LEGISLATIVE REFORM

THE CONTINUING CRIMINAL ENTERPRISE STATUTE AND JURY VERDICTS: DIFFERING CONCEPTIONS OF "JURY UNANIMITY"

I. THE PROBLEM

A. Introduction

Congress enacted the Continuing Criminal Enterprise statute ("CCE")[1] as part of the Comprehensive Drug Abuse Prevention & Control Act of 1970 ("the Act").[2] The Act's purpose as a whole was to forcefully attack the illegal drug trafficking problem, which, in the drafters' opinions, had reached epidemic proportions. The CCE was directed specifically at drug "kingpins"—i.e., those who hold positions of authority or management in drug operations—and the penalties for its violation are harsh. The mandatory minimum sentence is twenty years' imprisonment; under certain conditions, violating the CCE can lead to life in prison or even the death penalty.[3]

Due partially to these draconian penalties, the CCE embodies various elements meant to assure that only "kingpins" are convicted thereunder. Some of these elements, however, have proved troublesome to courts as they relate to jury concurrence, for a jury might find that one is guilty of a CCE violation without agreeing on why.

To demonstrate preliminarily the difficulties posed by jury concurrence issues, consider the following example:

> Consider a case where D-1 is sued for injuring P-1 in a car accident allegedly caused by D-1's negligence. Some evidence shows that D-1 was speeding, other evidence that he was drunk; proof of either alone would establish negligence. Six jurors find that D-1 was speeding, but not drunk; the other six find that he was drunk, but not speeding. All twelve agree that D-1 was "negligent," but there is no unanimous agreement on what D-1 did that constituted negligence. May the jury return a verdict for P-1?[4]

This article examines one of those elements - specifically, whether the jurors must agree on the predicate acts which satisfy the "continuing series" provision of the statute. This provision requires that a defendant have committed a certain number of drug violations before he can be convicted of a CCE offense. Two circuits have dealt extensively with this question, and have reached contrary conclusions.[5] The Third Circuit

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1. 21 U.S.C. § 848 (1988).
2. Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-971 (1988)).
3. 21 U.S.C. §§ 848(a), (b), (e) (1988).
4. Hayden J. Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts are Invalidated by Juror Disagreement on Issues*, 36 OKLA. L. REV. 473 (1983).
5. 21 U.S.C. § 848(c), the relevant portion of the statute for purposes of this article, reads as

has determined that the jury must agree with exact specificity as to which predicate acts the defendant committed for a conviction to result. The Seventh Circuit, however, has argued that the CCE mandates no more than a unanimous finding that the defendant committed a "continuing series" of offenses.

The remainder of Part I will analyze the problems caused by the circuit split. Part II of this article details the arguments on each side. Part III will argue the superiority of the Third Circuit's view and will suggest a manner in which the legislature's intent could be clarified.

B. The Persistence and Perniciousness of the Split

The Supreme Court recently addressed the problem of jury unanimity in the context of a state murder statute in *Schad v. Arizona*.[6] However, no majority opinion resulted, and many questions were left unanswered. "All of the Justices indicated that factual disagreement among jurors would violate the Constitution in some instances, but none of them provided clear answers regarding when and why such situations would arise to require that trial courts demand specific juror agreement on certain factual elements."[7] The lower courts' difficulties in parsing out the CCE are due in large part to the open-endedness of the *Schad* holding. Some problems also probably result from the fact that CCE cases are distinguishable in many respects from the *Schad* scenario.[8] In any case, *Schad* is the closest the Supreme Court has come to

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follows:

> 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.

Another provision of this statute which has given rise to disagreement among the circuits is the language in subsection (2)(a), requiring a defendant to have acted in concert with five or more persons. Most circuits have accepted the view that the jury need not agree on the identity of these five persons, but must merely agree that there were five persons acting in concert with the defendant.

