

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EDDIE RICHARDSON, Petitioner v. UNITED STATES.
CASE NO: 97-8629 c. 1
PLACE: Washington, D.C.
DATE: Monday, February 22, 1999
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IN THE SUPREME COURT OF THE UNITED STATES

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EDDIE RICHARDSON, :

Petitioner :

v. : No. 97-8629

UNITED STATES. :

- - - - -X

Washington, D.C.

Monday, February 22, 1999

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:04 a.m.

APPEARANCES:

WILLIAM A. BARNETT, JR., ESQ., Chicago, Illinois; on
behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
General, Department of Justice; on behalf of the
Respondent.

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WILLIAM A. BARNETT, JR., ESQ.	
On behalf of the Petitioner	3
IRVING L. GORNSTEIN, ESQ.	
On behalf of the Respondent	X

1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 97-8629, Eddie Richardson v. the United
5 States.

6 Mr. Barnett.

7 ORAL ARGUMENT OF WILLIAM A. BARNETT, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. BARNETT: Mr. Chief Justice, and may it
10 please the Court:

11 The Fifth and Sixth Amendments to the United
12 States Constitution require that a jury in a Federal
13 criminal case unanimously agree as to each fact which is
14 necessary to constitute an offense. The jury is a finder
15 of fact.

16 The prosecutor's decision in the case --

17 QUESTION: And -- and what is the principal
18 authority for that proposition?

19 MR. BARNETT: Pardon me, Your Honor?

20 QUESTION: What is the principal authority for
21 that proposition? Winship?

22 MR. BARNETT: Winship.

23 The prosecutor's decision to charge in this
24 case --

25 QUESTION: Yes, but I had thought in -- in Schad

1 there was some indication that different jurors can be
2 persuaded by different pieces of evidence so long as they
3 all agree on the bottom line. I -- I think there's some
4 indication that jurors don't have to view each piece of
5 evidence unanimously --

6 MR. BARNETT: Well, the --

7 QUESTION: -- if they agree on the bottom line.

8 MR. BARNETT: The question I guess is what is
9 the bottom line, and the bottom line in --

10 QUESTION: Guilt or not guilt of the charged
11 offense.

12 MR. BARNETT: Yes, but the offense is defined.
13 And with respect to the definition of the offense, there
14 are certain constituent facts which the jury, as the
15 finder of fact, is required to find beyond a reasonable
16 doubt. In the continuing criminal enterprise statute,
17 those constituent facts are that the primary elements are
18 that the defendant be -- have committed a crime which is a
19 felony under the Federal narcotics statutes --

20 QUESTION: And if it's part of a continuing
21 series of violations, and it doesn't say how many or what.
22 I mean, I'm not sure that you can pin this statute down as
23 you would seek to do it.

24 MR. BARNETT: Well, if you cannot pin it down -

25 -

1 QUESTION: Well, Congress didn't seem to pin it
2 down.

3 MR. BARNETT: Congress --

4 QUESTION: Now, in RICO you've got a much more
5 precise scheme spelled out than here. Congress just said
6 a continuing series of violations.

7 MR. BARNETT: Well, you're correct, Your Honor.
8 In the RICO statute, it specifically states that there
9 have to be at least two and that they have to fall within
10 a certain time period with relationship to each other.

11 QUESTION: Right.

12 MR. BARNETT: On the other hand, just because
13 Congress called it a series of violations, in this case
14 instead of defining it as three or more violations or some
15 other specific definition, nevertheless, the word series
16 is a conclusion. It's a conclusory statement of fact.
17 The word series means nothing without a context, without
18 an object of the preposition. What is it a series of?

19 And they have defined that specifically in the
20 continuing criminal enterprise statute as violations of
21 the Federal narcotics laws. Those violations are very
22 specifically defined throughout the -- the statutory
23 framework, each and every one, and each and every one has
24 well defined elements which have been defined and
25 judicially interpreted over the years.

1 To suggest that the Congress, by using the word
2 series of violations, suggested that the jury did not have
3 to focus in on what it is that the series was comprised
4 of --

5 QUESTION: Well, there was ample evidence here
6 of, if you will, a continuing series.

7 MR. BARNETT: Well, a series is made up of the
8 constituent elements. So, in order to find a series, you
9 would have to find that they -- and it then occurred at
10 one time, a second time, a third time, a fourth time --

11 QUESTION: Well, there was plenty of evidence to
12 support the findings necessary. Your complaint is just
13 about the instruction, is it not?

14 MR. BARNETT: That's correct, Judge. This is
15 not a sufficiency of the evidence case.

16 QUESTION: Mr. Barnett --

17 QUESTION: The statute requires in section 1
18 that you violate a provision of the chapter and commit a
19 felony.

20 MR. BARNETT: That's correct, Your Honor.

21 QUESTION: You're not alleging that there was a
22 defect in -- in the findings as to that part of the
23 statute, are you? You're just addressing subclause 2,
24 which is the continuing series.

25 MR. BARNETT: I'm not -- I'm not suggesting

1 there's a defect in the statute at all.

2 QUESTION: Pardon me. A defect in the proof
3 under the statute.

4 MR. BARNETT: I'm not suggesting there was a
5 defect in the proof here. This is not a case about the
6 proof. It's a question as to whether or not the jury was
7 properly instructed that it had to unanimously find that
8 each of the elements had been --

9 QUESTION: My own questions are imprecise. Are
10 you saying that there is an insufficient finding on the
11 part of the jury with reference to paragraph 1 of the
12 statute as well as to paragraph 2?

13 MR. BARNETT: Insofar as it is implicitly
14 included in the series, yes, I am. I know that the
15 Government has taken the position that that issue has been
16 waived. On the other hand, by our request for an
17 instruction that the jury find with respect to the series,
18 defined as at least three, that it find unanimously that
19 each of the three has been proved, I would suggest that we
20 preserve that issue.

21 And the instruction given by the court to the
22 effect that it need not -- the jury need not find
23 unanimously with respect to any of the underlying
24 predicate offenses in the event that -- well, in effect,
25 told them they wouldn't have to agree with respect to that

1 first offense. And that was -- at least I'm arguing here
2 today that was legally wrong and violative of the
3 Constitution.

4 QUESTION: Well, what do you mean violative of
5 the Constitution?

6 MR. BARNETT: The Due Process Clause requires
7 sufficient specificity so that a man understands what it
8 is he's charged with.

9 QUESTION: Well, that's the indictment. There's
10 nothing wrong with the indictment here. The indictment
11 gives him notice of what he's charged with.

12 MR. BARNETT: Yes, but during the course of the
13 trial, a man must be able to meet the charges that are
14 being made against a man. When it is set forth in a
15 scattershot fashion so that he's, in effect, asked to hit
16 a moving target in -- in cross-examining witnesses as to
17 specific events when they don't give testimony with
18 respect to specific events and it's a generic type of
19 testimony, then it puts him in an untenable position --
20 excuse me.

21 QUESTION: Supposing in this case, there had
22 been evidence of six other convictions -- criminal
23 enterprises that met that definition, and the judge had
24 charged the jury that you must find that the person
25 committed three of those offenses. Now, do you think that

1 the law requires that the jurors agree on which three of
2 the six were committed?

