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## Joint Trials: Judicial Inefficiency?

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# JOINT TRIALS: JUDICIAL INEFFICIENCY?

Pursuant to Rule 8(b) of the Federal Rules of Criminal Procedure, a prosecutor may join two or more defendants in the same indictment.<sup>1</sup> Joinder requires an allegation that the defendants

<sup>1</sup> FED. R. CRIM. P. 8(b). The rule provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

*Id.* See *Ingram v. United States*, 272 F.2d 567, 568 (4th Cir. 1959) (joinder permissible where parties alleged to have participated in same act which constitutes offense).

Joinder was created out of common law. See, e.g., *Metheany v. United States*, 365 F.2d 90, 94 (9th Cir. 1966) (Rule 8(b) was substantially a codification of existing law), *cert. denied*, 393 U.S. 824 (1968); FED. R. CRIM. P. 8 advisory committee's note (Rule 8 is substantially restatement of pre-existing law).

Most states have adopted comparable provisions to Rule 8(b). See, e.g., CAL. PENAL CODE § 1098 (Deering 1971); ILL. ANN. STAT. ch. 38 §§ 111-14 (Smith-Hurd 1980); KY. REV. STAT. ANN. Rule 6.20 (Michie/Bobbs-Merrill 1990); N.Y. CRIM. PROC. LAW § 200.40 (McKinney 1990); TEX. PENAL CODE ANN. § 3.02 (Vernon 1974).

The rule governing joinder has been broadly interpreted. See *United States v. Davis*, 773 F.2d 1180, 1181 (11th Cir. 1985) ("rule is broadly construed in favor of initial joinder"); *United States v. Scott*, 659 F.2d 585, 589 (5th Cir. 1981) (broad construction of Rule 8 favoring initial joinder), *cert. denied*, 459 U.S. 854 (1982); *United States v. Ford*, 632 F.2d 1354, 1373 (9th Cir. 1980) ("Rule 8(b) should be construed broadly in favor of initial joinder"), *cert. denied*, 450 U.S. 934 (1981); *United States v. Satterfield*, 548 F.2d 1341, 1344 (9th Cir. 1977) (same), *cert. denied*, 439 U.S. 840 (1978); *United States v. Friedman*, 445 F.2d 1076, 1082 (9th Cir.) (same), *cert. denied sub nom.*, *Jacob v. United States*, 404 U.S. 958 (1971).

Joinder is expressly permitted under FED. R. CRIM. P. 8(b) even though not every defendant is charged with every offense in the indictment; the test is whether all charges arose out of the "same series of acts or transactions." See *United States v. Deckle*, 768 F.2d 1257, 1261 (11th Cir. 1985) (same); *United States v. Corbin*, 734 F.2d 643, 649 (11th Cir. 1984) (same). Rule 8(b) however, leaves undefined what is meant by "the same series of acts or transactions." *Id.* Clearly, similarity alone is not enough. A "series" is something more than "similar" acts. *King v. United States*, 355 F.2d 700, 703 (1966). See also *United States v. Diaz-Munoz*, 632 F.2d 1330, 1336 (5th Cir. 1980) (similarity in participation of two defendants is insufficient); *United States v. Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975) ("Where . . . there is no substantial identity of facts or participants," Rule 8(b) joinder is improper.); *United States v. Martinez*, 479 F.2d 824, 827-28 (1st Cir. 1973). Many courts find that if the acts were part of a common scheme or plan, or connected together, they can be regarded as a series. See, e.g., *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir.) (phrase "series of acts or transactions" logically includes transactions so interconnected in time, place, and manner as to constitute common scheme or plan), *cert. denied*, 440 U.S. 910 (1978). Thus, joinder of a conspiracy count and substantive counts arising out of the conspiracy is permitted since the claim of conspiracy provides a common

“have participated in the same act or transaction or series of acts or transactions.”<sup>2</sup> Once charged together, defendants invariably are tried together.<sup>3</sup> Typically, the trial judge defers to the “gov-

link and demonstrates the existence of a common scheme or plan. *E.g.*, *United States v. Andrade*, 788 F.2d 521 (8th Cir.) (conspiracy count provides common link with allegations of mail and wire fraud), *cert. denied*, 479 U.S. 963 (1986); *United States v. Kopituk*, 690 F.2d 1289, 1314 (11th Cir.) (tax offenses part of series of acts committed in furtherance of conspiracy), *cert. denied*, 461 U.S. 928 (1982); *United States v. DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981) (conspiracy count provides common link with substantive offense of intent to distribute cocaine). *Cf.* *United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971) (government cannot add conspiracy count merely to link all defendants; joinder permissible only where conspiracy charge is put forth in good faith). For the history of the drafting of Rule 8, see Orfield, *Joinder in Federal Criminal Procedure*, 26 F.R.D. 23-29 (1961).

<sup>2</sup> FED. R. CRIM. P. 8(b); *Schaffer v. United States*, 362 U.S. 511, 514-15 (1960) (separate substantive charges of indictment used identical language and violations of same criminal statute making proof of scheme competent as to all counts); *United States v. Harrelson*, 754 F.2d 1153, 1176-77 (5th Cir.) (propriety of joinder determined by initial allegation), *cert. denied*, 474 U.S. 908 (1985).

A prosecutor is entitled to charge and join parties in an indictment based on what he reasonably anticipates proving. *See United States v. Cook*, 99 F.R.D. 252 (E.D. Tenn. 1983) (presume prosecutor acting in good faith and evidence will demonstrate joinder proper). The allegations of the indictment are then accepted as true by the court; joinder is denied only upon demonstration by defendant of specific and compelling prejudice. *Harrelson*, 754 F.2d at 1176; *United States v. Phillips*, 664 F.2d 971, 1016 (5th Cir.) (allegations of indictment accepted as true making joinder proper; severance then becomes matter of trial court discretion under Rule 14), *cert. denied*, 457 U.S. 1136 (1981). When during the course of a trial, these allegations turn out to be baseless in light of the proof actually developed, the joint trial will nevertheless continue. *Schaffer*, 362 U.S. at 515 (joinder proper even though count dismissed because original allegations of indictment met explicit provisions of 8(b), and facial sufficiency is all that is required); *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir.) (where count justifying joinder is dismissed, severance will not be granted unless defendant prejudiced by joinder on dismissed count not alleged in good faith), *cert. denied*, 389 U.S. 833 (1967). Consequently, the courts have read an implied condition into Rule 8(b) that the prosecutor make the requisite allegation in good faith. *E.g.*, *Cook*, 99 F.R.D. at 254; *United States v. Kaufman*, 311 F.2d 695, 698 (2d Cir. 1963) (dismissal of conspiracy count not ground for severance absent bad faith on part of government); *United States v. Manfredi*, 275 F.2d 588, 593 (2d Cir.) (when defendant claims conspiracy charge made in bad faith, must move for a mistrial), *cert. denied*, 363 U.S. 928 (1960).

Some courts have held that 8(b) requirements have been met when it was clear the defendants had participated in the same transaction even though the indictment failed to allege it. *See United States v. Serubo*, 460 F. Supp. 689, 693 (E.D. Pa. 1978) (absence of “connecting” allegation from indictment not dispositive; government representations made in other pretrial proceedings and documents as to factual connections between counts may satisfy 8(b) requirements); *United States v. Florio*, 315 F. Supp. 795, 797 (E.D.N.Y. 1970) (even if indictment does not sufficiently allege a “series of acts” joining defendants, requisite nexus may be supplied by bill of particulars).

Misjoinder under Rule 8 is a question of law, reviewable on appeal. *See United States v. Lane*, 474 U.S. 438, 449 n.12 (1986) (Supreme Court in 5-4 decision resolved split among circuits, holding that “harmless error” doctrine applied to cases of misjoinder). *But cf.* *United States v. McLain*, 823 F.2d 1457, 1467 (11th Cir. 1987) (“misjoinder under Rule 8(b) is prejudicial per se”).

<sup>3</sup> *See United States v. DeLuna*, 763 F.2d 897, 919 (8th Cir.) (strong policy in favor of

ernment's charging strategy of maximum joinder,"<sup>4</sup> since it is believed to promote economical and efficient judicial administration.<sup>5</sup>

joint trial where defendants are alleged to have participated in same act or transaction or in same series of acts or transactions constituting an offense or offenses), *cert. denied*, 474 U.S. 980 (1985); *United States v. Sheikh*, 654 F.2d 1057, 1066 (5th Cir.) (same), *cert. denied*, 455 U.S. 991 (1981); *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.) (same), *cert. denied*, 444 U.S. 825 (1979); *United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978) (same); *United States v. Sullivan*, 578 F.2d 121, 123 (5th Cir. 1978) (same); *United States v. Gambrell*, 449 F.2d 1148, 1159 (D.D.C. 1971) (defendants jointly charged are to be jointly tried); Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6 HOFSTRA L. REV. 533, 536 n.14 (1978) (for defendant going to trial properly joined under Rule 8, chances of receiving a separate trial at later date unlikely at the trial level and even less likely on appeal).

A joint trial may be ordered by the court, even absent a joint charge by the prosecutor. See FED. R. CRIM. P. 13. Rule 13 provides:

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

*Id.* The propriety of joinder of indictments for trial under Rule 13 is determined by reference to Rule 8. See *Molatkofski v. United States*, 179 F.2d 905, 909 (1st Cir. 1950) (defendants could have been joined under Rule 8(b); therefore court authorized by Rule 13 to try defendants together). See also *Daley v. United States*, 231 F.2d 123, 125 (1st Cir.) (Rules 8(b) and 13 designed to promote efficiency and to avoid multiplicity of trials), *cert. denied*, 351 U.S. 964 (1956).

<sup>4</sup> Federal Bar Council Committee on Second Circuit Courts, *A Proposal Concerning Problems Created By Extremely Long Criminal Trials*, 5 (1989). Prosecutors favor joining defendants. See, e.g., *United States v. Casamento*, 887 F.2d 1141, 1147-48 (2d Cir. 1989) (indictment charged 35 defendants with 15 counts), *cert. denied*, 110 S. Ct. 1138 (1990); *United States v. Moten*, 564 F.2d 620, 622 (2d Cir.) (indictment charged 33 defendants with 40 counts), *cert. denied*, 434 U.S. 942 (1977); *United States v. Kelly*, 349 F.2d 720, 727 (2d Cir. 1965) (20 defendants charged with 160 counts), *cert. denied*, 384 U.S. 947 (1966); *United States v. Agnello*, 367 F. Supp. 444, 447 (E.D.N.Y. 1973) (23 defendants charged on 14 counts). The courts traditionally have recognized a strong presumption against splitting up an indictment. See, e.g., *United States v. Gallo*, 668 F. Supp. 736, 748 (E.D.N.Y. 1987).

