INDICTMENTS

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INDICTMENTS

JOINDER/SEVERANCE:

The Federal Rules of Criminal Procedure freely allow the joinder of several offenses against a single defendant, as well as several defendants for trial. The Government has a tendency to consolidate as many offenses and defendants in a single trial as is conceivably possible. While this most certainly serves the interest of judicial economy and convenience, "[few will deny that there is a positive correlation between the number of defendants and offenses accumulated within a single trial and the likelihood of conviction". Moore's Federal Practice-Criminal Rules, §8.02[2]. Accordingly, every effort should be made by a defendant to avoid such dangers where his desire for an acquittal outweighs his interest in the judicial convenience of a mass trial.

Rule 8(a) of the Federal Rules of Criminal Procedure provides that two or more offenses may be charged in separate counts of the same indictment or information where the offenses are:

1. out of character,

2. based on the same act or transaction, or

3. based on two or more acts or transactions connected together or constituting parts of a common scheme or design.

Rule 8(b) of the Federal Rules of Criminal Procedure provides that two or more defendants may be charged in the same indictment or information where they are alleged to have participated in:

1. the same act or transaction, or

See: *US v. Olander,* 584 F.2d 876 (9th Cir. 1978);
US v. Roell, 487 F.2d 395 (8th Cir. 1973);
US v. Hoffa, 349 F.2d 20 (6th Cir. 1965), *aff'd*, 385 US 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

2. in the same series of acts or transactions constituting an offense or offenses.

See: *US v. Santoni,* 585 F.2d 667 (4th Cir.), *cert. denied*, 440 US 910, 99S.Ct. 1221, 59L.Ed.2d 459 (19780; *US v. Velasquez*, 772 F.2d 1348 (7th Cir. 1985).

Rule 13 of the Federal Rules of Criminal Procedure provides that two or more indictments or informations may be tried together if the offenses and the defendants could have been joined in a single indictment or information.

Rule 14 of the Federal Rules of Criminal Procedure provides that where it appears that prejudice will result from a joint trial of either offenses or defendants for separate trial.

DISTINCTION BETWEEN "MISJOINDER" UNDER RULE 8 AND "PREJUDICIAL" JOINDER UNDER RULE 14:

While Rule 14 provides the proper remedy for prejudicial joinder of offenses or defendants, that rule presupposes that the original joinder was proper under Rule 8, F.R.CR.P.. Rule 14 provides for the severance of offenses or defendants properly joined under Rule 8, F.F.Cr.P., "where prejudice would result from their joint trial". Moore's Federal Practice-Criminal Rules, §14.02[1]; *Drew v. US* 331 F.2d 85 (D.C. Cir. 1964); *Roth v. US*, 339 F.2d 863 (10th Cir. 1964). The determination of "prejudice", however, is left to the "discretion" of the trial court, and accordingly, appellate review is limited solely to abuse of that discretion. *Opper v. US*, 348 US 84 (1954); *US v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 US 999 (1971); *US v. Dryder*, 423 F.2d 1175 (5th Cir.), *cert. denied*, 398 US 950 (1970).

On the other hand, where the propriety of the joinder under Rule 8, F.R.CR.P., is questioned the defendant is not saddled with the burden of demonstrating prejudice and once it is demonstrated that the joinder was improper under Rule 8, severance is mandatory. *Tillman v. US*, 406 F.2d 930, 933, n. 5 (5th Cir. 1969); *US v. Friedman,* 445 F.2d 1076 (9th Cir. 1971); *US v. Grasso*, 55 F.R.D. 288 (D.C. Pa. 1972); Moore's, Federal Practice-Criminal Rules, 14.02[1]; 1 Wright, Federal Practice and Procedure: Criminal, 144.

Therefore, it is important for counsel to distinguish between whether the relief sought. Whether it is from "misjoinder" under Rule 8, F.F.CR.P., or from "prejudicial joinder" under Rule 14, F.R.CR.P..

However, the United States Supreme Court has since held that misjoinder of defendants under Rule 8(b), is "subject to harmless error analysis and is not reversible per se." *US v. Lane*, 88 L.Ed.2d 814, 815 (1986). Reversal is required only where the misjoinder results in actual prejudice having a "substantial and injurious effect or influence in determining the jury's verdict", quoting *Kotteakos v. US*, 328 US 750 (1946).

JOINDER OF OFFENSE:

Rule 8(a), F.R.CR.P., permits joinder of offenses for trial in separate counts of the same indictment where the offenses are of the same character, or are based on the same act or transaction or constitute parts of a common scheme or design.

SIMILAR OFFENSE (WITHIN SHORT PERIOD OF TIME):

Courts have held that in addition to requiring that the offenses be of the "same or similar character" the joined offenses must have occurred over a relatively short period of time. *US v. Rogers*, 732 F.2d 625 (8th Cir. 1984) [holding a 20 month period to meet the test].

MISJOINDER:

Where a single indictment joins offenses, other than as provided above, such constitutes a "misjoinder" of offenses. *US v. Goodman*, 285 F.2d 378, 379 (5th Cir. 1960), *cert. denied*, 366 US 930, and failure to grant a severance for separate trial of such offenses constitutes reversible error, regardless of whether a showing of specific prejudice is made. *US v. Marionneaux*, 514 F.2d 1244 (5th Cir. 1973); *US v. Sutton*, 605 F.2d 260 (6th Cir. 1979); *US v. Chinchic*, 655 F.2d 547 (4th Cir. 1981). *See also US v. Werner*, 620 F.2d 922 (2nd Cir. 1980); *Tillman v. U.S.*, 406 F. 2d 930, 933, n. 5 (5th Cir. 1969); Moore's Federal Practice and Procedure: Criminal, §14.02[1]; Wright, Federal Practice and Procedure: Criminal, §144. Contra: *US v. Friedman*, 445 F.2d 1076 (9th Cir. 1971); *US v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 63 L.Ed.2d 780 (1980). The vice inherent in "misjoinder", which Rule 8(a) attempts to negate, is the harmful spill-over effect of trying an accused for unconnected offenses in the same trial.

IMPROPERLY CHARGED OFFENSES:

Indictments may also be infirm because of the manner in which the offenses are charged. An indictment my not charge a defendant with the same offense in a multiple counts nor may one count of an indictment contain several different offenses. Each of these practices violate due process by increasing the chances that a person will be convicted based only on the manner the offenses are charged.

"MULTIPLICITOUS" INDICTMENT:

First, the situation where a single indictment charges the same offense in various counts of the indictment; such constitutes a "multiplicitous" indictment. *Gerberding v. US*, 471 F.2d 55, 58 (8th Cir. 1973). The vice inherent in a multiplicitous indictment (one offense charged in several counts of the same indictment) is that the defendant may be caused to suffer multiple sentences for the same offense, or the indictment may have the effect of suggesting to a jury that the defendant has committed several crimes rather than one. *US v. Mamber*, 127 F.Supp. 925, 927 (D.C. Mass. 1955); *US v. Provizano*, 50 F.R.D. 361 (D.C. Wis.1974). *See US V. Digeronomo*, 598 F.2d 746 (2nd Cir. 1979) [reversible error for trial court not to instruct jury against convicting defendant of both Hobbs act violation and 18 U.S.C. §659 (interstate transportation) charged in same indictment].

But See: *US v. Salas-Camacho*, 859 F.2d 788 (9th Cir. 1987) [identical false statements made to two customs inspectors, with differing functions, are chargeable as separate violations of 18 U.S.C. §1001].

"DUPLICITOUS" INDICTMENT:

Second, where the same count of an indictment charges two or more separate offenses, such constitutes a "duplicitous" indictment. *US v. Goodman*, 285 F.2d 378, 379-380 (5th Cir. 1960), *cert. denied*, 366 US 930 (1961); *Gerberding v. US*, 471 F.2d 55, 59 (8th Cir. 1973). The vice inherent in "duplicitous" pleading is that there is no way to determine from the general verdict of "guilty", upon which of the several offenses charged in the same count the defendant was convicted. This makes proper assessment of punishment difficult, deprives the defendant of his right under the Sixth Amendment and Rule 7(c), F.R.CR.P., to notice of the nature of the accusation against him in order to adequately prepare a defense, and exposes the defendant to the likelihood that the difficulty in determining the particular offense upon which he was convicted will subject the defendant to double jeopardy. *US v. Leggett*, 312 F.2d 566, 570 (4th Cir. 1962). Also where evidence at trial constitutes a constructive amendment of the indictment and not merely a variance in proof, same constitutes a violation of the Grand Jury Clause of the Fifth Amendment. *US v. Zingaro*, 858 F.2d 94 (2nd Cir. 1988); *US v. Glenn*, 828 F.2d 855 (1st Cir. 1987).

But See: *US v. Zeidman*, 540 F.2d 314 (7th Cir. 1976) [indictment not duplicitous where the two acts alleged in one count originate from one transaction];
US v. Outpost Development Co., 552 F2d 868 (1977) [allegations in a single count that a Defendant committed an offense by one or more specific means held proper];
US v. North, 708 F.Supp. 372 (D.D.C. 1988) [indictment not duplicitous when efforts to impede or obstruct separate congressional inquiries were closely related in time and involve somewhat separate questions].

Failure to raise claim that indictment is duplicitous prior to trial may constitute waiver. *US v. Elam*, 678 F.2d 1234 (5th Cir. 1982).

REMEDY FOR "MULTIPLICITOUS" OR "DUPLICITOUS" PLEADING [ELECTION OF "OFFENSES" OR "COUNTS"]:

The Remedy available for "duplicitous" or "multiplicitous" pleading is to move to have the Government elect upon which charge they desire to proceed. In the case of a "duplicitous" indictment the Government should be required to elect that offense charged in the same count upon which it will rely and limit its proof to that offense. *US v. Goodman*, 285 F.2d 378, 380 (5th Cir. 1960), *cert. denied*, 376 US 919 (1961); *Thomas v. US*, 418 F.2d 567 (5th Cir. 1969). In the case of a "multiplicitous" indictment, the Government should be required to elect which of the counts upon which it wishes to proceed and to dismiss those counts not elected. *US v. Universal C.I.V. Credit Company*, 344 US 218, 225 (1952); *US v. Greenberg*, 344 US 218, 225 (S.D. N.Y. 1962); *US v. Greenberg*, 30 F.R.D. 164 (S.D.N.Y. 1962); Wright, Federal Practice & Procedure: Criminal, §145.

REMEDY FOR "MISJOINDER" OF OFFENSES [Rule 8a] [SEVERANCE FOR SEPARATE TRIAL]:

Where different offenses are improperly joined in separate counts of the same indictment in violation of Rule 8(a), F.R.CR.P., such constitutes a "misjoinder" of offenses, and a severance of the offenses for separate trial is the proper remedy. *US v. Goodman*, 285 F.2d 378 (5th Cir. 1960), *cert._denied*, 366 US 930 (1961); *US v. Bally Mfg. Corp.*, 345 F. Supp 410 (E.D. La. 1972); *Kleven v. US*, 240 F.2d 270 (8th Cir. 1957). *See also US v. Coleman*, 497 F. Supp. 619 (N.D. Ill. 1980); *US v. Bradford*, 487 F. Supp 1093 (D.C. Conn. 1980). The trial court has no discretion to deny a severance of improperly joined offenses whether the defendant can show harm or not. *Tillman v. US*, 406 F.2d 930, 933, n. 5 (5th Cir. 1969); *US v. Marrioneaux*, 514 F.2d 1244, 1248 (5th Cir. 1973); *US v. Pacente*, 490 F.2d 661 (7th Cir. 1973), *aff'd on rehearing*, 503 F.2d 543 (7th Cir.), *cert. denied*, 419 US 1048 (1974).

REMEDY FROM "PREJUDICIAL" JOINDER [Rule 14] [SEVERANCE FOR SEPARATE TRIAL]:

Where the offenses set out in separate counts of the same indictment are properly joined, pursuant to Rule 8(a), F.R.CR.P., but the defendant can demonstrate "prejudice" from such joinder, the defendant is entitled to a severance and separate trial of said offenses under Rule 14, F.R.CR.P.: *Cf. United States v. Burke,* 789 F. Supp. 2d 395, 399 (E.D.N.Y. 2011) (finding severance appropriate despite proper joinder under Rule 8(a) where defendant was charged with two counts limited in their scope and time within an ongoing RICO conspiracy three decades in the making). Whenever offenses are joined for trial the potential for prejudice arises, *King v. US*, 355 F.2d 700, 703 (1st Cir. 1966), and the trial court should remain alert to this possibility. *US v. Crawford*, 581 F.2d 489 (5th Cir. 1978) (citing *Shaffer v. US*, 362 US 511 (1960)); *US v. Clark*, 480 F.2d 1249 (5th Cir.) *cert. denied*, 414 US 978 (1973). In determining whether a severance is warranted under Rule 14 the trial judge is entitled to consider the interests of the judicial economy as against the prejudice or harm caused the accused. *US v. Forrest*, 623 F.2d 1107, 1115 (5th Cir.), *cert. denied*, 449 US 924 (1980); *US v. Benz*, 740 F.2d 903 (11th Cir. 1984). However as set out above, the determination of "prejudice" is left to the sound "discretion" of the trial court, and appellate review is limited to abuse of that discretion. *Opper v. US*, 348 US 84 (1954); *US v. Dryder*, 423 F.2d 1175 (5th Cir.), *cert. denied*, 398 US 950 (1970); *US v. Lewis*, 787 F.2d 1315 (9th Cir. 1986).

> "The decision to grant or deny a motion for severance under Rule 14 is committed to the broad discretion of the trial court. *US v. Webster*, 734 F.2d 1048, 1052 (5th Cir. 1984), petition for cert. filed. To demonstrate an abuse of discretion, the defendant bears a heavy burden of showing 'specific and compelling' prejudice, *US v. Scott*, 659 F.2d 585, 589 (5th Cir. 1981), *cert. denied*, 459 US 854, 103 S.Ct. 121, 74 L.Ed.2d 105 (1982), resulting in an 'unfair trial', Webster, 734 F.2d at 1052." *US v. Chagra*, 754 F.2d 1186 (5th Cir. 1985).

Courts have required a defendant appealing an adverse ruling on severance, after conviction, to demonstrate "compelling prejudice" such as the fact that a jury would be unable to collate and appraise the independent evidence against each defendant, *US v. Benz*, Supra, or "that the jury's perception of the defendant will be so adversely affected by the evidence of the prior crimes is so strong as to create a presumption favoring severance". *US v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986).

JOINING UNRELATED CRIMES "OF THE SAME OR SIMILAR CHARACTER" CREATES DANGER OF PREJUDICE":

The joinder of offenses that are "of the same or similar character" creates the greatest danger of prejudice to the defendant, and where same arises out of separate, unrelated transactions, criticism has been severe. *US v. Halper*, 590 F.2d 422 (2d Cir. 1978); *Drew v. US*, 331 F.2d 85 (D.C. Cir. 1964); *US v. Lotsch*, 102 F.2d 35 (2d Cir.) *cert. denied*, 307 US 622 (1939); *US v. Nadler*, 353 F.2d 570 (2nd Cir. 1965); *US v. Smith*, 112 F.2d 83 (2d Cir. 1940): *Dummill v. US*, 297 F.2d 34 (8th Cir. 1961); *Edwards v. Squier*, 178 F.2d 758 (9th Cir. 1949); *Patterson v. US*, 324 F.2d 310 (5th Cir. 1963). *See also* Wright, Federal Practice and Procedure: Criminal, §143; Moore's Federal Practice- Criminal Rules, §14.03 [describing such joinders as "inherently prejudicial"], and 8.05(2) and 8.06(1).

Clearly, the danger of prejudice is present where a defendant is forced to defend against unrelated crimes in the same trial. In *US v. Lotsch*, 102 F.2d 35 (2d Cir.), *cert. denied*, 307 US 622 (1939), Judge Learned Hand spoke to the issue:

> "There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition." *US v. Lotsch, Supra*, at p. 36.

And in *US v. Smith*, 112 F.2d 83, 85 (2d Cir. 1940), the Second Circuit noted that "even when cautioned, juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one." *See also US v. Nadler*, 353 F.2d 570, 572 (2d Cir. 1965).

In *US v. Halper*, 590 F.2d 422 (2d Cir. 1979), discussed more thoroughly below, the Court listed disadvantages and dangers to the defendant created by joinder of otherwise unrelated offenses:

> "The disadvantage to which a defendant is put and the potential danger to which a defendant is exposed by joinder of offenses of 'same or similar character' are easily understood. As explained by the Court of Appeals for the District of Columbia Circuit:

> (1) [the defendant] may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one." *US v. Halper, Supra*, at p. 430, quoting *Drew v. US*, 331 F.2d 85,88 (D.C. Cir. 1964).

MISJOINDER UNDER RULE 8(a) IS INHERENTLY PREJUDICIAL:

Likewise, the Fifth Circuit has noted that the prejudice from such misjoinder seems inescapable as the jury would inevitably infer that proof of one crime corroborates the defendant's guilt as to the other unrelated but jointly tried offenses. *US v. Meriwether*, 486 F.2d 1401 (5th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974). *See also*: ABA Minimum Standards Relating to Joinder and Severance, §2.2(a) (approved Draft 1968); *McElroy v. US*, 164 US 76 (1896) [originated rule that misjoinder is prejudicial per se[1]] the Supreme Court recently held that the harmless error rule applies to misjoinder under Rule 8(b), *US v. Lane*, 88 L.Ed.2d 814, 815 (1986).

