

12.17 Controlled Substance—Continuing Criminal Enterprise (21 U.S.C. § 848)

The defendant is charged in [Count _____ of] the indictment with engaging in a continuing criminal enterprise in violation of Section 848 of Title 21 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the violation[s] of [specify drug law violation] [as charged in [Count[s] _____ of] the indictment];

Second, the violation[s] [was] [were] part of a series of three or more violations committed by the defendant over a definite period of time, with the jury unanimously finding that the defendant committed each of at least three such violations;

Third, the defendant committed the violations together with five or more other persons. The government does not have to prove that all five or more of the other persons operated together at the same time, or that the defendant knew all of them;

Fourth, the defendant acted as an organizer, supervisor, or manager of the five or more other persons; and

Fifth, the defendant obtained substantial income or resources from the violations.

“Income or resources” means receipts of money or property.

Comment

“[A] jury in a federal criminal case brought under § 848 must unanimously agree not only that the defendant committed some ‘continuing series of violations’ but also that the defendant committed each of the individual ‘violations’ necessary to make up that ‘continuing series.’” *Richardson v. United States*, 526 U.S. 813, 815 (1999); *see also United States v. Garcia*, 988 F.2d 965, 969 (9th Cir. 1993) (concluding that general unanimity instruction is sufficient unless “genuine possibility” of juror confusion exists) (citing *United States v. Gilley*, 836 F.2d 1206, 1211-12 (9th Cir. 1988)); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1570-73 (9th Cir. 1989).

The Supreme Court has held that a § 846 drug conspiracy is a lesser included offense of a continuing criminal enterprise. *Rutledge v. United States*, 517 U.S. 292, 306-07 (1996).

To be held liable for occupying a “position of organizer” and a “supervisory position” within a continuing criminal enterprise, the defendant “must be in a position of management.” *United States v. Barona*, 56 F.3d 1087, 1097 (9th Cir. 1995); *but see United States v. Jerome*, 942 F.2d 1328, 1330-31 (9th Cir. 1991) (reversing conviction when jury was not properly instructed as to which of several persons could be included in “five or more” category).