<sup>5</sup> *Richardson v. Marsh*, 481 U.S. 200, 209-210 (1987).

Joint trials play a vital role in the criminal justice system. . . . Many joint trials . . . involve a dozen or more codefendants. . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes . . . that prosecutors bring separate proceedings. . . . Joint trials generally serve the interests of justice by avoiding [the inequity of] inconsistent verdicts [while] enabling [a] more accurate assessment of relative culpability.

*Id.* Furthermore, joint trials tend to conserve judicial resources, alleviate burdens imposed on citizens serving as jurors, and avoid reiteration of testimony by witnesses in a series of trials. *But see United States v. Borelli*, 435 F.2d 500, 502 (2d Cir. 1970) (governmental economy not an appropriate consideration for justification of joinder), *cert. denied*, 401 U.S. 946 (1971); *United States v. Kahaner*, 203 F. Supp. 78, 81 (S.D.N.Y. 1962) (judicial economy and prompt trial of accused must be weighed against unfairness to defendant), *cert. denied*, 375 U.S. 836 (1963).

These policy considerations are particularly important since the "government and the

Proper joinder, nevertheless, may be prejudicial to a defendant.<sup>6</sup> Recognizing this, Rule 14 of the Federal Rules of Criminal Procedure, which is entitled "Relief From Prejudicial Joinder," grants a court discretionary power to order severance of defendants, charges, or both, upon a showing of prejudice to a defendant's right to a fair trial.<sup>7</sup> The defendant must show substantial

courts have been placed under strict mandate to expedite criminal trials." *United States v. Werner*, 620 F.2d 922, 928 (2d Cir. 1980). *But see* Speedy Trial Act, 18 U.S.C. § 3161(h) (7) (recognizing that joinder of defendants potentially delays a trial).

<sup>6</sup> *See* *United States v. Butler*, 792 F.2d 1528, 1534 (11th Cir.) (bias inherent in joint trial), *cert. denied*, 479 U.S. 933 (1986); *United States v. Marszalkowski*, 669 F.2d 655, (11th Cir.) ("Inherent in every joint trial is, of necessity, some degree of bias"; so an exception to general rule of joinder exists where defendant is subject to undue prejudice), *cert. denied*, 459 U.S. 906 (1982); *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980) (notwithstanding inherent prejudice in joint trials, showing of compelling prejudice is required for severance); *United States v. Sanders*, 563 F.2d 379, 382 (8th Cir. 1977) (even if joinder of two or more defendants is technically proper, relief from joinder may be necessary if specific prejudice is claimed to arise from the joint trial), *cert. denied*, 434 U.S. 1020 (1978).

The advantages of a joint trial must be balanced against a defendant's right to a fair trial. *United States v. Gallo*, 668 F. Supp. 736, 754 (E.D.N.Y. 1987) (joinder initially proper but complexity of case has prejudicial impact on defendants warranting severance). *See* *United States v. Kahn*, 381 F.2d 824, 839 (7th Cir.) (determination must be made "whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant."), *cert. denied*, 389 U.S. 1015 (1967). *See also* *United States v. Hedman*, 630 F.2d 1184, 1200 (7th Cir. 1980) (same), *cert. denied*, 450 U.S. 965 (1981).

<sup>7</sup> FED. R. CRIM. P. 14 provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

*Id.* *See* *United States v. Sliker*, 751 F.2d 477, 492 (2d Cir. 1984) (Rule 14 affords trial court wide discretion to warrant severance), *cert. denied*, 470 U.S. 1058 (1985); *United States v. Burke*, 700 F.2d 70, 83 (2d Cir.) (severance denied at the "broad discretion of trial judge"), *cert. denied*, 464 U.S. 816 (1983); *United States v. Weisman*, 624 F.2d 1118, 1129-30 (2d Cir.) (severance "within the broad discretion of the trial judge and will not be overturned on appeal absent some showing of substantial prejudice . . ."), *cert. denied*, 449 U.S. 871 (1980).

Severance may be sought by the government or the defendant. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 221 at 774 (1982). However, the government's controlling position with regard to drafting the indictment and joining the defendants and offenses renders a prosecutor's motion unlikely. *Id.* *But see* *United States v. Erullon*, 482 F. Supp. 429, 432 (E.D. Pa. 1979) (government's motion for severance granted).

By definition, Rule 14 comes into play only if the original joinder was proper. *See* 1 C. WRIGHT, *supra*, § 221 at 769; *United States v. Wirsing*, 719 F.2d 859, 863 (6th Cir. 1983) (threshold inquiry to determine severance is whether joinder initially proper); *United States v. Rogers*, 636 F. Supp. 237, 241 (D.C. Colo. 1986) (same).

If a motion under Rule 14 is made before trial, the court may delay an appraisal of the danger of prejudice until more information is available. *See* *United States v. Holman*, 490

prejudice amounting to a miscarriage of justice. Thus, Rule 14 places a heavy burden on the defendant.<sup>8</sup> When denied, severance is reversible on appeal only if an abuse of discretion is shown.<sup>9</sup>

F. Supp. 755, 766 (E.D. Pa. 1980) (decision regarding severance must await trial); *United States v. Olin Corp.* 465 F. Supp. 1120, 1129-30 (W.D.N.Y. 1979) (defendant free to renew motion for severance later in trial). Even if the motion is properly denied when first made, the court has a continuing duty to grant a severance if prejudice appears through later events or developments at trial. *See Schaffer v. United States*, 362 U.S. 511, 516 (1960) (trial judge should be sensitive to possibility of prejudice developing).

<sup>8</sup> *See United States v. Wilkinson*, 754 F.2d 1427, 1435 (2d Cir.) (severance motion denied absent showing of substantial prejudice amounting to miscarriage of justice), *cert. denied sub nom.* *Shipp v. United States*, 472 U.S. 1019 (1985); *United States v. Sotomayor*, 592 F.2d 1219, 1227 (2d Cir.) (severance denied due to insufficient showing that defendant would have better chance for acquittal at separate trial), *cert. denied sub nom.* *Crespo v. United States*, 442 U.S. 919 (1979); *United States v. Herrera*, 584 F.2d 1137, 1143 (2d Cir. 1978) (severance denied because defendants failed to carry burden of showing substantial prejudice).

Substantial prejudice may result from (1) antagonistic or mutually exclusive defenses, (2) a codefendant with exculpatory testimony who is unwilling to testify in a joint trial due to the potential for self incrimination, or (3) introduction of a codefendant's out of court statements if they would incriminate the defendant and leave the defendant without the opportunity to cross examine the codefendant. *See United States v. Davis*, 623 F.2d 188, 195 (1st Cir. 1980) (severance on ground of conflicting defense denied because defendant failed to demonstrate conflict was so prejudicial that defenses are irreconcilable).

A defendant moving for severance to obtain favorable testimony from a codefendant "must show (1) a bona fide need for the testimony; (2) the substance of the [desired] testimony; (3) [the] exculpatory nature and effect [of the testimony]; and (4) that the codefendant would in fact testify" at a severed trial. *United States v. Williams*, 809 F.2d 1072, 1084 (5th Cir. 1987) (severance motion denied because defendant merely made conclusory statements regarding exculpatory nature of desired testimony). Once a defendant makes a threshold showing, the court must (1) examine the significance of the testimony in relation to defendant's theory of the case; (2) assess the extent of prejudice against absence of the testimony; (3) weigh the benefits of judicial administration and economy; and (4) consider the timeliness of the motion. *See United States v. Machado*, 804 F.2d 1537, 1544 (11th Cir. 1986) (severance motion denied desired testimony which would not significantly advance defendant's theory). *Cf. United States v. DiCesare*, 765 F.2d 890, amended by 777 F.2d 543 (9th Cir. 1985) (defendants not entitled to severance on ground that they wished to testify on one count and not all counts).

<sup>9</sup> *See United States v. Lane*, 474 U.S. 438, 449-502 n.12 (1986) (appellant must demonstrate that court's abuse of discretion caused substantial prejudice); *Opper v. United States*, 348 U.S. 84, 95 (1954) (whether defendants' should be tried together or severally is within sound discretion of trial judge); *United States v. Chang An-Lo*, 851 F.2d 547, 556 (2d Cir.) (reversal of denied motion to sever granted only upon showing trial judge clearly abused his discretion), *cert. denied*, 488 U.S. 966 (1988). *See also United States v. Carpentier*, 689 F.2d 21, 27 (2d Cir. 1982) (citing *United States v. Werner*, 620 F.2d 922, 928-29 (2d Cir. 1980), *cert. denied*, 459 U.S. 1108 (1983)). If the denial of severance motion causes some prejudice, but less than substantial prejudice, the court is not apt to reverse and will instead retain joinder and promote judicial efficiency. *Id.*

A defendant's claim that his acquittal would have been more probable is insufficient to find error in denying severance. *See, e.g., United States v. Garver*, 809 F.2d 1291, 1298 (7th Cir. 1987) (defendant's showing of probable chance for acquittal in separate trial is insufficient to overcome general rule that defendants indicted together should be tried to-

However, considering the infrequency with which severance is granted,<sup>10</sup> Rule 14 is perhaps more aptly entitled "No Relief From Prejudicial Joinder."<sup>11</sup> Recently, however, as the number, size, length and complexity of trials have continued to increase,<sup>12</sup> resulting in "mega-trials",<sup>13</sup> courts have begun to question the ra-

gether); *United States v. Ras*, 713 F.2d 311, 315 (7th Cir. 1983) (defendant must show joined trials were more than burden on chances of acquittal); *United States v. Bullock*, 451 F.2d 884, 889 (5th Cir. 1974) (same).

Courts consider several factors in determining whether severance is appropriate. *See, e.g.*, *United States v. Figueroa*, 618 F.2d 934, 945 (2d Cir. 1980) (possible prejudice from type of evidence to be admitted against other defendants); *United States v. Branker*, 395 F.2d 881, 887 (2d Cir. 1968) (number of counts and defendants), *cert. denied*, 393 U.S. 1029 (1969); *United States v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965) (disparities in quantum of proof offered against various defendants), *cert. denied*, 384 U.S. 947 (1966); *United States v. Gilbert*, 504 F. Supp. 565, 571 (S.D.N.Y. 1980) (apparent relative culpability of defendants).

