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## Aider and Abettor Liability, the Continuing Criminal Enterprise, and Street Gangs: A New Twist in an Old War on Drugs

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## COMMENTS

### AIDER AND ABETTOR LIABILITY, THE CONTINUING CRIMINAL ENTERPRISE, AND STREET GANGS: A NEW TWIST IN AN OLD WAR ON DRUGS

“[I]f these [street] gangs are allowed to become entrenched nationwide in the drug distribution business [then] we are going to have a problem nationally on the scale that is going to be reminiscent of the Mafia in its heyday.”<sup>1</sup> The warning is ominous; the threat is real.

The 1980s have witnessed unprecedented growth in gang size,<sup>2</sup> scope of activities, and sophistication.<sup>3</sup> Veteran social worker Useni Eugene Perkins notes,

Today's Black street gangs are more volatile, more destructive and more criminally-oriented than their predecessors. They are also better organized to enact these negative traits. Due to the saturation of drugs in the Black community, Black street gangs have organized a network of drug trafficking that generates high profits which they are not willing to relinquish. And because of the hopelessness and despair that fester in the Black community, they have more than a sufficient number of consumers to support this lucrative enterprise.<sup>4</sup>

Although sociologists and cultural anthropologists offer a variety of theories to explain this phenomenon, the explosion of the drug “crack” cocaine<sup>5</sup> is a driving impulse behind the violent expan-

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<sup>1</sup> *Federal Law Enforcement Role in Narcotics Control in Southern California: Hearings Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess. 36 (1988) (testimony of Gary Feess, Assistant U.S. Att'y, C.D. Cal.) [hereinafter *Federal Role*].

<sup>2</sup> There are an estimated 70,000 gang members in Los Angeles alone. See Robbins, *Armed, Sophisticated and Violent, Two Drug Gangs Blanket Nation*, N.Y. Times, Nov. 25, 1988, at B14, col. 3.

<sup>3</sup> *Federal Role*, *supra* note 1, at 40 (statement of James Bramble, Special Agent in Charge, D.E.A.).

<sup>4</sup> U. PERKINS, *EXPLOSION OF CHICAGO'S BLACK STREET GANGS: 1900 TO THE PRESENT* 38 (1987).

<sup>5</sup> For cocaine to be smoked, it must be converted into its free-base form. To do so,

sion of gangs.<sup>6</sup> At the forefront of this transformation of Black gangs into "organized" crime units are two Los Angeles-based gangs, the Bloods and the Crips, who are "[s]preading a sophisticated pattern of violence and drug dealing across the country . . . [a]s far east as Baltimore and Washington, [while] staking out claims along the way in middle-size cities like Omaha."<sup>7</sup>

As a result of these gang activities, crack cocaine is now a scourge of national proportion. Crack's expansive availability, inexpensive price-tag and potently addictive qualities have combined to wreak havoc on our social fabric. Nowhere is the effect of this damaging combination more magnified than in the social structure of the Black community.<sup>8</sup>

While the damage is significant, the cause is not lost. Our law enforcement sector has responded to the burgeoning crack trade with force and effectiveness.<sup>9</sup> Our legislatures have responded with tougher laws and stiffer penalties.<sup>10</sup> Finally, our prosecutors have

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powdered cocaine hydrochloride is "cut" with an alkali such as ammonia or bicarbonate of soda. The free-base is then heated to evaporate any remaining water; this leaves a waxy cocaine precipitate that crackles when smoked. The process thus eliminates the need to use the unstable solvent ether to extract the smokeable cocaine. Accordingly, "[c]rack is a street name for a [smokable] cocaine free-base prepared by a method which does not use solvents." "Crack" Cocaine: *Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong., 2d Sess. 71 (1986) (statement of Dr. Charles R. Schuster, Dir., National Institute on Drug Abuse).

<sup>6</sup> "The appearance of crack has given gang culture a terrible, almost irresistible momentum. Economic pathology, not surprisingly, is a more powerful causal factor than putative syndromes of 'family breakdown' or 'ghetto culture.' As the street supply [of crack] has burgeoned, gang rivalries have exploded into violent battles over sales territory and profit." Davis, *War in the Streets*, NEW STATESMAN & Soc'y, Nov. 11, 1988, at 30.

<sup>7</sup> Robbins, *Armed, Sophisticated and Violent, Two Drug Gangs Blanket Nation*, N.Y. Times, Nov. 25, 1988, at A1, col. 5. For a more detailed discussion of this subject, see *infra* Part IV.

<sup>8</sup> See generally Lamar, *Kids Who Sell Crack*, TIME MAG., May 9, 1988, at 20 (detailing crack's affect on inner-city youth); U. PERKINS, *supra* note 4, at 58 (crack in unprecedented demand from all sectors of the Black community).

<sup>9</sup> Examples of success abound. See generally *Detroit Jury: Brothers Are Drug Kings*, Chicago Trib., Oct. 28, 1988, § 1 at 6, col. 1 (discussing collapse of Chambers' Brothers empire which supplied one-half of Detroit's crack houses); Barton, *The Kansas City Experience: "Crack" Organized Crime Cooperative Task Force*, POLICE CHIEF, Jan. 1988, at 28-31 (discussing taskforce's success in identifying, arresting, and indicting Jamaican posses that dominated Kansas City's crack trade); *Gangs: L.A. Lawless*, ECONOMIST, July 2, 1988, at 25-26 (crediting Los Angeles Police Department gang sweeps with impairing gang drug trafficking).

<sup>10</sup> For example, in 1984, Congress amended the provisions of 21 U.S.C. § 841, Prohibited Acts A, to improve the section's penalty structure. Among other things, the amendment made sentencing a function of both the type and the quantity of narcotics involved, and increased fine levels to create greater punitive and deterrent effects. See H.R. REP. No. 1030, 98th Cong., 2d Sess. 255-60, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3437-42. Also, California recently adopted the "Street Terrorism En-

responded with new and innovative applications of existing statutes, including the Continuing Criminal Enterprise ("CCE")<sup>11</sup> and the Racketeer Influenced and Corrupt Organizations Act ("RICO"),<sup>12</sup> to the gang-controlled drug networks.

The creation of a national crack market through the entrepreneurial devise of the Crips and the Bloods provides prosecutors with a new, albeit controversial, application of the Continuing Criminal Enterprise statute. Under the traditional approach, a prosecutor would apply the CCE to a specific Crip or Blood "set"<sup>13</sup> for operating a narcotics network in a specific neighborhood. This Comment posits that the prosecutor also may attack the Crips and the Bloods for aiding and abetting the creation of new crack markets that are governed by other inner-city gangs in various cities across the United States. Under this theory, 18 U.S.C. section 2(a), Principals,<sup>14</sup> is applied to 21 U.S.C. section 848, the Continuing Criminal Enterprise. Accordingly, a gang leader convicted of aiding and abetting a crack network that qualifies as a continuing criminal enterprise will be punished as a principal of the enterprise itself.

The validity of this legal theory is unresolved. In litigation unrelated to the gang issue, the Seventh Circuit upheld the application of aider and abettor liability to a continuing criminal enterprise,<sup>15</sup> while the Second Circuit did not.<sup>16</sup>

This Comment argues that the Seventh Circuit's position is correct. To accomplish this task, the Comment is divided into four

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forcement and Prevention Act," which is designed to attack street gangs by focusing on their organizational structure and patterns of criminal activities. The Act mandates increased sentences for participation in gang-related criminal activities and provides for asset forfeiture. See CAL. PENAL CODE § 186.20 (West 1988).

<sup>11</sup> 21 U.S.C. § 848 (1988).

<sup>12</sup> 18 U.S.C. § 1961 (1988). For an example of a RICO application to a gang-controlled narcotics operation, see *United States v. Anderson*, Indictment No. 89 C.R. 0909 (N.D. Ill., filed Oct. 26, 1989), and its corresponding press coverage. Gibson, *Rukns, Robinson Indicted For Drugs, Murder*, Chicago Trib., Oct. 28, 1989, § 1 at 1, col. 2.

<sup>13</sup> The Crips and the Bloods are umbrella organizations composed of numerous gang "sets" owing allegiance to either the Blood or the Crip Code. There are 75 Blood sets and 103 Crip sets in Los Angeles. Each set has its own turf and membership; examples include the 5-Deuce Hoover Crips and the 118th Street East Coast Crips. For simplicity's sake, this comment will refer to the global designations of "Crips" and "Bloods."

<sup>14</sup> 18 U.S.C. § 2(a) (1988). The section states "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." For a complete analysis of the application of 18 U.S.C. § 2(a) to 21 U.S.C. § 848, see *infra* Parts II through IV.

<sup>15</sup> *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir.), *cert. denied*, 110 S. Ct. 260 (1989).

<sup>16</sup> *United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988).

parts. Part One reviews the elements of 21 U.S.C. section 848, the Continuing Criminal Enterprise, and its application to gang-controlled drug trafficking. Part Two examines the current split within the circuits on the applicability of 18 U.S.C. section 2(a), Principals, to the Continuing Criminal Enterprise offense. Part Three critiques the arguments of the Seventh and Second Circuits, and concludes that aider and abettor liability is applicable to the CCE. Finally, Part Four illustrates a practical application of aider and abettor liability to a continuing criminal enterprise. Specifically, the leaders of any Los Angeles-based street gang "set"<sup>17</sup> that is involved in the establishment of a gang-dominated Chicago crack market will be guilty of aiding and abetting a continuing criminal enterprise. As such, the leaders should be prosecuted under 18 U.S.C. section 2(a) and punished under 21 U.S.C. section 848 to the full extent of the law.

### I. THE CONTINUING CRIMINAL ENTERPRISE AND GANG CONTROLLED DRUG NETWORKS—A PERFECT FIT

In the late 1960s, America discovered that a burgeoning drug problem afflicted society. Exponential growth in drug use defied provincial perceptions of a small, contained drug sub-culture, and sophisticated markets emerged to satisfy user demand. In response, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>18</sup> the principal purpose of which was to "[p]rovid[e] more effective means for law enforcement aspects of drug abuse prevention and control, and . . . an overall balanced scheme of criminal penalties for offenses involving drugs."<sup>19</sup>

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<sup>17</sup> See *supra* note 13. Because the names "Crips" and "Bloods" simply signify allegiance to a specific gang code, there are neither formal governing bodies nor designated leaders to coordinate the activities of the various "sets" within the Crip or Blood nations. See Overend, *L.A.P.D. Targets Gang Leaders*, L.A. Times, Sept. 2, 1988, Part I, at 11, col. 3. Instead, the individual sets have specific leaders. Thus, prosecutors should focus their efforts on the leaders of the individual sets who are responsible for introducing and supplying crack to a particular city. Alternatively, if two or more sets join together to coordinate their drug efforts, the prosecutor's target will be the chosen leaders of what is essentially a newly ordained joint-venture. As Part III will demonstrate, the government is not required to identify a single ringleader. *United States v. Phillips*, 664 F.2d 971, 1034 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982). Indeed, "[a] defendant need not be the dominant organizer or manager of a criminal enterprise; the statute requires only that he occupy some managerial position." *United States v. Becton*, 751 F.2d 250, 255 (8th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985). However, the prosecutors must focus on the gang's "top brass, and not the lieutenants . . ." *Garrett v. United States*, 471 U.S. 773, *reh'g denied*, 473 U.S. 927 (1985).

<sup>18</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

<sup>19</sup> H.R. REP. NO. 1444, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4567.

Congress particularly was concerned with the professional criminals who organized, supplied, and managed the drug distribution networks.<sup>20</sup> Congress recognized that removing the professional criminal, or, in the drug vernacular, "kingpin," was insufficient if the enterprise itself remained functional. The creation of 21 U.S.C. section 848, the Continuing Criminal Enterprise, provided the means by which the kingpin would be punished severely and the enterprise would be dismantled through asset forfeiture.<sup>21</sup>

Moreover, Congress believed that section 848's harsh penalty provisions also would deter the creation of new criminal enterprises.<sup>22</sup> The legislative history reveals that "section 408 [codified as 21 U.S.C. section 848] is the only provision of the bill providing minimum mandatory sentences, and is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic [of drugs] . . . ." <sup>23</sup> The CCE thus has two purposes: 1) to provide debilitating punishment to existing criminal enterprises; and 2) to deter the creation of new enterprises.

The statute's sentencing provisions reflect these two goals. A defendant convicted of operating a continuing criminal enterprise will be sentenced to twenty years, at a minimum, with the possibility of life-incarceration.<sup>24</sup> In addition, the defendant will forfeit all as-

<sup>20</sup> Congress recognized that the professional criminal would be prone to return to narcotics distribution after release from prison. S. REP. NO. 617, 91st Cong., 1st Sess. 83 (1969). Congress thus sought to develop a provision that would keep the professional drug trafficker "out-of-circulation." H. REP. NO. 1444, 91st Cong., 2d Sess. 10, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4576.

<sup>21</sup> Congress indentified one purpose of the forfeiture provision as preventing undicted members of any drug ring from continuing the illegal enterprise after its organizers, managers, or supervisors had been convicted under § 848. See W. CORCORAN, M. CARLSON & T. TUCKER, CRIMINAL PROSECUTION UNDER THE CONTINUING CRIMINAL ENTERPRISE STATUTE—SECTION 848 OF TITLE 21, UNITED STATES CODE 4 (monograph prepared for Dep't of Just. Narcotics and Dangerous Drug Section, 1982) [hereinafter W. CORCORAN], citing S. REP. NO. 617, 91st Cong., 1st Sess. 78-79 (1969).

<sup>22</sup> W. CORCORAN, *supra* note 21, at 4.

<sup>23</sup> H.R. REP. NO. 1444, 91st Cong., 2d Sess. 10, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4576. The Second and Seventh Circuits' disagreement on the application of aider and abettor liability to the continuing criminal enterprise stems, in part, from their different interpretations of § 848's legislative history. For a more indepth analysis of the legislative history, see Parts II and III, *infra*.

<sup>24</sup> The text of the continuing criminal enterprise provides in part:

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual . . . and to the forfeiture prescribed in section 853 of this chapter; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced up to a term of imprisonment which may not be less than 30 years and which may be up to life imprison-

sets derived from the enterprise according to the forfeiture provisions provided in 21 U.S.C. section 853.<sup>25</sup> However, to secure a conviction for a violation of 21 U.S.C. section 848, the prosecutor must establish the following five elements: (1) the suspect has committed a felony violation of the federal narcotics laws; (2) which was part of a continuing series of violations; (3) in concert with five or more persons; (4) for whom the defendant was an organizer or supervisor; and (5) from which he derived substantial income or resources.<sup>26</sup>

The first requirement, a felony violation of federal narcotics laws, is limited statutorily to violations of either (or both) subchapters I or II of the Comprehensive Drug Abuse Prevention and Control Act.<sup>27</sup> Accordingly, only felony violations of 21 U.S.C. sections 801-972, inclusive, will satisfy this provision. Fulfillment of this element thus depends upon the alleged criminal acts of the defendant

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ment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual . . . and to the forfeiture prescribed in section 853 of this chapter.

. . . .

. . . (c) Continuing criminal enterprise defined

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.

21 U.S.C. § 848(a), (c) (1988).

<sup>25</sup> 21 U.S.C. § 848(a) (1988). Section 853, Criminal Forfeitures, states the following:

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

21 U.S.C. § 853(a) (1988). The controversy surrounding the forfeiture provision is beyond the ambit of this comment. For an explanation of how this forfeiture provision applies to the continuing criminal enterprise, see Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984*, 22 AM. CRIM. L. REV. 747 (1985).

<sup>26</sup> 21 U.S.C. § 848(c) (1988).

<sup>27</sup> *Id.* § 848(c)(1).

and the charges levied by the federal prosecutor.<sup>28</sup> Prosecutors should have little difficulty in fulfilling the felony requirement; as such, it should not be considered a "threshold" issue for determining the applicability of the CCE to gang-controlled narcotic distribution networks.

The second requirement, section 848(c)(2), dictates that the felony violation must be "part of a continuing series of violations." In *United States v. Collier*,<sup>29</sup> the court interpreted the term "series" to mean "[t]hree or more related acts."<sup>30</sup> Subsequently, courts have adopted universally the *Collier* definition as the standard of review for this requirement. However, the contextual demands of a continuing criminal enterprise require that these predicate offenses violate federal drug laws.

