

INTERNAL REVENUE SERVICE

Number: **199945007**

Release Date: 11/12/1999

CC:EL:CT-110293-99

July 27, 1999

UILC: 9999.92-00

MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (CT)

FROM: Barry J. Finkelstein
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SUBJECT: Potential Impact of Richardson v. United States on Criminal Tax Cases

In Richardson v. United States, No. 97-8629, 1999 U.S. LEXIS 3640 (June 1, 1999), a six-member majority held that in a prosecution under the federal "continuing criminal enterprise" ("CCE") statute, 21 U.S.C. § 848, a jury must unanimously agree on the specific drug violations constituting the "continuing series." Section 848 forbids any "person" from "engaging in a continuing criminal enterprise," and defines "continuing criminal enterprise" as involving a violation of the drug statutes where "such violation is part of a continuing series of violations." 21 U.S.C. § 848. In 1994 the Federal Government charged Richardson with violating the CCE statute. The Government presented evidence designed to show that Richardson had organized a gang, (where he was known as the "King") which distributed heroin, crack cocaine, and powder cocaine over a period of years extending from 1984 to 1991 and that Richardson had run the gang, managed its sale of drugs and obtained substantial income from those unlawful activities. A jury convicted Richardson of violating the CCE statute but were not required to unanimously agree on which specific drug violations he had committed.

In vacating Richardson's conviction, the Court read the statute's reference to "violations" as elements rather than means, settling a split in the circuits. The Court found support for such reading under considerations of language, tradition, and potential unfairness. Further, the holding that "each 'violation' here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law." *Id.* at *11. Thus, the jury must unanimously agree on which violations make up the elements of the "continuing series" of violations.

Although this decision only concerns the unanimity of underlying violations in a CCE offense, the rationale of the Court suggests a much broader application of its ruling (*i.e.*, situations where discrete acts are alleged in a single count, or the indictment count provides two or more factual bases upon which a conviction could rest). Consequently,

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this holding lends support to the holding in United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988). In Schad v. Arizona, 501 U.S. 624 (1991), a four-judge panel (in a plurality opinion) criticized Duncan's unanimity requirement, by virtue of its being based on the holding in United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). The rationale in Schad is distinguishable from that in Duncan, (because of the type of crimes involved), although in many instances has been interpreted to be a rejection of the jury unanimity requirement in Duncan. See e.g., United States v. Newman, No. 93-3289, 1993 U.S. App. LEXIS 32082 (6th Cir. Dec. 7, 1993); United States v. Sanderson, 966 F.2d 184 (6th Cir. 1992). An overview of Duncan and Schad, since Schad affected the strength of any precedent set by Duncan, would be helpful to provide a clearer picture of how Richardson may impact the state of the law.

United States v. Duncan involved a prosecution for making false statements as to a material matter on an income tax return. Duncan was convicted of filing a false income tax return in violation of 26 U.S.C. § 7206(1), the false return premised on two allegedly material false statements. Duncan requested an instruction requiring the jury to unanimously agree on which of the two statements were false in order to convict, but the trial court declined to give it. Instead, the trial court gave a general instruction that each juror must agree in order for the jury to convict. During their deliberations, the jury requested additional clarification concerning the two alleged false statements. The judge declined to give a special unanimity instruction and instead gave a supplemental instruction telling the jury that “if you are convinced . . . that Defendant Duncan’s return was false with respect to either one of [the false statements] . . . then you should convict the Defendant on this count.” Duncan, 850 F.2d at 1109 (citing the trial transcript at 1999-2000).

On appeal, following the holding in United States v. Gipson, 553 F.2d 453 (5th Cir. 1977),¹ the Sixth Circuit reversed Duncan’s conviction holding that a jury’s verdict must be unanimous as to one or the other statement because the two alleged false statements themselves constituted the essential culpable acts proscribed by statute and each false statement was a discrete fact requiring separate proof. Duncan, 850 F.2d at 1111. Further, the court held the trial judge was required to give an augmented unanimity requirement to the jurors as a matter of law when they sought specific information about their need to agree on one or more of the statements. Id. In addition, since the court found the tax return was the federal jurisdictional element while the false statement was the culpable act, juror unanimity was required. Id. at 1112. The court found further support “in analogous cases in a great variety of other statutory contexts, [where] alternative factual predicates have been held to require ‘specific’

¹ In Gipson, the Fifth Circuit held that a federal jury must agree on at least one of multiple alternative “conceptually distinct acts that would constitute the actus reus of the crime.” Further, the court laid down in dictum the broad principle that the jury must “be in substantial agreement as to just what a defendant did.” Gipson, 553 F.2d at 457.

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unanimity.” *Id.*, See e.g., United States v. Beros, 833 F.2d 455, 460-62 (3rd Cir. 1987); United States v. Peterson, 768 F.2d 64, 67 (2d Cir.) cert. denied, 474 U.S. 923 (1985). Not finding error with the Sixth Circuit’s holding, the Supreme Court denied the petition for writ of certiorari. United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988) cert. denied sub nom. Downing v. United States, 493 U.S. 1025 (1990).