SUCH JOINDER IS NEITHER EFFICIENT NOR ECONOMICAL:

Further, the "customary justification" for joinder of offenses "of the same or similar character" disappears when the offenses arise out of separate, unrelated transactions. *US v. Halper*, 590 F.2d 422 (2d Cir. 1979). In *Halper*, where the defendant was convicted in the same trial of unrelated crimes of fraud and income tax evasion, the Second Circuit reversed both convictions, holding that their joinder was prejudicial error. *US v. Halper, Supra*, at p. 431. The Court noted that neither time nor money is saved in trying offenses "of the same or similar character" together:

> "When all that can be said of two separate offenses is that they are of the 'same or similar character,' the customary justifications for joinder (efficiency or economy) largely disappear. Whereas the joinder of offenses 'based on the same act or transaction' or of offenses based 'on two or more acts or transactions connected together or constituting parts of a common scheme or plan' is reasonable and desirable both from the government's and the

[1] In fact, the Fifth Circuit has held that misjoinder of offenses under Rule 8(a) is "inherently prejudicial"; *US v. Bova*, 493 F.2d 33 (5th Cir. 1974).

> defendant's perspective, the same cannot be said for joinder of offenses of the 'same or similar character.' In the former situations, the government should not be put to the task of proving what is essentially the same, or at least connected, charges. *See*: *United States v. McGrath*, supra, 558 F.2d at 1106. In the later circumstance, however, the only time likely saved by joinder of 'same or similar character' offenses is the time spent selecting a jury, and perhaps the time spent examining character witnesses. On the whole, however, the 'trials' on the joined charges are distinct. *See*: 9 Moore's, Federal Practice, §8.05(2), at 8-19. At the same time, the risk to the defendant in such circumstances is considerable." *US v. Halper, Supra*, at 590 F.2d at p.430.

It has been described as "paradoxical" that Rule 8(a) permits joinder of "similar" offenses "while on the practical level the more similar the offenses the greater the chance that the jury will confuse them", Moore's, Federal Practice- Criminal Rules, §14.03

STANDARD OF REVIEW UNDER RULE 8(a):

The standard to be applied by the appellate court when reviewing the trial court's denial of a motion to sever improperly joined offenses under Rule 8(a) requires reversal *only* when the misjoinder results in actual prejudice having a "substantial and injurious effect or influence in determining the jury's verdict." *US v. Lane*, 88 L.Ed. 2d 814, 815 (1986); *see also Kotteakos v. US*, 382 US 750 (1946); *US v. Grey Bear*, 863 F.2d 572 (8th Cir. 1988); *US v. Castro*, 829 F.2d 1038, 1046 (11th Cir. 1987).[2]

This holding has resolved the conflict among the Circuit Courts in regard to Rule 8(b). But significantly, the High Court did not extend its holding to include Rule 8(a). The argument could be advanced, therefore, that Rule 8(a) retained the more stringent "prejudicial per se" standard. This is not how federal courts in the Fifth Circuit have interpreted the holding in *Lane*. *United States v. Williams,* 2021 WL 1063068 (E.D. Louisiana 2021) ("Rule 8(b) articulates *a more stringent test.* . . . [Lane] effectively overrul[ed] cases holding or implying that misjoinder under Rule 8 is inherently prejudicial.")

JOINDER OF DEFENDANTS [Rule 8b]:

As set out above, Rule 8(b), F.R.CR.P., permits joinder of defendants for trial where such defendants are alleged to have participated:

1. in the same act or transaction, or
2. in the same series of acts or transactions constituting an offense or offenses.

[2] Historically, the circuits were split on this issue. *See generally US v. Turkette*, 632 F.2d 896, 906 (1st Cir. 1980), rev'd on other grounds, 452 US 576 (1981); *US v. Graci*, 504 F.2d 411, 414 (3d Cir. 1974); *US v. Bledsoe*, 674 F.2d 647, 654, 657-58 (8th Cir.), cert. denied by *Phillips v. US*, 459 US 1040 (1982); *US v. Eagleton*, 417 F.2d 11,14 (10th Cir. 1969); *US v. Ellis*, 709 F.2d 688, 690 (11th Cir. 1983).

Previously the determination of "prejudice" under Rule 14, F.R.CR.P., is left to the trial court's discretion and may be overturned only upon a showing of abuse of that discretion, relief from a "misjoinder" of defendants under Rule 8(b), F.R.CR.P., has been held to be mandatory and a failure to grant a timely request is not regarded as harmless error. *US v. Nettles*, 570 F.2d 547 (5th Cir. 1978); *US v. Eggleston*, 417 F.2d 11, 14 (10th Cir. 1969); *Chubert v. US*, 414 F.2d 1018, 1021 (8th Cir. 1969); *Cupo v. US*, 359 F.2d 990, 993 (D.C. Cir. 1966) *cert. denied*, 385 US 1013 (1967); *US v. Spector*, 272 F.2d 567, 570-571 (7th Cir. 1959); *US v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *vacated on rehearing by* 642 F.2d 1001 (5th Cir.1980); *Tillman v. US*, 406 F.2d 930 (5th Cir. 1969), *vacated on other grounds as to one defendant, cert. denied as to all others*, 395 US 830; *US v. Bright*, 630 F.2d 804 (5th Cir. 1980) ["inherently prejudicial and thus reviewable on appeal as a matter of law"]. *Contra*: *US v. Friedman*, 445 F.2d 1076 (9th Cir. 1971).

However, as outlined above, the United States Supreme Court has since held that misjoinder of defendants under Rule 8(b), is "subject to harmless error analysis and is not reversible per se". *US v. Lane*, 88 L.Ed.2d 814, 815 (1986). Reversal is required only where the misjoinder results in actual prejudice having a "substantial and injurious effect or influence in determining the jury's verdict", quoting *Kotteakos v. US*, 328 US 750 (1946).

DISTINCTION BETWEEN RULES 8(a) AND 8(b):

OFFENSES OF "SAME OF SIMILAR CHARACTER":

One striking difference between the offenses that may be joined pursuant to Rule 8(a) and the defendants that may be joined pursuant to Rule 8(b) is that Rule 8(a) permits joinder of offenses on the sole basis that such offenses are of the "same or similar character", regardless of whether such offenses arise out of the same transaction, while Rule 8(b) will not allow the joinder of such "same or similar" offenses in a case where multiple defendants are involved unless such offenses arose out of the same series of acts or transactions. *Matheny v. US*, 365 F.2d 90, 94 (9th Cir. 1966); *Granello v. US*, 365 F.2d 990, 993 (D.C. Cir. 1966); *King v. US*, 355 F.2d 70 (1st Cir. 1966); *US v. Spector*, 326 F.2d 345; 349-351 (7th Cir. 1963); *Williamson v. US*, 310 F.2d 192, 197, n. 16 (9th Cir. 1962); *US v. Roselli*, 432 F.2d 879, 898 (9th Cir. 1970), *cert. denied*, 401 US 934; *US v. Diaz-Munoz*, 632 F.2d 330 (5th Cir. 1980); *US v. Kopitive*, 690 F.2d 1289, 1312 (5th Cir. 1982); *US v. Maggit*, 784 F.2d 590, 594 (5th Cir. 1986).

Thus, a severance should be granted under Rule 8 on the grounds of "misjoinder" where (1) two defendants are alleged to have committed similar offenses but the indictment does not allege that such offenses arose out of the same transaction; or (2) where the defendants are charged with offenses arising out of the same series of transactions, and one defendant is additionally charged with an unrelated but "similar offense; or (3) where the defendants are both charged out of several separate transactions, but there is no allegation that these transactions were related or part of the same series of acts or transactions, Wright, 1 Federal Practice and Procedure: Criminal Rules, §§143, 144.

PROPRIETY OF JOINDER VIEWED FROM FACE OF INDICTMENT:

The propriety of joinder under Rule 8 must be determined from the face of the indictment. *US v. Grassi*, 616 F.2d 1295, 1302 (5th Cir. 1980). By its express terms, Rule 8(b) of the Federal Rules of Criminal procedure permits joinder of defendants only "if they are alleged to have participated" in the same transaction or series of transactions (emphasis supplied) Rule 8(b), F.R.CR.P.. *See Schaffer v. US*, 362 US 511 (1960); *Jackson v. US*, 329 A.2d 782-787 (D.C. App. 1974). Accordingly, it is appropriate to determine whether severance is required under Rule 8, by "looking to the indictment alone". Moore's, Federal Procedure, Par. 8.06[3], at p. 839. *US v. Hatcher*, 860 F.2d 438, 441 (6th Cir. 1982).

In testing whether a joinder of defendants meets the test of Rule 9(b), the indictment must allege that each defendant participated in the same series of acts or transactions in which all of the other defendants participated. Moore's, Federal Practice-Criminal Rules, §8.06(3); *Williamson v. US* 310 F.2d 192, 197, n. 16 (9th Cir. 1962); *US v. Gaugis*, 374 F.2d 758 (7th cir. 1967); *US v. Matheny*, 365 F.2d 90, 94 (9th Cir. 1966), although it is not necessary that each defendant participated in each act or transaction in the series. *US v. Gimelstob*, 475 F.2d 157, 160 (3d Cir. 1973), *cert. denied*, 414 US 828; *James v. US*, 416 F.2d 467 (5th Cir. 1969), *cert. denied*, 397 US 907 (1970).

See also: *US v. Gallo*, 668 F.Supp. 736, 747 (E.D.N.Y. 1987), *aff'd*, 863 F.2d 185 (1988).

> "Joinder under Rule 8(b), therefore, is automatically authorized simply through the RICO conspiracy charge, which supplies the 'sufficient nexus' to tie the various defendants and the diverse predicate offenses together."

RULE 8(b) GOVERNS SEVERANCE OF DEFENDANTS OR OFFENSES IN MULTIPLE DEFENDANT CASES:

Where two or more defendants are charged, Rule 8(b) governs both joinder of offenses and defendants. *US v. Jackson*, 562 F.2d 789, 793 (D.C. Cir. 1977); *US v. Park*, 531 F.2d 754, 760, n. 4 (5th Cir. 1976).

Joinder of defendants in the same indictment is permissible under Rule 8(b) if the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting and offense. *Schafer v. U.S.*, 362 US 511, 514 (1960). If the conspiracy count is dismissed, however, Rule 14 of the Federal Rules of Criminal Procedure states that the defendants should be severed before submitting the case to the jury. *Schafer v. U.S.*, 362 US 511, 514 (1960). If the government fails to sever the defendants prior to submitting the issue to trial, Rule 14 provides for a new trial upon the showing that the defendants were prejudiced by the non severance. *Schafer v. U.S.*, 362 US 511, 514 (1960)

CONSPIRACY:

Conspiracy itself constitutes an offense, and where a conspiracy is charged, special problems present themselves with respect to joinder of defendants. Generally speaking, the Government will make a prima facie showing that otherwise unrelated transactions are part of a "series" by charging a conspiracy. Moore's Federal Practice-Criminal Rules, §8.06[2]; *King v.*

US, 355 F.2d 700, 704 (1st Cir. 1966); *US v. Hewes*, 729 F.2d 1302 (11th Cir. 1984); *US v. Dickey*, 736 F.2d 571 (10th Cir. 1984). However, where the single conspiracy which is alleged in fact constitutes several separate and distinct conspiracies, a severance should be allowed. Moore's Federal Practice- Criminal Rules, §8.06[4]; *Kotteakos v. US*, 328 US 750 (1946); *US v. Gentry*, 1071 (5th Cir. 1988) ["the Supreme Court found in *Kotteakos* that the parties suffered prejudice to their substantial rights from the 'dangers of transference of guilt from one to another across the line separating conspiracies'"]; *US v. Goss*, 329 F.2d 180 (4th Cir. 1964); *US v. Varelli*, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, *Saletcko v. US*, 405 US 1040 (1972); *US v. Saporta*, 270 F. Supp 183 (S.D.N.Y. 1967); *US v. Wasson*, 568 F.2d 1214 (5th Cir. 1978) [joinder of five unrelated conspiracies improper]; *US v. Camiel*, 689 F.2d 31 (3rd Cir. 1982) [directed verdict warranted where government failed to show a common scheme "involving all of the alleged co-schemers". Although it would appear none was required the court found prejudice because of the spillover effect of the evidence relating to other defendant's schemes].

On the other hand the Supreme Court has held that the mere fact the conspiracy count is dismissed prior to submission of the substantive counts to the jury does not warrant severance, unless prejudice is shown. *Schafer v. US*, 362 US 511 (1960).

DOUBLE JEOPARDY BARS MULTIPLE PROSECUTIONS FOR THE SAME OFFENSE:

"Specifically, the double jeopardy bar provides three categories of protection:

> "[I]t protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (emphasis supplied) *US v. Nichols*, 741 F.2d 767 (5th Cir. 1984).

See: *Brown v. Ohio*, 432 US 161, 165 (1977);
North Carolina v. Pearce, 395 US 711 (1969);
US v. Kalish, 734 F.2d 194 (5th Cir. 1984).

See also: *US v. Miller*, 870 F.2d 1067 (6th Cir. 1989) [manufacturing marijuana and possession of marijuana with intent to distribute are separate offenses].

And where alleged "conspiracy" involves one continuing "pattern" then the Government should be entitled to but "one pound of flesh" regardless whether the personnel involved shifted.

> "Whether one uses similes of wheels, hubs, or spokes, the result should be the same. A mere shuffling of personnel in an ongoing operation with an apparent continuity will not, alone, suffice to create multiple conspiracies." *US v. Nichols, Supra*, 741 F.2d 767 (5th Cir. 1984).

See also: *US v. Bernhardt*, 831 F.2d 181 (9th Cir. 1987) [federal prosecution after unsuccessful state prosecution might be an impermissible

> sham to give the state another bite at the apple where state was paying salary of the state prosecutor who had been made a special U.S. Attorney for purposes of pursuing the second action and where action was not pursued until federal authorities were contacted by the state prosecutor];
> *US v. Kalish*, 690 F.2d 1144 (5th Cir. 1977); and
> *US v. Scott*, 555 F.2d 522 (5th Cir. 1977);
>
> > "[T]he participants shared a continuing, common goal of buying and selling [drugs] for profit; the operations of conspiracy followed an unbroken and repetitive pattern; and the cast of conspirators remained much the same." *US v. Ruigonez*, 576 F.2d 1149, 1151 (5th Cir. 1978).

TEST AS TO WHAT CONSTITUTES "SAME SERIES OF ACTS OR TRANSACTIONS":

Each of the individuals joined for trial need not be charged in each of the substantive counts of an indictment where all of the substantive offenses arose out of the same conspiracy. *Shaffer v. US*, 362 US 511 (1960); *Wangron v. US*, 399 F.2d 106 (8th Cir.), *cert. denied*, 393 US 933 (1968).

"Transaction" has been held to be a flexible term implying some logical connection between the offenses, rather than any temporal immediacy between the acts. For example, concealment activities have been held to be properly joined under Rule 8 such as where obstruction of justice charges relate to efforts to conceal evidence of the underlying conspiracy and substantive counts. *US v. Carmichael*, 685 F.2d 903 (4th Cir. 1982).

COMMON DEFENDANTS ALONE INSUFFICIENT:

However, it is not sufficient for joinder under Rule 8(b) for the "sole connection between the offenses" to be "the presence" of several common defendants. *US v. Levine*, 546 F.2d 658 (5th Cir. 1977).

> "Especially when, as here, the nexus between the separate groups is the defendants common to each and the mutual identity [similarity] of the counts charged, the transference of guilt from one group of defendants to the other is inexorable. The result is an inherent prejudice that no form of limiting instructions …could absolve." *US v. Levine*, *Supra*.

SAME TIME PERIOD OR STATUTORY VIOLATION ALONE INSUFFICIENT:

The Fifth Circuit has noted that the "suggestion that because two operations existed during the same time period and each group of defendants were charged under the same statute …they could be joined is ludicrous and does not merit discussion". *US v. Nettles*, 570 F.2d 547, n. 6 (5th Cir. 1978).

The mere showing that acts occurred at or about the same time or that such acts violated the same statute is insufficient to demonstrate that the acts constitute a series of acts or transmissions falling within the parameters of Rule 8(b); *US v. Satterfield*, *Supra*; *US v. Martinez*, 479 F.2d 824, 827 (1st Cir. 1973); *King v. US*, 355 F.2d 700, 703 (1st Cir. 1966).

OVERALL SCHEME INVOLVING ALL DEFENDANTS:

The test under Rule 8(b) has been recently stated as follows: "In order to be part of the 'same series of acts or transactions', acts must be part of one overall scheme about which all joined Defendants knew and in which they all participated". *US v. Bledsoe*, 674 F.2d 647, 657 (8th Cir. 1982); *US v. Grassi*, 616 F.2d 1295 (5th Cir. 1980) ["Rule 89b0 permits joinder of defendants 'if they are alleged to have participated in the same …series or acts or transaction…']; *US v. Grey Bear*, 863 F.2d 572 (8th Cir. 1988).