<sup>10</sup> *See, e.g.*, *United States v. Staller*, 616 F.2d 1284, 1294 (5th Cir.) (to demonstrate abuse of discretion on appeal defendant must demonstrate "that the denial of severance caused him to suffer *compelling* prejudice") (citing *United States v. Perez*, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974)), *cert. denied*, 449 U.S. 869 (1980). Compelling prejudice is not found when the evidence against one codefendant is more damaging than the evidence against another. *See, e.g.*, *United States v. Magee*, 821 F.2d 234, 243 (5th Cir. 1987) (no compelling prejudice found when testimony of codefendants was presented); *United States v. Hughes*, 817 F.2d 268, 272-73 (5th Cir.) (no compelling prejudice found when codefendant offered large number of witnesses in complicated case), *cert. denied*, 484 U.S. 858 (1987); *United States v. Patterson*, 819 F.2d 1495, 1501 (9th Cir. 1987) (no compelling prejudice found in tax and narcotics charges when evidence of codefendant's wealth supported existence of heroin distribution conspiracy); *United States v. Mabry*, 809 F.2d 671, 682 (10th Cir.) (no compelling prejudice found merely from overwhelming evidence against codefendant), *cert. denied*, 484 U.S. 874 (1987). *See also* *United States v. Mims*, 812 F.2d 1068, 1075-76 (8th Cir. 1987) ("specter of guilt by association" with codefendant insufficient to warrant severance).

<sup>11</sup> Walsh, *Fair Trials and the Federal Rules of Criminal Procedure*, 49 A.B.A. J. 853, 856 (1963) ("might as well be entitled 'No Relief From Prejudicial Joinder' " because judge "may" decide prejudice). *See also* Dawson, *Joint Trials of Defendants In Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1410 (1979). "Reluctance to grant severance . . . grows in part from the many procedural difficulties of moving for severance." *Id.* "There is no good time to assert prejudicial joinder." *Id.* "Asserting it before trial is speculative; asserting it during trial is disruptive; and asserting it on appeal invites hindsight deeming the error harmless." *Id.*

<sup>12</sup> *See, e.g.*, *United States v. Moten*, 564 F.2d 620, 622 (2d Cir.) (40 charges against 22 defendants), *cert. denied*, 434 U.S. 959 (1977); *United States v. Morrow*, 537 F.2d 120, 125 (5th Cir. 1976) (10 charges against 23 defendants), *cert. denied*, 430 U.S. 956 (1977); *United States v. Braasch*, 505 F.2d 139, 141 (7th Cir. 1974) (conspiracy charge against 24 defendants), *cert. denied*, 421 U.S. 910 (1975); *United States v. Agueci*, 310 F.2d 817, 820 (2d Cir. 1962) (30 charges against 10 defendants), *cert. denied*, 372 U.S. 259 (1963). *See generally* Moss, *Mega-Trials: Risks and Rewards*, 74 A.B.A. J. 74, 75 (March 1988) (discussing growth of trial complexity).

<sup>13</sup> *See* Moss, *Mega-Trials*, *supra* note 12, at 75. A mega-trial is "one which has several defendants, several counts, and charges a variety of criminal conduct." *Id.* at 74-75. "Any trial lasting longer than a month or two is usually a mega-trial." *Id.* "A mega-trial is when

tionale of traditional justifications underlying mass trials.<sup>14</sup> In *United States v. Casamento*,<sup>15</sup> more popularly known as “The Pizza Connection Case,” the district court presided over a joint trial which included twenty-one defendants, involved the testimony of over 275 witnesses, thousands of exhibits, over forty thousand pages of transcripts, and lasted seventeen months.<sup>16</sup> Motions for severance were denied by the trial court.<sup>17</sup> On appeal, the Second Circuit rejected the defendants’ contentions that the denial of severance resulted in a denial of due process.<sup>18</sup> While affirming the district court’s decision, Judge Pierce, writing for the court, strongly implied that the traditional practices of joinder and severance need reexamination in light of modern realities.<sup>19</sup> In an effort to limit cases to a manageable size, the court set forth three “benchmarks” to be used by the prosecution and the trial judges to determine when joinder or severance is proper.<sup>20</sup> The court

the ‘Seven Santini Brothers’ deliver the indictment, and it takes an entire wagon train to deliver the discovery.” (statement of David Lewis, Esq.) *Id.* at 75.

<sup>14</sup> See, e.g., *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989) (court has “misgivings” in joint trial of 21 defendants, 16 counts), *cert. denied*, 110 S. Ct. 1138 (1990); *United States v. Gallo*, 668 F. Supp. 736, 753-754 (E.D.N.Y. 1987) (“we question the traditional assumption that denial of severance in cases such as this promotes efficiency” and is necessarily in best interests of justice), *aff’d*, 863 F.2d 185 (2d Cir. 1988). See generally Federal Bar Council Committee on Second Circuit Courts, *supra* note 4, at 5; Weinfeld, *The Problems of Long Criminal Trials*, 34 F.R.D. 155, 158 (1963) (discussing complexity of trial involving multiple defendants).

The original intent of Rule 14 was to prevent the injustice of mass trials. See *United States v. Gaston*, 37 F.R.D. 476, 477 (D.D.C. 1965) (statement of Alexander Holtzoff, member of Advisory Committee that drafted Federal Rules of Criminal Procedure). “It was the purpose of the Committee to make it possible for federal judges to prevent a mass trial, because a mass trial is contrary to the basic principles of our jurisprudence.” *Id.* at 477. See also 1 C. WRIGHT, *supra* note 7, § 223 at 811 (case law gives no confident feeling that purpose achieved); Moss, *Mega-Trials*, *supra* note 12, at 75 (approximately 50 mega-trials have been held in total in New York within the last three years alone; two dozen prosecutions lasting more than 3 months have been brought).

<sup>15</sup> 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990). Prosecution charged defendants with 16 counts, involving international conspiracy of narcotics distribution, with the proceeds from the sale of these narcotics being scattered among various pizza parlors. *Id.* at 1147-49.

<sup>16</sup> *Id.* at 1149.

<sup>17</sup> *United States v. Badalamenti*, 663 F. Supp. 1542, 1544 (S.D.N.Y. 1987), *aff’d sub nom.*, *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990).

<sup>18</sup> *Casamento*, 887 F.2d at 1151.

<sup>19</sup> *Id.* at 1151-53.

<sup>20</sup> *United States v. Casamento*, 887 F.2d 1141, 1151-52 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990). The court presented three benchmarks as follows:



clearly indicated that, although multi-defendant trials promote judicial economy, there is a point at which the inherent prejudice outweighs the desired benefits.<sup>21</sup>

This Note will explore the traditional concepts regarding joinder, and the benefits derived therefrom. It will then examine the shortcomings of a "mega-trial," given its recent increase in complexity, size and frequency of use. Furthermore, this Note will discuss the detrimental effects of mass trials on the criminal justice system, the jury, and the defendants. Finally, in an effort to reconcile the objectives of joint trials with modern reality, this Note will suggest reforms that will promote the fair and economical administration of justice.

### I. THE LAW OF DIMINISHING RETURNS AS APPLIED TO JOINDER

The law of diminishing returns states that as successive units of a variable resource are added to the production process, output will initially increase rapidly, but then it will level off and ultimately decrease.<sup>22</sup> It is submitted that this rudimentary economic

First, the district judge should elicit from the prosecutor a good faith estimate of the time reasonably anticipated to present the government's case. . . . [T]he judge need not accept the estimate without question but should be free to make an independent assessment based on various factors including the number of defendants, the time and territorial scope of the crimes charged, the number of witnesses likely to be called, and size of exhibits likely to be introduced, including wiretaps.

In those cases where the judge determines that the time for presentation of the prosecution's case will exceed four months, the judge should oblige the prosecutor to present a reasoned basis to support a conclusion that a joint trial of all the defendants is more consistent with the fair administration of justice than some manageable division of the case into separate trials for groups of defendants. In determining whether the prosecutor has made an adequate showing, the judge should weigh the interests of the prosecution, the defendants, the jurors, the court, and the public.

Finally, in assessing the appropriate number of defendants for any trial in which the prosecution's case is likely to require more than four months to present, the judge should oblige the prosecutor to make an especially compelling justification for a joint trial of more than ten defendants.

*Id.*

<sup>21</sup> *Id.* at 1151 (court noted benefits of multi-defendant trials, but also recognized evident disadvantages which can occur at trial).

<sup>22</sup> See C. AMMER & D. AMMER, *DICTIONARY OF BUSINESS AND ECONOMICS* 118 (1977) (diminishing returns principle seeks to establish a relationship between the additional output attributed to an increase in variable factors such as labor or capital). See generally P. GEMMILL, *FUNDAMENTALS OF ECONOMICS* 36-48 (6th ed. 1960) (discussion of theory of diminishing return) [hereinafter GEMMILL]; W. CURTIS, *MICROECONOMICS CONCEPTS FOR ATTORNEYS* 26-27 (1984) [hereinafter CURTIS] (to achieve maximum output efficiency resources there is

principle is applicable to judicial trials. Simply stated, joint trials are beneficial to a point,<sup>23</sup> after which they become increasingly detrimental, resulting in unreasonably protracted trials and unwarranted burdens on all of the parties concerned.<sup>24</sup>

### II. TRADITIONAL NOTIONS OF JOINT TRIALS

It is widely accepted that joint trials are more efficient<sup>25</sup> and

a limit to the proportions).

The use of fertilizer treatment per acre and corn production can illustrate. *See* CURTIS, at 26-27. On a tract of land where corn is grown, initially, more corn can be grown if more fertilizer (a variable input) is used. *Id.* The effect of the fertilizer use will continue until a point is reached where no additional corn will grow. *Id.* If more fertilizer is added, beyond this point, corn production will start to decrease. *Id.* Generally speaking, the point of diminishing return is reached when the addition of resources becomes detrimental to the manufacturing entity. P. SAMUELSON & W. NORDAUS, *ECONOMICS* 34 (12 ed. 1983). To further illustrate, output, as a function of varying inputs, can be depicted graphically. *Id.* Economists separate the graph into three areas: the first area shows output progressively increasing; the second area depicts the output as still increasing, but at a decreasing rate; the third area represents declining output. *See* CURTIS, at 28-29. The point at which output starts to decrease is called the point of diminishing returns. *See* GEMMILL, at 39. This point represents the amount of input resources that affords the most efficient use of the fixed variables. *See* CURTIS, at 29. The authors submit that this basic economic principle applies in the context of a joint trial, where the number of defendants, the number of counts, and the underlying subject matter of the trial would all be variables affecting the efficiency of a court. *Cf.* GEMMILL at 41-43.