3 MR. BARNETT: Yes, I do, Judge, and the reason
4 for that is because if they do not agree -- if you cannot
5 get the jurors to agree unanimously as to any one of those
6 elements, you have to drop it out. So, if you have six,
7 but you can only get unanimous agreement on two, for
8 instance, you haven't proved a series of six.

9 QUESTION: What about if you have thousands?
10 Because wasn't that the Government's case? To talk in the
11 abstract about agreeing on the particulars versus the
12 conclusion is one thing, but here the Government says
13 where we have a continuing series that involves thousands
14 of separate transactions and they didn't --

15 MR. BARNETT: But --

16 QUESTION: Was the prosecutor wrong in saying
17 that that was the series? He said every \$10 bag of crack,
18 every \$20 bag of heroin, each one of those sales was a
19 transaction in this series, and he said that the proof
20 supported literally thousands of -- and from the
21 thousands, the jury is supposed to pick out three or four?
22 That just seems to make no sense to me.

23 MR. BARNETT: Well, with respect to that series
24 of thousands that he's talking about, the testimony that
25 came in was from essentially three witnesses --

1 QUESTION: First, did the Government charge that
2 -- that that was the -- that's the continuing enterprise
3 that they were dealing with, one that involved thousands
4 of transactions? Are you challenging that that was an
5 accurate characterization of the series that the
6 Government charged?

7 MR. BARNETT: The way it was charged was as a -
8 - a conspiracy, and off the top of my head, I can't
9 remember if they said this involved thousands of
10 transactions. But you can certainly make the -- the
11 inferential jump from the terms of the indictment and the
12 way the conspiracy was described to -- to conclude that,
13 yes, this was a case involving thousands of transactions.

14 QUESTION: And the judge is supposed to tell the
15 jury, this case involves thousands of transactions, but
16 you have to pick out three and agree on those. If that's
17 so, then -- then doesn't the judge have to list all the
18 thousands, every runner who testified? They didn't
19 remember their individual sales, but they were able to
20 say, yes, we sold on an average of so much a week, so much
21 a day.

22 MR. BARNETT: Well, the --

23 QUESTION: Well, I guess nobody made the
24 Government charge thousands, did -- did they?

25 MR. BARNETT: No.

1 QUESTION: They could have charged just 10.

2 MR. BARNETT: And they --

3 QUESTION: They're just being greedy here. They
4 could have charged five, maybe three. Right?

5 MR. BARNETT: That's true.

6 QUESTION: And they could have provided a lot of
7 evidence for -- for just those three or those five.

8 MR. BARNETT: They also could have charged
9 predicate acts as substantive crimes, which they chose not
10 to do, which interestingly, the -- the RICO statute, which
11 has been referred to here -- routinely the Government
12 charges the predicate acts as substantive crimes. And the
13 convictions on those underlying substantive crimes become
14 the basis for finding the predicate in the RICO charge.

15 But in this statute, the Government has taken
16 the position that because the word series of violations is
17 not as specific as in RICO, they don't even have to charge
18 any predicate offenses. And -- and I'm not quarreling
19 with that. The case law is clear that they do not, but if
20 they do not, they should at least be required to point to
21 three offenses and say, you've got a series. If you can
22 agree on the three offenses, and particularly one within
23 the statute of limitations, then you've got a series --

24 QUESTION: Why should they be able to do -- why
25 should they have to do that more or less than they have to

1 point to the five people?

2 MR. BARNETT: The five-person requirement, as I
3 view the statute, is significantly different from the
4 underlying offenses. The -- the basic criminality of the
5 continuing criminal enterprise statute is contained within
6 the fact that there are narcotics violations which have
7 occurred. There is nothing else in the statute that's
8 criminal. Hanging around with five other people or making
9 a lot of money is not criminal in and of itself. Those -
10 - and in the structure of the statute, those are
11 subsidiary to the primary element that the violation be
12 part of a continuing series. They are --

13 QUESTION: But, I mean, in terms of your -- in
14 terms of knowledge of the defendant, in terms of your
15 knowledge as a defense attorney, when you see the
16 indictment, does it list the five people by name? Does it
17 have to?

18 MR. BARNETT: No.

19 QUESTION: No. All right. So, what do you do
20 if you want to know who they are?

21 MR. BARNETT: You can file a motion for a bill
22 of particulars.

23 QUESTION: Exactly. And so, I -- I suppose that
24 that's just what you would do in respect to the offenses
25 as well, if you lose this case. And you may win it, but

1 -- but -- but -- but if you'd lose it, it wouldn't be a
2 problem of notice. It would be the same problem, wouldn't
3 it? You'd say I don't know who they are and file a bill
4 of particulars. And -- and -- so, I don't see there's a
5 notice problem.

6 MR. BARNETT: Well, the notice problem comes in
7 when you have thousands of transactions because you, in
8 effect, have to defend against something having occurred
9 on any one --

10 QUESTION: Suppose there are thousands of
11 people, thousands of people. Indeed, there may have been
12 in this case.

13 MR. BARNETT: Well, in that event -- well, let
14 me back up a second.

15 QUESTION: If -- if you're worried about that,
16 isn't your move to move for a bill of particulars?

17 MR. BARNETT: But even a bill of particulars
18 wouldn't have done any good in this case if they gave us a
19 list of thousands of offenses and didn't say these are the
20 three that we're talking about. The question --

21 QUESTION: In other words, you want -- you want
22 to have to prepare for less. That's the guts of your
23 argument, isn't it?

24 MR. BARNETT: Well, yes, that's true.

25 QUESTION: Because if you got a list of a

1 thousand names, you -- you would have exactly the same
2 problem that you've got right now.

3 MR. BARNETT: That's correct.

4 QUESTION: So, what you're really saying is, I
5 have a right to -- to prepare, in effect, the -- the
6 narrowest and most -- and hence most manageable case
7 possible. That's -- that's basically your argument.

8 MR. BARNETT: Well, instead of -- well, I think
9 that it's fair to, instead of allowing the Government to
10 take a scattershot approach, when the ultimate argument
11 they are going to make to the jury is that you don't have
12 to look at anything in particular here, you just have to
13 take a look at the thousands of offenses and come to a
14 sense as opposed to a finding of fact that something has
15 occurred on such and such day three times in a row, but
16 instead have a sense that this is a bad man, that -- that
17 this activity is going on, but without pointing to the
18 specifics. Because if you don't have an agreement on a
19 specific -- if you don't have an agreement on enough
20 specifics to make a series, then you don't have agreement
21 on a series. The series is --

22 QUESTION: That's not necessarily -- excuse me.
23 Go ahead.

24 Isn't there an intermediate position? I'm
25 trying to -- could it not be true that there are three or

1 four witnesses who could testify that I sold heroin on a
2 such and such a street corner over and over again for 5
3 years? I can't remember any specific date or any specific
4 transaction, but I did it over and over again. And then
5 there's another witness who says, as I guess in this case,
6 he sold white heroin, somebody sold brown heroin, somebody
7 sold cocaine.

8 They might not remember the specific details,
9 but did you argue that they at least ought to be compelled
10 to find that there were -- they agreed on which series
11 took place? In other words, if they agreed that the
12 witness who testified that there were transactions in
13 brown heroin for 6 months in a row, I can't remember any
14 specific transaction, that that would be enough for a
15 series if they all agreed on that particular series? But
16 here you've got several series.

