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On the morning of August 9, 1997, five people were found shot to death execution style in a home in the 100 block of West French Place in San Antonio, Texas.[1] The wrists of the victims were bound with duct tape and then their lives taken—each with a shot to the head.[2] The killing of these five individuals, known as the French Place Murders, was the largest mass murder reported in the modern history of San Antonio, Texas.[3] Suspicions quickly emerged that the gruesome slayings were connected with the criminal activities of the Mexican Mafia, a prison-based gang engaged in criminal activities,[4] which extends beyond the walls of the Texas prison system.[5]

Federal prosecutors of the Western District of Texas were able to bring ten Mexican Mafia gang members to justice for the French Place Murders and others by utilizing a powerful weapon in their arsenal, the Racketeer Influenced and Corrupt Organization Act, commonly referred to as RICO [hereinafter RICO].[6] As hoped by

1. Anita McDivitt, *Execution-Style Killings Rock Family Father, Daughter Among Victims of City's Worst Mass-Murder in Memory,* SAN ANTONIO EXPRESS-NEWS, Aug. 10, 1997, at 1A.

2. *Id.*

3. *Id.*

4. Bill Hendricks & John Tedesco, *Mafia Raids Dawn on Mexican Mafia: Authorities Collect Drugs, Weapons in Citywide Gang Sweep,* SAN ANTONIO EXPRESS-NEWS, Oct. 4, 1997, at 1B.

5. *Id.*; John MacCormick, *Nueces DA Targets Youth Gangs,* SAN ANTONIO EXPRESS-NEWS, June 14, 1998, at 1A; Marty Sabota, *Suspect in 1994 Triple Shooting Jailed,* SAN ANTONIO EXPRESS-NEWS, Nov. 6, 1997, at 2B.

6. 18 U.S.C. §§ 1961–1968 (1994) [hereinafter RICO]; *see also* Maro Robbins, *Gang Member to Ask For Death,* SAN ANTONIO EXPRESS-NEWS, Mar. 5, 1999, at 2B. Increasingly, legislators and law enforcement have recognized that using the RICO statute can effectively attack a criminal organization such as the Mexican Mafia. *10 Mexican Mafia Members Receive Life Sentences,* SAN ANTONIO EXPRESS-NEWS, Sept. 7, 1997, at 7B (quoting U.S. Attorney Nora Manella who stated that sentences resulting from the utilization of the RICO statute demonstrated "an assurance that 'La

many,[7] these ten men were found guilty and later sentenced to life imprisonment without parole for their criminal activities associated with the Mexican Mafia including the French Place Murders.[8]

RICO allows the federal government to eradicate a criminal organization such as the Mexican Mafia through the prosecution of its members and associates for criminal offenses and other acts they commit for the purpose of maintaining the criminal organization and fulfilling its criminal objective.[9] In particular, RICO created a new form of conspiracy, which has proven to be a valuable weapon in the federal government's ongoing mission to dismantle gangs such as the Mexican Mafia, which are organized for the pursuit of criminal activities. RICO conspiracy is considered a more efficient, effective and expansive form of conspiracy.[10] Unlike traditional forms of conspiracy, RICO conspiracy allows the government for the first time to prosecute numerous defendants for seemingly unrelated crimes and conspiracies in a single trial.[11] In essence, the enactment of RICO has contributed to the rise of the "mega trial" phenomenon, where numerous defendants are prosecuted together.[12]

In a multi-defendant prosecution, each defendant must contend with the danger that the case against him will be tainted by evidence presented against his co-defendants that "spills-over" in the minds of the jurors and taints their decision in regards to his individual culpability.[13] Traditionally, courts have weighed the prejudice against the defendant, the "spill-over" effect inherent in

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Eme' members [in Los Angeles] are not immune from investigation, prosecution and imprisonment."); *Prosecutors Seek Ways to Continue Crackdown on Mexican Mafia Gang,* SAN ANTONIO EXPRESS-NEWS, Sept. 22, 1997, at 15A (reviewing the recent RICO prosecution of nineteen gang members in Los Angeles, CA).

7. Maro Robbins, *Gang Member To Ask For Death,* SAN ANTONIO EXPRESS-NEWS, Mar. 5, 1999, at 2B.

8. Maro Robbins, *Last Gang Member Given Life Sentence,* SAN ANTONIO EXPRESS-NEWS, July 10, 1999, at 2B.

9. United States v. Turkette, 452 U.S. 576, 589 (1981).

10. *Id.*

11. United States v. Sutherland, 656 F.2d 1181, 1192 (5th Cir. 1981) (stating that "a series of agreements that under pre-RICO law would constitute multiple conspiracies could, under RICO, be tried as a single 'enterprise' conspiracy"); United States v. Elliot, 571 F.2d 880 (5th Cir. 1978). In this case, six defendants and thirty-seven unindicted co-conspirators were suspected in more than twenty separate criminal pursuits, but the government was only required to charge a single conspiracy to violate a substantive RICO provision. *Id.*

12. *See generally* United States v. Andrews, 754 F. Supp. 1161, 1169 (N.D. Ill. 1990) (illustrating a multi-defendant conspiracy prosecution) .

13. United States v. Zafiro, 945 F.2d 881, 885-86 (7th Cir. 1991).

all multi-defendant trials, with the government's burden of presenting a meaningful and efficient case against the defendants to determine what justice requires.[14] Most courts including the United States Supreme Court have held that it is more fair and just to allow the government to prosecute the defendants together than to sever their cases, finding that the "spill-over" effect although present did not violate the constitutional rights of the defendant.[15]

Unforeseen by its drafters, however, RICO conspiracy created an enhanced "spill-over" effect.[16] Existing criminal procedural protections for misjoinder fail to sufficiently protect RICO conspiracy defendants from the enhanced "spill-over" effect created by RICO conspiracy.[17] Thus, the RICO conspiracy defendant is denied the opportunity to present his case to an impartial jury in violation of the Sixth Amendment.[18] Furthermore, the current inadequate procedural due process protections allow the RICO conspiracy defendant to be deprived of his liberty without due process of law in violation of the Fifth Amendment Due Process Clause of the United States Constitution.[19]

This article proposes that the Federal Rules of Criminal Procedure be amended in a way that accounts for the enhanced "spill-over" effect created by RICO conspiracy and comports with the requirements of procedural due process. With such a revision to the rules, RICO conspiracy prosecutions will provide the RICO conspiracy defendant with a meaningful way to present his defense to an impartial jury. Towards this end, this article presents the benefits of utilizing RICO conspiracy in dismantling the Mexican Mafia and its detrimental effect on procedural due process through a discussion of the relevant aspects of the RICO statute, developments in case law regarding RICO, and the recent prosecution of ten Mexican Mafia gang members of San Antonio, Texas in *United States v. Robert "Beaver" Perez*.

Part I describes the Mexican Mafia and the events that occurred in San Antonio which allowed the government to utilize RICO to assault the Mexican Mafia. Part II analyzes the RICO statute to establish its application to gangs. Part III examines specific

14. United States v. Zanin, 831 F.2d 740, 744 (7th Cir. 1987).
15. Zafiro v. United States, 506 U.S. 534, 539-40 (1993).
16. *Infra* notes 287-345 and accompanying text.
17. *Id.*
18. *Id.*
19. *See generally* U.S. CONST. amends. V, VI.

aspects of the jury trial in *United States v. Robert "Beaver" Perez*, the effect of the RICO conspiracy provision on procedural due process, how due process is implicated in RICO prosecutions, and proposes an additional procedural protection to be incorporated into the joinder-severance process of federal criminal procedure.

I. THE MEXICAN MAFIA: THE NATURE OF A GANG

A. *Composition & Structure*

The Mexican Mafia also known as the "Mexikanemi or La eme" is a prison-based gang, which exists and operates beyond the walls of the Texas prison system as well.[20] The city of San Antonio is designated as the "capital" of the gang.[21] The Mexican Mafia arose in the 1980's in the Texas prison system when primarily Hispanic prisoners formed this gang to protect each other from predatory attacks during a period of time when the Texas prison system was the site of violence and turmoil.[22] The newly formed Mexican Mafia sought to generate funds outside the walls of the prisons to help its incarcerated members with legal expenses and commissary ex-

20. Thaddeus Herrick, *10 Texas Gangsters Found Guilty of Racketeering and Conspiracy*, HOUS. CHRON., Mar. 4, 1999, at B1. The Texas Department of Criminal Justice reports that there are approximately 1,400 Mexican Mafia members in state prisons. *Id.*

21. THE MEXICAN MAFIA, MEXIKANEMI CONSTITUTION [hereinafter MAFIA CONSTITUTION] (stating "[T]hings in general: 1.) San Antonio is to be acknowledged as the central headquarters of Mexikanemi here in Texas. The rest of the major cities and/or towns will be: Austin, Houston, Corpus Christi, Dallas, Ft. Wort, [sic] Lubbock, Amarillo, Midland, Odessa, Laredo, El Paso and the Valley ..."). The Mexican Mafia created a Constitution entitled the "Mexikanemi Constitution." Maro Robbins, *Three Plead In Mass Slaying*, SAN ANTONIO EXPRESS-NEWS, Dec. 19, 1998, at 1B. This document was seized by local authorities in a search of one of the homes of an alleged Mexican Mafia member. *Id.* Jesus "Buzzard" Torres, a gang member who feared for his life after his relations with La Eme members went sour, turned to police for protection and revealed the story of this constitution. Maro Robbins, *Gang Turncoat Tells of Tight Operation*, SAN ANTONIO EXPRESS-NEWS, Jan. 22, 1999, at 2B. Torres, who was a personal secretary to the gang's San Antonio leader, was responsible for retyping and distributing the gang's constitution to its newest members. *Id.* This document, more like an organizational charter in form than a constitution, explains numerous aspects of the nature of the Mexican Mafia. MAFIA CONSTITUTION, *supra*.

22. Maro Robbins, *Anatomy of a Prison Based Gang: Six Weeks of Testimony Weaves a Tapestry of Heavy-Duty Violence*, SAN ANTONIO EXPRESS-NEWS, Feb. 28, 1999, at 1B (noting that a state official who monitors prison gangs testified that the prison gang arose in the Texas prison system during the early 80's amid sweeping prison reform).

penses, and to address the financial needs of members' families burdened by their loved ones' imprisonment.[23]

The Mexican Mafia has a defined structure and hierarchy.[24] The leaders of the Mexican Mafia are referred to as "President," "Vice President," "General," "Captain," "Lieutenant," and "Sergeant."[sic][25] The members are referred to as soldiers or "Canales."[26] Members of the Mexican Mafia are required to recruit new members and they are ultimately responsible for the loyalty of those new recruits.[27] An essential element of the Mexican Mafia is maintaining communication between its members.[28] In addition,

23. MAFIA CONSTITUTION, *supra* note 21 (stating that "[r]esponsibilities and Obligations: 1). It is any merecidos obligation, under the ranks of captain, to write the unit he was released from, share news, help with money or whatever favor(s) are possible for him to do. Anyone that goes home and does not help with money or favors and returns back to the system should not expect help support from the Mercidos here (system). Anyone that goes home and does not write and returns back to the system shall be the prime candidate for any job that needs to be done ..."); *see also* Robbins, *supra* note 22, at 1B (quoting gang-member Jesus "Buzzard" Torres who stated that, in 1985, the Mexican Mafia was "a movement to help each other like a family").

24. MAFIA CONSTITUTION, *supra* note 21.

25. *Id.*

26. First Superseding Indictment, United States v. Perez, No. SA-98-CR-265-EP, at 3 (W.D. Tex. filed Nov. 19, 1998) [hereinafter Perez Indictment].

27. MAFIA CONSTITUTION, *supra* note 21. This states that

> any and every member of Mexikanemi must represent Mexikanemi respectively, honorable and proudly and must never let the flag which he carries and represents fall. All Meridos are responsible for recruiting and/or picking up new members. The soldier who recommends a member is responsible for his own recommendation. Whether the recommendation results honorably or in betrayal. This is to say if the recommendation becomes a good soldier, it is honorable on the recommendator's [sic] part. In this same instance, if the recommendation becomes a traitor the soldier who recommended the traitor is responsible to take action against the traitor as soon as possible, utilizing whichever means are necessary. In a case where a recommendator [sic] cannot reach the traitor, then the brother that's the nearest to the traitor must execute the action ....

Id. (alteration in original).

28. MAFIA CONSTITUTION, *supra* note 21 (stating that "[i]t is the responsibility of the lieutenant of each unit town or county jail to keep in communication with all other units, towns and county jails. To keep informed of what is happening. It is not necessary for the lieutenant to write personally he has the right to apoint [sic] a brother to help him write. The communication of information is important. Many problems can be avoided by using our constitution and keeping close communication with other lieutenants ..."). In San Antonio, Jesus "Buzzard" Torres was charged with ensuring that communication was maintained between the members by the local leader, Robert "Beaver" Perez. Robbins, *supra* note 21, at 2B.

gang members of the Mexican Mafia are required to be loyal to the criminal organization.[29]

B. Purpose

The Mexican Mafia characterizes itself as a criminal organization by stating in its "Constitution" that "being a criminal organization we work in any criminal aspect or interest for the benefit and advancement of Mexikanemi. We shall deal in drugs, contract killings, prostitution, large scale robbery, gambling, weapons and everything imaginable."[30] La eme is a criminal organization, which operates as a business for the financial benefit of its members and for the continued operation and existence of La eme.[31]

The "business" of La eme includes extortion, retaliation, robbery, assault, murder and narcotic trafficking.[32] Most of the income generated by the organization is obtained through extorting sums of money from persons engaged in street crimes such as selling drugs and prostitution.[33] This extortion money constitutes a form of "tax."[34] Initially, the amount of the "tax' was ten percent of what the person made.[35] As time has passed, the amount of tax has become what the gang believes the person can pay.[36] This "tax" is referred to as the "ten percent" or "the dime."[37] When people have failed to pay the tax they have been threatened, robbed, assaulted or killed by well armed Soldiers or "Canales" who work together in groups called "crews."[38] In addition to extensive practice of extor-

29. MAFIA CONSTITUTION, *supra* note 21 (proclaiming that "which ever member of the Mexikanemi (and it does not matter if it's the President, Vice President, Generals, Captains, Lieutenants, Segeants [sic] or Soldiers) violates the rules of Mexikanemi in any manner, they will pay and have to suffer the consequences").