And where the indictment does "…not allege, even inferentially, any connection between" one defendant and the "conduct of other defendants detailed in [other] counts: of the indictment, courts have held severance to be required under Rule 8(b). *US v. Bledsoe*, 674 F.2d 647, 655 (8th Cir. 1982).

> "[f]acts must be alleged which at least suggest the existence of an overall scheme encompassing all the defendants and all the charged offenses." *US v. Bledsoe, Supra*, at P-657.

In *US v. Hatcher*, 680 F.2d 438, 441 (6th Cir. 1982), the Sixth Circuit noted, that "[I]n the present case, the indictment on its face alleges no connection between Monestas and the cocaine related charges against Hatcher… As a matter of law, the joinder of Monestas and Hatcher was, therefore, improper under Rule 8(b)".

MISJOINDER WHERE DIFFERENT FACTS AND CIRCUMSTANCES MUST BE ESTABLISHED TO SUPPORT THE DIFFERENT ALLEGATIONS:

In *US v. Gentile*, 495 F.2d 626 (5th Cir. 1974), the Fifth Circuit recognized that the standard for determining proper joinder was that counts "cannot be properly joined in a multitude defendant trial in different facts and circumstances must be established to support the alleged violations" involving different defendants. *US v. Gentile, Supra*, at p. 630.

> "[t]he criminal activity charged …was not part of a 'series of acts or transactions' under 8(b). The proof required to establish the sale of PCP on October 23 as alleged in Count 2 is entirely different from the proof required to establish the sale of LSD on November 11, as alleged in Count 3." *US v. Gentile, Supra*, at p. 630. *See also US v. Martin* 567 F.2d 849, 853 (9th Cir. 1977).

"WHEELS" AND "CHAINS":

If there are several separate and distinct conspiracies and the only connection between them is a common participant who has conspired with various other individuals regarding those various transactions, such is commonly referred to as a "wheel" conspiracy. There must exist proof that the various individuals at the spokes of the "wheel" knowingly conspired. Wright, Federal Practice Procedure- Criminal Rules, §144; *Kotteakos v. US*, 328 US 750, 754-755 (1946). Where, on the other hand, several individuals are alleged to have participated in various separate stages in a "vertical" operation [i.e. of providing illicit commodities for sale] such is commonly referred to as a "chain" conspiracy, and knowledge of the other participants in the scheme is said to be inferred from the very nature of the undertaking. *US v. Agueci*, 310 F.2d 817, 826-827 (2nd Cir. 1962), *cert. denied*, 372 US 959 (1963).

RULE 14: RELIEF FROM PREJUDICIAL JOINDER:

Where the joinder of defendants for trial is proper under Rule 8(b), F.R.C.P., then a severance of defendants may be obtained only upon showing of "prejudice" and under Rule 14, F.R.CR.P. Such is left to the discretion of the trial court and will be overturned on appeal only upon a showing of an abuse of discretion. *US v. Borain*, 708 F.2d 606, 608 (11th Cir. 1983); *US v. Johnson*, 713 F.2d 633 (11th Cir. 1983); *US v. Day*, 789 F.2d 1217, 1224 (6th Cir. 1986); *US v. Stotts*, 792 F.2d 1318, 1321 (5th Cir. 1986); *US v. Lamp*, 779 F.2d 1088, 1093 (5th Cir. 1986) [must demonstrate compelling prejudice against which trial court could not provide protection]; *US v. Chang An-Lo*, 851 F.2d 547, 1988 WL 66326 (2nd Cir. June 27, 1988). In most cases severance is denied. Wright, Federal Practice and Procedure: Criminal, §223.

> "In seeking to overturn the denial of a Rule 14 motion, '(t)he burden is upon a moving defendant to show facts demonstrating that he will be so severely prejudiced by a joint trial that it would in effect deny him a fair trial. The defendant must demonstrate that he suffered such prejudiced as a result of the joinder, not that he might have had a better chance for acquittal at a separate trial," *US v. Chang An-Lo, Supra*.

As has been previously discussed, prejudice is inherently present in any joint trial of numerous defendants. "[A]ll joint trials …furnish inherent opportunities for unfairness." *Spencer v. Texas*, 385 US 554 (1967). There are "no precise tests applicable" that can provide a foolproof resolution under Rule 14. *See e.g. US v. Moten*, 564 F.2d 620, 627 (2d Cir. 1977).

> "among time factors the court must consider in determining whether the prejudice of a joint trial rises to the level of a 'miscarriage of justice' are the following: the number of defendants and the number of counts; the complexity of the indictment; the estimated length of the trial; disparities in the amount or type of proof offered against the defendants; disparities in the degrees of involvement by defendants in the overall scheme; possible conflict between various defense theories or trial strategies; and, especially, prejudice from evidence admitted only against co-defendants but which is admissible or excluded as to a particular defendant." *US v. Gallo*, 668 F. Supp 736 (E.D.N.Y. 1987).

However, the courts have been reluctant to grant separate trials, and the test generally applied to determine whether a severance should be granted is to balance the prosecutorial and judicial inconvenience and expense of separate trials against the prejudice to the defendant of a joint trial. *US v. Rodgers*, 475 F.2d 828 (7th Cir. 1973).

Accordingly, severance of defendants properly joined under Rule 8(b), has been denied under Rule 14, even though obviously prejudicial factors existed; as where the defenses of codefendants are antagonistic or hostile. *US v. Abrams*, 29 F.R.D. 178 (S.D.W.Y. 1961); *US v. Leu*, 22 F.R.D. 490 (S.D.N.Y. 1958); *Dauer v. US*, 189 F.2d 343 (10th Cir.) *cert. denied*, 342 US 898 (1951); *US v. Nelson*, 468 F.2d 912 (5th Cir. 1972), *cert. denied*, 410 US 986 (1973); *US v. Martinez*, 466 F.2d 679 (5th Cir. 1972), *cert. denied* 414 US 1065 (1973) [where the defendant is subjected to additional expense by joint trial]; *US v. Berman*, 23 F.R.D. 26 (S.D. N.Y. 1959); *Photon Inc. v. Harris Intertype, Inc*., 28 F.R.D. 328 (D. Mass. 1961); *US v. Gioguardi*, 332 F.Supp. 7 (S.D.N.Y. 1971) [where the defendant would have a better chance of acquittal from separate trial]; *Tillman v. US*, 406 F.2d 920, 935 (5th Cir. 1969), *cert. denied*, 395 US 830 [where another defendant has a more extensive criminal record or other unattractive characteristics]; *Glass v. US*, 351 F.2d 680 (10th cir. 1965); *US v. Hoffa*, 367 F.2d 798, 709 (7th Cir. 1966), *rev'd on other ground*, 387 US 231 (1967); *US v. Myers*, 406 F.2d 746 (4th Cir. 1969); *US v. Adonizio*, 451 F.2d 49 (3rd Cir. 1971), *cert. denied*, 405 US 936 (1972); or where evidence is admissible against a co-defendant. *Katz v. US*, 321 F.2d 7,8 (1st Cir.) *cert. denied*, 375 US 903 (1963); *Rizzo v. US*, 304 F.2d 810, 818 (8th Cir.), *cert. denied*, 371 US 890 (1962); *US v. Harris*, 441 F.2d 1333 (10th Cir. 1977); *US v. Simuel*, 439 F.2d 687 (4th Cir.), *cert. denied*, 404 US 836 (1971); or where a co-defendant was willing to testify on behalf of a defendant, but only if he could be tried first; *US v. Blanco*, 844 F.2d 344 (6th Cir. 1988) [Rule 14 is not a "mechanism for alleged co-conspirators to control order in which they are tried].

"PREJUDICE" FOUND:

On the other hand, prejudice under Rule 14 has been found and severance granted to prevent a joint trial.

MULTI-COUNT INDICTMENT IN WHICH DEFENDANT IS ONLY MINIMALLY CHARGED:

Severance has been granted where there are numerous counts with each defendant only charged in a few court, and involved with only small portions of evidence, *US v. Gaston*, 37 F.R.D. 476 (D.D.C. 1965); *US v. Branker*, 395 F.2d 881 (2d Cir. 1968); *US v. Donaway*, 447 F.2d 940 (9th Cir. 1971).

Where there is a "gross disparity of the charges against the co-defendants as opposed to the charges against the accused." *US v. Sampol*, 636 F.2d 621, 651 (D.C. Cir. 1980) [defendant charged with a misprision what joined with co-defendants charged with conspiracy to assassinate a foreign official and two murders].

> "To speak in terms of 'transference' or 'rubbing off" of guilt, classic expressions used to explain why severance is justified in a particular case, would be to downplay the prejudice that [the Defendant] was subject to in a joint trial alongside two men on trial for the bombing murder of two people… He was not charged with the conspiracy or murders, but he still was required to sit in the court while the emotion charged testimony was unveiled to the jury and to hear his name bandied around the fringes of those offenses…" *US v. Sampol, Supra*, at p. 647.

See: *US v. Grey Bear*, 828 F.2d 1286 (8th Cir. 1987).

See also: *US v. Gallo*, 668 F. Supp 736, 736, 750 (E.D. N.Y. 1987), *aff'd*, 863 F.2d 183, 1988 [severance granted where there was "no indication …they necessarily knew of the enterprise's violent racketeering activity, and at the very least they did not become affiliated with that part of the Family's affairs."]

ANTAGONISTIC DEFENSES:

Antagonistic defenses may warrant a severance. Where co-defendants's theory of defense was completely antagonistic to the defendant's and the co-defendant's confession laid blame on defendant, the fifth Circuit has granted a severance. *US v. Johnson*, 478 F.2d 1129 (5th Cir. 1973).

See: *US v. Peveto*, 881 F.2d 844 (10th Cir. 1989) [severance required where one defendant claims he was working for the police as an informant and the other defendant claims he innocently went to the other's house and was held there against his will when police arrived].

But See: *US v. Kaufman*, 858 F.2d 994 (5th Cir. 1988) [a defendant's claim that he was entrapped (thereby admitting commission of the acts charged), did not preclude possibility that other defendants could

prevail on their defenses]; *US v. Silvers*, 425 F.2d 707 (5th Cir. 1970).

TEST:

Whether jury, in order to believe the core of the testimony offered by the defendant, must necessarily disbelieve the testimony offered by his co-defendant. *US v. Berkowitz*, 662 F.2d 1127, 1133-34 (5th Cir. 1981); *US v. Ramirez*, 710 F.2d 535, 546 (9th Cir. 1983); *US v. Stephenson*. 708 F.3d 580 (11th Cir. 1983); *US v. Lee*, 744 F.2d 1124 (5th Cir. 1984) [when co-defendant raises conflicting defenses, test for compelling severance is met and severance is required when defenses are antagonistic to point of being irreconcilable and mutually exclusive].

> "This circuit recognizes that the assertion of antagonistic defenses may satisfy this test, but to do so the defenses must be irreconcilable and mutually exclusive. In other words, 'the essence of one defendant's defense [must be] contradicted by a co-defendant's defense.' *US v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. Unit B, 1981)." *US v. Magdaniel-Mora*, 746 F.2d 715 (11th Cir. 1984).

The mere allegation that defenses are antagonistic defenses is not sufficient to require granting of a motion for severance. *US v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *reh'g. denied*, 714 F.2d 137; *US v. Mcpartlin*, 595 F.2d 1321 (7th Cir. 1979); *US v. Russell*, 703 F.2d 1243 (11th Cir. 1983); *US v. Mulherin*, 710 F.2d 731, 736 (11th Cir. 1983) [fact that co-defendant's defense was entrapment while defendant maintained he did not participate is insufficient].

One Court has even suggested that the conflict must be so irreconcilable that the jury would unjustifiably conclude both defendants are guilty. *US v. Fush*, 738 F.2d 497 (1st Cir. 1984).

Another has suggested that severance may be denied where codefendant's conflicting defense is incredulous. *US v. Shively*, 715 F.2d 260, 268 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1001 (1984).

See also: *US v. Almeida-Biffi*, 825 F.2d 830 (5th Cir. 1987) [no denial of fair trail where court refused to sever husband and wife codefendants since the jury's acceptance of wife's duress defense did not require the jury to disbelieve her husband's defense that he did not participate in a cocaine transaction].

PURPOSE OF RULE:

The theory for allowing such a severance is to avoid the danger that the defendant will be confronted by two prosecutors, the government and his co-defendant and prevent the situation where each defendant is the government's best witness against the other. *US v. Lee*, 744 F.2d 1124 (5th Cir. 1984) [holding the test not met there]; *US v. Romanello*, 726 F.2d 173, 174 (5th Cir. 1984) [holding the trial court had abused its discretion in denying severance where one

defendant claimed he had been robbed by the other two and they in turn claimed they were unaware those items had been stolen]. In *Romanello*, Judge Gee vividly described the specter of a joint trial in such circumstances and their accompanying danger of wrongful conviction.

> "I saw a lizard coming darting forward on six great taloned feet and fasten itself to a [fellow soul]…. [T]hey fused like hot wax, and their colors ran together until neither wretch nor monster appeared what he had been when he began….'
>
> The joint trial of conspiracy defendants was originally deemed useful to prove that the parties planned their crimes together. However, it has become a powerful tool for the government to prove substantive crimes and to cast guilt upon a host of co-defendants. In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante's hell, they become entangled and ultimately fuse together in the eyes of the jury, so that neither defense is believed and all the defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants. Today we hold that the defense of Gerald Vertucci was antagonistic to the defenses of Anthony Formanello and Victor Mendez and that Vertucci should have been severed from his Co-defendants."

PREJUDICE THAT WARRANTS SEVERANCE:

CO-DEFENDANT'S DEFENSE PREJUDICIAL TO DEFENDANT:

Where a co-defendant's defense would introduce matter prejudicial to defendant, *US v. Reed*, 376 F.2d 226 (7th Cir. 1967); *US v. Torres-Flores*, 827 F.2d 1031, 1035 (5th Cir. 1987).

CO-DEFENDANT HAS PLEAD GUILTY TO SIMILAR OFFENSE:

Where a co-defendant has pled guilty to a similar offense alleged in a separate count on an indictment which did not charge conspiracy, *US v. Wilcher*, 332 F.2d 117 (7th Cir. 1964).

ATTORNEY'S CONFLICT:

Where the same appointed counsel represents two defendants with antagonistic interests, *US v. Gougis*, 344 F.2d 758 (7th Cir. 1967); *Case v. North Carolina*, 315 F.2d 743 (4th Cir. 1963); *Foxworth v. Wainwright*, 516 F.2d 1072, 1077 (5th Cir. 1975).

JOINT TRIAL WOULD SUBVERT PRIVILEGE:

Where the exculpatory evidence of each of two jointly indicted spouses incriminated the other and subverted the marital privilege, *US v. Thoresen*, 281 F.Supp 498 (D.C. Cal. 1967).

SPILL-OVER EFFECT:

Where there is a lengthy indictment in a complicated case and it would be extremely difficult to distinguish the proof between the different counts and defendants, particularly where there is a likelihood that the jury may cumulate evidence of similar offenses or become confused, *US v. Sanders*, 266 F.Supp 615, 612-622 (D.C. La. 1967); *Gregory v. US*, 369 F.2d 185, 189 (D.C. Cir. 1966); *US v. Quinn*, 365 F.2d 256, 265-6 (7th Cir. 1966); *US v. Lotsch*, 102 F.2d 35 (2d Cir. 1939), *cert. denied*, 307 US 622 (1939); *US v. Adams*, 434 F.2d 756 (2d Cir. 1970); *Hill v. US*, 423 F.2d 1086 (5th Cir. 1970); *US v. Gallo*, 668 F.Supp 736 (E.D.N.Y. 1987).

But See: *US v. Gentry*, F.2d (8th Cir. 1988) [no threat of "transfer of guilt" because the charged defendants clearly conspired to possess a 30-pount unit of marijuana, despite variance between scope of conspiracy and defendant's participation].

TEST:

The defendant is entitled to severance only where he can "…demonstrate 'compelling prejudice' caused by the alleged evidentiary spill-over, which effectively precluded the jury's ability to make the necessary individualized determination." *US v. Phillips*, 664 F.2d 971, 1016-17 (5th Cir. 1981), *cert. denied*, 457 US 136 (1982); *US v. Butera*, 677 F.2d 1376, 1385 (11th Cir. 1982); *US v. Johnson*, 713 F.2d 633 (11th Cir. 1983); *US v. Coppola*, 788 F.2d 303, 307 (5th Cir. 1986); *US v. Gutierrez-Chavez*, 842 F.2d 77, 80 (5th Cir. 1988).

Merely "demonstrating that the evidence is stronger against a CO-defendant that oneself does not satisfy the burden of showing **compelling** prejudice," *US v. Marable*, 544 F.2d 224, 231 (5th Cir. 1978); *US v. Partin*, 552 F.2d 621, 641 (5th Cir. 1977), *cert. denied*, 434 US 909 (1977); *US v. Berkowitz*, 662 F.2d 1127, 1135, n.8 (5th Cir. 1981).