17 And did you argue that they have to at least
18 agree on which ones were proved beyond a reasonable doubt,
19 or did you just make the argument you got to pinpoint the
20 time and date of particular sales?

21 MR. BARNETT: Are you referring to my argument
22 in the court?

23 QUESTION: In the district court.

24 MR. BARNETT: In the district court?

25 QUESTION: What did you -- did you ask the judge

1 to say -- give you an instruction that it was something
2 not quite as specific as they've got to tell me the time,
3 date, and amount of heroin sold on such and such -- you
4 know, on such and such a transaction? It seems to me
5 there's a big difference.

6 MR. BARNETT: The instruction that we requested
7 was --

8 QUESTION: Would have required time and date and
9 place of three or four specific transactions.

10 MR. BARNETT: Well, the way it was phrased was
11 that -- it wasn't quite that specific or well thought
12 out --

13 QUESTION: No.

14 MR. BARNETT: -- I have to say. It's you must
15 unanimously agree on which three acts constituted the
16 series of violations. And that was as specific as we got
17 in our requested instruction.

18 The court's instruction was that the -- the jury
19 need not have -- you do not, however, have to agree as to
20 the particular three or more Federal narcotics offenses
21 committed by the defendant.

22 QUESTION: What was the sentence before the
23 however?

24 MR. BARNETT: Oh. You must unanimously agree
25 that the defendant committed at least three Federal

1 narcotics offenses. You do not, however, have to agree as
2 to the particular three or more Federal narcotics
3 offenses.

4 QUESTION: We don't really know that the
5 Government -- I guess we can ask the Government when it
6 comes up, but we don't really know that the Government
7 concedes that the jury has to decide upon a particular
8 series. I suspect the Government's view will be that if
9 nine jurors believed without a -- beyond a reasonable
10 doubt that -- and all nine of them believed beyond a
11 reasonable doubt that this defendant engaged in a series
12 of drug transactions, it doesn't matter which series each
13 of the jurors had in mind so long as all -- all of them
14 believed beyond a reasonable doubt that there was some
15 series.

16 MR. BARNETT: I think that logic --

17 QUESTION: You don't like that either.

18 MR. BARNETT: Oh, no, I certainly don't.

19 QUESTION: That's even worse I suppose. Right?

20 (Laughter.)

21 MR. BARNETT: And I think that logically follows
22 from what the Government's position is.

23 QUESTION: You might ask what the other three
24 jurors --

25 (Laughter.)

1 QUESTION: How do you -- what do you think about
2 the robbery statute, whoever by force and violence or by
3 intimidation takes money from a federally insured bank?
4 How does the Government have to proceed there if they have
5 -- where they're not -- there are some people who think
6 that force and violence but not intimidation this
7 particular defendant used and some think it's intimidation
8 but not force or violence? Now, does the -- do you have
9 to have unanimity on each of those if they say, we're
10 certain of one thing, he did it one way or the other, but
11 we're not certain? Some of them think it's force and
12 violence; some of them think it's intimidation. That
13 sounds familiar. That's called Schad.

14 MR. BARNETT: Yes. It's very --

15 QUESTION: All right. Now, all right, fine. So
16 -- so, what's the difference?

17 MR. BARNETT: Well, the -- there's a difference
18 between the characterization and the act, the legal
19 characterization of what the criminal act which has
20 occurred is, and whether the jury can distinguish between
21 two different legal characterizations of the same actus
22 reus may lend itself to this morally equivalence analysis
23 which is set forth in Schad. If they're morally
24 equivalent, does it make any difference whether it's
25 taking by force or taking by intimidation? We think not.

1 Therefore, the jury just has to unanimously agree, but
2 they are unanimously agreeing on a particular set of
3 facts, an actus reus, an act by the defendant which has a
4 particular victim, and with respect to that, they are
5 finding the guilt.

6 QUESTION: What about Justice -- I think it was
7 Justice Scalia's hypothetical in his concurring opinion in
8 Schad that a person is charged with first degree murder
9 and there's evidence that the -- the killing was committed
10 in the course of a felony? There's also evidence that --
11 that the defendant intended and deliberated. Does the -
12 - do the jurors have to pick between those two theories of
13 first degree murder?

14 MR. BARNETT: Well, as in Schad, the -- the --
15 the same -- well, that was the case in Schad, although it
16 was a State court case. But that -- once again, that is
17 not a question as to whether a particular actus reus has
18 occurred. That's a --

19 QUESTION: What's -- what's an actus reus?

20 MR. BARNETT: The -- the criminal act, the
21 specific set of --

22 QUESTION: What the defendant did?

23 MR. BARNETT: Yes, what he did. That has to do
24 with what he was thinking when he did it.

25 And the analysis in Schad pretty much

1 extrapolated from the moral equivalence argument which
2 applies -- what I would say applies to the legal
3 characterization of the act, would also apply to a certain
4 extent to the mens rea involved, which -- which is what
5 was suggested in Schad and what -- what this Court found.

6 But in this case, we're talking about the other
7 hypothetical posed by Justice Scalia, which is can you
8 indict a man and convict him for either assaulting Mr. X
9 on Tuesday or Mr. Y on Thursday? Just -- the jurors may
10 unanimously --

11 QUESTION: He'd be entitled to a severance
12 certainly.

13 (Laughter.)

14 MR. BARNETT: There's a -- there's a difference
15 between the jurors unanimously agreeing that a -- a crime
16 has occurred on such and such a date and -- and the jurors
17 unanimously calling something that happens a crime. Now,
18 12 jurors can each think to themselves a man has done,
19 let's call it, a crime and one because he thinks he
20 committed a murder, one because he thinks he committed a
21 robbery, one because he thinks he committed a rape. And
22 they don't unanimously agree that he did any of those
23 things, but each one of them says this man committed a
24 crime and they're unanimous on that. That is not
25 unanimous agreement on a specific crime with which this

1 man is charged.

2 QUESTION: And you would say that -- that that
3 rule applies in the hypothetical where six jurors think
4 the dope was sold at high school 1, six jurors think the
5 dope was sold at high school 2. They don't disagree
6 necessarily with the findings of the other six, but they
7 just focus on a -- on a different high school.

8 MR. BARNETT: Well, when you say they don't
9 disagree, Your Honor, I think --

10 QUESTION: They don't come to any conclusion.
11 They don't -- they don't negate that finding. They just
12 say I -- in going around the jury table, six say, I'm
13 convinced he sold it at high school number 1; six jurors
14 say, I'm convinced he sold it at high school number 2.
15 Isn't that just the mode of committing a series of -- of
16 transactions?

17 MR. BARNETT: No, I would not say that's a mode.
18 That's the essence of the transaction, what transactions
19 have occurred. And do you have 12 people unanimously
20 agreeing that the transactions have occurred, or do you
21 have 12 people agreeing that transactions occurred and
22 we're all willing to call whatever transactions we think
23 occurred a series?