<sup>23</sup> *See* Richardson v. Marsh, 481 U.S. 200, 210 (1987). "Joint trials generally serve the interests of justice. . . ." *Id.* There is a consensus that joint trials conserve judicial resources by saving manpower and time. *See, e.g.,* United States v. Stirling, 571 F.2d 708, 733 (2d Cir.) (public interest served by avoiding "unnecessarily multiplicitous [sic] litigation"), *cert. denied*, 439 U.S. 824 (1978); United States v. Borelli, 435 F.2d 500, 502 (2d Cir. 1970) (joint trials conserve judicial resources), *cert. denied*, 401 U.S. 946 (1971); United States v. Gilbert, 504 F. Supp. 565, 567 (S.D.N.Y. 1980) (severance not required in a six week trial).

<sup>24</sup> *Cf.* CURTIS, *supra* note 22, at 30-32 (after point of diminishing returns surpassed, one experiences increased costs and decreased productivity resulting in inefficiency). Regarding the judicial system, it is submitted that inefficiency can be characterized as the unnecessary employment of judicial resources and the amplification of prejudices towards the defendants. *Cf.* Dawson, *supra* note 11, at 1409-49 (discussing prejudice of joint-trial); Weinfeld, *The Problems of Long Criminal Trials*, 34 F.R.D. 155, 208-10 (1963) (discussing observations of benching long cases). Although not expressly attributing problems caused by mass trials to their size, courts have recognized some limitations to joinder. *See, e.g.,* United States v. DePalma, 466 F. Supp. 920, 923 (S.D.N.Y. 1979) (joint trials are inappropriate if a defendant's right to a fair trial is compromised); United States v. Ong, 397 F. Supp. 385, 388 (S.D.N.Y. 1975) (severance should not be granted unless defendant can show it will deny him a fair trial).

<sup>25</sup> *See* Bruton v. United States, 391 U.S. 123, 143 (1968) ("joint trials are more economical and minimize the burden on witnesses, prosecutors, and courts"); United States v. Buljubasic, 808 F.2d 1260, 1263 (7th Cir.) (joint trials reduce burdens on witnesses, expenditure of judicial and prosecutorial time), *cert. denied*, 484 U.S. 815 (1987); United States v. Borelli, 435 F.2d 500, 502 (2d Cir. 1970) ("general rule" in favor of joint trial "conserves

more economical than severed trials.<sup>26</sup> Further, the common wisdom is that joint trials avoid inconsistent verdicts and present the jury with an "overall picture" of the criminal act.<sup>27</sup>

### A. *The Presumed Prosecutorial Efficiency*

Joinder can be more efficient than severed trials because it saves the prosecutor from presenting duplicative evidence in separate trials.<sup>28</sup> This assumption is supported by the underlying belief that the evidence relating to each defendant is virtually identical and results from the same act or series of acts.<sup>29</sup> Generally, a conspir-

judicial resources, alleviates the burdens on citizens serving as jurors, and avoids the necessity of having witnesses reiterate testimony in a series of trials."), *cert. denied*, 401 U.S. 946 (1971).

<sup>26</sup> See *United States v. Lane*, 474 U.S. 438, 449 (1986) (Court noted "joint trials conserve state funds . . .") (quoting *Bruton v. United States*, 391 U.S. 123, 134 (1968)). See also *United States v. Kahaner*, 203 F. Supp. 78, 81 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). Rule favoring joint trials serves public interest "in avoiding duplicitous, time-consuming and expensive trials" by promoting the "[e]conomy of judicial manpower and the prompt trial of those accused . . ." *Id.*

<sup>27</sup> See, e.g., *Richardson*, 481 U.S. at 210 (joint trials serve interests of justice by "avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability."); *United States v. Badalamenti*, 663 F. Supp. 1542, 1545 (S.D.N.Y. 1987) ("[i]t was only by putting together the voluminous results of such continuous surveillance that the circumstantial evidence fitted together like a crossword puzzle to show that defendants were involved in a large-scale international conspiracy to import drugs"), *aff'd sub nom.* *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990); *United States v. Santoro*, 647 F. Supp. 153, 180 (E.D.N.Y. 1986) ("joint trial permits jury to see comprehensive presentation of the entire enterprise and the role played by each participant. . .") (quoting *United States v. Persico*, 621 F. Supp. 842, 852 (S.D.N.Y. 1985)), *aff'd mem.*, 880 F.2d 1319 (2d Cir. 1989). See also *Weinfeld*, *supra* note 24, at 177. "In criticizing . . . [lengthy, complex trials,] . . . let us remember that they attempt to reach the circumspect and subtle participant who cannot be convicted unless confronted with the full impact of his highly organized activity." *Id.* (statement by Paul Windels, Jr. Esq.). In some instances, "the illegality can be shown only by piecing together many transactions which are individually lawful." *Id.*

<sup>28</sup> See, e.g., *United States v. Moralis*, 868 F.2d 1562, 1572 (11th Cir. 1989) (court noted separate trials would result in inefficient duplication of evidence); *United States v. Casamayor*, 837 F.2d 1509, 1512 (11th Cir. 1988) (noting separate trials are an uneconomical duplication of evidence), *cert. denied*, 488 U.S. 1017 (1989); *Jervis v. Hall*, 622 F.2d 19, 20-21 (1st Cir. 1980) (prosecution argued, and court agreed, duplication of evidence was uneconomical). See also Note, *Project: Eighteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1987-1988*, 77 GEO. L.J. 763, 774 (1989) (joint trials result in judicial economy); *supra* notes 5 and 25. But see *Dawson*, *supra* note 11, at 1383 ("whether the trial is joint or individual affects only a small portion of the prosecutor's investment of time").

<sup>29</sup> See, e.g., *United States v. Swift*, 809 F.2d 320, 322 (6th Cir. 1987) (defendants charged with drug violations, racketeering, tax evasion, and false declarations to a grand jury properly joined because overlapping proof involved); *United States v. Borelli*, 435 F.2d 500,

acy charge will lead to a joinder of the defendants; however, unlike traditional conspiracy cases, most “mega-trials” stem from defendants’ participation in a multi-faceted enterprise.<sup>30</sup> Therefore, the evidence against any one defendant may be diverse and unrelated to other defendants, making duplicitous proof less likely.<sup>31</sup>

Courts and commentators have recently suggested that severance is actually beneficial to the government because it diminishes the overall trial time.<sup>32</sup> In mass trials, frequent adjournments are

502 (2d Cir. 1970) (traditional assumptions support joint trials “when indictment charges a crime ‘which may be proved against all the defendants by the same evidence and which result from the same or a similar series of acts.’”) (quoting *United States v. Kahaner*, 203 F. Supp. 78, 81 (S.D.N.Y. 1962), *aff’d*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963)), *cert. denied*, 401 U.S. 946 (1971); 1 C. WRIGHT, *supra* note 7, § 144, at 505. A number of courts “permit joinder under Rule 8(b) only if the indictment invites joint proof.” *Id.* “The strongest case for ordering a joint trial is where the evidence to support the charges against the several defendants is virtually identical.” *Id.* § 213 at 766. *But cf.* *United States v. Carson*, 702 F.2d 351, 366 (2d Cir.) (“differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials”), *cert. denied*, 462 U.S. 1108 (1983).

<sup>30</sup> See *United States v. Gallo*, 668 F. Supp. 736, 747 (E.D.N.Y. 1987), *aff’d*, 863 F.2d 185 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). The gravamen of the traditional notion of conspiracy was “the making [of] an agreement to commit a readily identifiable crime or series of crimes . . . over a period of years.” *Id.* In contrast, the gravamen of conspiracy today is the existence of a “sufficient nexus to tie the various defendants and the diverse predicate offenses together.” *Id.* If one would apply pre-RICO concepts of conspiracy to *Gallo*, it would most likely be that a single overreaching conspiracy could not be charged based on the allegations. *Id.* See generally Note, *Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law*, 58 NOTRE DAME L. REV. 587 (1983) (discusses differences between traditional conspiracy law and law under RICO).

In order to effectively obtain a conviction under RICO, it is the government’s burden to prove the existence of an “enterprise” and a connected “pattern of racketeering activity” which constitutes a series of criminal acts as defined by statute. See *United States v. Turkette*, 452 U.S. 576, 583 (1981). Once a RICO conspiracy charge is made, joinder is automatically authorized under Rule 8(b). See *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

<sup>31</sup> See *United States v. Casamento*, 887 F.2d 1141, 1152 (2d Cir. 1989) (argument by prosecution that evidence presented at joint trial would necessarily have to be presented at all severed trials not borne out), *cert. denied*, 110 S. Ct. 1138 (1990); *Gallo*, 668 F. Supp. at 756 (conspiracy to participate in multi-faceted enterprise involves diverse and unrelated forms - such being the “catch-all” nature of RICO). *But see* *Schaffer v. United States*, 362 U.S. 511, 515 (1960) (proof, although compartmentalized to each petitioner, was related to all petitioners); *United States v. Vaccaro*, 816 F.2d 443, 449 (9th Cir.) (denial of severance upheld even though only small percentage of total evidence directly against defendant, when greater percentage of evidence showed nature of scheme in which defendant allegedly was involved), *cert. denied*, 484 U.S. 914 (1987).

<sup>32</sup> See *Gallo*, 668 F. Supp. at 757 (severed trials prevent evidence from being scattered); *United States v. Agueci*, 310 F.2d 817, 841 (2d Cir. 1962) (noted extra time involved when necessary to represent multi-defendants in joint trial), *cert. denied*, 372 U.S. 959 (1963). See also *United States v. Sperling*, 506 F.2d 1323, 1341 (2d Cir. 1974) (wiser to break up these

caused by the necessity of requiring the multitude of parties and their respective attorneys and witnesses to be present at a specified time and place.<sup>33</sup> Severance of trials not only makes for fewer continuances and adjournments, but also makes side bars less frequent and allows the trial to move more rapidly "since only two or three attorneys are cross examining and raising objections rather than two or three dozen."<sup>34</sup>

Additionally, in a series of several trials, the government may benefit and overall trial time may decrease by the fact that subsequent trials will be shortened and often precluded as a result of an earlier trial.<sup>35</sup> Subsequent trials will progress more rapidly since the government will be more aware of which evidence is most convincing to a jury, while the court, now more familiar with the case, may rule more expeditiously and proficiently.<sup>36</sup> Further, the total number of severed trials may decrease since there is a greater likelihood that defendants will plead guilty once they see that the prosecution has secured convictions of other defendants.<sup>37</sup>

huge cases - little time saved by government having prosecuted offenses in one rather than two conspiracy trials), *cert. denied*, 420 U.S. 962 (1975); Weinfeld, *supra* note 24, at 161 (separate trials help defendants get adequate representation).