QUALITATIVE DISPARITY MUST BE SHOWN:

US v. Morrow, 537 F.2d 120, 137 (5th Cir. 1976), *cert. denied*, 430 US 956 (1977); *US v. Clark*, 732 F.2d 1536, 1542, n. 18 (11th Cir. 1984); *US v. Mitchell*, 733 F.2d 327, 331 (4th Cir. 1984) [disparity of evidence will require severance only in extreme cases]; *US v. Berkowitz*, 662 F.2d 1127,1135 (5th Cir. 1981); *US v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985);

> "[I]n this Circuit "[severance under Fed. Crim. Pro. 14 is an appropriate remedy for disparity in the evidence only in the most extreme cases." *Morrow*, 537 F.2d at 137 (footnote omitted). *Accord*, *United States v. Clark*, 732 F.2d 1536, 1542, n. 18 (11th Cir. 1984) [citing *Morrow*]; *United States v. Mitchell*, 733 F.2d 327, 331 (4th Cir. 1984) [citing *Morrow*]; *United States v. Berkowitz*, 662 F.2d 1127, 1135 (5th Cir. 1981). In quantitative terms, the amount of evidence offered against Mrs. Chagra was

> minimal compared to that offered against Harrelson. This is clearly insufficient in itself to justify severance, *See Berkowitz*, 662 F.2d at 1135, n. 8; a qualitative disparity must be shown as well." *US v. Harrelson, Supra*.

REPUTATION AND PAST CRIME ALONE ARE INSUFFICIENT:

US v. Walker, 720 F.2d 1527, 1533 (11th Cir. 1983);
US v. McCowan, 711 F.2d 1441, 1448-9 (9th Cir. 1983).

> "Moreover, evidence of the reputation or past crimes of a codefendant does not ordinarily justify severance. *See US v. Howell*, 664 F.2d 101, 106 (5th Cir. 1981), *cert. denied*, 455 US 1005, 102 S.Ct. 1641, 71 L.Ed.2d 873 (1982); *United States v. Perez*, 489 F.2d 51, 67 (5th Cir. 1973), *cert. denied*, 417 US 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974), and cases cited therein."

The mere fact that each defendant not present at each stage of the conspiracy has been generally held not to create sufficient confusion to a jury to warrant severance, *US v. Morrow*, 537 F.2d 120, 137 (5th Cir. 1976); *US v. Berkowitz*, 662 F.2d 1127, 1135, n.8 (5th Cir. 1981).

CO-DEFENDANT IS AN ASSHOLE:

Where a co-defendant had received extremely adverse publicity and expressed an intent to lay blame on defendant, severance is available, *US v. Valdes*, 262 F.Supp. 474) D.C. Puerto Rico, 1967). See also *US v. Nettles*, 570 F.2d 547 (5th Cir. 1978), where the Court granted the defendant partial relief by severing a codefendant who was the subject of adverse pre-trial publicity. Cf. *US v. Bibby*, 752 F.2d 1116 (5th Cir. 1985).

> "As to their claim about [co-defendant's] inflammatory references to this prior appearances in court, these statements, while unfortunate, were not sufficiently prejudicial to require a severance. Accordingly we find that the trial judge did not abuse his discretion in refusing to order separate trials." *US v. Bibby, Supra*, at p. 1123.

CO-DEFENDANT IS BULL-SHIT DEFENSE:

Where co-defendant's witnesses or defenses, not adopted by defendant, are incredulous, *US v. Gambrill*, 449 F.2d 1148 (D.C. Cir. 1971), severance is proper.

DELETERIOUS EFFECTS OF PROLONGED COMPLEX CASES:

US v. Gallo, 668 F. Supp 736 (E.D.N.Y. 1987), *aff'd*, 863 F.2d 185 (1988).

THE "65 DAY RULE" IN MEGA-TRIALS:

The Federal Bar Council Committee on Second Circuit Courts recently concluded that "mega-trials" should be severed into two ore more trials whenever it appears likely that a criminal trial will extend beyond 65 days and the prosecution cannot show that the interests of the justice require such lengthy trial.

> "The length of these trails appears to have a detrimental impact on the judicial system in several respects, ranging from the impairment of the fact finding process to the disruption of judges' calendars and the obvious strain on the resources of attorneys and litigants." A Proposal Concerning Problems Created by Extremely Long Criminal Trials, Federal Bar Council Committee on Second Circuit Courts, at p. 1 (January 11, 1989).

Interesting problems arise where the Government introduces an oral or written statement of a co-defendant or that co-defendant testifies at a joint trial.

"BRUTON" SEVERANCE:

With regard to the former, it should be noted that an oral or written statement of a co-defendant, while admissible against him [*see* Rule 801(d)(2)(A), F.R.E.] would be inadmissible against the defendant. Accordingly, if at a joint trial the Government introduces the written or oral statement of a non-testifying co-defendant which incriminates the defendant, such denies that defendant his Constitutional right to confrontation and cross-examination guaranteed by the Sixth Amendment, and a severance should be granted. *Bruton v. US*, 391 US 123, 126 and 135-136 (1968); *Thompson v. State of SC*, 672 F.Supp 896 (D.S.C. 1987). Where the defendant has made no incriminating statement of his own and does not take the stand it has been held no limiting instruction would safeguard the defendant's right under the confrontation clause. *Parker v. Randolph*, 442 US 62, 73-5 (1979); *Bruton v. US, Supra*, at p. 135. The "practical and human limitations of the jury system" would override the theoretically sound premise that juries will follow the court's instructions.

> "[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another the accusation is presumptively suspect and must be subject to the scrutiny of cross examination… This is so because the "truth finding" function of the confrontation clause is uniquely related when an accomplice's confusion is purported to be introduced against a criminal defendant without the benefit of cross examination." *Lilly v. Virginia*, 527 US 116, 131, 119 S.Ct. 1887, 1897 (1999).

Exceptions to this general rule requiring severance occur where: (1) the co-defendant whole statement is introduced testifies at the joint trial affording the defendant an opportunity to

cross-examine, *Welson v. O'Neil*, 402 US 622 (1971); *US v. Sims*, 430 F.2d 1089 (6th Cir. 1970); *Dugger v. US*, 434 F.2d 345 (10th Cir. 1970); *Roberts v. US*, 416 F.2d 1216 (5th Cir. 1969); and this is true regardless of whether the codefendant acknowledges having made the statement, *Nelson v. O'Neil*, 402 US 622 (1971); *US v. Hawk Wing*, 459 F.2d 428 (8th Cir. 1972); (2) the statement does not incriminate the defendant, *US v. Cassino*, 467 F.2d 610 (2nd Cir. 1972), *cert. denied*, 410 US 913; *Slowek v. US*, 413 F.2d 957 (8th Cir. 1969), or, it is "redacted" or "sanitized" so as to no longer refer to nor indirectly inculpate the non-confessing defendant. *US v. Weinrich*, 586 F.2d 481 (5th Cir. 1978), *cert. denied*, 881 US 927 (1979); *US v. Gonzalez*, 749 F.2d 1329 (9th Cir. 1984) [holding that the defendant who made the admissible statement has no right to "redaction" on the theory that the same might make the exculpatory portions thereof less believable thereby], or (3) the Co-defendant is a co-conspirator and his statement was made during the course and in the furtherance of a conspiracy.

This last exception to both the hearsay rule and the Sixth Amendment right of confrontation and cross-examination (statements made by co-conspirators) has long been recognized by the federal judiciary, *Clune v. US*, 151 US 590, 593 (1895); *Padgett v. US*, 283 F.2d 244 (5th Cir. 1960) and is now codified in Rule 801 (d)(2)(E), F.R.E.

The Supreme Court had held, in a plurality opinion, that where the defendant has as well confessed, and his confession "interlocks" with the implicating co-defendant's confession, Bruton does not preclude introduction of that co-defendant's confession at a joint trial where appropriate limiting instructions are given. *Parker v. Randolph*, 442 US 62 (1979). The Supreme Court reconsidered this issue, and, overruled the *Parker* plurality option, negating the so-called interlocking confessions except to the *Bruton* Rule: *Cruz v. New York*, 481 US 186, 95 L.Ed.2d 162 (1987):

> "We face again today the issue on which the Court was evenly divided in Parker.
>
> "We adopt the approach espoused by Justice Blackmun. While 'devastating' practical effect was one of the factors that Bruton considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 US at 136, 20 L.Ed.2d 476, 88 S Ct 1620, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be excluded from that category, as generally not 'devastating', codefendant confessions that 'interlock' with the defendant's own confession. '[T]he infinite variability of inculpatory statements (whether made by defendants or codefendants), and of their likely effect on juries, makes [the assumption that an interlocking confession will preclude devastation] untenable.' Parker, 442 US at 84, 60 L.Ed.2d 713, 99

S.Ct 2132 (Stevens, J., dissenting)." *Cruz v. New York, Supra*, 95 L.Ed.2d at pp. 170-71.

But where a confession of a non-testifying codefendant is redacted to eliminate the defendant's name and all reference to her existence, and is accomplished by a proper limiting instruction, same may not violate the confrontation clause. *See Richardson v. Marsh*, 481 US 200, 95 L.Ed.2d 176 (1987).

BRUTON DISCOVERY RIGHT UNDER RULE 14:

In light of the defendant's right, under *Bruton*, to a severance where the Government intends to introduce a non-testifying co-defendant's statement at such joint trial, Rule 14, F.R.CR.P., specifically provides that "[I]n ruling on a motion by a defendant for severance the court may order the attorney for the Government to deliver to the court for inspection in camera and any statements or confessions made by the defendant which the Government intends to introduce in evidence at the trial."

CONTEXTUAL INCULPATION:

In *Richardson v. Marsh*, 481 US 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Supreme Court addressed a type of *Bruton* problem; contextual inculpation. In that case, the codefendant Williams' written confession had been redacted. Not only had the defendant Marsh's name been deleted, but also throughout the confession, any reference to her existence had been expunged, *Richardson v. Marsh*, 481 US 200, 107 S.Ct. at 1705, 95 L.Ed.2d at 183. However, in the context of later testimony given by the defendant herself, and in the context of the prosecutor's closing argument, the confession in fact became incriminating to Marsh. There were numerous instructions by the trial judge to the jury that the confession was not to be considered against defendant Marsh. Under these circumstances, the Supreme Court declined to extended the *Bruton* analysis to contextually inculpating statements.

> "We hold that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." *Richardson v. Marsh*, 481 US 200, 95 L.Ed.2d 176, 188, 109 S.Ct. 1702.

Significantly, the Court expresses "no opinion" on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun. *Richardson v. Marsh, Supra*, at 95 L.Ed.2d 188, n.5.

But See *Smith v. US*, 561 A.2d 468 (D.C.App. 1989) [where some fourteen references to the accused were replaced with blank spaces in a non-testifying co-defendant's redacted confession, same "virtually invited" jury to fill in defendant's name].

It should be noted that footnote 10 in *Bruton*, to which the court refers in *Richardson* (concerning redaction as a method by which the prosecution can still have the benefit of the confession), clearly disfavors attempts at redaction in oral testimony. *Bruton v. US*, 391 US 123, 134, n. 10, 88 S.Ct. 1620, 1626, n. 10, 20 L.Ed.2d 476, 484, n.10 (1968).

In the similar case of *Cruz v. New York*, 481 US 186, 95 L.Ed.2d 162, 109 S.Ct. 1714, (1987), the Supreme Court reversed and remanded where a defendant, whose own incriminating statements had been admitted into evidence, objected to the introduction of his non-testifying codefendants pretrial confession which confession detailed the defendant's alleged participating in the crime.

The lower court expressed the view that because the defendant's statements not only interlocked with those of his codefendant, but also contained legally corroborated admissions of all the elements of the crime of which the defendant had been convicted, (1) the defendant had not been denied a fair trial, and (2) his motion for severance had properly been denied. *People v. Cruz*, 66 N.Y.2d 61, 485 N.E.2d 221 (1985) *rev'd sub nom. Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987).

On certiorari, the United States Supreme Court reversed and remanded the case for further proceedings. In an option by Scalia, J., joined by Brennan, Marshall, Blackmun, and Stevens, J., the Court held that the Confrontation Clause of the Sixth Amendment bars the admission, at a joint criminal trial, of a non-testifying codefendant's pretrial confession which incriminates the defendant and which is not directly admissible against the defendant, even though (1) the jury is instructed not to consider the confession against the defendant, and (2) the defendant's own confession, corroborating that of the codefendant, is admitted against the defendant.

> "This case is indistinguishable from Bruton with respect to those factors the Court has deemed relevant in this area: the likelihood that the instruction will be disregarded, *Bruton*, 391 US, at 135, 20 L.Ed.2d 476, 88 S.Ct 1620; the probability that such disregard will have a devastating effect, *id* at 136, 20 L.Ed.2d 476, 88 S.Ct 1620; and the determinability of these facts in advance of trial, *Richardson v. Marsh*, post, at __, 95 L.Ed.2d 176, 107 S.Ct. 1707." *Cruz v. New York*, 481 US 186, 95 L.Ed.2d 162, 172, 109 S.Ct (1987).

In the thoughtful opinion of *People v. Cruz*, 521 N.E.2d 321 (1988), the Court held that even a redacted confession denied the defendant a fair trial where it clearly referred to the defendant in light of the other evidence, including evidence of acquaintanceship, particularly where the prosecutor encourages jurors to consider each codefendant's admissions against the others, and informed the jury the statement by the codefendant had been redacted.

> "In Richardson, the Supreme Court rejected the theory of contextual inculpation because the confession by codefendant made no reference at all to the defendant and became incriminating

only when coupled with the defendant's own testimony. In the case before us, the physical setting of the trial as well as the prosecution's introduction of acquaintanceship evidence formed an impermissibly incriminating context when they established the terms 'friends' and 'two named individuals' as thinly veiled references to Hernandez' codefendants. No 'substantial inference' was required of the jury to identify defendant as one of the 'friends' mentioned by witnesses to Hernandez' statements. (*See United States* ex rel. *Velson v. Follette*, 430 F.2d 1055, 1059 (2nd Cir. 1970). As a result, it would be unrealistic in the extreme to expect a jury to ignore the clear import of Hernandez' statements, despite their redaction.

Furthermore, any possibility that the jury would be able to follow the court's limiting instructions was removed when the prosecution encouraged the jurors to consider each codefendant's admission against the other defendants, implying that the defendants' friendship allowed them to do so. *People v. Cruz*, 521 N.E.2d 18 (1988).

FILLING IN THE BLANKS:

Where some fourteen references to the accused were replaced with blank spaces in a non-testifying co-defendant's redacted confession, same "virtually invited" the jury to fill in defendant's name. *Smith v. US*, 561 A.2d 468, 1989 WL 71601 (D.C. App. 1989).

But See *US v. Gutierrez-Chavez*, 842 F.2d 77 (5th Cir. 1988) [admission of co-defendant's redacted confession although it implicated the defendant was harmless error in light of defendant's own admissions to agents that established his participation in the charged conspiracy].

"*DELUNA*" SEVERANCE:

Another situation requiring severance arises where one of the jointly tried co-defendants takes the stand offering a conflicting defense or implicating the defendant. *DeLuna v. US*, 308 F.2d 140 (5th Cir. 1962), *cert denied*, (1963) 324 F.2d 375; *Peel v. US*, 316 F.2d 907, 912 (5th Cir. 1963). Some courts have based such severance on the ground that to require a defendant to go to trial jointly with a co-defendant who is going to lay the blame on him would require the defendant to defend against "two adversaries, the United States and [his] co-defendant," *US v. Valdez*, 262 F.Supp 474 (D. Puerto Rico, 1967) [holding such to constitute a denial of the defendant's due process right to a "fair and impartial trial"]. *Contra*: *US v. Soto*, 256 F.2d 729 (7th Cir. 1958); *US v. Carter*, 401 F.2d 748 (3rd Cir. 1968), *cert. denied*, 393 US 1103 (1969).

Other courts have based severance in such situations upon the testifying co-defendant's right to comment upon the non-testifying defendant's failure to take the stand, and the effect this

has upon his Fifth Amendment privilege. The testifying codefendant's "…attorneys should be free to draw all rationale inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts." *DeLuna v. US*, 308 F.2d 140, 150-155 (5th Cir. 1962); *Griffin v. California*, 380 US 609 (1965). Severance is required, then, by the competing rights of the testifying co-defendant to comment upon the defendant's failure to take the stand and the non-testifying defendant's right to be free from such comment upon his exercise of a constitutional right. *DeLuna v. US, Supra*.

Some courts have required severance only where the testifying and non-testifying co-defendants are asserting conflicting or mutually exclusive defenses; *US v. Kahn*, 381 F.2d 824, 841 (7th Cir.), *cert. denied*, 389 US 1015 (1967); where under such circumstance the testifying co-defendant's attorney was under a "duty" to comment upon the jointly tried defendant's failure to take the stand. *Gurleski v. US*, 405 F.2d 253, 265 (5th Cir.), *cert. denied*, 395 US 977 (1968); *US v. Badolato*, 701 F.2d 915, 924 (11th Cir. 1983); *US v. Johnson*, 713 F.2d 633 (11th Cir. 1983).

