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**THE CASE OF THE MISSING HOLDING: THE
MISREADING OF *ZAFIRO v. UNITED STATES*,
THE MISREPLICATION OF PRECEDENT, AND
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DOCTRINE OF MUTUALLY EXCLUSIVE
DEFENSES**

Scott Hamilton Dewey*

PROLOGUE: THE FABLE OF THE CONSCIENTIOUS CLERKS

It was a Saturday afternoon, but the district court clerk was still at work on *United States v. Jones and Smith*. It was turning out to be an annoying case, because Jones's defense counsel was filing every nuisance motion under the sun. Among others, she had moved to sever Jones's joint trial with codefendant Smith on the grounds that the two defendants' defenses would be mutually exclusive.

So the clerk irritably but diligently went through the movant's brief and the government's opposition. Defense counsel apparently had gone to some online treatise, clipped out case summaries and pasted them straight into her brief. These authorities were dated, with only one from the district court's home circuit and another two from foreign circuits. "Typical," the clerk grumbled. When he checked the cited authorities, none of the cases shed much light on his case. The assistant U.S. attorney's brief was more careful and professional, and she cited two recent appellate opinions from the home circuit. Those cases both stated that the rule in the circuit was clear: a defendant is entitled to severance when his and a codefendant's defenses are mutually exclusive, such that for jurors to believe and acquit one, they necessarily had to disbelieve and convict the other. But a mere allegation of mutually exclusive defenses is insufficient to support the severance motion.

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The clerk reread the defense brief and saw that it really offered nothing more than a bald allegation of mutual exclusivity. So in his draft opinion, he stated the circuit's rule, noted the lack of any meaningful explanation of how the codefendants' defenses were irreconcilable, and rejected the motion. He knew how obsessed his judge was about not getting reversed by a circuit panel—she dwelt on this often—so he checked an additional one or two recent authorities from the home circuit to confirm that the rule in the AUSA's brief was current. Then he locked up the judge's chambers and headed uptown to meet some friends.

Almost two years later, a circuit court clerk was reading defense counsel's appellate briefs in *United States v. Jones and Smith*, which claimed prejudice from the district court's failure to sever the joint defendants, among other issues. The defense counsel cited three authorities in support of her argument, all of them somewhat dated and two of them from foreign circuits. The brief also attempted to distinguish two more recent authorities from the home circuit. The clerk printed out all these cases and studied them closely. She saw that they all agreed on the correct standard for when joint defendants must be severed due to mutually exclusive defenses. She also saw that the defendants' defenses were not really mutually exclusive—it would be possible for a jury to believe both at the same time.

The clerk remembered that her judge had warned her about this case and mentioned that there had been some earlier, rather confusing cases on the issue, and that the Supreme Court had at least partly addressed the issue several years earlier, so be sure to check all that out. The clerk read that Supreme Court opinion and noticed that while the Court had stated that "Mutually antagonistic defenses are not prejudicial per se," her own circuit and the cited foreign authorities stated that mutually exclusive or irreconcilable defenses *are* prejudicial per se and must be severed. She checked the most recent opinions from her circuit that addressed the issue, and found that they agreed with the other cases. So she wrote up her draft opinion, citing all the authorities from the briefs along with the Supreme Court's opinion and the recent decisions from her circuit. She stated the established rule, but discussed how it did not apply to *Jones and Smith*. Since the severance issue was only one among many, the clerk wrapped it up concisely and moved on to other, more complex issues. The judge was satisfied with her analysis, so her draft went out a month later as an unpublished opinion.

These two conscientious clerks basically did everything that was expected of them. They carefully checked the most current case law within their circuit and made certain that their drafts harmonized with it. It would have been hard for them to find out that the rule on mandatory severance of mutually exclusive defenses actually had been rejected already by the Supreme Court in the very case that the appellate clerk checked. It would have been even harder for them to discover that the rule was never properly established in their circuit, or any other circuit, in the first place.

I. INTRODUCTION

The federal criminal justice system relies heavily on joint trials of criminal defendants.¹ As the Supreme Court stated in *Richardson v. Marsh*,² “Joint trials generally serve the interests of justice by . . . enabling more accurate assessment of relative culpability,” “avoiding the scandal and inequity of inconsistent verdicts,” and contributing to “both the efficiency and the fairness of the criminal justice system” by averting the inconvenience, trauma, and other costs of multiple presentations of the same evidence and witnesses.³ For that reason, 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 “if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions constituting an offense or offenses.”⁴ The Supreme Court and the various circuit courts all favor joint trials.⁵

Yet joint trials can pose greater risks of prejudice to defendants.⁶ As such, Rule 14 of the Federal Rules of Criminal Procedure allows severance even of defendants properly joined under Rule 8(b): “If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.”⁷ Potential prejudice from joint trials can take many forms: prejudice to one defendant from a codefendant’s statement or confession (the *Bruton*

¹ See, e.g., *Zafiro v. United States*, 506 U.S. 534, 537-38 (1993); *Richardson v. Marsh*, 481 U.S. 200, 209-10 (1987).

² 481 U.S. 200.

³ *Id.* at 210.

⁴ FED. R. CRIM. P. 8(b); *Zafiro*, 506 U.S. at 537.

⁵ See *Zafiro*, 506 U.S. at 537-38; *Opper v. United States*, 348 U.S. 84, 95 (1954).

⁶ *Richardson*, 481 U.S. at 217 (Stevens, J., dissenting).

⁷ FED. R. CRIM. P. 14; *Zafiro*, 506 U.S. at 538.

problem);⁸ denial of Confrontation Clause rights from one defendant's inability to cross-examine another's witnesses;⁹ prejudice from one defendant's guilt rubbing off on another when there is a great disparity in the weight of evidence between codefendants;¹⁰ prejudice from a defendant in a joint trial being denied access to "essential exculpatory evidence" that would have been available in a separate trial;¹¹ and other factors that might prevent a jury from "assess[ing] the guilt or innocence of the defendants on an individual and independent basis."¹²

Wholly inconsistent, sharply conflicting defenses where a jury's belief in one defendant precludes their believing the other—referred to variously as mutually antagonistic, mutually exclusive, or irreconcilable defenses—represent another potentially prejudicial factor in joint trials.¹³ District and appellate courts in the various federal circuits have often shown uncertainty and confusion regarding how to handle this issue. Compounding the problem, irreconcilable defenses have received relatively little attention from the Supreme Court, unlike more familiar issues such as the *Bruton* problem.¹⁴ Yet in 1993, in *Zafiro v. United States*, the Court addressed the issue of mutually antagonistic defenses and gave instructions on how to handle them. In particular, the Court contradicted existing practices in most circuits, which by then presumed a mandatory severance rule for irreconcilable defenses, and held that "[m]utually antagonistic defenses are not prejudicial *per se*."¹⁵

Notwithstanding this effort at clarification, courts in various circuits failed to recognize the significance of the Court's ruling, and that it applies equally to "irreconcilable" or "mutually exclusive" defenses as

⁸ See, e.g., *Gray v. Maryland*, 523 U.S. 185, 192-93 (1998); *United States v. Gillam*, 167 F.3d 1273, 1277 (9th Cir. 1999); *United States v. Peterson*, 140 F.3d 819, 821-22 (9th Cir. 1998).

⁹ See, e.g., *United States v. Mayfield*, 189 F.3d 895, 901 (9th Cir. 1999).

¹⁰ See, e.g., *Desantis v. United States*, 459 U.S. 1014 (1982); *United States v. De Rosa*, 670 F.2d 889, 898 (9th Cir. 1982), *cert. denied. sub nom.*, *Bertman v. United States*, 459 U.S. 993 (1982); *United States v. Mardian*, 546 F.2d 973, 977-78 (D.C. Cir. 1976); *United States v. Donway*, 447 F.2d 940, 943 (9th Cir. 1971).

¹¹ *Zafiro*, 506 U.S. at 539; *United States v. Gay*, 567 F.2d 916, 918-20 (9th Cir. 1978); *United States v. Kaplan*, 554 F.2d 958, 966 (9th Cir. 1977).

¹² *United States v. Tootick*, 952 F.2d 1078, 1083 (9th Cir. 1991).

¹³ *Id.* at 1080-82; *United States v. Berkowitz*, 662 F.2d 1127, 1132-34 (5th Cir. 1981).

¹⁴ See generally *Gray v. Maryland*, 523 U.S. 185 (1998); *Richardson v. Marsh*, 481 U.S. 200 (1987); *Bruton v. United States*, 391 U.S. 123 (1968); *United States v. Peterson*, 140 F.3d 819 (9th Cir. 1998).

¹⁵ *Zafiro*, 506 U.S. at 537-38.

well as “mutually antagonistic” defenses.¹⁶ As such, various courts or circuits still reiterate a supposed mandatory severance rule for mutually antagonistic defenses that arose from a convoluted tangle of pre-*Zafiro* precedent ultimately based only on dicta, misunderstandings, and misreadings of earlier cases. Nor have legal scholars helped much with this problem. Of the scarce legal scholarship on the federal mutually exclusive defenses doctrine, most of it barely mentions the issue, most of it predates *Zafiro*, and most of that which came before or after does not clarify the issue much.¹⁷

¹⁶ On this issue—whether the Supreme Court in *Zafiro* also declared mutually exclusive and irreconcilable defenses not prejudicial per se, or only mutually antagonistic ones—I regret to confess that in an earlier article focused on the mutually exclusive defenses jurisprudence of the Ninth Circuit, I fell into the same trap into which many courts have fallen by assuming, based on various post-*Zafiro* case law, that there must be a difference between mutually antagonistic defenses and mutually exclusive or irreconcilable ones. A closer reading of *Zafiro* and the Seventh Circuit opinion from which it arose, as well as the rest of federal case law on the issue indicates that this assumption is incorrect. The definition of mutually antagonistic defenses used in *Zafiro* is the same as the principal definition of mutually exclusive and irreconcilable defenses. See the discussion of *Zafiro*, *infra* Part III; see also Scott Hamilton Dewey, *Irreconcilable Differences: The Ninth Circuit’s Conflicting Case Law Regarding Mutually Exclusive Defenses of Criminal Codefendants*, 8 BOALT J. CRIM. L., 1, 3-4 (2004), available at <http://boalt.org/bjcl/v8/v8dewey.pdf>.

¹⁷ There is relatively little scholarship or commentary on the topic of mutually exclusive defenses, though those sources that address the issue usually do so only in passing. See, e.g., George J. Cotsirilos & Matthew F. Kennelly, *When Should Birds of a Feather Flock Together?: Problems in Defending Multiple Defendant Prosecutions*, 4 CRIM. JUST. 2, 4-5 (1990); Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 812 (2001); Kathy Diner & Teisha C. Johnson, *Federal Criminal Conspiracy*, 42 AM. CRIM. L. REV. 463, 491-92 (2005); Steven M. Kowal, *Defending Food and Drug Criminal Cases in a New Era of Criminal Enforcement*, 46 FOOD, DRUG, COSMETIC L.J. 273, 300 (1991); Hon. Lewis L. Douglass, *Selected Issues in the Trial of a Drug Case*, 162 P.L.I./CRIM 131, 166 (1991); Paul Marcus, *Criminal Conspiracy Law: Time To Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 13 (1992); Brendan Rielly, *Using RICO To Fight Environmental Crime: The Case for Listing Violations of RCRA as Predicate Offenses for RICO*, 70 NOTRE DAME L. REV. 651, 691 & n.263 (1995) (ironically citing *Zafiro* to support the statement that “The court will often find prejudice if . . . the defendants’ defenses are mutually antagonistic or exclusive . . .”). See also *Eleventh Circuit: Survey of Recent Decisions*, 35 CUMB. L. REV. 727, 769-73 (2005) (discussing *United States v. Blankenship*); James Farrin, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 L. & CONTEMP. PROBS. 325, 337-39 (1989) (does not particularly focus on mutually exclusive defenses; notes a lack of data regarding joinder of defendants under Rule 8(b), but warns of possible ineffectiveness of jury instructions, juror confusion, and joinder effect (joint defendants all presumed guilty when all presented together) based on accumulated data regarding joinder of offenses under Rule 8(a)).

For more than twenty years, the *Georgetown Law Journal’s Annual Review of Criminal Procedure* has noted the existence of the doctrine and has offered examples of decisions that apply the doctrine. See, e.g., Allison C. Giles, *Joinder and Severance*, 79 GEO. L.J. 808, 817 & n.1010 (1991); *Joinder and Severance*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 279, 285 & n.963

(2005); David P. Murray, *Joinder and Severance*, 73 GEO. L.J. 455, 462 n.1209 (1984); Rachel Zwolinski, *Joinder and Severance*, 90 GEO. L.J. 1373, 1382 & n.938 (2002). From 2000 through 2004, the *Georgetown Law Journal* used the same basic language and cases, noting that “Prejudice may result from . . . the defendants’ antagonistic or mutually exclusive defenses,” but that the Supreme Court in *Zafiro* had ruled that “[m]utually antagonistic defenses are not prejudicial per se,” then listing a string of cases finding no abuse of discretion for denial of severance before giving a list finding such abuse of discretion, including *Serpoosh*, *Buljubasic*, *Mayfield*, *Peveto*, and *Rucker*. See, e.g., Richard Vorosmarti, *Joinder and Severance*, 89 GEO. L.J. 1307 (2002). Before that, from 1993 (after *Zafiro*) to 1999, the *Georgetown Law Journal*’s standard language was similar, but put the list of cases finding abuse of discretion before those that did not, and also misidentified *Tootick* as having been decided primarily on the basis of mutual antagonism. See, e.g., Carl H. Settlemeyer III, *Joinder and Severance*, 81 GEO. L.J. 1102, 1110 & n.1027 (1993). Before *Zafiro*, Georgetown’s stock language stated the mandatory severance rule: “Joinder cannot result in requiring the jury to choose between competing defenses so that believing one defendant necessarily requires the jury to convict the other defendant.” See, e.g., Daniel S. Sullivan, *Joinder and Severance*, 80 GEO. L.J. 1184, 1195 n.1023 (1992). In 2005, apparently for the first time, Georgetown stopped listing the various earlier decisions that found an abuse of discretion and only listed decisions that did not. *Joinder and Severance*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 279, 285 & n.963 (2005).

Interestingly, in 1965—after *De Luna* but before *Rhone*, *Ziperstein*, and the rest—a note in the *Yale Law Journal* that sought to cover all problems involving joint defendants under federal criminal procedure discussed disparity of evidence, evidence admissible against a codefendant, guilt of one defendant rubbing off on another, and others, but made no mention whatsoever of mutually exclusive defenses, suggesting that it was not recognized as a doctrine at that time. *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 563-66 (1965). Thereafter, in 1979, the single article with the most useful extensive discussion of the doctrine of mutually exclusive defenses appeared, discussing mostly pro-defendant, pro-severance developments in state courts during the 1960s and ‘70s, but also noting the D.C. Circuit’s *Rhone* decision and its progeny for the only clear mandatory severance rule within the federal judiciary up to that time. Reflecting the mood of the times, the article assumed that joinder of antagonistic defenses must be improper and called for much more liberal severance rules, with the burden on the prosecution, not the defense. See Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1422-26, 1452-55 (1979). Showing the same mood of the times was Robert R. Calo, *Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 30-31 (1985). An article that went to press just before the *Zafiro* decision displayed the same mood. See Kevin P. Hein, *Joinder and Severance*, 30 AM. CRIM. L. REV. 1139, 1167 (1993) (noting that as a result of the second-prosecutor effect where codefendants accuse each other, “an increasing number of courts are finding joint trials of defendants offering antagonistic defenses unfair”). See also Matthew Flannery, *The Availability of Severance Based on the Claim of Antagonistic Defenses: Commonwealth v. Chester*, 587 A.2d 1367 (Pa.), cert. denied, 112 S. Ct. 152, and cert. denied, 112 S. Ct. 422 (1991), 65 TEMP. L. REV. 1025 (1992) (discussing a Pennsylvania state supreme court decision in the context of the *Berkowitz* statement of the mandatory severance rule, and faulting the state court for not following *Berkowitz*’s reasoning more closely); Paul Marcus, *Re-Evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WM. & MARY BILL RTS. J. 67, 113-15, 113 n.286 (2002) (bemoaning the Supreme Court’s restriction on severance for mutually antagonistic defenses under *Zafiro* and lengthily and praisefully quoting Justice Stevens’s concurrence in *Zafiro*); Wade R. Habeeb, Annotation, *Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Cases*, 82 A.L.R. 3d 245 (2005) (discussing treatment of irreconcilable defenses in

Courts' confusion over the supposed mandatory severance rule for mutually exclusive defenses could, and can, lead to miscarriages of justice. These might be hard to trace, however. In the vast majority of cases in which the issue reached the federal appellate courts, the circuit court upheld the district court's denial of a defendant's motion to sever on grounds of mutual antagonism. But given that prosecutors normally may not appeal criminal trial verdicts, the circuits only heard cases in which defendants argued that district courts had erroneously denied severance, not cases in which district courts may have erroneously granted it. Yet improper severing of codefendants' trials based on a misapprehension regarding a supposed mandatory severance rule would improperly undercut the presumption in favor of joint trials. In so doing, it would also increase the risks of ill effects that joint trials are intended to prevent: unnecessary duplication of evidence, effort, and expense resulting in judicial dis-economy; the risk of inconsistent trial results; the jury's loss of clear comprehension of an entire criminal transaction; and the corresponding risk of prejudice to the government or to certain defendants from failure to jointly try codefendants who

both state and federal courts and noting that antagonistic defenses "seem to be a well-recognized ground for a separate trial" but that trial courts remain reluctant to grant, and appellate courts reluctant to reverse, on these grounds).

After *Zafiro*, various non-academic lawyers' magazines recognized the true significance of *Zafiro*—that it effectively took away defense attorneys' most common ground for requesting severance, and that it applied to "mutually exclusive" defenses as well as "mutually antagonistic" ones. See David Spears, *Mutually Antagonistic Defense is No Longer Ground for Severance*, N.Y.L.J., Feb. 25, 1993, at 1 (calling *Zafiro* "a short and little-noticed opinion" with a major negative impact on the criminal defense bar by tossing out the mandatory severance rule). "In effect, after the Supreme Court's decision in *Zafiro*, there is no longer any realistic ground for seeking a severance of co-defendants, and discretion about which defendants will be tried together in a single trial rests entirely with the government." *Id.* "Until the decision of the Seventh Circuit in the *United States v. Zafiro* . . . no court had questioned the validity of mutually antagonistic defenses as a ground for severance." [not true—*Tootick* did that earlier] *Id.* *Criminal Procedure*, N.Y.L.J., Feb. 1, 1993, at 51 (properly equating "mutually antagonistic" with "mutually exclusive"); see also U.S. *Supreme Court Review*, THE LEGAL INTELLIGENCER, Jan. 27, 1993, at 3 (properly equating "mutually antagonistic" with "mutually exclusive"). Some academic law articles also properly recognized *Zafiro's* significance. See, e.g., Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 539 & n.217 (1995) (characterizing "antagonistic defenses" as a "defense theory which gained popularity in the 1980s and early 1990s" before the Supreme Court rejected it in *Zafiro* and also mischaracterizing *Tootick* as having been decided primarily on grounds of mutual exclusivity); Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 977 n.449 (1993) (noting Supreme Court's rejection of mandatory severance rule for "mutually exclusive" defenses). Apparently, many federal circuit judges did not get this basic message.

might appropriately be tried together.¹⁸ Because the following pages reveal a large number of cases in which denial of severance was appealed on the basis of the mistaken rule, this implies that a large number of severances may have been granted based on that rule.¹⁹

Beyond these more serious potential problems arising from the doctrine, judges and clerks cumulatively must have spent a large amount of time studying and writing orders on motions that likely did not make an adequate showing of actual prejudice, but rather wrongly rested on a presumption of prejudice. Such motions would have improperly shifted the focus of analysis from the key issue—whether there was indeed a high risk of incurable prejudice—to the sometimes complicated detailed question of whether the defenses were truly irreconcilable. They also would have tended to improperly shift the burden of sorting out the issue from defense counsel to prosecutors and, more particularly, to judges and clerks. Many of the appellate cases that follow suggest such a pattern: seemingly thinly reasoned severance motions triggering lengthy, burdensome judicial discussions of the issue. As such, misapplication of the doctrine of mutually exclusive defenses, even where severances were denied, may have presented a significant ongoing judicial dis-economy.²⁰

As such, this Article seeks to illuminate and clarify the matter. It will demonstrate that there was never any proper grounding for the various mandatory severance rules that took root in almost every federal circuit, and that the Court's decision in *Zafiro* effectively overruled nearly all prior case law on the issue. Part II will discuss the decision that inadvertently gave birth to the doctrine of mutually antagonistic defenses—*United States v. De Luna*, a 1962 decision from the Fifth Circuit that primarily concerned other issues and was not decided solely on the basis of irreconcilable defenses. Part III will analyze the holdings and

¹⁸ *Zafiro*, 506 U.S. at 537-38; *Richardson*, 481 U.S. at 209-10; *United States v. Zafiro*, 945 F.2d 881, 885-86 (7th Cir. 1991). I wish to thank Judge Posner for pointing out the need to address this issue—why anyone should care about the misapplication of the doctrine of mutually exclusive defenses, and what harm might result—more forcefully and directly than in an earlier version of this article.

¹⁹ An article written by a disappointed criminal defense attorney after the *Zafiro* decision complained that by undoing the per se severance rule for mutually exclusive defenses, the Court had taken away defense counsel's main tool for severing defendants, since the standards for using other grounds, such as *Bruton* arguments, were so much more demanding. See Spears, *supra* note 17, at 1. This implies that at least some district courts may have been granting severance on grounds of mutually exclusive defenses rather liberally.

²⁰ The claims in this paragraph are also based in part on personal experience.

reasoning in the crucial case of *Zafiro v. United States* both at the Seventh Circuit and the Supreme Court, to distill what instructions the Court gave to lower federal courts. The analysis of *De Luna* and *Zafiro* provides a necessary framework for Part IV, which will trace the evolution of the doctrine of mutually antagonistic defenses in each of the circuit courts of appeal, both before and after *Zafiro*. Part V will reflect on what went wrong with judicial process to produce a doctrine built only on dicta and misunderstandings.

Although it is crucially important that codefendants be severed when necessary to avoid incurable prejudice, based on the Supreme Court's holding in *Zafiro*, it is appropriate that defense counsel should have to make a showing of actual, not theoretical or presumed, prejudice to support a severance motion. Finally, following the Court's command to abandon the misbegotten mandatory severance rule for mutually exclusive defenses will help maintain due regard for and protection of codefendants' rights while shifting the burden of reasoning and argumentation back where it belongs—onto the shoulders of defense counsel, and off of the backs of judges and clerks.

II. (SUPPOSED) ORIGINS OF THE DOCTRINE:

UNITED STATES V. DE LUNA (1962)

The development of the modern doctrine of mutually exclusive defenses began with the 1962 decision in *De Luna v. United States*.²¹ Yet *De Luna* was not primarily concerned with that issue, but rather with the interconnected questions of: (1) whether a nontestifying defendant in a joint criminal trial has a right under the Fifth Amendment to be free from a codefendant's comment on his refusal to testify; and (2) whether a codefendant in a joint trial has a right protected under the Sixth Amendment to comment on the other defendant's silence.

In *De Luna*, police saw one of two codefendants throw a package containing drugs out of the window of the car in which they were driving.²² At their joint trial, the codefendant who threw out the package testified that he had no knowledge of the package's contents at the time and that the other defendant had tossed it to him and ordered him to throw it out.²³ Each defendant blamed the other as the sole culprit.²⁴ However, counsel for the testifying defendant commented at length on

²¹ 308 F.2d 140 (5th Cir. 1962).

²² *Id.* at 142.

