

the crime, and as such, must be charged in the indictment. I find their argument unpersuasive, and therefore deny both motions.

The defendants wish to apply the rationale of the *Promise* and *Cotton* cases, both of which analyzed 21 U.S.C.A. § 841 (West 1999 & Supp. 2001), to the continuing criminal enterprise (“CCE”) statute found at 21 U.S.C.A. § 848. The *Promise* court held that an enhanced sentence under § 841 is error unless the enhancing factor, drug weight, has been charged in the indictment. *Cotton* goes one step further, holding that a court is without jurisdiction to impose an enhanced sentence under § 841 when drug quantity has not been alleged in the indictment.

Ealy and Church seek to draw similarities between the penalty provisions of § 841 and § 848. They note that the maximum penalty allowed under § 841 without specification of a drug weight is twenty years. *See* 21 U.S.C.A. § 841(b)(1)(C). In order to be eligible for a greater sentence under § 841(b)(1)(A) or (B), the prosecution must plead and prove a specific drug quantity. *See Promise*, 255 F.3d at 156-57. The defendants argue that § 848 operates the same way—that is, that a conviction under § 848(e) places the defendant in a twenty-years-to-life sentencing range. *See* 21 U.S.C.A. § 848(e). They believe that the death penalty becomes applicable only upon pleading and proof of an aggravating factor found in § 848(n). *See* 21 U.S.C.A. § 848(n).

I disagree with the defendants and find that § 841 and § 848 are not sufficiently similar to warrant application of *Promise* and *Cotton* to charges brought under the CCE statute. The language of § 848(e) states that a person engaging in a CCE who intentionally kills or causes the intentional killing of an individual “shall be sentenced to any term of imprisonment, which shall not be less than twenty years, and which may be up to life imprisonment, or may be sentenced to death.” 21 U.S.C.A. § 848(e)(1)(A). Clearly, a conviction under this section makes the defendant eligible for a death sentence. The prerequisite factors for conviction are contained in § 848(c) (definition of CCE) and § 848(e) (the intentional murder factor). The aggravating factors of § 848(n) need only be addressed if the defendant is first convicted under § 848(e). This is an entirely different penalty scheme from § 841 and thus the defendants’ argument is not convincing.

In accord with my earlier decision on the defendants first motion to strike, *see United States v. Church*, No. 1:00CR00104, 2001 WL 1661706 (W.D. Va. Dec. 27, 2001), I find that the sentencing factors of § 848(n) do not increase the sentencing range, but merely provide standards for the jury to use in determining which of the alternative available punishments should be imposed. Therefore, the government is not required to allege the aggravating factors of § 848(n) in the indictment.

For the reasons stated above, it is **ORDERED** that the defendants' Renewed Motions to Strike the Government's Notice of Intent to Seek the Death Penalty (Doc. Nos. 240, 241) are denied.

ENTER: February 11, 2002

United States District Judge