The *Collier* definition thus dictates a minimum threshold for the successful application of the CCE.<sup>31</sup> Whether the threshold is satisfied is litigated frequently; the defendant will assert that the prosecutor impermissibly relied upon felony violations which are not predicate offenses within the meaning of the "series" requirement.<sup>32</sup> Realistically, however, meeting this threshold is not difficult, given the multitude of illegal acts necessary to initiate, manage, and perpetuate a sophisticated criminal enterprise. Therefore, conspiracy,<sup>33</sup> possession, distribution, and smuggling are all felony vio-

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<sup>28</sup> For a more thorough treatment of what constitutes a felony violation, see W. CORCORAN, *supra* note 21, at 6-8.

<sup>29</sup> 358 F. Supp. 1351 (E.D. Mich. 1973), *aff'd per curiam*, 493 F.2d 327 (6th Cir.), *cert. denied*, 419 U.S. 831 (1974).

<sup>30</sup> *Id.* at 1355. The court also held that "[o]n its face the term 'continuing series' is not so vague that a person is not sufficiently warned of the consequences of his conduct nor is it so vague that the judge and jury will be unable to apply that term to the defendant's conduct." *Id.*

<sup>31</sup> The minimum threshold is not defined by number of convictions but rather requires at least three related violations of narcotics laws. See *infra* note 38 and accompanying text.

<sup>32</sup> See, e.g., *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1573 (9th Cir. 1989) (defendant unsuccessfully challenged prosecutor's reliance on narcotics violations not expressly listed in indictment); *United States v. Aiello*, 864 F.2d 257, 264 (2d Cir. 1988) (challenged prosecutor's use of conspiracy and aiding and abetting charges as predicate offenses); *United States v. Rosenthal*, 793 F.2d 1214, 1226 (11th Cir. 1986) (fearing that the jury may have relied on RICO convictions, defendant unsuccessfully challenged failure of court to utilize special verdict interrogatories which made it impossible to determine which three predicate acts the jury relied upon to find a CCE violation), *cert. denied*, 480 U.S. 919 (1987).

<sup>33</sup> Virtually all of the circuit courts accept the use of a conspiracy violation as a predicate offense for the CCE. See, e.g., *Aiello*, 864 F.2d 257 (despite defendant's claim to contrary, conspiracy charge under 21 U.S.C. § 846 qualified as second of three predicate offenses); *United States v. Fernandez*, 822 F.2d 382, 384-85 (3d Cir.) (affirmed use of § 846 conspiracy as predicate offense since it neither "collapses" § 848's statutory scheme nor denigrates Congress' scheme), *cert. denied*, 484 U.S. 963 (1987); *United*



lations that satisfy the "series" element.<sup>34</sup> Additional violations may include RICO offenses,<sup>35</sup> aiding and abetting a narcotics offense,<sup>36</sup> and unlawful use of a communications facility to facilitate a drug transaction.<sup>37</sup>

Courts have eased this burden even further by distinguishing violations from convictions.<sup>38</sup> In *United States v. Markowski*, the Seventh Circuit explained,<sup>39</sup>

As the Supreme Court emphasized in *Garrett [v. United States]*, the CCE statute is not a sentence enhancement provision or an aggravated version of an offense. It is a distinct crime that entails the supervision of a substantial criminal enterprise. What is important is proof that there

*States v. Ricks*, 802 F.2d 731, 737 (4th Cir. 1986) (government may rely on § 846 violation to establish § 848 offense), *cert. denied*, 479 U.S. 1009 (1986).

<sup>34</sup> See, e.g., *United States v. Becton*, 751 F.2d 250, 253 n.7 (8th Cir. 1984) (jury instructed that felonious conduct in furtherance of conspiracy, which included distribution, smuggling, and possession of marijuana, may be considered part of "series" of felonies), *cert. denied*, 472 U.S. 1018 (1985); *United States v. Sterling*, 742 F.2d 521, 526 (9th Cir. 1984) (predicate offenses included possession and possession with intent to distribute marijuana), *cert. denied*, 471 U.S. 1099 (1985); *United States v. Phillips*, 664 F.2d 971, 1031-34 (5th Cir. 1981) (convictions for importation, use of communications facility to facilitate commission of narcotics felony, and possession satisfied "series" requirement), *cert. denied*, 457 U.S. 1136 (1982).

<sup>35</sup> See, e.g., *Rosenthal*, 793 F.2d at 1226; *Sterling*, 742 F.2d at 526.

<sup>36</sup> *Aiello*, 864 F.2d at 264 (drug felony violation based upon aiding and abetting may qualify as "series" predicate where the aider and abettor is also the kingpin).

<sup>37</sup> The unlawful use of a communications facility is governed by 21 U.S.C. § 843(b). The statute provides:

(b) Communications facility

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term 'communication facility' means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

21 U.S.C. § 843(b) (1988). For an application of § 843(b) as a predicate offense, see *United States v. Possick*, 849 F.2d 332, 334 (8th Cir. 1988) (issuing orders over phone on distribution of cocaine in another city violates § 843(b) and serves as predicate violation); *United States v. Zavala*, 839 F.2d 523 (9th Cir.), *cert. denied*, 109 S. Ct. 86 (1988) (use of phone to facilitate distribution is predicate offense). This prohibition should prove to be a lethal weapon in the battle against gang dealers because of the gangs' heavy reliance on telephones and beepers to direct sales of drugs.

<sup>38</sup> See, e.g., *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1409 (11th Cir. 1989) (Clark, J., concurring) (violations need not result in convictions if government proves occurrence beyond reasonable doubt), *cert. denied*, 110 S. Ct. 1484 (1990); *United States v. Apodaca*, 843 F.2d 421, 432 (10th Cir.) (defendant need not have been previously convicted of offense of selling marijuana in order for it to be a predicate offense for CCE purposes), *cert. denied*, 109 S. Ct. 325 (1988); *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984) (overt violation of drug law sufficient even though not the basis of separate substantive count), *cert. denied*, 470 U.S. 1084 (1985).

<sup>39</sup> 772 F.2d 358 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986).

was indeed a far-flung operation. Whether this has led to other convictions is all but irrelevant to the nature of the CCE offense. This leads us to interpret 'violation' in the natural way as an offense [and] not as a conviction.<sup>40</sup>

Therefore, it is conceivable that an individual lacking a prior criminal conviction may be prosecuted successfully under section 848.

The essence of the "series" requirement is to demonstrate a pattern of violations indicative of both a flagrant disregard for the law and a propensity for continued criminal activity. The requirement, therefore, identifies a class of individuals to which the offense may be applied. According to the Supreme Court in *Garrett*,<sup>41</sup> this class is "[t]he 'top brass' in the drug rings, not the lieutenants and foot soldiers."<sup>42</sup> Section 848's three remaining elements then skillfully interact to whittle down this larger class to a core of criminal offenders (collectively representing the "top brass") who are punished justifiably under the CCE statute.

The three remaining elements thus afford a measure of protection not only to minor enterprise employees but also to petty criminal enterprises.<sup>43</sup> Accordingly, these three elements are the nucleus of the section 848 offense. They are cumulative barriers which prosecutors must overcome before the CCE properly may be applied to a gang-controlled narcotics network.

The third element of section 848 requires that the defendant act in concert with five or more other persons. Although this element relates intricately to the concept of management,<sup>44</sup> analytically it is treated here, and by the majority of courts, as a distinct element of the CCE offense.

In *Jeffers v. United States*,<sup>45</sup> the United States Supreme Court defined "concert" to "[h]ave its common meaning of agreement in design or plan."<sup>46</sup> The *Jeffers* Court further declared 21 U.S.C. section 846, Attempt and Conspiracy, to be a lesser included offense of the

<sup>40</sup> *Id.* at 361. See also *United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986) (quoting *Markowski*, 772 F.2d at 361), *cert. denied*, 480 U.S. 919 (1987).

<sup>41</sup> 471 U.S. 773, *reh'g denied*, 473 U.S. 927 (1985).

<sup>42</sup> *Id.* at 781.

<sup>43</sup> See *United States v. Valenzuela*, 596 F.2d 1361, 1368 (9th Cir.) (inclusion of "substantial income or resources" requirement represents Congress' effort to provide some protection to petty criminal enterprise defendants), *cert. denied*, 444 U.S. 865 (1979).

<sup>44</sup> 21 U.S.C. § 848(c)(2)(A) is the only section that contains more than one of the necessary elements for demonstrating a CCE offense. Each of the other elements is introduced in an independent subsection of § 848. See *supra* note 24.

<sup>45</sup> 432 U.S. 137 (1977).

<sup>46</sup> *Id.* at 149. In reaching this conclusion, the Court reviewed the legislative history of § 848, concluding that had Congress intended a different definition, it would have expressly indicated its desire. *Id.* For a more thorough review of the legislative history on this subject, see *id.* at 148 n.14.

continuing criminal enterprise.<sup>47</sup> As such, the Court reinforced its interpretation of "concert" as "agreement" because the essence of any conspiracy is an agreement among participants to a common criminal end. The agreement may be proved through either direct evidence or circumstantial evidence.<sup>48</sup>

Congress' requirement of five or more other persons is an arbitrary minimum threshold about which the legislative history is silent. Essentially, the requirement forces prosecutors to distinguish between the size, scope, and sophistication of various narcotics operations in order to ensure that the CCE net captures only large kingpins. Nonetheless, courts interpret this requirement liberally to eliminate the risk that a shrewd kingpin may avoid CCE's reach because he or she only directly consorted with four others.<sup>49</sup>

Accordingly, delegation of authority does not insulate the drug kingpin. For example, if the defendant personally hired only the foreman, and the foreman, in turn, hired the members of the crew, it is fair to conclude that the defendant hired or organized the crew.<sup>50</sup> "Mere delegation of authority [by the defendant] does not detract from [the defendant's] ultimate status as [the] organizer."<sup>51</sup> Nor does it matter that the defendant did not have personal contact with the crew, "[s]o long as it was established that he occupied an organizational status with respect to those persons."<sup>52</sup> Furthermore, the prosecutor is not required to establish either the five individuals' identities or that the kingpin had personal contact with any of these individuals.<sup>53</sup> Finally, courts consistently rule that the five people need not be involved in the operation at the same time<sup>54</sup> or

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<sup>47</sup> *Id.* at 150.

<sup>48</sup> The standard for proof of agreement for a conspiracy is therefore the same standard for proof for the "in concert" requirement of the CCE offense. *W. CORCORAN*, *supra* note 21, at 13.

<sup>49</sup> *United States v. Cruz*, 785 F.2d 399, 407 (2d Cir. 1986).

<sup>50</sup> *United States v. Phillips*, 664 F.2d 971, 1034 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

<sup>51</sup> *Id.*; *see also* *United States v. Bond*, 847 F.2d 1233, 1236 (7th Cir. 1988) (highest bosses may rule indirectly, in ways that leave few traces; thus indirect supervision can satisfy the management requirement).

<sup>52</sup> *Phillips*, 664 F.2d at 1034.

<sup>53</sup> *See* *United States v. Bolts*, 558 F.2d 316, 320 (5th Cir. 1977), *cert. denied*, 439 U.S. 898 (1978) (defendant's lack of personal contact with two individuals is immaterial because defendant was "calling shots" with respect to the narcotics operation). *Accord* *United States v. Becton*, 751 F.2d 250, 255 (8th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985).

<sup>54</sup> *Phillips*, 664 F.2d at 1034 (citing *United States v. Michel*, 588 F.2d 986, 1000 n.14 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979)).

in the same jurisdiction.<sup>55</sup>

Applying these principles to a gang-controlled narcotics operation should yield sufficient circumstantial evidence to satisfy the continuing criminal enterprise's third requirement. Membership in the gang should constitute *prima facie* evidence of agreement or common design.<sup>56</sup> Participation by a gang member in the drug distribution process in any capacity, whether as a leader or as a minor employee, also should be sufficient evidence of the individual's agreement to the larger gang principle of operating the criminal enterprise for profit. Finally, the narcotics transactions conducted by numerous gang members under the gang leader's supervision will provide the prosecutor with multiple opportunities to identify five individuals with whom the leader operated in concert.<sup>57</sup>

The fourth element, and the conclusion of section 848(c)(2)(A), requires that the defendant occupy either an organizer position, a supervisory position, or any other management position with respect to these five other persons. The Second Circuit noted that "[t]he language of the statute is disjunctive: the government's burden is only to show that [the defendant] organized, supervised or managed at least five other persons."<sup>58</sup> Additionally, the kingpin is not required to have the same type of superior-subordinate relationship with each of the five or more persons involved.<sup>59</sup>

The extent of the accused's managerial or supervisory capacity is most readily determined by a continuum that has evolved from numerous court decisions. The well-defined, hierarchical chain-of-command anchors one end of the continuum. This structure provides the most persuasive and easily documented evidence of organization, supervision or management.<sup>60</sup> At this level of

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<sup>55</sup> *United States v. Fry*, 423 F. Supp. 1269, 1272-73 (E.D. Mich. 1976), *aff'd without op.*, 559 F.2d 1221 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978).

<sup>56</sup> Employees of corporations are considered to work together to achieve the corporate goals; employment presumes agreement with the corporation's philosophy. Membership in a gang, particularly one primarily oriented to narcotics trafficking, creates an analogous common design and agreement. See CAL. PENAL CODE § 186.22(a) (West 1988) (individual who chooses to promote gang activity knowing full well that the gang is engaged in a pattern of criminal gang activity may be imprisoned an additional year following other felony conviction).

<sup>57</sup> See *United States v. Cruz*, 785 F.2d 399, 407 (2d Cir. 1986) (even though defendant never met the two streetcorner sellers, they were included in the proof of the "five or more other persons" element because they clearly operated within the organization managed and organized by the defendant).

<sup>58</sup> *United States v. Mannino*, 635 F.2d 110, 116 (2d Cir. 1980).

<sup>59</sup> *Id.* at 117. Accord *United States v. Dickey*, 736 F.2d 571, 587 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981), *cert. denied*, 457 U.S. 1186 (1982).

<sup>60</sup> *Mannino*, 635 F.2d at 117.

sophistication, the defendant's place within the hierarchy establishes the management element.<sup>61</sup> Thus, a drug kingpin is said to manage or supervise the network's lieutenants, enforcers, and street-level salesmen. Indeed, the proposition is well-established that for the purposes of the CCE statute, the subordinate of an intermediary is managed by someone further up the organization's structure.<sup>62</sup>

The inference of management derived solely from structural design becomes much less legally tenable as one moves along the continuum of organizational structure toward decentralization. Therefore, the focus of establishing supervision or management shifts to identifying the defendant's interactions with five or more specific individuals.<sup>63</sup> At this end of the continuum, the management element is "[e]stablished by demonstrating that the defendant exerted some type of influence over another individual as exemplified by that individual's compliance with the defendant's directions, instructions or terms."<sup>64</sup> However, the statute does not require that the defendant exercise absolute and exclusive "control" over his or her subordinates.<sup>65</sup> Use of physical force,<sup>66</sup> instructing the participants on sales terms and credit,<sup>67</sup> and setting up meeting places for drug transactions are all examples of such influence.<sup>68</sup>

At the midpoint of this continuum, there exists a third approach

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<sup>61</sup> See *United States v. Alvarez*, 860 F.2d 801, 817 (7th Cir. 1988) (although not using this standard, the court recognized that an individual's place in the hierarchy or structure of the organization may be used to establish management or supervision of five or more persons), *cert. denied*, 109 S. Ct. 1966 (1989); *United States v. Oberski*, 734 F.2d 1030, 1032 (5th Cir. 1984) (well-defined chains of command under control of kingpin provide courts with clearest examples of organization). For cases demonstrating this principle, see *United States v. Moya-Gomez*, 860 F.2d 706, 746-47 (7th Cir. 1988) (trial testimony established defendant co-managed well-organized hierarchical operation), *cert. denied*, 110 S. Ct. 213 (1989); *United States v. Sisca*, 503 F.2d 1337, 1340, 1345-46 (2nd Cir. 1974) (defendant was the undisputed kingpin of corporate-like criminal enterprise that distributed 200 kilos of cocaine annually), *cert. denied*, 419 U.S. 1008 (1974). Although not a street gang, the Chambers Brothers' crack network in Detroit employed a Fortune 500-like corporate structure. Wilkerson, *Detroit Drug Empire Showed All the Traits of Big Business*, N.Y. Times, Dec. 18, 1988, § 1 at 42, col. 1. Two of the Chambers Brothers were found guilty by a jury of conducting a CCE. *Detroit Jury: Brothers are Drug Kings*, Chicago Trib., Oct. 29, 1988, § 1 at 6, col. 6.

<sup>62</sup> See *Alvarez*, 860 F.2d at 817; *Mannino*, 635 F.2d at 117.