Incidentally, the circuits are also split on the question of how many violations constitute a "continuing series." Most germane for purposes of this paper are the views of the Third Circuit (three or more acts) (*see, e.g.*, United States v. Echeverri, 854 F.2d 638, 642 (3d Cir. 1988)) and of the Seventh Circuit (two or more acts) (*see, e.g.*, United States v. Canino, 949 F.2d 928, 946 (7th Cir. 1991), *cert. denied* 112 S.Ct. 1940 (1992)).

6. 111 S. Ct. 2491 (1991).

7. Katherine L. Harvey, *"Criminal Law*—United States v. Canino *and the Continuing Criminal Enterprise: Do Drug Kingpins Have a Right to Specific Juror Agreement?"*, 15 W. NEW ENG. L. REV. 271, 299 (1993).

8. Harvey, *supra* note 7, has highlighted one such distinction. "The *Schad* Court determined that the alternative ways of committing first degree murder under the Arizona statute were not elements of that offense, however, in a CCE case, the 'continuing series' provision constitutes an independent element of the CCE . . . . The *mens rea* alternative ways of committing first degree murder under the Arizona statute must be distinguished from the predicate crimes required for a conviction of a CCE offense, as the latter represent distinct criminal acts which form the basis for CCE conviction." *Id.* at 302-03. The distinction between different ways of committing a crime and different crimes finds its relevance in that many courts have focused on this point as the "dividing line" between legitimate and baseless nonconcurrence claims. For a thorough discussion of this issue, *see* Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting*

resolving the issue of jury unanimity on predicate acts under the CCE, and it has done little in the way of clarification.[9]

The effect of the circuits' disagreement is drastically different treatment of similarly-situated defendants in different circuits. And while such disparate treatment, based on a happenstance characteristic like geographic location, is always a cause for concern, its implications are especially serious here, for two related reasons.

For one, CCE cases involve significant constitutional questions. Whether we prefer to describe it in terms of the Sixth Amendment or the Fourteenth,[10] no one disputes that a constitutional right *is* at stake. Illustrative is the following excerpt from the Seventh Circuit's seminal *Canino* decision: "The *constitutional requirement of juror unanimity* in federal criminal offenses is satisfied when each juror in a CCE trial is convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed two predicate offenses."[11]

Secondly, as previously mentioned, the penalties for conviction under the CCE are extremely harsh. When rights of such magnitude as to implicate the Constitution are combined with sentences as harsh as death or life in prison, the least a defendant should be able to expect is that his trial's outcome will not depend on the circuit in which he is tried. And we must not forget that the Constitution has also been held to require proof of crimes beyond a reasonable doubt.[12] It has been cogently argued - and this article accepts the argument - that those courts which allow convictions based on only general unanimity leave a reasonable doubt as to whether the accused actually engaged in activity prohibited by the statute. This obviously contravenes our constitutional guarantees, and one's constitutional rights should be given great protection when his life is at stake.

Even if the Seventh Circuit view were the correct one, however, a defendant's treatment in court should not depend on where he is tried. Therefore, *either way*, the legislature should clarify its intent so as to assure equal protection of all CCE defendants, for yet another of our constitutional guarantees is "equal protection under the laws."

II. THE ARGUMENTS

A. *United States v. Echeverri*: The Third Circuit's Approach

In *Echeverri*,[13] the defendant had been convicted at trial on five counts, one of which was for operation of a continuing criminal enterprise. The defendant claimed on

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Jurors, 58 MO. L. REV. 1 (1993).

9. Professor Howe, among other commentators, has sharply criticized *Schad*. In Howe's view, "none of the three opinions written revealed a sensible approach to analyzing factual nonconcurrence problems under the Due Process Clauses." Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 MO. L. REV. 1, 59 (1993).

10. Prior to *Schad*, courts analyzed the problem in terms of a federal criminal defendant's right to jury unanimity under the Sixth Amendment (*see, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972)). In *Schad*, the Supreme Court held that "the question of juror agreement on factual issues should be interpreted under due process." Harvey, *supra* note 6, at 277.

11. *Canino*, 949 F.2d at 948 (emphasis added).