30. *Id.* The Mexican Mafia gang also refers to itself in its "literature" as "Mexikanemi" and "La Eme."

31. Perez Indictment, *supra* note 26, at 4.

32. MAFIA CONSTITUTION, *supra* note 21.

33. Perez Indictment, *supra* note 26, at 4.

34. MAFIA CONSTITUTION, *supra* note 21; Robbins, *supra* note 21, at 2B (relating story told by Mexican Mafia member who reports collecting extortion money from drug dealers).

35. Perez Indictment, *supra* note 26, at 4.

36. *Id.*

37. MAFIA CONSTITUTION, *supra* note 21 (stating "if any one of us in Mexikanemi has a business or interest we must put up 10% of the profits for the rest of the organization. This said 10% should always be used wisely and constructively for the interest of Mexikanemi in general, in what ever form(s) serve the best purpose ....").

38. Perez Indictment, *supra* note 26, at 5 (noting that the weapons used by

tion, the Mexican Mafia is involved in the sale and distribution of illegal drugs including heroin, cocaine, and marijuana.[39]

The Mexican Mafia condones murder as a means to further its existence. The acceptance of murder as a part of the gang's business is explicitly stated in the gang's "Constitution" where it states: "[E]ach member of Mexikanemi shall definitely be willing to sacrifice his life or at the same time, take lives any time that this honorable act is necessary."[40] In San Antonio, Mexican Mafia turf wars contributed to approximately 229 killings in 1993, climaxing a bloody four-year period in San Antonio history when murders totaled 880.[41] Many of the murders related to local gang wars had a devastating effect on San Antonio youth, with statistics indicating that juvenile-related murders rose seventy-nine percent from 1990 to 1995.[42] The majority of these murders resulted from power struggles within the Mexican Mafia gang and narcotics dealings.[43] Subsequent to the convictions of several Mexican Mafia leaders and their top soldiers of federal conspiracy charges in 1994, the number of murders dropped sharply and immediately.[44] Murders dropped to 194 in 1994 and 140 the following year.[45]

In 1997, incidences of violent crime were on the decline in San Antonio,[46] however, news of the French Place murders with the possibility of Mexican Mafia involvement filled numerous San Antonio residents with fear of renewed gang violence in their community.[47] At the time, the San Antonio Police Department reported that local street gangs claimed a membership of 17,000 with about 1,500 of them being considered "hard-core loyalists who engage in regular drive-by shootings, assaults and other violent

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the crews to intimidate or otherwise harm person owing the tax are either discarded or cleaned with alcohol by Soldiers wearing rubber gloves); Herrick, *supra* note 20, at B1 (noting that Mexican Mafia members gave the ten percent street tax collected from drug dealers and prostitutes to their leader, Robert "Beaver" Perez to redistribute to the gang's imprisoned members).

39. Perez Indictment, *supra* note 26, at 5; *see also* Herrick, *supra* note 20, at B1.

40. MAFIA CONSTITUTION, *supra* note 21.

41. Bill Hendricks, *Autos Deadlier Than Guns- More Road Deaths Than Homicides in S.A. for First Time in 12 Years,* SAN ANTONIO EXPRESS-NEWS, Jan. 2, 1997, at 1A.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *E.g.,* Maro Robbins, *Judge Dismisses Gang Trial Juror,* SAN ANTONIO EXPRESS-NEWS, Jan. 14, 1999, at 3B.

crimes."[48]

Community and governmental leaders, deeply concerned for the welfare of the citizenry, implemented numerous actions to solve gang violence,[49] while law enforcement officials struggled with the formidable task of bringing murderers to justice with little physical evidence and no witnesses willing to testify.[50] Afraid for their lives and the lives of their families, residents of gang-ravaged neighborhoods who had vital information about gang related criminal activities, including eyewitness accounts of murders, would not testify against known killers associated with the Mexican Mafia.[51]

C. *A Case Study*: United States v. Robert "Beaver" Perez

Although local and federal law enforcement officials strongly suspected that members of the Mexican Mafia were responsible for many of the unsolved murders in San Antonio, including the French Place murders, they were frustrated because they did not have enough physical evidence to link specific individuals to the killings.[52] Finally, there came a break in the investigation.[53] A young man, named Frank Estrada, detained in the Bexar County Jail, begged officials with the Federal Bureau of Investigations (FBI) to protect him from the Mexican Mafia in exchange for information.[54]

Frank Estrada, a member of the Mexican Mafia, revealed that one of the Generals of the Mexican Mafia had put a contract out on his life.[55] In exchange for protection he agreed to provide the FBI with information about numerous unsolved murders related to Mexican Mafia gang activities.[56] Frank Estrada revealed that he had

48. Adolpho Pesquera, *Gang Truce: Two Years of Fragile Peace,* SAN ANTONIO EXPRESS-NEWS, Mar. 23, 1997, at 1A.

49. *Id.*

50. Interview with Bill Baumann & David Counts, Assistant United States Attorneys of the United States Attorney's Office for the Western District of Texas, San Antonio, Tex. (Feb. 22, 2000) [hereinafter Interview with Baumann & Counts].

51. *Id.*

52. *Id.*

53. Maro Robbins, *7 Mafia Snitches Ready to Disappear,* SAN ANTONIO EXPRESS-NEWS, Feb. 22, 1999, at 1A.

54. *Id.*

55. *Id.*

56. *Id.* Another gang-member, defendant Daniel Angel Tavitas who partici-

been the triggerman in at least seven unsolved murders.[57] Later, Estrada testified that he had actually committed more murders, although he could not remember exactly how many murders he had committed.[58] Faced with unusual circumstances and hoping to bring those responsible for these murders to justice, the government agreed to give Estrada transactional immunity[59] in exchange for his testimony, which ultimately led to the convictions of ten Mexican Mafia members.[60]

Based on information provided by Frank Estrada, along with other confidential informants and unindicted co-conspirators, investigators were able to gather evidence that supported a two-count indictment against sixteen alleged Mexican Mafia members.[61] Count one was a substantive RICO offense and count two was for a violation of RICO conspiracy.[62] The government chose to charge under RICO because its goal was to neutralize the criminal organization in the most effective way possible.[63]

At trial, the government presented evidence that established

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pated in the French Place murders, testified about what occurred there in exchange for a reduced sentence and recommendation into the witness protection program. Maro Robbins, *Gang Case Jurors Start Deliberating,* SAN ANTONIO EXPRESS-NEWS, Feb. 25, 1999 at 2B; Maro Robbins, *Gang Trial Deliberations Expected to Begin Today,* SAN ANTONIO EXPRESS-NEWS, Feb. 24, 1999, at 2B.

57. Maro Robbins, *6-Week Trial In Mafia Case Nearing End,* SAN ANTONIO EXPRESS-NEWS, Feb. 23, 1999, at 1A.

58. Interview with Maro Robbins, Staff Writer, San Antonio Express-News (Mar. 3, 2000) [hereinafter Interview with Robbins] (relating the testimony of Frank Estrada). Mr. Robbins reports on federal trials in the San Antonio area. *Id.* He wrote countless articles about the events that occurred in relation to the Mexican Mafia, the French Place Murders and the testimony of witnesses during the course of the trial. *Id.* Mr. Robbins spent many hours listening to testimony of witnesses in *United States v. Robert "Beaver" Perez. Id.*

59. Interview with Baumann & Counts, *supra* note 50. *See generally* 18 U.S.C. § 6002 (2000) (barring testimony or other information compelled from a federal witness from being used against that witness in a criminal case, except in certain circumstances). Initially, it may seem shocking that the government would protect a known murderer from prosecution in exchange for his testimony. Unfortunately, reality suggests that murderers and racketeers primarily associate with individuals who themselves are tainted by criminal conduct. As distasteful as this seems, there is no easy alternative. According to Assistant United States Attorney Richard Durbin, Chief of the Criminal Division of the United States Attorney's Office for the Western District of Texas, the government did not "give away a case against him [Frank Estrada] because we never had one," and it did not have any evidence against him until he contacted the FBI. Robbins, *supra* note 53, at 1A.

60. Interview with Baumann & Counts, *supra* note 50.

61. Perez Indictment, *supra* note 26, *passim.*

62. *Id.* at 1.

63. Interview with Baumann & Counts, *supra* note 50.

the following events. Herberto "Herb" Huerta (Huerta) was the President of the Texas Mexican Mafia during the time of the predicate offenses[64] set out within the indictment, and that Robert "Beaver" Perez (Beaver) was one of his generals.[65] Huerta was incarcerated during most of the period of time in which the predicate acts were committed.[66] However, he continued to lead the gang, directing the Mexican Mafia's deadly and violent business from his enclosed prison cell.[67] One of those whom he directed was Beaver, a General in the Mexican Mafia who was in charge of directing and conducting the affairs of the Mexican Mafia in San Antonio.[68] Beaver ordered numerous members to collect the street tax from persons selling narcotics or committing other street crimes, through means of extortion and robbery.[69]

The government alleged that the Mexican Mafia was responsible for twenty-two racketeering acts spanning almost a four-year period, from 1994 to 1997.[70] These racketeering acts included fifteen murders, three attempted murders, two drug possessions, and one robbery.[71] With the exception of the French Place Murders, the murders and attempted murders occurred in relation to internal conflicts within the Mexican Mafia.[72] Initially, the conflicts centered on control of the organization. In 1995, one of the members, Luis Adames (Blue), challenged Huerta for the Presidency.[73] The emergence of this new leadership deeply divided the ranks of La eme.[74] A description of the internal struggle was discovered in let-

64. Perez Indictment, *supra* note 26.

65. Interview with Baumann & Counts, *supra* note 50.

66. Perez Indictment, *supra* note 26, at 6; *see also* Herrick, *supra* note 20, at B1 (noting that Huerta, a founding member, was convicted in 1994).

67. Perez Indictment, *supra* note 26, at 6.

68. *Id.*; Robbins, *supra* note 21, at 2B (reporting that a gang-member-turned-government-witness testified that he reported to Mexican Mafia General Robert "Beaver" Perez).

69. *E.g.*, Herrick, *supra* note 20, at B1 (noting that Perez, a general in the Mexican Mafia collected the street "tax" and redistributed the money amongst imprisoned members).

70. Perez Indictment, *supra* note 26, at 12-19.

71. *Id.*

72. *E.g.*, Maro Robbins, *Ten Are Found Guilty in Gang Case, Mexican Mafia Boss, Pals Face Life*, SAN ANTONIO EXPRESS-NEWS, Mar. 4, 1999, at 1A [hereinafter Robbins, *Ten Face Life*]; Maro Robbins, *Witness Links Suspect to Slayings*, SAN ANTONIO EXPRESS-NEWS, Feb. 9, 1999, at 2B (noting that Luis "Blue" Adames was found murdered several months after declaring himself President).

73. Maro Robbins, *Group's Letters Read in Court*, SAN ANTONIO EXPRESS-NEWS, Jan. 29, 1999, at 2B.

74. *Id.*

ters written between Huerta, Beaver, and other members.[75] Beaver, who was loyal to Huerta, faced these struggles within the rank and file of the San Antonio membership.[76] Later, more strife erupted as the organization attempted to silence members who talked about the French Place Murders.[77] Those gang members who lost favor with their leader became targets for murder.[78] Under orders from Beaver, officers and soldiers of the Mexican Mafia assassinated several of their own members.[79]

Tragically, the French Place Murders occurred when several Mexican Mafia gang members attempted to rob five individuals in the apartment of one of the victims.[80] Something went terribly wrong leading to the murder of one, and then all.[81] The victims of the French Place Murders are believed to have been at the wrong place at the wrong time.[82] For this mistake of fate, Mexican Mafia gang members ruthlessly killed the female victim first when she became "disrespectful" towards one of the gang members.[83] Her murder led to the killing of the rest of the victims.[84]

II. THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT (RICO)

A. *Overview & History Of RICO: The Road To Gang Prosecution*

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act commonly referred to as RICO.[85] RICO was

75. *Id.* (reporting that San Antonio police officer read letters between Mexican Mafia members which revealed the power struggle within the gang).

76. *Id.*

77. Maro Robbins, *Three Plead in Mass Slaying*, SAN ANTONIO EXPRESS-NEWS, Dec. 19, 1998, at 1B.

78. *E.g.*, Maro Robbins, *Gang Turncoat Tells of Tight Operation*, SAN ANTONIO EXPRESS-NEWS, Jan. 22, 1999, at 2B; Robbins, *supra* note 53, at 1A.

79. Maro Robbins, *Gang Turncoat tells of Tight Operation*, SAN ANTONIO EXPRESS-NEWS, Jan. 22, 1999, at 2B.

80. Maro Robbins, *Gang Trial Deliberations Expected to Begin Today*, SAN ANTONIO EXPRESS-NEWS, Feb. 24, 1999, at 1A (reporting that gang members who testified for the government described the massacre as a "botched robbery").

81. *Id.*

82. *Id.*

83. Maro Robbins, *Member Says Gang Was Tricked*, SAN ANTONIO EXPRESS-NEWS, Jan. 29, 1999, at 2B.

84. *Id.* (reporting that government informant testified that the four male victims of the French Place Murders were killed to "leave no witnesses").

85. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970).

enacted primarily to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[86] Congress hoped that RICO would substantially reduce the infiltration of organized crime and racketeering into legitimate businesses by criminalizing certain activities performed by individuals in relation to legitimate or illegitimate organizations.[87]

With the enactment of RICO, Congress significantly strengthened the government's ability to prosecute members of organized crime.[88] It constructed the RICO statute in a way that gave federal prosecutors the power to prosecute criminals who had previously been "untouchable" because of their insulation within their respective organizations.[89] In part, Congress extended the federal government's authority to prosecute these criminals by including a provision within the RICO statute, which required that a liberal interpretation of the statute be adopted.[90] Subsequently, courts have been able to extend RICO to numerous types of organizations, including gangs.[91]

Following the congressional mandate of liberal interpretation, the Supreme Court has interpreted RICO in a way that makes prosecution of gangs under RICO possible. In *United States v. Turkette,*[92] the Court held that the organization affected by or associated with criminal activity could be either a legal or illegal entity.[93]

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86. S. REP. NO. 91-617, at 80 (1969).