24 QUESTION: You think my hypothetical is the same
25 as your example of assaulting X on Tuesday and Y on

1 Wednesday?

2 MR. BARNETT: Yes, I do.

3 QUESTION: Well, the trouble that -- the trouble
4 is I don't think you can differentiate it from -- from
5 Schad by saying that Schad was essentially a case on
6 characterization. You said, well, it's a case about
7 characterization because it wasn't a case in which
8 anything turned on -- on distinctions of what you called
9 the actus reus. But it seems to me that -- that it did.

10 Take the -- the homicide example, the homicide
11 in a case which -- in a State which defines homicide in -
12 - in unitary terms. In -- one alternative for proving a
13 homicide would be to prove as a fact that the defendant
14 went through a certain thought process, i.e., deliberation
15 and premeditation. Another alternative for proving that
16 homicide -- the same -- the same victim -- would be to
17 prove as a fact that the defendant was engaged in robbery
18 at the time he killed. The distinction between those two
19 cases is not a distinction in characterization. It's a
20 distinction between two different facts, the fact of
21 thought, the fact of robbery. And -- and I don't see how
22 you can distinguish Schad as a characterization case. Am
23 I -- do I misunderstand your argument?

24 MR. BARNETT: No, you don't misunderstand my
25 argument, but I -- I think that with respect to that

1 distinction between the mental state required to commit a
2 first degree murder and that required to commit a felony
3 murder and the fact that the crime which has occurred is a
4 murder -- there has been a man killed -- takes it out of
5 the situation where we don't know whether the jury agrees
6 that the transaction occurs on Tuesday or the transaction
7 occurs on Thursday.

8 QUESTION: We don't know whether the jury agrees
9 that there was a certain thought process or whether the
10 jury agrees that there was a robbery.

11 MR. BARNETT: That's correct, but with respect
12 to the thought process/robbery dichotomy, the moral
13 equivalence test suggests that it doesn't matter which one
14 they agree on.

15 QUESTION: The moral equivalence test isn't
16 going to help you in -- in the case of the Tuesday or the
17 Thursday crime.

18 MR. BARNETT: Oh, I don't think it --

19 QUESTION: I mean, I think -- I think in order
20 to -- to make -- in order to avoid having those kinds of
21 distinctions get into this case, we've got to recognize
22 that Schad was, among other things, making the -- the due
23 process judgment based on -- on traditions of how we prove
24 crimes. And -- and one tradition that would pretty
25 clearly be excluded would be the -- the -- the -- the

1 charge simply of one crime, choosing one day and one
2 victim, another day and another victim as an alternative.
3 And that may be a very strong argument for the Government
4 -- against the Government's desire to -- to sort of have
5 the whole hog here and say that -- that even the -- as it
6 were, the principal act here could be proven in any of
7 alternative ways.

8 But I thought the case that you had brought to
9 us was whether in addition to proving the -- the principal
10 act here, the series could be proven in alternative ways.
11 And -- and I think my point is you can't distinguish the
12 alternative ways of proving a series from the situation in
13 Schad by saying that Schad was merely a case about
14 characterization because Schad was a case about different
15 acts.

16 MR. BARNETT: Well, Schad is distinguishable in
17 many respects, but I -- I would say that under the
18 circumstances of that case, that the Court came to that
19 conclusion premised upon its look at the historical way a
20 felony murder was treated like capital murder, and that
21 that analogy does not affect the analysis in this case --
22

23 QUESTION: Well, it doesn't because we don't
24 have the kind of historical precedent one way or the other
25 that you're talking about. And that's why I tried to pin

1 you down a little bit to find out what in practical terms
2 is really bothering you here. And I thought what's really
3 bothering you is -- is the problem of -- of case
4 preparation. You want to be in a position to -- to narrow
5 down the facts which you've got to negate, assuming you
6 put on a defense or cross examine, and I thought that was
7 -- that was what you were in practice really worried about
8 here.

9 MR. BARNETT: That is a very strong part of the
10 -- the argument.

11 QUESTION: Well, suppose Congress wants -- wants
12 to pass a statute that says we want to get at these
13 operations where there are lots of runners and people who
14 will not be able to tell you precisely any particular
15 sale, but will be able to testify in gross, I sold X -- on
16 average X many bags a week. Suppose Congress wanted to
17 get at that. Could it? Or are you saying, no, because
18 you have to prove discrete acts?

19 MR. BARNETT: Well, I don't think we have a case
20 here where you have children that -- that cannot
21 discriminate between dates and to suggest --

22 QUESTION: This is a runner who says, I'm in the
23 business of selling crack. I can't tell you -- I've been
24 doing it for years -- on any given day who -- who I sold
25 it to. Suppose Congress thinks that that exists in the

1 real world and wants to make a crime that covers that.

2 Are you saying they can't?

3 MR. BARNETT: I'm not saying they can't
4 legislate against a continuing criminal enterprise, which
5 is what they did here. What I'm saying is that they
6 should be -- the Government should be subject to the same
7 rules of proof that they are in any kind of a case, which
8 is they've got a fact that they have to prove and they
9 bring witnesses in who can testify to it. And I think
10 that to take the position that their witnesses are -- that
11 they're not going to have witnesses that are competent and
12 therefore we should just disregard the requirements that
13 they prove a case would be contrary to the Fifth
14 Amendment.

15 Your Honor, at this time, if I have any time --

16

17 QUESTION: Thank you, Mr. Barnett.

18 Mr. Gornstein, we'll hear from you.

19 ORAL ARGUMENT OF IRVING L. GORNSTEIN

20 ON BEHALF OF THE RESPONDENT

21 MR. GORNSTEIN: Mr. Chief Justice, and may it
22 please the Court:

23 It is an established principle of the criminal
24 law that while a jury must unanimously agree that the
25 prosecution has proven the elements of an offense, it need

1 not agree on the evidence supporting each element. As
2 applied to the CCE statute, that principle means that the
3 jury must unanimously agree that the defendant engaged in
4 a continuing series of violations, but it need not agree
5 on the particular acts that make up such a series.

6 QUESTION: And what -- what is the best
7 authority for that from this Court?

8 MR. GORNSTEIN: The Schad case and the cases
9 that precede Schad establish the basic controlling
10 principle here, which is that the only thing that a jury
11 has to be unanimous about is the elements of the offense
12 and the jurors do not have to agree on the evidence that
13 support each element. In Schad, the crime was murder, and
14 in Schad, some jurors -- six jurors could think it was a
15 felony of robbery, six jurors could believe there was an
16 intent to kill. As long as they all agreed that the
17 relevant mens rea was -- was established, they did not
18 have to be unanimous.

19 QUESTION: And six jurors could think that the
20 drugs were sold at high school 1 and six jurors at high
21 school 2 and that would suffice?

22 MR. GORNSTEIN: Now you're talking about for a
23 CCE?

24 QUESTION: Yes.

25 MR. GORNSTEIN: Well, you -- you would have to

1 show a continuing series, and I'm not sure that just one
2 -- one event would do it for a continuing series, but --

3 QUESTION: No. I'm assuming that there was a
4 series of transactions --

5 MR. GORNSTEIN: Right.

6 QUESTION: -- at high school 1 and a series of
7 transactions at high school 2.

8 MR. GORNSTEIN: Right. When -- if we -- in the
9 basic way the Government charges a case like this, as long
10 as all the acts were undertaken pursuant to a single
11 course of conduct, it should not matter whether half the
12 jurors pick out the three at one high school and half the
13 jurors pick out a series at another high school.