12. *In re* Winship, 397 U.S. 358 (1970). Justice Brennan, speaking for the majority, stated that this standard is "basic in our law and rightly one of the boasts of a free society . . . and a safeguard of due process of law in the historic, procedural content of 'due process'". *Id.*, at 362 (quoting Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting)).

13. 854 F.2d 638 (3rd Cir. 1988).

appeal that the failure to give a jury instruction calling for unanimous agreement as to which acts constituted the "continuing series" of narcotics violations was reversible error. The Third Circuit agreed, reasoning that more than a general unanimity instruction was necessitated where the potential for jury confusion was significant. Because of the complexity of the CCE statute, the court found enough potential for confusion here to warrant a specific unanimity instruction.

The court relied on its reasoning in *United States v. Beros*,[14] which in turn had relied on the seminal case of *United States v. Gipson*.[15] In *Gipson*, the Fifth Circuit analyzed the statute before it, which prohibited a number of acts with respect to stolen vehicles.[16] The court concluded that it could be violated by any one of several specific acts, thereby presenting a jury unanimity problem. Since the Fifth Circuit felt that a statute prohibiting all these acts gave rise to a significant probability of jury confusion or a less-than-unanimous verdict or both, the court concluded that

> The unanimity rule . . . requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required.[17]

Beros applied the *Gipson* rationale in a case implicating relatively complex criminal statutes which, like the CCE, required certain predicate acts.[18] The Third Circuit in *Beros* found that, although general unanimity instructions would normally adequately safeguard a defendant's constitutional rights, "[w]hen it appears . . . that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice."[19] Instead, a specific instruction was required to avoid the "lack of real unanimity."[20]

In *Echeverri*, the Third Circuit found the same rationale applicable in the context of the CCE. Noting that the jury was instructed that it must find three violations of drug laws as an element of the CCE,[21] the court stated that there was no way to determine whether the jury unanimously agreed on the *same* three violations. The government argued that unanimity as to such details was not required.[22] The Third Circuit replied: "We are unpersuaded. A defendant is entitled to have the court insist on unanimous agreement as to all the essential elements of the crime charged."[23] The court

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14. 833 F.2d 455 (3d Cir. 1987).

15. 553 F.2d 453 (5th Cir. 1977).

16. The statute involved was the National Motor Vehicle Theft Act, Pub. L. No. 99-508, § 101(1)(1)(a), 62 Stat. 806 (1948 (codified as amended at 18 U.S.C. § 2313 (1988)). The statute prohibits "receiving, concealing, storing, bartering, selling, or disposing of stolen vehicles moving in interstate commerce."

17. *Gipson*, 553 F.2d at 457-58.

18. The statutes involved were 29 U.S.C. § 501(c) (1982) and 18 U.S.C. §664 (1982).

19. *Beros*, 833 F.2d at 461, quoting United States v. Echeverry, 719 F.2d 974, 975 (9th Cir. 1983).

20. *Id.* at 462.

21. *Echeverri*, 854 F.2d at 643, citing United States v. Young, 745 F.2d 733, 747 (2d Cir. 1984) (continuing series means three drug-related criminal offenses). *But see supra* note 5 (circuits not in agreement as to number of offenses required to constitute "continuing series").

22. *Id.*

23. *Id.* As discussed *infra*, this reasoning reveals one possible flaw with the *Echeverri* approach.

further found that the complexity of the CCE precluded the effectiveness of a simple general unanimity instruction, and that Echeverri's conviction on the CCE count could not stand.

At least one court appears to have adopted the *Echeverri* rationale in the context of a perjury case. In *United States v. Holley*[24], the Fifth Circuit - which also decided *Gipson* - distinguished *Schad* and found that the defendant was entitled to a specific unanimity instruction:

> In *Schad*, there was a single killing of one individual, and Justice Souter, stressing that under Arizona law first degree murder was "a single crime", concluded that there was no more need for jury unanimity as to alternative mental states each satisfying the mens rea element of the offense than there was for the jurors to all agree on the precise means employed to cause death. [citation omitted] . . . This differs, however, from the situation where a single count as submitted to the jury embraces two or more separate offenses, though each be a violation of the same statute.[25]

The Fifth Circuit concluded that the high possibility of lack of jury unanimity as to at least one statement in each count against the defendant warranted a new trial.