87. *Id.*

88. Congress stated that the purpose of RICO is "[t]o seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

89. Russello v. United States, 464 U.S. 16, 19 (1983) (showing that the defendant was significantly insulated from the predicate acts of the "association in fact" enterprise formed to commit arson and defraud insurance companies).

90. 18 U.S.C. § 1961 (2000) (quoting Pub. L. § 91-453 which provides that "(a) the provisions of this title [enacting this chapter and amending sections 1505, 2516, and 2517 of this title] shall be liberally construed to effectuate its remedial purpose").

91. *10 Mexican Mafia Members Receive Life Sentences,* SAN ANTONIO EXPRESS-NEWS, Sept. 7, 1997, at 7B (reporting that ten Mexican Mafia gang members were sentenced to life imprisonment for RICO violations in Los Angeles, CA); *Prosecutors Seek Ways To Continue Crackdown on Mexican Mafia Gang,* SAN ANTONIO EXPRESS-NEWS, Sept. 22, 1997, at 15A (reviewing the recent RICO prosecution of nineteen gang members in Los Angeles, CA.).

92. 452 U.S. 576 (1981).

93. *Id* at 585.

The Court determined that the application of the RICO statute was not limited to situations where illegal activity has infiltrated legitimate business operations.[94] Instead, the Court found that RICO could be applied in situations where the organization in question was purely criminal in nature.[95]

Furthering the expanse of RICO, the Supreme Court in *National Organization for Women, Inc. v. Scheidler*,[96] resolved a split among the circuits when it determined that an organization did not have to have an economic motive to fall under the reach of the RICO statute.[97] Therefore, the goal of the organization does not have to be one of economic gain. RICO can be applied to organizations that have primarily political or ideological goals as well.

Critics have asserted that the RICO statute should only be applied to traditional forms of organized crime such as "The Mafia."[98] These critics emphasize that Congress enacted RICO to destroy the "Mafia."[99] Definitely, Congress had such an agenda,[100] but numerous factors indicate that RICO's expansion beyond traditional organized crime entities has been appropriate and was intended. For one, the Supreme Court has noted that in spite of "[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[101] The Court has observed that some of the expansion of RICO may be due to the "breadth of the predicate offenses" which includes wire, mail and securities fraud.[102] In addition, the Organized Crime Control Act of 1970 in which RICO was promulgated does not indicate that Congress intended to limit the application of RICO to organized crime.[103] In contrast, Congress expressly limited the application of other statutes enacted within the same period, to

94. *Id.*
95. *Id.*
96. 510 U.S. 249 (1994).
97. *Id.* at 262 (determining that "RICO contains no economic motive requirement").
98. H.J. Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 246 (1989).
99. *Id.* at 247 (quoting sponsor of RICO statute who is responding to criticism of RICO not being limited to organized crime).
100. United States v. Russello, 464 U.S. 16, 26 (1983) (noting that organized crime families were a major target of Congress in enacting RICO).
101. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (quoting Harco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (1994).
102. *H.J. Inc.*, 492 U.S. at 236.
103. *Id.* at 244.

traditional organized crime.[104] Furthermore, congressional sponsors of the RICO statute indicated that in RICO, "'organized crime' was simply a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances, not a precise concept."[105] For example, the crimes committed by members of the Mexican Mafia are a group of distinct offenses committed by an organized criminal group.[106] In essence, the crimes are committed to promote and further the criminal organization.[107]

The RICO statute criminalizes four types of activities. Three of these violations are referred to as "substantive RICO offenses."[108] A "person"[109] can commit a substantive RICO offense in three different ways: (1) by investing income derived from a pattern of racketeering activity or collecting an unlawful debt to obtain an interest in an enterprise affecting interstate or foreign commerce;[110] (2) by obtaining or maintaining through a pattern of racketeering activity or through collection of an unlawful debt "any interest in or control of" an enterprise affecting interstate or foreign commerce;[111] or, (3) working for or associating with an enterprise which affects interstate or foreign commerce through a pattern of racketeering activity or through the collection of an illegal debt to manage or conduct the affairs of such an enterprise.[112] The fourth type of violation under RICO is conspiracy to commit a substantive RICO offense. Thus, a person is in violation of the RICO statute when he conspires to commit a substantive RICO offense.[113]

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104. In the Omnibus Crime Control and Safe Street Act of 1968, Congress limited the statute to organized crime which it defined as "the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations." Omnibus Crime Control and Safe Street Act of 1968, § 601 (b), Pub. L. No. 90-351, 82 Stat. 209.

105. *H.J. Inc.*, 492 U.S. at 237 (quoting congressional sponsors of RICO).

106. MAFIA CONSTITUTION, *supra* note 21. The "Constitution" of the Mexican Mafia recognizes the commission of individual crimes by its members on behalf of the gang. *Id.*

107. *Id.*

108. Salinas v. United States, 522 U.S. 52 (1997) (referring to violations of 18 U.S.C. § 1962(a), (b), and (c) as substantive RICO offenses).

109. 18 U.S.C. § 1961(3)(2000) (defining the term "person" to include "any individual or entity capable of holding a legal or beneficial interest in property").

110. *Id.* § 1962(a).

111. *Id.* § 1962(b).

112. *Id.* § 1962(c).

113. *Id.* § 1962(d).

For any violation of the RICO statute, a person may be subjected to criminal or civil penalties including forfeiture of any interest or property acquired or maintained in violation of RICO.[114] The criminal penalties for committing a violation under RICO are formidable. A person who is convicted of a RICO violation may be imprisoned for up to twenty years or up to life imprisonment if the maximum penalty for the racketeering act is life imprisonment.[115] The convicted defendant will usually be directed to forfeit any interests acquired or maintained in violation of the RICO statute, and any property acquired from a RICO violation.[116] In addition, Courts are given power to prevent or restrain RICO violations by requiring divestiture of any interest in an enterprise or by the imposition of restrictions on the future activities of a person involved in RICO violations.[117] A person may receive a punishment for a substantive RICO offense that exceeds the punishment for the underlying offenses.[118] Furthermore, a court may authorize an order preventing the transfer of forfeitable property prior to conviction.[119]

All ten defendants in *Perez* were found guilty and sentenced to life imprisonment without parole.[120] The term of imprisonment was statutorily required because the underlying criminal offenses of the Mexican Mafia were murders.[121] Although feared by residents, this deadly gang had little forfeitable property. When its leader, Beaver, was arrested only $30,000 was confiscated from his home in a subsidized housing neighborhood.[122]

Like other statutes,[123] RICO provides civil remedy for injuries sustained as a result of a substantive RICO violation, effectively superimposing the civil realm of law atop the criminal realm.[124] Con-

114. *Id.* § 1963(a).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* § 1963 (describing applicable criminal penalties for engaging in racketeering activity).
119. *Id.* § 1963(d)(1).
120. Robbins, *Ten Face Life*, *supra* note 72, at 1A.
121. Interview with Baumann & Counts, *supra* note 50; 18 U.S.C. § 1963(a) (setting statutory sentencing requirements).
122. Herrick, *supra* note 20, at B1.
123. For example, the Clayton Act, after which the RICO statute was modeled, includes civil penalties. 15 U.S.C. § 12 (1994).
124. 18 U.S.C. § 1964(c)(2000) (declaring that a person may sue for injury sustained as a result of a violation of 18 U.S.C. § 1962). If the plaintiff is successful in this suit, she may recover triple damages and any cost associated with bringing suit

gress created RICO with both civil and criminal sanctions because it recognized that the government did not have the resources to identify and pursue every matter arising from a RICO violation.[125] Thus, the civil RICO provision allows private persons to sue when a RICO violation is the proximate cause of an injury to their business or property.[126]

The United States Supreme Court has addressed numerous complex issues, which arose from disputes over interpretive differences of the RICO statute in both the civil and criminal contexts.[127]

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including reasonable attorney fees from the defendant. *Id.* In order to assert a claim under the civil RICO provisions for an injury caused by a RICO violation, the plaintiff must assert a substantive RICO offense in her pleading. *Id.* A criminal conviction, however, is not necessary to initiate the cause of action. S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 491 (1985); Poling v. Morgan, 598 F. Supp. 686, 690 (D. Ariz. 1984); Glusband v. Benjamin, 530 F. Supp. 240, 241 (S.D.N.Y. 1981). Most courts have found that a plaintiff, to be compensated for an injury under 18 U.S.C. § 1962(a), must assert an injury that resulted from the defendant's investment of racketeering income. *E.g.*, Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 584 (5th Cir. 1992); Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 941 F.2d 1220, 1229-30 (D.C. Cir. 1991); Ouaknine v. McFarlane, 897 F.2d 75, 82-83 (2d Cir. 1990); Craighead v. E.F. Hutton & Co., 899 F.2d 485, 494 (6th Cir. 1990); Rose v. Bartle, 871 F.2d 331, 356-58 (3d Cir. 1989). Today, claims asserted under the RICO statute are applied to a broad range of conduct often occurring over an extended period of time and involving a large number of people and entities. Frederick B. Lacey, *Civil RICO Update*, SE28 ALI-ABA 547 (Aug. 26, 1999) (discussing the expanding use of RICO and its extensive impact on numerous individuals and entities). The pleading which asserts a civil RICO violation is usually long and complex because most RICO complaints allege predicate offenses which must be pleaded with particularity. FED. R. CIV. P. 9(b).

125. Paul B. O'Neill, *"Mother of Mercy, Is This the Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. REV. 172, 180-82 (1990).

126. 18 U.S.C. § 1964(c) (2000); *Sedima*, 473 U.S. at 497 (noting that the "compensable injury necessarily is the harm caused by [the] predicate acts" of a RICO violation). Another civil RICO provision provides that a defendant who has been convicted of crimes as a part of the criminal RICO statute is estopped from denying the underlying criminal offenses on which the subsequent civil suit is based if the suit is brought by the United States government. 18 U.S.C § 1964(d)(2000). Most civil suits are brought for violations of 18 U.S.C § 1964(c). G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollerheim: Will Civil RICO be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 619 (1987) (noting that in 1985 and 1986 about 92.5% of civil RICO claims cite to 18 U.S.C. § 1964(c)).

127. *E.g.*, Salinas v. United States, 522 U.S. 52 (1997); Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997); Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994); Alexander v. United States, 509 U.S. 544 (1993); Reves v. Ernst & Young, 507 U.S. 170 (1993); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992); Tafflin v. Levitt, 493 U.S. 455 (1990); H.J. Inc. v. N.W. Bell Tel. Co., 492 U.S. 229 (1989); Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987); *Sedima*, 473 U.S. at

Few of these issues were addressed until private citizens began to utilize the civil RICO provision as a claim for relief.[128] For years after its enactment, the civil RICO provision had little effect on organized crime or racketeering within organizations because few civil suits were filed.[129] Finally, in the late 1980's, the number of suits filed under civil RICO grew astronomically.[130] With this increase, courts found themselves trying to resolve numerous ambiguities in the statute.[131] The Supreme Court has attempted to resolve most of these ambiguities by liberally construing the RICO statute, as it believes Congress intended.[132]

Although the Court has addressed numerous issues related to the substantive RICO violations, it has only addressed one regarding RICO conspiracy.[133] In *Salinas v. United States*,[134] the Court once again resolved a split among the circuits when it determined that a RICO conspiracy charge did not require proof of the commission of an overt act "to effect the object of the conspiracy" as required by the general federal conspiracy statute.[135] Here, the Court noted that RICO conspiracy was intended to be more "comprehensive" than traditional conspiracy statutes.[136] The Court was sharply criticized for this holding.[137] Irrespective of this criticism, the *Salinas*

499-50 (holding that RICO was not limited to organized crime; it also was applicable to legitimate businesses); Am. Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985).

128. Although this paper focuses on RICO in a criminal context, some discussion of legal developments which arose in the civil context is necessary because these legal developments are applicable to RICO in the criminal context as well. *E.g., Scheidler*, 510 U.S. at 249; *Alexander*, 509 U.S. at 544; *Reves*, 507 U.S. at 170; *H.J. Inc.*, 492 U.S. at 229; *Malley-Duff*, 483 U.S. at 143; *Shearson/Am. Express*, 482 U.S. at 220; *Sedima*, 473 U.S. at 499-50.

129. Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 51 (1996) (noting that few civil claims were asserted).

130. Robert E. Wood, *Civil RICO—Limitations in Limbo*, 21 WILLAMETTE L. REV. 683, 684 (1985); William H. Reinquist, *Get RICO Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14.

131. Abrams, *supra* note 129, at 51.

132. *E.g., Reves*, 507 U.S. at 183 (recognizing that it is utilizing Congress' intent to broadly interpret RICO provisions); *H.J. Inc.*, 492 U.S. at 248-49 (indicating that it would not apply a narrow construction to the pattern element of a RICO violation because it would be contrary to congressional intent).

133. Jeremy M. Miller, *RICO And Conspiracy Construction: The Mischief of The Economic Model*, 104 COM. L. J. 26, 63 n.16 (1999).

134. 522 U.S. 52, 63 (1997).

135. *Id.*

136. *Id.*

137. *E.g.*, Miller, *supra* note 133, at 63 n.16; Barry Tarlow, *RICO Report*, at

decision regarding the RICO conspiracy provision allows the government to indict an individual without having to prove that the RICO conspiracy defendant or his coconspirators committed any act in furtherance of the conspiracy.[138]

B. *The Heart Of RICO Conspiracy: Elements Of A Substantive RICO Offense*

Most defendants including gang members, are charged with violating section 1962(c) of the RICO statute which makes it a crime for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."[139] In order to obtain a conviction under this section of the RICO statute, the government must prove the existence of the enterprise in question, the pattern of racketeering activity, the effect on interstate or foreign commerce, and the conduct of the defendant in relation to the enterprise.[140]

The Enterprise

An "enterprise" is statutorily defined to include "[a]ny individual, partnership, corporation, association or other legal entity and any union or group of individuals associated in fact although not a legal entity."[141] Interpreting this statute, the Supreme Court defined an enterprise as a "group of persons associated together for a common purpose of engaging in a common course of conduct."[142] This broad interpretation has allowed lower courts to recognize a number of entities as enterprises, which are not enumerated in the statute.[143]

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http://www.criminaljustice.org/CHAMPION/ARTICLES/98apr05.htm (last visited Mar. 13, 2001).

138. 18 U.S.C. § 1962(c)(2000).