<sup>63</sup> *United States v. Roman*, 870 F.2d 65, 74-5 (2d Cir.), *cert. denied*, 109 S. Ct. 3164 (1989). *Accord United States v. Aguilar*, 843 F.2d 155, 157-58 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 305 (1989); *United States v. Maull*, 806 F.2d 1340, 1344 (8th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987).

<sup>64</sup> *United States v. Possick*, 849 F.2d 332, 336 (8th Cir. 1988).

<sup>65</sup> *Id.* at 336-37.

<sup>66</sup> *Id.* at 336. *Accord United States v. Jones*, 801 F.2d 304, 308-09 (8th Cir. 1986).

<sup>67</sup> *Possick*, 849 F.2d at 336.

<sup>68</sup> *United States v. Dickey*, 736 F.2d 571, 587 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

for determining organization, management, or supervision; this is the "central role" standard. The most frequently cited demonstration of this standard is *United States v. Mannino*.<sup>69</sup> In *Mannino*, the defendant's "[s]uccess as a middleman with a vast network of purchasers and sources of immense supply . . . reveal[ed] his essential function as an organizer, supervisor or manager."<sup>70</sup> Other indicia of conduct sufficiently central in role to satisfy the management element may include arranging the purchase as well as the delivery of the narcotics.<sup>71</sup> Determining the defendant's position on the continuum is not, however, a rigid exercise. Courts often interchange elements of the "central role" and "control" standards to ascertain the extent of the defendant's managerial or supervisory role in less organized or unsophisticated drug networks.<sup>72</sup>

Today's increasingly sophisticated gang narcotics operations, in essence a microcosm of the gang's organizational structure,<sup>73</sup> should place the gangs on the continuum between the end anchored by the organized, hierarchical standard and the midpoint, where the "central role" standard becomes the arbiter of the management ele-

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<sup>69</sup> 635 F.2d 110 (2d Cir. 1980).

<sup>70</sup> *Mannino*, 635 F.2d at 117. See also *United States v. Oberski*, 734 F.2d 1030, 1032 n.3 (5th Cir. 1984) (although defendant was not the chief kingpin and did not exercise control, his role as main chemist within organization allowed finding that he organized narcotic manufacturing process for CCE conviction).

<sup>71</sup> *United States v. Lewis*, 759 F.2d 1316, 1331-33 (8th Cir.), cert. denied, 474 U.S. 994 (1985).

<sup>72</sup> In *Mannino*, the court also demonstrated five separate instances of the kingpin's control over his subordinates. *Id.* at 117. Alternatively, courts may fuse the two standards, thus creating a hybrid which is used for organizations that fall between the midpoint and the unsophisticated end of the organizational continuum. See, e.g., *Possick*, 849 F.2d at 336 (management proved through arranging acquisition/delivery of drugs, use of force, and directing delivery of profits and payments); *Dickey*, 736 F.2d at 587 (management proven through arranging meeting places for two large marijuana transactions, and ordering subordinates where to store, where to sell, and how to sell marijuana); *Jones*, 801 F.2d at 308-09 (management element satisfied through the use of force, setting prices for drugs, and dictating to whom sales may be made).

<sup>73</sup> Gang organizational patterns vary according to purpose, age, size, ethnic orientation, etc. The modern law enforcement perception of the gang is hierarchical. J. HAGEDORN & P. MACON, *PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY* 82 (1988) (the authors, however, take exception to this approach and argue that a gang's organization must be analyzed according to age groups). Under the traditional hierarchical model, the leader is followed by a select group of officers who serve as an advisory board. The next level consists of the remaining hardcore members, or those who are intricately involved in and are fiercely loyal to the gang. They are also the most violent criminal members of the gang. Vincent, *Information Memo* 1 (1988) (available through Chicago Police Dep't Gang Crime Unit). The lower levels, in descending rank, are the marginal members who are peripherally involved in the gang, *id.*, and the "want-to-be's" or those youths seeking to join a gang. For an in-depth view of the social and cultural system of a gang, see R. KEISER, *THE VICE LORDS: WARRIORS OF THE STREETS* (1979).

ment. Naturally, each gang will vary in sophistication and organization, thereby requiring each prosecutor to consider carefully where on the continuum the gang actually belongs. It is crucial, however, that larger scale gang-controlled narcotics networks exhibit sufficiently similar organizational characteristics to warrant a general conclusion about their position on the continuum.

The drug market, an illegal free-enterprise system, is guided nonetheless by the perennial laws of supply and demand; as such, it naturally embodies the organizational characteristics of today's mainstream economic markets. Inevitably, a gang's organization will mimic the larger structure of society.<sup>74</sup> Thus, the entrepreneurial principles and practices needed to make any business venture successful appear in the gang narcotics networks as well. Accordingly, the gang leaders, like other kingpins, are strategists. For example, they decide where and how to establish the markets, arrange the supply and delivery of the narcotics, dictate prices, and provide for defense of their turf. After charting the gang's course, the leaders insulate themselves by using lieutenants who, in turn, employ gang members to implement the strategy.<sup>75</sup>

The level of narcotics involvement by the individual gang is, however, directly related to the size of its membership and the degree of organizational sophistication achieved by the gang. The smaller, less organized gangs are generally only involved in selling drugs at the street level. As the gang grows and becomes more structured, it develops more specialized distribution methods and expands its product from PCP, marijuana, and pills to heroin and cocaine, due to the larger margin of profit involved. Several highly organized, well structured gangs presently active in Chicago are deeply entrenched in the operation of large-scale narcotics trafficking networks.<sup>76</sup>

The crack market further demonstrates these principles.<sup>77</sup> Gangs distribute crack through both street dealers and the opera-

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<sup>74</sup> T. WILLIAMS & W. KORNBLUM, *GROWING UP POOR* 77 (1985).

<sup>75</sup> This pattern of insulation is universal to any sophisticated narcotics operation. See M. CHAIKEN & B. JOHNSON, *CHARACTERISTICS OF DIFFERENT TYPES OF DRUG INVOLVED OFFENDERS 17* (monograph prepared for ISSUES and Practices in Crim. Just., Nat'l Inst. of Justice, 1988); *Profits in a Risky Business: A Look at How New York's Street Drug Trade Works*, NEWSWEEK, May 29, 1989, at 37.

<sup>76</sup> SELECT COMM. ON NARCOTICS ABUSE AND CONTROL, 100TH CONG., 2D SESS., 1987 UPDATE ON DRUGS AND DROP-OUTS REPORT 19 (Comm. Print 1987).

<sup>77</sup> The Jamaican posses, although not an inner-city gang, compete with the gangs for control of the crack market. As such, they utilize the same distribution techniques and are organized similarly. For a description of these techniques, see Barton, *The Kansas City Experience: "Crack" Organized Crime Cooperative Task Force*, POLICE CHIEF, Jan. 1988, at 29. The posses, however, import and distribute their own cocaine, while the gangs purchase the powdered cocaine through independent distributors.

tion of numerous crack houses within their "turf."<sup>78</sup> The lieutenants or other upper echelon members oversee the distribution system. This role includes converting the cocaine into crack, distributing the crack to the marketing entities, monitoring sales within a specific house or between a series of houses, and receiving the proceeds. A crew boss is designated to manage the actual sales within the crack house or on the street. The crew boss then assigns to the workers within the crack house specific roles, including lookouts, guards, money handlers, and drug dispensers. The workers may be from any strata of the gang's hierarchy and sometimes include elementary school students hoping eventually to join the gang.

A sophisticated hierarchical organization helps the prosecutor. Instead of having to rely exclusively on the "central role" standard to prove that the defendant occupied a supervisory or managerial position within the drug network, the prosecutor may satisfy the managerial requirement by identifying the gang member's position within his particular gang's organizational scheme. The leading case utilizing this approach is the Second Circuit's decision in *United States v. Ayala*,<sup>79</sup> where the kingpin's enterprise mirrored the distribution system normally employed by gangs. Specifically, Ayala's co-defendant Gonzalez oversaw a hierarchically organized street-level heroin operation.<sup>80</sup> As such, Gonzalez resided at the pyramid's apex. Co-defendants Ayala and Betacourt, who were the street managers, occupied the second level. The third level consisted of six to eight salaried street distributors. Finally, addicts and teenage street runners comprised the lowest tier.<sup>81</sup> The appellate court affirmed the district court's finding that both Gonzalez and Ayala managed five or more persons due to the nature of their duties and positions within the hierarchical distribution scheme.<sup>82</sup>

The fifth and final element of section 848 requires that the kingpin derive substantial income or resources from his enterprise. This requirement is directed solely at the magnitude of the operation in order to distinguish small-time operators from those actually targeted by the offense.<sup>83</sup> However, courts have refused to establish

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<sup>78</sup> *Federal Role*, 100th Cong., 2d Sess. 40 (1988) (statement of James Bramble, Special Agent in Charge, D.E.A.).

<sup>79</sup> 769 F.2d 98 (2d Cir. 1985).

<sup>80</sup> *Id.* at 102.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 101.

<sup>83</sup> *United States v. Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), *aff'd in part and vacated in part*, 432 U.S. 137 (1977).



a minimum necessary income to facilitate this distinction.<sup>84</sup> Indeed, the mechanics of demonstrating substantial income or resources are generally open-ended. The Tenth Circuit explained that “[t]he government need not prove a definite amount of net profit—it is sufficient to show substantial gross receipts, gross income or gross expenditures for resources.”<sup>85</sup>

Both direct and circumstantial evidence may be used to demonstrate substantial income or resources. For example, in *United States v. Chagra*,<sup>86</sup> the Second Circuit held that “[t]he jury is entitled to draw the eminently reasonable inference that a defendant running an expensive drug trafficking operation without another, legitimate and remunerative occupation is obtaining the funds to transact his business from his drug transactions.”<sup>87</sup> Thus, circumstantial evidence that the defendant spent large sums of money, in cash, for various personal items including jewelry, automobiles, real estate, and a swimming pool, on \$5,000 of declared taxable income is sufficient to support a conclusion that the defendant acquired substantial income from his drug operation.<sup>88</sup>

Alternatively, the defendant’s position in the drug network’s hierarchy may also provide sufficient circumstantial evidence of substantial income. For example, in *Ayala*, evidence that the organization’s street-level sellers made a base pay of \$26,000 permitted the jury to accept the inference that the kingpin, a full two levels higher up in the organizational chart, earned substantial income from his network.<sup>89</sup> Both the amount of money passing through the organization and the amount of drugs sold are also examples of permissible circumstantial evidence of substantial income or resources.<sup>90</sup>

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<sup>84</sup> *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.) (if Congress had intended a minimum requirement, it easily could have provided one), *cert. denied*, 457 U.S. 1125 (1982). *Accord* *United States v. Roman*, 870 F.2d 65, 75 (2d Cir.), *cert. denied*, 109 S. Ct. 3164 (1989).

<sup>85</sup> *United States v. Rivera*, 837 F.2d 906, 924 (10th Cir. 1988), *reh’g granted*, 847 F.2d 660 (1988) (quoting *United States v. Dickey*, 736 F.2d 571, 588 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985)). *Accord* *Jeffers*, 532 F.2d at 1116.

<sup>86</sup> 669 F.2d 241 (5th Cir. 1982), *cert. denied*, 459 U.S. 846 (1983).

<sup>87</sup> *Id.* at 258.

<sup>88</sup> *Dickey*, 736 F.2d at 588.

<sup>89</sup> *Ayala*, 769 F.2d at 102. *Accord* *United States v. Sisca*, 503 F.2d 1337, 1346 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

<sup>90</sup> *United States v. Bolts*, 558 F.2d 316, 321 (5th Cir. 1977), *cert. denied*, 439 U.S. 898 (1978). *See also* *United States v. Gonzalez*, 866 F.2d 781, 784 (5th Cir.) (number of drug sales made is sufficient evidence of substantial income), *cert. denied*, 109 S. Ct. 2438 (1988); *United States v. Grazzio*, 710 F.2d 691, 698 (11th Cir. 1983) (purchase of 4800 pounds of marijuana for resale is sufficient for substantial resources), *cert. denied*, 466 U.S. 937 (1984).

Today's crack cocaine trade is very lucrative: a \$10,000 kilo of powdered cocaine can be converted, through the cooking process,<sup>91</sup> into three kilos of crack cocaine valued at \$100,000.<sup>92</sup> In 1985, at the start of the crack explosion, "[t]he daily "take" from a rock<sup>93</sup> house operation has been placed at a few thousand dollars in some instances, and up to \$25,000 a house on the first and fifteenth of each month when welfare checks arrive."<sup>94</sup> By 1987, the Jamaican-organized posses that controlled crack houses throughout Dallas were making an estimated \$400,000 per day.<sup>95</sup> The Crips and the Bloods, who sell on average twenty-five to forty kilos per month per gang,<sup>96</sup> also make astronomical profits.

The conclusion inevitably follows that gangs derive substantial income from their narcotics operations, whether proved by expenditures on consumer goods,<sup>97</sup> by the amount of crack sold per month, or by the amount of profit generated by one kilo of cocaine. Alternatively, under the *Ayala* holding, a gang leader receives substantial income due to the nature of his or her position within the drug trafficking organization.<sup>98</sup> Indeed, "[m]oneys received by the defendant's underlings may be considered constructively received by the defendant [kingpin] . . . ."<sup>99</sup>

From this analysis of all five elements of the CCE statute, the inescapable conclusion is that the CCE offense applies to gang-controlled narcotics distribution networks. More importantly, the CCE is a potent weapon that should be used against the gangs. The penalty provisions strike at the heart of the gang problem: by targeting and severely punishing the gang leaders,<sup>100</sup> the continuity of the

<sup>91</sup> See *supra* note 5.

<sup>92</sup> *Profits in a Risky Business: A Look at How New York's Street Drug Trade Works*, NEWSWEEK, May 29, 1989, at 37.

<sup>93</sup> Rock is one of many street names for crack cocaine.

<sup>94</sup> Klein & Maxson, "Rock" Sales in Los Angeles, 69 SOCIOLOGY & SOC. RES. 561, 563 (1985).

<sup>95</sup> McGuire, *Jamaican Posses: A Call for Cooperation Among Law Enforcement Agencies*, POLICE CHIEF, Jan. 1988, at 20.

<sup>96</sup> Hackett & Lerner, *L.A. Law: Gangs & Crack*, NEWSWEEK, April 27, 1987, at 35.

<sup>97</sup> Lamar, *Kids Who Sell Crack*, TIME, May 9, 1988, at 20, 23 (bulk of crack earnings goes to conspicuous consumption: cars, jewelry, clothing etc.).

<sup>98</sup> See *supra* note 89 and accompanying text.

<sup>99</sup> *United States v. Roman*, 870 F.2d 65, 75 (2d Cir.) (citing *United States v. Ayala*, 769 F.2d 98, 102-03 (2d Cir. 1985)), *cert. denied*, 109 S. Ct. 3164 (1989).

<sup>100</sup> The controversial concept of focusing enforcement on gang leaders is known as "gang bashing." The underlying principle is that only a very small number of gang members will have the entrepreneurial and leadership skills with which to lead a gang. See M. CHAIKEN & B. JOHNSON, *supra* note 75, at 12-13; Vincent, *Information Memo 2* (1988) (available through Chicago Police Dep't Gang Crime Unit) (the leader is the key to the gang's strength and perpetuation). By removing these individuals from the streets, the power, organization, and appeal of the gangs are impeded. See Stapleton &

gang is upset. Absent their leaders, gangs will become less aggressive and thus less criminal.<sup>101</sup> Furthermore, the forfeiture provision<sup>102</sup> accompanying section 848 provides the means to cripple effectively the remainder of the gang's network<sup>103</sup> and to tarnish the monetary allure of drugs. The CCE provision is thus a stiff penalty today and a deterrent for tomorrow's gang activities.

While as yet no formal case law governs the application of the CCE to gang-controlled narcotics operations, some prosecutors have recognized its potential value in the war on gangs and drugs. Prosecutors used CCE indictments against the Jamaican posse in Kansas City.<sup>104</sup> The Los Angeles United States Attorney's Office identified CCE indictments as a means to "[s]ystematically decimate these [gangs] and their leadership and to take away the proceeds of their gains."<sup>105</sup> Still, the potent CCE weapon is exceedingly underutilized in the war against gangs and drugs.