14 QUESTION: Suppose that half the --

15 QUESTION: Well, who decides that they were
16 all --

17 QUESTION: Suppose that half the jurors think
18 that it didn't happen at all at high school 1, but that it
19 happened at high school 2, and the six other jurors
20 think --

21 MR. GORNSTEIN: Right.

22 QUESTION: -- just the opposite, that it didn't
23 happen at all in high school 2, but it happened at high
24 school 1.

25 MR. GORNSTEIN: Justice Kennedy, that -- the

1 same result would follow. Just as in Schad, if six jurors
2 had concluded there was no robbery at all and six jurors
3 had concluded there was no intent to kill at all, they
4 would still unanimously agree on the relevant mens rea.

5 All that -- that -- the question of what is an
6 element of -- of an offense is essentially a question of
7 statutory construction. What did Congress intend for the
8 elements of an offense to be? Here the text of the act
9 expressly says that the relevant element is that there
10 must be a continuing series of violations. Given that
11 definition of the element, the only thing that the jury
12 must be unanimous about is that the defendant engaged in a
13 continuing series of drug violations.

14 QUESTION: But it isn't just a question of
15 intent. You wouldn't say that the Government could enact
16 a crime which says anyone who, you know, is -- is either
17 guilty of -- of filing an incorrect income tax return or
18 of -- of rape shall go to jail for 30 years, and then
19 throw it to the jury and let the jury decide. You know,
20 you have some evidence of rape, some evidence of failure
21 to file a proper income tax return. None of the -- on
22 neither count can you get 12 jurors, but you get 6 on one
23 and 6 on the other. Can the Government do that?

24 MR. GORNSTEIN: No -- no, it --

25 QUESTION: So long as it intends to do it.

1 That's really what the Government intends.

2 MR. GORNSTEIN: You were right to correct me,
3 Justice Scalia. The first question is one of legislative
4 intent. What did Congress intend for the element to be?
5 Once you know what Congress intended for the elements to
6 be, there is then a due process question about whether
7 Congress can rationally -- rationally define the elements
8 of the offense in the way that it did. And the -- the
9 hypothetical of he -- she struck A on Monday or B on
10 Tuesday is completely unlike this CCE statute in due
11 process terms.

12 QUESTION: What if the series -- you say so long
13 as it's rational. What if the series elements were not
14 tagged on to a -- a concrete that you needed 12 jurors
15 for?

16 Incidentally, you agree you needed 12 jurors for
17 part 1 of the statute.

18 MR. GORNSTEIN: We do not agree with that,
19 Justice --

20 QUESTION: You don't even think you need 12 --

21 MR. GORNSTEIN: We do not agree on that.

22 QUESTION: You don't have to have this jury
23 agree about anything.

24 MR. GORNSTEIN: They do have to agree about the
25 elements of the offense, but not the facts underlying it.

1 And what the -- what the first element -- we would
2 acknowledge it is a more difficult question because if you
3 look at the first element in isolation, it does look like
4 it's focusing on a discrete act by a single defendant.

5 QUESTION: It sure does.

6 MR. GORNSTEIN: But when you read it in the
7 context of the whole statute, which is -- the following
8 sentence says that that's just part of a series of
9 violations, it's best understood as really the functional
10 equivalent of saying, there must be a series of violations
11 at least one of which took place within the statute of
12 limitations period.

13 QUESTION: So, you -- you think Congress could
14 enact a statute which says, anyone who is guilty of a
15 series of burglary shall go to jail for so many years, and
16 if you put the statute that way, you would not have to
17 prove to the satisfaction of 12 jurors any burglary.

18 MR. GORNSTEIN: Well, you'd have to prove a
19 series, but the --

20 QUESTION: You'd have to prove a series.

21 MR. GORNSTEIN: Correct.

22 QUESTION: Three think this burglary, three
23 think another one, three think a third one, and three
24 think a fourth one, and this fellow goes to jail even
25 though, beyond a reasonable doubt, no 12 people think he

1 did anything that was illegal.

2 MR. GORNSTEIN: Well, first of all, a series --
3 presumably they would all have to agree that there were
4 at least three or at least two depending on how you
5 defined a series.

6 But to answer your hypothetical, Justice Scalia,
7 the question in that case would be is Congress or the
8 legislature, whoever it was, responding to a new and
9 distinct form of criminal activity or is it simply
10 attempting to circumvent unanimity requirements for what
11 have -- what has been an historical single offense of
12 burglary.

13 QUESTION: Schad was decided mostly on the basis
14 of tradition. It had been done this way, you know, for a
15 long time. And if I had to apply the same rule to the
16 present case, I would look to those cases that -- that
17 dealt with recidivism. And as I -- you know, you're
18 guilty of this offense. You'll -- if -- if you have
19 committed a prior offense as well, you -- you have a
20 higher sentence. And let's assume that they're both
21 elements of the -- of the offense. And in those cases, as
22 I understand the historical background, you had -- you had
23 to prove the prior offense by a unanimous jury and you
24 couldn't say the jury -- you know, the jury thinks you
25 committed a prior crime.

1 QUESTION: Justice Scalia, I'm not sure about
2 the background that you're speaking of, but I don't think
3 it's fair to compare this statute to a recidivism statute.
4 It is not. It is a completely different kind of statute.

5 What it is -- what Congress was addressing here
6 was a new kind of crime, and that is the operation by drug
7 kingpins of large scale drug businesses from which they
8 derive substantial revenues. It is not just somebody
9 committed one crime and then another. It is a drug
10 business crime, and that's why it's called continuing
11 criminal enterprise. And in -- in responding to that
12 distinct form of criminal activity, it was entirely
13 rational for Congress to say -- to define the series
14 element so as to require agreement on a series but not on
15 the particular acts.

16 And I would also distinguish this case from the
17 -- the case where you just have to prove a series because
18 there are other elements to this offense. The Government
19 has to prove that there was a conspiracy. It has to prove
20 that the -- the -- that the defendant derived substantial
21 revenues from that conspiracy, and the addition of -- of
22 those elements helps to establish that what Congress was
23 doing was responding to --

24 QUESTION: May I give you this -- this
25 hypothetical? Supposing in this -- the facts of this very

1 case, the Government had brought four different CCE
2 charges, one involving the sale of brown heroin from 1984
3 to 1990, the second involving the sale of white heroin in
4 1988, and the third involving the sale of cooked cocaine
5 in November of 1993 -- three separate -- and then the
6 fourth, charging the whole bunch. Under your view, if I
7 understand it, the defendant could be found not guilty on
8 all of the three charges but guilty on the fourth.

9 MR. GORNSTEIN: I have to work through that
10 hypothetical a second, Justice --

11 QUESTION: Well, each is a continuing criminal
12 enterprise. The first involves brown heroin from 1984 to
13 1990. The second involves white heroin in 1990, and the
14 third involves cooked cocaine --

15 MR. GORNSTEIN: And then there's one
16 overriding --

17 QUESTION: And then there's one overriding.

18 MR. GORNSTEIN: One overriding --

19 QUESTION: And they could be -- and they charge
20 all four.

21 MR. GORNSTEIN: Right.

22 QUESTION: The jury could be not convinced on
23 any one of the first three, but enough -- you get a
24 combination to convict on the fourth, and that would be
25 okay.