Specifically, in situations where there is a substantial likelihood of jury confusion or where a conviction may occur as a result of different jurors concluding that a defendant committed different acts, the court found that precedent dictated the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree on a particular set of facts. Duncan, 850 F.2d at 1113-14. Otherwise, a patchwork verdict could result. An example of a patchwork verdict would be “when only six jurors agree that one specific illegal act was committed, while the other six agree that a different illegal act was committed, but the jury as a whole returns a guilty verdict.” United States v. Dolan, No. 95-1769, 1996 U.S. App. LEXIS 27354, at *9 n.2 (6th Cir. 1996). Under this example, “while there is no unanimity between jurors as to all principal factual elements underlying the specified offense, the jurors are able to produce an inappropriate guilty verdict because they are all of the opinion that some illegal act was committed.” *Id.*

Schad v. Arizona, 501 U.S. 624 (1991), involved Arizona’s legal definition of first-degree murder which encompasses premeditated murder and felony murder, each containing a separate set of elements from the other. In Schad, the prosecution argued the defendant was guilty of first-degree murder either because he had the premeditation to kill or because, in the process of committing the felony of robbery, a death resulted. The jury was given a general verdict form without specific instructions requiring the jury to unanimously agree on which method Schad employed in committing first-degree murder. The Supreme Court analyzed Schad’s claims on appeal for violations of the Due Process Clause of the Fourteenth Amendment rather than under the Sixth Amendment.

Justice Souter, writing for four justices including himself, authored the Court’s opinion. The rationale in Schad for affirming Arizona’s Supreme Court’s holding was based primarily on two principles. First, the equating of the two mental states “as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes.” *Id.* at 640. Second, while sufficiently distinct requisite mental states might require separate jury verdicts, such verdicts were not required where the mental states “reasonably reflect notions of equivalent blameworthiness or culpability.” *Id.* at 643.

The Court noted that although it had “never before attempted to define what constitutes an immaterial difference as to mere means and what constitutes a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings, there is body of law in the federal circuits, deriving primarily from

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the decision of the Fifth Circuit in United States v. Gipson, that addresses this problem.” Id. at 633-34. The Court, however, summarized its opinion of Gipson’s approach by stating that “the notion of ‘distinct conceptual groupings’ is simply too conclusory to serve as a real test.” Id. at 635. Further, the Court found the Gipson approach flawed “because conjectural groupings may be identified at various levels of generality, and we have no [known] standard to determine what level of generality is appropriate.” Id. These statements have been construed to be a clear rejection of Gipson’s unanimity requirement by some courts. See e.g., United States v. Sanderson, 966 F.2d 184 (6th Cir. 1992). As Duncan relied on Gipson to support its holding, it too has been deemed rejected by Schad. Despite this, an argument could be made to limit Schad to specific criminal violations, not encompassing criminal tax. To date, no case other than Schad and its progeny, have negatively cited Duncan relative to its unanimity requirement. Other cases have cited Duncan with approval and further refined its unanimity and specific unanimity jury instruction requirements.

Justice Scalia, in a separate concurrence, concluded the Court’s historical argument was dispositive of Schad’s due process claim. In the absence of historical precedent favoring the state’s position, however, Justice Scalia indicated that he likely would have sided with the dissent because the reasonableness of equating the different mental states was not itself sufficient to allow only one verdict with respect to premeditated murder and felony murder. Schad, 501 U.S. at 648-53.

The dissent was comprised of four justices who believed the conviction should be reversed because the crime under which Schad was convicted was based on a general guilty verdict. They found the problem with Arizona’s statute is that it “criminalizes several alternative patterns of conduct,” under a single heading. Id. at 656. Further, they argued the plurality affirmed the conviction without knowing whether the jury reached a unanimous decision on any one element that constituted either way of proving first-degree murder. Id. at 654.

The holding in Schad relative to juror unanimity could be construed negated by the unanimity requirement outlined in Richardson. In Schad, the jury was not required to unanimously agree on which way the defendant committed first-degree murder. Conversely, in Richardson, not only were the jurors required to unanimously agree whether the defendant violated the CCE statute, they are now required to unanimously agree on which underlying specific drug offenses the defendant committed before they can convict for violating the CCE law. The Richardson majority, held the jury must unanimously agree as to which “three” drug violations a defendant actually committed before a finding of guilt can be sustained under a charge of CCE. The Court assumed but did not decide, that the necessary number was “three” as was required of the prosecution in this case. Richardson, 1999 U.S. LEXIS 3640, at *10.

Citing Schad, the Court stated that a federal jury need not always decide unanimously which of several means the defendant used to commit an element of the crime. Id.

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at *8-9. However, a jury cannot convict a defendant of a crime unless it unanimously finds the government has proved each element of that crime. Id. at *8. In this case, the Court found that each of the “three” violations were a separate element thereby requiring juror unanimity about which crime the defendant committed. Id. *10. Lastly, the Court, again citing Schad, reaffirmed the finding that the “Constitution itself limits a state’s power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where the definition risks serious unfairness and lacks support in history or tradition.” Id. at *13 (citing Schad, 501 U.S. at 632-33). This statement by the Court is not only based on the plurality opinion in Schad, but is also consistent with the Sixth Circuit’s findings in Duncan. In the context of criminal tax cases, where an indictment count includes multiple “acts” (e.g., statements, items, or income tax returns) within the same count, an argument can be made that Duncan, supported by the unanimity requirement mandated by Richardson, is to be followed. Thus, Richardson, strengthens Duncan’s unanimity requirement in criminal tax cases and the principle that proof of one “act” is enough for a conviction.

Should you have any questions, please feel free to contact Marta Yanes of my staff on 622-4470.