Echeverri has also found support in the scholarly discussion of jury unanimity. Katherine L. Harvey[26] has treated the issue in some depth and has found the *Echeverri* rationale superior to that of *Canino*. The most compelling element, in her opinion, is that allowing divergence on the predicate acts would disrupt the defendant's constitutional right to due process of law. Not only is there substantial doubt as to which acts the defendant committed under the *Canino* rationale but, more importantly, there is a question as to whether the defendant's conduct even rose to the level of a "continuing criminal enterprise." Harvey also cogently argues that requiring specific unanimity is in keeping with the purpose of the statute, i.e., "to punish the drug lords, not their subordinates."[27] She further contends that a specific unanimity requirement would benefit not only criminal defendants but the government as well. The government's benefit would inure from the fact that, when certain predicate act convictions are vacated, the defendant will not be acquitted of a CCE charge unless "the vacated convictions represented the acts upon which the jury had relied to find a con-

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As Professor Jimmy Gurule has pointed out, the *Canino* court finds the essential portion of the "continuing series" provision to be the *number* of predicate offenses. Since the Seventh Circuit discerns that Congress, in enacting this statute, was primarily concerned with targeting large-scale drug operations, the size of such operations is more essential to a convicition than the specific predicate offenses committed. Therefore, an agreement as to the number of offenses committed might satisfy the unanimity requirement "as to all the essential elements of the crime charged." However, Congressional intent may also cogently be interpreted another way; this is also discussed *infra*.

Professor Gurule further commented on yet another difficulty surrounding this statute. In certain cases, the evidence adduced at trial may be probative of a predicate offense not set forth in the indictment. Professor Gurule cogently argues that a defendant should not have to defend himself against such unofficial charges, and that a conviction based on a predicate offense not stated in the indictment should not be able to stand. Interview with Jimmy Gurule, Professor of Law, Notre Dame Law School, Notre Dame, IN (29 March 1994).

24. 942 F.2d 916 (5th Cir. 1991).

25. *Id.* at 927.

26. Harvey, *supra* note 7.

27. *Id.* at 314. *But see supra* note 24 for a discussion of the argument that the "purpose" might also be read as simply requiring agreement as to the number of offenses committed, not specifically what these offenses *are*.

tinuing series."[28]

Professor Scott W. Howe[29] has also studied the question and, while his main emphasis was not on the correctness or incorrectness of *Echeverri*,[30] he appears to have accepted its standard when he concludes that

> [a] factual concurrence mandate follows from the conclusion that due process incorporates a legality ideal . . . . The *Winship* holding embodied an innocence-weighted legality ideal: A conviction must rest on proof beyond a reasonable doubt of all the facts necessary to establish a crime . . . .[31]

B. *United States v. Canino*: The Seventh Circuit's Approach

In *Canino*,[32] defendant was convicted for, *inter alia*, engaging in a continuing criminal enterprise. On appeal, one of his objections to his conviction was that the District Court erred in failing to instruct the jury that it must be unanimous as to the predicate acts involved in the CCE charge. Defendant cited *Echeverri* in his favor. The court did not accept his argument.

The *Canino* court found it especially significant that the Third Circuit did not require specific unanimity as to the "five underlings" element of the CCE.[33] In the Seventh Circuit's view there was no sound distinction between this element and the "continuing series" provision; the two should receive equal treatment on the question of jury unanimity. The purposes of the CCE, in the court's opinion, would be better served by a requirement of only general, as opposed to specific, unanimity in both cases: "[j]uror unanimity seems functionally incongruous with the purposes of the CCE."[34] The Seventh Circuit opined that Congress' intent in enacting the CCE was to focus "on the frequency of the defendant's participation in conspiratorial drug offens-

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28. *Id.* at 314.