²³ *Id.*

²⁴ *Id.*

the other defendant's refusal to testify. The nontestifying defendant's counsel strenuously objected that this was "inflammatory and prejudicial."²⁵

Writing for the appellate panel, Judge John Minor Wisdom, considered the single most distinguished writer and scholar on the Fifth Circuit Court of Appeal in its glory days of the 1950s and '60s,²⁶ reflected at length on the history, purpose, and evolution of the privilege against self-incrimination.²⁷ Judge Wisdom considered various Supreme Court decisions, and then held that the Fifth Amendment protection must be broadly construed, such that it was improper for a judge, prosecutor, or codefendant's counsel to comment on a defendant's refusal to testify and to penalize him for exercising a constitutional right.²⁸ Judge Wisdom also penned controversial dicta suggesting that the Sixth Amendment gives a testifying defendant a right, and counsel a duty, to "draw all rational inferences from the failure of a co-defendant to testify."²⁹ Although the trial judge gave jury instructions sufficient to cure any prejudice in a normal case,³⁰ the *De Luna* court held that,

considering the head-on collision between the two defendants, the repetition of the comments, and the extended colloquy over the comments between the trial judge and the lawyers, the imputation of guilt to de Luna [the nontestifying defendant] was magnified to such an extent that it seems unrealistic to think any instruction to the jury could undo the prejudicial effects of the reference to de Luna's silence.³¹

Therefore, the court concluded, "for each of the defendants to see the face of Justice they must be tried separately."³²

Judge Wisdom offered no broad exceptions to the general rules favoring joint trial of criminal defendants and relying on jury instructions to cure most potential prejudice. And, *De Luna* never states that mutually exclusive defenses alone mandate severance. Rather, the

²⁵ *Id.* at 142-43.

²⁶ See JACK BASS, UNLIKELY HEROES 41-55 (1981); Joel W. Friedman, *John Minor Wisdom: The Noblest Tullanian of Them All*, 74 TUL. L. REV. 1, 24 (1999).

²⁷ *De Luna*, 308 F.2d at 144-54.

²⁸ *Id.* at 151-52.

²⁹ *Id.* at 142-43.

³⁰ *Id.* at 143.

³¹ *Id.* at 154.

³² *Id.* at 155.

decision is based on multiple, interwoven factors that combined to create serious actual prejudice. *De Luna* holds that where there are sharply contradictory defenses, *and* one defendant remains silent, *and* a testifying defendant's counsel comments on the other defendant's silence, *and* there is extended colloquy on the matter in the jury's presence, then the resulting prejudice to the nontestifying defendant is beyond the curative power of jury instructions. These multiple factors are treated as cumulative, rather than as separate, independently sufficient grounds for severance. Aside from brief comments noting that each defendant blamed the other³³ and the reference to a "head-on collision" between the defendants and their defenses,³⁴ *De Luna* says nothing about irreconcilable defenses, how to define such irreconcilability, or whether severance is then automatically required. Thus, the mutual inconsistency between the theories and evidence of the defenses was only part of a total equation in the decision-making process. Far more important to the *De Luna* decision were: (1) actual prejudice; and (2) the assumption that counsel for a nontestifying defendant has a right to comment on a codefendant's silence—an assumption found highly questionable by concurring Judge Bell and various subsequent decisions.³⁵ Whether or not the *De Luna* defendants' defenses were mutually antagonistic, the comments on silence, and the presumed right to make them, were the major part of what created a "head-on collision" for the *De Luna* court.³⁶

³³ *Id.* at 142.

³⁴ *Id.* at 154.

³⁵ *Id.* at 155-56 (Bell, J., concurring). Justice Bell noted,

It was proper in the defense of Gomez for his counsel to comment upon the fact that he had taken the stand, but it was improper for him to comment upon the fact that de Luna had not taken the stand There is no authority whatever for the proposition that Gomez would in any wise have been deprived of a fair trial if the comments regarding the failure of de Luna to testify had not been made. He had no right to go that far The opinion of the majority will create an intolerable procedural problem.

Id. See also *United States v. De la Cruz Bellinger*, 422 F.2d 723, 726-27 (9th Cir. 1970) (noting that *De Luna's* declaration of per se rule allowing counsel to comment on nontestifying codefendant's silence is dicta); *United States v. McKinney*, 379 F.2d 259, 265 (6th Cir. 1967) ("We agree with the concurring opinion in *De Luna* . . . to the effect that such comment by the attorney would not be permissible."); *Hayes v. United States*, 329 F.2d 209, 221-22 (8th Cir. 1964) (distinguishing *De Luna*); *United States v. Marquez*, 319 F. Supp. 1016, 1020 n.11 (S.D.N.Y. 1970) ("The *De Luna* view generally has not found favor with those courts which have considered it, and at least one Court of Appeals has flatly rejected it."); see also *United States v. Sandoval*, 913 F. Supp. 498, 500-01 (S.D. Tex. 1995).

³⁶ In *Gurleski v. United States*, 405 F.2d 253, 265 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969), the court noted that "[t]rue antagonistic defenses are exemplified in *De Luna*," the "*De Luna* 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,"

Thus, though the issue of mutually antagonistic defenses seem to have been a *necessary* factor in the *De Luna* court's reversal for denial of severance, it clearly did not constitute a *sufficient* factor in itself, absent the comments on silence. Yet in every circuit, the various lines of precedent that presume a mandatory severance rule for mutually antagonistic defenses lead, directly or indirectly, only to *De Luna*.

III. THE SUPREME COURT SPEAKS: *ZAFIRO v. UNITED STATES* (1993)

Zafiro v. United States,³⁷ the most important decision regarding the doctrine of mutually exclusive defenses, arose in the Seventh Circuit almost thirty years after *De Luna*. *Zafiro*³⁸ involved four defendants—Soto, Garcia, Martinez, and Zafiro—tried jointly in a drug conspiracy and possession case.³⁹ Two defendants, Soto and Garcia, were followed by government agents as they moved a box in Soto's car from Soto's garage to the apartment of Zafiro, who was Martinez's girlfriend.⁴⁰ When the agents confronted Soto and Garcia as they were carrying the box up the stairs to the apartment, they dropped the box and fled into the apartment. The box contained fifty-five pounds of cocaine. The agents entered the apartment and found all four defendants inside.⁴¹ When the agents later executed a search warrant, they found a suitcase in a closet containing sixteen pounds of cocaine, twenty-five grams of

a "duty [to comment on a codefendant's refusal to testify] arises only when the arguments of the co-defendants are antagonistic," and "to demonstrate the innocence of Gomez, it was the *duty* of his counsel to comment on the failure of cousin De Luna to contradict Gomez's version of the incident." *Id.* at 265. The court then described how the *Gurleski* trial presented no such situation and created no such duty. *Id.* The court also approvingly cited *Hayes v. United States*, 329 F.2d 209 (8th Cir. 1964), *cert. denied*, 377 U.S. 980 (1964), for the proposition that a codefendant had no right to comment on another codefendant's silence and faced no prejudice when the codefendant desiring to comment would gain no significant benefit from such comment. *Id.* Thus, *Gurleski* points out how the issue of mutually exclusive defenses in *De Luna* is inextricably interwoven with the presumption of a right to comment on a nontestifying codefendant's silence. If there is no such right, or if the right exists but is never invoked, *De Luna* has little to say about mutually exclusive defenses in a vacuum. However, in *United States v. Crawford*, 581 F.2d 489, 491 n.1 (5th Cir. 1978), the court cited *Gurleski* in noting, "One of the factors that caused this court to require a severance in *De Luna* . . . has been said to have been the antagonism of the defenses asserted by the co-defendants." *Id.* This statement is accurate—the presence of mutually exclusive defenses was clearly a factor; but it was never asserted to be, by itself and absent the other more powerful factors, a separate, independently sufficient basis for severance. See generally *De Luna*, 308 F.2d 140.

³⁷ 506 U.S. 534 (1993).

³⁸ 945 F.2d 881 (7th Cir. 1991).

³⁹ *Id.* at 884.

⁴⁰ *Id.*

⁴¹ *Id.*

heroin, and four pounds of marijuana next to a sack holding almost \$23,000 in cash.⁴² Police found an additional seven pounds of cocaine in a different car parked in Soto's garage that Martinez had given to another girlfriend but which she had never used.⁴³

Soto and Garcia filed motions for severance claiming mutually antagonistic defenses. Soto testified that he knew nothing about any drug conspiracy or what was in the box until he was arrested, and that Garcia had asked him for the box and he had merely given it to him.⁴⁴ Garcia did not testify, but during closing arguments, his lawyer stated that the box was Soto's and that Garcia had known nothing about its contents.⁴⁵ Martinez and Zafiro also moved for severance on grounds of mutual antagonism.⁴⁶ Zafiro testified that she was merely Martinez's girlfriend, that he stayed in her apartment occasionally, kept some clothes there, and asked her to store a suitcase for him without telling her what was in it.⁴⁷ Martinez did not testify, but his lawyer argued that Martinez had not known of any cocaine delivery and did not know what was in the suitcase, because the apartment was not his.⁴⁸

In a concise opinion, Judge Posner noted that the government denied that any of the various defendants' defenses were mutually antagonistic but conceded that if they were, the defendants would be entitled to separate trials.⁴⁹ Posner observed that Rule 14 of the Federal Rules of Criminal Procedure allows severance if either a defendant or the government would be prejudiced by joint trial, but that the rule says nothing about mutual antagonism.⁵⁰ He continued, "There is nothing, either, to suggest that two defendants cannot be tried together if it is certain that one but not both committed the crime and the only uncertainty is which one—the government's idea of when mutually antagonistic defenses bar a joint trial."⁵¹ Posner then noted the

vast number of cases say[ing] that a defendant is entitled to a severance when the "defendants present mutually antagonistic defenses" in the sense that "the acceptance

⁴² *Zafiro*, 506 U.S. at 536.

⁴³ *Zafiro*, 945 F.2d at 884.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 884-85.

of one party's defense precludes the acquittal of the other defendant[]" This formulation has become canonical. But we recall Justice Holmes's warning that to rest upon a formula is a slumber that prolonged means death.⁵²

Contradicting the established rule, Posner reasoned, "The fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid 'the scandal and inequity of inconsistent verdicts.'" He questioned why a case in which the acceptance of one party's defense precludes the acquittal of the other defendant should not be viewed as a "paradigmatic" case of harmless mutual finger-pointing. Recognizing potential confusion and inconsistency in the established rule, Posner proclaimed, "We must dig beneath formulas."⁵³

Setting to this digging, Posner noted that defendants tried together in connection with the same crime "should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants."⁵⁴ He identified two situations that might apply: first, a complex case with many defendants, some of them perhaps only peripherally involved and facing the risk that the others' guilt might rub off on them.⁵⁵ However, he also observed that even in such situations, the countervailing desirability of trying all members of a conspiracy together, thus offering the jury the whole picture at once and conserving judicial and prosecutorial resources, "has invariably prevailed in the appellate cases," based either on faith in the jury's ability to follow limiting instructions or on deference to the district judge's decision not to sever.⁵⁶ The second situation was where essential exculpatory evidence would be unavailable, or highly prejudicial evidence unavoidable, due to joint trial.⁵⁷

Considering these two situations, Posner determined,

[M]utual antagonism, finger-pointing, and other manifestations or characterizations of the effort of one

⁵² *Id.* at 885.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 886.

defendant to shift the blame from himself to a codefendant neither control nor illuminate the question of severance. If it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted—and in either case there would be a miscarriage of justice.⁵⁸

Posner thus reasoned, quite logically, that joint trials should contribute to the finding of truth and justice by making it easier for the government and jury to smoke out the guilty; he ignored criminal defense attorneys' eagerness to exploit the possibility of inconsistent verdicts or any other such miscarriage of justice if it might favor their clients. He also hypothesized a truly and incurably prejudicial situation where all defendants but one blamed that one, such that he faced "a barrage of prosecutors," but found that *Zafiro* was not such a case.⁵⁹ Rather, *Zafiro* involved a "symmetrical situation" in which each member of each pair of defendants blamed the other.⁶⁰ Applying a sort of law and economics analysis, Posner reasoned that "[n]o defendant was placed at a *net* disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn," since although each defendant faced the charges of the opposing defendant as well as the prosecutor, each defendant also was given a "live body to offer the jury in lieu of himself (or herself)."⁶¹ He explained that for each defendant to be able to accuse another was "apt to be more persuasive than telling the jury to let everyone go" in a situation in which the police found seventy-five pounds of narcotics on premises connected with the four defendants. Moreover, a joint trial of all four defendants would give the jury a fuller picture than jurors would get from separate trials of the non-conflicting pairs of defendants. For that reason, Posner observed, "Joint trials, in this as in many other cases, reduce not only the direct costs of litigation, but also error costs."⁶² He also added,

We remind the defense bar that they are not obliged to make futile arguments on behalf of their clients. The argument that a conviction should be reversed because the district judge failed to sever properly joined defendants for trial is nearly always futile even when the

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

defendants can be said to be presenting mutually antagonistic defenses.⁶³

The Supreme Court granted certiorari to “consider whether Rule 14 requires severance as a matter of law when codefendants present ‘mutually antagonistic defenses.’”⁶⁴ In an opinion penned by Justice O’Connor, the Court noted the Seventh Circuit’s observation regarding the “vast number” of cases, saying that “a defendant is entitled to a severance when the defendants present mutually antagonistic defenses in the sense that the acceptance of one party’s defense precludes the acquittal of the other defendant.”⁶⁵ The Court affirmed.⁶⁶ It also gave no other definition of mutually antagonistic defenses anywhere else in the relatively brief opinion, and thus implicitly adopted the Seventh Circuit’s definition.

The Court reviewed Rule 8(b), which allows joint trials, noting the “preference in the federal system for joint trials of defendants who are indicted together” and how joint trials “play a vital role in the criminal justice system” by “promot[ing] efficiency and ‘serv[ing] the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.’”⁶⁷ The Court then turned to Rule 14, noting how, “the Courts of Appeals frequently have expressed the view that ‘mutually antagonistic’ or ‘irreconcilable’ defenses may be so prejudicial in some circumstances as to mandate severance[,]” but that “[n]otwithstanding such assertions, the courts have reversed relatively few convictions for failure to grant a severance on grounds of mutually antagonistic or irreconcilable defenses.”⁶⁸ The Court observed that this low reversal rate perhaps reflected the “inability of defendants to prove a risk of prejudice in most cases involving conflicting defenses.”⁶⁹

The Court continued,

Nevertheless, petitioners urge us to adopt a bright-line rule, mandating severance whenever codefendants have conflicting defenses. . . . We decline to do so. Mutually antagonistic defenses are not prejudicial *per se*.

⁶³ *Id.* at 886-87.

⁶⁴ *Zafiro v. United States*, 506 U.S. 534, 535 (1993).

⁶⁵ *Id.* at 537 (internal quotations omitted).

⁶⁶ *Id.* (internal quotations omitted).

⁶⁷ *Id.* (quoting *Richardson v. Marsh*, 481 U.S. 200, 209-10 (1987)).

⁶⁸ *Id.* at 538 (ironically citing *Tootick* as an example of reversal due to mutually antagonistic defenses along with *Rucker* and *Romanello*).

⁶⁹ *Id.*

Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion.⁷⁰

Although some confusion could arise from the language declining to adopt a mandatory severance rule for "conflicting defenses" taken out of context, which in effect states a truism since no one ever suggested such a rule for *all* conflicting defenses, even minimally conflicting ones, the next statement—"Mutually antagonistic defenses are not prejudicial *per se*"—clarifies that point and implicitly refers to the Seventh Circuit's definition of the term.

Echoing Posner but adding to his reasoning, the Court declared, "We believe that . . . a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." The Court then offered examples of what might cause prejudice requiring severance under Rule 14: when evidence that would not be admissible against a defendant in a separate trial would be admitted against a codefendant in a joint trial, or when evidence tending to exculpate a defendant that would be available in a separate trial would be unavailable in a joint trial. The Court noted that this list was not comprehensive, and that the "risk of prejudice will vary with the facts in each case." But although "[w]hen the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary," the Court emphasized, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice."⁷¹

With this in mind, the Court then discussed the facts of *Zafiro*, stating,

[W]e note that petitioners do not articulate any specific instances of prejudice. Instead they contend that the very nature of their defenses, without more, prejudiced them. Their theory is that when two defendants both claim they are innocent and each accuses the other of the crime, a jury will conclude (1) that both defendants are lying and convict them both on that basis, or (2) that at

⁷⁰ *Id.* at 538-39 (citation omitted).

⁷¹ *Id.* at 539 (citations omitted).

least one of the two must be guilty without regard to whether the Government has proved its case beyond a reasonable doubt.⁷²

In response to this argument, the Court reasoned that “a fair trial does not include the right to exclude relevant and competent evidence” and saw “no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant.”⁷³ The Court also found that the second situation—conviction based on conflicting defenses without adequate proof of guilt by the prosecution—did not apply where the government “offered sufficient evidence as to all four petitioners.”⁷⁴ The Court continued, “Moreover, even if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and ‘juries are presumed to follow their instructions.’”⁷⁵ The Court detailed the various proper instructions the court gave the jury regarding the government’s obligation to prove guilt beyond a reasonable doubt, the jury’s duty to separately consider each defendant and charge, and how the jury must not treat lawyers’ arguments as evidence or draw any inferences from defendants’ exercise of the right to silence; it concluded, “These instructions sufficed to cure any possibility of prejudice.”⁷⁶ Finally, the Court emphasized that Rule 14 leaves the determination of risk of prejudice and any necessary remedy “to the sound discretion of the district courts.”⁷⁷

Thus, the majority opinion in *Zafiro* stands for various core propositions: (1) mutually antagonistic defenses, as implicitly defined by the Seventh Circuit’s definition that acceptance of one defendant’s defense precludes acquittal of another defendant, are *not* prejudicial per se and do not in themselves require mandatory severance; (2) to gain severance, a defendant must “articulate any specific instances of prejudice” or show “a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence[,]” and mutually antagonistic defenses alone do not constitute any of these grounds; (3) mutually antagonistic defenses and cross-accusations by antagonistic defendants, do not create sufficient prejudice to justify severance where the prosecution offers sufficient evidence for conviction of each

⁷² *Id.* at 539-40.

⁷³ *Id.* at 540.

⁷⁴ *Id.*

⁷⁵ *Id.* (again quoting *Richardson*).

⁷⁶ *Id.* at 541.

⁷⁷ *Id.*

defendant; and (4) even where there is a risk of prejudice from mutually antagonistic defenses, jury instructions are usually sufficient to cure it. In classic O'Connor style, the *Zafiro* opinion rejected a bright-line rule in favor of a more fact-specific inquiry.

In *Zafiro*, the Court was not perfectly explicit in its definition of mutually antagonistic defenses. But the mandatory severance rule it was reviewing was obviously the Seventh Circuit's rule and definition, and since no other definition was supplied, there is little doubt that its holding applies to that definition. The Court also was not entirely explicit in identifying mutually antagonistic defenses as synonymous with irreconcilable or mutually exclusive defenses. However, the Court did twice refer to "'mutually antagonistic' or 'irreconcilable' defenses" in a manner suggesting that these are indeed the same. Regardless of the particular label used in one circuit or another, the Court clearly indicated that any defenses that share the characteristics given in the Seventh Circuit definition of mutually antagonistic defenses are not prejudicial per se. Since the Seventh Circuit's definition of mutually antagonistic defenses that the Court considered is identical to the predominant definition of mutually exclusive or irreconcilable defenses,⁷⁸ the Court's ruling necessarily also applies to the latter categories.

Although the *Zafiro* Court was unanimous, Justice Stevens wrote a concurring opinion in which he backpedaled from some aspects of the majority opinion. He emphasized that it was possible that both defendants in each pair of antagonistic defendants in *Zafiro* could have lacked knowledge of the contents of one container or the other (the box or the suitcase), and that "dual ignorance defenses do not necessarily translate into 'mutually antagonistic' defenses, as that term is used in reviewing severance motions, because acceptance of one defense does not necessarily preclude acceptance of the other and acquittal of the codefendant."⁷⁹ Stevens thus accepted and clarified the definition of mutually antagonistic defenses with which the Court was working, and also stated his opinion that none of the defenses in *Zafiro* rose to the level of mutual antagonism.⁸⁰ Stevens ignored Posner's insinuation that it would strain credulity for all defendants to claim innocence and ignorance in a situation where seventy-five pounds of narcotics were found on premises connected with them.⁸¹ Stevens's reasoning would

⁷⁸ See *infra* Part IV (discussing the development of the "rule" in the various courts of appeals).

⁷⁹ *Zafiro*, 506 U.S. at 542 (Stevens, J., concurring).

⁸⁰ *Id.* at 542.

⁸¹ *United States v. Zafiro*, 945 F.2d 881, 886 (7th Cir. 1991).

also apply to *De Luna*, where each defendant theoretically could have claimed ignorance of the contents of the packet of drugs and why either would have wanted it thrown out of the window of a moving car being followed by police, but it would strain credulity to do so. It would also apply to both *United States v. Johnson*⁸² and *United States v. Crawford*,⁸³ early Fifth Circuit decisions based on possession of contraband in situations where it was very implausible for both defendants to deny awareness of the contraband; decisions which helped to lay the foundation for the supposed mandatory severance rules that sprang up in most circuits during the years before *Zafiro*.

At any rate, Justice Stevens concluded, "In my opinion, the District Court correctly determined that the defenses presented in this case were not 'mutually antagonistic[,]'" and urged the Court to "save for another day evaluation of the prejudice that may arise when the evidence or testimony offered by one defendant is truly irreconcilable with the innocence of a codefendant."⁸⁴ Stevens thus also associated irreconcilable defenses with mutually antagonistic ones. Since he found no mutually antagonistic defenses in *Zafiro*, he "hesitate[d]" to develop a rule controlling such situations from that case.⁸⁵

Stevens then outlined various potential problems with the majority's rule. He noted that joinder could be highly prejudicial, "particularly when the prosecutor's own case in chief is marginal and the decisive evidence of guilt is left to be provided by a codefendant"; additionally, the "burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor."⁸⁶ He pointed out, first, the second-prosecutor problem that can result when a codefendant accuses another defendant, and second, the risk that a jury confronted with two defendants, "at least one of whom is almost certainly guilty," might "convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant."⁸⁷ Stevens accepted the majority's reasoning that such risk of prejudice may be minimized by careful jury instructions, but found that "the danger will remain relevant

⁸² 478 F.2d 1129 (5th Cir. 1973).

⁸³ 581 F.2d 489 (5th Cir. 1978).

⁸⁴ *Zafiro*, 506 U.S. at 543.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 544.

to the prejudice inquiry in some cases.”⁸⁸ He warned more generally of the prejudicial risks of joint trials, then concluded by agreeing with the majority that “a ‘bright-line rule, mandating severance whenever codefendants have conflicting defenses’ is unwarranted,” but calling for “district courts [to] retain their traditional discretion to consider severance whenever mutually antagonistic defenses are presented. Accordingly, I would refrain from announcing a preference for joint trials, or any general rule that might be construed as a limit on that discretion.”⁸⁹

Stevens thus articulated a profound concern that joint trials could interfere with the traditional roles of prosecution and defense by potentially lightening the prosecution’s burden. Yet virtually all the points Stevens raised were not truly problematic under the majority’s holding. The majority only said that mutually antagonistic defenses are not prejudicial per se, in themselves without other factors. The majority obviously did not say that there could never be severance where irreconcilable defenses are involved, nor did it say that jury instructions would always be sufficient to cure the risk of prejudice.

The *Zafiro* majority also emphasized that district courts would keep their discretion to grant severance after considering mutually antagonistic defenses along with other potentially prejudicial factors. The majority did not take any discretion away from district courts, but rather freed them from a mandatory severance rule that limited their discretion not to sever. Stevens’s concerns about prejudicial risks from joint trials of mutually antagonistic defendants apply mostly to joint trials in general, not specifically to mutually exclusive defenses.⁹⁰ Finally, if the government presents a jury with two defendants, at least one of whom almost certainly must be guilty, and the jury convicts the guiltier-seeming one of the two, then the government may indeed have benefited from the incriminating nature of the situation, but that does not mean the government did not prove its case beyond a reasonable doubt any more than where an individual defendant is caught in highly incriminating circumstances. Stevens ignored Posner’s trenchant points

⁸⁸ *Id.*

⁸⁹ *Id.* at 545.

⁹⁰ Regarding these risks, see generally Robert R. Calo, *Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 30-31 (1985); Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1422-26, 1452-55 (1979); *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 563-66 (1965).

about the issue of inconsistent verdicts, efficient truth-seeking, and the possibility of prejudice to the government from separate trials.