> "The *DeLuna* rule applies only when it is counsel's duty to make a comment, and a mere desire to do so will not support an incursion on a defendant's carefully protected right to silence. Clearly, a duty arises only when the arguments of the co-defendant's are antagonistic." *Gurleski v. US, Supra*, at p. 265.

In order to protect the non-testifying defendant's Fifth Amendment privilege courts have limited the right of counsel for the testifying co-defendant to comment upon the jointly tried defendant's failure to testify unless it can be demonstrated that this so-called "duty" to comment exists or "real prejudice" will result from his inability to make same. *US v. Johnson*, 713 F.2d 633 (11th Cir. 1983); *US v. Kopituk*, 690 F.2d 1289, 1319 (11th Cir. 1982); *US v. DeLaCruz Bellinger*, 422 F.2d 723 (9th Cir.), *cert. denied*, 389 US 942 (1970); *US v. Kahn*, 381 F.2d 824, 829-841 (7th Cir.), *cert. denied*, 389 US 1015 (1967); *US v. Battaglia*, 394 F.2d 304 (7th Cir. 1968) ; *US v. McKinney*, 379 F.2d 259, 265 (6th Cir. 1967); *US v. Hyde*, 448 F.2d 815, 832 (5th Cir. 1971); *Kolod v. US*, 371 F.2d 983, 991 (10th Cir. 1967). However, keep in mind that Judge Wisdom's well-reasoned opinion in DeLuna did not speak of the testifying co-defendant's "duty" to comment but upon his attorney's right to "…be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence." *DeLuna v. US*, 308 F.2d 140, 143 (5th Cir. 1962). *See also US v. Crawford*, 581 F.2d 489 (5th Cir. 1978); *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970).

At least one Court has held that "under no circumstances" does a co-defendant's counsel have a right or duty to comment on a jointly tried defendant's silence. *US v. McClure*, 734 F.2d 484, 491 (10th Cir. 1984).

> "We reject the dictum of the *DeLuna* majority and today hold that under no circumstances can it be said that a defendant's attorney is obligated to comment upon a codefendant's failure to testify."

The better course of action is to sever such defendants for separate trial any time a co-defendant desires to testify and comment upon the non-testifying defendant's failure to take the stand, since, with respect to a choice between the competing rights of two criminal defendants and the inconvenience to the Government and the judiciary from separate trials, the latter should give way.

NEED TO CALL A JOINED CO-DEFENDANT TO TESTIFY ON DEFENDANT'S BEHALF:

Still another situation calling for a severance may arise when a defendant seeks to call a jointly charged defendant as a witness on his behalf; *US v. Echeles*, 342 F.2d 892 (7th Cir. 1965); *US v. Martinez*, 486 F.2d 15 (5th Cir. 1973); *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970) [holding denial of same may constitute denial of "due process"]; *US v. Shuford*, 343 F.2d 772 (4th Cir. 1971); *US v. Gleason*, 259 F.Supp 282 (S.D.N.Y. 1966); since it would violate one defendant's Fifth Amendment right to allow another defendant to require his testimony at a joint trial. *US v. Echeles*, 352 F.2d 892, 897-98 (7th Cir. 1965).

TEST:

However, to require a severance in order to obtain the testimony of a co-defendant the defendant must demonstrate:

(1) a bona fide need for the testimony,

(2) the substance of the expected testimony,

(3) its exculpatory nature and effect, and

(4) that the designated co-defendant will in fact testify.

US v. Grapp, 653 F.2d 189 (5th Cir. 1981); *US v. Butler*, 611 F.2d 1066, 1071 (5th Cir.), *cert. denied*, 449 US 830 (1980); *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979); *Byrd v. Wainwright*, 482 F.2d 1017 (5th Cir. 1970); *US v. Sica*, 560 F.2d 149 (3rd Cir. 1976); *US v. Johnson*, 713 F.2d 633 (11th Cir. 1983); *US v. Williams*, 809 F.2d 1072, 1084 (5th Cir. 1987); *US v. Ascarrunz*, 838 F.2d 759 (5th Cir. 1988); *US v. Hernandez*, 841 F.2d 82 (5th Cir. 1988).

A "bare conclusory assertion" merely tracking and negating the language of the indictment has been held insufficient. *US v. DeSimone*, 660 F.2d 532, 539-40 (5th Cir. 1981), *cert. denied*, 455 US 1028; *US v. Johnson*, 713 F.2d 633 (11th Cir. 1983).

Likewise, courts have refused severance where the proffered testimony does not controvert a defendant's involvement in its entirety, arguing that it must be sufficiently exculpatory to outweigh the concerns for judicial economy favoring joint trial; *US v. Butler*, 611 F.2d 1066, 1077 (5th Cir. 1980); *US v. Edwards*, 549 F.2d 362, 366 (5th Cir. 1977); *US v. Johnson*, 713 F.2d 633 (11th Cir. 1983).

Some courts have even held that the co-defendant's proffered testimony "lack[s] a certain amount of credibility" unless it inculpates the co-defendant whose testimony is sought; *US v. DeSimone*, 660 F.2d 532, 540 (5th Cir. 1981); *US v. Metz*, 608 F.2d 147, 156 (5th Cir. 1979); *US v. Alejandro*, 527 F.2d 423, 428 (5th Cir. 1976); *US v. Johnson*, 713 F.2d 633 (11th Cir. 1983); *US v. Pepe*, 747 F.2d 632 (11th Cir. 1984). The co-defendant's statements against penal interest [*See* Rule 804 (b)(3), F.R.E.] certainly satisfy this argument and may be sufficient in themselves. At the very least, refusal to sever should render their hearsay admissions admissible, despite the rule's requirement of additional indicia of reliability.

Most courts require a particularly strong affirmative showing that the co-defendant would in fact testify if the trials were severed, *US v. Nakaladski*, 481 F.2d 289 (5th Cir.), *cert. denied*, 414 US 1064 (1973); *US v. Iacoveti*, 466 F.2d 1147 (5th Cir.), *cert. denied*, 410 US 908 (1973); *US v. Noah*, 475 F.2d 688 (9th Cir.) *cert. denied*, 414 US 821; *US v. Bethea*, 446 F.2d 30 (3rd Cir.), *cert. denied*, 404 US 1003 (1971); expressing some skepticism as to whether the co-defendant would not claim his constitutional privilege even if a separate trial were granted. Wright, Federal Practice and Procedure: Criminal, §225; *US v. Oxford*, 735 F.2d 276 (7th Cir. 1984) [mere possibility co-defendant would testify insufficient]; *US v. Caspers*, 736 F.2d 1246 (8th Cir. 1984).

This skepticism may be justified, but it does not warrant unequal treatment of the parties in a criminal prosecution. For example, courts often engage in practices designed to assist the Government in obtaining testimony of an individual desired by the Government to prosecute another. One co-defendant is often given immunity or tried first by the Government in order that his Fifth Amendment privilege will no longer be available when he is called as a witness for the Government at he subsequent trial of his Co-defendant, and defendants have no right to require that all individuals alleged to have participated in the same offense be tried together, *US v. Bronson*, 145 F.2d 939, 943 (2nd Cir. 1944). These same practices should be available to assist a defendant in order that he might be afforded the same opportunity to defend against criminal charges that the Government has to prosecute them. *See US v. Gleason*, 259 F.Supp 282 (S.D.N.Y. 1966).

IMMUNITY FOR DEFENSE WITNESSES:

Some courts have recognized the defendant's right to compulsory testimony under a grant of immunity within certain limited circumstances, where:

(1) the witness' testimony is essential to an effective defense,

(2) the witness is available to testify,

(3) the testimony sought is "clearly exculpatory", and

(4) there is no showing of "strong governmental interests" against the immunity grant,

Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980); *US v. DePalma*, 476 F.Supp 775 (S.D.N.Y. 1979). *See also Herman v. US*, 589 F.2d 1191 (3rd Cir. 1978), *cert. denied*, 441 US 913 (1979); *US v. Lord*, 711 F.2d 887 (9th Cir. 1983). Cf: *US v. Bazzano*, 712 F.2d 826 (3rd Cir. 1983) en *banc* [it is within trial court's discretion to deny defense witness immunity at probation revocation hearing].

See also US v. Salerno, 505 U.S. 317, 324, 112, S.Ct. 2503, 25086 (1992) where two witnesses testified favorably to the defendant before the grand jury. The government did not believe their testimony and attempted to impeach them before the grand jury. Thereafter, the defense attempted to call them to testify at trial. But they invoked their Fifth Amendment rights not to incriminate themselves. Since trial counsel was unable to obtain defense witness immunity for the two witnesses, he removed the admission of their grand jury testimony. The US Supreme Court remanded the case for a determination whether the government had a similar motive in developing their testimony before the grand jury as it have had at trial. If the government did have a similar motive, the witness grand jury testimony would be admissible at trial.

Also cf: *US v. Yates*, 524 F.2d 1282, 1283 (D.C. Cir. 1975) [the government's obligation to assure the defendant's right to confrontation by a grant of use immunity to witness' whose hearsay statements are offered after they invoke their Fifth Amendment privilege]; *Simmons v. US*, 390 US 377 (1968) [in effect immunizes defendant's testimony at suppression hearing allowing the accused to testify at his pretrial suppression hearing to invoke his Fourth Amendment right to be free from admissibility of such testimony at his trial]. *Contra*: *US v. Gleason*, 616 F.2d 2 (2nd Cir. 1979), *cert. denied*, 444 US 1083 (1980); *US v. Lenz*, 616 F.2d 960 (6th Cir.), *cert. denied*, 447 US 929 (1980); US v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977); *US v. Heldt*, 668 F.2d 1238 (9th Cir. 1981) *cert. denied*, 456 US 926 (1982). It would appear same is still an open question in the Fifth Circuit; *US v. Beasley*, 550 F.2d 261, 268 (5th Cir.) *cert. denied* 434 US 938 (1977); *US v. D'Apice*, 664 F.2d 75 (5th Cir. 1981). *See also US v. Pennell*, 737 F.2d 521 (6th Cir. 1984) *en banc*, [no inherent power to grant immunity to witness who asserts Fifth Amendment privilege, either under §6002 or Sixth Amendment, leaving open question of circumstances where prosecutorial misconduct in refusing to grant immunity is demonstrated] *cert. denied* 469 U.S. 1158 (1985).

SEVERANCE OF OFFENSES:

FIFTH AMENDMENT:

Where a defendant demonstrated a need to testify as to one of the offense charged in the same indictment, but not as to the others severance might be required, *Cross v. US*, 335 F.2d 987 (D.C. Cir. 1964); *Dunaway v. US*, 205 F.2d 23 (D.C. Cir. 1953); *US v. Baker*, 202 F.Supp 657, 686 (D.D.C. 1966); *Hatcher v. US*, 423 F.2d 1086 (5th Cir.), *cert. denied* 400 US 848 (1970); cf: *Bradley v. US*, 433 F.2d 1113 (D.C. Cir. 1969) [where defendant testified as to one count but was not questioned nor coerced regarding those counts as to which he desired to exercise his Fifth Amendment privilege, no severance required]; *Baker v. US*, 401 F.2d 958, 976-7 (D.C. Cir. 1968) [requiring that defendant "make a convincing showing that he has both important testimony to give as to one count and strong need to refrain from testifying on the other"]; *US v.*

Valentine, 706 F.2d 282, 290-1 (10th Cir. 1983); *US v. Outler*, 659 F.2d 1306, 1313 (5th Cir.), *cert. denied*, 455 US 950 (1982).

EVIDENCE ADMISSIBLE ONLY AS TO ONE COUNT:

Where evidence of one of the joined offenses would not be admissible at the separate trial of the other (especially in complicated trials where the jury may have difficulty in separating the evidence relating to teach particular charge) severance might be proper; *Drew v. US*, 331 F.2d 85 (D.C. Cir. 1964); or where "other crimes" rule [404(b), F.R.E.] would exclude evidence of one offense from trial of another; *US v. Fortz*, 540 F.2d 733 (4th Cir. 1976); *State v. Carter*, 475 F.2d 349 (D.C.Cir. 1973) the evidence. However, a cautionary instruction may limit the harm of "other crimes"; *Robinson v. US*, 459 F.2d 847 (D.C. Cir. 1972), and the "other crimes" rule must in fact exclude the admission of extraneous offenses as to some, but not all charged offenses; *US v. Williamson*, 482 F.2d 508 (5th Cir. 1973).

EMPANELLING TWO JURIES:

Several courts have held that empanelling two separate juries to hear the evidence and separately determine the guilt of two jointly tried defendants will satisfy Rule 14's concern for immunizing prejudice from joinder while conserving judicial resources. *US v. Lewis*, 716 F.2d 16 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 412 (464 US 996 (1983) [recognizing however, that such procedure presents substantial risk of prejudice]; *US v. Hayes*, 676 F.2d 1359 (11th Cir.), *cert. denied*, 459 F.2d 1040 (1982).

FAILURE TO RENEW MOTION AT CLOSE OF EVIDENCE:

Failure to renew one's Motion for Severance at the close of the Government's case or at the close of all evidence may constitute a waiver of same. *US v. Brian*, 630 F.2d 1307, 1310 (8th Cir. 1980); *US v. Mansaw*, 714 F.2d 785, 790 (8th Cir. 1983); *US v. Perez*, 648 F.2d 219, 223 (5th Cir. 1981), *cert. denied*, 454 US 970 (1981).

MOTIONS TO DISMISS THE INDICTMENT

LIMITATIONS:

Counsel should determine at the outset whether the date of the indictment occurred later than that statute of limitations. Most offenses must be charged with the five year statute of limitations set forth in Title 18 United States Code, section 3282.

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years after such offense shall have been committed." 18 United States Code, Section 3282.

"Committing" or "conspiring" to commit offenses in violation of Title 18 United States Code, sections 1014 and 1344 are barred by a ten year statute of limitations set forth in Title 18 United States Code, section 3293.

> "No person shall be prosecuted, tried or punished for a violation of, or conspiracy to violate- -
>
> (1) section 215, 656, 657, 1005, 1006, 1007, 1008, 1014, or 1344;
>
> …unless the indictment is returned or the information is filed within ten years after the commission of the offense." Title 18 United States Code, section 3293.

This statute of limitation does not mention or refer to "causing" or "aiding and abetting" an offense under Title 18 United States Code, section 2. It does expressly apply to conspiracies to commit the listed offenses. Thus the ten year statute of limitations does not apply to causing the illegal action of another.

The United States Supreme Court requires that statutes of limitation be construed in favor of the defendants.

> "Criminal statutes of limitation are to be liberally interpreted in favor of repose." *U.S. v. Marion*, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971).

Thus counsel should determine whether the five year statute of limitations expired before the indictment was returned. If not the indictment must be dismissed as barred by limitations.

PRE-INDICTMENT DELAY:

The due process clause of the Fifth Amendment requires dismissal of an indictment for delay if such delay results in a violation of fundamental concepts of justice or the community's sense of fair play. In order to determine whether a due process violation has occurred, the Government's reasons for the delay must be weighed against the prejudicial effects of the delay on the Defendant. *US. v. Crouch*, 51 F.3d 480 (5th Cir. 1995), *cert. denied*, *U.S. v. Marion*, 30 L.Ed. 2d 468 (1971); *US v. Townley*, 665 F.2d 579, 581-82 (5th Cir.), *cert. denied*, 456 U.S. 1010 (1982); *U.S. v. Hendricks*, 661 F.2d 38, 39-40 (5th Cir. 1981); *U.S. v. Nixon*, 634 F.2d 306, 310 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981); *U.S. v. Willis*, 583 F.2d 203, 207-208 (5th Cir. 1978).

The showing of prejudice, however, does not end a pre-indictment delay inquiry. The Supreme Court has stated that "proof of prejudice is generally a necessary but not sufficient element of a due process claim … [T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *U.S. v. Lovasco*, 52 L.Ed.2d 752, 759 (1977); *U.S. v. Lindstrom*, 698 F.2d 1154, 1158 (11th Cir. 1983). A defendant's showing of prejudice triggers a 'sensitive balancing of the government's need for an investigative delay … against the prejudice asserted by the defendant." *U.S. v. Brand*, 556 F.2d 1312, 1317 n.7 (5th Cir. 1977),

cert. denied, 434 U.S. 1063 (1978). For example, a delay caused by a good faith ongoing investigation will generally not be considered a due process violation. *U.S. v. Lovasco*, 52 L.Ed.2d 752 (1977). However, delay that prejudices a defendant will require dismissal of an indictment if the reason for the delay is a sinister one. "Sinister" reasons include using the delay to gain tactical advantage over the accused. *U.S. v. Marion*, 30 L.Ed.2d 468, 481 (1971).

Deliberate action by the Government designed to gain a tactical advantage occurs when the prosecution engages in reckless disregard of circumstances known to it that suggest that there is an appreciable risk that delay would impair the ability of the defendant to mount an effective defense. *U.S. v. Lovasco*, 52 L.Ed. 2d 752, 762 n.17 (1977).