29. Howe, *supra* note 9.

30. Howe concentrated primarily on the importance of examining the evidence in each particular case, rather than attempting to draw broad generalizations. *Id.* at 74. He feels that such case-by-case analysis is mandated by the Due Process Clause, which, he explains, rests on the legality principle. "The essence of legality is the notion that an individual should not be convicted or punished for a crime unless she has engaged in conduct that was previously proscribed by positive law defining that conduct as criminal." *Id.* at 9.

31. *Id.* at 81. Two other articles, written before *Echeverri* but nevertheless supporting an *Echeverri*-like rationale, are *Right to Jury Unanimity on Material Fact Issues:* United States v. Gipson, 91 HARV. L. REV. 499 (1977) and Mark A. Gelowitz, *Jury Unanimity on Questions of Material Fact: When Six and Six Do Not Equal Twelve*, 12 QUEEN'S L.J. 66 (1987).

32. United States v. Canino, 949 F.2d 928, 946 (7th Cir. 1991), *cert. denied* 112 S.Ct. 1940 (1992)

33. *See supra* note 5 for a discussion of the "five underlings" provision. The Third Circuit case most often cited for this proposition is *United States v. Jackson*, 879 F.2d 85 (3d Cir. 1989).

34. *Canino*, 949 F.2d at 948, n.7. The court here offers a hypothetical situation in which a jury disagrees on which predicate offenses were found to exist but agrees that three existed. "If the jurors . . . were required to agree on which three predicate acts constituted the 'continuing series' the defendant would be acquitted, despite the fact that everyone believed beyond a reasonable doubt that he was involved in three criminal acts. This result is at odds with the purpose of the CCE which is interested in punishing a defendant whom the jury is convinced was involved in a related series of drug activity with relevant frequency. It is the defendant's demonstrated frequency in participating in conspiratorial drug offenses that is the focus of the CCE offense, rather than any particularization of the acts used to demonstrate 'continuous.' A conviction under the CCE is justified when the jury has a unanimously agreed sense that the defendant exhibited such conspirational [sic] frequency rather than a shared sense of what those acts may have been." *Id.*

es" rather than on the particular offenses committed.[35] Aside from such policy reasons, the court found fault with the analogy drawn by the Third Circuit between the *Gipson* scenario and CCE cases:

> [T]he statute *Gipson* examined is very different from the CCE . . . . The Fifth Circuit felt that the substantive acts listed in [18 U.S.C. § 2313] were too disparate in kind . . . that absent a specific unanimity instruction it was unclear whether the defendant was convicted for one class of offense or the other. This dichotomy in 18 U.S.C. § 2313 is not duplicated in the CCE . . . . The expansive breadth of culpable offenses suitable for CCE treatment diminishes our need to ascertain precisely what acts each juror finds attributable to the defendant . . . .[36]

The Seventh Circuit thereby concluded that Canino's conviction was not unconstitutional despite the lack of a specific unanimity instruction.

At least one circuit, the Ninth, has manifested a willingness to adopt the *Canino* rationale. In *United States v. LeMaux*,[37] the defendant was convicted in the District Court of conducting a continuing criminal enterprise. Defendant contended, *inter alia*, that the jury should have received an instruction mandating specific unanimity as to the predicate acts. The Ninth Circuit conceded that this would have been "the better practice,"[38] but that, where the evidence was as "straightforward, generally consistent, and powerfully incriminating"[39] as the court found it to be in this case, there was no reason to question the jury's determinations.