139. Blakey & Cesar, *supra* note 126, at 619 (noting that in 1985 and 1986 about 92.5% of civil RICO claims cite to 18 U.S.C. § 1964(c)).

140. 18 U.S.C. § 1962(c).

141. *Id.* § 1961(4).

142. United States v. Turkette, 452 U.S. 576, 583 (1981).

143. *E.g.*, United States v. Vaccaro, 115 F.3d 1211, 1220 (5th Cir. 1997) (cheating scheme in a casino); United States v. London, 66 F.3d 1227, 1244 (5th Cir. 1995) (involving sole proprietorship); United States v. Blinder, 10 F.3d 1468, 1473

An "association in fact" enterprise is an "an ongoing organization, formal or informal," where its associates function as a "continuing unit" to achieve shared illegal objectives.[144] Moreover, this form of enterprise must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses."[145] In an "association in fact" enterprise, it is not necessary that the membership and activities remain the same throughout the lifetime of the enterprise.[146] Brief interruptions of the enterprise's illegal activities do not per se defeat the existence of a single enterprise.[147]

Often, it seems easier to prove the existence of an "association in fact" enterprise by what it does rather than through an analysis of its structure.[148] Still, an "association in fact" enterprise must function as a unit.[149] It cannot merely function on an *ad hoc* basis.[150] It must have an ascertainable structure distinguishable from a temporary structure, which arises in the course of racketeering.[151] In determining whether or not the targeted association is an "association in fact" enterprise, it is essential to determine if "the enterprise would still exist were the predicate acts removed from the equation."[152] Most courts agree that all enterprises must exhibit three characteristics: "1) a common or shared purpose; 2) some continuity of structure and personnel; and 3) an ascertainable structure distinct from that inherent in a pattern of racketeering."[153]

A gang is defined as "a number of people associated together in some way."[154] Consistent with this definition, gangs are consid-

(9th Cir. 1993) (finding that a group of legal entities such as corporations, may constitute an "association in fact").

144. *Turkette*, 452 U.S. at 583.

145. United States v. Riccobene, 709 F.2d 214, 224 (3d Cir. 1983).

146. United States v. Console, 13 F.3d 641, 650-53 (3d Cir. 1993).

147. *Id.*

148. United States v. Coonan, 938 F.2d 1553, 1559 (2d Cir. 1991) (quoting United States v. Bagaric, 706 F.2d 42, 56 (2d Cir. 1983)).

149. First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763 (2d Cir. 1994).

150. Handeen v. Lemaire, 112 F.3d 1339, 1351 (8th Cir. 1997).

151. Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808, 815 (8th Cir. 1992) (stating that the enterprise cannot simply be "the minimal associations which surrounds the [pattern racketeering] acts." (quoting United States v. Bledsoe, 674 F.2d 647, 664 (8th Cir. 1982)). Although the enterprise and the pattern of racketeering are separate elements of a RICO violation, the government need not adduce different proof for each element. United States v. Turkette, 452 U.S. 576, 583 (1981). The same proof may be used to establish both elements. *Id.*

152. *Handeen*, 112 F.3d at 1352.

153. *Id.* at 1351.

154. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 752 (2d ed. 1983).

ered "association in fact" enterprises.[155] The Mexican Mafia does manifest the elements of an "association in fact" enterprise. It has an identified group purpose expressed in its "Constitution," which is "the advancement of criminal practices for the benefit of and advancement of Mexikanemi."[156] The gang's structure is distinguishable from the pattern of racketeering in that it has designated permanent positions.[157] The Mexican Mafia continues to exist regardless of whether or not its members are free to commit crimes on the street of San Antonio or are imprisoned in Texas' correctional facilities.[158]

The Conduct Of The Defendant

In *Reves v. Ernst & Young*,[159] the Supreme Court addressed the meaning of "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs."[160] The Court developed the *Reves* "operation and management" test to assess the individual defendant's conduct in relation to the enterprise. The Court held that a violation under 18 U.S.C § 1962(c) of the RICO statute could only be found against those "who participated in the operation or management of an enterprise through a pattern of racketeering activity."[161] However, the court rejected the petitioner's assertion that only those in the upper rungs of the organization should fall under the purview of RICO.[162] Instead, the Court found that "any person employed by or associated with [an] enterprise," even those individuals with low-level positions may be found in violation of the RICO statute because low level participants, although following the directions of superiors, "operate" the enterprise as well.[163]

155. United States v. Andrews, 754 F. Supp. 1161, 1165 (N.D. Ill. 1990) (indicating that the RICO enterprise was a street gang called the "El Rukns"); Perez Indictment, *supra* note 26, at 2 (describing the Mexican Mafia as an "association in fact" enterprise as defined by 18 U.S.C. § 1961(4)); U.S. Department of Justice, Criminal Division, Organized Crime & Racketeering Section, Douglas E. Crow & Miriam Banks, *Racketeering Statutes In Gang Prosecutions* 1, 1 (Apr. 22, 1998) (suggesting that gangs should be defined as "association in fact" enterprises).

156. MAFIA CONSTITUTION, *supra* note 21.

157. *Id.*

158. Robbins, *supra* note 22, at 1B.

159. 507 U.S. 170 (1993).

160. *Id.* at 177.

161. *Id.* at 184.

162. *Id.*

163. *Id.*

Furthermore, an individual may be associated with an enterprise even though he holds no official position and has no formal connection with it.[164] Thus, being associated with an enterprise may be effected by means of an informal or loose relationship.[165] Finally, when a person's actions are remote to the activity of the enterprise, or his role in the enterprise is minor, he will still be associated with the enterprise within the meaning of the statute, if he knowingly participated in an illegal racketeering activity of the enterprise.[166]

Individuals who are considered "associated with" the Mexican Mafia span the entire range of possible levels of participation. This gang has a distinct hierarchy, where its leaders are given named positions.[167] These leaders directly manage and operate the affairs of the gang while their subordinates "operate" the enterprise by carrying out the orders of its leadership.[168]

The Pattern Of Racketeering Activity

Generally, a "pattern of racketeering activity" exists when two or more racketeering activities have occurred.[169] One of these predicate offenses must have occurred within five years prior to the return of the indictment and the other must have occurred no more than ten years earlier.[170] The alleged racketeering activity must be chargeable or indictable for the substantive RICO charge to be available.[171] It is important to note that sometimes proof of more than two predicate acts may be required.[172] In *Perez*, the gov-

164. *Id.* (determining that a person may operate or manage an enterprise though only associated with it through exerted control).

165. *Id.* at 184-86.

166. *Id.* at 185.

167. MAFIA CONSTITUTION, *supra* note 21.

168. *Id.*; Robbins, *Gang Turncoat, supra* note 21, at 2B (relating story told by Mexican Mafia member who reports collecting extortion money from drug dealers).

169. 18 U.S.C. § 1961(5)(2000).

170. *Id.*

171. 18 U.S.C. § 1961(1)(A)-(E)(2000). The federal government cannot commit acts that are "chargeable" or "indictable." Therefore, the federal government cannot violate § 1962, and cannot be found liable under § 1964(c). *See* Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991); McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993).

172. *E.g.*, H.J. Inc. v. N.W. Bell Tel. Co., 492 U.S. 229, 230 (1989) (finding that two predicate acts may not be sufficient to establish a RICO violation); Bacchus Indus. v. Arvin Indus., 939 F.2d 887, 891 (10th Cir. 1991) (determining that prov-

ernment alleged the commission of twenty-two predicate offenses spanning almost a four-year period from 1994 to 1997.[173] These racketeering acts included fifteen murders, three attempted murders, two drug possessions, and one robbery.[174]

Predicate acts which constitute "racketeering activity" have been statutorily defined to include a number of crimes such as murder, kidnapping, gambling, arson, robbery, extortion, money laundering, wire and mail fraud and to a lesser extent obstruction of justice and witness intimidation.[175] Certain state crimes punishable by more than one year of imprisonment are also considered racketeering activities.[176] Since RICO's enactment, Congress has expanded the list of predicate offenses on two occasions. The Comprehensive Crime Control Act of 1984[177] included the dealing in obscene material and the non-reporting of currency and foreign transactions.[178] More recently, in the Antiterrorism and Effective Death Penalty Act of 1996,[179] Congress added a number of immigration crimes to the list of racketeering activities, which can be considered RICO predicate offenses.[180] Despite these changes, the predicate offenses for most RICO cases remain wire and mail fraud.[181]

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ing two predicate acts does not establish a pattern of racketeering per se). The Department of Justice will not approve a prosecution under RICO where the predicate acts are considered to have arisen from a single criminal episode. *H.J. Inc.*, 492 U.S. at 231, 237.

173. Perez Indictment, *supra* note 26, at 12-19.

174. *Id.*

175. 18 U.S.C. § 1961(1).

176. *Id.* § 1961(1)(A); *see also* United States v. Polanco, 145 F.3d 536 (2d Cir. 1988) (holding that murder was a state crime that may serve as a RICO predicate offense); Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 746-47 (3d Cir. 1996) (rejecting federal and state RICO claims because the petitioner failed to prove the elements for an offense under the state fraud statute).

177. Pub. L. No. 98-473, §§ 901, 1020, 98 Stat. 1837, 2135, 2143 (codified in scattered sections of Titles 18 and 31, U.S.C.).

178. Pub. L. No. 98-473, § 1020(1)-(2) (1984) (codified at 18 U.S.C. § 1961 (1)(A)-(B)); *See, e.g.*, Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 57 (1989) (applying state RICO statute to selling of obscene video tapes at retail video store).

179. Pub. L. No. 104-132, Title IV § 433, 100 Stat. 1214, 1274 (1996) (amending 18 U.S.C. § 1961(1)).

180. H.R. REP. NO. 104-22, at 9 (1995); 141 CONG. REC. H1588 (daily ed. Feb. 10, 1995) (stating that immigration crimes were added to the list of RICO predicate offenses because "[o]rganized crime rings in this country, with ties to others abroad, have developed to prey upon illegal immigrants who want to come to the United States").

181. Klehr v. A.O. Smith Corp., 521 U.S. 179, 191 (1997) (noting that, as of 1985, ninety percent of all civil RICO cases arose from mail, wire or securities

In addition to proving the predicate offenses, the government must show that the racketeering acts are *related* and that there is *continuity* of criminal activity in order to ascertain a "pattern" of racketeering activity.[182] Proof of relatedness does not require that the racketeering acts be directly related to each other.[183] Rather, the relatedness requirement is satisfied where the racketeering acts are related to the same enterprise in some way.[184] In other words, the predicate acts benefited or furthered the goals of the enterprise; were the means by which the defendant participated in the affairs of the enterprise, or the defendant's participation in the enterprise in some way facilitated the commission of the racketeering acts.

In *H.J. Inc. v. Northwestern Bell Telephone Co.*,[185] the Court held that continuity could be established in a variety of ways.[186] The government can prove that a series of related predicate acts extends over a substantial period of time; or that the predicate acts invoke a distinct threat of long-term racketeering activity. If the government moves to prove the existence of a distinct threat of long-term racketeering activity, it may show that the threat was implicit or explicit; or that the predicate acts are attributable to a defendant operating as part of a long term association that exists for criminal purposes.[187]

In *Sedima, S.P.R.L. v. Imrex Co. Inc.*, the Supreme Court attempted to address what constitutes a "pattern of activity."[188] Sim-

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fraud).

182. *E.g.*, H.J. Inc. v. N.W. Bell Tel. Co., 492 U. S. 229, 240-42 (1989) (noting that while two predicate acts are necessary to form a RICO pattern they may not be sufficient unless they are both related and amount to or pose a threat of continued criminal activity); Tel-Phonic Serv., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1140 (5th Cir. 1992) (holding that the minimum requisite number of predicates is not sufficient to establish a RICO pattern). The racketeering predicates "must be related and amount to or pose a threat of continued criminal activity." *Id.* (citing *H.J. Inc.*, 492 U.S. at 236-39).

183. United States v. Turkette, 452 U.S. 576 (1981) (stating the focus of RICO is the enterprise, the predicate acts must be related to the enterprise and not each other). Consistent with this principle, lower courts have upheld the convictions of defendants where predicates were unrelated to each other. *E.g.*, United States v. DeLuca, 137 F.3d 24, 36-37 (1st Cir. 1998); United States v. Castro, 89 F.3d 1443, 1450-51 (11th Cir. 1996); United States v. Darden, 70 F.3d 1507, 1526-27 (8th Cir. 1995); United States v. DiNome, 954 F.2d 839, 843-44 (2d Cir. 1992).

184. *Turkette*, 452 U.S. 576 (1981).

185. 492 U.S. 229 (1989).

186. *Id.* at 230.

187. *Id.*

188. 473 U.S. 479, 496 n.14 (1985).

ply, showing that a member of the enterprise committed an isolated crime will not be sufficient.[189] Referring to the Senate's original report on the proposed RICO statute, the Court determined that a pattern consists of "continuity plus relationship."[190] Here, the Court embraced the definition of "pattern" found in 18 U.S.C. § 3575(e) which states that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics."[191]

The Effect On Commerce

Proving the effect on interstate or foreign commerce is a jurisdictional element essential to winning the conviction. However, courts have uniformly held that only a *de minimis* effect on interstate commerce is required.[192] In fact, the government is not required to prove that the individual defendant had knowledge of the requisite effect on commerce.[193] It is sufficient to prove that the

189. *Id.* (noting that RICO was designed to combat organized crime, not isolated offenses).

190. *Id.*

191. Formerly 18 U.S.C. § 3575(e)(1982) (covering increased sentences for dangerous special offenders), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 212(a)(1)-(2), 98 Stat. 1837, 1987. Adopting the *Sedima* Court's analysis, several circuits have developed a way to assess the existence of a pattern through application of some form of what is sometimes referred to as the *Sedima* "continuity plus relationship" test. *E.g.*, United States v. Palumbo Bros., Inc., 145 F.3d 850, 877 (7th Cir. 1998) (noting that the racketeering activity must be related and the acts establish continued criminal activity); Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 769 (8th Cir. 1992) (determining that the test for relationship is whether "acts are similar in method, purpose and result," and that one test for continuity is existence of "threat of causing continuous harm in future"); United States v. Freeman, 6 F.3d 586, 596 (9th Cir. 1993) (interpreting *Sedima* broadly, and stating that two predicate acts arising from a single scheme of bribery committed to improve the introduction of special interest litigation constituted a pattern); Resolution Trust Corp. v. Stone, 998 F.2d 1534, 1543-44 (10th Cir. 1993) (declaring that factors to be considered when assessing if a pattern exists include: (1) number of victims; (2) number of racketeering acts; (3) variety of racketeering acts; (4) whether injuries caused were distinct; (5) complexity and size of scheme; and (6) nature or character of enterprise or unlawful activity).