Justice Stevens's misgivings aside, the Supreme Court's unanimous ruling in *Zafiro*, in declaring that "Mutually antagonistic defenses are not prejudicial *per se*," established that there should be no mandatory severance rule where "the acceptance of one party's defense precludes the acquittal of the other defendant" without a further showing of actual prejudice. This holding applies whether the defenses in question are labeled "mutually antagonistic," "irreconcilable," or "mutually exclusive." Although the Court was not as perfectly explicit on these points as it ideally might have been, a careful, thorough reading of *Zafiro* reveals the Court's message clearly enough. Yet, despite the Court's clear message, many judges in most federal circuits continued to show unawareness of the significance of *Zafiro*, and confusion or error regarding how to handle mutually exclusive defenses.

IV. A SHORT-CIRCUIT IN JUDICIAL PROCESS: THE CIRCUITS' CONFUSION
AND ERROR REGARDING MUTUALLY EXCLUSIVE DEFENSES
BEFORE AND AFTER *ZAFIRO*

A. *Pioneers and Borrowers*

After the *De Luna* holding, all the federal circuits, except the Sixth Circuit, developed some version of the mandatory severance rule for mutually exclusive defenses. In general, each such supposed "rule" came as a result of borrowing dicta from foreign circuits for use as dicta in the home circuit, which over time was laundered, taken out of context, and separated from its origins such that it accrued seemingly sufficient respectability and permanence to pass as an established, ironclad rule. These supposed "rules" were firmly entrenched by the time of the Supreme Court's *Zafiro* opinion. After *Zafiro*, some circuits cleaned up their acts and mostly incorporated the meaning of *Zafiro* either directly or indirectly, though usually with occasional backsliding. Other circuits missed the point of *Zafiro* almost entirely and continued reiterating their respective versions of the very mandatory severance rule that *Zafiro* had discarded.

Because most circuits merely borrowed their mandatory severance "rules" from foreign circuits, the various "rules" reflect a bifurcation in the rule's origin in the three circuits that pioneered development of the rule: the Fifth, Seventh, and D.C. Circuits. The D.C. Circuit was the first to move toward creating a mandatory severance rule. In 1966, it first

enunciated what would become its distinctive version of the rule: mandatory severance is required where “defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.”⁹¹ A Tenth Circuit panel, conducting a review of mutually exclusive defenses case law, later categorized this as the stricter of the two main versions of the rule.⁹² The D.C. Circuit’s rule had fewer progeny than its main rival, which emerged from the Fifth and Seventh Circuits. Although various circuits borrowed it along with the other version, the D.C. version became the standard version of the rule in only one other circuit—the neighboring Fourth Circuit.

The other, weaker version of the rule—mandatory severance required where “the acceptance of one party’s defense precludes the acquittal of the other defendant,” as considered by Judge Posner and the Supreme Court in *Zafiro*—began to develop in both the Fifth and Seventh Circuits during the 1970s. In both circuits, the new “rule” relied heavily on a misreading of a 1967 opinion from the Seventh Circuit that discussed *De Luna* and briefly mentioned the issue of antagonistic defenses. From those inauspicious beginnings, the two circuits became the major exporters of the mandatory severance rule to other circuits, though the other circuits also traded this dominant version of the rule among each other, along with lesser trafficking in the D.C. Circuit’s alternate version.

Ironically, the pioneering circuits that took the lead in setting loose the mandatory severance rule on the other circuits proved to be among the most dutiful and conscientious in following the Supreme Court’s ruling in *Zafiro*. Other borrowing circuits generally had a poorer record of comprehending the significance of *Zafiro*. In particular, courts in some of the western circuits—the Eighth, Ninth, and Tenth—proved to have the most difficulty recognizing the import of *Zafiro*. The other borrowing circuits generally had more mixed records. Only the Sixth Circuit, which mostly resisted the temptation to borrow the supposed severance rule from anyone, sailed on peacefully and unchanged both before and after *Zafiro*.

⁹¹ Rhone v. United States, 365 F.2d 980 (D.C. Cir. 1966).

⁹² United States v. Swingler, 758 F.2d 477, 495 (D.C. Cir. 1985) (D.C. version a “somewhat stronger variant”).

B. *The D.C. Circuit*

The D.C. Circuit began to develop its peculiar version of the mandatory severance rule for mutually exclusive defenses in the 1966 case *Rhone v. United States*.⁹³ In rejecting a defendant's claim of prejudice from a joint trial, the *Rhone* court briefly reviewed possible sources of such prejudice:

Prejudice from joinder of defendants may arise in a wide variety of circumstances as, for example, where one defendant makes an inculpatory statement admissible against his codefendant [citing *Opper v. United States*, 348 U.S. 84 (1954)] where the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty, and where only one defendant testifies and urges the jury to draw an adverse inference from his codefendant's silence [citing *De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962)].⁹⁴

In *Rhone*, the appellant claimed prejudice because his codefendant testified while he did not, which the appellant argued emphasized to the jury his failure to take the stand. But the court noted that he never made any such argument to the district court during trial and even explicitly adopted his codefendant's testimony.

At least two points should be emphasized regarding the *Rhone* court's reflections on prejudice from joinder. First, the court noted that prejudice *may* arise, not that it *will* arise, from the situations it listed as examples. That obviously implies that sometimes prejudice might not arise in those situations. Although the *Rhone* court did not discuss the matter further, its language is in keeping with *Zafiro* regarding the possibility of limiting instructions to cure or mitigate prejudice, or cases where the prosecution's evidence of guilt is so overwhelming that a codefendant's additional arguments or accusations are effectively irrelevant ("this conflict alone demonstrates that both are guilty").

Second, the *Rhone* court apparently took two factors that were interwoven in the *De Luna* decision and pulled them apart to treat them as separate, independent potential causes of prejudice. In the context of

⁹³ *Rhone*, 365 F.2d 980.

⁹⁴ *Id.* at 981 (citations omitted).

the *Rhone* court's list of situations where prejudice *may* arise, there was no problem with this: clearly, prejudice *may* arise where the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty, and it also *may* arise where only one defendant testifies and urges the jury to draw an adverse inference from his codefendant's silence. The danger lies in treating these factors as separate and independent while effectively changing "may" to "must," as later courts would do in fabricating a mandatory severance rule grounded on *De Luna* and *Rhone*.

D.C. Circuit panels did not immediately rush in to wreak this transformation; rather, the process happened quite gradually. Throughout the early 1970s, D.C. Circuit opinions generally stayed close to the reasoning of both *Rhone* and *De Luna*. In *United States v. Wilson*,⁹⁵ the court noted the defendants' invocation of *Rhone* in claiming that their defenses were irreconcilable and clearly created a danger that the jury would infer that they both were guilty.⁹⁶ The court said no more about *Rhone*, but merely explained why there was little or no conflict in the defenses.⁹⁷

In *United States v. Hines*,⁹⁸ the court did not quote any language from *Rhone*, since the appellant invoked *De Luna*.⁹⁹ In rejecting the appellant's argument that he was prejudiced by his codefendant's counsel commenting that his client took the stand (implicitly emphasizing that the appellant had not), the *Hines* court noted the multiple, interwoven prejudicial factors that existed in *De Luna*—"both defendants presented conflicting and irreconcilable defenses, only one defendant testified, and in closing argument the latter's counsel urged the jury to draw an adverse inference from the co-defendant's silence[]"¹⁰⁰—before concluding, "In the present case, the defenses were not mutually exclusive as they were in *De Luna*. This court has strongly suggested, and other circuits have held, that this distinction alone precludes the application of the *De Luna* rule. [citing *Rhone* along with cases from the 5th and 7th Circuits]."¹⁰¹ The *Hines* court thus recognized that the *De Luna* "rule" was based on the presence of multiple factors together, and

⁹⁵ 434 F.2d 494 (D.C. Cir. 1970).

⁹⁶ *Id.* at 499.

⁹⁷ *Id.* at 500.

⁹⁸ 455 F.2d 1317 (D.C. Cir. 1971).

⁹⁹ *Id.* at 1334.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

suggested that the presence of mutually exclusive defenses was a concern where the other factors are present, not necessarily by itself.¹⁰²

Various subsequent opinions from the 1970s carefully observed the *Rhone* court's "may arise" language in rejecting appellants' arguments for severance.¹⁰³ Some of these also emphasized the "alone" from *Rhone*'s "the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty," noting that the *Rhone* "rule" would not apply where, for example, the government produced substantial independent evidence of a defendant's guilt.¹⁰⁴

However, other opinions gradually moved in the direction of a new mandatory severance rule. In 1970, in *United States v. Robinson*,¹⁰⁵ which would become one of the main cited sources for the D.C. Circuit's mandatory severance rule, the court observed that to show abuse of discretion in a denial of a severance motion based on conflicting defenses, just showing antagonistic defenses was not enough: "At the very least, it must be demonstrated that a conflict is so prejudicial that differences are irreconcilable, and 'that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [quoting *Rhone*]." ¹⁰⁶ In *United States v. Maynard*,¹⁰⁷ the court repeated this language.¹⁰⁸ In *United States v. Ehrlichman*,¹⁰⁹ the court slightly condensed *Robinson*'s language, gradually making it look more like a mandatory severance rule: "To obtain a severance on the ground of conflicting defenses, 'at the very least, it must be demonstrated [and so on] . . .'" ¹¹⁰ In *United States v. Haldeman*,¹¹¹ the court injected *Robinson*'s meaning into the *Rhone* language, declaring, "As set forth in *Rhone v. United States*, the governing standard requires the moving defendant to

¹⁰² See also *United States v. Lemonakis*, 485 F.2d 941, 952 & n.17 (1973) (also discussing irreconcilable defenses in the context of the other *De Luna* factors).

¹⁰³ *United States v. Bolden*, 514 F.2d 1301, 1309-10 (D.C. Cir. 1975); *United States v. Leonard*, 494 F.2d 955, 966 (D.C. Cir. 1974); *United States v. Hurt*, 476 F.2d 1164, 1169 (D.C. Cir. 1973); *United States v. Lemonakis*, 485 F.2d 941, 951 (D.C. Cir. 1973).

¹⁰⁴ *Leonard*, 494 F.2d at 966-67; *Hurt*, 476 F.2d at 1169.

¹⁰⁵ 432 F.2d 1348 (D.C. Cir. 1970).

¹⁰⁶ *Id.* at 1351 (citation omitted). The court found that the *Robinson* appellant had failed to make such a showing. *Id.* There is a slight latent ambiguity in the *Robinson* language, in that the court does not make it perfectly clear whether this showing is a sufficient, or only a necessary but insufficient, condition for severance. Because the appellant had not made the required showing, the court had no need to explore the matter further.

¹⁰⁷ 476 F.2d 1170 (D.C. Cir. 1973).

¹⁰⁸ *Id.* at 1178.

¹⁰⁹ 546 F.2d 910 (D.C. Cir. 1976).

¹¹⁰ *Id.* at 929.

¹¹¹ 559 F.2d 31 (D.C. Cir. 1976).

show that ‘the defendants present conflicting and irreconcilable defenses and there is a danger’ [and so on]” to “support a motion for severance” based on inconsistent defenses.¹¹²

Ehrlichman and *Haldeman* were among the last pre-*Zafiro* decisions in the D.C. Circuit to show any hint of the original limitations in the *Rhone* language. Even before *Ehrlichman*, the court in *United States v. Gorham*¹¹³ transformed the language of *Rhone* and *Robinson* into an overt mandatory severance rule: “The relevant legal standard is that failure to grant severance is reversible error where ‘the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.’”¹¹⁴ In *United States v. Wright*,¹¹⁵ the court stated, “This circuit has repeatedly articulated, however, that the denial of a severance motion generally constitutes an abuse of discretion when ‘the defendants present conflicting and irreconcilable defenses and there is a danger . . . [etc.] that both are guilty.’ [citing *Rhone*, *Haldeman*, and *Ehrlichman*].”¹¹⁶ D.C. Circuit panels repeated the language from *Wright* in both *United States v. Tarantino*¹¹⁷ and *United States v. Manner*.¹¹⁸ Only two relatively minor opinions were more guarded in their statement of the *Rhone* “rule.”¹¹⁹

¹¹² *Id.* at 71 (citation omitted) (also quoting *Bolden* to the effect that defenses must be “so contradictory as to raise an appreciable danger that the jury would convict solely on the basis of the inconsistency.’ To warrant a severance, in short, the accounts of co-defendants must be ‘on a collision course’”). Note that *Haldeman*, and to a lesser extent *Ehrlichman*, preserve some of the latent ambiguity in *Robinson* by declaring the showing in question to be required, but not necessarily sufficient in itself to gain severance. That is, *Haldeman* says that a defendant must show conflicting defenses and a danger of great jury confusion, but does not promise automatic severance if the showing is made.

¹¹³ 523 F.2d 1088 (D.C. Cir. 1975).

¹¹⁴ *Id.* at 1092.

¹¹⁵ 783 F.2d 1091 (D.C. Cir. 1986).

¹¹⁶ *Id.* at 1094.

¹¹⁷ 846 F.2d 1384, 1399 (D.C. Cir. 1988).

¹¹⁸ 887 F.2d 317, 326 (D.C. Cir. 1989).

¹¹⁹ *United States v. Harrison*, 931 F.2d 65, 71 (D.C. Cir. 1991) (doctrine of antagonistic defenses is “a narrow one,” applying only when “there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty’; it does not apply when ‘independent evidence of each defendant’s guilt supports the jury’s verdict.’” [citing *Leonard*]); *United States v. Wills*, No. 89-3148, 1990 WL 64856, at *2 (D.C. Cir. May 16, 1990) (“The denial of a severance may constitute an abuse of discretion only when the defendants present ‘conflicting and irreconcilable defenses’; defendant has burden of showing conflict so prejudicial that differences are irreconcilable and “jury will unjustifiably infer that the conflict itself shows that all co-defendants are guilty.”).

After *Zafiro*, the D.C. Circuit was more conscientious in following *Zafiro* than were most other circuits. In the first post-*Zafiro* opinion involving the issue of mutually exclusive defenses, *United States v. Brown*,¹²⁰ the court discussed at length the *Zafiro* ruling and its language regarding how mutually antagonistic defenses are not prejudicial per se, how Rule 14 does not require severance even if prejudice is shown but instead leaves tailoring of relief to the district court, and how a district court should only grant severance where there is a “serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”¹²¹ Nearly all subsequent D.C. Circuit opinions closely followed *Zafiro*,¹²² with only one exception that relied more on *Tarantino* and *Haldeman*, but at least acknowledged *Zafiro* in upholding the district court’s denial of severance.¹²³

Thus, the D.C. Circuit largely seems to have cleaned up its act after *Zafiro*. Yet a sample of recent district court decisions from that circuit indicates that some uncertainty may still remain, at least at the district court level. Two of four district court opinions since 1999 involving claims of mutually exclusive defenses relied on *Zafiro*,¹²⁴ while the other two showed no awareness of it.¹²⁵ Of these latter two, one opinion merely noted the absence of any showing or proffer about irreconcilable defenses in passing,¹²⁶ but the other cited *Tarantino* for the proposition that a “court should also grant severance where the defendants allege mutually contradictory and irreconcilable defenses”¹²⁷—a proposition rejected in *Zafiro*.

C. The Seventh Circuit

The Seventh Circuit’s long and fateful dalliance with the doctrine of mutually exclusive defenses began in 1967 in *United States v. Kahn*,¹²⁸

¹²⁰ 16 F.3d 423 (D.C. Cir. 1994).

¹²¹ *Id.* at 433 (quoting *Zafiro*).

¹²² *United States v. Gilliam*, 167 F.3d 628, 635 (D.C. Cir. 1999); *United States v. Vargas*, No. 97-3105, 1998 U.S. App. LEXIS 30945, at *2 (D.C. Cir. Dec. 1, 1998); *United States v. Moore*, 104 F.3d 377, 383 (D.C. Cir. 1997); *United States v. Applewhite*, 72 F.3d 140, 144 (D.C. Cir. 1995).

¹²³ *United States v. Yelverton*, 197 F.3d 531, 539 n.11 (D.C. Cir. 1999).

¹²⁴ *United States v. Brodie*, 326 F. Supp. 2d 83, 94 (D.D.C. 2004); *United States v. Edelin*, 118 F. Supp. 2d 36, 49 (D.D.C. 2000).

¹²⁵ *United States v. Gray*, 292 F. Supp. 2d 71, 86-87 (D.D.C. 2003); *United States v. Adeosun*, 49 F. Supp. 2d 7, 14 (D.D.C. 1999).

¹²⁶ *Adeosun*, 49 F. Supp. 2d at 14.

¹²⁷ *Gray*, 292 F. Supp. 2d at 87.

¹²⁸ 381 F.2d 824 (7th Cir. 1967).

though the judges on the *Kahn* panel never could have imagined what would result from a few innocent statements on the topic. In *Kahn*, three defendants (Kahn, Sachs, and Curran) were tried jointly for criminal conspiracy to misuse funds deposited in federally insured banks.¹²⁹ Kahn claimed prejudice from improper joinder due to admission of evidence in a joint conspiracy trial that could not have been admitted against him in a separate trial.¹³⁰ The court discussed at length the particular problems of conspiracy trials but noted the district court's "complete admonitory instructions" and found no prejudice to defendants or abuse of discretion for denial of severance on the grounds raised by Kahn.¹³¹ The court also noted, *a la* Posner, "Not to be forgotten among the considerations affecting the exercise of the trial court's discretion is the possible prejudice to the Government which might result from a separate trial."¹³²

Sachs and Curran raised various arguments that the *Kahn* court rejected. Most significantly, they argued that the joint trial with Kahn deprived them of the right to comment to the jury on Kahn's failure to take the stand,¹³³ and they invoked *De Luna* as authority.¹³⁴ The *Kahn* panel then discussed and carefully distinguished *De Luna* for over two full pages in their opinion.¹³⁵ The court characterized as "dicta" the *De Luna* court's statements regarding a defendant's confrontation rights, including the right to comment on a codefendant's refusal to testify.¹³⁶ The *Kahn* court then discussed Judge Bell's concurrence in *De Luna*, in which he questioned and rejected the new "right" proclaimed by the *De Luna* majority and described how it would make joint trials difficult or impossible.¹³⁷ The *Kahn* court, like the Eighth Circuit panel in *Hayes v. United States*,¹³⁸ agreed with Bell, rejected the *De Luna* majority's proclamation of an absolute right, and held, "There must be a showing that real prejudice will result from the defendant's inability to comment."¹³⁹

¹²⁹ *Id.* at 828.

¹³⁰ *Id.* at 838.

¹³¹ *Id.* at 838-39.

¹³² *Id.* at 838.

¹³³ *Id.*

¹³⁴ *Id.* at 839.

¹³⁵ *Id.* at 839-41.

¹³⁶ *Id.* at 840.

¹³⁷ *Id.*

¹³⁸ 329 F.2d 209, 221 (7th Cir. 1964).

¹³⁹ *United States v. Kahn*, 381 F.2d 824, 840 (7th Cir. 1967).

The *Kahn* court also noted that at trial, Sachs and Curran sought to distance themselves from Kahn and place blame on him, presenting themselves as innocent dupes of the “dexterous mastermind, Kahn,” while Kahn argued that he acted in good faith with the advice and assistance of “responsible and reputable individuals.”¹⁴⁰ The court recognized that these defenses were inconsistent, but it concluded:

The degree of antagonism, however, is not as great as that in *De Luna* where the defenses were mutually exclusive. There, if one defense were believed, the other could not be. In the instant case, it is not clear that Kahn could not have been found innocent if Sachs and Curran were so found.

It must be noted that there were many witnesses and that a great amount of evidence was brought before the jury. However, the extensive evidence and testimony did not present the jury the dilemma of mutually exclusive defenses, with no evidentiary basis for judgment between them, in which a comment on the failure to testify would indicate which horn of the dilemma should be seized. While we dislike the necessity of weighing the benefit which might accrue to a defendant by his counsel’s comment on a co-defendant’s refusal to testify, we are not convinced that Sachs and Curran suffered any prejudice from their inability to do so. We hold that the trial court did not err in refusing to sever for the ground asserted.¹⁴¹

This is all the *Kahn* court said about mutually exclusive defenses. In passing, they defined mutual exclusivity as where acquittal of one defendant precludes acquittal of the other—“if one defense were believed, the other could not be”—which would become the basis for the definition used in most circuits. But the *Kahn* court obviously made no holding that such mutual exclusivity alone mandates severance. The defendants had not raised an argument that they were entitled to severance solely due to mutually exclusive defenses, but argued only about their right to comment on Kahn’s failure to testify. The *Kahn* court’s discussion was focused on this issue, not on mutually exclusive defenses in isolation, and it addressed the question of mutually exclusive

¹⁴⁰ *Id.* at 840.

¹⁴¹ *Id.* at 841.

defenses only in conjunction with the supposed “right” to comment. Thus the *Kahn* court properly recognized that the issues of mutually exclusive defenses and right to comment were inextricably interwoven in *De Luna*, and merely held that because of the absence of “the dilemma of mutually exclusive defenses, with no evidentiary basis for judgment between them” in *Kahn*, Sachs and Curran had no right to comment on Kahn’s silence.¹⁴² In the end, *Kahn*, like *Zafiro*, primarily stands for the principle that severance will be granted only on a “strong showing of prejudice.”¹⁴³ To the extent *Kahn* discusses mutual exclusivity, it suggests that the mere theoretical presence of mutual exclusiveness is not enough to mandate severance; rather, there must be actual prejudice, with or without mutual exclusiveness.¹⁴⁴ *Kahn*, like *De Luna* and *Rhone*, gave no holding supporting a per se severance rule for mutually exclusive defenses alone.

As such, some early Seventh Circuit forays into developing a severance rule did not use *Kahn* and instead turned to a different source: the D.C. Circuit’s “both are guilty” language. In *United States v. George*,¹⁴⁵ in rejecting a severance claim, the court observed, “Here we fail to discern any conflict of defense strategies, much less one so irreconcilable ‘that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.’ [quoting *Robinson*].”¹⁴⁶ In *United States v. McPartlin*,¹⁴⁷ the court similarly alluded to the *Robinson* language in passing: “There may be cases, as we recognized in *George*, in which the conflict among defendants is of such a nature that the ‘jury will unjustifiably infer that this conflict alone demonstrates that both are guilty’ [but not this one].”¹⁴⁸ In *United States v. Harris*,¹⁴⁹ the court suggested, also in passing, that mutually exclusive defenses were significant for determining need to sever, but no more than that: “Hostility or conflict between defendants is not sufficient to require severance, and the parties have never explained how their defenses are mutually exclusive or conflict.”¹⁵⁰ These opinions, along with *Kahn*, were all the jurisprudence the Seventh Circuit produced on the mutually

¹⁴² *Id.*

¹⁴³ *Id.* at 839.

¹⁴⁴ See *United States v. Battaglia*, 394 F.2d 304, 317 (7th Cir. 1968) (recognizing that mutually exclusive defenses were just one factor combined with inability to comment and real prejudice in requiring severance under *Kahn*).

¹⁴⁵ 477 F.2d 508 (7th Cir. 1973).

¹⁴⁶ *Id.* at 515.

¹⁴⁷ 595 F.2d 1321 (7th Cir. 1979).

¹⁴⁸ *Id.* at 1334.

¹⁴⁹ 542 F.2d 1283 (7th Cir. 1976).

¹⁵⁰ *Id.* at 1313.

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exclusive defenses doctrine up to early in 1979, and none of them could be properly read as giving a holding that created a per se severance rule for mutually exclusive defenses.

Nevertheless, later in 1979, the court in *United States v. Ziperstein*¹⁵¹ confidently asserted, “This circuit has a well-established standard for determining when the claim of ‘mutually antagonistic’ defenses will mandate a severance. Such ‘mutual antagonism’ only exists where the acceptance of one party’s defense will preclude the acquittal of the other.”¹⁵² As support for this well-established standard, the court offered only *Kahn* and *McPartlin*.¹⁵³ The *Ziperstein* court then offered *De Luna* as a classic example of this “mutual antagonism”: “In a case such as *De Luna*, where someone must have possessed the contraband, and one defendant can only deny his own possession by attributing possession and consequent guilt to the other, the defenses are antagonistic.”¹⁵⁴ The *Ziperstein* court either ignored or misunderstood how *De Luna* was not decided solely on the issue of mutual exclusiveness, but also on the interwoven questions of Fifth Amendment privilege not to testify versus the Fifth Circuit’s presumption of a Sixth Amendment right to comment on an antagonistic codefendant’s silence. It also ignored the same limitations on the *Kahn* holding. Although it weakly cited (“see also”) *McPartlin*, it nowhere mentioned the D.C. Circuit’s “both are guilty” standard to which *McPartlin* alluded, nor the fact that *McPartlin* never mentioned the “accept one defense, preclude acquittal of the other” formula. Notably, *Ziperstein* introduced the term “mutually antagonistic” to the Seventh Circuit; earlier cases had not used that construction.