1 MR. GORNSTEIN: That's possible, and -- and that
2 is possible --

3 QUESTION: That is consistent with your theory.

4 MR. GORNSTEIN: It is but it's highly unlikely,
5 Justice Stevens, that anything like that would ever
6 happen, but if it did, it would be --

7 QUESTION: Well, except you have one witness on
8 each of them and six of them think this guy is
9 unbelievable and six think the other guy is -- so, I don't
10 think that's so totally impossible.

11 MR. GORNSTEIN: Well, I would -- I would -- I
12 would question that, but if -- if that unusual thing did
13 happen, it would -- you would -- you would convict for the
14 same reason that there's a conviction when six jurors
15 think that there's a robbery and they're convinced beyond
16 any doubt that there's not intent to murder and -- and six
17 are convinced that there's an intent to murder and
18 convinced beyond any doubt that there's no robbery. And
19 that is the --

20 QUESTION: Those are all means and manners, but
21 why can't we adopt the rule that where an element of the
22 statute requires the commission of a crime, you need to
23 have -- or a series of crimes, you need to have 12 tried
24 and true jurors find that in fact a crime was committed?

25 MR. GORNSTEIN: I just don't --

1 QUESTION: Once you say that an element of it is
2 a crime, a whole crime, not just intent, not just any of
3 the manners or means, but a completed crime, once the
4 Government wants to get somebody and impose an additional
5 penalty for a crime, whether it's an individual crime or a
6 series of crimes, you need 12 people to say there was a
7 crime here, here, and here. What -- what would that
8 destroy?

9 MR. GORNSTEIN: Justice Scalia, I --

10 QUESTION: What classic statutes would that harm
11 that --

12 MR. GORNSTEIN: Well, I think what it would --
13 would harm are the modern statutes and -- for which there
14 are no precedent and because --

15 QUESTION: -- we're exactly answering whether we
16 should let these modern statutes proceed.

17 QUESTION: It's bank robbery. It's bank
18 robbery. Whoever by physical -- you know, what is it?
19 Assault or -- or intimidation, I mean, extortion. I don't
20 know. I guess you could charge under bank robbery he
21 either did it through extortion --

22 MR. GORNSTEIN: You could. You could charge one
23 or the other.

24 QUESTION: Or you could say he did it through
25 assault, which is a crime, and some of the people say it

1 was assault and some of the people think it's extortion.
2 I mean, sending somebody a note, give me the money or your
3 life, is -- I would worry that there are lots of classical
4 statutes that would be affected by that.

5 QUESTION: Well, and I suppose one could get --
6 get around the rule that Justice Scalia proposes, if it
7 were ever adopted, by -- you know, Congress comes in and
8 says, well, we're not talking about crimes here. We're
9 talking about something called drug transactions. And
10 they're not separately criminal, but if you combine them
11 in such a way, then they are criminal.

12 MR. GORNSTEIN: Mr. Chief Justice, I just think
13 that illustrates that there's really not a -- a strong
14 principle behind it because even if you take Schad, I'm
15 not sure what the distinction is when you say, robbery is
16 a separate offense, but we'll move robbery in as part of
17 murder and say half of the jurors only half defined it and
18 then they found an element of the offense.

19 QUESTION: How do you --

20 QUESTION: The answer -- no, please go ahead.

21 The answer may be, as I think Justice Scalia
22 suggested a second ago in -- in preface to his question,
23 Schad assumed that there was in -- it was possible in the
24 analysis to make a distinction between means and ends.
25 The end in Schad was -- was the killing. One of the means

1 by which that killing, in effect, was accomplished was --
2 was -- was what we tend to call the mental element. And
3 historically we have said the mental element can be proven
4 either as, you know, the factual element -- he deliberated
5 -- or the mental element can be satisfied by proving that
6 he was committing another offense when the killing
7 occurred, i.e., in Schad's case, robbery. There was a
8 means/ends distinction.

9 The trouble with applying Schad here is that I
10 don't think we're talking about the same kind of
11 means/ends distinction because what we're talking about
12 here is an entirely separate element that does not go to
13 the end of proving the one crime which -- which brought us
14 into court. The particular transaction, which was the
15 transaction principally charged here, was not committed by
16 this other series. It was committed, whether he committed
17 three other offenses or didn't commit three other
18 offenses. And so, we don't have the same kind of
19 means/ends distinction possible here that we had in Schad.

20 MR. GORNSTEIN: I don't see the distinction.
21 What we have here is the element is defined that we're
22 dealing with as a continuing series of violations. And
23 it's true, that's not the whole crime, but it seems to me
24 the same analysis would apply to a particular element.
25 And that is --

1 QUESTION: Yes, but you -- you apply -- well,
2 that's right. But what you're doing is saying, there are
3 different means of proving the series, this three, that
4 three, a third three, and so on. But the relationship
5 between the series and the principal crime charged here,
6 i.e., this particular transaction that brought us into
7 court, is not the same as it was in Schad. So, query
8 whether -- whether -- whether Schad should open the door
9 to proving an element which is not itself a means to the
10 -- to the commission of the principal crime in the same
11 manner that Schad would allow if it were an element going
12 to the means of proving --

13 MR. GORNSTEIN: But Schad announced a principle
14 that was broader than just the means. It was a
15 distinction between what is the element and what are the
16 facts that helped to prove the element, the element as
17 defined by the legislature.

18 Then once you answer that question, you have a
19 second question which is, did the legislature define the
20 element in a rational way?

21 But the first question is just a question of
22 statutory interpretation under Schad, and here the text of
23 the act says that all the element is is proof of a
24 continuing series of violations. Given that definition of
25 the element, the only thing the jury has to be unanimous

1 about is that there's such a series.

2 And now we have a question. Did Congress -- is
3 that a rational way to proceed?

4 QUESTION: Well, should rationality include --
5 include whether it -- it simply deprives the jury of its
6 historic function? I mean, any crime could now be -- you
7 -- you could dispense with the unanimity requirement of
8 the jury by charging -- enacting new statutes for a series
9 of burglaries, for a series of robberies, for a series of
10 rapes, and the defendant would be -- would be held before
11 the court and -- and -- and all you would need is a -- is
12 a minority of the jury to believe that one or another rape
13 occurred, a robbery occurred, or burglary occurred. And
14 that's just so contrary to what our tradition has been.

15 MR. GORNSTEIN: As I said --

16 QUESTION: Is that -- is that an irrational
17 definition?

18 MR. GORNSTEIN: Well, it may be if there's not a
19 distinctive form of criminal activity that's being
20 addressed, but there's a big difference between just
21 requiring proof of a series, as in your hypotheticals, and
22 requiring proof of a conspiracy from which the
23 defendant --

24 QUESTION: What if a defendant is charged with
25 speeding on the -- on or about such and such a date at the

1 intersection of 15th and Pennsylvania Avenue? And after
2 the evidence, six of the jury say he was really speeding
3 when he was on Pennsylvania Avenue, but not when he turned
4 into 15th, and the other part of the jury says, well, he
5 wasn't really speeding when he was on Pennsylvania. It
6 was after he turned onto 15th. Do you think that that
7 jury can properly return a verdict of guilty on that
8 charge?