As stated by the court in *U.S. v. Brand*, 556 F.2d 1312, 1317 n.7 (5th Cir. 1977), the final determination of the issue requires a balancing of the respective interests by the courts:

> "The parties argue in their belief about whether *Marion*, as interpreted by this Court, requires the defense to show both actual prejudice and intentional tactical delay by the prosecutor before a due process violation may be found. The dispute is settled by *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044 (1977), which holds that prejudice and the governmental interests not amounting to an intentional tactical delay will automatically justify prejudice to a defense. On the contrary, the court engages in a sensitive balancing of the government's need for an investigative delay in *Lovasco* against the prejudice asserted by the defendant.
>
> …*Lovasco* indicates that such a requirement [of intentional conduct] misreads *Marion*, which stated:
>
> 'We need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delay requires the dismissal of the prosecution.'
>
> *United States v. Marion*, 404 U.S. at 324, 92 S.Ct. at 465. According to the Supreme Court, that statement remains true today. *Lovasco*, 431 U.S. 783, 97 S.Ct. 2044. Clarity will come only on a case-by-case basis." *U.S. v. Brand*, 556 F.2d 1312, 1317 n.7 (5th Cir. 1977).

PREJUDICE OF GRAND JURY:

Defendants are entitled to indictment "returned by a legally constituted and unbiased jury." *Costello v. U.S.* 350 U.S. 359, 363, 76 S.Ct. 406, 409 (1956).

If there is a reason to believe the grand jury foreman knows of the Defendants and where there is reason to believe the grand jury foreman is adverse to the institution with which the

Government associates the Defendants, this Court should determine whether the Defendants constitutional guarantees of an independent and impartial investigative body have been abrogated necessitating dismissal of the indictment.

> "The fifth amendment provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of the grand jury." All that is constitutionally required of an indictment is that it be "returned by a legally constituted and unbiased jury." *United States v. Heffington*, 682 F.2d 1075, 1080 (5th Cir. 1982) (quoting *Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956))." *U.S. v. Mitchell*, 777 F.2d 248 (5th Cir. 1985).

If a grand juror knows a defendant or is adverse to the institution with which the Defendants have been associated by the Government, the grand jury is biased in violation of the constitution.

> "A look at the grand jury through the records reveals that it was composed of people from all walks of life, some of whom were former union members. The judge immediately and in the presence of all of the panel eliminated six prospective grand jurors when indications of prejudice appeared. ***No grand juror personally knew petitioner or was shown to be adverse to the institutions with which petitioner is generally identified." Beck v. Washington***, 82 S.Ct. 955, 959, 369 U.S. 541 (1962).

FAILURE TO STATE AN OFFENSE:

An Indictment not only cites statutory elements it "must state the species, -it must descend to particulars." *U.S. v. Diecidue*, 603 F.2d 535, 547 (5th Cir. 1979) [quoting *U.S. v. Cruikshank*, 23 L.Ed. 588 (1875)].

> "[I]t is not sufficient that the indictment shall charge the offense in the same generic terms as the definition; ….it must descend to particulars.
>
> "…Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Russell v. U.S.*, 8 L.Ed.2d 240, 251-252 (1962).

INSUFFICIENT FACTUAL PARTICULARITY TO ENSURE PROSECUTOR WILL NOT FILL IN ELEMENTS WITH FACTS NOT CONSIDERED BY THE GRAND JURY

BILL OF PARTICULARS WILL NOT CURE INVALIDITY

If an indictment fails to specify the offense with sufficient particularity, Defendants have no assurances that the prosecutor will not fill in the factual elements with facts not considered by the grand jury. This is why a bill of particulars will not remedy a short fall in pleading. *U.S. v. Russell*, 8 L.Ed.2d 240 (1962)[indictment cannot be cured by bill of particulars because of the danger "a defendant could …be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."]

> "[I]t is a settled rule that a bill of particulars cannot save an invalid indictment. …To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convinced on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *U.S. v. Russell*, 8 L.Ed.2d 240, 254-255 (1962).

In *U.S. v. Abrams*, 539 F. Supp. 378 (S.D.N.Y. 1982), the court was confronted with an obstruction of investigation [18 U.S.C. 1510]. The charges tracked the statute and alleged that they occurred during a certain time period in the Southern District of New York. The court concluded:

> "[T]he indictment clause of the Fifth Amendment [] requires that an indictment contain some amount of actual particularity to endure that the prosecution will not fill in elements of its case with facts other than those considered by the grand jury. It is thus the Indictment Clause of the Fifth Amendment that leads us to conclude that the counts in question must be dismissed.
>
> "We are mindful of the precept that indictments 'which track the language of a statute and , in addition, do little more than state time and place in approximate terms' are generally legally sufficient. We not however, that the indictments that have been upheld under this precept have been more factually specific than the counts considered here." *U.S. v. Abrams*, 539 F. Supp. 378, 385 (S.D.N.Y. 1982)

The indictment should be dismissed for failure to adequately apprize the Defendants of the charges they must meet.

VAGUENESS:

Rule 7(c)(1) states in pertinent part: '[t]he indictment . . . shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

To explain this further, "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *See Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 766 (1962). *See also United States. v. Goodman*, 605 F.2d 870, 884 (5th Cir. 1979) (noting the general principles to determine the sufficiency of an indictment). An indictment is sufficient if it alleges that a defendant "attempted" to commit a crime without alleging what specific, overt act, necessary to prove the crime, the defendant committed. *United States v. Resendiz-Ponce*, 127 S. Ct. 782 (2007).

Applying the second prong of *Hamling v. United States*, 418 U.S. 87, 117 (1974), if a Defendant cannot plead to an acquittal or conviction as a bar to any future prosecution because the Defendant cannot determine by the general charges what act or acts he is accused of committing. The charge does not descend to specifics regarding the offense conduct committed by the defendant and is not being specific enough a charge to act as a bar to subsequent prosecutions. Failing to inform the Defendant as to the charge also prevents him from entering a "voluntary and knowing" plea. *Strickland v. Washington*, 466 U.S. 668 (1984).

Charge one "not framed" to apprize the Defendant "with reasonable certainty, of the nature of the accusation against [him], are defective, although it may follow the language of the statute." *United States v. Simmons*, 96 U.S. 360, 362 (1877). Therefore, the allegations in Count One must be dismissed since they are so vague, ambiguous, and indefinite that they do not inform the Defendant of the nature of the case against him, prevent him from adequately preparing a defense, and do not prevent the possibility of a subsequent prosecution for the same offense.

OUTRAGEOUS GOVERNMENT CONDUCT:

A motion to dismiss the Indictment is appropriate on ground of outrageous government conduct. For example, if an investigation constitutes a fraud on the State Courts. Ostensibly, federal agents permitted criminal cases to be resolved illegally, pursuant to the payment of bribes in the criminal courts and, thus, committed a fraud on those courts. The FBI's agent was an active participant in this fraud. The FBI employed other District Attorney Office employees in perpetration of fraud. The FBI allowed crimes to be committed before sitting State, Count and District Judges in actual court proceedings. This constitutes outrageous government conduct which calls for the dismissal of this prosecution.

In *U.S. v. Taylor*, 956 F.Supp. 662 (D.S. Carolina 1997) the Court dismissed the indictments pursuant to its supervisory power because the government, among other things, withheld *Brady* material from the defense and lied to the court about this fact. Finding that the investigation began appropriately but because of overzealousness and political pressure to weed out misconduct in the state house caused it to lose its way and the government committed a fraud on the court, the district judge dismissed the case pursuant to his supervisory power. This case was reversed because the defendants did not show that they were prejudiced by this misconduct. *U.S. v. Derrick*, 163 F.3d 700 (4th Cir. 1998).

"Although the requirement of outrageousness has been stated in several different ways by various courts, the thrust of each of these formulations is that the challenged conduct must be shocking, outrageous, and clearly intolerable. *See e.g.,* Russell, 411 U.S. at 432, 93 S.Ct. at 1643 (conduct must violate " 'fundamental fairness' " or " 'shock[] the universal sense of justice,'") (quoting Kinsella, 361 U.S. at 246, 80 S. Ct. at 304); Nichols, 877 F.2d at 827 (conduct must be "shocking and outrageous and reach [] an 'intolerable level' ") (quoting *Russell*, 411 U.S. at 431-32, 93 S.Ct. at LM {99} 1643); *United States v. Ryan*, 548 F.2d 782, 789 (9th Cir.) (conduct must be "so grossly shocking and so outrageous as to violate the universal sense of justice"), cert. denied, 429 U.S. 939, 97 S.Ct. 354, 50 L.Ed.2d 308 (1976), and *cert. denied*, 430 U.S. 965, 97 S.Ct. 1644, 52 L.Ed.2d 356 (1977).

The cases make it clear that this is an extraordinary defense reserved for only the most egregious circumstances. It is not to be invoked each time the government acts deceptively or participates in a crime that it is investigating. Nor is it intended merely as a device to circumvent the predisposition test in the entrapment defense. *See United States v. Warren*, 747 F.2d 1339, 1341-42 (10th Cir. 1984) ("the outrageous governmental conduct defense is manifestly reserved for only 'the most intolerable government conduct,'") (quoting *Jannotti*, 673 F.2d at 608); *Ryan*, 548 F.2d at 789 ("the due process channel which Russell kept open is a most narrow one").

Government agents often need to play the role of criminals in order to apprehend criminals, and this role occasionally entails unseemly behavior. Wide latitude is accorded the government to determine how best to fight crime. *See Russell*, 411 U.S. at 435, 93 S.Ct. at 1644 (noting danger of "giv[ing] the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve"); *see also United States v. Esch*, 832 F.2d 531, 539 (10th Cir. 1987), *cert. denied*, 485 U.S. 908, 108 S.Ct. 1084, 99 S.Ed.2d 242 and *cert. denied*, 485 U.S. 991, 108 S. Ct. 1299, 99 L.Ed.2d 509 (1988).

> FN5. These two factors are not necessarily exclusive. They appear to represent the primary contexts in which the defense has been successful to date, although other situations have arisen in which government conduct has been held to be outrageous. *See e.g.,* Marshank, 777 F. Supp. At 1524 (outrageous conduct where agents induced defendant's attorney to help investigate, interrogate, and arrest defendant)." *U.S. v. Mosley*, cause number 90-8100 (10th Cir. 1992).

INTERFERENCE WITH RIGHT TO COUNSEL:

To compel represented witnesses to appear before the prosecutor for the purpose of disparaging their counsel outside that lawyer's presence, violates the Code of Professional Responsibility and the Rules Court.

Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility, expressly provides that:

> "During the course of his representation of a client a lawyer shall not: Communicate or cause another to communicate on the subject of that representation by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Similarly, Rule 4.2 of the ABA Model Rules of Professional Conduct specifically states that:

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

More specifically, the Rules of Professional Conduct of the State of Texas provide in rule 4.02 that:

> "(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person…the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer had the consent of the other lawyer or is authorized to do so."

ETHICAL STANDARDS INCORPORATED INTO LOCAL FEDERAL COURT RULES

The Local Rules for the United States District Courts of the Western District of Texas, expressly provide that lawyers practicing before these Courts must abide by the ethical rule forbidding contact with represented individuals. Rule AT-4 of the Local Rules for the United States District Court for the Western District of Texas mandates that an attorney's conduct before the courts of the Western District of Texas is governed by the Rules of Professional Conduct of the State Bar of Texas and Code of Professional Responsibility of the American Bar Association.

> "Every member of the bar of this Court and any attorney permitted to practice in this Court under Local Rule AT-1 hereof shall familiarize oneself with and comply with the standards of professional conduct required by member of the State Bar of Texas and contained in the Texas Disciplinary Rules of Professional Conduct, V.T.C.A. Government Code, Title 2, Subtitle G-Appendix and the decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct of this Court. This specification shall not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the Code of Professional Responsibility of the American Bar Association shall be noted. No attorney permitted to practice

> before this Court shall engage in any conduct which degrades or impugns the integrity of the Court or in any manner interferes with the administration of justice therein." *See* Local Rule AT-4 for the Western District of Texas.

Thus, the rules governing the conduct of attorneys practicing before the District Court for the Western District of Texas expressly incorporate as the "Standards of Professional Conduct" before these Courts, the Rules of Professional Conduct of the State Bar of Texas which in strict, mandatory terms provide that a lawyer "shall not communicate… with a person … the lawyer knows to be represented by another lawyer … unless the lawyer had the consent of the other lawyer {Rules of Professional Conduct of the State Bar of Texas 4.02, expressly incorporated as the "Standards of Professional Conduct" before the District Court.

Moreover, 28 USC §5306 expressly applies the rules of ethics to federal prosecutions.

> "Ethical standards for attorneys for the government. (a). An attorney for the government shall be subject to the state laws and rules and local federal court rules governing attorneys in each state where the attorney engages in that attorney's duties in the same extent in the same manner as other attorneys in that state.

What this means is that once a targeted individual is represented by an attorney Government Counsel may not communicate with that defendant unless his or her attorney is notified and gives prior consent. *See U.S. v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932, 93 S.Ct 2758, 37 L.Ed.2d 160 (1973). The Fifth Circuit has recognized that conduct which violates this canon of ethics is reprehensible and that suppression may be the appropriate sanction. *U.S. v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied sub nom*; *Brunk v. U.S.*, 451 U.S. 1021, 101 S.Ct. 3010, 69 L.Ed.2d 394 (1981).

> "We agree that the conduct which occurred in this case was highly improper and unethical. …The action that was taken in this case is truly reprehensible and taints the dignity of the offices of the U.S. Attorney, the D.E.A. and the F.B.I.." *U.S. v. Killian*, 639 F.2d 206, 210 (5th Cir.), cert. denied sub nom; *Brunk v. U.S.*, 451 U.S. 1021, 101 S.Ct. 3010, 69 L.Ed.2d 394 (1981).

There can be little question that these ethical rules were intended to regulate the conduct of advocates on both sides of the bar, and courts have been quick to impose sanctions whether the violation was occasioned by a prosecutor, *see U.S. v. Hammad*, 858 F.2d 834, 839-842 (2d Cir. 1988)[3], or defender, see *U.S. v. Grieg*, 967 F.2d 1018, 1023 (5th Cir. 1992), where the Fifth Circuit recently reiterated:

[3] In *Hammad* the Second Circuit discussed the appropriateness of imposing sanctions upon a prosecutor who violated that Cannon, interfering with a represented parties attorney-client relationship:

> "On appeal, the government…claims that even if there was a violation of the disciplinary rule, exclusion is inappropriate to remedy an ethical breath. We

> "[Defense Counsel's] alleged conduct was highly unethical and clearly violated the Model Code of Professional Responsibility as well as the American Bar Association's Model Rules of Professional Conduct.
>
> Grieg's [defense] counsel was in clear violation of both the American Bar Association's Model Rules of Professional Conduct and the Model Code of Professional Responsibility. Rule 4.2 of the Model Code provides:
>
> RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law. The Model Code's Disciplinary Rule 7-104(A)(1) is substantially identical." *U.S. v. Grieg*, 967 F.2d 1018, 1023 (5th Cir. 1992).

DISMISSAL IS THE APPROPRIATE REMEDY WHERE PROSECUTOR'S INTERFERENCE WITH CITIZEN'S RIGHT TO REPRESENTATION CAUSES THE ACCUSED TO LOSE HIS LAWYER

In *U.S. v. Lopez*, 765 F. Supp. 1453 (N.D. Cal. 1991) the District Court for Northern District of California was confronted with a prosecutor whose contact and communication with a represented accused resulted in that individual losing his lawyer.

> "It is thus no exaggeration to say that the conduct of the government in this case cost the defendant his lawyer. The record makes it clear that Lopez retained Tarlow and wished to be represented by him if his case proceeded to trial. The government made that impossible." *U.S. v. Lopez*, 765 F.Supp. 1432, 1456 (N.D. Cal. 1991).
>
> Just as the government misconduct in this case must be characterized as egregious and flagrant, the court has no difficulty

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> have not heretofore decided whether suppression is warranted for a DR 7-104(A)(1) violation… We now hold that, in light of the underlying purposes of the Professional Responsibility Code and the Exclusionary rule, suppression may be ordered in the district court's discretion…
>
> "Accordingly, we reject he government's effort to remove suppression from the arsenal of remedies available to district judges confronted with ethical violations." *U.S. v. Hammad*, 858 F.2d 834, 842 (2d Cir. 1988).

> in finding that defendant Lopez was substantially prejudiced by that misconduct. As the court has already indicated, the prosecutor's conduct ultimately served to deprive Lopez of his chosen counsel. The record indicates that Lopez, who retained Barry Tarlow because of his skills as a trial attorney, went to great lengths to avoid just this result." U.S. v. Lopez, 765 F. Supp. 1433, 1461 (N.D. Cal. 1991).

In *U.S. v. Lopez*, 765 F. Supp. 1433, 1461 (N.D. Cal. 1991), even though the Defendant's new lawyer was eminently competent[4], the District Court found that dismissal was the only appropriate remedy where the prosecutor's communication with a represented individual resulted in that citizen's loss of his or her counsel of choice. The Ninth Circuit noted that it may be the appropriate remedy but was not in that particular case. *See U.S. v. Lopez* 4 F.3d 1455 (9th Cir. 1993).