192. *E.g.*, United States v. Doherty, 867 F.2d 47 (1st Cir. 1989); United States v. Norton, 867 F.2d 1354 (11th Cir. 1989); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988).

193. U.S. Department of Justice, Criminal Division, Organized Crime & Racketeering Section, Douglas E. Crow & Miriam Banks, *Racketeering Statutes In Gang Prosecutions* 1, 3 (Apr. 22, 1998) (suggesting that gangs should be defined as "association in fact" enterprises).

enterprise as a whole affected commerce.[194] When a criminal enterprise is the target of the RICO case, the prosecutor can show the effect on interstate or foreign commerce by proving one of the following: (1) the enterprise purchased, sold or distributed contraband, in interstate commerce; (2) the enterprise used interstate facilities (interstate banking system, telephone calls, wire transfers); (3) members or associates of the enterprise traveled in interstate commerce, or outside the United States, to carry out their illegal activities; or (4) the victims, such as storefronts, of the enterprise's illegal activities were involved in interstate commerce.[195]

C. *RICO Conspiracy*

> "The primary focus of the crime of conspiracy is the agreement itself, the collusion, the secrecy and the resulting threat to society that such criminal liaisons create."[196]

In addition to being prosecuted for committing a substantive RICO offense, a person may also be prosecuted under the RICO statute for conspiring to commit a substantive RICO offense.[197] Generally, the crime of conspiracy involves conspiring to complete a substantive criminal offense.[198] To secure a conviction for conspiracy, the government is required to prove the existence of an agreement to complete an illegal goal.[199] Moreover, the government must prove that the defendant had knowledge of the conspiratorial agreement and voluntarily participated in it.[200] Along with the RICO statute there are numerous federal statutory provisions which proscribe conspiracy as a distinct crime.[201] Most of these crimes require the government to prove that one of the conspirators committed an overt act[202] to further the objective of the

194. *Id.*
195. *Id.*
196. State v. Verive, 627 P.2d 721, 732 (Ariz. Ct. App. 1981).
197. 18 U.S.C. § 1962(d)(2000).
198. KAPLAN, CRIMINAL LAW: MATERIAL AND CASES 919 (3rd ed. 1983). Conspiracy is an inchoate crime. *Id.* at 923. Although similar to attempt, it is different in that it requires two participants but requires less conduct than attempt because it is more of a preparatory crime than attempt. *Id.*
199. Todd R. Russell & O. Carter Snead, *Federal Criminal Conspiracy*, 35 AM. CRIM. L. REV. 739, 745 (1998).
200. *Id.* at 747.
201. *E.g.*, 15 U.S.C. § 1 (2000); 18 U.S.C. §§ 224, 286, 351(d), 371, 372, 794(c), 1201(c), 2384 (2000); 21 U.S.C. §§ 846, 963 (2000).
202. Russell & Snead, *supra* note 199, at 750. An overt act need only be an act

conspiracy.[203] Unlike these other federal conspiracy crimes, the RICO conspiracy provision does not require the completion of an overt act.[204] Although many bemoan the lack of an overt requirement in RICO conspiracy,[205] this concern seems misplaced in light of the insignificance of an overt act. Such an act need only indicate that the conspiracy has gone beyond a mere meeting of the minds[206] Thus, an overt act need not be illegal or an offense charged in the indictment.[207]

It was in *Salinas v. United States*[208] where the Supreme Court held that a defendant could be convicted for violating the RICO conspiracy provision without the commission of an overt act.[209] The Court noted that "[t]he RICO conspiracy statute broadened conspiracy coverage by omitting the requirement of an overt act, it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts."[210] Taking a stance in favor of the prosecution, the Court opined that if the government was required to prove that every conspirator committed an overt act, most RICO conspiracy prosecutions would become "nugatory."[211]

The Court emphasized that the defendant need not personally commit or agree to commit two predicate acts (two acts of racket-

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that indicates the conspiracy has moved beyond "a mere meeting of the minds." State v. Celaya, 556 P.2d 1167, 1172 (Ariz. Ct. App. 1976).

203. 18 U.S.C § 371 (defining an overt act as an "act to effect the object of the conspiracy").

204. Salinas v. United States, 522 U.S. 52, 62 (1997). In the civil realm, this is not the case. A plaintiff who seeks a civil remedy for injury to her business or property, which was caused by a violation of the RICO conspiracy provision must prove the existence of a conspiracy and the commission of an overt act in furtherance of the conspiracy that proximately caused the injury. Bowman v. W. Auto Supply Co., 985 F.2d 383, 387-88 (8th Cir. 1993). On November 3, 1999, the Supreme Court heard oral arguments to determine whether a plaintiff who brings a civil RICO conspiracy claim must prove that the overt act that caused the injury was an act in furtherance of the conspiracy or that not only did the overt act proximately cause the injury in furtherance of the conspiracy, but it was also a racketeering act. *See* Beck v. Prupis, 162 F.3d 1090 (11th Cir. 1998), *cert. granted*, 119 S.Ct. 2046 (1999).

205. Miller, *supra* note 133, at 58-63.

206. Yates v. United States , 354 U.S. 298, 334 (1957).

207. United States v. Hurley, 957 F.2d 1, 3 (1st Cir. 1992) (determining that even legal conduct may be considered an overt act).

208. 522 U.S. 52 (1997).

209. *Id.* at 62.

210. *Id.*

211. *Id.* (quoting Bannon v. United States, 156 U.S. 464, 469 (1895)).

eering) to be found guilty of RICO conspiracy.[212] The government is only required to prove that two or more people agreed to commit a substantive RICO offense and that the defendant knew of and agreed to the overall objective of the RICO conspiracy.[213] The overall objective of the RICO conspiracy must be to commit a substantive RICO offense.[214]

The RICO conspiracy provision is a more comprehensive form of conspiracy than the general conspiracy offense.[215] It is considered a weapon in the prosecution's arsenal that enhances the reach of the government in its fight against "organized" crime.[216] RICO conspiracy allows the government to prosecute multiple unrelated crimes and conspiracies in a single prosecution as long as the goal of the conspiracies is to commit a substantive RICO offense.[217] Thus, the government may "rim the wheel"[218] of conspirator situations where the only common denominator between co-conspirators may be one co-conspirator.[219] In such circumstances, the government may charge numerous defendants with a single conspiracy even though the predicate crimes seem totally unrelated.[220] Such single prosecutions are approved because the co-

212. *Id.* at 65.

213. *Id.*; United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998); United States v. Marmolejo, 89 F.3d 1185, 1196-97 (5th Cir. 1996).

214. *Salinas*, 522 U.S. at 62.

215. *Id.*

216. Russello v. United States, 464 U.S. 16, 26 (1983) (noting that RICO was "intended to provide new weapons of unprecedented scope" in order to eradicate organized crime).

217. This is based on the fact that the focus of RICO is the enterprise. In *United States v. Turkette*, the Supreme Court determined that an enterprise is separate and distinct from the pattern of racketeering. United States v. Turkette, 452 U.S. 576 (1981). Thus, the "various associates" of an enterprise "function as a continuing unit." *Id.* at 583. Consistent with this holding, lower courts have upheld the convictions of defendants involved in unrelated crimes and conspiracies who were convicted in a single prosecution. *E.g.*, United States v. DeLuca, 137 F.3d 24, 36-37 (1st Cir. 1998); Unites States v. Darden, 70 F.3d 1507, 1526-27 (8th Cir. 1996); United States v. Castro, 89 F.3d 1443, 1450-51 (11th Cir. 1996); United States v. DiNome, 954 F.2d 839, 843-44 (2d Cir. 1992).

218. This concept is linked to the concept of a "chain conspiracy." KAPLAN, *supra* note 198, at 974. Before RICO, the government could only prosecute co-conspirators who could be "linked" in a chain. *Id.* Subsequently, those conspirators connected only by one pivotal conspirator can now be linked forming a wheel, hence the government can rim the wheel in a RICO conspiracy.

219. United States v. Elliot, 571 F.2d 880, 898 (5th Cir. 1978).

220. *Id.* In this case, six defendants and thirty-seven unindicted co-conspirators were suspected in more than twenty separate criminal pursuits, but the government was only required to charge a single conspiracy to violate a sub-

conspirators have not conspired to do one particular thing like sell drugs or defraud the government. Rather, the co-conspirators have agreed to further the same criminal objective—to commit a substantive RICO offense.[221]

In spite of the distinctions between RICO conspiracy and other forms of conspiracy, federal courts have held that legal principles that govern the prosecution of other conspiracy crimes govern RICO conspiracy cases as well.[222] Consistent with this determination, the Court found that the government must prove that the partners in the criminal plan agreed to pursue the criminal objective, although each conspirator did not agree to commit or facilitate each and every part of the substantive RICO offense.[223]

In light of the fact that traditional conspiracy principles apply to RICO conspiracy, numerous common law developments are applicable as well. For one, the government need not prove that the defendant participated in, or was aware of all the acts committed in furtherance of the conspiracy.[224] The conspirator is liable for acts committed by other conspirators during the course of and in furtherance of the conspiracy.[225] Co-conspirators must agree to strive towards a criminal objective and in this process may divide up the tasks, however, each individual co-conspirator is liable for the acts of his partners in crime.[226] When the criminal scheme calls for some of the partners to commit the crime and others to provide support, "the supporters are as guilty as the perpetrators."[227] The co-conspirator is liable for the conspiracy even if they could not

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stantive RICO provision. *Id.*

221. *Id.* at 899.

222. Salinas v. United States, 522 U.S. 52, 63 (1997) (adhering to the general rule that well settled terminology of criminal law is given its ordinary meaning). As a result, the Court determined that when Congress uses the phrase "to conspire," as it does in section 1962(d), it intends to use it in its conventional sense and, as such, certain well-established principles of conspiracy attach. *Id.* at 63-64.

223. *Id.*

224. *Id.* at 53; Blumenthal v. United States, 332 U.S. 539, 557 (1947) (determining that it is only necessary to prove that the defendant knew of the general objective of the conspiracy not all the details).

225. *Salinas*, 522 U.S. at 63; Pinkerton v. United States, 328 U.S. 640, 646 (1946).

226. *Salinas*, 522 U.S. at 63; *Pinkerton*, 328 U.S. at 646 (stating that so long as the partnership in crime continues, partners act for each other in carrying it forward).

227. *Salinas*, 522 U.S. at 64 (noting that in United States v. Holte, 236 U.S. 140, 144 (1915), Justice Holmes determined that "a person may conspire for the commission of a crime by a third person.").

have committed the substantive offense.[228] In fact, a conspiracy will be found to continue to exist even where the individual conspirators did not agree to "commit or facilitate each and every part of the substantive offense."[229]

Thus, a defendant who had minimal participation in the conspiracy or was a participant at one level of the conspiracy will be convicted of conspiracy.[230] Many lower federal courts have determined that this means that the *Reves* "operation or management" test does not apply to RICO conspiracy.[231] The attempt to reconcile traditional conspiracy principles with the *Reves* decision has created a split between the Second, Seventh, Eleventh, and Fifth Circuits on the one hand, and the Third and Ninth Circuits on the other.[232]

The Seventh Circuit Court of Appeals recently defined the conflict between the Circuit Courts as being a dispute about how to apply the *Reves* test in light of the *Salinas* decision.[233] The heart of this dispute is the issue of personal participation—what level of personal participation in the enterprise is required to convict a defendant of RICO conspiracy.[234] In *Salinas*, the Supreme Court determined that a defendant does not have to commit a predicate offense or an overt act to be found guilty of RICO conspiracy.[235] The Seventh Circuit noted that *Reves* limits those who can be convicted of a substantive RICO violation to individuals who operate or manage the affairs of an enterprise.[236] In *Reves*, the Supreme Court held

228. *Salinas*, 522 U.S. at 63; United States v. Rabinovich, 238 U.S. 78, 86 (1915).

229. *Salinas*, 522 U.S. at 63; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-54 (1940).

230. United States v. Prieto-Tejas, 779 F.2d 1098, 1103 (5th Cir. 1986).

231. *E.g.*, United States v. Castro, 89 F.3d 1443, 1452 (11th Cir. 1996); United States v. Napoli, 45 F.3d 660, 680-84 (2d Cir. 1995), *cert. denied*, 514 U.S. 1084 (1995); MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 979 (7th Cir. 1995); United States v. Starrett, 55 F.3d 1525, 1547-1548 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1335 (1996); United States v. Quintanilla, 2 F.3d 1469, 1484-85 (7th Cir. 1993).

232. *Compare* United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998), *and Quintanilla*, 2 F.3d at 1484-85, *and Starrett*, 55 F.3d at 1547, *and Napoli*, 45 F.3d. at 683-84, *with* Neibel v. Trans World Assurance Co., 108 F. 3d 1123, 1128 (9th Cir. 1997), *and* United States v. Antar, 53 F.3d 568, 581 (3d Cir. 1995).

233. Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 962 (7th Cir. 2000); *Posada-Rios*, 158 F.3d at 857 (determining that in RICO conspiracy cases, it was the "better-reasoned rule" to disregard the *Reves* test in light of the Supreme Court's decision in United States v. Salinas).

234. *Brouwer*, 199 F.3d at 966.

235. *Salinas*, 522 U.S. at 64.