However shaky the foundation for *Ziperstein*’s “well-established standard,” it soon came to dominate the Seventh Circuit. Most opinions stuck close to the specific language of *Ziperstein*, using both the “mutually antagonistic” construction and “acceptance of one party’s defense will preclude the acquittal of the other” construction.¹⁵⁵

¹⁵¹ 601 F.2d 281 (7th Cir. 1979).

¹⁵² *Id.* at 285.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *United States v. Hughes*, 310 F.3d 557, 563 n.8 (7th Cir. 2002); *United States v. McClurge*, 311 F.3d 866, 871 (7th Cir. 2002); *United States v. Mietus*, 237 F.3d 866, 873 (7th Cir. 2001); *United States v. Wilson*, Nos. 93-2109, 93-2148, 1994 WL 101906, at *4 (7th Cir. Mar. 24, 1994); *United States v. Dimas*, 3 F.3d 1015, 1020 (7th Cir. 1993); *United States v. Chapman*, 954 F.2d 1352, 1359-60 (7th Cir. 1992); *United States v. Cochran*, 955 F.2d 1116, 1121 (7th Cir. 1992); *United States v. Hartmann*, 958 F.2d 774, 786 (7th Cir. 1992); *Carter v. Peters*, No. 91-1229, 1992 WL 145528, at *1 (7th Cir. June 29, 1992); *United States v.*

Ziperstein stated its “rule” relatively forcefully: the “claim of ‘mutually antagonistic’ defenses will mandate a severance . . . only . . . where the acceptance of one party’s defense will preclude the acquittal of the other.”¹⁵⁶ Yet although the term “mandate” is perfectly clear, the remainder of the definition contains some possible ambiguity, since it is different to say “will mandate a severance if” (which makes mutual antagonism a sufficient condition for severance in itself) as against “will mandate a severance only if (or only where)” (which can be read in normal usage to describe either a sufficient condition or only a necessary but insufficient condition, though in academic logic “only if” clearly only describes a necessary but insufficient condition).¹⁵⁷ Although many subsequent decisions followed *Ziperstein* in using “mandate/d” or similar terms such as “require/d,”¹⁵⁸ others used weaker, less mandatory language, such as: “should”;¹⁵⁹ “justify/ied”;¹⁶⁰ “Joint trials may be found fundamentally unfair if codefendants present true ‘mutually antagonistic defenses’”;¹⁶¹ “[A] district court may grant severance if codefendants assert mutually antagonistic defenses”;¹⁶² or “Generally, where co-defendants assert mutually antagonistic defenses, severance must be granted [implying possible exceptions].”¹⁶³ Nearly all opinions followed *Ziperstein*’s “only where” construction.

Guerrero, 938 F.2d 725, 727-28 (7th Cir. 1991); *United States v. Briscoe*, 896 F.2d 1476, 1518 (7th Cir. 1990); *United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990); *United States v. Turk*, 870 F.2d 1304, 1306 (7th Cir. 1989); *United States v. Mazzanti*, 888 F.2d 1165, 1172 (7th Cir. 1989); *Madyun v. Young*, 852 F.2d 1029, 1034 (7th Cir. 1988); *United States v. Williams*, 858 F.2d 1218, 1224 (7th Cir. 1988); *United States v. Rollins*, 862 F.2d 1282, 1289 (7th Cir. 1988); *United States v. Bruun*, 809 F.2d 397, 407 (7th Cir. 1987); *United States v. Robinson*, 783 F.2d 64, 68 n.2 (7th Cir. 1986); *United States v. Goudy*, 792 F.2d 664, 673 (7th Cir. 1986); *United States v. Hendrix*, 752 F.2d 1226, 1232 (7th Cir. 1985); *United States v. Gironda*, 758 F.2d 1201, 1220 (7th Cir. 1985); *United States v. Harris*, 761 F.2d 394, 401 (7th Cir. 1985); *United States v. Keck*, 773 F.2d 759, 765 (7th Cir. 1985); *United States v. Centracchio*, 774 F.2d 856, 861 (7th Cir. 1985); *United States v. Hasting*, 739 F.2d 1269, 1274 (7th Cir. 1984); *United States v. Banks*, 687 F.2d 967, 973 (7th Cir. 1982); *United States v. Moschiano*, 695 F.2d 236, 246 (7th Cir. 1982); *see also United States v. McAnderson*, 914 F.2d 934, 949 (7th Cir. 1990); *United States v. Petullo*, 709 F.2d 1178, 1181-82 (7th Cir. 1983).

¹⁵⁶ 601 F.2d at 285.

¹⁵⁷ *See* HOWARD POSPESEL, INTRODUCTION TO LOGIC: PROPOSITIONAL LOGIC 41-45 (2d ed. 1984).

¹⁵⁸ *See, e.g., Williams*, 858 F.2d at 1224; *Goudy*, 792 F.2d at 673; *Hendrix*, 752 F.2d at 1232; *Hasting*, 739 F.2d at 1274.

¹⁵⁹ *See, e.g., Gironda*, 758 F.2d at 1220; *Keck*, 773 F.2d at 765.

¹⁶⁰ *See, e.g., Bruun*, 809 F.2d at 406.

¹⁶¹ *Lewis v. Huch*, 964 F.2d 670, 676 (7th Cir. 1992); *Madyun*, 852 F.2d at 1034.

¹⁶² *United States v. Turk*, 870 F.2d 1304, 1306 (7th Cir. 1989); *United States v. Mazzanti*, 888 F.2d 1165, 1172 (7th Cir. 1989) (actually quoting *Turk* but incorrectly attributing the quotation to *Goudy*).

¹⁶³ *United States v. Rollins*, 862 F.2d 1282, 1289 (7th Cir. 1988).

A few other opinions introduced other versions of the rule. In *United States v. Shively*,¹⁶⁴ the court explained,

But Shively also casts his argument for severance in a more conventional form by appealing to a line of cases which hold that if codefendants have inconsistent defenses severance must be granted if—but only if—the defenses “conflict to the point of being irreconcilable and mutually exclusive.” [citing *United States v. Crawford* (5th Cir. 1978); *United States v. Kopituk* (11th Cir. 1982)]. The danger is that in a case of irreconcilable and mutually exclusive defenses the jury is quite likely to convict at least one of the defendants without carefully weighing the evidence of his guilt. This is not such a case.¹⁶⁵

Shively thus noted two foreign-circuit cases, probably cited by the defense in briefs, and briefly discussed the issues involved before dismissing the defendant’s argument. The *Shively* court clearly did not formally adopt a rule from the Fifth or Eleventh Circuits or create one of its own through this dicta. But in a seemingly inexorable process similar to what happened in most other circuits, *Shively* was soon being cited for a rule that mutually antagonistic defenses “will only justify severance if the defenses ‘conflict to the point of being irreconcilable and mutually exclusive.’”¹⁶⁶

A similar example of turning innocent dicta into a rule occurred in *United States v. Oglesby*.¹⁶⁷ In rejecting a typical claim of error for denial of severance, the *Oglesby* court explained that the defendant was unable to make a showing of any possibility of prejudicial error resulting from a joint trial, noting,

Specifically, Oglesby failed to demonstrate that a joint trial with a co-defendant proceeding *pro se* would raise

¹⁶⁴ 715 F.2d 260 (7th Cir. 1983).

¹⁶⁵ *Id.* at 268.

¹⁶⁶ *United States v. Bruun*, 809 F.2d 397, 406 (7th Cir. 1987); *see also* *United States v. Hartmann*, 958 F.2d 774, 786-87 (7th Cir. 1995) (citing *Shively*); *United States v. Emond*, 935 F.2d 1511, 1514 (7th Cir. 1991) (quoting *Bruun*, quoting *Shively*); *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985); *Rollins*, 862 F.2d at 1289 (citing *Shively* for a rule that “if codefendants have inconsistent defenses severance must be granted if—but only if—the defenses conflict to the point of being irreconcilable and mutually exclusive”) (internal quotations omitted).

¹⁶⁷ 764 F.2d 1273.

difficulties such as: (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive [see, e.g., *United States v. Shively*]; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.¹⁶⁸

Initially, subsequent opinions recognized that *Oglesby* had laid out a non-exclusive list of situations where actual prejudice *might* arise.¹⁶⁹ A few years later, other panels had converted the *Oglesby* list into an exclusive list of factors to show actual prejudice and indicated that demonstrating "conflicting and irreconcilable defenses" automatically showed actual prejudice.¹⁷⁰ Notably, the implication that "conflicting and irreconcilable defenses" show actual prejudice per se is derived indirectly from *Shively's* non-holding on that point.

One often-cited Seventh Circuit opinion, unlike *Shively* or *Oglesby*, set out deliberately to provide an alternative to the *Ziperstein* version of the rule. In *United States v. Buljubasic*,¹⁷¹ the court sought to include the *George* version of the rule along with the *Ziperstein* version in a compound rule, although the *Buljubasic* court dropped the D.C. Circuit's "both are guilty" construction, perhaps recognizing that the two versions could not coexist harmoniously. The *Buljubasic* version stated, "Unless the defenses are so inconsistent that the *making* of a defense by one party will lead to an unjustifiable inference of another's guilt, or unless the acceptance of a defense *precludes* acquittal of other defendants, it is not necessary to hold separate trials. [citing *Ziperstein* and various of its progeny along with *George*]."¹⁷² Although a few later opinions showed

¹⁶⁸ *Id.* at 1276 (citations omitted).

¹⁶⁹ *United States v. Garner*, 837 F.2d 1404, 1413 (7th Cir. 1987) (noting that *Oglesby* identified four situations in which severance under Rule 14 "might be required," listing the *Oglesby* factors, then adding, "While these four situations are not the only ones that might trigger Rule 14, they do provide a helpful reference in reviewing the district court's exercise of discretion"); see also *United States v. Clark*, 989 F.2d 1490, 1499 (7th Cir. 1993) ("might").

¹⁷⁰ *United States v. Hamilton*, 19 F.3d 350, 357-58 (7th Cir. 1994) ("To show actual prejudice, [the defendant] must demonstrate that one of the following circumstances was present in his case: (1) conflicting and irreconcilable defenses; . . .") (citing *Clark*); *United States v. Prewitt*, 34 F.3d 436, 440 (7th Cir. 1994) (same as *Hamilton*).

¹⁷¹ 808 F.2d 1260 (7th Cir. 1987).

¹⁷² *Id.* at 1263.

an awareness of *Buljubasic's* alternative language,¹⁷³ most opinions just lumped it together with all the *Ziperstein* clones.¹⁷⁴

Yet the most anomalous of all the Seventh Circuit's pre-*Zafiro* decisions involving mutually antagonistic defenses was *United States v. Hartmann*.¹⁷⁵ *Hartmann* gave a compound version of the rule by trying to join nearly all the different versions that ever had appeared in Seventh Circuit jurisprudence:

In *United States v. Buljubasic*, we announced the test for severance due to antagonistic defenses: [repeating the *Buljubasic* compound standard]. The latter ground mentioned in this excerpt has been referred to as the "mutually antagonistic defenses" test. [citing *United States v. Ziperstein*]. Mutual antagonism, as interpreted in the case law, implies a conflict in defenses that is "irreconcilable and mutually exclusive." [citing *United States v. Shively*]. Put simply, defenses are not mutually antagonistic unless they are "so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." [citing *United States v. George*]. This standard requires that "acceptance of one defendant's defense will preclude the acquittal of the other defendant. [citing *United States v. Bruun*]."¹⁷⁶

Hartmann represented the last appearance of the D.C. Circuit's "both are guilty" construction in Seventh Circuit jurisprudence, and in trying to lump together the various different versions harmoniously, the *Hartmann* panel seems not to have considered whether a version that allowed the jury to accept only one of two conflicting defenses could be consistent with a version that required the jury to reject both.

One other anomaly from the pre-*Zafiro* period was *United States v. Centracchio*.¹⁷⁷ The *Centracchio* court stated, "The rule in this circuit . . . is

¹⁷³ See, e.g., *United States v. Mohammad*, 53 F.3d 1426, 1432 n.5 (7th Cir. 1995); *United States v. Chapman*, 954 F.2d 1352, 1359 (7th Cir. 1992); *United States v. Hartmann*, 958 F.2d 774, 786 (7th Cir. 1992); *Stomner v. Kolb*, 903 F.2d 1123, 1127 (7th Cir. 1990); *United States v. Mazzanti*, 888 F.2d 1165, 1172 (7th Cir. 1989); *United States v. Madyun*, 852 F.2d 1029, 1034 (7th Cir. 1988).

¹⁷⁴ See, e.g., *United States v. Emond*, 935 F.2d 1511, 1514 (7th Cir. 1991); *United States v. Turk*, 870 F.2d 1304, 1306 (7th Cir. 1989).

¹⁷⁵ 958 F.2d 774 (7th Cir. 1992).

¹⁷⁶ *Id.* at 786-87 (citations omitted).

¹⁷⁷ 774 F.2d 856 (7th Cir. 1985).

that mutually antagonistic defenses do not necessarily mandate severance," and then rephrased the *Ziperstein* "acceptance of one defense precludes acquittal of the other defendant" construction.¹⁷⁸ The *Centracchio* court thus pointed out yet another latent ambiguity in *Ziperstein* and its progeny. *Ziperstein* itself had said that the circuit had a "well-established standard for determining when the claim of 'mutually antagonistic' defenses will mandate a severance. Such 'mutual antagonism' only exists where the acceptance of one party's defense will preclude the acquittal of the other."¹⁷⁹ This leaves ambiguous whether "such mutual antagonism" here refers to *all* mutual antagonism, defining mutual antagonism to be only the extreme situation where acceptance of one defense precludes acquittal of the other defendant, or whether "such mutual antagonism" only refers to a special subcategory of a broader category of mutual antagonism that includes lower-level varieties that do not require severance. Logically, it is possible to imagine defenses that are mutually antagonistic in the sense of each making the other harder to believe, but without rising to the level of mutual exclusiveness, and this seems to be exactly what some other circuits did when confronted with the language in *Zafiro*.¹⁸⁰ *Ziperstein* also offered *De Luna* as an example of mutually antagonistic defenses,¹⁸¹ but failed to answer the question of whether all mutual antagonism had to share a similarly high level of conflict and risk of prejudice. Subsequent opinions varied on that point, with some of them using language suggesting (or capable of being read to say) that severable mutual antagonism might be a subcategory,¹⁸² while others tended to indicate that the label "mutual antagonism" only applied to situations requiring severance.¹⁸³

¹⁷⁸ *Id.* at 862.

¹⁷⁹ 601 F.2d 281, 285 (7th Cir. 1979).

¹⁸⁰ See *infra* Parts III.D-III.M (discussing the development of the "rule" in the Fifth, First, Second, Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits).

¹⁸¹ *Ziperstein*, 601 F.2d at 285.

¹⁸² See, e.g., *United States v. Williams*, 858 F.2d 1218, 1224 (7th Cir. 1988) (using language very similar to *Hendrix*); *United States v. Hendrix*, 752 F.2d 1226, 1232 (7th Cir. 1985) ("In this circuit, severance is required because of 'mutually antagonistic defenses' only when the defenses are so antagonistic that 'the acceptance of one party's defense will preclude'"); *United States v. Girona*, 758 F.2d 1201, 1220 (7th Cir. 1985) ("Severance should be granted only if defenses are so 'mutually antagonistic' that the acceptance of one defendant's defense will preclude the acquittal of the other defendant."); *United States v. Goudy*, 792 F.2d 664, 673 (7th Cir. 1980) (using language very similar to *Hendrix*).

¹⁸³ See, e.g., *United States v. Rollins*, 862 F.2d 1282, 1289 (7th Cir. 1988) ("Defenses are mutually antagonistic only where acceptance of one defendant's defense precludes the acquittal of the other defendant."); *United States v. Keck*, 773 F.2d 759, 765 (7th Cir. 1985) ("One of the few instances in which a court should grant a motion to sever exists when defendants present mutually antagonistic defenses. . . . Defenses are mutually antagonistic,

Some of this confusion began to change in the wake of the Supreme Court's ruling in *Zafiro*, and the case's origin in the Seventh Circuit probably helped make that circuit's judges particularly attentive to that ruling. Even before the Supreme Court's ruling, Seventh Circuit panels began to adjust their standards and back away from the per se severance "rule" to reflect the circuit's opinion in *Zafiro*.¹⁸⁴ Various post-*Zafiro* opinions clearly followed it, and even if they borrowed a definition of mutually antagonistic defenses from earlier authorities, they recognized that the earlier per se severance rule associated with those authorities no longer applied.¹⁸⁵

Yet other opinions still showed confusion as to the proper standards post-*Zafiro*. In the first post-*Zafiro* opinion, *United States v. Goines*,¹⁸⁶ the court quoted *Zafiro*'s "mutually antagonistic defenses are not prejudicial per se" and "prevent a jury from making a reliable judgment about guilt or innocence" language. Then, the *Goines* court followed this by observing how the defendant had "not shown that his defense was irreconcilable with Sprinks' [co-defendant's] defense to the extent that to acquit one would preclude the acquittal of the other[.]" suggesting that the *Goines* court thought that such irreconcilable defenses did not come under the *Zafiro* holding and its language regarding mutually antagonistic defenses.¹⁸⁷ Similarly, in *United States v. Mohammad*,¹⁸⁸ the

however, only where the acceptance of one party's defense precludes the acquittal of the other defendant."); see also *Stomner v. Kolb*, 903 F.2d 1123, 1127 (7th Cir. 1990) (referring to "true 'mutually antagonistic defenses'"); *United States v. Turk*, 870 F.2d 1304, 1306 (7th Cir. 1989) (same as *Rollins*); *United States v. Mazzanti*, 888 F.2d 1165, 1172 (7th Cir. 1989) (same as *Rollins*); *Madyun v. Yung*, 852 F.2d 1029, 1034, 1035 (7th Cir. 1988) (referring to "true 'mutually antagonistic defenses'").

¹⁸⁴ *United States v. Williams*, Nos. 91-2420, 91-242, 1992 WL 196911, at *4 (7th Cir. Aug. 17, 1992); *United States v. Pedroza-Diaz*, Nos. 91-1738, 91-1749, 1992 WL 196916, at *2 (7th Cir. Aug. 16, 1992).

¹⁸⁵ *United States v. McClurge*, 311 F.3d 866, 871 (7th Cir. 2002) (following *Zafiro* and *Mietus*); *United States v. Hughes*, 310 F.3d 557, 563 & n.8 (7th Cir. 2002) (citing *Dimas* for definition and following *Zafiro*); *United States v. Mietus*, 237 F.3d 866, 873-74 (7th Cir. 2001) (citing *Dimas* for definition, following *Zafiro*, and expressing doubt that *Romanello*'s holding survived *Zafiro*); *United States v. Wilson*, 237 F.3d 827, 835-36 (7th Cir. 2001) (following *Zafiro*); *United States v. Richardson*, 130 F.3d 765, 777 (7th Cir. 1997) (following *Zafiro*); *United States v. Ramirez*, 45 F.3d 1096, 1100 (7th Cir. 1995) (following *Zafiro*); *United States v. Wilson*, Nos. 93-2109, 93-2148, 1994 WL 101906, at *4 (7th Cir. Mar. 24, 1994) (following *Zafiro*); *United States v. Dimas*, 3 F.3d 1015, 1020 (7th Cir. 1993) (citing *Cochran* for definition but following *Zafiro*); *United States v. Rivera*, 6 F.3d 431, 437 (7th Cir. 1993) (following *Zafiro*); see also *United States v. Bibb*, Nos. 95-1155, 95-1242, 95-1244, 95-1516, 95-2437, 1996 WL 102547, at *2 (7th Cir. Mar. 6, 1996).

¹⁸⁶ 988 F.2d 750 (7th Cir. 1993).

¹⁸⁷ *Id.* at 781.

¹⁸⁸ 53 F.3d 1426 (7th Cir. 1995).

court quoted various pieces of key language from *Zafiro*, and quoted the *Buljubasic* compound version of the mandatory severance rule in a footnote,¹⁸⁹ suggesting that the court believed that *Buljubasic*'s "unless the acceptance of a defense precludes acquittal of other defendants" language was not impacted by *Zafiro*. Still other post-*Zafiro* opinions overlooked *Zafiro* altogether.¹⁹⁰ Notably, these were the opinions that grew out of the *Oglesby* list of four factors potentially causing actual prejudice and used the term "conflicting and irreconcilable defenses" rather than the Seventh Circuit's usual "mutually antagonistic defenses." This terminological shift apparently was enough to prevent recognition that *Zafiro* also addressed irreconcilable defenses. Other opinions applying state law followed state versions of a mandatory severance rule rather than *Zafiro*.¹⁹¹

Some confusion also has surfaced at the district court level in recent opinions. Out of three recent district court opinions that discuss mutually antagonistic defenses, only one really follows *Zafiro*.¹⁹² The other two both cite not only *Zafiro*, but also the four *Oglesby* factors, including the first one that suggests that severance may be required for conflicting and irreconcilable defenses alone (and thus is affected by *Zafiro*).¹⁹³ One of these opinions also cites the *Buljubasic* compound rule as though it is still intact and unaffected by *Zafiro*, including the second part of it suggesting that separate trials are automatically required if the acceptance of a defense precludes acquittal of other defendants.¹⁹⁴

D. *The Fifth Circuit*

Given that the Fifth Circuit produced the *De Luna* opinion, it is particularly ironic that that circuit's initial jurisprudence on mutually exclusive defenses did not rely on *De Luna* directly. Rather, the earliest such opinion only alluded to a decision from the D.C. Circuit. In *United*

¹⁸⁹ *Id.* at 1432 & n.5.

¹⁹⁰ *United States v. Hamilton*, 19 F.3d 350, 357-58 (7th Cir. 1994); *United States v. Prewitt*, 34 F.3d 436, 440 (7th Cir. 1994); *United States v. Clark*, 989 F.2d 1490, 1499 (7th Cir. 1993).

¹⁹¹ *Rastafari v. Anderson*, 278 F.3d 673, 688 (7th Cir. 2002); *Hernandez v. Cowan*, 200 F.3d 995, 999 (7th Cir. 2000); *Nelson v. Haws*, No. 92-4130, 1995 WL 98521, at *1 (7th Cir. Mar. 8, 1995). Ironically, though it is beyond the scope of this Article to explore this issue, it appears likely that most state mandatory severance rules derive from the tainted federal jurisprudence discussed in this Article.

¹⁹² *United States v. Taylor*, 293 F. Supp. 2d 884, 891, 892 (N.D. Ind. 2003).

¹⁹³ *United States v. Carman*, No. 02 CR 464-1, 5, 6, 8, 2004 WL 1638231, at *5 (N.D. Ill. July 16, 2004); *United States v. Lawrence*, No. 02 CR 200, 2003 WL 22089778, at *2-*3 (N.D. Ill. Sept. 9, 2003). Both of these opinions are more careful than *Prewitt* and *Hamilton*, however, and state that the *Oglesby* factors "may" warrant severance.

¹⁹⁴ *Carman*, 2004 WL 1638231, at *6.

States v. Martinez,¹⁹⁵ in response to a claim of prejudice from conflicting defenses, the court noted (perhaps from the appellant's brief):

In *United States v. Robinson*, [D.C. Cir. 1970] the court said: "In order to demonstrate abuse of discretion by a trial judge, one must show more than the fact that co-defendants whose strategies were generally antagonistic were tried together At the very least, it must be demonstrated that a conflict is so prejudicial that differences are irreconcilable, and 'that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'" The logical significance to be drawn from *Robinson* is that conflicts among defendants do not *per se* require severance. *Martinez* is thus left to show affirmatively an abuse of discretion on the part of the trial court in denying severance. We do not think he has met that burden.¹⁹⁶

Far from declaring a mandatory severance rule, the *Martinez* court only derived from *Robinson* the proposition that there is no general mandatory severance rule for conflicting defenses, and that a defendant must show actual prejudice. And, it gave no indication of any intention to formally adopt *Robinson's* "both are guilty" language as a rule for the Fifth Circuit. The following year, in *United States v. Eastwood*,¹⁹⁷ the court similarly found no clear showing of prejudice and in a "see also" footnote noted the "At the very least . . . both are guilty" language from *Robinson*.¹⁹⁸ This, too, was far from a holding establishing a *per se* severance rule, but that did not stop *Eastwood* from being cited occasionally as support for the general existence of a mandatory severance rule,¹⁹⁹ while *Martinez* later was cited as authority for a specific "both are guilty" version of the rule in the Fifth Circuit in an anomalous decision in *United States v. Herring*.²⁰⁰

¹⁹⁵ 466 F.2d 679 (5th Cir. 1972).