Part I thus provides a conceptual model that demonstrates how a gang's organization, distribution methods, and scope of illegal narcotics trafficking fulfill the statutory requirements of the continuing criminal enterprise. The practical application of the CCE statute to a particular gang is a fact-specific exercise; nonetheless, the model predicts that the statute will apply despite potential variations between gang organizations. Having established that a gang-controlled narcotics operation is indeed a continuing criminal enterprise, it is now possible to address the two remaining issues: first,

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Needle, *Response Strategies to Youth Gang Activity* (Report by Center for the Assessment of the Juv. Just. System Sept. 1982), reprinted in *Gang Violence and Control in the Los Angeles and San Francisco Areas with a View to What Might be Done by the Federal Government: Hearings Before the Senate Subcomm. on Juvenile Justice*, 98th Cong., 1st Sess. 101-17 (1983). The Los Angeles Police Department in 1988 adopted the gang-bashing theory as the focus of its enforcement techniques. See Overend, *L.A.P.D. Targets Gang Leaders as Tactics Shift*, L.A. Times, Sept. 2, 1988, § 1 at 11, col. 3 (late ed.).

<sup>101</sup> "Lacking any reliable theories for why gang-related killings ebb and flow, law enforcement officials and gang experts have often suggested that a typical gang set will at least temporarily fragment if its leaders are eliminated by lengthy state prison sentences." Overend, *L.A.P.D. Targets Gang Leaders as Tactics Shift*, L.A. Times, Sept. 2, 1988, § 1 at 32, col. 1-2. See also U. PERKINS, *EXPLOSION OF CHICAGO'S BLACK STREET GANGS: 1900 TO THE PRESENT* 38 (1987) (a noticeable lull in violent gang activity occurs when key leaders are in jail).

<sup>102</sup> See *supra* note 25.

<sup>103</sup> Although initiated under RICO forfeiture provisions and not the CCE, the government's seizure of the Chicago El Rukn's gang headquarters is an apt demonstration of how the forfeiture concept works. See Gibson & Gorman, *Rukns, Robinson Indicted for Drugs, Murder*, Chicago Trib., Oct. 28, 1989, § 1 at 2, col. 3.

<sup>104</sup> See Barton, *The Kansas City Experience: "Crack" Organized Crime Cooperative Task Force*, POLICE CHIEF, Jan. 1988, at 28, 30.

<sup>105</sup> *Federal Role*, 100th Cong., 2d Sess. 37 (1988) (statement of Gary Feess, Assistant U.S. Att'y, C.D. Cal.).

whether it is possible to aid and abet a continuing criminal enterprise; and second, whether the activities of the Bloods and Crips in assisting the creation of gang-dominated crack networks constitute aiding and abetting a CCE.

## II. THE SPLIT IN THE CIRCUITS

The multi-billion dollar per annum drug industry has a stranglehold on America's social fabric, moral strength, and economic productivity. A bold and powerful response is necessary. As established, the driving purpose of the CCE statute is to strike forcefully at the upper echelons of the drug markets.<sup>106</sup> Broadening the radius of CCE's hammerlike stroke to include the aiders and abettors of the upper echelon also would be a powerful response to the drug epidemic. But is such an approach legally permissible? The ultimate issue is how large CCE's targeted class of offenders should be. This section explores the Second and Seventh Circuit decisions on this relatively new issue.<sup>107</sup>

In *United States v. Ambrose*, the Seventh Circuit addressed the validity of applying 18 U.S.C. section 2(a), Principals, to 21 U.S.C. section 848, Continuing Criminal Enterprise.<sup>108</sup> In *Ambrose*, ten former Chicago policemen appealed convictions for aiding and abetting a continuing criminal enterprise.<sup>109</sup> The officers, known as the infamous "Marquette 10," provided protection for two large narcotics dealers in Chicago's Marquette District. In exchange for money and goods, the officers tipped off the dealers to impending police raids and even harassed rival drug dealers.<sup>110</sup> The former officers challenged their convictions, arguing that Congress could not have intended to subject mere aiders and abettors to the harsh penalties reserved for the kingpin.<sup>111</sup>

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<sup>106</sup> See *supra* note 41 and accompanying text.

<sup>107</sup> Despite the approaching 20th anniversary of § 848, the issue of aiding and abetting a continuing criminal enterprise has only been considered in five cases. See *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir.) (en banc), *cert. denied*, 110 S. Ct. 260 (1989); *United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988); *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988); *United States v. Ambrose*, 740 F.2d 505 (7th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); and *United States v. Vasta*, 649 F. Supp. 974 (S.D.N.Y. 1986).

<sup>108</sup> 740 F.2d 505 (7th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

<sup>109</sup> *Id.* at 507.

<sup>110</sup> Specifically, the officers

[n]ot only failed to arrest the distributors or their employees, they [also] warned the distributors of impending raids by honest policemen, ignored many complaints from citizens about the activities of the distributors . . . and even beat up and threatened to kill a drug dealer who was competing with the protected distributors.

*Id.*

<sup>111</sup> *Id.*

However, the Seventh Circuit rejected this appeal. The court held that when the aider and abettor is a member of the kingpin's organization, he or she may not be charged under 18 U.S.C. section 2(a); however, when the aider and abettor is an independent entrepreneur who voluntarily assists the kingpin, prosecution under section 2(a) is permissible.<sup>112</sup> This crucial distinction resulted from a pragmatic analysis of the CCE's punishment objectives and terms. The CCE is intended to reach the kingpin; accordingly, the kingpin's employees should be prosecuted under other sections of the federal narcotics laws that carry lesser penalties. This dichotomy reflects the kingpin's greater culpability vis-a-vis his or her underlings. The court thus reasoned that punishing the kingpin's employees for complicity under 21 U.S.C. section 848 would emasculate the sentencing differential because kingpins and employees would be punished equally.<sup>113</sup> As the court explained, "When a statute reveals on its face, as section 848 does, the legislators' purpose to make one class of persons punishable more heavily than another, a court will not defeat that purpose by applying the general aiding and abetting statute to the second class."<sup>114</sup>

However, punishment of the police officers, who were the kingpins' protectors but not their employees, did not raise such a statutory concern.<sup>115</sup> Indeed, the court feared that the opposite result would occur: a failure to punish the officers as aiders and abettors would weaken the impact of the continuing criminal enterprise statute. Accordingly, "[t]he effectiveness of the kingpin statute might . . . be reduced if a kingpin's police protectors, such as these defendants, whose efforts enabled large drug enterprises to flourish brazenly for years, could never be punished as aiders and abettors."<sup>116</sup>

The court's reasoning suggests that the defendants' protection of the drug enterprises was so essential to the operations' existence that the defendants were as culpable as the kingpins themselves.<sup>117</sup> Since "Congress probably would have wanted them to be punish-

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<sup>112</sup> *Id.* at 507-08.

<sup>113</sup> *Id.* at 507.

<sup>114</sup> *Id.* at 508. *Cf.* *United States v. Southard*, 700 F.2d 1, 20 (1st Cir.), *cert. denied*, 464 U.S. 823 (1983) (court upheld aider and abettor indictment in conjunction with the substantive gambling violation since defendant's actions placed him above the class of "mere bettor").

<sup>115</sup> *Ambrose*, 740 F.2d at 508.

<sup>116</sup> *Id.*

<sup>117</sup> Although the court never explicitly stated this conclusion, the inference was clearly intended. For example, in discussing the possibility of punishing the officers under 21 U.S.C. § 846, the court wrote that

[t]he penalties are not nearly so heavy as those under section 848, so that under the position urged by the defendants the aider and abettor could not be punished as

able . . . *as severely* as the kingpins themselves,"<sup>118</sup> the court held that the police officers were properly convicted for aiding and abetting a continuing criminal enterprise.<sup>119</sup> Moreover, the court refused to find the defendants guilty of aiding and abetting a 21 U.S.C. section 846 conspiracy, a charge with a lesser although still significant penalty, because punishment under section 846 would not have properly reflected the defendants' degree of culpability.<sup>120</sup>

Having established the applicability of aider and abettor liability to the CCE offense, the Seventh Circuit then addressed whether the judge, in sentencing the aider and abettor, was bound by the mandatory minimum sentencing provisions of section 848.<sup>121</sup> Interestingly, the majority, based on Learned Hand's famous definition of an aider and abettor,<sup>122</sup> concluded that any aider and abettor, no matter how insignificant the magnitude or effect of his or her assistance, may be punished under section 848. Thus, even a policeman who took an isolated bribe from a kingpin but did not provide a more systematic pattern of protection would be, like the "Marquette Ten," an aider and abettor of the kingpin.<sup>123</sup> As such, the officer would be subject to CCE's punishment provisions.

The court recognized that within this hypothetical, the two classifications of "crooked" officers had significantly different degrees of culpability. The court, however, failed to develop a threshold that could distinguish between these two starkly different culpability levels. Ideally, the court should have defined a standard that would allow application of 18 U.S.C. section 2(a) to 21 U.S.C. section 848 only when the aider and abettor's assistance proved instrumental in perpetuating the criminal enterprise.<sup>124</sup> Instead, the court held that the sentencing judge would not be bound by the minimum sentenc-

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severely as the principal *even if he was just as culpable*. We do not think that Congress intended this result.

*Ambrose*, 740 F.2d at 508 (emphasis added).

<sup>118</sup> *Id.* (emphasis in original).

<sup>119</sup> *Id.* at 508.

<sup>120</sup> *Id.* at 509. See *supra* note 117.

<sup>121</sup> *Id.* at 508.

<sup>122</sup> Learned Hand's famous definition of aiders and abettors appeared in *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938). Hand required that the alleged aider and abettor "[i]n some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, [and] that he seek by his action to make it succeed." 100 F.2d at 402. However, as the *Ambrose* majority recognized, the definition is silent as to the magnitude and essentiality of the aider and abettor's role. *Ambrose*, 740 F.2d at 509.

<sup>123</sup> *Id.*

<sup>124</sup> This is the approach Judge Wood suggested in his dissenting opinion in *Ambrose*. See *infra* note 126 and accompanying text.

ing provisions of section 848.<sup>125</sup> Thus, the judge could sentence the officer who took the isolated bribe to two or three years in prison while sentencing the officer who engaged in the more systematic pattern of protection to a lengthier period of incarceration. Under this ruling, any aider and abettor of a kingpin would be punished under section 848 regardless of the amount or effectiveness of the assistance rendered. This new judicial sentencing discretion thus removed the risk that the aider and abettor might suffer disproportionate or cruel and unusual punishment.

Judge Wood dissented with respect to the issue of sentencing discretion.<sup>126</sup> While the judge did not object to the majority's reliance on Learned Hand's definition of aiders and abettors, he did criticize the majority for failing to place the definition within the context of the CCE. The dissent's analysis corrected this error: by contextually defining an aider and abettor according to the elements of the CCE offense, Judge Wood fashioned a test that permitted application of aider and abettor liability based on the magnitude and effect of each individual's assistance to the kingpin.

Judge Wood argued that whenever the aider and abettor intentionally associates with the criminal venture, participates in it as something he or she wishes to bring about, and tries to make the venture succeed, then 18 U.S.C. section 2(a) rightly makes the aider and abettor punishable as a principal.<sup>127</sup> However,

[i]f a defendant does not meet each of the criteria for being an aider and abettor as applied to a continuing criminal enterprise, that is, if he has not in fact associated himself with the criminal enterprise, participated in it, wished its success, and worked to make it succeed, then a judgment of acquittal should be entered.<sup>128</sup>

Judge Wood reasoned that any defendant who satisfied this test

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<sup>125</sup> *Ambrose*, 740 F.2d at 510. The majority reached this conclusion based on the requirement of *Solem v. Helm*, 463 U.S. 227 (1983), that a criminal sentence must be proportionate to the crime for which the defendant has been convicted to pass constitutional muster under the Eighth Amendment's cruel and unusual punishment clause. *Ambrose*, 740 F.2d at 510. The court recognized that in certain situations, the application of aider and abettor will produce disproportionate punishment.

[T]here will then be cases where a kingpin's own misconduct is not sufficiently egregious to earn him more than the minimum ten-year no-parole prison sentence and where the aider and abettor's culpability is much less (maybe he was just a minor supplier of the kingpin)—yet the aider and abettor would have to be given the same sentence.

*Id.* To remove the risk of such a disproportionate result, the majority held that the judge was not bound by the minimum sentence provision. *Id.*

<sup>126</sup> *Ambrose*, 740 F.2d at 513-16 (Wood, J., concurring in part and dissenting in part).

<sup>127</sup> *Id.* at 514 (Wood, J., concurring in part and dissenting in part).

<sup>128</sup> *Id.* at 515 (Wood, J., concurring in part and dissenting in part).

would be equally as culpable as the enterprise's principal.<sup>129</sup>

Concurring with the majority, Judge Wood concluded that the conduct of the "Marquette Ten" clearly amounted to aiding and abetting a CCE.<sup>130</sup> However, he disagreed with the majority's idea that *every* third party who provided assistance to a drug kingpin would be an aider and abettor of a CCE. Using a contextual definition of aiding and abetting, Judge Wood distinguished the majority's hypothetical of an officer taking a single bribe from the conduct of the "Marquette Ten." Judge Wood concluded that "[s]uch isolated transactions *without more* would not necessarily meet the aiding and abetting test as applicable to a continuing criminal enterprise."<sup>131</sup> Thus, the dissent rejected the majority's notion that sentencing discretion would allow aider and abettor liability to be applied to any and all third parties.<sup>132</sup> By adhering to the mandatory minimum sentencing provision, the dissent in effect required that prosecutors select only those accomplices whose degree of culpability approached that of the kingpin. Should the prosecutor not be able to do so, the charge could not be brought.

Shortly thereafter, the Southern District of New York addressed the same issue in *United States v. Vasta*;<sup>133</sup> *Vasta* represented the first time that the CCE aider and abettor liability issue was argued before a court within the Second Circuit. In *Vasta*, the court resolved several pre-trial motions arising out of a twenty-three count indictment charging, *inter alia*, co-defendants Vasta and Abbamonte with operating a continuing criminal enterprise.<sup>134</sup> The fourth count of the

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<sup>129</sup> Judge Wood wrote,

The sentences in our case, though arguably strict, are certainly not so disproportionate to the crime involved that they amount to cruel and unusual punishment under the eighth amendment. One who meets the aiding and abetting test as applied to a continuing criminal enterprise will be much more than a minor offender and as deserving of punishment as the kingpins.

*Id.* at 515 (Wood, J., concurring in part and dissenting in part). Judge Wood found the officers' conduct to be so egregious that the conclusion naturally followed that the officers were equally as culpable as the kingpins they protected. He wrote, "[I]f there be any merit to the view that aiders and abettors may not be quite as culpable as genuine principals, this is not the case to try to fashion some exception." *Id.* at 514 (Wood, J., concurring in part and dissenting in part) (footnote omitted).

<sup>130</sup> [The former police officers] participated in it, and wanted and tried over a period of time to make it succeed. . . . They had the power to shut the enterprise down and dethrone the management, but did not do so. These defendants contributed to the success of the entire criminal enterprise on a continuing basis.

*Id.* at 514 (Wood, J., concurring in part and dissenting in part).

<sup>131</sup> *Id.* (Wood, J., concurring in part and dissenting in part) (emphasis added).

<sup>132</sup> Judge Wood considered Judge Posner's holding to be without support and an invitation to wander outside the legislatively created bounds of 18 U.S.C. § 2(a). *See id.* at 514-15 (Wood, J., concurring in part and dissenting in part).

<sup>133</sup> 649 F. Supp. 974 (S.D.N.Y. 1986).

<sup>134</sup> *Vasta*, 649 F. Supp. at 978.



indictment charged two additional defendants, Squitieri and Paradiso, with aiding and abetting Abbamonte in his continuing criminal enterprise activities.<sup>135</sup>

Specifically, the fourth count alleged that Squitieri and Paradiso's assistance enabled Abbamonte, while incarcerated, to maintain communications with his narcotics employees and to obtain heroin supplies, thereby keeping his criminal enterprise alive.<sup>136</sup> The record further revealed that Squitieri and Paradiso were independent entrepreneurs, neither employees of the kingpin nor employees of the kingpin's enterprise.<sup>137</sup>

Squitieri and Paradiso filed a motion to dismiss the fourth count, arguing, like the officers did in *Ambrose*, that Congress could not have intended to subject aiders and abettors to the same harsh penalties as a kingpin.<sup>138</sup> However, the court denied the motion. The court held that because Squitieri and Paradiso were independent entrepreneurs who expended substantial effort in helping Abbamonte to preserve his heroin network, they could be punished as principals.<sup>139</sup> The court further noted, however, that accomplices who provided "low" level or insignificant assistance were exempt from the harsher CCE punishment.<sup>140</sup>

The *Vasta* court, in contrast to the Seventh Circuit in *Ambrose*, recognized, in principle, the need for a "degree of culpability" test to guide the application of 18 U.S.C. section 2(a) to section 848. While the court never specifically defined a threshold of culpability beyond which the aider and abettor would deserve punishment under section 848, the court's analogy of Squitieri and Paradiso's actions to the conduct of the corrupt police officers in *Ambrose* indicates that the threshold would be quite high. The analogy to *Ambrose* leads to the conclusion that Squitieri and Paradiso's methods of assistance, although never specifically identified by the court, were so significant that without them Abbamonte's heroin operation would have collapsed.<sup>141</sup> This assistance stands in stark contrast to that of a "low-level" accomplice.<sup>142</sup> Thus, the court concluded that

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 982.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 982.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See *supra* note 116 and accompanying text.