236. *Brouwer*, 199 F.3d at 966.

that mere association with an enterprise did not constitute a substantive RICO violation.[237] Attempting to reconcile these two cases, the Seventh Circuit observed that it is counterintuitive to find someone guilty of conspiring to commit a substantive crime for which they cannot be convicted.[238] The court resolved this concern by reasoning that a person who has not committed a substantive RICO offense but has conspired to violate a substantive RICO offense has not agreed to operate or manage the enterprise, rather they have agreed "personally to facilitate the activities of those who do" manage or operate the enterprise.[239]

Like all other forms of conspiracy crimes, direct evidence is not necessary to prove a RICO conspiracy.[240] The government does not have to prove that the defendant knew all the details of the enterprise or the number or identities of his coconspirators.[241] The defendant may be found guilty of RICO conspiracy, if there is circumstantial evidence from which the jury can infer that the defendant knowingly participated in the overall goal of the conspiracy itself.[242] The elements of a conspiracy may be proved by circumstantial evidence because it is the nature of the offense that in the course of the conspiracy, conspirators attempt to conceal their conduct.[243] "The agreement, a defendant's guilty knowledge and a defendant's participation in the conspiracy all may be inferred from the development and collocation of circumstances."[244] A meeting of all the actors does not need to take place.[245] A tacit agreement can be construed from proof that two or more persons sought the same criminal goal, through independent actions.[246] These actions may appear isolated however be deemed con-

237. *Id.* (quoting Reves v. Ernst & Young, 507 U.S. 170 (1993)).

238. *Id.*

239. *Id.* at 967.

240. *Posada-Rios*, 158 F.3d at 857; United States v. Sneed, 63 F.3d 381 (5th Cir. 1995) (finding that "no element need be proved by direct evidence: in a conspiracy to commit mail fraud").

241. Conspiracy law allows the government to prove only the "essential nature of the plan" and the conspirator's connection to it to ensure that conspirators do not avoid prosecution due to their cleverness. Blumenthal v. United States, 332 U.S. 539, 557 (1947).

242. United States v. Fernandez-Roque, 703 F.2d 808, 814-15 (5th Cir. 1983).

243. *Posada-Rios*, 158 F.3d at 857.

244. United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992) (quoting U.S. v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991).

245. Griffin v. State, 455 S.W.2d 882, 885 (Ark. 1970) (stating a "meeting of the actors" maybe inferred).

246. *Id.*

nected.[247] Because the government may prove the conspiracy with circumstantial evidence, the Defendant may be acquitted of the substantive RICO violation but found guilty of the RICO conspiracy charge.[248] The defendant may be convicted of conspiracy even if the underlying substantive offense does not ensue because conspiracy is considered a distinct crime—"a distinct evil, dangerous to the public, and so punishable in itself."[249]

Most of the circumstantial evidence utilized to prove conspiracy crimes comes from the testimony of co-conspirators at trial.[250] Co-conspirators testify in regards to the conduct and statements made by the defendant in the course of the conspiracy.[251] In most circumstances, out-of-court statements are considered hearsay and not admissible.[252] However, out-of court statements made by a defendant to a co-conspirator in furtherance of the conspiracy are admissible.[253] This is because the co-conspirator who is in a criminal partnership with the defendant is considered an agent of the defendant.[254] In most conspiracy cases, it is followed as a rule that "persons who are indicted together should be tried together."[255] As a result, co-conspirator testimony presents difficult issues for the defense since most co-conspirators are prosecuted in a single

247. *Id.*

248. Salinas v. U.S., 522 U.S. 52, 64 (1997) (citing Callanan v. United States, 364 U.S. 587, 594 (1961) (holding that Congress, in the absence of any inconsistent expression, can maintain a long-established distinction between substantive offenses and conspiracy)).

249. *Id.*

250. United States v. Gaytan, 74 F.3d 545, 558 (5th Cir. 1996) (considering quantity calculations contained in PSR's based on co-conspirator testimony to convict the defendant); United States v. Powers, 75 F.3d 335, 340 (7th Cir. 1996) (allowing government to present evidence of defendant's involvement and participation in the conspiracy through the testimony of co-conspirators); United States v. Williams, 56 F.3d 63, 63 (4th Cir. 1995) (same).

251. *E.g.*, United States v. Vaandering, 50 F.3d 696, 699 (9th Cir. 1995) (convicting defendant of conspiracy to possess methamphetamines with intent to distribute based on testimony of co-conspirator); *Gaytan*, 74 F.3d at 558 (considering quantity calculations contained in pre-sentencing report based on co-conspirator testimony to convict the defendant); *Powers*, 75 F.3d at 340 (allowing government to present evidence of defendant's involvement and participation in the conspiracy through the testimony of co-conspirators); *Williams*, 56 F.3d at 63 (same).

252. FED. R. EVID. 802 (2000).

253. *Id.* at 801(d)(2)(E). Proving that the defendant's statement was made to his co-conspirator in the course of the conspiracy need only be proved by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171, 175 (1987).

254. *Bourjaily*, 483 U.S. at 183 (noting that the co-conspirator exception is well settled in American jurisprudence).

255. United States v. O'Bryant, 998 F.2d 21, 25 (1st Cir. 1993).

trial.[256] Primarily, defense counsel is concerned that if the jury considers some of the defendants guilty, it is likely to consider the rest guilty as well.[257] However, multi-defendant trials preserve judicial and prosecutorial resources and are necessary in the interest of justice to enable the government to fairly prosecute co-conspirators.[258]

Justice Scalia expressed the views of many when he stated that "[i]t would impair both the efficiency and the fairness of the criminal justice system to require ... that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes the trauma) of testifying, and randomly facing the last tried defendants who have the advantage of knowing the prosecution's case beforehand."[259] Joint trials are thought to serve the interest of justice because they avoid inconsistent judgments and enable a more accurate assessment of relative culpability, which may operate to the advantage of the defendants. As a result of this thought process, there is a presumption in favor of multiple defendant trials.

Critics of RICO conspiracy have asserted that it is unconstitutional because it punishes people for their associations in violation of their First Amendment right to freely associate.[260] They claim that a violation of the RICO conspiracy provision amounts to conspiring to conspire.[261] In essence, individuals are being punished for mere thoughts rather than conduct.[262] As a result, they are being convicted for their associations.[263]

Courts cognizant of this concern have placed limitations on the reach of both RICO and other forms of conspiracy. For example, an individual may not be convicted of a drug conspiracy merely because evidence reveals that he associated with drug conspirators

256. Richardson v. Marsh, 481 U.S. 200, 206-10 (1987); United States v. Elder, 90 F.3d 1110, 1119 (6th Cir. 1996) (favoring joint trials in conspiracy cases); United States v. Musquiz, 45 F.3d 927, 931 (5th Cir. 1995) (indicating that joint trials in conspiracy cases are the preference).

257. *Richardson*, 481 U.S. at 209.

258. *Id.*

259. *Id.*

260. Miller, *supra* note 133, at 53; Shawn D. Akers, Note, *RICO and Social Protest: Devilifying A First Amendment Liberty*, 11 REGENT U. L. REV. 219, 221 (1998-99); Barry Tarlow, RICO Report, THE CHAMPION, Apr. 1998, *available at* http://www.criminaljustice.org/CHAMPION/ARTICLES/98apr05.htm (last visited Mar. 12, 2001).

261. Miller, *supra* note 133, at 53.

262. *Id.*

263. *Id.*; Akers, *supra* note 260, at 221; Tarlow, *supra* note 260.

or by evidence that places him "in a climate of activity that reeks of something foul."[264] Likewise, mere association with a RICO enterprise does not constitute RICO conspiracy.[265] A defendant's presence at the scene of a crime is not enough to establish a finding that the defendant was a conspirator, although a jury may consider the defendant's presence and participation along with other evidence in determining that the defendant is guilty of conspiracy.[266]

Moreover, there seems to be almost no distinction between the existence of an enterprise and the existence of a RICO conspiracy.[267] In *United States v. Neapolitan*,[268] the Seventh Circuit Court of Appeals addressed the complexity of the relationship between the substantive RICO provisions and RICO conspiracy.[269] The court emphasized that two factors limit the scope of the RICO conspiracy provision. The first limiting factor identified by the Court was the nature of the agreement.[270] The Court reasoned that in examining the RICO conspiracy, one has entered into two agreements: an agreement to commit a substantive RICO violation by conducting or participating in the affairs of an enterprise and an agreement to the commission of at least two predicate acts.[271] Thus, if a person committed two acts and did not agree to become involved with the enterprise, they have not committed RICO conspiracy.[272] Likewise, a person who is affiliated with the conspiracy but does not agree to the commission of two predicate acts is not guilty of RICO conspiracy either.[273]

The second identified limiting factor was the requirement of proving the existence of the enterprise. The existence of the enterprise is what distinguishes a conspiracy from a substantive RICO offense.[274] When the enterprise is a legal entity, this issue does not arise because legal enterprises are usually entities with a well-

264. United States v. Maltos, 985 F.2d 743, 746 (5th Cir. 1992) (quoting United States v. Galvan, 693 F.2d 417, 419 (5th Cir. 1982)).
265. United States v. Neapolitan, 791 F.2d 489, 499 (7th Cir. 1986).
266. United States v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991).
267. *Neapolitan*, 791 F.2d at 499-50 (stating that a defendant must manifest his agreement to the objective of a RICO violation and not necessarily agree personally to violate the statute).
268. *Id.*
269. *Id.*
270. *Id.* at 498-99.
271. *Id.* at 499.
272. *Id.*
273. *Id.*
274. *Id.*

defined organizational structure.[275] However, when the enterprise is an "association in fact" enterprise such as the Mexican Mafia, the government must take particular care in proving its existence.[276] In particular, it is important to firmly establish the structure of the "association in fact" enterprise because the structure is the central characteristic of an enterprise.[277] An "association in fact" enterprise must be more than "[a] group of people who get together to commit a pattern of racketeering activity."[278]

1. RICO Conspiracy Dismantles The Mexican Mafia

The promulgation of the RICO conspiracy provision reflects the cleverness of its drafters who were determined to create a form of conspiracy that would allow the government to dismantle organizations and prosecute its members and associates for the commission of multiple "unrelated" crimes and conspiracies.[279] Prior to RICO, if sixteen members of the Mexican Mafia committed unrelated crimes and conspiracies to maintain and further the aims of the gang, the government had no effective way of stopping the criminal organization.[280] With the enactment of RICO, this problem was solved.[281]

In San Antonio, utilization of the RICO conspiracy provision enabled the government to begin eradicating one of the most deadly criminal organizations in Texas, the Mexican Mafia.[282] The leadership of the Mexican Mafia effectively silenced those "outsiders" who could have provided evidence regarding the deadly activities of the gang.[283] Federal prosecutors had to build their RICO

275. *Id.*
276. *Id.*
277. *Id.* at 500.
278. *Id.*
279. United States v. Sutherland, 656 F.2d 1181, 1192 (5th Cir. 1981) (noting that "a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single 'enterprise' conspiracy").
280. *Id.*
281. *Id.*
282. Robbins, *Ten are Face Life, supra* note 72, at 1A (reporting that Assistant United States Attorney Bill Baumann stated that the government would remain vigilant in its fight to rid San Antonio of this blood-thirsty gang). Attorney Bill Baumann stated "we need to keep a foot on the[ir] [sic] throat or they'll be killing again." *Id.*
283. The gang leadership had numerous individuals assassinated. Maro Robbins, *Gang Trial Verdict Sealed Until Yesterday,* SAN ANTONIO EXPRESS-NEWS, Mar. 3, 1999, at 1A.

conspiracy case from those associated with the gang's activities.[284] The RICO conspiracy provision allowed prosecutors to target a broad range of participants for prosecution.[285] The government was able to not only prosecute those individuals who committed or agreed to commit two or more RICO predicate acts but also those who agreed to furthering or facilitating the goals of the Mexican Mafia[286]

2. The RICO Conspiracy "Spill-Over" Effect

In *United States v. Robert "Beaver" Perez*,[287] ten of the sixteen originally indicted chose to present their cases to a jury rather than settle their cases through the plea-bargaining process.[288] Prior to the onset of the trial, the court denied the motion to sever the cases of each respective defendant. Instead, the prosecution of all ten defendants shortly thereafter ensued in a single prosecution.[289] These ten defendants, along with their attorneys grimly watched as federal prosecutors initially presented the government's case to the jury.[290] Assistant United States Attorneys Bill Baumann and David Counts presented evidence, which established Count one of the indictment—the RICO Substantive violation which included the underlying predicate acts and Count Two—the RICO Conspiracy violation, substantiating the charges against each defendant. Prosecutors asserted that the Mexican Mafia was an "association in fact" enterprise and put on a seemingly endless stream of witnesses to prove each element of the RICO offenses and each underlying predicate offense in order to persuade the jury to convict these ten men.[291] Overwhelmed by the magnitude of the government's case against these defendants, observers watched the government's attorneys bombard the jury with a mountain of evidence,[292] which did

284. Interview with Baumann & Counts, *supra* note 50.
285. *Id.*
286. *Id.*; *Salinas*, 522 U.S. at 64.
287. Criminal No. SA-98-CR-265-EP.
288. Interview with Baumann & Counts, *supra* note 50.
289. Interview with Ed Camara, Defense Attorney for Michael Perez, one of the co-defendants in *United States v. Robert "Beaver" Perez et al.*, in San Antonio, Tex. (Mar. 1, 2000) [hereinafter Interview with Camara].
290. *Id.*
291. *Id.*; Interview with Robbins, *supra* note 58.
292. Interview with Camara, *supra* note 289; Interview with Robbins, *supra* note 58.

lead to the eventual conviction of all ten defendants.[293]

Defendants with minimal involvement wondered if the jury could actually distinguish one defendant from another.[294] As the trial progressed, they silently questioned whether or not the jury would be able to associate the appropriate defendant with the evidence being presented.[295] They hoped that the jury would hear their defense regarding their individual involvement or lack of involvement in spite of the monstrosity of the government's case amidst the terror historically invoked by the Mexican Mafia within the local community and the presentation of the atrocities that occurred at French Place.[296] One such defendant was Michael Perez (Michael) who was Beaver's nephew.[297] During the course of the investigation of Beaver, federal law enforcement officials contacted Michael and asked him to cooperate with their investigation of his uncle by providing information about Beaver's activities.[298] They threatened to indict him as well if he did not cooperate.[299]

Subsequent to Michael's refusal to cooperate with federal authorities, he was indicted.[300] The government's circumstantial evidence suggested a minimal connection between Michael and two predicate acts.[301] Two witnesses testified that Michael drove the vehicles in two drive-up shootings.[302] In addition, the government asserted that he had participated in meetings where plans for specific murders had taken place.[303]

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293. Interview with Camara, *supra* note 289; Interview with Robbins, *supra* note 58.