¹⁹⁶ *Id.* at 687.

¹⁹⁷ 489 F.2d 818 (5th Cir. 1973).

¹⁹⁸ *Id.* at 822.

¹⁹⁹ *See, e.g., United States v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. 1981). Notably, though, some earlier post-*Eastwood* opinions used *Eastwood* only to support the proposition that a defendant's reliance on an entrapment defense was not sufficient to justify severance without a showing of actual prejudice. *See United States v. Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980); *United States v. Mota*, 598 F.2d 995, 1001 (5th Cir. 1979).

²⁰⁰ 602 F.2d 1220, 1225 (5th Cir. 1979).

The next early Fifth Circuit opinion after *Martinez* and *Eastwood* to address the issue of mutually antagonistic defenses was *United States v. Johnson*.²⁰¹ In *Johnson*, two defendants, Johnson and Smith, were tried jointly for passing counterfeit money.²⁰² Johnson claimed that he was not present when the charged crime was committed. Smith confessed to having passed the bills but denied intent because he claimed to be a government informer who knowingly passed the bills to a third party who knew the money to be counterfeit.²⁰³ In his confession, Smith stated that Johnson was with him at the scene of the crime.²⁰⁴ The only other person at the scene, the recipient of the counterfeit money, testified only that he believed it was Johnson who was there based on Johnson's height and comments from Smith, but did not know for certain who the third person at the scene was because it was dark.²⁰⁵ Thus Smith provided the principal evidence to contradict Johnson's non-presence defense.²⁰⁶ Smith's attorney, and Smith while taking the stand and affirming his out-of-court confession, seized every opportunity to incriminate Johnson.²⁰⁷ Johnson predicted this result in a pre-trial motion for severance, and moved again for severance during and after trial after his prediction proved correct.²⁰⁸ The district court denied all these motions.²⁰⁹

On these facts, the *Johnson* court held that Johnson had been denied a fair trial and reversed for denial of severance.²¹⁰ The court did not use the expression "second prosecutor," but emphasized how Smith and his counsel aggressively portrayed Johnson as the villain.²¹¹ It also stressed how Smith's testimony was the primary basis for convicting Johnson since the recipient's uncertain testimony would be "enough to support Johnson's conviction [but] was clearly not sufficient to compel it[.]"²¹² such that "Smith was the government's best witness against Johnson."²¹³ The court noted reprovingly that the trial court admitted Smith's confession with no deletions of the statements incriminating Johnson.²¹⁴

²⁰¹ 478 F.2d 1129 (5th Cir. 1973).

²⁰² *Id.* at 1130.

²⁰³ *Id.* at 1132.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1133.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1132-33.

²⁰⁸ *Id.* at 1131-32.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1131, 1134.

²¹¹ *Id.* at 1132-33.

²¹² *Id.* at 1133.

²¹³ *Id.*

²¹⁴ *Id.* at 1133 & n.5.

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The court reasoned that the facts of the case and trial made it insurmountably difficult for a jury to consider the defendants' guilt separately, while with a fairly simple case with only two defendants, it would have been "entirely practicable" to accord them separate trials.²¹⁵

Most crucially regarding the issue of mutually exclusive defenses, the *Johnson* court came nowhere near stating a general mandatory severance rule for mutually antagonistic defenses. It declared, "We hold that in the particular circumstances of this case the trial court abused its discretion in not granting a severance pursuant to its 'continuing duty at all stages of the trial to grant a severance if prejudice does appear.'"²¹⁶ Those particular circumstances include the unredacted confession, the aggressive second-prosecutorial stance, the apparent lack of limiting instructions (the *Johnson* court never mentions this issue), and the sharply contradictory defenses. Additionally, the *Johnson* court never mentioned the doctrine of mutually antagonistic defenses and cited no authority regarding it; in fact, the court cited *De Luna* only in a footnote regarding how the district court was warned in advance that Smith "quite properly" had "no qualms about casting Johnson as the major culprit in the counterfeit transaction."²¹⁷

But from these inauspicious, carefully limited roots, a general rule of mandatory severance of mutually antagonistic defenses grew and blossomed rapidly in the Fifth Circuit. Again, ironically, notwithstanding that *De Luna* was a Fifth Circuit opinion, the source for that circuit's rule was imported and derived from *De Luna* only indirectly, seemingly with no awareness of that indirect source. This may be because earlier Fifth Circuit case law properly understood *De Luna* as hinging on its contested holding that a defendant's counsel has a duty to comment on a co-defendant's refusal to testify when the defendants offer mutually antagonistic defenses. In *Gurleski v. United States*,²¹⁸ the court noted that "[t]rue antagonistic defenses are exemplified in *De Luna*," but added that the "*De Luna* rule applies only when it is counsel's duty to make a comment," that a "mere desire to do so will not support an incursion on a defendant's carefully protected right to silence," that a "duty [to comment on a codefendant's refusal to testify] arises only when the arguments of the co-defendants are antagonistic," and that a codefendant had no right to comment on

²¹⁵ *Id.* at 1133-34.

²¹⁶ *Id.* at 1134 (quoting *Schaffer v. United States*, 362 U.S. 511, 516 (1960)).

²¹⁷ *Id.* at 1132-33, 1133 n.4.

²¹⁸ 405 F.2d 253 (5th Cir. 1968), *cert. denied*, 395 U.S. 981 (1969).

another codefendant's silence and faced no prejudice when the codefendant desiring to comment would gain no significant benefit from such comment.²¹⁹ Thus, *Gurleski* pointed out how the issue of mutually exclusive defenses in *De Luna* is inextricably interwoven with the supposed right to comment on a nontestifying codefendant's silence, rather than creating a general mandatory severance rule for mutually exclusive defenses even in the absence of the right to comment issue. Similarly, in *United States v. Nakaladski*,²²⁰ the court discussed how the

DeLuna ruling, which recognized the right of defendants in certain circumstances to comment on the failure of a co-defendant to testify, is, however, limited only to those occasions where the defendants' defenses are based on mutually exclusive theories of guilt that would create a duty upon counsel to comment upon the refusal of the other defendant to testify.²²¹

So in forming its mandatory severance rule, the Fifth Circuit misread an opinion from a foreign circuit. In *United States v. Wilson*,²²² the first Fifth Circuit opinion to declare a mandatory severance rule for mutually antagonistic defenses, the court stated, "Before severance is required because of conflicting defenses, the defenses must be antagonistic to the extent that they approach being mutually exclusive. [citing *United States v. Kahn*, (7th Cir. 1967)]."²²³ As already discussed, *Kahn* said no such thing. The *Wilson* court offered no other authority for this early statement of the rule—not *De Luna* itself, not *Martinez* or *Eastwood*, and not *Johnson*. Notably, the construction of the *Wilson* court's language on mutually antagonistic defenses also allows at least two possible readings: either that defenses that approach being mutually exclusive are a sufficient condition to require severance, or that such defenses are only a necessary but not sufficient condition that requires one or more other factors in addition. However, the *Wilson* court's loose "approach being" construction never appeared again in Fifth Circuit jurisprudence.

Subsequent opinions gradually further developed the Fifth Circuit's incipient mandatory severance rule. Specifically, 1978 was a particularly active year. In *United States v. Bynum*,²²⁴ the court followed *Wilson* in

²¹⁹ *Id.* at 265.

²²⁰ 481 F.2d 289 (5th Cir. 1973).

²²¹ *Id.* at 302 (citations omitted) (citing *Gurleski*).

²²² 500 F.2d 715 (5th Cir. 1974).

²²³ *Id.* at 723.

²²⁴ 566 F.2d 914 (5th Cir. 1978).

rejecting a defendant's severance claim because the "defenses were not mutually exclusive and antagonistic."²²⁵ In *United States v. Marable*,²²⁶ the court adjusted *Wilson's* language to read, "Before a severance will be granted due to inconsistent defenses, a defendant must demonstrate that the defenses are antagonistic to the point of being mutually exclusive."²²⁷ In *United States v. Swanson*,²²⁸ the court ignored *Wilson* and instead transformed language from *Martinez* into a severance rule: "To compel severance, the alleged conspirators' defenses must be not only antagonistic but irreconcilable."²²⁹ All of these opinions left open the potential ambiguity as to whether irreconcilability or mutual exclusivity constituted a necessary or sufficient condition for severance.

Also in 1978, unlike in its earlier opinion in *Johnson*, the Fifth Circuit first used the mandatory severance rule to reverse based on denial of severance of mutually antagonistic defenses. In *United States v. Crawford*,²³⁰ the majority of a divided panel found the defenses irreconcilable and mutually exclusive where police pulled over two defendants and found an unregistered sawed-off shotgun "partially hidden" under the dashboard of their car.²³¹ The court reasoned that one, the other, or both had to be in possession and it was impossible to claim ignorance.²³² At trial, "[t]he sole defense of each was the guilt of the other," and one defendant actively incriminated the second while the second pinned possession exclusively on the first.²³³ The court identified not mere hypothetical antagonism, but actual compelling prejudice where each defendant "was the government's best witness against the other," introducing hostile witnesses against each other and cross-examining them.²³⁴ The trial court also overruled repeated motions for severance even after "the inevitability of prejudice should have become apparent."²³⁵ Although the court found "evidence of each defendant's individual guilt was strong, this joint trial was intrinsically

²²⁵ *Id.* at 926.

²²⁶ 574 F.2d 224 (5th Cir. 1978).

²²⁷ *Id.* at 231.

²²⁸ 572 F.2d 523 (5th Cir. 1978).

²²⁹ *Id.* at 529.

²³⁰ 581 F.2d 489 (5th Cir. 1978).

²³¹ *Id.* at 490.

²³² *Id.* at 492.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

prejudicial.”²³⁶ The court concluded that “[a] fair trial was impossible under these inherently prejudicial conditions.”²³⁷

Having found actual compelling prejudice on the facts in *Crawford*, the court could, and basically did, reach its decision based on demonstrated prejudice without any general rule requiring mandatory severance of irreconcilable defenses, like the *Johnson* court did. Such a general rule was not necessary to the decision. However, the court cited *Wilson* and *Swanson* in stating, “To cause the type of compelling prejudice that prevents co-defendants from obtaining a fair trial, the defenses must conflict to the point of being irreconcilable and mutually exclusive.”²³⁸ Thus the *Crawford* court presumed such a rule rather than creating it. However, the court did not address whether or not jury instructions could have mitigated the prejudice in *Crawford*. Like its predecessors, *Crawford*’s statement of the rule remains somewhat ambiguous as to whether defenses conflicting to the point of being irreconcilable and mutually exclusive constitute a merely necessary or sufficient condition for mandatory severance.

Notably, although the *Crawford* court cited *Johnson* for how antagonistic defenses can cause incurable prejudice, it did not cite it for a per se severance rule.²³⁹ It mentioned *De Luna* only in a footnote citing *Gurleski*, noting, “One of the factors that caused this court to require a severance in *De Luna* . . . has been said to have been the antagonism of the defenses asserted by the co-defendants.”²⁴⁰ This modest statement seems to recognize that *De Luna* did not treat mutually exclusive defenses as an independent basis for mandatory severance absent the other interwoven factors in that case. As such, the only basis for the “rule” stated in *Crawford* was the unfounded dicta from *Swanson* and *Wilson* that resulted from misreadings of earlier opinions.

The next major milestone in the development of the Fifth Circuit’s mandatory severance rule came at the end of 1981 in *United States v. Berkowitz*,²⁴¹ which would become one of the most influential opinions on the issue throughout federal jurisprudence. In rejecting defendants’ claims of abuse of discretion from denial of severance of mutually antagonistic defenses, the *Berkowitz* court reflected at greater length than

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 491.

²³⁹ *Id.*

²⁴⁰ *Id.* at 491 n.1.

²⁴¹ 662 F.2d 1127 (5th Cir. 1981).

any previous panels of the Fifth Circuit on the circuit's accumulated jurisprudence on the question. The court began with the premise, "In this circuit, to compel severance the defenses must be more than merely antagonistic—they must be antagonistic to the point of being mutually exclusive [citing *Marable* and *Wilson*] or irreconcilable [citing *Crawford*, *Swanson*, and a case that followed *Swanson*]."242 It then considered how these and other decisions had handled conflicting defenses.²⁴³ Finally, it concluded,

Synthesizing these decisions, we hold that the defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possibility exists "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty."²⁴⁴

Berkowitz's major contributions to the Fifth Circuit's construction of its mandatory severance rule were: (1) the language stating that to compel severance, defenses must be "antagonistic to the point of being mutually exclusive or irreconcilable"; and (2) the language stating that to believe the "core" of one defense, the jury must disbelieve the other. The brief, somewhat hesitant reference to the D.C. Circuit's "both are guilty" construction, by contrast, seems to be the second to last time it ever appeared in the Fifth Circuit.²⁴⁵ *Berkowitz* became the most cited decision on the issue in the Fifth Circuit, and its construction became almost standard, although various linguistic variations remained as courts rephrased *Berkowitz* or drew on its predecessors for statements of the "rule."

Various subsequent decisions used the *Berkowitz* construction almost exactly: "mutually exclusive or irreconcilable" and "believe the core of

²⁴² *Id.* at 1133.

²⁴³ *Id.* at 1134.

²⁴⁴ *Id.* (quoting *Eastwood*, quoting *Robinson*).

²⁴⁵ See *United States v. Nichols*, 695 F.2d 86, 92-93 (5th Cir. 1982) (the last time).

one, disbelieve the other.”²⁴⁶ A later important decision, *United States v. Romanello*, became the next most frequently cited case on the issue in the Fifth Circuit, after *Berkowitz*.²⁴⁷ *Romanello* followed *Berkowitz* and *Crawford* closely, but rephrased the language slightly to “irreconcilable and mutually exclusive” plus the “core” language, which was followed in various subsequent opinions.²⁴⁸ But, some opinions, whether drawing on *Berkowitz* or its predecessors, used the “irreconcilable and/or mutually exclusive” language without the “core” language;²⁴⁹ some used only “mutually exclusive” with no “core” language;²⁵⁰ some used only “mutually antagonistic” with the “core” language;²⁵¹ at least two opinions used just the “core” language alone;²⁵² one decision used only “irreconcilable” with “core”;²⁵³ and one used only “mutually exclusive” with “core.”²⁵⁴ Although the Fifth Circuit seems not to have suffered much from this problem, each of these linguistic mutations represented a chance for the “rule” to become unmoored from its roots and potentially

²⁴⁶ *United States v. Rojas-Martinez*, 968 F.2d 415, 419 (5th Cir. 1992); *United States v. Rocha*, 916 F.2d 219, 231 (5th Cir. 1990); *United States v. Sandoval*, 847 F.2d 179, 183 (5th Cir. 1988); *United States v. Almeida-Biffi*, 825 F.2d 830, 833 (5th Cir. 1987).

²⁴⁷ 726 F.2d 173 (5th Cir. 1984).

²⁴⁸ *Id.* at 177; *United States v. Carrion*, 809 F.2d 1120, 1125 (5th Cir. 1987); *United States v. DeVeaue*, 734 F.2d 1023, 1027 (5th Cir. 1984); *United States v. Lee*, 744 F.2d 1124, 1126 (5th Cir. 1984).

²⁴⁹ *United States v. Toro*, 840 F.2d 1221, 1238 (5th Cir. 1988); *United States v. Fortna*, 796 F.2d 724, 738 (5th Cir. 1986); *United States v. Webster*, 734 F.2d 1048, 1053 (5th Cir. 1984); *United States v. Horton*, 646 F.2d 181, 186 (5th Cir. 1981); *United States v. Grapp*, 653 F.2d 189, 193 (5th Cir. 1981); *United States v. Sheikh*, 654 F.2d 1057, 1065 (5th Cir. 1981); *United States v. Wilson*, 657 F.2d 755, 765 (5th Cir. 1981) (citing *Herring* and *Crawford*); *United States v. DeSimone*, 660 F.2d 532, 541 (5th Cir. 1981); *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978).

²⁵⁰ *United States v. Holcomb*, 797 F.2d 1320, 1324 (1986); *United States v. Archer*, 733 F.2d 354, 361 (5th Cir. 1984); *United States v. Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980); *United States v. Dohm*, 597 F.2d 535, 539 (5th Cir. 1979); *United States v. Marable*, 574 F.2d 224, 231 (5th Cir. 1978); *United States v. Wilson*, 500 F.2d 715, 723 (5th Cir. 1974).

²⁵¹ *United States v. Stotts*, 792 F.2d 1318, 1321 (5th Cir. 1986); *United States v. Aguiar*, 610 F.2d 1296, 1302 (5th Cir. 1980). Some used only “irreconcilable” without any “core” language. See *United States v. Guerra-Marez*, 928 F.2d 665, 676 (5th Cir. 1991); *United States v. Wheeler*, 802 F.2d 778, 782 (5th Cir. 1986) (saying defendant “must prove that the defenses were irreconcilable and that the jury would draw adverse inferences from the conflict itself,” which moves hesitantly in the direction of the D.C. Circuit’s “both are guilty” construction) (citing *Stotts* and *Nichols*); *United States v. Horton*, 705 F.2d 1414, 1416-17 (5th Cir. 1983) (following *Swanson*); *Demps v. Wainwright*, 666 F.2d 224, 227 (5th Cir. 1982); *United States v. Mota*, 598 F.2d 995, 1001 (5th Cir. 1979) (citing *Swanson*); *United States v. Swanson*, 572 F.2d 523, 528 (5th Cir. 1978) (mischaracterizing *Martinez*).

²⁵² *United States v. Hernandez*, 842 F.2d 82, 86 (5th Cir. 1988); *United States v. Bruno*, 809 F.2d 1097, 1103 (5th Cir. 1987).

²⁵³ *United States v. Kane*, 887 F.2d 568, 572 (5th Cir. 1989) (citing *Marable* and *Bruno*).

²⁵⁴ *United States v. Long*, 894 F.2d 101, 106 (5th Cir. 1990) (quoting *Berkowitz* and *Romanello*).

head in a new direction not in keeping with its origins, as happened in other circuits. For instance, courts could potentially start to view mutually exclusive defenses and irreconcilable defenses as separate categories, rather than two different labels for the same thing, depending on the use of “and” or “or.” This would tend to interfere with the recognition that irreconcilable, mutually exclusive, and mutually antagonistic all mean the same thing. In jurisprudence, as opposed to fiction or journalism, such gratuitous linguistic variety should be viewed as unwelcome and dangerous.

One particularly anomalous opinion, *United States v. Nichols*,²⁵⁵ created a compound rule, declaring, “A court should grant severance for antagonistic defenses when the conflict is ‘so irreconcilable that the jury will infer that both defendants are guilty solely due to the conflict,’ [citing *Herring*] or when the defenses are ‘irreconcilable and mutually exclusive.’”²⁵⁶ Interestingly, while some of the similar efforts to combine the “both are guilty” version of the rule with the “irreconcilable” or “mutually exclusive” version into a compound rule in other circuits lumped these categories together as one, the *Nichols* court correctly recognized them to be different categories. *Nichols* was the last time the “both are guilty” construction made an appearance in Fifth Circuit jurisprudence.

One Fifth Circuit opinion from the pre-*Zafiro* period deserves additional special mention, because it was the last case from the Fifth Circuit (and one of the few from any circuit) in which the court reversed for denial of severance. *United States v. Romanello*²⁵⁷ involved a gold jewelry heist in which one defendant (Vertucci) claimed to have been robbed at gunpoint by unknown persons similar in appearance to the other two codefendants (Romanello and Mendez), who claimed that they had been hired by a third party to transport the gold, not knowing it was stolen.²⁵⁸ Confidently announcing, “The Fifth Circuit has developed a fairly consistent litany of tests for determining whether severance is required in the ‘antagonistic defense’ situations[,]” the court applied the *Berkowitz* “antagonistic to the point of being irreconcilable and mutually exclusive” and “to believe the core of one defense, must necessarily disbelieve the other” formula.²⁵⁹ The majority concluded, “Obviously these defenses are irreconcilable and mutually exclusive. If the jury

²⁵⁵ 695 F.2d 86 (5th Cir. 1982).

²⁵⁶ *Id.* at 92-93 (citations omitted).

²⁵⁷ 726 F.2d 173 (5th Cir. 1984).

²⁵⁸ *Id.* at 175, 177.

²⁵⁹ *Id.* at 177.

believed that Romanello and Mendez robbed Vertucci, then it could not believe that they were innocent shippers. On the other hand, if the jury believed their defense, then they could not have robbed Vertucci, and his defense would cave in.”²⁶⁰ The court emphasized the “second prosecutor” problem of codefendants weakening each others’ defenses and so strengthening the government’s case, and held that

a defendant like Vertucci deserves a new, severed trial when: [(1)] the core of his defense is the guilt of his co-defendant; [(2)] to disprove his defense would establish his guilt; [(3)] his defense and the defense of his co-defendant are irreconcilable and mutually exclusive; [(4)] the co-defendant actively attacks his defense at trial; and [(5)] he suffers compelling prejudice as a result.”²⁶¹

Although the *Romanello* court reversed the district court’s denial of severance on procedural grounds, it also held that “the evidence was sufficient to support the verdicts against all three defendants”²⁶²—an important part of the equation for determining actual prejudice under *Zafiro* and the D.C. Circuit’s version of the severance rule.

The *Romanello* panel was sharply divided. The dissenter (correctly) noted, “While the defenses are to some extent antagonistic, in sober fact they are not . . . of their nature irreconcilable or mutually exclusive[]” where the two sets of codefendants never claimed to know each other and Vertucci never identified the others as his alleged robbers.²⁶³ Since the only basis presented at trial for assuming that Romanello and Mendez were the robbers was an inference offered by Vertucci’s counsel, the dissent argued that the “core” of a defense should be measured by evidence proffered, not inferences and allegations devised by clever counsel.²⁶⁴ By that standard, “at their core the defenses of Vertucci, Romanello and Mendez are quite consistent.”²⁶⁵ The dissent further noted, *a la Zafiro*, that the district judge had properly instructed the jury not to rely on statements of counsel as evidence.²⁶⁶

²⁶⁰ *Id.*

²⁶¹ *Id.* at 181.

²⁶² *Id.* at 177 n.4.

²⁶³ *Id.* at 182 (Gee, J., dissenting).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 183.

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But both the *Romanello* majority and the dissent accepted the *Berkowitz* formula as a correct statement of the Fifth Circuit's mandatory severance rule; their disagreement was only on how to apply that rule. Like various other panels before it, notably the *Crawford* court, the *Romanello* court merely presumed the existence of that rule rather than creating it.

As with the opinions up to *Crawford*, some ambiguity remained in the language of later cases as to whether mutually exclusive defenses were sufficient in themselves to mandate severance. For example, in *United States v. Mota*, the court followed *Swanson* in saying, "To compel a severance, the . . . defenses must be irreconcilable."²⁶⁷ That seems fairly close to a per se severance rule, though some slight potential ambiguity remains. In three cases decided before *Berkowitz*, the court used a much weaker construction: "Severance is allowable when . . . defenses are irreconcilable and mutually exclusive."²⁶⁸ Allowable, but not mandatory? Perhaps. In *United States v. Sheikh*,²⁶⁹ the court offered a stronger version that suggests a condition sufficient in itself: "The existence of antagonistic defenses among codefendants is cause for severance when the defenses conflict to the point of being irreconcilable and mutually exclusive."²⁷⁰

In the wake of *Berkowitz*, Fifth Circuit panels mostly spoke in terms of severance being "compelled" or "required" where defendants raised mutually exclusive defenses, though often in the ambiguous constructions "to compel/require severance" or "for severance to be compelled/required" rather than the more direct "severance is compelled/required."²⁷¹ One of the clearest expressions of the per se rule appeared in *United States v. Rojas-Martinez*: "Codefendants are entitled to severance when they demonstrate defenses that are . . . mutually exclusive or irreconcilable . . ."²⁷² But some opinions used the construction, "severance is required only if . . .,"²⁷³ which in classical

²⁶⁷ *United States v. Mota*, 598 F.2d 995, 1001 (5th Cir. 1979).