<sup>33</sup> See Dawson, *supra* note 11, at 1385 (joint trials far more difficult to schedule; as number increases, it becomes harder to find date acceptable to court, prosecution, witnesses and attorneys). See also Gallo, 668 F. Supp. at 755 (court cannot wait for all parties to be available before trial date is set). Cf. *United States v. Pineda*, No. 81 Cr. 376-CSH, slip op. at 26 (S.D.N.Y. May 17, 1982) (substantial delay in completing evidentiary hearing caused by engagement of Pineda's counsel in long criminal trial); Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (1976) (congressional recognition that joinder of defendants causes delay).

<sup>34</sup> Gallo, 668 F. Supp. at 757. See generally *Agucci*, 310 F.2d at 840-41. In *Agucci*, the court stated, with regard to restricting the number of defendants, that:

Each counsel, understandably in the mass-conspiracy case, makes a determined effort . . . to distinguish his client from other defendants on trial; he often duplicates matter covered by other counsel, prolongs cross-examination by repetitiveness, becomes more vigorous in his trial demeanor than might ordinarily be proper, and becomes unduly adamant about trial technicalities.

*Id.*; Dawson, *supra* note 11, at 1387 (judge must expect many more objections from defense attorneys in a joint trial).

<sup>35</sup> See *United States v. Gallo*, 668 F. Supp. 736, 757 (E.D.N.Y. 1987) ("[d]uplicative and cumulative evidence becomes easier to identify and exclude . . . conspiracies verified more readily. . ."), *aff'd*, 863 F.2d 185 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989).

<sup>36</sup> *Id.* "Each successive trial moves at a quicker and smoother pace." *Id.* See Weinfeld, *supra* note 24, at 161 (government gains opportunity to learn from early mistakes; such exposure may encourage pleas and sharpen later cases).

<sup>37</sup> See Dawson, *supra* note 11, at 1389 (when cases severed, first trial may well be the

*B. The Presumed Witness Efficiency*

Joinder can be more efficient since it lessens the burden imposed upon witnesses, who are spared the necessity, and perhaps trauma, of giving testimony in a series of trials.<sup>38</sup> Again, this assumption is presupposed by the notion that the same evidence and the same witnesses will be used against each defendant.<sup>39</sup> Often the contrary is true and the witnesses are not identical in "mega-trials", where the defendant is an alleged participant in a multi-faceted enterprise.<sup>40</sup> Furthermore, for those situations where there are common witnesses, they can be protected from multiple appearances by stipulating necessary, but undisputed, noncritical testimony.<sup>41</sup> Moreover, it should be noted that most witnesses in a criminal trial are not laypersons, but professionals such as prosecution investigators, lab employees and police officers, whose job functions include testifying in court.<sup>42</sup>

only trial); Langrock, *Joint Trials: A Short Lesson from Little Vermont*, 9 CRIM. L. BULL. 612, 616-17 (1973). The "domino theory" provides:

The verdict of the first defendant tried has a great deal of bearing on the disposition of the other defendants charged with the same offense. . . . In a vast majority of the cases, an initial conviction has induced the awaiting codefendant to negotiate a plea. . . . Thus, the experience has been that a single trial of one defendant has resulted in the disposition of almost all the charges stemming out of the single crime, and this has occurred without the length of the joint trial and the attendant complications that almost always go with such a trial.

*Id.*

<sup>38</sup> See, e.g., *United States v. Lyles*, 593 F.2d 182, 191 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979); *United States v. Borelli*, 435 F.2d 500, 503 (2d Cir. 1970) (citing witness inconvenience and safety as compelling factors favoring joint trials), *cert. denied*, 401 U.S. 946 (1971); *United States v. Persico*, 621 F. Supp. 842, 852 (S.D.N.Y. 1985) (same); *United States v. Castellano*, 610 F. Supp. 1359, 1411 (S.D.N.Y. 1985) (same). See also *Parker v. United States*, 404 F.2d 1193, 1196 n.4 (9th Cir. 1968) (particular attention should be paid to witness who often is most burdened by a long trial, and most often forgotten), *cert. denied*, 394 U.S. 1004 (1969).

<sup>39</sup> See *Gallo*, 668 F. Supp. at 758 (witness considerations decreased where severed trials concern separate and independent evidence and witnesses); *United States v. Sperling*, 506 F.2d 1323, 1341 n.25 (2d Cir. 1974) (much wiser for government to try separately as there were no common witnesses), *cert. denied*, 420 U.S. 962 (1975).

<sup>40</sup> See *United States v. Gallo*, 668 F. Supp. 736, 758 (E.D.N.Y. 1987) (need for duplicative testimony negligible), *aff'd*, 863 F.2d 185 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989); *Sperling*, 506 F.2d at 1341 n.25 (only one common witness against members of both conspiracies).

<sup>41</sup> See *Dawson*, *supra* note 11, at 1385. Stipulation could eliminate repeated testimony regarding lab results. *Id.* Trial court could even condition severance on such stipulation in appropriate circumstances. *Id.*

<sup>42</sup> See *Gallo*, 668 F. Supp. at 758 (court makes distinction between federal law enforcement agents as witnesses and civilian witnesses); *Dawson*, *supra* note 11, at 1384-85 (impor-

### C. *The Consistent Verdict Justification*

Other justifications advanced in support of joinder are that severance fosters inconsistent jury verdicts and unequal treatment of legally indistinguishable defendants.<sup>43</sup> Joint trials, on the other hand, are more consistent and consequently more equitable in the verdicts they deliver.<sup>44</sup> This "consistency-of-verdict" argument fails, however, for the same reasons asserted in the efficiency argument.<sup>45</sup> Because in a "mega-trial", by definition, the charges against the defendants vary with the degree of involvement, mere participants should be distinguished from the more culpable defendants and are deserving of different treatment.<sup>46</sup>

### D. *The "Overall Picture" Justification*

Finally, it is said that joinder provides the jury with the "big picture" of the pattern and interrelationship of the complex offenses.<sup>47</sup> Once the whole picture is before the jury, they can con-

stant to know whether testifying is part of their job when assessing inconvenience imposed on witness).

<sup>43</sup> See *Bruton v. United States*, 391 U.S. 123, 143 (1968) (White, J., dissenting) (arguing majority should note separate trials cause varying consequences for each defendant). See also *infra* note 44 and accompanying text.

<sup>44</sup> See *Bruton*, 391 U.S. at 143 (White, J., dissenting) (unfairness of separate trials confirmed by "common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried."); *United States v. Stromberg*, 22 F.R.D. 513, 525 (S.D.N.Y. 1957) (if separate trials must be held, then "defendants will be placed in unequal positions, with some gaining the advantage of disclosure of the [g]overnment's case and the possibility of . . . fading memories making proof of the charge ever more difficult"), *aff'd in part, rev'd in part*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). See also A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 1-275 (3d ed. 1974) (prior trial of codefendant allows defense counsel full discovery in advance of government's case; alternatively, if first defendant is convicted, codefendant may turn state's evidence).

<sup>45</sup> See *infra* note 46 and accompanying text.

<sup>46</sup> See *United States v. Gallo*, 668 F. Supp. 736, 750 (E.D.N.Y. 1987) (several defendants here only peripherally involved and should not be burdened with stigma of those more actively involved), *aff'd*, 863 F.2d 185 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989); *United States v. Sampol*, 636 F.2d 621, 647 (D.C. Cir. 1980) (as to each of the defendants, court must consider the "gross disparity in the quantity and venality" of the evidence), *cert. denied*, 465 U.S. 1036 (1984). See generally Note, *Joinder and Severance*, 27 How. L.J. 787, 789-96 (1984) (analysis of joinder issues).

<sup>47</sup> See *Gallo*, 668 F. Supp. at 756 (government argues severance denies them opportunity to present "big picture" to jury and consequently would hamper jurors' ability to understand operation of enterprise); *United States v. Persico*, 621 F. Supp. 842, 852 (S.D.N.Y. 1985) (joint trial allows jury to see "comprehensive presentation" of entire enterprise and role of each defendant).

sider the full impact of the involvement of each defendant and determine his relative culpability.<sup>48</sup> The jury's ability to judge the relative culpability of each defendant is only as effective as its ability to compartmentalize the evidence relevant to each.<sup>49</sup> In the context of "mega-trials", however, there is a danger of jury confusion and spill-over culpability, making this assumption questionable.<sup>50</sup>

### III. THE EQUITABLE COSTS OF MEGA-TRIALS

#### A. *Equitable Costs of Joinder to the Judicial System*

Joinder is purportedly more efficient than separate trials because it conserves judicial resources while minimizing the burdens placed on a court and on a jury.<sup>51</sup> This assumption is questionable when one considers that the "mega-trial" often monopolizes a court's calendar for the better part of a year.<sup>52</sup> The length and

<sup>48</sup> See *supra* notes 27 and 47. "[I]f you tried the ultimate principles out of the context of their apparatus, the chances of conviction, as a practical matter, would be slim indeed." Weinfeld, *supra* note 24, at 177 (1963) (statement of P. Windels, Jr., Esq.). But see *Gallo*, 668 F. Supp. at 756. The "overall view" argument neglects the fact that evidence used to prove the "big picture" in a joint trial should be limited to only that evidence which would be admitted at a trial of a single defendant. *Id.* If evidence would be excluded at the severed trial, it should be excluded as to that defendant in a joint trial. *Id.* Since the government is not able to introduce unlimited "enterprise" evidence at individual trials of each defendant, it cannot here. *Id.* at 757. Most notably, the "enterprise" evidence, used to show the existence, structure and operations of the defendants and to present the "big picture" and "overall view" to the jury, has taken only a few days. *Id.*; Dawson, *supra* note 11, at 1394 (overall view calls for evidence unrelated to defendant on trial and is therefore unfairly prejudicial).

<sup>49</sup> See *infra* notes 70-80 and accompanying text (equitable costs to defendant).

<sup>50</sup> See *infra* notes 70-80 and accompanying text (equitable costs to defendant).

<sup>51</sup> *Bruton v. United States*, 391 U.S. 123, 134 (1968) ("Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial."); *United States v. Werner*, 620 F.2d 922, 928 (2d Cir. 1980) (policy underlying Rule 8 is "trial convenience and economy of judicial and prosecutorial resources. . ."). The judicial economy rationale is "itself based upon a presumption, lacking any empirical 'proof' that a single consolidated trial is superior to several shorter trials." Federal Bar Council Committee on Second Circuit Courts, *supra* note 4, at 5. See also *United States v. Gallo*, 668 F. Supp. 736, 756 (E.D.N.Y. 1987) (assumption only applicable to cases where all the evidence is admissible against all defendants), *aff'd*, 863 F.2d 185 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). But see Dawson, *supra* note 11, at 1390 (assumption of judicial economy is not supported by empirical data).