<sup>142</sup> The unspoken assumption is that a low-level accomplice will have a lower degree of culpability. The *Vasta* court, however, did not provide an example of a lower-level accomplice. The Seventh Circuit in *Ambrose* suggested that a minor narcotics supplier of a kingpin is an example of an aider and abettor with a lower degree of culpability. See

even though the defendants did not qualify as kingpins under section 848, their acts could warrant punishment as principals under the CCE.<sup>143</sup>

In the subsequent trial, Squitieri and Paradiso were convicted of aiding and abetting Abbamonte's continuing criminal enterprise. Paradiso appealed his conviction and twenty-year sentence to the Second Circuit in *United States v. Amen*.<sup>144</sup>

Not surprisingly, Paradiso's argument in front of the Second Circuit differed from his initial argument. Paradiso's new thesis postulated that "because section 848 applies only to a person in charge of a CCE, one cannot incur liability for aiding and abetting such a person."<sup>145</sup> Persuaded by this reasoning, the Second Circuit concluded that only those who meet all of the CCE's requirements may be punished under section 848.<sup>146</sup>

In rejecting the application of 18 U.S.C. section 2(a), the *Amen* court relied almost exclusively on its interpretation of the CCE's legislative history. The court explained its decision through step-by-step reasoning that resembles a logician's syllogism: (1) Congress intended to target the ringleaders of large-scale narcotics operations, which the Supreme Court identified as the "top brass" and not the lieutenants or foot soldiers;<sup>147</sup> (2) when, however, Congress assigned guilt to only one type of participant in a transaction, it intended to leave the others unpunished for the offense;<sup>148</sup> therefore, (3) because Congress defined 21 U.S.C. section 848 as targeting the leadership of the drug enterprises, it necessarily excluded those who do not lead.<sup>149</sup> Paradiso, guilty of assisting in the operation of the drug ring while Abbamonte served his jail sentence, never served in a supervisory or managerial capacity in Abbamonte's enterprise.

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*supra* note 125. A police officer who received a single bribe would be another example of a low-level accomplice whose assistance is too insignificant to warrant the continuing criminal enterprise's penal sanctions. See *supra* note 131 and accompanying text.

<sup>143</sup> The court noted that "[t]he fact that neither defendant himself can be classified as a drug kingpin to warrant being proceeded against as a principal is irrelevant." *Vasta*, 649 F. Supp. at 982. The court then cited as support the case of *Hagerty v. United States*, 5 F.2d 224 (7th Cir. 1925) (conviction of a federal officer for aiding and abetting the impersonation of a federal officer to defraud the government upheld even though the defendant federal officer could not himself have been convicted of impersonating a federal officer). *Id.*

<sup>144</sup> 831 F.2d 373 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

<sup>145</sup> *Id.* at 381.

<sup>146</sup> *Id.* at 382.

<sup>147</sup> *Id.* at 381 (quoting *Garrett v. United States*, 471 U.S. 773, 781 (1985)).

<sup>148</sup> *Id.* at 381 (citing *Gebardi v. United States*, 287 U.S. 112 (1932); *United States v. Farrar*, 281 U.S. 624 (1930)).

<sup>149</sup> *Amen*, 831 F.2d at 381.

Accordingly, Paradiso could not be considered a kingpin; thus, he could not be punished under the CCE for his complicity.

To support this conclusion, the court traced the evolution of section 848 from its original proposal as a post-conviction sentence-enhancement provision to its final passage as a separate federal offense. In principle, the initial proposal resembled a recidivist statute: following conviction on a narcotics charge, the prosecutor could petition the court for a finding that the defendant was a special offender who, upon release, would revert to his illegal ways. If the court made such a finding, it could supplement the defendant's sentence.<sup>150</sup>

Congress, however, believed that the proposal suffered from numerous constitutional infirmities.<sup>151</sup> The legislature instead adopted the Dingell Amendment, which transformed the initial proposal into a separate offense known as the Continuing Criminal Enterprise.<sup>152</sup> The Second Circuit reasoned that if it could isolate Congress' motive in passing the Dingell Amendment, it would be able to determine whether the application of aider and abettor liability to the CCE was consistent with that intent.

To isolate this intent, the Second Circuit focused on the statute's targeted class of offenders. If the Dingell Amendment narrowed or maintained the same class of offenders, it inevitably would follow that the amendment foreclosed the application of aider and abettor liability, which would have broadened section 848's scope. If, however, the amendment expanded section 848's targeted class of offenders, the application of aider and abettor liability to the CCE would be consistent with congressional intent.

The court recognized that the initial provision, by nature of its post-conviction format, limited the class to convicted, serious offenders. The Second Circuit concluded that Congress passed the Dingell Amendment to rectify serious constitutional defects within the original proposal.<sup>153</sup> Therefore, the amendment was not

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<sup>150</sup> To review the text of the original continuing criminal enterprise provision, see *infra* note 238 and accompanying text.

<sup>151</sup> The most significant constitutional objection to the sentence-enhancement provision was that it "allowed sentencing to be imposed without providing a defendant with an opportunity to cross-examine persons providing information as to the continuing criminal offense." *Amen*, 831 F.2d at 382. For additional objections, see S. REP. NO. 617, 91st Cong., 1st Sess. 467-74 (1969).

<sup>152</sup> See H.R. REP. NO. 1444, 91st Cong., 2d Sess. 82, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4650-52.

<sup>153</sup> *Amen*, 831 F.2d at 382. The amendment sponsored by Representative Dingell was not, however, free of its own potentially serious constitutional defects or controversies. See *infra* note 241.

designed to broaden the class of targeted offenders. Thus, the Second Circuit reasoned that the purpose and targeted class of offenders remained constant; the only change was in the means of procuring stronger punishment. Accordingly, the Second Circuit concluded,

While the legislative history makes no mention of aiders and abettors, it makes it clear that the purpose of making CCE a new offense rather than leaving it as sentence enhancement was not to catch in the CCE net those who aided and abetted the supervisors' activities, but to correct its possible constitutional defects by making the elements of the CCE triable before a jury.<sup>154</sup>

Additionally, the Second Circuit, in a quiet rebuke of the Seventh Circuit's reasoning in *Ambrose*, questioned the ability of courts to distinguish between the kingpin's employees and those third parties who only "help" the kingpin.<sup>155</sup> The court feared that an employee of the operation, whose assistance to the kingpin proved more valuable than that of the "helpful" third party, would be punished less severely<sup>156</sup> than the aider and abettor.<sup>157</sup> This incongruity, combined with the legislative history, led the court to conclude that it could not reconcile 18 U.S.C. section 2(a) and 21 U.S.C. section 848 without damaging the "plain terms and clear intent of section 848."<sup>158</sup>

In 1987, the Second Circuit re-addressed the aider and abettor liability issue in *United States v. Benevento*.<sup>159</sup> In this case, Ernest Benevento appealed his conviction for aiding and abetting his nephew Ernesto's continuing criminal enterprise. The record revealed the nature but was unclear as to the extent of Ernest's complicity. Ernest, although not employed in his nephew's heroin manufacturing

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<sup>154</sup> 831 F.2d at 382.

<sup>155</sup> *Id.*

<sup>156</sup> As established, an employee of a CCE cannot be convicted of aiding and abetting the CCE. Hence, the employee is provided a degree of protection not available to an independent aider and abettor who may be subject to CCE's mandatory minimum penalty.

<sup>157</sup> The court indirectly raised a degree of culpability argument through this analysis. Essentially, it could not justify the mandatory minimum sentence for a third party's assistance that proved to be of limited effect and magnitude. Judge Wood's dissent in *United States v. Ambrose* is a reasoned response to these concerns. See *supra* note 127 and accompanying text. The Seventh Circuit later adopted Judge Wood's proposal in *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir.) (en banc), *cert. denied*, 110 S. Ct. 260 (1989). See *infra* note 170 and accompanying text. Accordingly, the Second Circuit's concerns are placated because the degree of culpability test ensures that aider and abettor liability will be applied only in situations where the magnitude and effect of the assistance is so significant that it enables the enterprise to survive when, in the absence of the assistance, it would have faltered or even collapsed.

<sup>158</sup> *Amen*, 831 F.2d at 382.

<sup>159</sup> 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988).

and distribution network, nonetheless provided substantial assistance to that enterprise.<sup>160</sup> Specifically, he allowed his nephew to use his Arizona home as a heroin laboratory, maintained detailed financial records for the enterprise, contributed substantial amounts of capital to help finance his nephew's second narcotics operation, and attempted to smuggle his nephew's currency out of the country.<sup>161</sup>

Despite allegations that Ernest acted in a managerial capacity, the government lacked sufficient evidence to convict Ernest of violating the continuing criminal enterprise statute.<sup>162</sup> Relying on *Amen*, which prohibited punishment under section 848 of any defendant who did not independently meet all five CCE statutory requirements,<sup>163</sup> the court reversed Ernest Benevento's conviction on the CCE charge.<sup>164</sup>

Most recently, the Seventh Circuit, sitting *en banc* in *United States v. Pino-Perez*,<sup>165</sup> thoroughly re-examined the permissibility of punishing an aider and abettor under section 848.<sup>166</sup> Pino-Perez appealed his conviction and forty-year sentence for aiding and abetting a drug kingpin. He was "the supplier" of cocaine to a drug ring in southern Wisconsin supervised by one Nichols.<sup>167</sup> The record indicated that Pino-Perez made frequent sales of cocaine in substantial quantities to Nichols for a lengthy period of time.<sup>168</sup> In fact, Pino-Perez was a much larger dealer than Nichols, the kingpin.<sup>169</sup>

The Seventh Circuit's decision in *Pino-Perez* is significant for two reasons: first, the court reaffirmed the application of 18 U.S.C. sec-

<sup>160</sup> *Id.* at 71.

<sup>161</sup> *Id.* Although the record indicates the types of assistance provided by Benevento, it is silent as to the effect the assistance had on the operation. It is therefore impossible to accurately predict Benevento's degree of culpability (*i.e.*, whether his assistance amounted to a sufficiently significant degree such that it would be proper to punish him as a principal). The Second Circuit did not need to make this determination since it rejected the application of aider and abettor liability to the CCE.

<sup>162</sup> *Id.* at 71-72.

<sup>163</sup> See *supra* note 146 and accompanying text.

<sup>164</sup> *Benevento*, 836 F.2d at 71-72.

<sup>165</sup> 870 F.2d 1230 (7th Cir.) (*en banc*), *cert. denied*, 110 S. Ct. 260 (1989).

<sup>166</sup> Judge Posner, writing for the majority, explained,

A court of appeals has a responsibility to reexamine its decisions in light of new arguments, new evidence, new experience, especially when by doing so it may be able to eliminate a conflict between circuits and thereby lighten the Supreme Court's burden of resolving such conflicts. In that spirit we have undertaken to reexamine *Ambrose*, but having done so we adhere to our view that there is aider and abettor liability for assisting a kingpin.

*Id.* at 1231.

<sup>167</sup> *Id.* at 1232 (emphasis in original).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1232.

tion 2(a) to the continuing criminal enterprise; and second, the court finally recognized that the applicability of aider and abettor liability is a function of the defendant's degree of culpability. In essence, the majority adopted Judge Wood's *Ambrose* dissent.<sup>170</sup> Accordingly, the *Pino-Perez* court jettisoned the notion that a judge could disregard CCE's minimum sentencing provision and rely on his own discretion to sentence the kingpin's aider and abettor.

Nonetheless, the court's first task required resolution of the pivotal issue of whether aider and abettor liability could be legally applied to the CCE. Writing for the majority, Judge Posner could not say "amen" to the Second Circuit's interpretation of 21 U.S.C. section 848's legislative history in *Amen*.<sup>171</sup> In rejecting the Second Circuit's reasoning, Judge Posner focused on an argument curiously overlooked in his prior *Ambrose* opinion. Specifically, he argued for the majority that 18 U.S.C. section 2(a) automatically applied to 21 U.S.C. section 848 even though Congress did not address the issue at the time of section 848's passage.<sup>172</sup> However, Posner also noted that the common law recognized three exceptions to the automatic application of section 2(a) to the entire criminal code.<sup>173</sup> He thus had to demonstrate two independent principles: first, that section 2(a) automatically applied to 21 U.S.C. section 848 (provided, of course, that section 848's legislative history did not reveal a specific congressional statement to the contrary); and second, that aiding and abetting a kingpin did not qualify as a common law exception to the first principle.

Addressing the first issue, Judge Posner noted that 18 U.S.C. section 2(a) automatically has applied to every new federal criminal statute since the precursor to section 2(a) in 1909.<sup>174</sup> Accordingly, "[e]very time Congress has passed a new criminal statute the aider and abettor provision has automatically kicked in and made the aiders and abettors of violations of the new [criminal] statute punishable as principals."<sup>175</sup>

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<sup>170</sup> See *supra* note 126 and accompanying text.

<sup>171</sup> While I would like to take credit for this clever witticism, it really belongs to Judge Posner. *Pino-Perez*, 870 F.2d at 1233. For the Second Circuit's interpretation of 21 U.S.C. § 848's legislative history, see *supra* note 154 and accompanying text.

<sup>172</sup> *Pino-Perez*, 870 F.2d at 1233.

<sup>173</sup> *Id.* at 1231-32.

<sup>174</sup> *Id.* at 1233. Judge Posner also cited *United States v. Jones*, 678 F.2d 102 (9th Cir. 1982), and *United States v. Sopczak*, 742 F.2d 1119 (8th Cir. 1984) (*per curiam*), for the proposition that "the aiding and abetting provision . . . is applicable to the entire criminal code." *Id.*

<sup>175</sup> *Pino-Perez*, 870 F.2d at 1233 (citing *Standefer v. United States*, 447 U.S. 10, 20 (1980)).

However, had Congress adopted the initial post-conviction sentence-enhancement provision, liability for aiding and abetting a kingpin would have been impossible. As Judge Posner explained, “[T]here would have been no aider and abettor liability for assisting a kingpin, because there would have been no kingpin offense; there would just have been kingpin offenders against other criminal statutes.”<sup>176</sup> The Dingell Amendment, however, transformed the post-conviction proposal into a separate offense. The adoption of the CCE as a separate offense meant that 18 U.S.C. section 2(a) automatically attached to section 848. Judge Posner recognized that

[i]t was not Congress’s *purpose* in making the operation of a continuing criminal enterprise a separate offense to bring section 2(a) into play. But such is never Congress’s purpose in creating a new offense. Congress doesn’t have to think about aider and abettor liability when it passes a new criminal statute, because section 2(a) attaches automatically. The question is not whether section 2(a) is applicable—it always is.<sup>177</sup>

He concluded, “[T]here is no more reason to infer from [section 848’s] legislative history an intent to preclude aider and abettor liability than there would be to draw such an inference from the legislative history of any other federal criminal statute.”<sup>178</sup> Thus, aider and abettor liability automatically applied to the continuing criminal enterprise.

With respect to Judge Posner’s second issue, the three common law exceptions to aider and abettor liability are as follows: first, “when a ‘crime is so defined that participation by another is necessary to its commission,’ that participant is not an aider and abettor;”<sup>179</sup> second, a victim of a crime such as extortion, blackmail or bribery may not be charged as an aider or abettor for any of his conduct that may have assisted in the commission of these crimes;<sup>180</sup> and third, where a criminal statute seeks to protect a member of a group, that member cannot be found guilty of aiding and abetting the violation of the very criminal statute that affords that person protection.<sup>181</sup> According to Judge Posner, only the first exception is pertinent to the CCE offense.<sup>182</sup> More importantly, Judge Posner argued that “[p]ersons who assist a kingpin but are

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<sup>176</sup> *Pino-Perez*, 870 F.2d at 1233. The Second Circuit agreed with this conclusion. See *supra* note 154 and accompanying text.

<sup>177</sup> *Id.* (emphasis in original).