²⁶⁸ *United States v. DeSimone*, 660 F.2d 532, 541 (5th Cir. 1981); *United States v. Horton*, 646 F.2d 181, 186 (5th Cir. 1981); *United States v. Grapp*, 653 F.2d 189, 192 (5th Cir. 1981).

²⁶⁹ 654 F.2d 1057 (5th Cir. 1981).

²⁷⁰ *Id.* at 1065.

²⁷¹ *See, e.g.*, *United States v. Berkowitz*, 662 F.2d 1127, 1133 (5th Cir. 1981); *United States v. Lee*, 744 F.2d 1124, 1126 (5th Cir. 1984); *United States v. DeVeau*, 734 F.2d 1023, 1027 (5th Cir. 1984); *United States v. Romanello*, 726 F.2d 173, 177 (5th Cir. 1984).

²⁷² *United States v. Rojas-Martinez*, 968 F.2d 415, 419 (5th Cir. 1992).

²⁷³ *See, e.g.*, *United States v. Archer*, 733 F.2d 354, 361 (5th Cir. 1984); *Romanello*, 726 F.2d at 182 (Gee, J., dissenting); *see also United States v. Sandoval*, 847 F.2d 179, 183 (5th Cir.

logic establishes only a necessary condition, not a sufficient one (“severance is required if . . .”). Those opinions that relied only on the “cores in conflict language” implied, but did not state outright, that such conflict was sufficient in itself for severance: “The test for severance because of antagonistic defenses is [cores in conflict].”²⁷⁴ Various other cases used constructions which implied that although a trial court should, or had the option to, grant severance where defenses are irreconcilable, it did not necessarily have to, or it might not be reversible error not to: “A court should grant severance”;²⁷⁵ “severance is warranted”;²⁷⁶ or “To justify severance.”²⁷⁷

Yet after doing so much to set loose the mandatory severance rule for mutually exclusive defenses on the federal judiciary, the Fifth Circuit generally hewed closely to the Supreme Court’s ruling in *Zafiro* from 1993 onward. In the first such Fifth Circuit opinion, *United States v. Stouffer*,²⁷⁸ the court noted that the Supreme Court had “expressly declined to adopt” a per se severance rule, had instead required a “serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence[,]” and had expressed faith in the curative powers of limiting instructions in many prejudicial situations.²⁷⁹ The Fifth Circuit thus generally recognized that “mutually antagonistic” in *Zafiro* also covered “mutually exclusive” and “irreconcilable.” Most subsequent opinions followed *Zafiro*, *Stouffer*, or other cases following *Zafiro*.²⁸⁰ Even those opinions that did not as clearly follow the *Zafiro*

1988) (severance not required unless . . .); *United States v. Almeida-Biffi*, 825 F.2d 830, 833 (5th Cir. 1987) (same).

²⁷⁴ See, e.g., *United States v. Bruno*, 809 F.2d 1097, 1103 (5th Cir. 1987); *United States v. Hernandez*, 842 F.2d 82, 86 (5th Cir. 1985).

²⁷⁵ *United States v. Nichols*, 695 F.2d 86, 92-93 (5th Cir. 1982).

²⁷⁶ *United States v. Fortna*, 796 F.2d 724, 738 n.13 (5th Cir. 1980).

²⁷⁷ *United States v. Kaufman*, 858 F.2d 994, 1004 (5th Cir. 1988); *United States v. Toro*, 840 F.2d 1221, 1238 (5th Cir. 1988).

²⁷⁸ 986 F.2d 916 (5th Cir. 1993).

²⁷⁹ *Id.* at 924.

²⁸⁰ *Brown v. Dretke*, 419 F.3d 365, 372 (5th Cir. 2005); *United States v. Daniels*, 281 F.3d 168, 177, 178 (5th Cir. 2002); *United States v. Matthews*, 178 F.3d 295, 299 (5th Cir. 1999); *United States v. Mann*, 161 F.3d 840, 862 (5th Cir. 1998); *United States v. Castillo*, 77 F.3d 1480, 1491 (5th Cir. 1996) (citing *Thomas*); *United States v. Pettigrew*, 77 F.3d 1500, 1517, 1518 (5th Cir. 1996); *United States v. Walters*, 87 F.3d 663, 670-71 (5th Cir. 1996); *United States v. Thomas*, 12 F.3d 1350, 1363 (5th Cir. 1994); *United States v. Restrepo*, 994 F.2d 173, 187-88 (5th Cir. 1993).

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holding or cited earlier versions of the mandatory severance rule were clearly aware of *Zafiro* and at least followed it on some points.²⁸¹

Not all confusion has been cleared up in the Fifth Circuit, however – at least not at the district court level. One recent district court opinion closely followed *Zafiro*,²⁸² but another, even more recent opinion – involving the Enron bankruptcy – still stated, “Co-defendants are entitled to severance when they demonstrate antagonistic defenses[]” and cited *United States v. Rocha*²⁸³ from 1990 for the traditional *Berkowitz/Romanello* version of the mandatory severance rule before citing *Zafiro*’s requirement that severance should be granted only if there is a serious risk that joint trial would compromise a specific trial right of a defendant or prevent the jury from making a reliable judgment about guilt or innocence.²⁸⁴ The juxtaposition of the two cited authorities implies a lingering unawareness that *Zafiro* rejected the very sort of per se severance rule stated in *Rocha*, perhaps due to terminological confusion between “mutually antagonistic” and “mutually exclusive.”

After the D.C., Seventh, and Fifth Circuits pioneered the introduction and entrenchment of the mutually exclusive defenses doctrine into federal jurisprudence without any proper holding, the other federal circuits all borrowed the tainted rule from the pioneers, usually without much research or reflection, and also without any proper holding.

E. The First Circuit

The doctrine of mutually exclusive defenses first tentatively appeared in the First Circuit in 1978 in *United States v. Luna*.²⁸⁵ In holding there was clearly no abuse of discretion, the court explained, “Appellants did not assert inconsistent defenses, which would possibly have required the jury to believe one accused at the expense of another,”

²⁸¹ *United States v. Solis*, 299 F.3d 420, 442 (5th Cir. 2002) (following *Rocha* regarding codefendant’s admitting to conspiracy not requiring severance but also noting *Zafiro* ruling); *United States v. Neal*, 27 F.3d 1035, 1045-47 (5th Cir. 1994) (citing definition of antagonistic defenses from *Rojas-Martinez*, *Romanello*, and *Berkowitz*, but noting *Zafiro*’s holding that mutually antagonistic defenses are not prejudicial per se and following *Stouffer* on the curative power of limiting instructions).

²⁸² *Perkins v. United States*, No. Civ. A. 300 CV 2042 M, 2002 WL 368523, at *8-9 (N.D. Tex. Mar. 6, 2002).

²⁸³ 598 F.2d 995, 1001 (5th Cir. 1979).

²⁸⁴ *United States v. Causey*, No. CRIM. H-04-0251, 2004 WL 2414438, at *10 (S.D. Tex. Oct. 19, 2004).

²⁸⁵ 585 F.2d 1, 5 (1st Cir. 1978).

among other reasons.²⁸⁶ For this proposition, the court cited *United States v. Martinez*,²⁸⁷ a First Circuit opinion which, ironically, never discusses inconsistent defenses directly.²⁸⁸

In 1980, the First Circuit followed the example of most other circuits in borrowing the doctrine from other circuits. In *United States v. Davis*,²⁸⁹ the court reasoned that antagonistic defenses do not require severance per se. "Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty."²⁹⁰ The *Davis* court cited *United States v. Ehrlichman*²⁹¹ and *United States v. Robinson*²⁹² from the D.C. Circuit, as well as *United States v. Becker*²⁹³ from the Fourth Circuit, which in turn cited only *Robinson* and *Ehrlichman* for the rule.²⁹⁴ In *United States v. Talavera*,²⁹⁵ a First Circuit panel cited *Davis* and *Becker* for the same supposed rule.²⁹⁶ *Talavera* thereafter became for a time the most salient authority on mutually exclusive defenses in the First Circuit, and various subsequent decisions followed its "both are guilty" construction.²⁹⁷

A different version of the rule entered First Circuit jurisprudence with *United States v. Arruda*,²⁹⁸ in which a First Circuit panel moved closer to the definition of the rule in most other circuits when it stated, "Antagonism of defenses requires severance only where the defenses are so inconsistent that the jury would have to believe one defendant at the expense of the other; the conflict alone establishes the guilt of a

²⁸⁶ *Id.* at 5.

²⁸⁷ 479 F.2d 824 (1st Cir. 1973).

²⁸⁸ *Id.* at 828.

²⁸⁹ 623 F.2d 188 (1st Cir. 1980).

²⁹⁰ *Id.* at 194-95.

²⁹¹ 546 F.2d 910, 929 (1st Cir. 1976).

²⁹² 432 F.2d 1348, 1351 (1st Cir. 1970).

²⁹³ 585 F.2d 703, 707 (1st Cir. 1978).

²⁹⁴ *Id.*

²⁹⁵ 668 F.2d 625 (1st Cir. 1982).

²⁹⁶ *Id.* at 630.

²⁹⁷ *United States v. Serafino*, 218 F.3d 327, 329-30 (1st Cir. 2002) (citing *Talavera* and combining the *Talavera* version of the rule with another version); *United States v. Smith*, 46 F.3d 1223, 1230-31 (1st Cir. 1995) (giving the *Talavera* version of the rule along with another version); *United States v. Brennan*, 994 F.2d 918, 925 (1st Cir. 1993); *United States v. Luciano Pacheco*, 794 F.2d 7, 8 (1st Cir. 1986); *United States v. Porter*, 764 F.2d 1, 12 (1st Cir. 1985) (inaccurately citing *Luna* as well as *Talavera* for the "both are guilty" version of the rule); *United States v. Bautista*, 731 F.2d 97, 100 (1st Cir. 1984); *United States v. Rush*, 738 F.2d 497, 514 (1st Cir. 1984).

²⁹⁸ 715 F.2d 671 (1st Cir. 1983).

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defendant. [See *Talavera and Luna*].”²⁹⁹ The “See” citation suggests that the *Arruda* court might have recognized that neither of the cases cited directly and unambiguously supported the altered definition of the rule in *Arruda*. Like *Talavera* before it, *Arruda* became a leading authority for the mutually exclusive defenses doctrine that was cited directly or indirectly in various subsequent opinions, one of which (*United States v. Drougas*) went beyond *Arruda* in directly misattributing the “believe one at the expense of the other” construction to *Talavera*.³⁰⁰ In *United States v. Angiulo*,³⁰¹ a First Circuit panel quoted *Arruda* through *Drougas*, but then slightly rephrased the *Arruda* version to read, “the antagonism in defenses must be such that if the jury believes one defense, it is compelled to convict the other defendant. [See *Drougas and Arruda*; see also *Talavera and Davis*].”³⁰² Again, the court apparently recognized at least some friction with the *Talavera* line. The *Angiulo* version also showed up in later decisions.³⁰³

In 1983, the panel in *United States v. Fusaro*³⁰⁴ conducted a quick comparison of decisions involving mutually exclusive defense theories before rejecting the defendant’s claim of a right to a severed trial. The court considered *Talavera* along with *United States v. Berkowitz*³⁰⁵ from the Fifth Circuit and *United States v. Moschiano*³⁰⁶ from the Seventh, concluding that all required that codefenses be “truly irreconcilable” to require severance, that “tattling or ‘finger-pointing’ is not enough,” and that “[i]f the defendants agree on the basic facts, the who, what, when, and where, so to speak, the failure to sever is not an abuse of discretion.”³⁰⁷ Later, the panel in *United States v. Luciano Pacheco*³⁰⁸ crafted the *Fusaro* court’s reasoning into yet another statement of (or corollary to) the mutually exclusive defenses “rule.” The court reasoned that “the need for severance turns on the *degree* of conflict, and the extent

²⁹⁹ *Id.* at 679.

³⁰⁰ *United States v. Rose*, 104 F.3d 1408, 1415 (1st Cir. 1997); *United States v. Smith*, 46 F.3d 1223, 1230 (1st Cir. 1995) (giving the *Arruda* version of the rule along with the *Talavera* version); *United States v. Yefsky*, 994 F.2d 885 (1st Cir. 1993); *United States v. Crooks*, 766 F.2d 7, 10 (1st Cir. 1985); *United States v. Drougas*, 748 F.2d 8, 20 (1st Cir. 1984) (citing *Arruda* and *Talavera* for the *Arruda* version of the rule).

³⁰¹ 897 F.2d 1169 (1st Cir. 1990).

³⁰² *Id.* at 1195.

³⁰³ *United States v. Woods*, 210 F.3d 70, 79 (1st Cir. 2000); *United States v. Torres-Maldonado*, 14 F.3d 95, 105 (1st Cir. 1994).

³⁰⁴ 708 F.2d 17 (1st Cir. 1983).

³⁰⁵ 662 F.2d 1127, 1132-35 (1st Cir. 1981).

³⁰⁶ 695 F.2d 236, 245-47 (1st Cir. 1982).

³⁰⁷ *Fusaro*, 708 F.2d at 25.

³⁰⁸ 794 F.2d 7, 9 (1st Cir. 1986).

to which the antagonism goes beyond mere fingerpointing into the realm of fundamental disagreement over core and basic facts. [See *Fusaro* (severance requires disagreement over the basic facts, the who, what, when and where)].³⁰⁹ Later opinions also relied on this “no severance without showing fundamental disagreement over core and basic facts” construction in finding no basis for severance.³¹⁰

Interestingly, some panels sought to combine different versions of the First Circuit’s supposed “rule” on mutually exclusive defenses, or used more than one in the same opinion. In *Luciano Pacheco and United States v. Serafino*, the panel combined *Talavera’s* “both must be guilty” construction with *Luciano Pacheco’s* “fundamental disagreement over core and basic facts” language. In *Serafino*, the court made a compound rule: a defendant had to demonstrate that the defenses were so irreconcilable as to involve fundamental disagreement over core and basic facts such that the jury unjustifiably would infer that this conflict alone demonstrated that both defendants were guilty.³¹¹ In *United States v. Smith*, the court gave the *Arruda* rule, then later gave the *Talavera* rule, and determined that neither applied to the facts in *Smith*.³¹²

After the Supreme Court’s decision in *Zafiro* changed the legal landscape regarding the doctrine of mutually exclusive defenses, some First Circuit panels recognized this, but others did not. In *United States v. Rodriguez-Marrero*,³¹³ the court accepted the Supreme Court’s invitation and did not go beyond *Zafiro* in addressing mutually exclusive defenses.³¹⁴ In various other cases, panels showed an awareness of *Zafiro*, though they often turned to First Circuit precedent for statements of the “rule.”³¹⁵ Other panels seem to have missed *Zafiro* completely.³¹⁶

³⁰⁹ *Id.* at 9.

³¹⁰ *United States v. Capelton*, 350 F.3d 231, 239 (1st Cir. 2003); *United States v. Serafino*, 281 F.3d 327, 329-30 (1st Cir. 2002) (combining *Luciano Pacheco/Pena-Lora* version with *Talavera* version into one rule); *United States v. Pena-Lora*, 225 F.3d 17, 34 (1st Cir. 2000); *United States v. Paradis*, 802 F.2d 553, 561 (1st Cir. 1986).

³¹¹ *Serafino*, 281 F.3d at 329-30.

³¹² *United States v. Smith*, 46 F.3d 1223, 1230-31 (1st Cir. 1995).

³¹³ 390 F.3d 1 (1st Cir. 2004).

³¹⁴ *Id.* at 26.

³¹⁵ *Pena-Lora*, 225 F.3d at 32 (following *Luciano Pacheco* for rule); *United States v. Rogers*, 121 F.3d 12, 16 (1st Cir. 1997); *United States v. Rose*, 104 F.3d 1408, 1415 (1st Cir. 1997) (following the *Arruda* version of the rule); *Smith*, 46 F.3d at 1230-31 (following both *Arruda* and *Talavera* versions); *United States v. Yefsky*, 994 F.2d 895, 896-97 (1st Cir. 1993) (following *Arruda*).

Recent district court opinions from the First Circuit show a spotty record in recognizing the significance of *Zafiro*. In *United States v. Catalan-Roman*,³¹⁷ the court relied solely on *Zafiro* in rejecting a defendant's irreconcilability argument, noting, "[I]t is well-settled that mutually antagonistic defenses are not prejudicial per se."³¹⁸ By contrast, in *United States v. Merlino*,³¹⁹ in similarly rejecting an irreconcilability argument, the court noted the *Zafiro* rule that "antagonistic defenses do not establish a *per se* right to severance," then quoted *Angiulo* for the correct severance rule: "[T]he antagonism in defenses must be such that if the jury believes one defense, it is compelled to convict the other defendant."³²⁰ Of course, the *Angiulo* statement of the rule is what the Supreme Court rejected in *Zafiro*.

F. The Second Circuit

The doctrine of mutually exclusive defenses made a tentative early appearance in Second Circuit jurisprudence in *United States v. Marquez*.³²¹ In that case, the district court rejected a defendant's motion to comment upon codefendants' silence and their assertion of their privilege against self-incrimination, noting, "Movant has failed to show the nature of his defense; he has not shown in what respect, if any, his defense is inconsistent with or antagonistic to the [*sic*] of his codefendants."³²² The court thus suggested that such antagonism might be significant, though it cited no authority for the proposition. Later in the 1970s, Second Circuit panels rejected irreconcilability arguments without stating a severance rule, but instead noted that the defenses in the cases in question did not show the sort of sharp conflict seen in Fifth Circuit cases such as *De Luna* or *Johnson*.³²³

³¹⁶ *United States v. Capelton*, 350 F.3d 231, 239 (1st Cir. 2003); *Serafino*, 281 F.3d at 329-30; *United States v. Woods*, 210 F.3d 70, 79 (1st Cir. 2000); *United States v. Torres-Maldonado*, 14 F.3d 95, 105 (1st Cir. 1994); *United States v. Brennan*, 994 F.2d 918, 925 (1st Cir. 1993).

³¹⁷ 354 F. Supp. 2d 104 (D.P.R. 2005).

³¹⁸ *Id.* at 106 (citing *Zafiro*).

³¹⁹ 204 F. Supp. 2d 83 (D. Mass. 2002).

³²⁰ *Id.* at 90.

³²¹ 319 F. Supp. 1016 (S.D.N.Y. 1970).

³²² *Id.* at 1018.

³²³ *United States v. Di Giovanni*, 544 F.2d 642, 644 (2d Cir. 1976) (defenses not as antagonistic as those in *De Luna* and *Johnson*); *United States v. Jenkins*, 496 F.2d 57, 68 (2d Cir. 1974) (defendant did not show very real prejudice as in *Johnson*, where one codefendant confessed and directly incriminated or contradicted defendant in front of the jury).

The mandatory severance “rule” entered the Second Circuit in 1982 in *United States v. Carpentier*.³²⁴ In rejecting an irreconcilable defenses argument, the *Carpentier* court noted that a simple showing of some antagonism between defendants’ theories of defense does not require severance, then quoted the statement of the “rule” from the Fifth Circuit’s decision in *Berkowitz*: “[T]he defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant.”³²⁵ *Carpentier* became for a time the leading authority on mutually exclusive defenses in the Second Circuit, and various subsequent opinions followed it directly or indirectly.³²⁶ In *United States v. Tutino*, the court dropped the “core of defense” language from *Berkowitz* and *Carpentier*, but otherwise kept the “rule” the same: “To obtain a severance on the ground of antagonistic defenses, a defendant must show that the conflict is so irreconcilable that acceptance of one defendant’s defense requires that the testimony offered on behalf of a codefendant be disbelieved.”³²⁷ Later cases followed *Tutino*’s slightly amended version of the “rule.”³²⁸

In 1990, the Second Circuit’s jurisprudence on mutually exclusive defenses entered a complicated new phase with its opinion in *United States v. Serpoosh*.³²⁹ *Serpoosh* is another rare example of a federal appellate court reversing a district court for denial of a severance motion. The *Serpoosh* panel worked through the legal issues involved at greater length than in the many other decisions where rejection of such motions was relatively straightforward and automatic.³³⁰ In *Serpoosh*, the court noted that the Second Circuit had described severance denials as “virtually unreviewable” because “appellants must show prejudice so

³²⁴ 689 F.2d 21 (2d Cir. 1982).

³²⁵ *Id.* at 27-28.

³²⁶ *United States v. Cardascia*, 951 F.2d 474, 484 (2d Cir. 1991) (also offering alternative statements of the “rule”); *United States v. Cardascia*, 951 F.2d 474, 484 (2d Cir. 1991) (also offering alternative statements of the “rule”); *United States v. Villegas*, 899 F.2d 1324, 1346 (2d Cir. 1990); *United States v. Serpoosh*, 919 F.2d 835, 837-38 (2d Cir. 1990) (also offering alternative statements of the “rule”); *Grant v. Hoke*, 921 F.2d 28, 31 (2d Cir. 1990); *United States v. Tutino*, 883 F.2d 1125, 1130 (2d Cir. 1989); *United States v. Alvarado*, 882 F.2d 645, 656 (1st Cir. 1989); *United States v. Casamento*, 887 F.2d 1141, 1153 (2d Cir. 1989); *United States v. Potamitis*, 739 F.2d 784, 790 (2d Cir. 1984); *United States v. Sliker*, 751 F.2d 477, 492 (2d Cir. 1984).

³²⁷ *Tutino*, 883 F.2d at 1130 (citing *Potamitis* and *Carpentier*).

³²⁸ *United States v. Benitez*, 920 F.2d 1080, 1085-86 (2d Cir. 1990).

³²⁹ 919 F.2d 835 (2d Cir. 1990).

³³⁰ *Id.* at 837-39.

severe as to amount to a denial of a constitutionally fair trial.”³³¹ The court then stated the severance rule three ways:

Appellants must show “the conflict is so irreconcilable” that acceptance of one defendant’s defense will lead the jury to convict the other. [citing *Tutino*]. Severance is required only when “the jury, in order to believe the core of testimony offered on behalf of [one] defendant, must necessarily disbelieve the testimony offered on behalf of his codefendant.” [citing *United States v. Potamitis* directly and *Carpentier* and *Berkowitz* indirectly; quotation simplified]. Alternatively, appellants must show that “the jury will infer that both defendants are guilty solely due to the conflict.” [quoting *United States v. Herring* from the 5th Circuit].³³²

Accordingly, the court found clear prejudice from a joint trial where “[b]oth defendants gave detailed and mutually exclusive explanations of their conduct on the day of the arrest[,]” the “damage done was greatly enhanced by the sparring between counsel for the two defendants in which each characterized the other defendant as a liar who concocted his story to escape blame[,]” and “the main purpose of the rule governing joinder, judicial economy, would not have been seriously frustrated by separate trials.”³³³

There are various complications in the reasoning in *Serpoosh*. First, the court significantly rephrased the “rule” stated in *Tutino* to say something substantially different: “so irreconcilable that acceptance of one defendant’s defense will lead the jury to convict the other” is not necessarily the same as “so irreconcilable that acceptance of one defendant’s defense requires that the testimony offered on behalf of a codefendant be disbelieved,” since the latter version allows the jury to disbelieve the codefendant and still acquit on grounds of lack of evidence or failure of proof, while the former seemingly does not. And does “lead” imply merely a push in the direction of convicting the other defendant, or an inexorable, inevitable result? The *Serpoosh* panel then reintroduced the *Carpentier/Berkowitz* “core of testimony” language as a statement of the rule, though that language is not quite the same as either the phrasing of the rule in *Tutino* or *Serpoosh*’s rephrasing of that

³³¹ *Id.* at 837.

³³² *Id.* at 837-38.

³³³ *Id.* at 838-39.

phrasing. Then, like panels in other circuits, the *Serpoosh* court also stuck in the “both are guilty” construction, ironically citing to the Fifth Circuit, where the “both are guilty” version of the rule made a brief appearance then quickly died out, rather than to the D.C. Circuit, which was the main source of that statement of the rule. Again, although the *Serpoosh* panel noted that this was an alternative, the “believe one, disbelieve (or convict) the other” versions of the rule seem inconsistent with a version stating that severance is required only where the jury will disbelieve both defendants and find them both guilty. The *Serpoosh* panel, operating in the pre-*Zafiro* legal environment, followed the pattern of most other circuits in opinions finding prejudice from denial of severance by not considering the possibility of curative jury instructions.