<sup>52</sup> See *Gallo*, 668 F. Supp. at 754 (noting some trials take well over one year, with comparable time spent on pre-trial matters). The assumed efficiency of consolidated trials should not go unquestioned in mega-trials. *Id.* See also *United States v. Sperling*, 506 F.2d 1323, 1341 n.25 (2d Cir. 1974) (suggesting break-up of large cases may be "much wiser"), *cert.*



complexity of these trials have a detrimental impact upon the judicial system.<sup>53</sup> A trial judge's rulings made throughout the "mega-trial"<sup>54</sup> will demand more attention and effort than smaller, severed trials.<sup>55</sup> In a mass trial, where there are numerous circumstances for the judge to consider when deciding a particular issue,<sup>56</sup> a greater likelihood for error exists, and such an error is likely to have broad repercussions since there are multiple de-

*denied*, 420 U.S. 962 (1975); Weinfeld, *supra* note 24, at 158 (discussing whether lengthy, complex trials oppose a defendant's right to a fair trial).

"Mega-trials" are a recent development in the annals of criminal law. See Federal Bar Council Committee on Second Circuit Courts, *supra* note 4, at 1 (prior to 1983 only one trial in the Second Circuit had lasted more than 65 days). The RICO Act, passed in 1970, has contributed greatly to the proliferation of mass trials since the RICO charge is automatically grounds for joinder. See *Gallo*, 668 F. Supp. at 747 (RICO conspiracy charge gives broad joinder authority to prosecution); *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.) (RICO designed to entangle even "those peripherally involved with the enterprise."), *cert. denied*, 439 U.S. 953 (1978). See generally Note, *A RICO you Can't Refuse: New York's Organized Crime Control*, 53 BROOKLYN L. REV. 979 (1988) (broad overview of RICO and its inherent flaws, including lack of standing to determine if defendants should be tried together).

<sup>53</sup> See *United States v. Agnello*, 367 F. Supp. 444, 447 (E.D.N.Y. 1973) ("grave problems" in trial management may be foreseen where 23 defendants are charged with fourteen counts of conspiracy to embezzle). See generally Dawson, *supra* note 11, at 1385-89 (discussing difficulties related to lengthy trials).

<sup>54</sup> See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 555 (1976) (trial judge must insure jury impartiality); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (trial judge has responsibility to protect defendant from external prejudices). See also *United States v. Casamento*, 887 F.2d 1141, 1152 (2d Cir. 1989) (trial judge's trial management decisions were exemplary), *cert. denied*, 110 S. Ct. 1138 (1990); Weinfeld, *supra* note 24, at 209 (statement of Medina, J.) (judge is powerful entity responsible for guidance of proceedings); P. WICE, CHAOS IN THE COURTHOUSE: THE INNER WORKINGS OF THE URBAN CRIMINAL COURTS 124-25 (1985) (judge responsible for aiding jury); U.S. TASK FORCE REPORT: THE COURTS 65-79 (1978) (trial judge is critical figure in criminal cases).

<sup>55</sup> See *United States v. Agueci*, 310 F.2d 817, 840 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Mega-trials cause a "great problem . . . [in] trial management." *Id.*; *Gallo*, 668 F. Supp. at 755. In *Gallo*, Chief Judge Weinstein, referring to mega-trials, stated:

The judge must, . . . make numerous decisions on the admissibility of evidence, and must fashion admonitions to the jury regarding the proper limited consideration to be accorded [to] much of the proof. The complexity and fragility of this task in such a convoluted and prolonged case is suggested by the . . . numerous problems of scheduling and administration.

*Id.* See generally U.S. TASK FORCE REPORT: THE COURTS, *supra* note 54, at 80 (problems with court administration); N. KERN & R. BRAY, THE PSYCHOLOGY OF THE COURTROOM (1982) (psychological analysis of decision making process).

<sup>56</sup> See *Agueci*, 310 F.2d at 840 (mass trials typically present court with large array of difficult problems); *Gallo*, 668 F. Supp. at 755 ("The grinding tension of such a long, complex case, particularly where the judge is making rulings which are continuously on the borderline of probative force and prejudice, is debilitating."). See also *supra* note 11 and accompanying text. See generally WICE, *supra* note 54, at 124-39 (overview of judge's role and experiences in criminal trial).

fendants.<sup>57</sup> It follows that justice may be administered more efficiently and accurately if the case was of more manageable proportions.

As recently as ten years ago, criminal trials lasted weeks, and only occasionally lasted several months.<sup>58</sup> However, since the enactment of the Racketeering Influenced Corrupt Organizations Act [RICO],<sup>59</sup> conspiracy trials have increased in both size<sup>60</sup> and length.<sup>61</sup> When a "mega-trial" appears on the docket, the judge must be prepared to clear his calendar for an indeterminable amount of time.<sup>62</sup> A "mega-trial" affords little or no flexibility in

<sup>57</sup> See *Gallo*, 668 F. Supp. at 755. Chief Judge Weinstein stated:

[A]s the trial develops, it becomes increasingly difficult for the court to view objectively the case and its evidentiary decisions without the added tension of avoiding errors that might result in a mistrial or reversal. The judge knows that the court cannot afford the time for retrial and he or she may be pressed to make decisions to avoid that eventuality, instead of deciding issues only as an informed trial judge's conscience mandates.

*Id.*

<sup>58</sup> See Weinfeld, *supra* note 24, at 157 (statement of Smith, J.). In 1963, there were 22 criminal jury trials lasting 20 or more trial days in the federal courts. *Id.* See also Federal Bar Council Committee on Second Circuit Courts, *supra* note 4, at 1 (during 1974 - 1982 "only one criminal trial in Southern and Eastern Districts lasted . . . 65 trial days. . .").

<sup>59</sup> See 18 U.S.C. §§ 1961-68 (1988). The Act makes it:

unlawful for any person who has received any income derived . . . from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated . . . to use or invest, . . . any part of such income, . . . in acquisition of any interest in, or the establishment or operation of, any enterprises which is engaged in, or . . . affect[s], interstate or foreign commerce.

*Id.* at § 1962 (a).

The Supreme Court has interpreted "enterprise" as "proved by evidence of an ongoing organization, . . . and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). See also *United States v. Culbert*, 435 U.S. 371, 377 (1978) (anti-racketeering statute sets out with precision the conduct being criminalized). See generally Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 614 (1985) (court faced with enforcing public interest law should "give vent to its imagination").

<sup>60</sup> See, e.g., *United States v. Santoro*, 647 F. Supp. 153, 156 (E.D.N.Y. 1986) (23 defendants indicted on 14 counts), *aff'd*, 880 F.2d 1319 (2d Cir. 1989). Cf. *United States v. Moreton*, 25 F.R.D. 262, 263 (W.D.N.Y. 1960) (17 defendants indicted on 2,533 counts including 11 conspiracy counts). See generally Silver, *Monitoring the Length of Criminal Trials: A Judicial Prospective on the Problem of Controlling the Length of Criminal Trials*, 12 STATE CT. J. (1988) (discussing effects of long criminal trials on courts).

<sup>61</sup> See, e.g., *United States v. Casamento*, 887 F.2d 1141, 1147 (2d Cir. 1989) (three years from indictment to verdict and seventeen months of trial), *cert. denied*, 110 S. Ct. 1138 (1990); *United States v. Ruggiero*, No. 83-412 (E.D.N.Y. Sept. 24, 1986) (LEXIS, Genfed library, Dist file) (indictment over 4 years old with trial still in progress).

<sup>62</sup> *United States v. Gallo*, 668 F. Supp. 736, 755 (E.D.N.Y. 1987), *aff'd*, 863 F.2d 185 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). In *Gallo*, Chief Judge Weinstein, discussing the effect of mega-trials on the courts, stated:

a judge's scheduling, fostering inefficiency since the court must purge its docket and reroute other cases.<sup>63</sup> A "mega-trial" effectively causes an obstruction in the caseload of a court, which, in light of increasing crime rates,<sup>64</sup> is detrimental to society and best minimized by the use of a number of smaller trials.<sup>65</sup>

A criminal defendant is protected by a constitutional right to a trial by jury.<sup>66</sup> In a "mega-trial", the jurors ability to act as an

If the court does decide to try the case as a whole, the judge must adjourn the remainder of his or her civil and criminal calendars for an indefinite and protracted period of time. The effect under the individual calendar system is ruinous. The already overburdened docket of the court reaches a breaking point, and the administration of justice in *all* of the court's cases is unconscionably delayed.

*Id.* (emphasis in original). See also Federal Bar Council Committee on Second Circuit Courts, *supra* note 4, at 1 (long trials disrupt judges' calendars).

<sup>63</sup> *Gallo*, 668 F. Supp. at 755 (severed trials offer greater flexibility than do joint trials). Judges sitting on long cases often have later cases reassigned to other judges. See *United States v. Drummond*, 511 F.2d 1049, 1051 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975). In *Drummond*, the case was reassigned from Judge Travia because he was presiding over *United States v. Bernstein*, 533 F.2d 775 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976), a 9 month long criminal case that charged nine defendants with 65 counts. *Id.* at 780 n.1. *Cf. United States v. Mendoza*, 565 F.2d 1285, 1287 (5th Cir. 1978) (trial judge was not able to consider defendant's motion for over four months due to involvement with protracted criminal case); *SEC v. Weis Sec., Inc.*, 517 F.2d 453, 455 (2d Cir. 1975) (judge reassigned an application because he was too busy with a protracted criminal trial).

<sup>64</sup> See P. McMUIGAN & R. RADER, *CRIMINAL JUSTICE REFORM: A BLUEPRINT* 266-67 (1983) (graphical depiction of 50% increase in crime rate between 1972 and 1981); *CRIME IN AMERICA* 6-9 (B. Cohen 2d ed. 1977) (crime statistics excerpts from *Time Magazine*). See generally PRESIDENT'S COMMISSION ON ORGANIZED CRIME: *ORGANIZED CRIME TODAY* 33-51 (1986) (overview of rise in organized crime and effects of prosecutions).

<sup>65</sup> See *Gallo*, 668 F. Supp. at 755. Use of smaller trials allows the court calendar to be more easily adjusted and controlled, allowing some normalcy to remain in the court's docket. *Id.* In contrast, by permitting the mega-trial to proceed, the trial judge presides almost exclusively over a single case. *Id.*; Dawson, *supra* note 11, at 1385-86. Joint trials "are far more difficult to schedule than individualized trials: as the number of participants increase, it becomes harder to find a trial date" acceptable to all the participants. *Id. Cf. WICE, supra* note 54, at 51, 134-35 (courts need to process large quantities of cases everyday in order to keep pace with caseload); B. ALPER & L. NICHOLS, *BEYOND THE COURTROOM* 16 (1981) (case flow management is critical issue).