294. Interview with Camara, *supra* note 289.

295. *Id.*

296. *Id.*

297. Maro Robbins, *Gang Boss, Other Get Life Sentences,* SAN ANTONIO EXPRESS-NEWS, July 9, 1999, at 2B; Interview with Camara, *supra* note 289.

298. Interview with Camara, *supra* note 289.

299. *Id.*

300. *Id.* Soon after refusing to provide information to the authorities, his name, "Michael Perez," began appearing on the affidavits accompanying numerous search warrants in place of the name of another suspect named Michael Valdez." *Id.* Prior to refusing the authorities, all affidavits had listed "Michael Valdez" in the statement of facts. *Id.* Immediately afterwards the name "Michael Valdez." was replaced with that of "Michael Perez." *Id.* Without explanation, Michael Valdez was never implicated in anyway and never indicted although his name appeared in numerous affidavits prior to the threats made to Michael by law enforcement officials. *Id.*

301. Interview with Baumann & Counts, *supra* note 50; Robbins, *supra* note 297.

302. Interview with Baumann & Counts, *supra* note 50.

303. *Id.*

In his defense, Mr. Camara, Michael's attorney, hoped to separate him, set him apart from his co-defendants in the minds of the jurors through the presentation of what he considered exculpatory evidence.[304] Mr. Camara presented evidence through the testimony of two witnesses who reported that Michael Valdez had been present at those meetings rather than Michael Perez and introduced the affidavits, which reflected the name switching before and after Michael was threatened by authorities.[305] This evidence was not persuasive. Michael, along with his codefendants was found guilty and sentenced to life imprisonment without parole.[306]

In the end, the trial before the jury lasted a little over six weeks.[307] During that time, the jury heard testimony from over 150 witnesses and reviewed over twenty crates of documents.[308] In fact, there was so much "evidence" for the jury to consider that a larger deliberation room had to be secured for them.[309] Prior to retiring to the jury room for deliberations, the jury listened for over an hour as the trial judge gave them their instructions.[310] Almost a week later, the jury emerged with a unanimous verdict.[311]

The massive amount of evidence presented by the government in this trial indicates that RICO conspiracy defendants are subjected to an enhanced "spill-over" effect.[312] "Spill-over" occurs when there is a gross disparity in the evidence against various co-defendants.[313] In multi-defendant prosecutions, "[t]he danger is that the bit players may not be able to differentiate themselves in the jurors' minds from the stars."[314] Consequently, the jury may merge the defendants and the charges and deliver one big verdict.[315] This "spill-over" effect, inherent in multi-defendant prose-

304. *Id.*
305. Interview with Camara, *supra* note 289.
306. Robbins, *supra* note 297.
307. Maro Robbins, *Gang member Gets 15 Years in Plea,* SAN ANTONIO EXPRESS-NEWS, Apr. 28, 1999, at 2B.
308. *Id.*
309. Robbins, *10 Face Life, supra* note 72, at 1A.
310. Interview with Robbins, *supra* note 58.
311. Herrick, *supra* note 20.
312. United States v. Andrews, 754 F. Supp. 1161, 1175-1178 (N.D. Ill. 1990). Here the Court discusses the prejudice experienced by the defendants in the instant case who are charged in a RICO conspiracy. The court notes that this case is not an ordinary case. *Id.* at 1175.
313. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 883 (5th ed. 1996).
314. United States v. Zafiro, 945 F.2d 881, 885 (7th Cir. 1991).
315. *Id.*

cutions,[316] is enhanced in RICO conspiracy prosecutions because the government is allowed to prosecute multiple unrelated crimes and conspiracies in a single prosecution.[317]

In order to discern the enhanced "spill-over" effect in RICO conspiracy trials, it is necessary to discuss the present process and related procedures regarding the joinder and severance of co-defendants. The process of determining severance and joinder is governed by three respective rules within the Federal Rules of Criminal Procedure. Rule 8 authorizes the types of defendants and charges that can be joined.[318] Rule 13 allows the court to join separate actions if they could have been joined under Rule 8.[319] Rule 14 permits the Court to sever or provide other relief if prejudice would result from joinder.[320]

Rule 8(b) allows the joinder of an unlimited number of defendants "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."[321] The trial judge determines the appropriateness of joinder by reviewing the face of the indictment.[322] When the indictment alleges that the joined defendants are members of a conspiracy, it is well settled that joinder is proper.[323] In most conspiracy cases, it is followed as a rule that "persons who are indicted together should be tried together."[324] Multi-defendant trials are believed to preserve judicial and prosecutorial resources and to be necessary in the interest of justice to enable the government to fairly prosecute co-conspirators.[325] Thus, there is a presumption in favor of joinder. Many believe that it would impair the efficiency and the fairness of the criminal justice system if prosecutors were

316. United States v. Morales, 868 F.2d 1562, 1573 (11th Cir. 1989); United States v. McLaurin, 557 F.2d 1064, 1074 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978); Spencer v. Texas, 385 U.S. 554, 562 (1967).

317. United States v. Sutherland, 656 F.2d 1181, 1192 (5th Cir. 1981) (stating that "a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single 'enterprise conspiracy'").

318. Fed. R. Crim. P. 8 (1999).

319. *Id.* R. 13.

320. *Id.* R. 14.

321. *Id.* R. 8.

322. United States v. Bruun, 809 F.2d 397, 406 (7th Cir. 1987); United States v. Velasquez, 772 F.2d 1348, 1354 (7th Cir. 1985), *cert. denied*, 475 U.S. 1021 (1986); United States v. Andrews, 754 F. Supp. 1161, 1168 (N.D. Ill. 1990).

323. United States v. Garner, 837 F.2d 1404, 1412 (7th Cir. 1987), *cert denied*, 486 U.S. 1035 (1988).

324. United States v. O'Bryant, 998 F.2d 21, 25 (1st Cir. 1993).

325. *Id.*

required to bring separate proceedings, "presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes the trauma) of testifying, and randomly facing the last tried defendants who have the advantage of knowing the prosecution's case beforehand."[326] Furthermore, multi-defendant trials are thought to serve the interest of justice because they avoid inconsistent judgments and enable a more accurate assessment of relative culpability, which may operate to the advantage of the defendants.

Prior to RICO, Rule 8(b) limited the scope of a proper indictment to the number of individuals who could conspire to commit a single substantive crime or predicate offense.[327] RICO conferred on the government broad charging authority.[328] As a result, the enactment of RICO conspiracy removed the natural barrier implicit in Rule 8(b) by allowing "'a series of agreements that under pre-RICO law would constitute multiple [unrelated] conspiracies could under RICO be tried as a single 'enterprise conspiracy' in violation of § 1962(d)."[329] RICO conspiracy has provided the government with a more effective, efficient and expansive way to join multiple defendants and multiple crimes in one prosecution.[330] For example, a pattern of racketeering can include a limitless number of substantive crimes and consequently, a limitless number of conspirators.[331] Inadvertently, the enactment of RICO contributed to the birth of the mega-trial effectively neutralizing the implied limitations on the number of defendants that Rule 8(b) placed on the scope of the indictment.[332]

Notwithstanding the presumption of joinder in conspiracy

326. *Id.*

327. United States v. Riccobene, 709 F.2d 214, 222-23 (3d Cir. 1983); United States v. Sutherland, 656 F.2d 1181, 1192 (5th Cir. 1981).

328. United States v. Andrews, 754 F. Supp. 1161, 1169 n.9 (N.D. Ill. 1990); United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir. 1986).

329. *Andrews*, 754 F. Supp. at 1169 & n.9 (quoting *Sutherland*, 709 F.2d at 1192).

330. *Sutherland*, 656 F.2d at 1192.

331. *Andrews*, 754 F. Supp. at 1169 n.9.

332. *Id. at* 1161. Here, the Court encountered a "mega-trial" where 38 defendants were charged with 175 count indictment under the RICO statute. *Id.* at 1164. The Court held that, although the joinder of the defendants was technically correct, severance was required under the Federal Rules of Criminal Procedure Rule 14 because the defendants would be prejudiced by the mega-trial. *Id.* at 1178. This court defined a mega-trial as one in which the government estimates the length of the trial to be greater than four months, and ten or more defendants are joined. *Id.* at 1172.

cases, the law recognizes that there are times when justice requires that a severance be granted.[333] Although joinder might be technically correct under Rule 8(b), Rule 14 authorizes severance if such joinder would be prejudicial to the defendants.[334] The trial court has broad discretion to determine when severance under Rule 14 is mandated.[335] To determine if severance is appropriate the court must "balance possible prejudice [against the defendants] against inconvenience and expense to the Government, the court and the jurors."[336] In *Zafiro v. United States,*[337] the Supreme Court instructed that a motion for severance should be granted "if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence."[338] It is important to note that the *Zafiro* Court provided guidance regarding the appropriateness of severance absent an understanding of how the existing joinder and severance procedures are affected by the RICO conspiracy provision. To date, the Supreme Court has not recognized the unique conspiracy created by RICO nor has it identified the enhanced "spill-over" effect present in RICO conspiracy prosecutions.

Rule 8(b) and Rule 14 may provide adequate procedural protection against improper joinder to defendants charged with a traditional form of conspiracy. However, they fall far short in providing procedural due process protection to RICO conspiracy defendants, defendants indicted together for conspiring to commit a substantive RICO offense. The current procedures prevent the RICO defendant from receiving a fair trial in RICO conspiracy prosecutions because they do not account for the RICO conspiracy

333. Zafiro v. United States, 506 U.S. 534, 539 (1993).

334. *Zafiro*, 506 U.S. at 539; United States v. Lane, 474 U.S. 438, 447 (1986); *Andrews*, 754 F. Supp. at 1169 & n.9 (suggesting that Rule 14 be considered in relation to Rule 2). Rule 2 states that the Federal Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." FED. R. CRIM. P. 2 (1999).

335. United States v. Caliendo, 910 F.2d 429, 437 (7th Cir. 1990) (noting that the trial court is in the best position to balance "the cost of conducting separate trials and the possible prejudice inherent in a single trial").

336. United States v. Pacente, 503 F.2d 543, 549 n.8 (7th Cir. 1974), *cert. denied,* 419 U.S. 1048 (1974).

337. 506 U.S. 534 (1993).

338. *Id.* at 539.

"spill-over" effect.[339] These rules have not been amended subsequent to the enactment of RICO.[340] The enhanced spill-over effect of RICO conspiracy has increased the number of defendants and unrelated offenses listed in the indictment. When the trial judge reviews the face of the indictment as required by Rule 8(b), he is not able to discern each individual's participation in relation to the rest of the participants in the enterprise. The indictment provides broad language about the defendant's role in the crime.[341] It does not indicate in what way the defendant personally participated in the conspiracy.[342] The trial judge is unable to determine whether or not the defendant is a member of the enterprise, a co-conspirator, both or neither from the face of the indictment.[343] Therefore, the trial judge is not able to glean the nature, both in degree and extent, of each defendant's personal participation. In other words, the trial judge is not able to determine if the defendant is a member of the enterprise, a member of the single conspiracy, which furthered the goal of the enterprise or neither. It has been suggested that faced with evidence against multiple defendants, a jury will be able to compartmentalize the evidence against each defendant and deliver a fair verdict. Due to the enhanced "spill-over" effect created by RICO conspiracy, the jury cannot "compartamentalize"[344] the evidence against one defendant

339. Rules 8, 13 and 14 of the Federal Rules of Criminal Procedure represent the statutory procedures in place for determining severance. Fed. R. Crim. P. 8, 13, 14 (1999).

340. Fed. R. Crim. P. 8, 13, 14 (1999).

341. Perez Indictment, *supra* note 26, at 22 (stating that on or about November 23, 1994, Frank Estrada, aided by MARTIN "PANCAKE" ORTEGON, MICHAEL PEREZ, and ROBERT "ROBE" OR "ROVE" HERRERA, JR., shot and killed Luis "Blue" Adames.") This language is vague and does not describe to the judge specifically what the defendant did. The indictment does not state how the defendant manifested his "agreement" to conspire to violate 18 U.S.C. § 1962 (c) (1998)).

342. *Id.*

343. *Id.* The indictment is a persuasive piece of legal writing intended to justify the charges against the defendants. From the face of this indictment, the reader is unable to discern each defendant's degree or level of involvement. It could be argued that evidence regarding degree and level of involvement is better presented at the time of the trial. It is important to note, however, that the value of severance is lost once the trial begins.

344. U.S. v. Elder, 90 F.3d 110, 119-20 (6th Cir. 1996) (discussing compartmentalization). Currently, the United States Supreme Court has determined that "spill-over" effect may be cured and juries will be able to compartmentalize the evidence if proper jury instructions are given. Zafiro v. United States, 506 U.S. 534, 541 (1993)

from another. In effect, a RICO conspiracy defendant is denied the opportunity to present his defense to an impartial jury.[345]

III. RICO CONSPIRACY & PROCEDURAL DUE PROCESS

A joinder-severance procedure that fails to account for the RICO conspiracy "spill-over" effect substantially impairs the RICO conspiracy defendant's ability to present his case to a fair and impartial jury in violation of the Sixth Amendment. The failure of this process constitutes a violation of the Due Process Clause of the Fifth Amendment.[346] "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[347] Procedural due process provides that a person can only be deprived of certain substantive rights–life, liberty, and property pursuant to constitutionally adequate procedures.[348]

A. Mathews v. Eldridge: *A Standard Of Review In Criminal Fact-Finding*

To determine the sufficiency of procedural protections, most courts employ the procedural due process standard established in *Mathews v. Eldridge*[349] by the Supreme Court.[350] In this case, the Court found that to determine the constitutional sufficiency of existing procedures required an analysis of the governmental and private interests concerned.[351] This test requires that three factors be examined to determine if the requisites of due process have been met.[352] "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such an interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

345. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (declaring that "the fundamental requirement of due process is that the defendant be provided with the opportunity to present his defense to a jury 'at a meaningful time and in a meaningful manner'").

346. *Supra* notes 282-345 and accompanying text (discussing the current procedures and presenting their insufficiency in RICO conspiracy prosecutions).

347. *Mathews*, 424 U.S. at 332.

348. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

349. 424 U.S. 319 (1976).

350. R.G. Britton v. Rogers, 631 F.2d 572, 580 (8th Cir. 1980).

351. *Mathews*, 424 U.S. at 335.