<sup>178</sup> *Id.* at 1234.

<sup>179</sup> *Pino-Perez*, 870 F.2d at 1231 (quoting *United States v. Southard*, 700 F.2d 1, 20 (1st Cir.), *cert. denied*, 464 U.S. 823 (1983)).

<sup>180</sup> *Id.* at 1232 (citing *Southard*, 700 F.2d at 19-20).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1232.

not supervised, managed, or organized by him *do not fit any of these three exceptions*, and we are reluctant to create a fourth."<sup>183</sup>

However, the first exception does apply to the kingpin's employees. This distinction, first explored in *Ambrose*, centers on the deterrent effect of the CCE. To punish enterprise employees as severely as the kingpin would emasculate the sentencing differential between the followers and the more culpable leader. However, punishment of an aider and abettor outside the scope of the kingpin's authority raises no such threat.<sup>184</sup> Hence, Judge Posner concluded that the exception may be applied to the kingpin's employees, but not to the independent third parties who purposely offer the kingpin assistance.

Having thus established the foundation for 18 U.S.C. section 2(a)'s application to the CCE, Judge Posner proceeded to develop guidelines for its proper application. He focused on defining when an accomplice could be considered an aider and abettor.<sup>185</sup>

The quintessential distinction between an accomplice who is an aider and abettor and one who is not is purposeful intent—mere knowledge of the existence of the continuing criminal enterprise is insufficient to warrant aider and abettor liability. The court, like Judge Wood did in his *Ambrose* dissent, reached this caveat by splicing the essential purpose of a continuing criminal enterprise, its perpetuation through time, into Learned Hand's famous definition of aiding and abetting.<sup>186</sup> Thus, an accomplice who associated with, participated in, and, by his actions, sought to make the criminal enterprise succeed may be punished as an aider and abettor.<sup>187</sup>

Accordingly, the mere fact, without more, that a marina leased a boat to a person known to be a drug trafficker would be insufficient to create liability for the marina for aiding and abetting the kingpin.<sup>188</sup> Likewise, supplying any quantity of narcotics to an enterprise would not be, by itself, sufficient to create aider and abettor liability; the supplier also must have wanted the kingpin's enterprise to succeed.<sup>189</sup> The requirement of purpose thus creates a degree of culpability threshold that guarantees that aider and abettor liability will not allow "the more culpable [to be] let off more lightly than the

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<sup>183</sup> *Id.* (emphasis added).

<sup>184</sup> See *supra* note 115 and accompanying text.

<sup>185</sup> *Pino-Perez*, 870 F.2d at 1233-36.

<sup>186</sup> *Id.* at 1235.

<sup>187</sup> *Id.* This is the identical test that Judge Wood proposed in his dissent in *United States v. Ambrose*. See *supra* note 127 and accompanying text.

<sup>188</sup> *Pino-Perez*, 870 F.2d at 1235.

<sup>189</sup> *Id.*



less culpable."<sup>190</sup>

The majority affirmed Pino-Perez's conviction and punishment for aiding and abetting a continuing criminal enterprise.<sup>191</sup> Therefore, a supplier who is the major (and possibly only) provider of drugs to a continuing criminal enterprise in significant quantities and for a significant period of time purposely promotes the success of the enterprise. This supplier is a sufficiently culpable aider and abettor to warrant punishment under section 848.<sup>192</sup>

In summary, the Second Circuit focused on Congress' intended class of CCE offenders. The court concluded that Congress only intended the CCE to apply to the kingpin. Accordingly, when Congress assigned guilt to only one type of participant in a transaction, it intended to leave the others unpunished. Thus, there is no permissible distinction between the kingpin's employee and an independent entrepreneur because aider and abettor liability applies to neither of these individuals. Finally, the court concluded that the

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<sup>190</sup> *Id.* at 1236.

<sup>191</sup> Three judges, Easterbrook, Cudahy and Manion, dissented with respect to the aiding and abetting conviction. First, they argued that a supplier of narcotics should be punished under 21 U.S.C. § 841, which doles out greater penalties for the larger quantities of drugs sold. Accordingly, to punish a supplier under § 848 would "demolish the graduated structure of penalties under § 841." *Pino-Perez*, 870 F.2d at 1238 (Easterbrook, J., dissenting in part and concurring in part). Second, the dissent contends that the majority damaged the language and scope of § 2(a) by declaring that employees of the enterprise are not subject to aider and abettor liability. *Id.* at 1238-39 (Easterbrook, J., dissenting in part and concurring in part). Finally, if § 2(a) automatically applied to § 848, "[t]hen we might dismiss the evolution of § 848 as irrelevant." *Id.* at 1240 (Easterbrook, J., dissenting in part and concurring in part). However, the legislative history indicated a clear "[d]esire to create mandatory minimum (and life maximum) penalties for the *dozens* of drugs, not in achieving increases in the sentences of *aides-de-camp*." *Id.* (Easterbrook, J., dissenting in part and concurring in part) (emphasis in original). Accordingly, the majority opinion not only contradicted the expressed purpose of the CCE, but its creation of immunity for enterprise employees, who naturally assist the kingpin, damaged the language and structure of § 848. To avoid these adverse consequences, the dissenters reasoned that the prudent choice would be not to apply 18 U.S.C. § 2(a) to 21 U.S.C. § 848.

Although the dissent does raise some interesting points, it should be accorded little significance. Easterbrook essentially challenged the existence of the common law exception to aider and abettor liability which protects those whose assistance is necessary to commit a crime that assigns guilt to only one participant. Both the Seventh and Second Circuits recognize that the exception exists for enterprise employees; these courts differ, however, as to whether the scope of the exception includes the independent third parties who also provide assistance to the kingpin. This issue is explored in greater detail in Part III *infra*.

<sup>192</sup> Presumably, the effect of Pino-Perez's steady and bountiful supply of cocaine to Nichols enabled Nichols to achieve a greater market share than would have otherwise been possible. Regardless, those who purposely supply an enterprise with the intent to see the enterprise flourish are guilty of aiding and abetting a continuing criminal enterprise.

CCE only applies to defendants who satisfy all five of the statute's independent requirements.

In contrast, the Seventh Circuit concluded that because the final version of section 848 created a separate criminal offense, 18 U.S.C. section 2(a) automatically applied to the CCE statute. However, the court recognized three common law exceptions to the universal application of aider and abettor liability to the criminal code; the kingpin's employees fall under one of the exceptions, while independent entrepreneurs do not. Accordingly, aider and abettor liability applies to those accomplices outside the enterprise who purposely provide assistance to advance the enterprise's interests. As such, these offenders may be punished under section 848.

### III. THE TRIUMPH OF THE SEVENTH CIRCUIT

At its most elementary level, the split in the circuits concerns the scope of the common law exception that "[w]hen Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense."<sup>193</sup> Ultimately, the debate focuses on whether courts, in applying aider and abettor liability to the CCE, can distinguish between the kingpin's employees and the independent third parties who purposely assist the kingpin. Both circuits recognize the exception but disagree as to its scope. The Second Circuit interpreted the exception very broadly to include all CCE participants other than the leader. Conversely, the Seventh Circuit interpreted the scope of the exception more narrowly so as to include only the employees of the enterprise.

Both circuits cited *United States v. Farrar*<sup>194</sup> as the basis of the exception; more importantly, both courts claimed that *Farrar* supported their respective, yet inconsistent, interpretations of that exception. In *Farrar*, the government sought to prosecute the defendant for purchasing alcohol for beverage purposes in violation of section 6 of the National Prohibition Act.<sup>195</sup> In essence, section 6 stated that no one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit. The defendant therefore argued that section 6 applied only to those persons au-

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<sup>193</sup> *United States v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988). *See also Pino-Perez*, 870 F.2d at 1231 (quoting *United States v. Southard*, 700 F.2d 1, 20 (1st Cir. 1983), *cert. denied*, 464 U.S. 823 (1983)).

<sup>194</sup> 281 U.S. 624 (1930).

<sup>195</sup> *Id.* at 631. The pertinent part of § 6 of the National Prohibition Act provided that "[n]o one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the commissioner so to do except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided . . . ." *Id.*

thorized to sell, purchase, or deal in liquors for non-beverage reasons.<sup>196</sup> Accordingly, the defendant maintained that as an ordinary purchaser, he did not come within the purview of the Act;<sup>197</sup> therefore, he could not be prosecuted for a section 6 violation. In addition, the court recognized that since long before the adoption of the Eighteenth Amendment, a purchaser of liquor was not guilty of a crime even though the sale was prohibited.<sup>198</sup> Indeed, “[i]t is fair to assume that Congress, when it came to pass the Prohibition Act, knew this history and, acting in light of it, deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability.”<sup>199</sup>

The occurrence of the criminal offense—the purchase of the alcohol for consumption—nonetheless required the defendant’s participation. The government’s decision to prosecute the defendant represented an attempt to extend aider and abettor liability to a statutorily immunized purchaser. The district court quashed the indictment and the court of appeals affirmed.<sup>200</sup> Therefore, *Farrar* establishes that when Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense.

Despite both circuits’ reliance on *Farrar*, neither circuit explained why the outcome supported its respective interpretation of the exception as applied to the CCE. The Second Circuit, in *Amen*, merely summarized the *Farrar* holding as if the holding itself sufficiently demonstrated the truth of the court’s reasoning.<sup>201</sup> The Seventh Circuit’s analysis in *Pino-Perez*, while more in-depth, nevertheless failed to explain why *Farrar* permitted a distinction between a kingpin employee and an independent entrepreneur for aider and abettor liability.<sup>202</sup>

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<sup>196</sup> *Id.* The regulation was designed to minimize the risk that alcohol provided for legitimate reasons, such as medicinal needs, would not be illegally converted to the absolutely and unconditionally prohibited use of alcohol as a beverage. *Id.* at 633.

<sup>197</sup> *Id.* at 632.

<sup>198</sup> *Id.* at 634.

<sup>199</sup> *Id.* Congress apparently wanted to have the purchaser testifying against the seller rather than punish the purchaser for making the purchase. *Id.*

<sup>200</sup> *Id.* at 634.

<sup>201</sup> *United States v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987), *cert. denied*, 472 U.S. 823 (1988).

<sup>202</sup> The Seventh Circuit did argue, however, that permitting the enterprise employees to be prosecuted as aiders and abettors of the kingpin would destroy the incremental deterrence garnered by punishing the kingpin more severely. *Pino-Perez*, 870 F.2d at 1232. However, this is not an interpretation of the *Farrar* decision. While the reasoning is logical, it is insufficient, by itself, to explain why the *Farrar* decision permits a distinction between CCE employees and independent entrepreneurs who assist the CCE for the purposes of aider and abettor liability issues.

Both circuits committed the same analytical error; ironically, the same type of mistake prompted Judge Wood to dissent in *Am-brose*.<sup>203</sup> Specifically, both circuits failed to integrate the *Farrar* exception into the criminal transactions contemplated by the CCE offense. Therefore, a careful analysis of *Farrar* within the context of the CCE statute is required to determine which circuit's interpretation is more consistent with *Farrar*.

Section 848 declares the operation of a continuing criminal enterprise to be a criminal offense; however, the enterprise itself can only be created through a continuing series of narcotics sales between the enterprise and its client base. Thus, to apply properly the *Farrar* exception, it must be analyzed within the context of the drug transactions contemplated by the CCE provision.

The first step is to identify whom section 848 considers to be the parties to the transaction. As established, the statute targets the actual kingpin; the problem is that the kingpin is not normally involved in the actual street-level sales.<sup>204</sup> To circumvent this technicality, the CCE effectively credits the kingpin with the responsibility for all the sales made by his or her employees.<sup>205</sup> Accordingly, section 848 defines the "seller" as the kingpin and his or her employees; the enterprise and its employees are thus considered a single entity for transactional purposes. Despite this transactional unity, however, both circuits recognize that the employees of the kingpin are immune from aider and abettor liability with respect to section 848. Just as in *Farrar*, the employees' participation is necessary to complete the drug transaction; however, the employees are not targeted by the CCE for prosecution.

Section 848 does not define the "purchaser." Like the thirsty drinker in *Farrar*, the drug user must first purchase narcotics to complete the transaction that, combined with other similar transactions, may culminate in a CCE violation. Just as the prohibition statute does not punish the purchaser for his role in the alcohol transaction, the CCE does not punish the drug purchaser.<sup>206</sup> Under the *Farrar*

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<sup>203</sup> See *supra* note 126 and accompanying text.

<sup>204</sup> Like any shrewd manager, the kingpin will oversee but not actually participate in the sale. If the police happen to interrupt the sale and arrest the dealer, the kingpin will not be present to be arrested.

<sup>205</sup> Indeed, the kingpin is credited with all the income received by his street-dealers. See *supra* note 99 and accompanying text. Additionally, the kingpin assumes responsibility for all of the drugs sold through his organization. See *supra* note 90 and accompanying text. Finally, the kingpin is credited with supervision over all enterprise employees, whether or not he has personal contact with them. See *supra* note 50 and accompanying text.

<sup>206</sup> Although a current trend in law enforcement is to arrest and punish the purchaser

standard, the drug purchaser cannot be charged or convicted of aiding and abetting the drug kingpin.

The missing party in the analysis thus far is the independent third party who voluntarily assists the kingpin. Quite simply, *Farrar* does not provide this party with aider and abettor immunity; the dynamics of a narcotics transaction demonstrate "why." The independent third party is extraneous: he or she is neither a "seller" nor a "purchaser." Indeed, the CCE transaction neither depends upon nor contemplates a third party's existence. The third party's assistance may be instrumental in enabling the transaction to occur, but the transaction nonetheless will occur without the assistance. Indeed, transactions will continue until some factor or factors, such as an inadequate narcotics supply, police raids, excessive competition, ineffective communication, or any other market force, cause the enterprise to close down.

The third party thus assists not by participating in the transaction, but by minimizing "hostile market forces" that seek to prevent the transaction. A review of the case law demonstrates as much. *Paradiso*, in *Amen*, maintained a communication channel between *Abbamonte* and his employees, and secured additional sources of heroin.<sup>207</sup> Similarly, in *Ambrose*, the policemen protected the kingpin only against the omnipresent forces of law.<sup>208</sup> *Benevento*, in *Benevento*, maintained the accounting books and provided a laboratory for his nephew<sup>209</sup> while *Pino-Perez*, in *Pino-Perez*, guaranteed an available supply of cocaine to the kingpin *Nichols*.<sup>210</sup> These defendants facilitated but did not participate in the transactions. Their assistance focused on the continuance of the enterprise as an entity and not on the actual day-to-day street-level narcotics sales. The independent third party thus is not part of a CCE transaction, and therefore must be distinguished from the enterprise employees. The *Farrar* exception protects the enterprise employees but not the independent third parties.

An analysis of the scope of *Farrar*'s "immunity" leads to the same conclusion. The National Prohibition Act protected the purchaser of alcohol, not the seller, from liability. Therefore, anyone who aided *Farrar* in purchasing alcohol could not be punished under the National Prohibition Act for aiding and abetting a princi-

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as well, there are no such provisions incorporated into the CCE provision. As such, a purchaser of narcotics is innocent of any criminal offense under § 848.

<sup>207</sup> See *supra* note 135 and accompanying text.

<sup>208</sup> See *supra* note 110 and accompanying text.

<sup>209</sup> See *supra* note 161 and accompanying text.

<sup>210</sup> See *supra* notes 167-69 and accompanying text.

pal because Farrar never committed a criminal offense.<sup>211</sup> Accordingly, since the CCE does not punish the drug purchaser/end-user, a person who aids and abets the purchaser is not punishable under section 848. However, the narcotics seller is liable under the CCE. A third party who purposefully assists a narcotics dealer therefore may be liable as an aider and abettor. Thus, defining the *Farrar* exception in terms of the CCE transaction demonstrates the validity of the Seventh Circuit's position.

In addition to *Farrar*, the Second Circuit also cited *Gebardi v. United States*<sup>212</sup> to support its position that only kingpins should be punished under the CCE. In *Gebardi*, a man and a woman were indicted for conspiring to transport the woman across state lines to engage in a sexual relationship in violation of the Mann Act. The Mann Act sought to punish "[a]ny person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery or for any other immoral purpose . . . ."<sup>213</sup>

To violate the Mann Act, two participants, the male transporter and the female transportee, were needed;<sup>214</sup> however, both participants were not punished equally. The act did not punish the transportee for merely consenting to be transported across state lines for an immoral purpose.<sup>215</sup>

For the woman to fall within the ban of the statute she must, at the least, 'aid or assist' someone else in transporting or in procuring transportation for herself. But such aid and assistance must . . . be more active than mere agreement on her part to the transportation and its immoral purpose.<sup>216</sup>

The man and the woman appealed their conspiracy convictions.

