however, that at least eight members of the Supreme Court construed section 848 *(b)* (2) (A) as requiring proof of an agreement between the defendant and others. Construed in this way, a section 846 conspiracy is a lesser included offence of section 848. Thus, successive prosecutions of a single offence under both statutes would offend the double jeopardy clause.

D. Sentencing issues

One unique feature of the sentencing scheme established by 21 U.S.C. section 848 can be found in 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 15 July, 1932

(D.C. Code, sections 24-203 to 24-207) shall not apply". This subsection of the Act has the effect of denying any defendant convicted under section 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 the sentencing scheme of section 848.

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. The gravamen of these two constitutional challenges is essentially the same. Each of these challenges is premised on the idea that an absolute bar to parole in some way offends the United States Constitution.

Yet it is clear that there is no right to parole guaranteed by the United States Constitution. Rather, parole is entirely contingent upon either the grace of the restraining authority or some specific statutory entitlement. Accordingly, every court that has considered these constitutional claims has, quite correctly, rejected them summarily.

Recognizing the weakness of these constitutional challenges, a number of defendants have elected to contest the prohibition of parole of section 848 *(c)* 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 section 848 *(c)*, 18 U.S.C. section 4202 governed the eligibility of prisoners for parole. Thus, this reference in section 848 *(c)* had the effect of denying parole to those convicted under the continuing criminal enterprise statute. In 1976, however, section 4202 was repealed as part of a recodification of federal parole laws. The provisions of section 4202 were then recodified as part of 18 U.S.C. section 4205. The text of section 848 remained unchanged, however. Congress did not choose to repeal this provision of the continuing criminal enterprise statute 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" (section 4205 *(h)*). Therefore it would seem that the prohibition on parole effected by section 848 *(c)* remains undisturbed by the recodification of the parole laws.

IV. Forfeiture under 21 U.S.C. section 848

In enacting section 848 Congress intended to create a powerful deterrent against large-scale drug trafficking. In addition Congress adopted section 848 with an eye towards providing prosecutors with a multi-faceted tool for proceeding against drug distribution networks. Congress attempted to achieve these goals by providing section 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 section 848 *(a)* (2) provides the prosecutor with a new and powerful weapon to be used in combatting large-scale drug traffickers. Forfeiture denies criminal enterprises the use of many of their economic resources, reduces the profit motive behind many drug-trafficking schemes and provides the United States with additional revenue.

In the past several years, increasing emphasis has been placed on the forfeiture provisions of the Act. Asset seizures by the United States have increased dramatically from the earlier techniques to aggressive pursuit of illicit drug profits. Forfeiture investigations and prosecutions have assumed a greater sophistication. Thus, criminal forfeiture has begun to assume the significance that Congress intended it to have when section 848 was enacted.

Litigation of criminal forfeitures presents a number of legal issues not typically found in criminal prosecutions. 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 assets the prosecutor may have to seek a restraining order or performance bond. 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 that 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 have purchased these assets. Finally, the maintenance and disposition of forfeited property will often present the prosecutor with a host of questions.

The investigation and litigation of criminal forfeitures under the continuing criminal enterprise statute has been discussed at length in a United States Department of Justice publication entitled *Criminal Forfeitures under the RICO and Continuing Criminal Enterprise Statutes.* This publication canvasses the law in this area, highlighting a wide range of

issues that frequently arise in this litigation. It also provides forms for indictments, restraining orders and special verdicts in criminal forfeiture cases. The publication, available to prosecutors in the United States is an indispensable guide for the litigation of criminal forfeitures arising out of drug-trafficking activity. Because the topic of criminal forfeiture has been thoroughly discussed in this previously issued Department of Justice publication, we will not review the issues raised by these forfeiture provisions in this article. We will instead urge those interested in criminal forfeiture under 21 U.S.C. section 848 to obtain a copy of *Criminal Forfeitures under the RICO and Continuing Criminal Enterprise Statutes.*

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