Notwithstanding these problems, *Serpoosh* and its progeny also became leading Second Circuit authorities on mutually exclusive defenses. In *United States v. Cardascia*,³³⁴ the court extended the *Serpoosh* court’s reasoning when it declared,

It is not the mere existence of antagonistic defenses that prompts a required severance. Instead, the defenses must conflict to the point of being so irreconcilable as to be mutually exclusive before we will find such prejudice as denies defendants a fair trial. [citing *Villegas, Carpentier & Berkowitz*]. Defenses are mutually exclusive or irreconcilable if, in order to accept the defense of one defendant, the jury must of necessity convict a second defendant. The trial judge should order a trial severance when “the jury, in order to believe the *core* of the testimony offered on behalf of [one] defendant, must necessarily disbelieve the testimony offered on behalf of his codefendant.” [quoting *Carpentier & Berkowitz*; also citing *Serpoosh* and *Potamitis*]. Similarly, severance should be granted when antagonism at the *essence* of the defenses prevails to such a degree—even without being mutually exclusive—that the jury unjustifiably infers that the conflict alone indicated that both defendants were guilty. [citing *Serpoosh & Berkowitz*].³³⁵

³³⁴ 951 F.2d 474 (2d Cir. 1991).

³³⁵ *Id.* at 484 (citations omitted).

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The *Cardascia* court found the defendants defenses “not mutually exclusive at their core or essence.”³³⁶

The *Cardascia* court strengthened the *Serpoosh* court’s “acceptance of one defendant’s defense will lead the jury to convict another” language “to accept the defense of one defendant, the jury must of necessity convict a second defendant.” It also introduced the term “mutually exclusive” to the Second Circuit’s irreconcilability jurisprudence. *Cardascia* followed *Serpoosh* in throwing the “both are guilty” version of the rule together with the “believe one defense, must disbelieve other” version, as did a later opinion in *United States v. Rea*.³³⁷ *Cardascia*’s “accept one defense, must convict another defendant” construction was twice cited as a statement of the rule on severance of irreconcilable defenses within the past decade.³³⁸

In the wake of *Zafiro*, the Second Circuit conscientiously applied its holding on mutually antagonistic defenses, at least for a time. Several opinions (many of them unpublished) followed *Zafiro* and strayed no farther into the thicket of irreconcilable defenses doctrine.³³⁹ At least one other unpublished opinion rejected a defendant’s claim of antagonistic defenses by simply noting that the defenses were not antagonistic and going no further into the precedential thicket.³⁴⁰ In *United States v. Haynes*,³⁴¹ in response to a defendant’s invocation of authorities such as *Serpoosh*, *Potamitis*, *Carpentier*, *Berkowitz*, and *Tutino* from the “to believe one, must disbelieve the other” lineage, the court noted that such

³³⁶ *Id.* at 485.

³³⁷ 958 F.2d 1206, 1224-25 (2d Cir. 1992).

³³⁸ *United States v. Yousef*, 327 F.3d 56, 151 (2d Cir. 2003) (giving *Cardascia*’s definition of “mutually antagonistic” defenses before correctly noting *Zafiro*’s holding that such defenses are not prejudicial per se); *United States v. Schwartz*, Nos. 99-1287, 99-1293, 2000 WL 534162, at *2 (2d Cir. May 3, 2000) (citing *Cardascia* for definition of “mutually exclusive” defenses).

³³⁹ *United States v. Dinero Express, Inc.*, No. 01-1634, 2002 U.S. App. LEXIS 26738, at *8-9 (Dec. 20, 2002); *United States v. Jacques Dessange, Inc.*, No. 00-1486, 2001 U.S. App. LEXIS 2514, at *11 (2d Cir. Feb. 16, 2001); *United States v. Diaz*, 176 F.3d 52, 104 (2d Cir. 1999); *United States v. Shareef*, 190 F.3d 71, 77 (2d Cir. 1999); *United States v. Blackwell*, Nos. 97-1143, 97-1242, 97-1144, 97-1173, 1999 WL 163980, at *3 (2d Cir. Mar. 18, 1999); *United States v. Carrillo*, No. 96-1636, 1998 WL 778311, at *1 (2d Cir. Oct. 30, 1998); *United States v. Rosario*, 111 F.3d 293, 297 (2d Cir. 1997); *United States v. Wise*, Nos. 96-1694, 96-1724, 1997 WL 592843, at *1 (2d Cir. Sept. 24, 1997); *United States v. Montour*, No. 96-1652, 1997 WL 570945, at *1 (2d Cir. Sept. 16, 1997); *United States v. Medina-Rojas*, Nos. 96-1127, 96-1175, 1996 WL 591328, at *2 (2d Cir. Oct. 15, 1996); *United States v. Tortora*, 30 F.3d 334, 339 (2d Cir. 1994); *United States v. Harwood*, 998 F.2d 91, 95 (2d Cir. 1993); *United States v. Beverly*, 5 F.3d 633, 637 (2d Cir. 1993).

³⁴⁰ *Smith v. Mann*, No. 98-2740, 2000 WL 298256, at *1 (2d Cir. Mar. 21, 2000).

³⁴¹ 16 F.3d 29 (2d Cir. 1994).

authorities “were recently overruled by the Supreme Court” in *Zafiro*.³⁴² Subsequent cases cited *Haynes* on that point in tandem with *Zafiro*.³⁴³

But the Second Circuit wandered back into the thicket in one of its most important cases of the later 1990s, *United States v. Salameh*,³⁴⁴ the first World Trade Center bombing case. Although the *Salameh* court was properly aware of *Zafiro*'s holding that mutually antagonistic defenses are not prejudicial per se and that prejudice from such defenses often may be cured by jury instructions, it also introduced a new version of the rule: “In order to make a showing of ‘mutually antagonistic’ or ‘irreconcilable defenses,’ the defendant must make a factual demonstration that ‘acceptance of one party’s defense would tend to preclude the acquittal of [the] other.’”³⁴⁵ This new definition, with its “tend to preclude acquittal” language, was borrowed from dated Seventh and Tenth Circuit opinions from the 1980s and was imported without a holding.³⁴⁶ It also gave one of the loosest standards of any circuit, since “tend to preclude” is much mushier than an outright “preclude” or analogously definite term, and potentially could be read broadly enough to cover any ill effect on the other defendant’s defense. Three subsequent unpublished opinions cited *Salameh* regarding mutually antagonistic defenses; one gave *Salameh*'s new definition of irreconcilable defenses before noting the qualification in *Salameh* and *Zafiro* that such defenses are not prejudicial per se;³⁴⁷ the other two showed no awareness of *Zafiro*.³⁴⁸

Recent district court opinions from the Second Circuit also reflect the tangled web of precedent on mutually antagonistic defenses that developed in that circuit since 1970. In *United States v. DiPietro*,³⁴⁹ the court used *Salameh*'s definition of mutually antagonistic defenses. The court made no mention of *Zafiro*, but rejected the defendant’s motion as not satisfying the *Salameh* definition. By contrast, in *United States v.*

³⁴² *Id.* at 31-32 (also, by use of “see also,” implicitly recognizing that *Tutino*'s statement of the rule was different from that in *Potamitis*, *Carpentier*, and *Berkowitz*).

³⁴³ *Montour*, 1997 WL 570945, at *1; *Diaz*, 176 F.3d at 104.

³⁴⁴ 152 F.3d 88 (2d Cir. 1998).

³⁴⁵ *Id.* at 116.

³⁴⁶ *Id.* (quoting *United States v. Smith*, 788 F.2d 663, 668 (10th Cir. 1986) and citing *United States v. Keck*, 773 F.2d 759, 765 (7th Cir. 1985)).

³⁴⁷ *United States v. Kitchen*, No. 99-1576, 2000 WL 553884, at *2-3 (2d Cir. May 3, 2000).

³⁴⁸ *United States v. Hedges*, 99-1700, 99-1704, 99-1716, 2000 WL 964767, at *4 (2d Cir. July 12, 2000) (using *Salameh*'s definition of mutually antagonistic defenses); *United States v. Schwartz*, Nos. 99-1287, 99-1293, 2000 WL 534162, at *2 (2d Cir. May 3, 2000) (citing *Salameh* but using *Cardascia* and *Tutino* definition).

³⁴⁹ No. 5502 CR 1237, 2005 WL 783357, at *5 (S.D.N.Y. Apr. 6, 2005).

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Coffey,³⁵⁰ the court quoted an aging earlier district court opinion for the *Carpentier* “believe core of one’s testimony, must disbelieve the other” mandatory severance rule and ignored *Zafiro*.³⁵¹ Other recent decisions followed *Zafiro*.³⁵²

G. *The Third Circuit*

The doctrine of mutually exclusive defenses made its first tentative appearance in Third Circuit jurisprudence in 1971 in *United States v. Barber*.³⁵³ The court rejected the defendant’s argument that denial of severance improperly prohibited him from calling his co-defendants as witnesses,³⁵⁴ and further observed, “[T]he mere presence of hostility among defendants or the desire of one to exculpate himself by inculcating another have both been held to be insufficient grounds to require separate trials.”³⁵⁵ Other early cases were primarily focused on the other issues raised in *De Luna* and addressed the issue of mutually antagonistic defenses only in passing.³⁵⁶

In 1982, the Third Circuit took a step toward importation of a mandatory severance rule for mutually exclusive defenses in *United States v. Provenzano*.³⁵⁷ This step was limited and tentative, however. When a defendant invoked *United States v. Crawford* from the Fifth Circuit regarding his right to a severed trial due to antagonistic defenses, the *Provenzano* court answered, “But, as the court in *Crawford* noted, such defenses must conflict ‘to the point of being irreconcilable and mutually exclusive.’ That is just not the situation here.”³⁵⁸ Although this statement does not constitute a holding and does not even clearly

³⁵⁰ 361 F. Supp. 2d 102 (E.D.N.Y. 2005).

³⁵¹ *Id.* at 120 (“The defense of a defendant reaches a level of antagonism . . . that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his codefendant.”) (quoting *United States v. Turoff*, 652 F. Supp. 707, 711 (E.D.N.Y. 1987)).

³⁵² *United States v. Schlesinger*, 360 F. Supp. 2d 512, 524 (E.D.N.Y. 2005); *United States v. Williams*, No. 5302 CR 1372, 2004 WL 1810714, at *1 (S.D.N.Y. Aug. 12, 2004).

³⁵³ 442 F.2d 517 (3d Cir. 1971).

³⁵⁴ *Id.* at 529.

³⁵⁵ *Id.* at 530 (citing *Dauer v. United States*, 189 F.2d 343 (10th Cir. 1951)).

³⁵⁶ *United States v. Somers*, 496 F.2d 723, 731 (3d Cir. 1974) (focusing on the same issue as *Addonizio*) (“Where there is mutual exclusivity among the defenses (i.e., where acceptance of one defense requires rejection of the others), the ability to comment on the failure to testify is significant, for such comment may well influence which of the defenses will be believed by the jury.”); *United States v. Addonizio*, 451 F.2d 49, 63 (3d Cir. 1971) (discussing mutual exclusivity of defenses in the context of a defendant’s claim of prejudice due to inability to comment on codefendants’ failure to testify, as in *De Luna* and *Kahn*).

³⁵⁷ 688 F.2d 194, 198 (3d Cir. 1982).

³⁵⁸ *Id.* (citations omitted).

indicate the *Provenzano* panel's acceptance of the *Crawford* court's reasoning regarding mandatory severance of irreconcilable defenses, subsequent opinions came to treat it as a firm definition of mutually antagonistic defenses or even as a per se severance rule.³⁵⁹

But the Third Circuit built up little jurisprudence on mutually exclusive defenses prior to the Supreme Court's holding in *Zafiro*. Post-*Zafiro*, the Third Circuit dutifully sought to apply its holding. Yet some potential confusion crept in. In *United States v. Quintero*,³⁶⁰ the court lengthily quoted *Zafiro* regarding mutually antagonistic defenses, including the Supreme Court's holding that these are not prejudicial per se.³⁶¹ Yet elsewhere in the opinion, the *Quintero* court concluded that based on its review of the trial evidence, "we do not believe the defendants presented mutually exclusive defenses."³⁶² The court cited no authority regarding mutually exclusive defenses or how to define them, and it is possible, though not wholly clear, that the court might have been treating mutually exclusive and mutually antagonistic defenses as different categories.

United States v. Voigt,³⁶³ in which the Third Circuit reasoned through the issue of irreconcilable defenses at considerable length, brought additional potential confusion. Again, the court lengthily quoted and considered *Zafiro* regarding mutually antagonistic defenses.³⁶⁴ It noted, "While mutually antagonistic defenses have been much discussed in theory, only rarely have courts found that they exist in practice."³⁶⁵ Yet the court also explained that to gain severance, defendants must demonstrate clear and substantial prejudice resulting in a manifestly unfair trial, and then stated,

Although precise articulations may differ, courts agree that "[m]utually exclusive defenses . . . exist when

³⁵⁹ *United States v. Sandini*, 888 F.2d 300, 306 (3d Cir. 1989) (noting only that mutually exclusive defenses was a legitimate basis for a defendant to request severance); *United States v. Homick-Van Berry*, No. 04-269, 2005 WL 1168398, at *9 (D.N.J. May 18, 2005) (citing *Provenzano* for definition of mutually antagonistic defenses); *United States v. Spencer*, No. 99-256-06, 1999 WL 973856, at *2 (E.D. Pa. Oct. 25, 1999) ("In this Circuit, to warrant a severance, an antagonistic defense must conflict 'to the point of being irreconcilable and mutually exclusive.'") (ignoring *Zafiro*).

³⁶⁰ 38 F.3d 1317 (3d Cir. 1994).

³⁶¹ *Id.* at 1339.

³⁶² *Id.* at 1343.

³⁶³ 89 F.3d 1050 (3d Cir. 1996).

³⁶⁴ *Id.* at 1094-95.

³⁶⁵ *Id.* at 1094.

acquittal of one codefendant would necessarily call for the conviction of the other." *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991). This type of situation arises "when one person's claim of innocence is predicated solely on the guilt of a co-defendant." *United States v. Harris*, 9 F.3d 493, 501 (6th Cir. 1993). In determining whether mutually antagonistic defenses exist such that severance may be required, the court must ascertain whether "the jury could reasonably construct a sequence of events that accommodates the essence of all appellants' defenses." *United States v. Perez-Garcia*, 904 F.2d 1534, 1548 (11th Cir. 1990).³⁶⁶

Though again not entirely clear, this language implies that as in *Quintero*, the Third Circuit was treating mutually exclusive and mutually antagonistic defenses as different categories, or rather, was viewing mutually exclusive defenses as an extreme subcategory of the wider category of mutually antagonistic defenses. Yet the *Voigt* court's description of mutually exclusive defenses requiring severance, drawn mostly from pre-*Zafiro* authorities, basically only gives *Zafiro*'s definition of mutually antagonistic defenses which the Court held to be not subject to a per se severance rule. The *Voigt* court also showed some widely shared confusion about a highly confusing case when it parenthetically summarized *Tootick* as "finding mutually antagonistic defenses warranting reversal where two defendants charged with assault both defended themselves by arguing that the other committed the assault alone."³⁶⁷ Although that description is factually correct as far as it goes, it misses certain key points of the *Tootick* opinion: first, the *Tootick* panel explicitly rejected a per se severance rule even in situations of truly mutually exclusive defenses; and second, the *Tootick* panel based its reversal of the trial court's denial of severance on the trial judge's failure to give necessary limiting instructions and control adversarial excesses by counsel, not on the antagonism of the defenses.³⁶⁸

Shortly after the *Voigt* decision, another panel of the Third Circuit followed *Zafiro* more closely in *United States v. Balter*.³⁶⁹ The *Balter* court noted the Supreme Court's rejection of a bright-line mandatory severance rule for mutually antagonistic defenses and its requirement

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 1095.

³⁶⁸ See *infra* notes 461-75 and accompanying text.

³⁶⁹ 91 F.3d 427 (3d Cir. 1996).

that defendants show a serious risk that a specific trial right would be violated.³⁷⁰ The court also reaffirmed the point made in *Voigt* that since *Zafiro*, irreconcilable defense claims usually were found insufficient to warrant severance without a strong showing that such specific rights were impaired.³⁷¹ However, the court's task might have been made easier because the defendants at trial specifically claimed to have "mutually antagonistic defenses";³⁷² we can only guess whether the court might have reasoned differently had the defendants used different magic words and claimed mutually exclusive defenses.

The Third Circuit continued to produce relatively little jurisprudence on mutually antagonistic defenses after the two major decisions in 1996. Recent district court decisions from the Third Circuit have generally acknowledged and followed *Zafiro*, though at times, some of the potential confusion over whether mutually exclusive and mutually antagonistic defenses are the same or different still shows through. In one case, the district court quoted *Zafiro* for a no per se severance rule for mutually antagonistic defenses, quoted *Provenzano* for mutually antagonistic defenses being those "where the defenses conflict 'to the point of being irreconcilable and mutually exclusive,'" and then quoted *Voigt* regarding mutually exclusive defenses and mutually antagonistic defenses that may require severance, before finding that defense counsel had not offered mutually antagonistic defenses.³⁷³ In another case, the court cited *Zafiro* on mutually antagonistic defenses, then concluded that the defendants "did not have mutually antagonistic or mutually exclusive defenses."³⁷⁴

H. *The Fourth Circuit*

The Fourth Circuit began its foray into the mutually exclusive defenses doctrine by borrowing from the D.C. Circuit. In *United States v. Becker*,³⁷⁵ the court, in rejecting the defendant's severance claim, followed *Ehrlichman* and *Robinson*, reasoning, "To obtain severance on the ground of conflicting defenses it must be demonstrated that the conflict is so prejudicial that the differences are irreconcilable, 'and that the jury will

³⁷⁰ *Id.* at 432-33.

³⁷¹ *Id.* at 433.

³⁷² *Id.* at 432.

³⁷³ *United States v. Homick-Van Berry*, No. 04-269, 2005 WL 1168398, at *9-*10 (D.N.J. May 18, 2005).

³⁷⁴ *Kindler v. Horn*, 291 F. Supp. 2d 323, 357 (E.D. Pa. 2003). *See also* *Guess v. Carroll*, No. Civ. A. 03-741-JJF, 2004 WL 502207, at *5 (D. Del. Mar. 10, 2004) (unreported opinion closely following *Zafiro*).

³⁷⁵ 585 F.2d 703 (4th Cir. 1978).

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unjustifiably infer that this conflict alone demonstrates that both are guilty."³⁷⁶ *Becker* was long the leading authority on the issue in the Fourth Circuit, and many subsequent opinions cited it for the "both are guilty" version of the rule, although Fourth Circuit panels were also generally careful to note the rule's origins in the D.C. Circuit.³⁷⁷ In *United States v. Ferguson*,³⁷⁸ in which defendants made an untimely motion for severance based on irreconcilable defenses, the court added a corollary to the *Becker* rule when it reasoned, *a la Zafiro*, "[T]he independent evidence of the guilt of both defendants was so strong that any conflict in defenses cannot be said to have resulted in their convictions."³⁷⁹

Although *Becker's* "both are guilty" construction long dominated Fourth Circuit jurisprudence on mutually antagonistic defenses, other panels experimented tentatively with other versions. In one unpublished opinion, the court reviewed various other circuits' opinions requiring that defenses be truly irreconcilable or mutually exclusive before concluding that the defendants' motions failed under any of these definitions.³⁸⁰ Notably, although the panel did not stop to study the issue, it assumed in passing that irreconcilable and mutually exclusive defenses might be separate categories.³⁸¹ In *United States v. Ricks*,³⁸² the court simplified the rule in a manner analogous to the later *Zafiro* holding, merely stating, "[A] defendant must establish that the asserted conflict [in defenses] is so prejudicial that he will be denied a fair trial if tried jointly with his co-conspirators."³⁸³ In another unpublished opinion, the court simply noted that the defenses were "hardly irreconcilable" and thus found no abuse of discretion in denial of severance without citing any authority.³⁸⁴

³⁷⁶ *Id.* at 707 (quoting *United States v. Ehrlichman*, 546 F.2d 910, 929 (D.C. Cir. 1976) and *United States v. Robinson*, 432 F.2d 1351, 1351 (D.C. Cir. 1970)).

³⁷⁷ *United States v. Najjar*, 300 F.3d 466, 473 (4th Cir. 2002) (giving alternate version of the rule along with "both are guilty" version and not noting *Ehrlichman* or *Robinson*); *United States v. Smith*, 44 F.3d 1259, 1267 (4th Cir. 1995); *United States v. Clark*, 928 F.2d 639, 644 (4th Cir. 1991); *United States v. Hawkins*, Nos. 87-5535, 87-5536, 87-5537, 87-5546, 1987 WL 30619, at *2 (4th Cir. Dec. 30, 1987); *United States v. Sellers*, 658 F.2d 230, 232 (4th Cir. 1981).

³⁷⁸ 778 F.2d 1017 (4th Cir. 1985).

³⁷⁹ *Id.* at 1020 (citing *Sellers*).

³⁸⁰ *United States v. Osamor*, Nos. 89-5445, 89-5459, 1991 WL 208991, at *2 (4th Cir. Oct. 18, 1991) (citing decisions from Second, Eighth, Tenth, and D.C. Circuits along with *Spitler*).

³⁸¹ *Id.*

³⁸² 882 F.2d 885 (4th Cir. 1989).

³⁸³ *Id.* at 894 (citing *Spitler*).

³⁸⁴ *United States v. Chaney*, No. 94-5467, 1995 WL 25638, at *2 (4th Cir. Jan. 18, 1995).

After the Supreme Court's ruling in *Zafiro*, Fourth Circuit panels mostly abandoned earlier statements of the severance "rule" and relied solely on *Zafiro* and its "specific trial right" language in rejecting claims for severance based on irreconcilable defenses.³⁸⁵ A recent district court opinion similarly relied solely on *Zafiro*.³⁸⁶ But two other appellate opinions did not mention *Zafiro*,³⁸⁷ and one of these still gave the *Becker* version of the rule.³⁸⁸

In 2002, in *United States v. Najjar*,³⁸⁹ the court was aware of *Zafiro*, including its language about the power of jury instructions to cure some level of actual prejudice from conflicting defenses.³⁹⁰ Yet the court also stated a new, compound version of the mandatory severance rule derived from pre-*Zafiro* precedent: "The rule requires more than finger pointing. There must be such a stark contrast presented by the defenses that the jury is presented with the proposition that to believe the core of one defense it must disbelieve the core of the other, [citing *Romanello* from the Fifth Circuit] or 'that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [citing *Becker*]."³⁹¹ That the *Becker* version could reappear, and the *Romanello* version could appear for the very first time in Fourth Circuit jurisprudence even after several years of conscientiously following *Zafiro* is a testament to the peculiar persistence of the mandatory severance "rule." Some of the same uncertainty also surfaced in an earlier post-*Zafiro* district court decision, which was similarly aware of *Zafiro* but noted earlier decisions from the Fifth and Tenth Circuits before following the reasoning from the First Circuit's pre-*Zafiro* 1990 decision in *United States v. Angiulo*, which presumed a per se severance rule for mutually antagonistic defenses.³⁹²

³⁸⁵ *United States v. Montgomery*, 262 F.3d 233, 245 (4th Cir. 2001); *United States v. Bullock*, Nos. 95-5983, 95-5984, 95-4028, 2000 WL 84449, at *7 (4th Cir. Jan. 27, 2000); *United States v. Stevenson*, Nos. 94-5874, 94-5875, 94-5876, 1996 WL 44091, at *3 (4th Cir. Feb. 6, 1996); *United States v. Gooding*, Nos. 94-5405, 94-5406, 94-5407, 94-5408, 95-5409, 94-5410, 94-5444, 94-5445, 94-5448, 1995 WL 538690, at *5 (4th Cir. Sept. 11, 1995). See generally *United States v. Borda*, Nos. 96-4752, 96-4807, 96-4856, 96-4806, 1999 WL 294540 (4th Cir. May 11, 1999); *United States v. Little*, Nos. 98-4099, 98-4100, 1999 WL 156056 (4th Cir. Mar. 23, 1999).

³⁸⁶ *United States v. Cuong Gia Le*, 316 F. Supp. 2d 330, 342 (E.D. Va. 2004).