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<sup>211</sup> "It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act." *Shuttlesworth v. City of Birmingham*, 373 U.S. 262, 265 (1963). Indeed,

[i]n order to sustain the conviction of a defendant who has been charged as an aider and abettor, it is necessary that there be evidence showing *an offense to have been committed* by a principal and that the principal was aided by the accused, although it is not necessary that the principal be convicted or even that the identity of the principal be established.

*Hendrix v. United States*, 327 F.2d 971, 975 (5th Cir. 1964) (emphasis added). *Accord United States v. Bernstein*, 533 F.2d 775, 799 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976).

<sup>212</sup> 287 U.S. 112 (1932).

<sup>213</sup> 18 U.S.C. § 398 (1940) as quoted in *Gebardi*, 287 U.S. at 118.

<sup>214</sup> *Gebardi*, 287 U.S. at 118-19.

<sup>215</sup> "The penalties of the statute are too clearly directed against the acts of the transporter as distinguished from the consent of the subject of the transportation." *Id.* at 119.

<sup>216</sup> *Id.* at 119.

The sole issue before the court was the sufficiency of the evidence for the convictions.<sup>217</sup> The record revealed that the man purchased the railway tickets for both parties, and that the woman consented in advance of the ticket purchases to both the transportation and the fornication.<sup>218</sup> The court ruled that her consent, without more, was insufficient evidence to convict her of conspiring to violate the Mann Act.

In applying this criminal statute we cannot infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter, any more than it has been inferred that the purchaser of liquor was to be regarded as an abettor of the illegal sale.<sup>219</sup>

Relying solely on the above quoted language, the *Gebardi* opinion could be construed to support the exception that when Congress assigns guilt to one party in the transaction, it intends to leave the others unpunished. In fact, the Second Circuit reached this conclusion; however, like its reference to *Farrar*, the court offered no illuminating analysis as to why *Gebardi* explained the outcome of the CCE aiding and abetting liability issue. The Second Circuit only commented cryptically that *Gebardi* held an "acquiescing woman not guilty of aiding and abetting Mann Act violation."<sup>220</sup>

In stark contrast, the Seventh Circuit cited *Gebardi* to demonstrate what it deemed to be the second of the three common law exceptions to the universal application of 18 U.S.C. section 2(a) to the criminal code.<sup>221</sup> Specifically, the court interpreted *Gebardi* to mean that when a criminal statute seeks to protect a "certain group of persons thought to be in need of special protection," a member of that group cannot be found guilty of aiding the very criminal statute that affords the person protection.<sup>222</sup> Ostensibly, the "protected" group consists of a class often victimized by the accompanying criminal act; in *Gebardi*, the female prostitute was the victim of an immoral transgression. Accordingly, the *Gebardi* Court held that the statute manifested a legislative purpose to prevent the victimized woman's act of consent from being a basis for aider and abettor or conspirator liability.<sup>223</sup> Under the Seventh Circuit's rea-

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<sup>217</sup> *Id.* at 116.

<sup>218</sup> *Id.* at 116.

<sup>219</sup> *Id.* at 119.

<sup>220</sup> *United States v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

<sup>221</sup> *United States v. Pino-Perez*, 870 F.2d 1230, 1232 (7th Cir.), *cert. denied*, 110 S. Ct. 260 (1989).

<sup>222</sup> *Id.*

<sup>223</sup> *See United States v. Spittler*, 800 F.2d 1267, 1275 (4th Cir. 1986).

soning, *Gebardi* would be irrelevant to the aider and abettor liability issue because Congress never considered enterprise employees or independent entrepreneurs who assisted the kingpin to be victims, much less worthy of Congressional protection.

A careful review of the procedural implications of the *Gebardi* decision indicates that the Seventh Circuit is again correct in its analysis. Specifically, the *Gebardi* court concluded that mere acquiescence *without more* was insufficient evidence of the woman's aiding and abetting a Mann Act violation. However, the court also recognized that if the woman had engaged in more active conduct, such as arranging the trip or purchasing the tickets,<sup>224</sup> her actions would have transcended mere acquiescence. As such, she would have been guilty. Thus, it is possible that both parties to the Mann Act transaction may be assigned guilt. Accordingly, the Mann Act, unlike the National Prohibition Act in *Farrar* and the CCE provision itself, does not provide immunity for the second party from aider and abettor liability when the participant's conduct is more than mere acquiescence. With active participation, the female no longer is a victim to be protected.<sup>225</sup>

The *Gebardi* decision thus does not demonstrate the exception to aider and abettor liability proposed by the Second Circuit. As established, the exception requires a statute to punish only one participant in the transaction. The Mann Act, by punishing the first party and conditioning the second participant's potential liability upon the nature and scope of that participant's activity, falls outside the ambit of the exception.

Thus, neither the *Farrar* nor *Gebardi* decisions support the Second Circuit's arguments against applying aider and abettor liability to the CCE offense. Instead, when analyzed within the context of section 848, *Farrar* persuasively explains why the court may distinguish between the enterprise employees and the independent third

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<sup>224</sup> *United States v. Gebardi*, 287 U.S. 112, 117 (1932).

<sup>225</sup> The Fourth Circuit recognized as much in *Spiller*. 800 F.2d at 1267. The Fourth Circuit initially considered the *Gebardi* opinion in its more traditional interpretation as demonstrating the principle that accomplice liability will not be imposed upon those the statute intends to protect as a victim. *Id.* at 1276. (In *Gebardi*, the woman prostitute was the "victim" of the immoral and criminal transgression.) However, the Fourth Circuit also recognized that "[w]hen an individual protected by such legislation exhibits conduct more active than mere acquiescence . . . he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy. We derive such conclusion . . . from *Gebardi*." *Spiller*, 800 F.2d at 1276. Thus, in *Spiller*, the court found the defendant guilty of aiding and abetting extortion because the defendant's affirmative conduct transposed him from a victim of the extortioner's demands to an aider and abettor of the extortion. *Id.* at 1278. *Accord* *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964), *aff'd* 383 U.S. 169 (1966).



parties for the application of aider and abettor liability. Therefore, the case law decidedly favors the application of 18 U.S.C. section 2(a) to 21 U.S.C. section 848.

Normally, refuting the cited case law would be sufficient; however, the Second Circuit raised important questions concerning the legislative history of the CCE provision. If the legislative history manifests a Congressional intent not to apply aider and abettor liability to the CCE, then the foundation of the Seventh Circuit's argument for aider and abettor liability crumbles. Although the Second Circuit offered the legislative history solely to support its now defeated case law conclusions, the legislative history represents a separate issue for analysis.

As explained in Part II, the Second Circuit's interpretation of the legislative history argued that Congress made the continuing criminal enterprise a separate offense in order to avoid the alleged constitutional faults of section 848's precursor, the post-conviction sentence enhancement provision.<sup>226</sup> The court reasoned,

While the legislative history makes no mention of aiders and abettors, it makes it clear that the purpose of making [the] CCE a new offense rather than leaving it as a sentence enhancement was not to catch in the CCE net those who aided and abetted the supervisors' activities, but to correct its possible constitutional defects by making the elements of the CCE triable before a jury.<sup>227</sup>

With such a focused purpose, the Dingell Amendment<sup>228</sup> seemingly denied the Second Circuit the latitude to apply 18 U.S.C. section 2(a) to 21 U.S.C. section 848. The court concluded, "Normally we would assume that in enacting a later statute (section 848) Congress had the earlier one (section 2) in mind and we would reconcile the two if we could, but we do not believe it possible to do so here and still remain faithful to the plain terms and clear intent of section 848."<sup>229</sup>

The legislative history does confirm that Congress adopted the Dingell Amendment to correct the original provision's constitutional defects.<sup>230</sup> The legislative history does not, however, limit the

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<sup>226</sup> See *supra* note 153 and accompanying text.

<sup>227</sup> *United States v. Amen*, 831 F.2d 373, 382 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

<sup>228</sup> Representative Dingell (D-Mich.) sponsored the amendment that transformed the original sentence enhancement provision into a separate offense. See *supra* note 152.

<sup>229</sup> *Amen*, 831 F.2d at 382.

<sup>230</sup> The amendment offered by Mr. Dingell, which was adopted by the full committee, corrected these defects. Instead of providing a post conviction pre-sentencing procedure, it made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court.

Thus, it is seen that the Dingell amendment improved the continuing criminal

intent of section 848 to such a narrowly defined constitutional motive. Indeed, to interpret the Dingell Amendment solely as a constitutional remedy misses the subtleties of Congress' action.

Congress implicitly understood that if it chose to make the CCE a separate criminal offense, it would open the door to aider and abettor liability.<sup>231</sup> Congress was not, however, limited to this remedy. A careful reading of the legislative history reveals that Congress had available a second option through which it could have resolved the original provision's constitutional problems without having to abandon the post-conviction sentence-enhancement format. Nonetheless, Congress rejected this approach; instead, it chose to adopt the Dingell Amendment and to make the continuing criminal enterprise a separate offense. Had Congress truly desired to maintain the same size "net" for the CCE, as the Second Circuit postulated it did, the legislature would have adopted the other option. However, by adopting the Dingell Amendment, Congress made it possible for aider and abettor liability to be applied to the continuing criminal enterprise.

While Congress considered House Bill 18583, the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>232</sup> it also debated Senate Bill 30, the Organized Crime Control Act of 1969.<sup>233</sup> Both bills contained proposals to enhance the punishment for special classes of convicted felons: S. 30 targeted organized crime figures who were considered dangerous offenders<sup>234</sup> while H.R. 18583 targeted drug felons involved in a continuing criminal

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activity section. All of the signers of these additional views supported the Dingell amendment as preferable to the original language.

H.R. REP. NO. 1444, 91st Cong., 2d Sess. 84, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4651.

<sup>231</sup> Since its inception in 1909, 18 U.S.C. § 2(a) has automatically applied to every new criminal code section adopted by Congress. *See supra* note 177 and accompanying text.

<sup>232</sup> H.R. 18583, 91st Cong., 2d Sess., 116 CONG. REC. 25374 (1970). For a brief synopsis of H.R. 18583's progression through Congress to its final form, see 28 CONG. QUARTERLY WEEKLY REP. 2257-59 (Sept. 18, 1970).

<sup>233</sup> S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 827, 831-32 (1969).

<sup>234</sup> The primary purpose of Title X, therefore, is to see to it that convicted felons prone to engage in further crime are imprisoned long enough to give society reasonable protection. While the central thrust of the title is against organized crime, its impact can be expected to be significant across the criminal justice system as it faces the dangerous offender.

S. REP. NO. 617, 99th Cong., 1st Sess. 83 (1969). When S. 30 initially was introduced in January, 1969, the special offender sentencing provision was listed as Title VII. S. 30, 91st Cong., 1st Sess. § 801 (1969), *reprinted in Measures Relating to Organized Crime Hearings before the Subcomm. on Criminal Laws and Procedures of the Senate Judiciary Comm.*, 91st Cong., 1st Sess. 21-26 (1969) (statement of Peter W. Low, Assoc. Professor of Law, Univ. of Va. School of Law) [hereinafter *Senate Hearings*]. Through a series of amendments adding other sections to S. 30, the special offender sentencing provision became

enterprise.<sup>235</sup>

The original texts of both bills were almost interchangeable. The proposed Title X of S. 30, Dangerous Special Offender Sentencing, stated:

(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over twenty-one years of age has reason to believe that the defendant is a dangerous special offender such attorney . . . may sign and file with the court . . . a notice (1) specifying that the defendant is a dangerous special offender who upon conviction is subject to the imposition of a sentence under subsection (b) of this section . . . .<sup>236</sup>

Furthermore, "(e) A defendant is a special offender for purposes of this subsection if . . . (3) an offender whose felony offense was in furtherance of a conspiracy with three or more persons to engage in a pattern of criminal conduct in which he would occupy a managerial level position or employ bribery or force."<sup>237</sup> The original version of H.R. 18583 endorsed the same principal, albeit in slightly different terminology.<sup>238</sup> These parallels are significant.

The proposed procedural processes of these bills were equally similar. "In both bills, S. 30 and H.R. 18583 in its original form, the prosecuting attorney is called upon, in order to institute the special sentencing procedures, to file with the court an instrument specifying that the defendant falls in the category of a special offender, in

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Title X. See *Hearings on S. 30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 68-79 (1970) [hereinafter *House Hearings*].

<sup>235</sup> H.R. REP. NO. 1444, 91st Cong., 2d Sess. 82, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4649.

<sup>236</sup> S. 30, 91st Cong., 2d Sess. 67-68, reprinted in *House Hearings*, *supra* note 234, at 68-69.

<sup>237</sup> *Id.*, reprinted in *House Hearings*, *supra* note 234, at 71.

<sup>238</sup> H.R. 18583 included § 508, Continuing Criminal Enterprises, which provided:

(a) Whenever an attorney charged with the prosecution of a defendant over the age of twenty-one years in a court of the United States for an alleged violation of this title, the authorized penalty for which is imprisonment for more than one year, has reason to believe that the defendant has been involved in a continuing criminal enterprise, such attorney . . . may sign and file with the court . . . a notice (1) specifying that such defendant is a person who has been involved in a continuing criminal enterprise and upon such conviction of such violation will be subject to the imposition of a sentence under this section . . . .

. . . .

. . . (b)(2) A defendant may be found to be involved in a continuing criminal enterprise for purposes of this section if . . . the defendant—

(A) played a substantial role in a continuing criminal enterprise involving any violation of this title in concert with at least five other persons and occupied a position of organizer, a supervisory position, or any other position of management . . .

H.R. 18583, 91st Cong., 1st Sess. § 508 (1970).

which case special procedures are provided for sentencing.”<sup>239</sup> Furthermore,

[b]oth bills provide[d] for a hearing before sentencing wherein the defendant is permitted the ordinary representation and process, except that he is to be afforded only ‘the substance of such parts of the presentence report as the court intends to rely upon’ and this only if there are not ‘placed in the record compelling reasons for withholding particular information.’<sup>240</sup>

Thus, both original proposals were subject to the same criticisms and constitutional challenges. Although not expressly stating this principle, the House Report’s textual treatment of the constitutional objections to H.R. 18583 acknowledged the close relationship between the two bills. Specifically, the report listed four defects in the original H.R. 18583 proposal.<sup>241</sup> It then stated,

Even the proponents of this special sentencing procedure had constitutional doubts about it. The Justice Department conceded: ‘The lack of direct precedent may make it virtually impossible to predict whether these procedures would survive constitutional challenges.’ Senate Hearings of S.30, page 377. The report on the proposed Organized Crime Control Act of 1969 (S.30) by the Association of the Bar of the City of New York says: ‘We think that it is unlikely that the proposed procedures would pass constitutional muster.’ The amendment offered by Mr. Dingell . . . corrected these defects.<sup>242</sup>

The report summarized the constitutional challenges to H.R. 18583 by direct reference to S. 30. These bills, based on the same principle but with slight deviations in linguistic construction, thus faced *identical* constitutional challenges.

Nonetheless, Congress solved the identical constitutional challenges through two distinctly different means. To properly address the issue whether the Dingell Amendment permits the application of aider and abettor liability to the CCE, one must first understand the option that Congress rejected when it made the CCE a separate criminal offense. The Second Circuit did not use this approach. Instead, the court relied exclusively on the House Report on H.R.

<sup>239</sup> H.R. REP. No. 1444, 91st Cong., 2d Sess. 82, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4649.

<sup>240</sup> *Id.*

<sup>241</sup> The defects are as follows: (1) the court, in considering the petition to enhance the defendant’s sentence for involvement in a continuing criminal enterprise, is entitled to rely on material which neither the defendant nor his counsel would ever see; (2) illegally obtained evidence may be used to sentence the defendant to life without any real protections afforded by a jury; (3) the right to confrontation is illusory under the proposal; and (4) one element of the continuing criminal offense held the defendant guilty unless he proved himself innocent. *See* H.R. REP. No. 1444, 91st Cong., 2d Sess. 83-84, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4650-51.

<sup>242</sup> *Id.* at 84, *reprinted in* 1970 U.S. CODE CONG. & ADMIN NEWS at 4651.

18583 to analyze the CCE's legislative history.<sup>243</sup> In fact, the Second Circuit never addressed Congress' resolution of S. 30's identical constitutional dilemmas. The court thus failed to recognize that Congress could have remedied the provision's constitutional defects without abandoning the post-conviction sentence-enhancement format. This omission has proven fatal to the Second Circuit's interpretation of section 848's legislative history.