352. United States v. Raddatz, 447 U.S. 667, 677 (1980).

Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail."[353]

Traditionally, the *Mathews v. Eldridge* test has been utilized to determine the sufficiency of procedural safeguards in the context of administrative proceedings.[354] In the criminal context, one standard for determining the sufficiency of procedural protections has remained elusive.[355] It is likely that this lapse can be explained by examining the nature of due process itself. The Supreme Court noted that "unlike some legal rules [due process] is not a technical conception with fixed content unrelated to time, place and circumstances."[356] Due Process is "flexible" and requires a fresh assessment of each individual situation to determine what procedural protections are required to satisfy the requisites of due process.[357] In the criminal realm, the individual defendant is subjected to a number of different proceedings, which have been determined to require different degrees of procedural protections and vastly different procedures.[358] It is not being suggested that every single criminal proceeding requires that a new set of procedural safeguards be implemented. But every type of criminal proceeding may require its own set of procedural due process protections, which seems to be what has developed within the criminal context, particularly in the cases which have utilized the *Mathews v. Eldridge* test in the criminal context.

The application of this test was first adopted by the Eighth Cir-

353. *Mathews*, 424 U.S. at 335; *E.g.*, Goldberg v. Kelly, 397 U.S 254, 271 (1970).

354. *R.G. Britton*, 631 F.2d at 580. In this case, the eighth circuit noted that the *Mathews* test was originally developed to be applied in the administrative context but that it did not "perceive any doctrinal obstacle" to its utilization in the criminal context. *Id.* At that time, no federal court, other than the lower court on review, had yet applied the *Mathews* standard to review procedures in a criminal proceeding. *Id.*

355. Medina v. California, 505 U.S. 437, 437 (1992) (noting that there are several ways to evaluate the sufficiency of procedural safeguards).

356. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Bowen v. City of New York, 476 U.S. 483, 485 (1986) (noting that the *Mathews* test should not be mechanically applied).

357. *Mathews*, 424 U.S. at 335; Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

358. *E.g., Medina*, 505 U.S. 437; Ake v. Oklahoma, 470 U.S. 68, 77-84 (1985); United States v. Raddatz, 447 U.S. 667 (1980); Strickland v. Washington, 466 U.S. 668 (1984); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

cuit Court of Appeals in *R.G. Britton v. Rogers.*[359] Here the Court noted that in *Mathews v. Eldridge* the Supreme Court emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process."[360] The Eighth Circuit determined that under a *Mathews v. Eldridge* analysis additional procedures were valued to the degree in which they reduced the possibility of factual error.[361]

The opinion of the Eighth Circuit was later manifested in two cases in which the United States Supreme Court invoked the *Mathews* test to resolve procedural due process claims in two distinct aspects of criminal procedure, which involved the determination of factual issues.[362] Initially, the Court applied the *Mathews* procedural due process test to determine the constitutionality of a process outlined in the Federal Magistrate Act, 28 U.S.C. § 636(b)(1)(B). This statutory provision allows a district judge to designate a magistrate to conduct hearings regarding suppression of evidence and recommend a decision to the district judge regarding the defense's motion to suppress. The district judge makes his decision, reviewing de novo the recommendation and developed record before coming to a decision. Later, the Court applied the *Mathews* test to determine whether or not procedural due process required that an indigent defendant be provided with a psychiatrist when his mental condition is a relevant part of the defense. In this second case, *Ake v. Oklahoma*, Justice Marshall established concretely the validity of applying the *Mathews* analysis to procedural due process claims, which arise in a criminal context and involve an issue of fact-finding.

359. *R.G. Britton*, 631 F.2d at 579-581 (determining that the sufficiency of the procedural safeguards in place in the sentencing process of the State of Arkansas by applying the *Mathews* procedural due process test).

360. *Id.* at 580.

361. *Id.*

362. *Medina*, 505 U.S. at 437; *e.g., Ake*, 470 U.S. at 77-84 (utilizing the procedural due process test of *Mathews* to determine whether or not due process required that an indigent defendant be provided with a psychiatrist when his mental condition is a relevant part of the defense); *Raddatz*, 447 U.S. 667 (invoking the *Mathews* procedural due process test to determine the adequacy of the procedural protections of process established in the Federal Magistrate Act, 28 U.S.C. § 636(b)(1)(B), which allows district judge to designate a magistrate to conduct hearings regarding suppression of evidence upon which the district judge will have de novo review of outcome).

B. *Application Of* Mathews v. Eldridge *In The Joinder & Severance Process Of RICO Conspiracy Prosecutions*

1. *The Private Interest Of The RICO Conspiracy Defendant*

A RICO conspiracy defendant faces the loss of his freedom, a liberty interest, if convicted of the charge.[363] The term of imprisonment can be for many years and possibly his entire life.[364] In the *Ake* case, Justice Marshal noted that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."[365] In the United States, the importance of accuracy in criminal proceedings is reflected in the "host of safeguards" that have been developed by the Supreme Court since the inception of the Court.[366] Due process does not provide an impenetrable barrier to be free from physical restraint.[367] Instead, it guarantees a fair process of decision-making, which works to protect an individual from the arbitrary loss of his freedom.[368] In addition, it stands for the proposition that fundamental fairness requires that the criminal defendant have "an adequate opportunity to present their claims fairly within the adversary system."[369]

2. *A Proposed Additional Procedure*

In the second phase of the *Mathews v. Eldridge* analysis, it is necessary to assess the risk of erroneously depriving the RICO conspiracy defendant of his liberty. The nature of the private interest in question calls for a careful consideration of this issue. In *Perez,* all ten defendants, despite their level of involvement, faced a sentence of life imprisonment without parole.[370] In essence, the balance of their lives was at issue in determining whether or not their cases should be severed. Several factors earlier discussed indicate that there is a strong chance that the RICO conspiracy defendant will be

363. 18 U.S.C. § 1963 (a)(1999).
364. *Id.*
365. *Ake,* 470 U.S. at 78.
366. *Id.*
367. Pac. Mut. Ins. Co. v. Haslip, 499 U.S. 1, 28-32 (1991) (Scalia, J., concurring) (discussing the definition and attributes of due process).
368. *Id.*
369. Ross v. Moffitt, 417 U.S. 600, 612 (1974).
370. Maro Robbins, *Last Gang Member Given Life Sentence,* SAN ANTONIO EXPRESS-NEWS, July 10, 1999, at 2B.

erroneously deprived of his freedom. These factors arise from the enhanced spill-over effect inherent in RICO conspiracy prosecutions.[371] It is not reasonable to expect a jury to be able to accurately assess each defendant's culpability based "solely upon that defendant's own acts, statements and conduct" in the face of a mammoth amount of evidence generated by the government and numerous defendants upon whom to discern.[372] The risk of erroneous deprivation is high in light of the fact that the courts do not identify these factors and severance decisions are made with the backdrop of a presumption in favor of joint trials.[373]

To decrease the substantial risk of erroneously depriving the RICO conspiracy defendant of his liberty, the Federal Rules of Criminal Procedure should be amended to account for the issues that arise in the joinder-severance process due to the enhanced "spill-over" effect present in RICO conspiracy prosecutions. Specifically, a provision should be added to Rule 8 that reflects such a consideration. The proposed provision should require the government to file along with the indictment a separate memorandum to the court, which specifically enumerates what conduct the government intends to prove against each defendant. Procedurally, the Memorandum of Specific Conduct (MOSC) should be filed with the court for inspection in camera and discussed in an ex parte hearing to protect the work product of the Assistant United States Attorney (AUSA).

The MOSC should specify for each co-defendant the "who, what, when, where and how" that comprises the basis of the government's indictment.[374] In essence, the government would be required to "plead" the offense with particularity.[375] The specificity of the MOSC would allow the judge to make an informed decision regarding severance based on specific conduct and circumstances. In addition, it would give her a more complete view of the enterprise, including its structure, racketeering activities and alleged level of

371. *Supra* notes 287-345 and accompanying text (discussing the current procedures and presenting their insufficiency in RICO conspiracy prosecutions).

372. United States v. Fernandez, 892 F.2d 976, 990 (11th Cir. 1989).

373. Zafiro v. United States, 506 U.S. 534, 539 (1993).

374. *C.f.* United States v. Smithkline Beecham Clinical Lab., Inc., No. CIV. A. 96-1380, 2000 WL 17838, at *3 (E.D. La. Jan. 10, 2000) (describing the requirements of Rule 9(b) of the Federal Rules of Civil Procedure and noting that, in pleadings, plaintiffs are required to plead "averments of fraud or mistake" with particularity).

375. *Id.*

individual participation among the alleged co-conspirators. The proposed provision would increase judicial efficiency by setting out the case for the judge in advance of trial. With this view of the case, the judge would be alerted to specific issues in the case and be prepared to address them more effectively in pre-trial proceedings. The MOSC would allow the judge to make a meaningful and informed decision in regards to severance. The inadequacies of the current procedures encourage the trial judge who attempts to contemplate the need for severance to decide in favor of joinder; a defeatist attitude of "wait and see" in hopes of working it out in trial.[376] Unfortunately for the RICO conspiracy defendant, this wait and see attitude comes too late, when conviction is inevitable and success in appeal is remote.

3. The Governmental Interest

Finally, the government's interest must be considered. Generally, the government has a huge stake in the joinder decision. Multi-defendant trials are economically as well as strategically advantageous to the government.[377] Both the judiciary and the prosecution conserve a vast amount of resources.[378] Witnesses are not subjected to multiple trials, allowing the government to present the entire case at one time.[379] For these reasons joint trials are considered "an essential element of the quick administration of judgment."[380] At the same time, these obvious governmental concerns must be tempered "by [the government's] interest in the fair and accurate adjudication of criminal cases."[381] Thus, the government cannot maintain the strategic advantage provided by the creation of RICO conspiracy over co-defendants if the result of that advantage would place the accuracy of the verdict at issue.[382]

Complying with this proposed provision would add minimal burden to the government because of the existing policies within the Department of Justice regarding RICO prosecutions. The Justice Department recognizes that RICO prosecutions are "different"

376. Interview with Camara, *supra* note 289.
377. Zafiro v. United States, 506 U.S. 534, 536 (1993); Richardson v. Marsh, 481 U.S. 200, 209 (1987).
378. United States v. Andrews, 754 F. Supp. 1161, 1171 (N.D. Ill. 1990).
379. *Id.*
380. United States v. Walters, 913 F.2d 388, 393 (7th Cir. 1990).
381. Ake v. Oklahoma, 470 U.S. 68, 79 (1985).
382. *See generally Ake*, 470 U.S. at 79.

and has adopted internal procedures, which ensure enhanced supervision of RICO prosecutions.[383] The assigned AUSA is already required to prepare an internal document with much more detail than is being proposed for the MOSC.[384]

In addition to building the case with the evidence at hand in preparation for grand jury proceedings and formulation of the indictment, the AUSA must prepare along with her internal prosecution memorandum, an additional memorandum that summarizes the case in every detail.[385] These documents are forwarded to the Organized Crime & Racketeering Section of the Criminal Division of the Department of Justice in Washington D.C. for approval to move forward with the RICO prosecution.[386] A case will not be filed under the RICO statute without this approval.[387] If the AUSA was required to submit the Memorandum of Specific Conduct to the court along with the indictment, the AUSA would merely need to draw from this existing document to comply with the proposed

383. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL Ch. 110 (1992).

384. *Id.* Another benefit of adopting the requirement to generate a Memorandum of Specific Conduct is that many courts believe that the prosecution shares the burden of ensuring that the proceedings are fair in multi-defendant prosecutions. *See* United States v. Andrews, 754 F. Supp. 1197, 1199 (N.D. Ill. 1990) (noting that government has the responsibility to assist courts in developing an equitable severance plan because the government is the only party with knowledge of evidence prior to trial); *see also* United States v. Casamento, 887 F.2d 1141, 1152 (2d Cir. 1989) (noting that district courts should receive assistance from government in severing a mega-trial to ensure a fair and efficient plan of severance).

385. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL Ch. 110 (1992).

386. *Id.* In determining the appropriateness of the "fit", the AUSA must consider the specific advantages and disadvantages of charging under the RICO statute related to her case. U.S. Department of Justice, Criminal Division, Organized Crime & Racketeering Section, Douglas E. Crow & Miriam Banks, *Racketeering Statutes In Gang Prosecutions* 1, 1 (Apr. 22, 1998). In the prosecution of gangs, the AUSA may take advantage of numerous benefits. *Id.* For one, the prosecution may try defendants who were members of the enterprise together. *Id.* In addition, the prosecutor may join a number of crimes together including state crimes, crimes committed in other jurisdictions, and crimes where the statute of limitations has run. *Id.* In addition, there are numerous evidentiary advantages. The AUSA will be able to get evidence from other crimes admitted. *Id.* Furthermore, rather than being restricted to presentation of evidence about a single crime or a series of crimes, the AUSA will be able to introduce evidence concerning the existence of the criminal organization and the defendant's contact with it. *Id.* Finally, the AUSA will be able to consider sentencing benefits and the possibility of forfeitures. *Id.* Of some concern may be the added complexity of charging under RICO. Preparation and presentation of the evidence must be carefully considered and facilitated in a way that even the most unsophisticated of jurors could understand. *Id.*

387. *Id.*

provision.

IV. CONCLUSION

The RICO conspiracy statute ingeniously allows the government to dismantle a criminal organization through the prosecution of its members and those associated with it for a variety of crimes in one trial. RICO conspiracy provides the government with a more efficient, effective and expansive way to make this strike. In the process, it prevents the RICO defendant from having a fair trial in violation of the Fifth Amendment Due Process Clause. A constitutional violation occurs because there is a substantial increase in the likelihood that the jury in a multi-defendant RICO prosecution will not be able to make an accurate judgment because of the resulting enhanced spill-over effect. Hence, the RICO conspiracy defendant will effectively be prevented from having a fair trial.

Due Process is a dynamic concept that requires such procedural protections as each individual situation necessitates. The proposed Memorandum of Specific Conduct would allow the judge to consider the merits of a motion to sever in a more meaningful way than with an indictment alone. By providing additional procedural safeguards in the pretrial process, alleged RICO co-conspirators will be ensured a fair trial. It is important to reflect upon the fact that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process."[388] The Federal Rules of Criminal Procedure must provide the RICO conspiracy defendant with a meaningful way to individualize his case in relation to his co-defendants.

388. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).