> "We have recognized that exercise of supervisory powers is an appropriate means of policing ethical misconduct by prosecutors…we have also expressly recognized the authority of the District Court to dismiss actions where government attorneys have 'willfully deceived the court,' thereby interfering with 'the orderly administration of justice.' … [W]e question the prudence of remedying [Lyons] misconduct through dismissal of a valid indictment. To justify such an extreme remedy, the government's conduct must have caused substantial prejudice to the defendant and been flagrant in its disregard for the limits of appropriate professional conduct." *U.S. v. Lopez* 4 F.3d 1455 (9th Cir. 1993). *See also U.S. v. Acosta*, 526 F.2d 670, 674 (5th Cir.), *cert. denied*, 426 U.S. 920 (1976).

But an even worse case exists where the Government abuses it non-reciprocal, compulsory power to separate represented citizens from their counsel in order to achieve those results.

PRE-INDICTMENT AS WELL AS POST-INDICTMENT

The courts have made clear that it matters not that defendants had not been indicted and their Sixth Amendment right to counsel had not yet attached.

The courts that have considered the issue has concluded, "the ethical prohibition of the State Bar…should be applied pre-indictment" as well as post-indictment to prohibit such hostile communication with represented parties. *U.S. v. Lopez*, 765 F. Supp. 1433, 1451 (N.D.Cal. 1991). As the Second Circuit reiterated in *Hammad*:

[4] "There is no question that Lopez's new counsel is very able and will provide him with outstanding representation….", *U.S. v. Lopez*, 765 F. Supp. 1433, 1461 (N.D. Cal. 1991).

> "The applicability of DR 7-104(A)(1) to the investigatory stages of a criminal prosecution presents a closer question. The government asserts the rule is coextensive with the sixth amendment, and hence, that it remains inoperative until the onset of adversarial proceedings. The appellee responds that several courts have enforced DR 7-104(A)(91) prior to attachment of sixth amendment protections. We find no principled basis in the rule to constrain its reach as the government proposes…. …The sixth amendment and the disciplinary rule serve separate, albeit congruent purposes. …[T]he Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise. The Model Code of Professional Responsibility, on the other hand, encompasses the attorney's duty 'to maintain the highest standards of ethical conduct.' … Hence, the Code secures protections not contemplated by the Constitution.
>
> Moreover, we resist binding the Code's applicability to the moment of indictment. The timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances." *U.S. v. Hammad*, 858 F.2d 834, 838-839 (2d Cir. 1988)[5].

More importantly, here the opportunity to engage in such hostile interference with the attorney-client relationship was occasioned by the exclusive, non-reciprocal, compulsory process of the Federal Grand Jury.

Last term, the Supreme Court recounted the over 150-year history of the federal courts' inherent power to regulate the conduct of attorneys who appear before them and noted that the "power reaches both conduct before the court and that beyond the court's confines…." *Chambers v. Nasco, Inc.*, 115 L.Ed. 2d 27, 44 (1991).

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[5] **REGARDLESS WHO INITIATED THE CONTACT**

And it matters not whether the individual or opposing counsel initiated the contact or interview.

> "Nor is the prosecutor's conduct excused by the fact that the defendant initiated contact with the government. Courts have consistently ruled that the ethical prohibition bars a prosecutor from communicating with a represented individual without his or her counsel even if it is the individual who makes the first contact. …The Discussion text following Rule 2-100 explicitly states that it is irrelevant whether an attorney is contacted by the opposing party. In addition, the Committee on Professional Ethics of the ABA has unanimously ruled that the ethical prohibition is violated even when the defendant initiates contact with the government. … Moreover, as the ethical prohibition applies to attorneys and is designed in part to protect their effectiveness, a represented party may not waive it." U.S v. Lopez, 765 F. Supp. 1433, 1451-2 (N.D. Cal. 1991).

In a brief filed with the Supreme Court of the United States, this same Government argued that "Because of the special status of lawyers in the judicial system, we [Department of Justice] believe that state and ethical codes may constitutional regulate attorneys" [Brief for the United States of Amicus Curiae, at p. 4, *Gentile v. State Bar of Nevada*].

> "A lawyer is not in the same position as private citizen with respect to the judicial system. Rather, the lawyer has a 'fiduciary obligation to the courts.' …[C]ourts have for centuries possessed authority 'over members of the bar, incident to their broad responsibility for keeping the administration of justice and the standards of professional conduct unsullied… [L]awyers must operate as assistants to the court in search of a just solution to disputes." [Brief of the United States as Amicus Curiae, at p. 6, filed in *Gentile v. State Bar of Nevada*, November 1990.

The Government has no problem seeking to enforce such codes of professional conduct against defense attorneys when it suits their purpose; even to the exclusion of those lawyer's First Amendment rights. They should not be heard to suggest that they are not bound by those same rules when it does not suit their purpose.

The Supreme Court had the opportunity to reiterate the need "to have counsel present" before the prosecution seeks waiver of an accused's asserted Fifth Amendment right to counsel, even before indictment or any formal charges have been lodged. *Minnick v. Mississippi*, 498 U.S. 146, 112 L.Ed. 2d 489, 111 S.Ct. 486 (1990).

The Government's actions interfering with the relationship between a defendant and counsel irretrievably damages the relationship. This fact must have a bearing on a Court's decision. Where the Government intentionally injects itself into the relationship between an attorney and his client, it does so knowing that there will be a "…substantial risk… that the basic trust between counsel and client, which is the cornerstone of the adversary system, would be undercut," *Wilson v. Mintzes*, 761 F.2d 275, 285 (6th Cir. 1985), quoting *Linton v. Perini*, 656 F.2d 207, 208 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162.

Just last month the United States District Court for New Mexico took action against a prosecutor for violating this very Cannon by communicating with a represented individual under much less egregious circumstances than presented here, *In the Matter of Doe, Esq.* 801 F. Supp 478 (D. New Mexico, 1992):

> "[T]he profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious.
>
> Law evolves with the collective experience of a society's efforts to peaceably resolve human conflict. Hence, law is not stagnant. Lawyers, in our adversary system, breathe life into its words. As they zealously advocate a client's interest, the law advances and, as

> they employ reason, they direct its movement. But, the law in this social order is not self-executing—the necessary instrument in the lawyer.
>
> Today, it is beyond argument that one of the lawyer's most noble responsibilities is to protect the individual against Government excesses. Indeed, a lawyer's role is so essential to such vague concepts as "due process" and "equal protection of laws" that we guarantee the indigent a right to a lawyer. And although these concepts, so central to justice, are ultimately defined by the courts, they are fist given substance by the lawyer.
>
> When we hear the complaint, "it's not the law," the cry, "they're not following the law," or the clarion call, "there ought to be a law," we are jarred to the reality that our nation is a legal polity. Within this polity there is an increasingly palpable perception that the public is no longer empowered and that the legislature and executive are no longer responsive to its needs. It is not surprising, then, that the public turns to the remaining independent branch of Government—the judiciary—to vindicate its rights under the law. Again it entreats the lawyer.
>
> Acknowledging the crucial rule of the lawyer in our nation's fabric, we must understand ethical standards are not merely a guide for the lawyer's conduct, but are an integral part of the administration of justice. Recognizing a Government lawyer's role as a shepherd of justice, we must not forget that the authority of the Government lawyer does not arise from any right of the Government, but from power entrusted to the Government. When a Government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public truest, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power.
>
> For this reason, some observe that our system of law is a "tripartite entity"; that the process requires contending lawyers and a neutral tier; that if any of these three supports is missing, the process fails; and, that if any to leg is disproportionately weak, the structure as a whole is weakened." *In the Matter of Doe, Esq.* 801 F. Supp 478 (D. New Mexico, 1992).

This Court has supervisory power to remedy a prosecutor's misuse or abuse of their authority before the grand jury. *Bank of Nova Scotia v. U.S.*, 108 S. Ct. 2369, 2374 (1988). This Court has the inherent power to dismiss the indictment pursuant to it supervisory powers. *U.S. v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974); *U.S. v. Chanen*, 549 F.2d 1306, 1309 (9th Cir.), *cert.*

denied, 434 U.S. 825 (1977). As the Third Circuit aptly noted in *U.S. v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979):

> "[W]hile in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.
>
> We suspect that dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse, of the grand jury process." *U.S. v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979).

CHANGE OF VENUE:

Sixth Amendment to the Constitution of the United States

Rule 18, F.R.CR.P.
Rule 20, F.R.CR.P.
Rule 21, F.R.CR.P.
Rule 22, F.R.CR.P.

CONSTITUTIONAL PROVISIONS:

Art. Ill, Sec. 2, Paragraph 3, of the United States Constitution provides that "trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state, the trial shall be at such place or places as congress may by laws have directed." The Sixth Amendment also provides that trial shall be held in the "District wherein the crime shall have been committed, which district shall have been previously ascertained by law."

PLACE OF TRIAL WITHIN DISTRICT:

Rule 18 of the Federal Rules of Criminal Procedure provides that unless otherwise permitted by statute or the criminal rules, "the prosecution shall be had in a district in which the offense was committed." The Rule further provides that the Court shall determine "the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

This Rule serves to implement the Sixth Amendment requirement that a criminal defendant have the right to trial" …by an impartial jury" in the "District wherein the crime shall have been committed, which district shall have been previously ascertained by law."

There is no constitutional right insuring that a defendant may be tried within a given division of a district. *US v. Anderson*, 328 US 699, 704-705 (1946); *US v. James*, 528 F.2d 999 (5th Cir.), *cert. denied*, 429 US 959 (1976); *Lafoon v. US*, 250 F.2d 958 (5th Cir. 1958); *US v. Burns*, 662 F.2d 1378 (11th Cir. 1981).

But where the government has apparently chosen a division with demographics having substantially fewer persons of an identifiable class than the members of this class in the defendant's home division, counsel should move to transfer venue on equal protection ground sand under *Batson v. Kentucky*.

"The defendant [has] the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson v. Kentucky* 476 U.S. 79, 90 L Ed. 2d 69, 80 (1986). Selecting the jury members in a way that systematically excludes Hispanics from the jury violates the Equal Protection Clause and fundamental principles of fairness and a "fair cross section" of his community as guaranteed by the Sixth Amendment. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. --, 128 L.Ed. 2d. 89, 107, n. 19 (1994), citing *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 90 L.Ed. 1181 (1946).

> "The Equal Protection Clause guarantees the defendant that [the Government] will not exclude members of his race from the jury venire…" *Batson v. Kentucky*, 90 L.#.d.2d. at 80, citing *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880).

The effect of selecting a situs for trial at this distant location also offends the purpose of the Jury Selection and Service Act of 1968 [Title 28 U.S.C. §1861 et.seq.] which is to obtain jury lists "that represent a cross section of the relevant community" and to "establish an effective bulwark against impermissible forms of discrimination and arbitrariness." 1968 U.S. CodeCong&Adm.News, pp. 1792, 1794.

> "[Excluding] identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor v. Louisiana*, 419 U.S. 422, 42 L.Ed.2d. 690, 698 (1975). Courts have taken into account just such considerations as the effect the selection of a particular situs will have upon the "fair cross-section" requirements of the Jury Selection and Service Act, holding same impermissible. *U.S. v. Fernandez*, 480 F.2d 726, 734 (2nd Cir. 1973); *Alvorado v. State*, 486 P.2d 891 (S.C. Ala. 1971); *Mallett v. Missouri*, 494 U.S. 1009 (1990), Marshall, J., dissenting from denial of cert. ["I would grant the petition to consider whether a trial court's decision to transfer a capital trial of an Afro-American defendant to a country with no residents of the defendant's race violate the Equal Protection

> Clause or the Sixth Amendment's fair cross section requirement…."].
>
> "In particular, it seems to us that the …holding of certain trials in Westbury rather than Brooklyn may well lead to departures from the prescriptions of the Jury Selection and Service Act." *U.S. v. Fernandez*, 480 F.2d 726, 734 (2nd Cir. 1973)

COURT MUST GIVE DUE REGARD TO THE CONVENIENCE OF DEFENDANT AND WITNESSES:

In selecting the division, the court must give "due regard to the convenience of the defendant and the witnesses." Rule 18, F.R.CR.P.. *See also*: *Dupoint v. US*, 388 F.2d 39 (5th Cir. 1967); *US v. Burns*, 662 F.2d 1378 (11th Cir. 1981); *US v. Balistrieri*, 778 F.2d 1226 (7th Cir. 1985); *US v. Fernandez*, 480 F.2d 726 (2nd Cir. 1973).

In *Dupoint v. US*, 388 F.2d 39 (5th Cir. 1967), where the trial court had overruled a defendant's objection to trial in a division 42 miles from the one in which the offense was committed based on the convenience of the prosecutor, the Fifth Circuit held that the trial court is "mandatorily directed to exercise due regard for the convenience of the defendant and the witnesses…" *Dupoint v. US, Supra*, at p.43.

The Court further stated that:

> "That a defendant should be tried in the division in which the offense was committed, especially when he resides there, is not lightly to be evaded. The real effect of Rule 18 is that it is not to be done except with due regard for the defendant's convenience and that of the evidenced by the Constitutional requirement that none shall be prosecuted outside the district in which the offense is committed, it is the public policy of the Country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government." *Dupoint v. US, Supra* at p. 44.

Similarly, in *US v. Fernandez*, 480 F.2d 726 (2nd Cir. 1973), where the case had been assigned to a judge in Westbury, a division 26 miles from the one in which the crime had occurred, the defendant moved to reassign the case to the division in which the crime had occurred for the convenience of his witnesses. *US v. Fernandez, Supra*, at p. 730. The trial court denied the motion and on appeal the Second Circuit, in noting that "the only person convenienced by trial at Westbury was the judge," *Supra*, at p. 730, held that denying the motion violated Rule 18 of the Federal Rules of Criminal Procedure, and if the defendant had shown prejudice it "might well have reversed on that ground alone." *US v. Fernandez, Supra*, at p. 730.

It is also clear that the place of trial cannot be determined based on a "general policy" within a district to schedule criminal trials efficiently. *US v. Burns*, 662 F.2d 1378 (11th Cir. 1981). In *Burns*, where defendant's trial was moved from Huntsville, Alabama to Birmingham (one hundred miles away), the trial court denied defendant's motion to transfer the case to the division in which the crime occurred, based on a district policy to try all criminal cases there. The Eleventh Circuit rejected this per se rule holding that the failure of the trial court to exercise its discretion "within the ambit of Rule 18" was reversible error. *US v. Burns, Supra*, at p. 1383.

> "The reasoning which would support an exercise of discretion in this manner, however, is necessarily circular: all criminal cases are scheduled for trial in Birmingham, none are scheduled for trial in Huntsville; therefore, trial can be scheduled more promptly in Birmingham. More than incantation of the words 'speedy trial' is required to distinguish the order in this case from an application of the per se rule about which defendants complain. Application of such a rule in this case was reversible error."
>
> We think that a district judge's exercise of discretion resulting in a trial in an environment alien to the accused over a proper objection must be supported by a demonstration in the record that the judge gave due regard to the factors now incorporated in Rule 18. The record in this case does not contain such a demonstration. Obviously trial in Birmingham was inconvenient to objecting defendants. Obviously trial in Birmingham was inconvenient to virtually all of the many witnesses. For speedy trial considerations to outweigh such factors they should be set forth in findings that are sufficiently detailed to allow review. The record before us does not furnish any hint of a reason why a trial could not be held in the Northwestern Division within a reasonable time except for the policy of the court not to do so. The requirements of Rule 18 compel that this be held insufficient." *US v. Burns, Supra*, at p. 1383.

VENUE WHERE OFFENSES CHARGED WERE COMMITTED IN MORE THAN ONE DISTRICT:

When you are dealing with crimes that were committed in more than one district or offenses which are continuing in nature, venue must be determined pursuant to the provisions of Title 18, U.S.C., §3237(a) that an offense "…begun in one district and completed in another, or committed in more than one district, may be …prosecuted in any district in which such offense was begun, continued, or completed." The danger inherent in such a "continuing offense doctrine" is that it vests in the Government broad discretion, *US v. Johnson*, 323 US 273, 275 (1944); *US v. Provo*, 215 F.2d 53 (2nd Cir. 1954); *US v. Parr*, 17 F.R.D. 512 (S.D. Tex. 1955), subject only to the seldom granted provisions of Rule 21(a) and (b), F.R.CR.P., which allows transfer to another district where "prejudice" can be shown or "the convenience of parties and witnesses" or "the interest of justice" would require. In *US v. Cabrales*, 524 US 1, 118 S.Ct.

1792, 141 L.ED.2d 1 (1998) The Supreme Court held that venue for money laundering was proper in the place where the money was laundered, not where the illegal drug activity which generated the money occurred. Even though the drug deals occurred in Missouri, the money laundering offenses were being conducted and completed in Florida.

Rule 18 of the Federal Rules of Criminal Procedure expressly provides that "the court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

> **"Rule 18. Place of Prosecution and Trial**
> …The court ***shall*** fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." (emphasis supplied) Rule 18, F.R.CR.P.

The 5th Circuit has held that the Trial Judge is to consider the convenience of "the defendant and **his** witnesses" [emphasis added] *United States v. James* 528 F.2d 999, 1021 (1976), not that of the government.