S. 30 was first introduced in the Senate in 1969. After entertaining limited constitutional criticism of S. 30,<sup>244</sup> the Senate concluded that Title X represented the best efforts "to draft fair and effective sentencing provisions that are consistent with basic constitutional protections and that will afford society every protection possible in a difficult and delicate area of law."<sup>245</sup>

After the bill passed in the Senate, the House began deliberations in early 1970.<sup>246</sup> At the House Hearings on Organized Crime Control,<sup>247</sup> serious constitutional objections to Title X surfaced. Among the more vocal opponents of Title X was the Chairman of the Committee on Federal Legislation of the Association of the Bar of the City of New York.<sup>248</sup> In addition to criticism, the American Bar Association offered eight amendments to Title X to remedy defects within the proposed bill.<sup>249</sup> More importantly, the suggested amendments would provide Title X with the necessary procedural protection to pass constitutional muster without having to jettison the post-conviction sentence-enhancement format.<sup>250</sup> Congress thus did not have to make Title X of S. 30 a separate offense. In-

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<sup>243</sup> See *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987), cert. denied, 485 U.S. 1021 (1988).

<sup>244</sup> See *Senate Hearings*, supra note 234, at 467-74 (statement of Lawrence Speiser, Dir., Washington Office of A.C.L.U.) (vagueness and due process concerns); *id.* at 216, 218 (report of Comm. on Federal Legislation of N.Y. County Lawyers Ass'n) (opposed to increased sentences due to person's criminal status).

<sup>245</sup> S. REP. NO. 617, 91st Cong., 1st Sess. 100 (1969).

<sup>246</sup> H.R. REP. NO. 1549, 91st Cong., 2d Sess. 37 (1970).

<sup>247</sup> *Organized Crime Control: Hearings on S.30 and related proposals Before Subcomm. No. 5. of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) [hereinafter *House Organized Crime Control Hearings*].

<sup>248</sup> See *House Organized Crime Control Hearings*, supra note 247, at 342. The New York Bar's criticism of S.30 is of special significance because the H.R. Rep. No. 1444 on the Continuing Criminal Enterprise indicates that the Bar's conclusion applied to the original CCE provision as well. See supra note 242 and accompanying text.

<sup>249</sup> *House Organized Crime Control Hearings*, supra note 247, at 538, 544-547 (statement of Edward L. Wright, President-elect A.B.A.). "[I]f these eight amendments to title X are adopted, title X will without exception conform to the A.B.A. standards and the formal position of the A.B.A." 116 CONG. REC. 35201, 35203 (1970) (letter of Edward L. Wright to Hon. Emanuel Celler).

<sup>250</sup> "The ABA suggested only a limited number of specific amendments, preserving the basic thrust and concept of each of the various titles of S.30." *Id.*

stead, the proposed A.B.A. amendments represented a less drastic, but equally effective, remedy for S. 30's constitutional defects.

Indeed, the House did not make Title X a separate offense; it adopted the A.B.A. amendments. During the floor debates, Representative Poff announced the proposed changes to the Senate version of Title X, explaining that "Title X has been modified to reflect [the] specific suggestions of the ABA to make it more nearly conform to the ABA Standards Relating to Sentencing Alternatives and Procedures."<sup>251</sup> The Senate accepted the House amendments<sup>252</sup> and S. 30, with Title X remaining a post-conviction sentence-enhancement provision, was signed into law.<sup>253</sup> Title X thus became 18 U.S.C. sections 3575-3578.<sup>254</sup> Subsequent court cases have upheld the constitutionality of these provisions.<sup>255</sup>

Congress thus had two options for resolving the identical constitutional crisis facing the original versions of the CCE. The fact that Congress made the CCE a separate offense instead of adopting the A.B.A. amendments, as it did with S. 30, indicates that Congress acted with a broader intention than simply remedying the alleged constitutional defects of the initial provision.

The subtleties of Congress' actions on section 848 are even more noticeable when 21 U.S.C. section 849, Dangerous Special Drug Offender Sentencing, is added to the picture. On September 24, 1970, Representative Poff offered an amendment to add two additional sections to H.R. 18583,<sup>256</sup> which by this time incorporated the Dingell Amendment. Poff's proposed amendment, which was later codified as 21 U.S.C. section 849, adopted the *very option* that Congress had previously rejected by accepting the Dingell amendment. On the House floor, Representative Poff explained that his amendment

is essentially the same as title X of the Organized Crime Control Act [S.30] favorably reported by the [House] Committee on the Judiciary. . . . [I]t incorporates the substantive and procedural changes recommended by the board of governors of the American Bar Association, and those changes I think better protect the rights of the

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<sup>251</sup> 116 CONG. REC. 35297 (1970).

<sup>252</sup> 116 CONG. REC. 36296 (1970).

<sup>253</sup> Organized Crime Control Act of 1970, Pub. L. 91-452, title x, § 1001(a), Oct. 15, 1970, 84 Stat. 948, 949-51.

<sup>254</sup> However, these sections were repealed in 1984 as part of the effort to reduce judicial discretion in sentencing. Sentencing Reform Act of 1984, Pub. L. 98-473, Title II, ch. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987.

<sup>255</sup> See, e.g., *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980); *United States v. Inendino*, 463 F. Supp. 252 (N.D. Ill. 1978).

<sup>256</sup> 116 CONG. REC. 33630 (1970).

accused and better structure the penalty package.<sup>257</sup>

Thus,

[T]itle X of the Organized Crime Control Act, 18 U.S.C. sections 3575-3578 and section 849 of Title 21, U.S.C., are, for the purposes of . . . constitutional attack, interchangeable, and legislative debates and scholarly criticism which were sparked by Title X provide the most useful source material in studying section 849.<sup>258</sup>

Congress had its cake and ate it too. Instead of choosing between the two options capable of resolving the constitutional dilemmas of the original version of H.R. 18583, Congress chose both. It made 21 U.S.C. section 848 a separate offense and then proceeded to adopt 21 U.S.C. section 849, which incorporated the very provisions that would have resulted had Congress forsaken the Dingell Amendment for the proposed A.B.A. recommendations. The Seventh Circuit in *Pino-Perez*<sup>259</sup> recognized as much, but failed to properly explain the consequences.<sup>260</sup>

To review the legislative history of section 848 and conclude, as did the Second Circuit, that Congress adopted the Dingell amendment solely to resolve the constitutional challenges facing the CCE is far too simplistic. The adoption of 21 U.S.C. section 849, at the very least, demonstrates as much. The Second Circuit's interpretation of the legislative history is thus refuted; only the Seventh Circuit's argument that 18 U.S.C. section 2(a) applies to the entire criminal code remains unscathed. Congress certainly did not adopt the Dingell amendment for the express purpose of applying aider and abettor liability to section 848. Nonetheless, Congress chose to make the continuing criminal enterprise a separate offense; in so doing, it opened the door for application of aider and abettor liability.

This analysis thus demonstrates that aider and abettor liability applies to the CCE. Both the case law and the legislative history endorse this result. Accordingly, the Seventh Circuit's conclusion in *Pino-Perez* is correct: any individual who purposefully provides significant assistance to a kingpin with the intent that the enterprise

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<sup>257</sup> *Id.*

<sup>258</sup> *United States v. Tramunti*, 377 F. Supp. 6, 7 (S.D.N.Y. 1974).

<sup>259</sup> 870 F.2d 1230 (7th Cir.), *cert. denied*, 110 S. Ct. 260 (1989).

<sup>260</sup> The court wrote,

The opinion in *Amen* gives the impression that the conversion of the kingpin statute from a sentence-enhancement provision to a provision creating a new and distinct offense was an unconsidered last-minute switch. That is not correct. The Dingell Amendment . . . was debated extensively; what is more, the sentence-enhancement provision was ultimately restored to another provision of Title II of the omnibus act. See 21 U.S.C. § 849 (dangerous special drug offender sentencing).

*Id.* at 1234.

succeed should be prosecuted under 18 U.S.C. section 2(a) and punished under 21 U.S.C. section 848.

Part IV provides a practical demonstration of this principle. Through the hypothetical scenario explained in the next section, a prosecutor will be able to integrate the conclusion of Part I, namely that the CCE may be applied to a gang-controlled narcotics operation, with the principle of aider and abettor liability derived from Parts II and III. In the process, the CCE will be transformed into a double-edged sword capable of striking down both the gang "kingpin" who oversees the street-level narcotics operation and the individual members of other gangs whose willing assistance facilitated either the creation or perpetuation (or both) of the targeted drug market.

#### IV. THE CCE, AIDER AND ABETTOR LIABILITY AND THE CHICAGO CRACK MARKET

The headline of the Chicago Tribune on Sunday, August 27, 1989, contained frightening news: "Crack Breaks the Chicago Barrier." Chicago, which had somehow managed to avoid the crack cocaine nightmare that was scarring other cities, awakened to a new but more deadly variation of an old game. The particularly worrisome aspect of crack's emergence in Chicago, the article explained, was the possible role of Los Angeles-based gangs.<sup>261</sup>

The Crips and the Bloods, spurred by increasing police crack-downs and a rapidly deflating cocaine price, recognized that they could make a two hundred to three hundred percent profit margin by marketing crack in other cities.<sup>262</sup> Drawn by the lure of money, the gangs began to spread across the country. Initially, authorities believed that the spread of crack cocaine was "[m]ore the work of individual members migrating to other cities than an organized criminal enterprise."<sup>263</sup> By focusing on cities "[t]hat had little or no

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<sup>261</sup> Circumstantial evidence of a growing alliance between Chicago and Los Angeles gangs, including a meeting in Las Vegas between high ranking members of the Crips and leaders of a large street gang, has raised suspicions that "Los Angeles gangs might be involved in the Chicago area's emerging crack problem . . ." Blau, *Crack Breaks the Chicago Barrier*, Chicago Trib., Aug. 27, 1989, § 1 at 16, col. 3. The evidence is still inconclusive. *Id.*

<sup>262</sup> Worthington, *Migrating L.A. Gangs Find New Turf in the Midwest*, Chicago Trib., May 1, 1988, § 1 at 21.

<sup>263</sup> Armstrong, *Los Angeles Gangs Go National*, Christian Science Monitor, July 19, 1988, § 1 at 5, col. 1. See also Worthington, *Migrating L.A. Gangs Find New Turf in the Midwest*, Chicago Trib., May 1, 1988, § 1 at 21 (police officers in numerous cities agree that the mobile Los Angeles gang members are individual operators and not a closely organized group).



experience in dealing with gangs or rock trafficking,"<sup>264</sup> the "[i]ndividual members . . . use friends or relatives in the targeted cities to set up drug operations. Eventually, they take control of the local market."<sup>265</sup>

Denver, which previously did not have a significant gang problem, followed this pattern. The Denver Post, describing its city as virgin territory,<sup>266</sup> noted that "Los Angeles-based black youth gangs are primarily responsible for shipping crack to Denver . . . ."<sup>267</sup> More importantly, the arrival of the Crips and the Bloods prompted the creation of gangs in Denver affiliated with either Los Angeles sect.<sup>268</sup>

However, as the Crips and the Bloods began to move into cities with more entrenched gangs, their approach necessarily had to change. Instead of trying to dominate the local market, the Los Angeles gangs now focus on creating the infrastructure for the crack market that will be controlled on a day-to-day basis by a local gang.<sup>269</sup> In addition, the Crips and the Bloods assume the role of being the principal suppliers of crack to these new enterprises; in this manner, the gang-controlled crack markets in various cities become tied to the cocaine supplies of Los Angeles.<sup>270</sup> The Los Angeles gangs thus are instrumental in both creating and perpetuating crack cocaine markets in other cities.

Crack cocaine's emergence in Chicago is consistent with this more recent pattern.

The arrival of crack in the suburbs of Chicago mirrors the way it came to some other Midwestern cities. . . . In Kansas City, Mo., and the twin cities of Minneapolis and St. Paul, for example, crack was introduced by the Los Angeles-based Crips and Bloods street gangs. The gangs

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<sup>264</sup> Murphy, *L.A. Black Gangs Likened to Organized Crime Groups*, L.A. Times, Jan. 11, 1987, Part 1 at 23, col. 1 (late ed.).

<sup>265</sup> Armstrong, *Los Angeles Gangs Go National*, Christian Science Monitor, July 19, 1988, Part I at 3, col. 1.

<sup>266</sup> Chronis, *Crack Fighters Seek to Head Off Epidemic*, Denver Post, June 13, 1988, at 6A, col. 1.

<sup>267</sup> *Id.*

<sup>268</sup> Garnaas, *Crips Were First on the Scene in City, Then Came Bloods*, Denver Post, May 12, 1988, at 8A, col. 1.

<sup>269</sup> "Since July, [the Los Angeles gangs] have gone underground. Often they carry no identification and they don't hang around on street corners. They are here to develop a distribution system. They make their contacts, deliver and leave." Robbins, *Armed, Sophisticated and Violent, Two Drug Gangs Blanket Nation*, N.Y. Times, Nov. 25, 1988, at B14, col. 2.

<sup>270</sup> The role of the Crips and Bloods as suppliers makes fundamental economic sense. "[C]ocaine can be purchased for as little as \$10,000 per kilogram in California, which is considerably less than the \$17,000 to \$20,000 per kilogram paid by dealers in Chicago." Blau, *Crack Breaks the Chicago Barrier*, Chicago Trib., Aug. 27, 1989, § 1 at 16, col. 4.

first set up drug operations in outlying areas with black populations and small, unsophisticated police departments . . . .<sup>271</sup>

Indeed, “[s]ome Chicago and suburban police suspect that a similar alliance could be playing a role in the emerging crack problem in Chicago’s poor suburbs, where undermanned police forces are ill-prepared to identify and deal with the problem.”<sup>272</sup>

The timing of crack’s arrival in Chicago is by no means fortuitous; it coincides with the decline of the once dominating El Rukn gang. “Until now . . . crack has not spread in Chicago because gangs associated with the sale of the drug have been unable to challenge the authority of the city’s established gangs, who were content with heroin and cocaine.”<sup>273</sup> The decline of the El Rukns has created a power struggle not only for control of “turf” but also for dominance in the Chicago narcotics market. “Police say that much of the violence can be linked to rivalry for drug markets once dominated by the Rukns, the legally battered South Side-based gang whose power is expected to decline as the government prepares more charges against it.”<sup>274</sup> Reportedly, the gangs seeking to take over the El Rukn gang narcotics trade are more amenable to the introduction of crack.<sup>275</sup> The environment is thus ripe for a cooperative relationship between these west-side gangs and their Los Angeles counterparts. Apparently, such a relationship already has begun to blossom.

If the current trend continues, Chicago will soon face a sophisticated crack market modeled by the Crips and the Bloods and managed by the local gangs. As Part I of this Comment argues, the crack market managed by the local gang represents a continuing criminal enterprise. As such, the gang’s kingpin should be prosecuted under 21 U.S.C. section 848. More importantly, as Parts II and III demonstrate, the Los Angeles-based Crips and Bloods are quintessential examples of independent third parties aiding and abetting the criminal enterprise.<sup>276</sup> Accordingly, the leaders of the Crips and the

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<sup>271</sup> *Id.* § 1 at 16, col. 1.

<sup>272</sup> *Id.* § 1 at 16, col. 2.

<sup>273</sup> Blau, *30 Killings Tied to Drug Turf Battles*, Chicago Trib., Jan. 1, 1989, § 1 at 28, col. 1.

<sup>274</sup> *Id.* Indeed, the latest round of indictments is expected to decimate the El Rukns, as the gang lost most of its principal leaders and its headquarters. See Gibson & Gorman, *Rukns, Robinson Indicted for Drugs, Murder*, Chicago Trib., Oct. 28, 1989, § 1 at 1.

<sup>275</sup> See Blau, *30 Killings Tied to Drug Turf Battles*, Chicago Trib., Jan. 1, 1989, § 1 at 28, col. 1.

<sup>276</sup> Compare the Crips’ and the Bloods’ roles with that of Pino-Perez in *United States v. Pino-Perez*. The Seventh Circuit declared Pino-Perez an aider and abettor for his role as sole supplier of cocaine to a drug kingpin. The argument for extending aider and abettor liability to the Crips and the Bloods is thus even stronger. In addition to being the

Bloods who are responsible for forging the relationship with the Chicago gangs should be prosecuted for aiding and abetting a continuing criminal enterprise.

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primary suppliers of crack to the local gang market, the Crips and the Bloods provided invaluable assistance in creating the market in the first place.