<sup>66</sup> U.S. CONST. amend. VI. The sixth amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." *Id.* The right to a jury trial is regarded as "indispensable protection" against governmental tyranny. See *Brown v. Louisiana*, 447 U.S. 323, 330 (1980). The essential feature of a jury trial is the "imposition between the accused and his accusers of the common sense judgement of a group of laymen. . . ." *Id.* (quoting *Williams v. Florida*, 399 U.S. 78, 87 (1970)). See also *Baldwin v. New York*, 399 U.S. 66, 72 (1970) (New York statute allowing non-jury trials of offenses with maximum sentence over six months is violative of due process). See generally BASSIOUNI, *CRIMINAL LAW AND ITS PROCESS: THE LAW OF PUBLIC ORDER* 476-503 (1969) (comprehensive examination of jury trials and other constitutional rights afforded to criminal defendants).

The Supreme Court in *Bruton v. United States*, 391 U.S. 123 (1968), recognized that a

intermediary between the government and the defendant is impaired as they become mentally and physically strained as the months progress.<sup>67</sup> The effect of this strain may be transferred to the defendants, who may in turn receive an increasingly prejudicial trial.<sup>68</sup>

Although some disruption of a juror's social and economic status is unavoidable when the length of a trial is measured in terms of months and years rather than weeks, the effects of such a disturbance may be devastating.<sup>69</sup> It is contended that by leaving a juror with the memory of a distressing experience, unreasonably long trials create a reluctance on the part of some to participate in the judicial process. Furthermore, since this juror will, in the course of normal daily social interaction, share his experience with others, the efficacy of the justice system will be diminished.

defendant in a joint trial may be incriminated by the admission into evidence of a codefendant's out of court statement, and thereby be denied 6th Amendment confrontation rights. *Bruton*, 391 U.S. at 137. However, if a defendant is not directly implicated by the codefendant's out of court statement, there is no *Bruton* violation and severance is not necessary. See *Richardson v. Marsh*, 481 U.S. 200, 210-11 (1987) (no *Bruton* violation when codefendants' confession, which is not incriminating on its face, becomes so when linked with evidence introduced at trial). See generally Note, *The Admission of a Codefendants' Confession After Bruton v. United States: The Questions and A Proposal for their Resolution*, 1970 DUKE L.J. 329 (general discussion of joinder and severance).

<sup>67</sup> See *United States v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). In *Kelly*, the jurors complained that the length of the trial went well beyond the three month estimate which had been given them. *Id.* See also Moss, *Mega-Trials*, *supra* note 12, at 76. Jurors lose their attention in a protracted trial. *Id.* One defense attorney stated that halfway through a 17 month trial he motioned for a mistrial on the ground that the jury had been "irreparably benumbed." *Id.* See generally Berger, *Can Juries Cope with Multi-Month Trials?*, 3 AM. J. TRIAL ADVOC. 449, 450 (1980) (discussing factors taken into account with respect to lay jurors in protracted trials and suggesting changes); Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482 (1956).

<sup>68</sup> See *Kelly*, 349 F.2d at 759. In *Kelly*, the trial length clearly affected one of the jurors ability to remain impartial. *Id.* The juror was ultimately excused because "he blamed the delay on the defendants . . . ." *Id.* To compound the problem of frustration, the jury is privy to an almost unending stream of evidence of unlawful conduct. *Id.* See also *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989) (excused juror harbored resentment towards defendants), *cert. denied*, 110 S. Ct. 1138 (1990).

<sup>69</sup> See *Gallo*, 668 F. Supp. at 754 (seemingly endless trials work severe hardships on jurors); *United States v. Agueci*, 310 F.2d 817, 841 (2d Cir. 1962) (jurors suffer "extraordinary hardships" when taken away from their normal lives), *cert. denied*, 372 U.S. 959 (1963); *United States v. Alberico*, 453 F. Supp. 178, 182 (D. Colo. 1977) (sequestration grossly interferes with everyday life of jurors).

### *B. Equitable Costs to the Defendants*

One of the principal claims of defendants when appealing a denial of severance is that their case was so complex that it overwhelmed the jury, which became confused as to what evidence was relevant to each defendant.<sup>70</sup> However, in light of the importance of the jury to our system of jurisprudence, courts consistently hold that cases are not so complex as to prevent a jury from compartmentalizing the evidence against individual defendants.<sup>71</sup> The ultimate test of complexity on review is "whether the jury can separate the evidence relevant to each defendant."<sup>72</sup> In determining whether complexity in multi-party trials should mandate severance, courts often consider the underlying criminal con-

<sup>70</sup> See, e.g., *United States v. Sampol*, 636 F.2d 621, 643 (D.C. Cir. 1980) (relative culpability of defendant may lead to jury confusion); *United States v. Branker*, 395 F.2d 881, 887-88 (2d Cir. 1968) (inability of jury to separate evidence is directly proportional to number of counts charged), *cert. denied*, 393 U.S. 1029 (1969); *United States v. Bufalino*, 285 F.2d 408, 417 (2d Cir. 1960) (to believe jurors can assess and separate voluminous evidence is "somewhat naive"); *United States v. Abrams*, 539 F. Supp. 378, 382-83 (S.D.N.Y. 1982) (same).

<sup>71</sup> See, e.g., *Casamento*, 887 F.2d at 1150 (mix of guilty and not guilty verdicts is some indication of jury's ability to comprehend voluminous evidence and differentiate defendants); *United States v. Moten*, 564 F.2d 620, 627 (2d Cir. 1977) (mixed verdicts of guilt and innocence are indicative of ability to compartmentalize evidence), *cert. denied*, 434 U.S. 959 (1978); *United States v. Kahaner*, 203 F. Supp. 78, 82 (S.D.N.Y. 1962) (appellants did not prove prejudice from codefendants confession).

The amount of proof offered against a defendant is a consideration when ruling on a motion for severance. See *United States v. Fortna*, 796 F.2d 724, 738 (5th Cir.), *cert. denied*, 479 U.S. 950 (1986). However, a defendant is "not necessarily entitled to a severance when his alleged involvement in a conspiracy is minimal." *Id.* See also *United States v. Vaccaro*, 816 F.2d 443, 449 (9th Cir.) (defendant not substantially prejudiced notwithstanding relatively small amount of evidence relevant to him), *cert. denied*, 489 U.S. 914 (1987); *United States v. Carson*, 702 F.2d 351 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983) (differing levels of proof in multi-party trials is inevitable and standing alone is insufficient to warrant severance); Dawson, *supra* note 11, at 1401-02.

<sup>72</sup> *Kahaner*, 203 F. Supp. at 81. Judge Weinfeld stated:

The ultimate question is whether, under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him?

*Id.* Even if the jury has difficulty in reaching a verdict, courts are insistent that the verdicts are on the merits of the evidence against the defendant. See, e.g., *United States v. Moten*, 564 F.2d 620, 627 n.9. (2d Cir. 1977) (court did not find jury confusion notwithstanding forelady's letter to Chief Judge stating "it was impossible to reach a fair verdict. . ."). See generally Berger, *supra* note 67.

duct,<sup>73</sup> or the number of counts charged and the number of defendants being jointly tried.<sup>74</sup> Additionally, courts often find that any danger of confusion has been circumvented by proper jury instructions.<sup>75</sup> In the wake of the extensive studies on the ability of people in a complex environment to efficiently process information, the traditional rationales advanced for justifying joinder are no longer compelling when applied to modern day “mega-trials”.<sup>76</sup> A trial is an event that produces a multitude of stimuli in the form of testimony, real and circumstantial evidence, charts, and instructions, all of which the jury is expected to recall when they deliberate.<sup>77</sup> The ability of a jury to compartmentalize and recall relevant information is clearly dependent upon the amount

<sup>73</sup> See, e.g., *Casamento*, 887 F.2d at 1150 (sales of illicit drugs are not complex transactions); *United States v. Kelly*, 349 F.2d 720, 727 (2d Cir. 1965) (court found 7 counts of securities violations against 4 defendants to be complex); *United States v. Santoro*, 647 F. Supp. 153, 180 (E.D.N.Y. 1986) (RICO conspiracy is “highly technical and counter intuitive.”) (citing *Gallo*); *United States v. Agnello*, 367 F. Supp. 444, 447 (E.D.N.Y. 1973) (conspiracy to embezzle is considered complex charge).

<sup>74</sup> See, e.g., *Abrams*, 539 F. Supp. at 382 (20 counts against 5 defendants not unmanageable); *United States v. Moreton*, 25 F.R.D. 262, 262-63 (W.D.N.Y. 1960) (2,533 counts against 17 defendants is “obviously” complex, resulting in substantial prejudice). *But see Agnello*, 367 F. Supp. at 447 (substantial prejudice not found where 23 defendants are tried jointly on 14 counts).

<sup>75</sup> See *Opper v. United States*, 348 U.S. 84, 95 (1954) (“Our theory of trial relies upon the ability of a jury to follow instructions.”). See also *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir.) (prejudicial effect of inadmissible evidence neutralized by “careful jury instructions.”), *cert. denied*, 449 U.S. 856 (1980); *United States v. Becker*, 569 F.2d 951, 964 (5th Cir.) (severance is justified only if the prejudice is “beyond the curative powers of a cautionary instruction.”), *cert. denied*, 439 U.S. 865 (1978).

<sup>76</sup> See generally G. COHEN, *MEMORY IN THE REAL WORLD* (1989) (overview of numerous experiments and factors involving memory). Studies focusing on environmental factors affecting memory have determined that overly complex environments reduce the ability of a person to efficiently process and integrate information. See H. SCHRODER, M. DRIVER & S. STREUFERT, *HUMAN INFORMATION PROCESSING* 31 (1967). Complexity is primarily a function of information load, information diversity, and the rate the information is supplied to the subject. *Id.* The general hypothesis is that low environmental complexity leads to boredom and inattentiveness resulting in poor retention. *Id.* at 36-39. A high degree of complexity serves to confound and confuse the subject, resulting in frustration which hampers the ability of the subject to process information. *Id.* at 37-41. Moderate complexity affords the subject a challenge that is not insurmountable. *Id.* See also KROLL & OGAWA, *RETRIEVAL OF THE IRRETRIEVABLE: THE EFFECTS OF SEQUENTIAL INFORMATION ON RESPONSE BIAS IN PRACTICAL ASPECTS OF MEMORY: CURRENT RESEARCH AND ISSUES* 490 (1988) (discussing effects of post-event information on memory).