9 MR. GORNSTEIN: They can, yes. I think if you
10 -- even if you had a crime like reckless driving and a
11 number of things -- and that was the definition of the
12 crime, and a number of things happened, he turned into the
13 right lane, he sped, he did a number of things, you could
14 charge the crime of reckless driving. And then as long as
15 the jurors agreed that he was recklessly driving, they
16 wouldn't have to agree on the particular facts that
17 convinced them that he was recklessly driving.

18 QUESTION: What about the Hobbs Act or the
19 Travel Act? I mean, suppose that you have a person
20 traveling in interstate commerce intending to distribute
21 the proceeds of an unlawful activity. Six jurors think
22 that the unlawful activity was robbing a bank; six jurors
23 think that, on a totally different day, the unlawful
24 activity was selling a lottery ticket without permission.
25 In other words, is this going to apply to the Travel Act?

1 And then you look at the Hobbs Act with
2 extortion. Six jurors think that he took a bribe with a
3 traffic ticket and thereby extorted under color of
4 official right, and six jurors think that what he did was
5 rob a bank pretending to be a policeman with the right to
6 go into a vault.

7 I mean, does this apply across the board? The
8 Travel Act, the Hobbs Act, all the illegal gambling
9 statutes?

10 I didn't think it did, to tell you the truth,
11 and I was trying to figure out what the theory would be to
12 distinguish the ones from the other.

13 MR. GORNSTEIN: Well, one thing you have to
14 decide is what is Congress defining as the element of an
15 offense.

16 QUESTION: Well, that defines --

17 MR. GORNSTEIN: In some -- in some cases there
18 could be two -- two separate acts, each of which -- for
19 example, if you take a drug distribution, each drug
20 distribution is a separate offense that is charged and
21 punishable as such. And therefore, you could not charge
22 an either/or, either he distributed A or B. That would be
23 two distinct offenses.

24 QUESTION: No, no, but that isn't the problem.

25 MR. GORNSTEIN: Here in this case what we

1 have --

2 QUESTION: Here's it's not this?

3 MR. GORNSTEIN: That's right.

4 QUESTION: It's not that in the Hobbs Act. It's
5 not that in the Travel Act. Look at the money laundering
6 statutes. Six people think that this money laundering
7 came from -- from a copyright violation. That's one of
8 them under the -- six of them think that the money came
9 from a big dope ring. Does it matter? I'm not asking
10 because I have a view. I'm asking you --

11 MR. GORNSTEIN: I would have to look at each one
12 of those statutes to see whether what we're talking about
13 is separate crimes or not --

14 QUESTION: No, no.

15 MR. GORNSTEIN: -- or just alternative ways
16 of --

17 QUESTION: It's not. We know what the Hobbs Act
18 says. We know what the Travel Act says.

19 MR. GORNSTEIN: But still you'd have to decide
20 whether each source that you got it for really created --
21 or purpose really created a separate crime. You'd have
22 to decide --

23 QUESTION: Well, we all know that -- I mean, the
24 Travel Act says whoever travels in interstate commerce
25 with intent to distribute the proceeds of any unlawful

1 activity. That's it.

2 MR. GORNSTEIN: Right. That sounds like --

3 QUESTION: Now -- now, six people think --

4 MR. GORNSTEIN: That sounds very much like a
5 case where you walk in on a burglary and you could have
6 various intents, and as long as the jury finds one of the
7 intents to commit a felony, then you've got a burglary.

8 QUESTION: So, basically you're -- you're saying
9 across the board --

10 MR. GORNSTEIN: And -- well, there's always a
11 constitutional question at the -- at the back end which
12 asks is this a rational way to define an offense.

13 QUESTION: Well, but to think of the Hobbs Act,
14 the Hobbs Act -- the crime is affecting interstate
15 commerce. And one person thinks affecting interstate
16 commerce through, for example, extortion defined as
17 extorting money under official right. All right? Now,
18 they all think he affected interstate commerce. That's
19 awfully broad. And six people think he affected
20 interstate commerce by pretending to be a policeman and
21 robbing a bank or being a policeman and going in and
22 robbing a bank, getting in that way, and six people think
23 what he did was take a bribe from somebody he stopped to
24 get a traffic ticket. Now, what about --

25 MR. GORNSTEIN: So long as that is one offense,

1 and that looks very much like Schad to me where six
2 people --

3 QUESTION: By the way, they're totally different
4 days and --

5 MR. GORNSTEIN: -- six people could conclude
6 that somebody committed a robbery, and six could be
7 absolutely convinced that there was no robbery; and six
8 could be absolutely convinced that there's an intent to
9 kill and six could be absolutely convinced that there was
10 no intent to kill.

11 QUESTION: All right. Now, my problem is
12 suppose that I think with the Hobbs Act, anyway, that's
13 just too broad because all you have as the common thing is
14 you affected interstate commerce. Now, if I go down that
15 track, I have to draw a line and I don't know how to draw
16 the line. You're telling me don't go down it. But, my
17 goodness, if I don't go down it, look what happens.

18 MR. GORNSTEIN: I -- I think that you can start
19 in this case with realizing that this act starts with a
20 conspiracy. Under Rutledge, it said that we have a
21 conspiracy plus other elements. Here all the predicates
22 charged were undertaken pursuant to a single conspiracy.

23 QUESTION: You didn't charge conspiracy as the
24 predicate act.

25 MR. GORNSTEIN: We did not specifically mention

1 conspiracy as a predicate act. Conspiracy was in a
2 separate count, but it was very clear from count 1 and
3 count 2 that the very continuing criminal enterprise was
4 -- was undertaken pursuant to the conspiracy that was set
5 out --

6 QUESTION: Well, but you're saying that this is
7 a --

8 QUESTION: The conspiracy, any particular
9 conspiracy? As I understand your case, they could have
10 all had different -- the different jurors could have
11 different conspiracies in mind.

12 MR. GORNSTEIN: No. There was just one
13 conspiracy charged in the indictment.

14 QUESTION: Well, but there could have been a lot
15 of other -- I mean, there could have been --

16 MR. GORNSTEIN: There was only one and it was a
17 conspiracy to distribute drugs --

18 QUESTION: But that's probably accidental. I
19 mean --

20 MR. GORNSTEIN: It is -- that is the way the
21 Government charges these cases, Justice Scalia.

22 QUESTION: But the Government -- but the
23 Government could charge these cases by saying, you know,
24 it could have been this conspiracy, it could have -- you
25 could have conspired with these eight people or maybe it's

1 these eight people or maybe it's these eight people. And
2 it's up to the jury if -- if you get four for each, you
3 have a conviction on the conspiracy count as well. Right?

4 MR. GORNSTEIN: Not necessarily, Justice Scalia,
5 because in that hypothetical you could borrow some of the
6 principles from conspiracy law where when there -- the
7 Government charges a single conspiracy and in fact it
8 turns out there may be multiple conspiracies, then a jury
9 could get a separate charge about whether there was a
10 different conspiracy than the one the Government was
11 agreeing to.

12 QUESTION: It seems to me the direction you're
13 going in now is to say that this is like a traditional
14 conspiracy, and you're attempting to answer the problem
15 raised earlier when we said that this is a modern sort of
16 crime that's troubling. And so, you say, well, it's like
17 -- enough like a conspiracy that we shouldn't have to
18 worry too much. Is that about where the argument is
19 going?