> "The real effect of Rule 18 is that it is not to be done except with due regard for the defendant's convenience and that of the witnesses. **The convenience of the government is *not* a factor**." *Dupoint v. United States* 388 F.2d 39, 44 (5th Cir. 1967)

The Advisory Committee notes to Rule 18 as well reflect that the discretion given to the trial court for fixing the place of trial must take into account "due regard to the convenience of the defendant and **his** witnesses." [emphasis added] Adv. Comm. Notes to Rule 18, F.R.CR.P. (August 1, 1989).

The paramount consideration for fixing a place within the District for trial under Rule 18 are the convenience to the defendant and witnesses and the prompt administration of justice- - "the court is not authorized to fix the place on trial on the basis of other considerations to the exclusion of these." *United States v. Burns*, 662 F.2d 1378, 1383 (11th Cir. 1981).

VENUE WHERE OFFENSE CHARGED IS ONE OF OMISSION:

To compound the hardship upon the defendant, the Supreme Court has found single district venue [when the offense charged was a "failure" to perform an act required by law] to lie only in the district where the required act was not performed. In *Johnson v. US*, 351 US 215, 220 (1956), for example, the Court held that venue in a selective service case for refusal to report for civilian work lay only in the district to which the defendant had been ordered to report, even though the defendant had never been present in that district and "no act of any kind was committed in that distant district." *Johnson v. US*, 351 US 215, 223 (1956) (dissenting opinion). *See also*: *Travis v. US*, 364 US 631 (1961) [holding that venue for a prosecution for false statements lies only in Washington where an affidavit was mailed to the National Labor Relations Board, not in Colorado, where the defendant resided and the affidavit had been

prepared, signed and mailed]. For Opinions finding multiple venue in similar situations: *US v. Williams*, 424 F.2d 344 (5th Cir. 1970), *rev'd on other grounds*, [*en blanc*], 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 F.2d 954 (1972); *DeRosier v. US*, 218 F.2d 420 (5th Cir.) 349 US 921 (1955); *US v. Harbolt*, 426 F.2d 1346 (5th Cir. 1970); *Imperial Meat Co. v. US*, 316 F.2d 435 (10th Cir.) 365 US 820 (1963); *Henslee v. US*, 262 F.2d 40 (5th Cir.), *cert. denied*, 359 US 984 (1959).

VENUE IN CONSPIRACY CASES:

In a conspiracy case, venue lies in any district in which the conspiracy was entered into or where any act in furtherance of the conspiracy took place. *Hyde v. US*, 225 US 347, 363 (1912); *Downing v. US*, 384 F.2d 594 (5th Cir.), *cert. denied*, 382 US 901 (1965); *Ladner v. US*, 168 F.2d 771 (5th Cir.), *cert. denied*, 335 US 827 (1948); *US v. Brandon*, 320 F.Supp 520 (W.D. Mo. 1970); *US v. Peters*, 297 F.Supp 1124 (D. Min. 1969); *US v. Hinton*, 268 F.Supp 728 (S.D. La. 1967).

VENUE WHERE OFFENSE CHARGED IS AIDING AND ABETTING:

Where one is charged with "aiding and abetting" in the commission of an offense, venue lies both in the district where the principal offense was committed and in the district where the acts alleged to constitute aiding and abetting took place. Moore's Federal Practice-Criminal Rules, §18.03[1]. *See_also*: 18 U.S.C. §2; *US v. Kilpatrick*, 458 F.2d 864, 867-888 (7th Cir. 1972); *US v. Bozza*, 365 F.2d 206, 221 (2nd Cir. 1966).

With respect to offenses involving the use of the mails or transportation in interstate or foreign commerce, 18 U.S.C. §3237 provides that venue will lie "…in any district from, through or into which such commerce or mail-matter moves." However, such venue statute embraces only those crimes in which the use of the mails or interstate transportation is a specific element of the offense and would not include offenses where the mails are merely incidentally used in the commission of the offense (i.e. delivery of false statements, 18 U.S.C. 1001). This broad venue for offenses in which the use of the mails is an element [in "any district from, through, or into which such …mail matter moves"] has been held not to exhaust the possible choices of venue, and that accordingly venue may also be established in any district where the applicable substantive statute so provides or where the offense was "committed" [e.g., where a fraudulent scheme was formulated in a securities-fraud case involving the use of the mails, *US v. Cashin*, 281 F.2d 669, 674 (2nd Cir. 1960)], thereby affording the government an even broader choice of forums.

Where the defendant, on his own motion, seeks a transfer of his case to a non-venue district, the defendant waives his right to trial within the district where the offense was committed which is guaranteed by the Sixth Amendment to the Constitution and Rule 18, F.R.CR.P.. Such waiver of district venue occurs when a defendant moves for transfer from the district for trial under Rule 21(a) or (b), or transfer from the district for plea and sentence under Rule 20, F.R.CR.P..

TWO DEFENDANTS, TWO JURIES:

An alternative to severance, where some of the government's evidence is inadmissible against a codefendant is to hold a joint trial before two juries and remove one or the other jury from the courtroom during the presentation of such evidence. *US v. Hayes*, 676 F.2d 1359 (11th Cir. 1982); *US v. Rimar*, 558 F.2d 1271 (8th Cir. 1977); *US v. Sidman*, 470 F.2d 1158 (9th Cir. 1972).

TRANSFER FROM DISTRICT FOR TRIAL:

RULE 21, F.R.CR.P.:

Where a defendant seeks to transfer his case from a proper venue district for trial, such must be accomplished through the discretionary provision of Rule 21 of the Federal Rules of Criminal Procedure.

RULE 21(a), TRANSFER DUE TO PREJUDICE:

Pursuant to Rule 21(a) a defendant may move for a change of venue on grounds of prejudice in the district where the prosecution is brought.

The provision of Rule 21(a) requires that a defendant demonstrate that he cannot obtain a fair trial at "any place" fixed by law. This standard is extremely "difficult to meet" and the determination of whether such prejudice exists is left to the sound discretion of the trial court and will not be overturned only upon a clear showing of an abuse of that discretion. *US v. Williams*, 523 F.2d 1203 (5th Cir. 1975). One commentator has lamented that "[t]he burden of showing abuse of discretion in denying a motion under Rule 21(a) is a virtually impossible one; indeed, there does not seem to be a federal case where the burden has been met." Moore's Federal Practice-Criminal Rules, §21.03[3].

In light of the fact that the "ultimate question" in determining whether prejudice exists is "whether it is possible to select a fair and impartial jury" it has been held that "'the proper occasion for such a determination is upon the voir dire" of the jury. *Blumenfeld v. US*, 284 F.2d 46, 50 (8th Cir. 1960), *cert. denied*, 365 US 812 (1961); *Estes v. US*, 335 F.2d 609 (5th Cir. 1964). As a consequence, to preserve error for appeal, the defendant may have to request and obtain responses regarding prejudicial pretrial publicity, etc., at voir dire and exercise all of his or her peremptory challenges in order to demonstrate to an appellate court that the jurors were prejudiced. *US v. Moran*, 236 F.2d 361 (2nd Cir.), *cert. denied*, 352 US 909 (1956).

In order to protect your record, defense counsel should attach to his or her motion, and move into the record, affidavits and examples of unfavorable newspaper publicity, TV and radio programming logs and the like. Live witnesses may be utilized to demonstrate for the record on appeal the saturation of such publicity and its unfavorable nature.

In light of the extreme reluctance on the part of courts to grant transfers for "prejudice" under Rule 21(a), other means of avoiding prejudicial publicity should also be explored. These may include: (1) a motion for continuance of trial until such prejudicial publicity has "blown

over"; (2) waiver of a jury trial where it is felt that the judge is less likely to be affected by prejudicial publicity than the average juror; (3) motion to have the judge recuse himself, where you are not so fortunate; (4) request for specific interrogation or an instruction to prospective jurors and panel members with regard to such publicity; and (5) motion seeking judicial regulation of the conduct of the parties or counsel or news media. The latter may be especially helpful where, in light of the publicity surrounding the case, the prosecutor's office sets up a "P.R. Department" to keep the media abreast of current developments. A motion for transfer within the district for trial pursuant to Rule 18, F.R.CR.P., may be looked on with greater favor by the trial court, and in districts with large geographical boundaries relief from prejudicial publicity may be thereby obtained.

RULE 21(b), TRANSFER ON THE GROUNDS OF "CONVENIENCE":

Where the Government has the choice of several districts in which to bring an indictment (a "multi-venue" case), Rule 21 (b) [transfer for "convenience of the parties and witness"] provides such broad discretion in the trial court as to afford a criminal defendant very little protection from the Government's shopping spree to obtain a venue favorable to the prosecution.

Rule 21(b) of the Federal Rules of Criminal Procedure provides for transfer of a case for trial, upon motion of the defendant, "for the convenience of the parties and witnesses, and in the interest of justice."

It is interesting to note that such transfers under both sections (a) and (b) of Rule 21 are obtainable only upon motion of the defendant.

It has been noted that while Rule 21(a) is designed to protect a defendant's right to a fair trial without "prejudice", Rule 21 (b) is designed to provide the defendant with a "convenient trial." Wright, Federal Practice and Procedure: Criminal, §344. That is, Rule 21(b) is designed to prevent the Government from choosing from a forum, which places undue inconvenience or hardship upon a defendant. The Rule thereby "implements the policy that venue should be chosen to minimize the inconvenience to the defense." Wright, Federal Practice and Procedure: Criminal, §343; *Jones v. Gasch*, 404 F.2d 1231, 1236 (D.C. Cir.), *cert. denied*, 390 US 1029 (1968).

Again, however, the question of determining when "convenience" and the "interest of justice" require a transfer is left to the discretion of the trial court and will be overturned only upon a showing of an abuse of that discretion. *Estes v. US*, 335 F.2d 609 (5th Cir.), *cert. denied*, 379 US 964 (1965); *US v. Phillips*, 433 F.2d 1364 (8th Cir.), *cert. denied*, 401 US 917 (1971).

Factors which have been considered in exercising discretion to grant a transfer for "convenience" or in the "interest of justice" under Rule 21(b), F.R.CR.P., are: the residence of a defendant, *US v. Jessup*, 38 F.R.D. 42 (D. Tenn. 1965); *US v. Amador Casanas*, 233 F.Supp 1001 (D.D.C. 1964); *US v. Herold*, 309 F.Supp 997 (D.Wis. 1970); *US v. Rossiter*, 25 F.R.D. 258 (D. Puerto Rico, 1960); the corporate offices of a corporate defendant; *US v. General Motors Corp.*, 194 F.Supp 745, 756 (D.N.Y. 1961); *US v. National City Lines*, 7 F.R.D. 393, 402 (D. Cal. 1947); the locale of the events at issue in the particular case; *US v. Van Allen*, 28 F.R.D.

329, 340 (S.D. N.Y. 1961); *US v. Aronson*, 319 F.2d 48, 52 (2nd Cir.), *cert. denied*, 375 US 920 (1963); *US v. Jones*, 43 F.R.D. 511, 515-516 (D.D.C. 1967); the location of possible witnesses; *US v. Jessup*, 38 F.F.D. 42 (D. Ten. 1965); *US v. Foster*, 33 F.R.D. 506 (D. Md. 1963); *Jones v. Gash*, 404 F.2d 1231, 1240-1241 (D.C. Cir.), *cert. denied*, 390 US 1029 (1967); the location of records involved in a particular case*; US v. Jessup*, 38 F.R.D. 42 (D. Tenn. 1965); *US v. General Motors Corp.*, 194 F.Supp 754 (S.D.N.Y. 1961); *US v. Erie Basin Metal Products Co.*, 79 F.Supp 880 (D. Md. 1948); the disruption of the defendant's business; *US v. Olen*, 183 F.Fupp 212 (S.D.N.Y. 1960); *US v. Rossiter*, 25 F.R.D. 258 (D. Puerto Rico, 1960); *US v. White*, 95 F.Supp 544, 551 (D. Neb. 1951); *US v. National City Lines*, 7 F.F.D. 393, 402 (D. Cal. 1947); the accessibility of the district of trial, or the crowded docket condition of the district where the charges are brought, *US v. Amador Casanan*, 223 F.Supp 1001 (D.D.C. 1964); where the defendant has numerous proceedings ongoing in another district; *US v. Ray*, 234 F. Supp. 371 (D.D.C. 1964); or, where the defendant resided and the great majority of events and transactions in question occurred; *US v. Clark*, 360 F.Supp 936 (S.D.N.Y.), mandamus denied, 481 F.2d 276 (2nd Cir. 1974).

TRANSFER WITHIN A DISTRICT:

RULE 18, F.R.CR.P.:

Transfers within a district were formerly governed by Rule 19, F.F.Cr.P., which was abrogated in 1966, with the amendments of that same year. The 1966 amendment to Rule 18 of the Federal Rules of Criminal Procedure provides for the fixing of the place of trial by the court in a division within the district" …with due regard to the convenience of the defendant and the witnesses." Rule 18, F.R.CR.P.; *Dupoint v. US*, 388 F.2d 39 (5th Cir. 1967). Thus, Rule 18, F.R.CR.P., specifically provides for intra-district transfers upon motion of the defendant where the "convenience of the defendant" and the "witnesses" would require the same. Moore's, Federal Practice-Criminal Rules, §18.02[3]; Wright, Federal Practice and Procedure: Criminal, §§305 and 311; *Dupoint v. US*, 388 F.2d 39 (5th Cir. 1967); *US v. Fernandez*, 480 F.2d 726 (2nd Cir. 1973).

Furthermore, while the language of amended Rule 18 does not clearly specify that the court shall take "prejudice" into account in fixing the place of trial within the district, the 1966 Committee Notes to both Rule 18 and Rule 21(a) of the Federal Rules of Criminal Procedure indicate that this is the intent of the amendment. Moore's, Federal Practice and Procedure: Criminal, §305; *US v. Tijerina*, 407 F.2d 349, 354 (10th Cir.) *cert. denied*, 396 US 843 (1969); *Gwane v. US*, 409 F.2d 1399 (9th Cir. 1969).

As mentioned before, courts are often less reluctant to transfer a case to another division within a district pursuant to Rule 18, F.R.CR.P., than to transfer a case for trial to another district pursuant to Rule 21, F.R.CR.P. Where, in a large district, the harm of prejudicial publicity may be obviated by transferring the case to a distant division, a request for transfer within the district under Rule 18 may be a practical alternative to the rarely granted intra-district transfer for "prejudice" under Rule 21(a), F.R.CR.P. However, requests for transfer within the district are within the trial court's discretionary power, as well, and will not be overturned short of showing of abuse in that discretion. *Houston v. US*, 419 F.2d 30 (5th Cir. 1969).

Abuse of discretion will only be found if the facts compel, not merely support venue transfer, *US v. Hunter*, 672 F.2d 815 (10th Cir. 1982). *See also US v. Raineri*, 670 F.2d 702 (7th Cir. 1982). Lack of court facilities at the alternatives sites requested in defendant's motion to transfer was ample basis for judge's discretion to deny motion.

However, a blanket denial of all motions to transfer as court policy is an abuse of discretion. *US v. Burns*, 662 F.2d 1378 (11th Cir. 1981).

TRANSFER FROM DISTRICT FOR PLEA AND SENTENCE:

TRANSFER FOR PLEA:

Rule 20 of the Federal Rules of Criminal Procedure provides a method by which a defendant who "wishes to plead guilty or "*nolo contendere*" and desires "to waive trial" may have his case transferred from the district in which an indictment or arrest warrant is pending to a district where defendant is present or resides, which may be more convenient or more favorable for sentencing purposes.

The request for such transfer under Rule 20 by the defendant must be in writing and is "subject to the approval of the United States Attorney for each district."

Rule 20, F.R.CR.P., allows such transfer for plea and sentence to a district in which the defendant is "present" or resides. In effect, Rule 20, F.R.CR.P., gives a criminal defendant who swishes to plead guilty an opportunity to secure disposition of the case and sentence in a more favorable forum. Often, a defendant is arrested and charges are brought in a distant district where the defendant's reputation, family and community ties, and other local mitigating factors are unknown. Where the defendant desires to plead guilty, and such factors are in his favor, a transfer for plea and sentence to the district of his residence where he was either arrested, is being held, or is present while on bond may prove very beneficial. Remember, however, that such transfer may be obtained only upon the written consent of the prosecutor in both the district where the prosecution or arrest warrant are pending and the prosecutor in the district to which transfer is sought.

Another consideration is whether or not to seek a Rule 20 transfer for plea and sentence is the relative sympathies of the courts involved, as well as their track record regarding similarly situated defendants and offenses. Consequently, some investigation into these matters should be done before such transfer is sought.

Rule 20(c), F.R.CR.P., specifically provides that in the event the defendant should plead "not guilty" after the proceeding has been transferred then "the clerk shall return the papers to the court in which the prosecution was commenced and the proceedings shall be restored to the docket of that court." Subsection (c) of Rule 20 further provides that the defendant's previous statement that he wished to plead guilty or nolo contendere may not thereafter be used against him. The application of *Harris v. New York*, 401 US 222 (1971), allowing the use of a

defendant's statements obtained in violation of *Miranda* for impeachment purpose after the defendant testified in his own behalf at trial, should be considered in such a situation.