<sup>77</sup> *United States v. Gallo*, 668 F. Supp. 736, 750 (E.D.N.Y. 1987) (jury stores relevant evidence “in their collective mind.”), *aff’d*, 863 F.2d 185 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). See generally DON, *DISCRETIONARY JUSTICE: A CRITICAL INQUIRY* 248 (1981) (questioning aptitude of jury to resolve legal issues).

of information introduced,<sup>78</sup> the saliency of the information,<sup>79</sup> and the time period between the last exposure to the information and when it is to be recalled.<sup>80</sup> It is contended that the test of complexity should be: when viewing the trial as a whole, has the defendant established a clear probability that all of the circumstances combine to compromise the jury's ability to determine guilt or innocence?

Since under the rules of joinder there must be a common nexus between the defendants,<sup>81</sup> distinctions between the voluminous information put forth at trial are inherently imperceptible.<sup>82</sup> The jury's task is further hindered when evidence produced at trial is admissible against some, but not all, of the defendants.<sup>83</sup> In addi-

<sup>78</sup> See DON, *supra* note 77, at 249 ("jurors must decipher and retain an unrealistic amount of evidence and technical data"). See also *supra* note 76.

<sup>79</sup> See HUMAN INFORMATION PROCESSING, *supra* note 76, at 27-28; E. LOFTUS, EYEWITNESS TESTIMONY 25-27 (1979). "The extraordinary, . . . unusual, and interesting . . . attract our attention and hold our interest, both attention and interest being important aids to memory. The opposite of this principle is inversely true—routine, commonplace and insignificant circumstances are rarely remembered. . . ." *Id.* at 27 (quoting Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391, 394 (1933)); A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 66 (1979) ("courts accept hypothesis that vivid images are better retained than memories devoid of interest.").

<sup>80</sup> See LOFTUS, *supra* note 79, at 52. "It is by now a well-established fact that people are less accurate and complete in their eyewitness accounts after a long retention interval than after a short one." *Id.* at 53. As early as 1885, H. E. Ebbinghaus established what is now called "the forgetting curve". *Id.* Memory, as a factor of time, decays rapidly immediately after an event, but the rate of forgetting tends to decrease over time. *Id.* See also BJORK & BJORK, ON THE ADAPTIVE ASPECTS OF RETRIEVAL FAILURE IN AUTOBIOGRAPHICAL MEMORY, IN PRACTICAL ASPECTS OF MEMORY: CURRENT RESEARCH AND ISSUES 283 (1988) (stored information is not lost or erased, but inaccessible over time). See generally H. EBBINGHAUS, MEMORY: A CONTRIBUTION TO EXPERIMENTAL PSYCHOLOGY (1885) (classic empirical study of human memory).

<sup>81</sup> See FED. R. CRIM. P. 14, *supra* note 7.

<sup>82</sup> See *United States v. Agnello*, 367 F. Supp. 444, 447 (E.D.N.Y. 1973). Where the jury is to make findings of guilt or innocence from voluminous direct and circumstantial evidence, the ability to compartmentalize is endangered. *Id.* Non-salient evidence is further subject to compromise by the incorporation of later information. See LOFTUS, *supra* note 79, at 56-58. In an experiment, 40 subjects were shown a three minute videotape involving the disruption of a classroom by 8 demonstrators. *Id.* At the conclusion of the tape, one-half of the class was asked a question which misrepresented the number of demonstrators as being 4, and the other half 12. *Id.* A week later, both groups, in response to being asked how many intruders there were, tended to incorporate the misrepresentations in their answers by compromising towards the misstated quantity. *Id.* It is submitted that this test, and its results, are directly applicable to a case such as *Casamento*, where the jury was asked to digest 40,000 pages of transcripts taken in the course of 17 months.

<sup>83</sup> See, e.g., *United States v. Butler*, 822 F.2d 1191, 1194 (D.C. Cir. 1987) (defendant named in 8 of 49 unlawful acts); *United States v. Ong*, 541 F.2d 331, 338 (2d Cir. 1976) (codefendants "literally convicted themselves" by inadmissible evidence as against each

tion to the heavy burden already confronting the jury in terms of sheer volume, the ability of a person to efficiently recall information decreases substantially over time.<sup>84</sup> It is submitted that by the time a "mega-trial" ends, the jury's capability to come to a rational decision on guilt or innocence is unacceptably compromised.

The problem of jury confusion is further compounded by "spill-over" prejudice.<sup>85</sup> If the jury accepts the prosecutions evidence of the charges which made joinder possible, as time passes, the jury may associate all of the defendants with all of the criminal acts.<sup>86</sup> This danger undermines a defendant's right to have a trial judged on the merits.<sup>87</sup> Guilt by association becomes a critical concern where one defendant is a relatively minor figure in a "mega-trial", since it often happens that this defendant must wait months

other), *cert. denied*, 429 U.S. 1075 (1977). See also *Casamento*, 887 F.2d at 1153 (court looks at effect of alleged "spill-over" prejudice).

In an effort to avoid the prejudicial effects of "spill-over" prejudice, the New York Court of Appeals recently tried a novel approach. See *People v. Ricardo B.*, 73 N.Y.2d 228, 535 N.E.2d 1136, 538 N.Y.S.2d 796 (1989). In *Ricardo B.*, the court empaneled two juries in order to shield one defendant from a codefendant's inculpatory statement. *Id.* at 232, 535 N.E.2d at 1337-38, 538 N.Y.S.2d at 797.

<sup>84</sup> See LOFTUS, *supra* note 79, at 25-29 (relying on R. Shepard, *Recognition Memory for Words, Sentences and Pictures*, 6 J. VERBAL LEARNING & VERBAL BEHAV. 156-63 (1967)). Shepard tested 34 subjects for recognition of pictures after the passage of various time lengths. *Id.* He found that after a two hour delay, retention was 100%, but after 4 months retention dropped to 57%. *Id.* The test used a true-false answer question; therefore, the 57% is much higher than actual retention due to guessing. *Id.* See also *supra* note 80 (discussing effects of time on memory recall).

<sup>85</sup> See *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring). A codefendant in a conspiracy trial is in an unenviable position, as there normally will be evidence of criminal activity by someone. *Id.* "It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." *Id.*; *United States v. Austin*, 786 F.2d 986, 991 (10th Cir. 1986) (prosecution's remarks clear attempt to prove guilt by association). See also *Dawson*, *supra* note 11, at 1403.

<sup>86</sup> See *Dawson*, *supra* note 11, at 1404. Guilt by association convictions are rational decisions by a jury to convict based on the evidence. *Id.* A steady stream of evidence tending to prove the entire conspiracy makes it difficult to compartmentalize and thereby prejudices peripheral defendants. *United States v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

<sup>87</sup> See *United States v. Kahaner*, 203 F. Supp. 78, 81 (1962). "To be sure, . . . guilt is personal." *Id.* (quoting *United States v. Cafaro*, 26 F.R.D. 170, 172 (S.D.N.Y. 1960)). Ideally, everyone should have "a separate trial where evidence admissible only against him would be heard by the jury." *Id.* *But cf. Lutwak v. United States*, 344 U.S. 604, 619 (1953) ("[a] defendant is entitled to a fair trial but not a perfect one.").



before having a chance to present his case.<sup>88</sup> By the time many of the defendants have rested their case in chief, the jury may have determined that the allegations justifying joinder are valid and presume that all the defendants under the conspiratorial umbrella are guilty.<sup>89</sup> The minor figure who has not yet put forth his case is then put in the unenviable position of having to disprove his association with the conspiracy, rather than having the prosecution prove his guilt.<sup>90</sup>

#### IV. SUGGESTED REFORMS

Certain reforms are necessary in order to re-align the current practice of joinder with the philosophies embodied within the Federal Rules of Criminal Procedure. To secure the "just determination of every criminal proceeding" in light of the recent proliferation of the "mega-trial", the presumption that joint indictments lead to joint trials must be eradicated. The trial judge, after eliciting all relevant information from the government and defendant, would be in the best position to determine if joinder is warranted. Though there can be no bright-line standard in determining whether defendants should be jointly tried, the judge should focus primarily on the length of trial and the number of defendants.<sup>91</sup> It is suggested that four months is a pivotal point in the jury's ability to recall pertinent information.<sup>92</sup> Therefore, it is

<sup>88</sup> See Moss, *supra* note 12, at 75 (ten months passed before defendant was even mentioned); *supra* notes 70-87 (discussing problems of confusion and complexity created by mega-trials). A minor participant may be tried first, but this would cause other problems just as likely to result in a conviction not based on the merits. See *infra* note 90 (discussing problems created by incorporation of post-event information).

<sup>89</sup> See Dawson, *supra* note 11, at 1404-05. Since there is an inherent nexus between the co-defendants, once a juror has heard damaging testimony against a major defendant, another more minor defendant may be unfairly prejudiced before he is even involved in the trial. *Id.* Cf. LOFTUS, *supra* note 79, at 60 (suggestion of non-existent object's existence increases likelihood that person will "remember" having seen object).

<sup>90</sup> See Dawson, *supra* note 11, at 1404. Defendants ordinarily have a more difficult task in dispelling guilt when they are joined with other defendants because they have the heavy burden of proving "non-participation in the criminal activities with the group the prosecutor has defined by his joinder decisions." *Id.* The prosecution then enjoys an air of guilt which diminishes the amount and quality of evidence needed to produce guilt beyond a reasonable doubt. *Id.*

<sup>91</sup> See *supra* note 20 (Casamento court created ten defendant and four month "benchmarks").

<sup>92</sup> See *supra* note 84 (discussing experiments done with memory recall as a function of

the contention of this Note that a presumption against trials that are to last longer than four months be created. To overcome this presumption, the government should be required to provide a compelling reason in the interests of justice as to why the defendants should be jointly tried. In any event, if the "overall" trial time is to exceed four months, minor figures should automatically be entitled to a separate trial.<sup>98</sup> Since our system of jurisprudence encompasses the idea that it is better to err on the side of innocence, there is no compelling reason why minor figures should not be severed from a large mass trial.

### CONCLUSION

A "mega-trial", by its nature, defeats the primary purpose underlying joinder, namely judicial economy. "Mega-trials" not only put an unwarranted strain on judicial resources, but also subject codefendants to a forfeiture of their right to a fundamentally fair trial. Since the courts have created the presumption for joint trials, the courts are free to change it. Trial judges must be prompted to take affirmative steps to re-align the goals of joinder with the realities of the modern world.

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time).

<sup>98</sup> See *supra* notes 82-88 (discussing particularly acute prejudices regarding minor defendants).