20 MR. GORNSTEIN: Well, no. I don't -- I think
21 that one of the things that you don't have to worry about
22 is how -- that Congress really was, and all these elements
23 of the offense established, responding to a new and
24 distinct form of criminal activity. It wasn't just taking
25 a traditional offense and wiping out unanimity. It saw a

1 whole new kind of criminal activity which was the
2 operation by drug kingpins of drug businesses from which
3 they derived substantial revenues. Nobody disputes that
4 that was a new and distinct form of criminal activity that
5 Congress was confronted with.

6 And the question you have to ask yourself is, in
7 responding to that kind of problem, was Congress acting
8 rationally in defining the elements of the offense --

9 QUESTION: But rationally may not be the
10 happiest adverb there because rationally suggests there
11 has to be a connection between means and ends. And if
12 Congress' end is to, you know, catch as many of these
13 people as possible and send them to prison, then they're
14 probably going to define the thing in such a way that the
15 -- a hung jury is not much of a threat to them. I think
16 you -- you've got to spell out a little bit more why this
17 was a permissible --

18 MR. GORNSTEIN: Well, but you have to look --
19 look at the elements of this offense. There has to be a
20 conspiracy. There has to be a series of violations.
21 There has to be substantial revenues derived from the
22 conspiracy. That spells out pretty clearly exactly the
23 problem that Congress was faced with.

24 QUESTION: Mr. Gornstein, what's new about this
25 problem? I mean, habitual drug dealers may be new, but

1 there were habitual pick-pockets. There were habitual
2 bank robbers. There's no reason why statutes like this
3 couldn't have been enacted in the past. But it's part of
4 our Anglo-Saxon legal tradition that we didn't have
5 statutes like this. We didn't put somebody in jail for
6 being a traditional -- an habitual speeder and then having
7 the jury decide whether he might have speeded on any of 10
8 different days. We habitually have not done this.

9 (Laughter.)

10 MR. GORNSTEIN: Well, first of all, I don't
11 think this, for the reasons that I've said, that this is
12 the same as an habitual offender statute.

13 But second of all, there are other State law
14 crimes that to some extent have gone to define a series as
15 the basis for the crime. For example, child abuse is a -
16 - is a classic example where all the jury has to agree
17 upon is --

18 QUESTION: Mr. Gornstein, it just occurred to
19 me, when you talked about multiple conspiracies, in the
20 Kantiakis case, the court held you can't just find a whole
21 bunch of conspiracies if you charge one. I really think
22 your position may be inconsistent with the -- with that
23 ancient case.

24 MR. GORNSTEIN: The --

25 QUESTION: The Kantiakis case.

1 MR. GORNSTEIN: Well, you can't find one. If
2 there's just one, then you find one.

3 QUESTION: There are a whole bunch of them
4 there, and you say, well, that's not good enough to
5 satisfy the one conspiracy charge.

6 MR. GORNSTEIN: Well, if there's -- I'm not sure
7 I'm following the hypothetical.

8 QUESTION: It's not a hypothetical. It's 328
9 U.S.

10 MR. GORNSTEIN: No, no. I'm sorry. Which --
11 which part of my position are you questioning? That's --
12

13 QUESTION: Well, your position that you can sort
14 of lump everything together, and that's just as good as -
15 - I mean, even though each juror thinks it's one separate
16 part of the whole, as long as they all come out with the
17 same conclusion, that's enough.

18 MR. GORNSTEIN: No, but I think if they all
19 agree there's one essential conspiracy that they don't
20 have to agree to every single part or element or crime
21 that was committed in connection with that conspiracy.

22 QUESTION: No. They have to agree it's the same
23 conspiracy.

24 MR. GORNSTEIN: That's right, and that's what -
25 - that was what was charged here.

1 QUESTION: And here you don't have to agree it's
2 the same series of violations.

3 MR. GORNSTEIN: No, I think that you did agree
4 that there was -- that they were the same in this sense.
5 They were all undertaken pursuant to a single conspiracy
6 that was managed and led by the defendant from 1984 to
7 1991. It involved the sale of all three kinds of drugs in
8 the area of Chicago, Illinois. That was the -- the very
9 conspiracy charged in count 1, and that they were all --
10 all the acts were undertaken pursuant to that single
11 conspiracy and they were a single course of related
12 conduct in that sense.

13 QUESTION: Well, maybe what you're suggesting to
14 us is that we ought to decide how far the means/ends
15 distinction can be applied by asking how much more
16 difficult, if at all, it -- it makes the -- it makes it
17 for the defendant to prepare for trial. And you're
18 saying, well, this isn't making it any tougher than it is
19 to defend a conspiracy case.

20 MR. GORNSTEIN: That's correct.

21 QUESTION: So, is the -- is the implicit
22 criterion that the limiting principle on what is possible
23 under the means/end Schad distinction is a different
24 principle, and that is, how tough is it making it for the
25 defendant to -- to prepare to -- to defend himself?

1 MR. GORNSTEIN: I don't think that was the
2 principle the Court was articulating in Schad. I just
3 think --

4 QUESTION: Well, maybe it should have.

5 MR. GORNSTEIN: But I think that what you've
6 articulated is just that that answers a second objection
7 that there may be here, a notice objection. There really
8 isn't a notice objection here.

9 QUESTION: Yes, but that isn't the only
10 objection. I mean, he's not concerned just about the
11 preparation. He's also concerned that his client is
12 entitled to 12 -- to 12 votes instead of just 6.

13 MR. GORNSTEIN: I understand that, Justice --
14 I'm just saying that to the extent that what's being
15 raised is a notice objection, that the fact that this --
16 you get the same notice that you get on a conspiracy
17 charge completely answers that.

18 I realize there is a separate question that
19 needs to be asked and answered about the unanimity
20 question, and there our position is, as I have said, that
21 the element here, as defined by Congress, as clear as it
22 could be, it's a continuing series of violation, and the
23 underlying facts just help to establish that element.

24 And then all you have left is a constitutional
25 question which is, in light of our traditions and in light

1 of the modern problem that Congress was faced with, did it
2 rationally reach the conclusion that this was --

3 QUESTION: The modern problem is Oliver Twist,
4 Murder, Incorporated. I mean, there have been continuing
5 criminal enterprises I guess since the beginning of time.

6 MR. GORNSTEIN: Well, it was -- there may have
7 been, but not the persistence -- the pervasiveness of the
8 problem is -- and the ineffectiveness of prior solutions
9 is what led --

10 QUESTION: The ones that exist in our time
11 always seem worse, of course. I mean, I'm not worried
12 about Oliver -- about -- about Fagin anymore, but --

13 (Laughter.)

14 MR. GORNSTEIN: I think there is quite a
15 difference between somebody who commits a -- just a -- a
16 repeat offender and somebody who is operating a drug
17 business and is -- and part of that drug business from --
18 has literally thousands and thousands of street sales
19 over the course of time and is deriving from that millions
20 of dollars. And that's the distinction.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Gornstein.

23 The case is submitted.

24 (Whereupon, at 12:04 p.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

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EDDIE RICHARDSON, Petitioner v. UNITED STATES.
CASE NO: 97-8629

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