In a pre-*Canino* law review article,[40] attorney Hayden J. Trubitt supported the propriety, in some instances, of what he termed "patchwork verdicts." Trubitt based his conclusions largely on the notion of the "rule of individualism"[41] and the "slippery slope" danger of applying the *Gipson* rationale to diverse situations. Trubitt essentially concludes that patchwork verdicts are frequently acceptable and that, contrary to the suggestion of Gipson, a defendant is not unconditionally entitled to specific unanimity.[42]

Trubitt's reasoning, however, does not necessarily require that juries in CCE cases receive instructions of only general unanimity. For one, Trubitt himself states that "patchwork verdicts should be least acceptable in capital cases and increasingly acceptable in felony, misdemeanor, and civil cases."[43] Violation of the CCE is a serious enough felony to warrant a minimum mandatory sentence of twenty years' imprisonment; some defendants receive life in prison or the death penalty. Under Trubitt's own reasoning, therefore, CCE cases are among those in which patchwork verdicts are least tolerable.

Secondly, Trubitt's article focused on statutes which differ significantly from the

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35. Harvey, *supra* note 7 at 287. *See also supra* notes 23 and 34.
36. *Canino*, 949 F.2d at 946.
37. 994 F.2d 684 (9th Cir. 1993).
38. *Id.* at 689. The court cites to United States v. Hernandez-Escarsega, 886 F.2d 1560, 1573 (9th Cir. 1989), *cert. denied* 497 U.S. 1003 (1990).
39. *Id.*
40. Trubitt, *supra* note 4.
41. This "rule" can be succinctly summarized as requiring "that each juror should give his verdict as if he were the sole judge of the case. The rule of individualism suggests that patchwork verdicts are proper." Trubitt, *supra* note 4 at 559.
42. *Id.* at 558.
43. *Id.* at 532.

CCE. As previously mentioned, the CCE arguably is more concerned with the size and scope of an operation than with the specific predicate offenses which might bring a defendant within the purview of the statute. Trubitt's choice of words, however, suggested that he had studied statutes, like the one at issue in *Gipson,* where potential predicate offenses were actually listed therein. Trubitt himself opined that *Gipson* "provides no useful guidance for interpreting other statutes;"[44] hence, his arguments against the *Gipson* approach might not readily apply to cases involving the CCE.[45]

Furthermore, Professor Howe has cogently explained why "slippery slope" arguments like Trubitt's do not withstand protracted analyses.[46] In essence, he argues that if there is no "distorted risk of misinterpretaion that would run in favor of criminally accused persons",[47] there is no slippery slope of which to complain. And because Howe believes that CCE cases warrant thorough case-by-case- analyses, he opines that one decision will not - or at least, should not - "do much to inform future decisionmakers of how to resolve nonconcurrence problems not specifically addressed."[48] Thus, Trubitt's fear that "hard cases will require unanimity on deeper and deeper levels of specificity,"[49] and that "[t]he resulting precedents would be embarrassing at best and dangerous at worst,"[50] is not likely to materialize in the context of CCE cases.

III. THE NECESSARY STATUTORY REVISIONS

The arguments advanced in favor of the *Canino* approach do not completely lack merit. The Seventh Circuit's reading of Congressional intent is certainly plausible, and if Congress did seek to target certain operations based on their size as opposed to the specific activities in which they engaged, it can be asserted that a general unanimity instruction in a CCE case is sufficient. Moreover, the Third Circuit's disparate treatment of the "five underlings" and "continuing series" provisions is questionable. The Third Circuit in *Jackson* reasoned that "[u]nlike the three offenses necessary to constitute a series, which is the conduct which the CCE statute is designed to punish and deter, the identity of these underlings is peripheral to the statute's other primary concern, which is the defendant's exercise of the requisite degree of supervisory authority over a sizeable enterprise."[51] The *Canino* court found the two provisions essentially indistinguishable; arguably, the Third Circuit has not presented a fully persuasive view to the contrary.

Notwithstanding these considerations, the arguments for general unanimity fail to comport with the *constitutional right* of a federal criminal defendant to a unanimous jury verdict. "Our criminal justice system has always required more than mere jury agreement that a defendant is an evildoer to convict him,"[52] and whether we prefer to

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44. *Id.* at 549.

45. Opining that "a patchwork verdict is not unconstitutional if it is between distinct acts," Trubitt admonishes courts to avoid following *Gipson*'s suggestion to the contrary. *Id.* at 558.

46. Howe, *supra* note 9.

47. *Id.* at 26.

48. *Id.* at 25. Interested readers should refer to Professor Howe's article in its entirety. It is discussed only briefly here, but Howe himself sets forth a rich and complete discussion of this and other issues relevant to the subject of this article.

49. Trubitt, *supra* note 4 at 549.

50. *Id.*

51. United States v. Jackson, 879 F.2d 85, 88-89 (3d Cir. 1989).

52. *Right to Jury Unanimity on Material Fact Issues:* United States v. Gipson, 91 HARV. L. REV.

classify this problem as the right to a unanimous jury or the right to due process, the right is constitutional in nature and reasonable doubts as to any facts relevant to a conviction should be dispelled. "Mere agreement as to some vague idea of guilt is not sufficient to render a lawful verdict."[53] Moreover, while the *Canino* court read the purpose behind the statute as aimed at size rather than substance, other interpretations are both possible and plausible. "The CCE statute's primary purpose is to punish the drug lords, not their subordinates. Allowing significant juror divergence on the predicate acts constituting the statute's 'continuing series' element would disrupt that very purpose and intrude on the CCE defendant's constitutional right to due process of law."[54]

Different proposals have surfaced to aid in protecting a defendant's rights in these circumstances. One commentator, deeming such rights "*Gipson* rights," has suggested that the trial court could be delegated the duty to instruct the jury, at counsel's request, that they must be unanimous as to every component of the relevant act(s). The commentator recognized, however, that since this provided the means "least intrusive on traditional jury prerogatives,"[55] it would also tend to be least effective. The commentator also, therefore, examined a remedy "at the other end of the spectrum of intrusiveness": special verdicts and special interrogatories.[56] Although these are generally disfavored in criminal trials, they are not impossibilities. The commentator's findings with respect to special verdicts are bolstered by Katherine Harvey's article.[57] Until and unless courts receive a directive from Congress or the Supreme Court, this remains a possibility that should not be ignored.

However, the optimal solution at this juncture would be an amendment to the statute. Congress must clarify whether it intended results along the lines of *Canino* or *Echeverri.* This article has argued, with the support of other commentators, that the constitutional requirement of juror unanimity is fully met and best protected only by the specific unanimity which the *Echeverri* court mandated. Congress must inform us if it agrees - and even if it does not - in order that all similarly-situated defendants might be tried in a similar manner. Section 848 (c)(2) of Title 21 should be amended to include a sentence such as: "The jury shall be unanimous as to the specific acts constituting the 'continuing series of violations' referred to above."[58]

In the absence of further guidance from the Supreme Court, such a specific revision is necessary to insure that courts will continue to respect the due process requirement of proof beyond a reasonable doubt, "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty

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499, 501 (1977).

53. Mark A. Gelowitz, *Jury Unanimity on Questions of Material Fact: When Six and Six Do Not Equal Twelve*, 12 QUEEN'S L.J. 66, 100 (1987).

54. Harvey, *supra* note 7 at 314.

55. Note, *supra* note 52 at 503.

56. *Id.*

57. *Id. See also* Harvey, *supra* note 7 at 311-14.

58. Congress might also want to clarify the number of jurors who must agree to make a verdict "unanimous"; whether such unanimity is also required for the "five underlings" provision of the statute; and how many offenses it intends to comprise a "continuing series." The latter two issues have been discussed briefly in the footnotes to this article; as mentioned, the circuits are split as to these questions as well. Harvey, among other commentators, discusses the "number of jurors" problem. *See supra* note 6 at 296-98.

man go free."[59]

Kirsten M. Dunne[*]

59. *Winship*, 397 U.S. at 372 (1970) (Harlan, J., concurring).

* B.B.A., University of Notre Dame, 1992; J.D. Candidate, Notre Dame Law School, 1995.