³⁸⁷ *United States v. Smith*, 44 F.3d 1259, 1267 (4th Cir. 1995); *Chaney*, 1995 WL 25638, at *2.

³⁸⁸ *Smith*, 44 F.3d at 1267.

³⁸⁹ 300 F.3d 466 (4th Cir. 2002).

³⁹⁰ *Id.* at 473, 475.

³⁹¹ *Id.* at 474 (citations omitted).

³⁹² *United States v. Holland*, 59 F. Supp. 2d 492, 520 (D. Md. 1998).

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I. *The Sixth Circuit*

The Sixth Circuit had one of the most stable, unvarying rules for handling severance claims, and commendably showed less impulse than most circuits to import new versions of the rule from outside its own circuit.

The Sixth Circuit's jurisprudence on severance of mutually antagonistic defenses began in 1979 in *United States v. Vinson*.³⁹³ The court rejected defendants' claims of prejudice from denial of severance, reasoning, "Absent some indication that the antagonism between co-defendants misled or confused the jury, the mere fact that co-defendants attempt to blame each other does not compel severance."³⁹⁴ As authority, the *Vinson* court cited *United States v. Perez*, which basically says nothing regarding conflicting defenses or confusion or misleading of the jury.³⁹⁵ Yet *Vinson's* commonsensical rule came closer than most circuits to the Supreme Court's later ruling in *Zafiro*. Directly or indirectly, *Vinson* provided authority for a long string of Sixth Circuit decisions involving mutually antagonistic defense claims.³⁹⁶ Although later judges did rephrase the language in *Vinson*, the meaning remained constant through the 1990s.³⁹⁷

Post-*Vinson* decisions added various corollaries in keeping with the basic rule. In *United States v. Gallo*, the court emphasized that defendants

³⁹³ 606 F.2d 149 (6th Cir. 1979).

³⁹⁴ *Id.* at 154.

³⁹⁵ *Id.*

³⁹⁶ *United States v. Logan*, Nos. 97-5912, 97-5914, 1999 WL 25638, at *14 (6th Cir. July 19, 1999) (citing *Weiner*); *United States v. Critton*, 43 F.3d 1089, 1098 (6th Cir. 1995); *United States v. Bond*, 22 F.3d 662, 666 (6th Cir. 1994) (citing *Weiner*); *United States v. Weiner*, 988 F.2d 629, 634 (6th Cir. 1993) (citing *Benton*); *United States v. Crotinger*, 928 F.2d 203, 206 (6th Cir. 1991) (citing *Horton*); *United States v. Blakeney*, 942 F.2d 1001, 1011 (6th Cir. 1991) (citing *Horton*); *United States v. Arthur*, 949 F.2d 211, 217-18 (6th Cir. 1991) (citing *Kendricks*); *United States v. Moore*, 917 F.2d 215, 221 (6th Cir. 1990); *United States v. Horton*, 847 F.2d 313, 317 (6th Cir. 1988); *United States v. Benton*, 852 F.2d 1456, 1469 (6th Cir. 1988) (citing *Gallo*); *United States v. Day*, 789 F.2d 1217, 1224 (6th Cir. 1986); *United States v. Gallo*, 763 F.2d 1504, 1527 (6th Cir. 1985); *United States v. Kendricks*, 623 F.2d 1165, 1168 (6th Cir. 1980) (slightly rephrasing the *Vinson* language to read, "To prevail [on a severance motion], the defendant must show that 'antagonism between co-defendants will mislead or confuse the jury'"). See also *United States v. Davis*, 707 F.2d 880, 883 (6th Cir. 1983) (deriving rule requiring defendants to show jury confusion or inability to separate evidence as to defendants not from *Vinson* or *Kendricks*, but from *Opper v. United States*, 348 U.S. 84, 94 (1954), along with opinions from the Fifth and D.C. Circuits).

³⁹⁷ See, e.g., *Logan*, 1999 WL 25638, at *14 ("If antagonistic defenses are present, to merit severance the defendant must demonstrate that the antagonism will mislead or confuse the jury."); *Critton*, 43 F.3d at 1098 ("[S]everance is justified only if presentation of these defenses in the same trial will mislead or confuse the jury.").

claiming error for denial of severance due to antagonistic defenses must “make a strong showing of prejudice” and demonstrate “an inability by the jury to separate and treat distinctively evidence that is relevant to each particular defendant on trial.”³⁹⁸ The *Gallo* court further noted that even where a defendant demonstrates some potential jury confusion, the risk of confusion must be balanced against society’s need for speedy and efficient trials.³⁹⁹ It also required defendants to show actual prejudice from antagonistic defenses and allowed no reversal absent a “clear showing of specific and compelling prejudice resulting from a joint trial.”⁴⁰⁰ The *Gallo* court thus offered reasoning similar to that of the Supreme Court’s ruling in *Zafiro*. Later, the court in *United States v. Davis*⁴⁰¹ repeated this general refrain, adding that even if a trial court erred, reversal would be required only if misjoinder caused actual prejudice with a substantial and injurious impact on a defendant; “[o]therwise, where there is ‘overwhelming evidence of guilt,’ the claimed error is harmless.”⁴⁰²

The Sixth Circuit did see some precedential borrowing from other circuits, but only to a relatively brief and limited extent. In *United States v. Warner*,⁴⁰³ the court cited *Vinson* on a different point, then proceeded to give the “both are guilty” version of the mandatory severance rule originating in the D.C. Circuit: “The burden is on defendants to show that an antagonistic defense would present a conflict ‘so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.’ [citing *Davis* (1st Cir. 1980); *Herring* (5th Cir. 1979); *Haldeman* (D.C. Cir. 1976)].”⁴⁰⁴ In *United States v. Harris*,⁴⁰⁵ an opinion rendered ten months after *Zafiro*, though seemingly oblivious to it, the court quoted *Warner*’s language regarding irreconcilable defenses leading the jury to conclude that “both are guilty,” and then also cited *Crawford* in the Fifth Circuit for a different

³⁹⁸ 763 F.2d at 1525.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 1526; see also *United States v. Hayes* (Harry Walker), Nos. 88-5735 to 88-5738, 88-5891 to 99-5894, 1989 WL 105937, at *3 (6th Cir. Sept. 14, 1989) (quoting *Gallo* on defendant’s need to prove an inability by jury to separate and treat differently evidence particular to each defendant); *United States v. Day*, 789 F.2d 1217, 1224 (6th Cir. 1986) (discussing and applying *Gallo*).

⁴⁰¹ 809 F.2d 1194, 1207 (6th Cir. 1987).

⁴⁰² *Id.* (quoting *United States v. Lane*, 474 U.S. 438, 450 & n.13 (6th Cir. 1986)); see also *United States v. Benton*, 852 F.2d 1456, 1469 (5th Cir. 1990) (following *Gallo* and *Davis*).

⁴⁰³ 971 F.2d 1189 (6th Cir. 1992).

⁴⁰⁴ *Id.* at 1196.

⁴⁰⁵ 9 F.3d 493 (6th Cir. 1993).

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definition of antagonistic defenses: where “one person’s claim of innocence is predicated solely on the guilt of a co-defendant.”⁴⁰⁶

But such foreign imports never took root. Fairly soon after *Zafiro*, Sixth Circuit panels relied on it primarily or exclusively, and where this reliance was not exclusive, the courts generally were using the parallel rule from the *Vinson/Gallo/Benton* lineage.⁴⁰⁷ Only three opinions from the early years after *Zafiro* did not cite it, and two of these relied instead on the parallel *Vinson* rule,⁴⁰⁸ while the other was the peculiar *Harris* decision.⁴⁰⁹

Yet even in a circuit with as clean a record as that of the Sixth, confusion can still creep in, at least at the district court level. For instance, in 1996, a judge in the Eastern District of Michigan closely followed *Zafiro* and *Breinig* regarding the issue of mutually antagonistic defenses.⁴¹⁰ Seven years later, another judge in the same district seemed oblivious to *Zafiro* but cited *Harris* (and, indirectly, *Crawford*) for the rule that “Antagonistic defenses exist ‘when one person’s claim of innocence is predicated solely on the guilt of a co-defendant.’”⁴¹¹ However, the situation in the latter case was complicated by its involving a habeas corpus appeal from the Michigan state court system, which still uses a pre-*Zafiro* rule on mutually exclusive or irreconcilable defenses.⁴¹²

⁴⁰⁶ *Id.* at 501.

⁴⁰⁷ *Phillips v. Million*, 374 F.3d 395, 398 (6th Cir. 2004); *United States v. Walls*, 293 F.3d 959, 966 (6th Cir. 2002) (also citing the *Vinson* rule via *Moore*); *United States v. Arispe*, No. 01-2329, 2002 U.S. App. LEXIS 15264, at *7 (6th Cir. July 25, 2002) (relying on *Zafiro* through *Breinig*); *Hutchison v. Bell*, 303 F.3d 720, 731 (6th Cir. 2002); *United States v. Cope*, 312 F.3d 757, 780 (6th Cir. 2002); *Stanford v. Parker*, 266 F.3d 442, 458 (6th Cir. 2001); *United States v. Logan*, Nos. 97-5912, 97-5914, 1999 WL 25638, at *14 (6th Cir. July 19, 1999) (also citing the *Vinson* rule via *Weiner*); *United States v. Long*, 190 F.3d 471, 476 (6th Cir. 1999); *United States v. Davis*, 170 F.3d 617, 621 (6th Cir. 1999); *United States v. Austin*, Nos. 94-4220, 94-4238, 94-4278, 1996 WL 109500, at *6 (6th Cir. Mar. 11, 1996); *United States v. Breinig*, 70 F.3d 850, 852-53 (6th Cir. 1995) (finding prejudice and reversing not due to mutually antagonistic defenses, but because of improper admission of inflammatory impermissible evidence); *United States v. Ghazaleh*, 58 F.3d 240, 244 (6th Cir. 1995); *United States v. Pierce*, 62 F.3d 818, 830 (6th Cir. 1995); *United States v. Bond*, 22 F.3d 662, 666 (6th Cir. 1994) (also citing the *Vinson* rule via *Weiner*).

⁴⁰⁸ *United States v. Critton*, 43 F.3d 1089, 1098 (6th Cir. 1995); *United States v. Weiner*, 988 F.2d 629, 634 (6th Cir. 1993).

⁴⁰⁹ *Harris*, 9 F.3d at 501.

⁴¹⁰ *United States v. Lopez*, 915 F. Supp. 891, 900 (E.D. Mich. 1996).

⁴¹¹ *Eli v. Metrish*, No. 03-70741, 2003 WL 22902358, at *9 (E.D. Mich. Oct. 30, 2003).

⁴¹² *Id.*

J. *The Eighth Circuit*

The Eighth Circuit started out with a general rule on severance close to the one the Supreme Court later laid down in *Zafiro*. In *United States v. Jackson*,⁴¹³ the court stated that “[s]everance will be allowed upon a showing of real prejudice to an individual defendant,” but denial of severance was not grounds for reversal unless “clear prejudice and an abuse of discretion are shown”—the defendant must “affirmatively demonstrate that the joint trial prejudiced (his) right to a fair trial.”⁴¹⁴

But not long afterward, the Eighth Circuit began its importation of the mutually exclusive defenses rule from foreign circuits. In *United States v. Boyd*,⁴¹⁵ the court noted that to gain severance due to antagonistic defenses, a defendant “must at the very least show that the conflict is so prejudicial that the differences are irreconcilable.”⁴¹⁶ The *Boyd* court thus borrowed a portion of the D.C. Circuit’s rule without using the characteristic “both are guilty” construction, and without further defining what constituted irreconcilability. Numerous subsequent Eighth Circuit opinions followed *Boyd* on that point.⁴¹⁷ In *United States v. Johnson*,⁴¹⁸ the court strengthened the *Boyd* rule slightly, noting that the “existence of antagonistic defenses does not require severance unless the defenses are actually irreconcilable.”⁴¹⁹ Various later cases cited the *Johnson* version of the *Boyd* rule.⁴²⁰

Not until several years after *Boyd* did the Eighth Circuit add the missing piece of the D.C. Circuit’s mutually exclusive defenses severance rule in (the ironically named) *United States v. De Luna*,⁴²¹ not mentioning *Robinson*, but instead quoting *Haldeman*: “[T]he governing standard requires the moving defendant to show that ‘the defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are

⁴¹³ 549 F.2d 517 (8th Cir. 1977).

⁴¹⁴ *Id.* at 523-24 (citation omitted).

⁴¹⁵ 610 F.2d 521 (8th Cir. 1979).

⁴¹⁶ *Id.* at 526 (citing *Robinson* from the D.C. Circuit).

⁴¹⁷ *United States v. Jones*, 880 F.2d 55, 63 (8th Cir. 1989) (citing *Robinson* from the D.C. Circuit instead of Eighth Circuit jurisprudence, and also noting the Fifth Circuit’s severance test); *United States v. Robinson*, 774 F.2d 261, 267 (8th Cir. 1985); *United States v. Miller*, 725 F.2d 462, 468 (8th Cir. 1984); *United States v. Singer*, 687 F.2d 1135, 1146 (8th Cir. 1982).

⁴¹⁸ 944 F.2d 396 (8th Cir. 1991).

⁴¹⁹ *Id.* at 402 (also quoting *Jones* for the Fifth Circuit’s definition of irreconcilability).

⁴²⁰ *United States v. Washington*, 318 F.3d 845, 858 (8th Cir. 2003); *United States v. Mason*, 982 F.2d 325, 328 (8th Cir. 1993); *United States v. Oakie*, 12 F.3d 1436, 1441 (8th Cir. 1993); *United States v. Swinney*, 970 F.2d 494, 499 (8th Cir. 1992).

⁴²¹ 763 F.2d 897 (8th Cir. 1985).

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guilty.”⁴²² Various subsequent opinions adopted the “both are guilty” construction, though it remained only a sub-current in Eighth Circuit jurisprudence.⁴²³

The Eighth Circuit also borrowed from other sources. In *United States v. Jones*,⁴²⁴ in addition to citing *Robinson* from the D.C. Circuit for its “at least irreconcilable” language, the court added, “as the Fifth Circuit has stated, the test is whether the defenses so conflict ‘that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other.’”⁴²⁵ Two later opinions followed *Jones*’s “irreconcilable” (or “actually irreconcilable”) plus “believe core of one, must disbelieve core of other” formula.⁴²⁶ More cases just took the “core” language from *Jones* and turned it into yet another version of the mandatory severance rule.⁴²⁷

But the Eighth Circuit’s most characteristic, and still current, statement of the mandatory severance rule first appeared in 1991 in *United States v. Gutberlet*.⁴²⁸ In *Gutberlet*, the court introduced a compound rule for severance: “Defendants can show real prejudice either by showing that their defense is irreconcilable with the defense of their codefendant or codefendants or that the jury will be unable to compartmentalize the evidence as it relates to separate defendants.”⁴²⁹ The latter part of that statement is still a proper basis for severance even

⁴²² *Id.* at 921.

⁴²³ *United States v. Delpit*, 94 F.3d 1134, 1143 (8th Cir. 1996) (“‘Antagonistic’ defenses require severance only when ‘there is a danger that the jury will unjustifiably infer that *this conflict alone demonstrates that both are guilty.*’”); *United States v. Ortiz*, 315 F.3d 873, 898 (8th Cir. 2002) (repeating “only when” language from *Delpit*, but citing only *Spitler* (8th Cir. 1986) from the Fourth Circuit, not any authorities from either the Eighth or the D.C. Circuits); *United States v. Basile*, 109 F.3d 1304, 1309 (8th Cir. 1997) (repeating “only when” language from *Delpit*); *United States v. Lara*, 891 F.2d 669, 671-72 (8th Cir. 1989). *See also* *Hood v. Helling*, 141 F.3d 892, 898 (8th Cir. 1998) (Lay, J., dissenting) (citing *Delpit* and *Basile* for “both are guilty” language).

⁴²⁴ 880 F.2d 55 (8th Cir. 1989).

⁴²⁵ *Id.* at 63 (citing *Bruno* and *Lee* from the Fifth Circuit).

⁴²⁶ *United States v. Johnson*, 944 F.2d 396, 403 (8th Cir. 1991); *United States v. Mason*, 982 F.2d 325, 328 (8th Cir. 1993).

⁴²⁷ *United States v. Abfalter*, 340 F.3d 646, 652 (8th Cir. 2003); *Hood*, 141 F.3d at 896; *United States v. Penson*, 62 F.3d 242, 244 (8th Cir. 1995); *United States v. Wint*, 974 F.2d 961, 966 (8th Cir. 1992); *United States v. Gutberlet*, 939 F.2d 643, 645 (8th Cir. 1991); *see also* *United States v. Flores*, 362 F.3d 1030, 1039 (8th Cir. 2004) (giving the *Jones* definition of irreconcilable defenses but following *Hood v. Helling* in calling them “mutually antagonistic” defenses; also recognizing that under *Zafiro* such defenses are not prejudicial per se and that jury instructions may cure or mitigate any potential prejudice).

⁴²⁸ 939 F.2d 643.

⁴²⁹ *Id.* at 645.

under *Zafiro*; the first part suggests a per se severance rule for irreconcilable defenses. The *Gutberlet* court then used *Jones's* "core" definition of irreconcilability, borrowed from the Fifth Circuit.⁴³⁰ Many subsequent Eighth Circuit opinions used *Gutberlet's* compound rule with its mandatory severance component, including the great majority of that circuit's post-*Zafiro* decisions.⁴³¹

Probably because of the Eighth Circuit's heavy reliance on its own compound rule, its jurisprudence shows less awareness of *Zafiro* than most other circuits. In fact, Eighth Circuit panels relied on *Zafiro* in only three decisions after 1992.⁴³² Other opinions noted the existence of *Zafiro* but did not apply it to the issue of irreconcilable defenses, and instead hewed to the Eighth Circuit's "rule."⁴³³ Two of these decisions noted *Zafiro's* holding that mutually antagonistic defenses are not prejudicial per se, but then stated one or another version of the Eighth Circuit's rule that irreconcilable defenses are prejudicial per se.⁴³⁴ Various other opinions did not mention *Zafiro* at all.⁴³⁵

Trial courts in the Eighth Circuit have dutifully followed the *Gutberlet* rule in recent decisions.⁴³⁶ In its most recent opinion on the issue, *United States v. Nichols*,⁴³⁷ the Eighth Circuit similarly noted *Zafiro's* holding that mutually antagonistic defenses are not prejudicial per se but

⁴³⁰ *Id.*

⁴³¹ *United States v. Frank*, 354 F.3d 910, 920 (8th Cir. 2004); *United States v. Mickelson*, 378 F.3d 810, 817 (8th Cir. 2004); *United States v. Washington*, 318 F.3d 845, 858 (8th Cir. 2003); *United States v. Ghant*, 339 F.3d 660, 665 (8th Cir. 2003); *United States v. Abfalter*, 340 F.3d 646, 652 (8th Cir. 2003); *United States v. McDougal*, 137 F.3d 547, 557 (8th Cir. 1998); *United States v. Taylor*, Nos. 98-1039, 98-2792, 98-1041, 98-2555, 1998 WL 537466, at *3 (8th Cir. Aug. 24, 1998); *United States v. Koskela*, 86 F.3d 122, 126 (8th Cir. 1996); *United States v. Bordeaux*, 84 F.3d 1544, 1547 (8th Cir. 1996); *United States v. Warfield*, 97 F.3d 1014, 1019 (8th Cir. 1996); *United States v. Melina*, 101 F.3d 567, 571 (1996); *United States v. Shivers*, 66 F.3d 938, 940 (8th Cir. 1995); *United States v. Jackson*, 64 F.3d 1213, 1217 (8th Cir. 1995); *United States v. Henderson-Durand*, 985 F.2d 970, 975-76 (8th Cir. 1993).

⁴³² *United States v. Flores*, 362 F.3d 1030, 1039 (8th Cir. 2004); *United States v. Al-Muqsit*, 191 F.3d 928, 941 (8th Cir. 1999); *Jenner v. Class*, 79 F.3d 736, 742 (8th Cir. 1996).

⁴³³ *Frank*, 354 F.3d at 920; *Mickelson*, 378 F.3d at 817; *Hood*, 141 F.3d at 896, 897; *United v. Basile*, 109 F.3d 1304, 1309-10 (8th Cir. 1997); *Bordeaux*, 84 F.3d at 1544; *Melina*, 101 F.3d at 571; *United States v. Penson*, 62 F.3d 242, 243-44 (8th Cir. 1995); *Shivers*, 66 F.3d at 939-40.

⁴³⁴ *Basile*, 109 F.3d at 1309-10; *Ortiz*, 315 F.3d at 898.

⁴³⁵ See generally *Washington*, 318 F.3d 845; *Ghant*, 339 F.3d 660; *Abfalter*, 340 F.3d 646; *Taylor*, 163 F.3d 604; *Warfield*, 97 F.3d 1014; *Jackson*, 64 F.3d 1213; *Koskela*, 86 F.3d 122; *Henderson-Durand*, 985 F.2d 970; *United States v. Oakie*, 12 F.3d 1436 (8th Cir. 1993).

⁴³⁶ See generally *United States v. Kraft*, No. CRIM03-315, 2005 WL 578313, at *4 (D. Minn. Mar. 11, 2005) (noting *Zafiro* but applying the *Gutberlet* rule via *Mickelson*); *United States v. Prime Plating, Inc.*, CRIM04-28 JRT/FLN, 2004 WL 2801595 (D. Minn. Nov. 24, 2004).

⁴³⁷ 416 F.3d 811 (8th Cir. 2005).

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gave the *Gutberlet* rule, via *United States v. Mickelson*, on mandatory severance of irreconcilable defenses.⁴³⁸ Thus the Eighth Circuit, by delinking “irreconcilable” from “mutually antagonistic,” walked into a particularly bad trap of terminological confusion that has prevented both circuit and district judges from recognizing *Zafiro*’s significance.

K. *The Ninth Circuit*

The Ninth Circuit was a relative latecomer to the mutually exclusive defenses party.⁴³⁹ Through the end of the 1970s, Ninth Circuit panels facing claims of antagonistic defenses were saying no more than merely that “Conflicting and antagonistic defenses being offered at trial do not necessarily require granting a severance, even if hostility surfaces or defendants seek to blame one another.”⁴⁴⁰ At least one rare early case from the Ninth Circuit, *United States v. Roselli*,⁴⁴¹ briefly discussed antagonistic defenses in the context of *De Luna*. In *Roselli*, a defendant cited *De Luna* and claimed that severance was required because two other defendants testified while he did not.⁴⁴² The court explained,

In that case, however, the defenses of the accused were antagonistic. The testifying defendant sought to establish that de Luna, and not he, had committed the crime, and his counsel commented unfavorably upon de Luna’s failure to take the stand. The defenses of Friedman and Teitelbaum [the other *Roselli* defendants] were not antagonistic to that of Roselli; indeed, Friedman’s testimony tended to exculpate Roselli; and there was no comment from any quarter on Roselli’s failure to testify.⁴⁴³

The *Roselli* court thus included comment on a nontestifying defendant as part of the very definition of antagonism under *De Luna*. This was a correct reading of the significance of *De Luna*. While mutual antagonism can be considered separately as a factor in that case, it cannot, or should not, be disentangled from the holding and treated as an independent basis for severance that is sufficient in itself.

⁴³⁸ *Id.* at 816.

⁴³⁹ For a more detailed discussion of this topic, see generally Dewey, *supra* note 16.

⁴⁴⁰ *United States v. Lutz*, 621 F.2d 940, 945 (9th Cir. 1980) (quoting same language from *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978)).

⁴⁴¹ 432 F.2d 879 (9th Cir. 1970).

⁴⁴² *Id.* at 902.

⁴⁴³ *Id.*

The mutually exclusive defenses doctrine made its first Ninth Circuit appearance in 1984 in *United States v. Ramirez*.⁴⁴⁴ In discussing why the defendant was not entitled to severance, the *Ramirez* court imported language from the Fifth and Seventh Circuits, stating that to justify severance and reversal of a trial court's decision not to sever, "it must be shown, on the facts of the individual case, that the defenses 'are antagonistic to the point of being mutually exclusive.' [citing *United States v. Marable* (5th Cir. 1978)]. Only where the acceptance of one party's defense will preclude the acquittal of the other party does the existence of antagonistic defenses mandate severance. [See *United States v. Salomon* (5th Cir. 1980); *United States v. Ziperstein* (7th Cir. 1979)]."⁴⁴⁵

The *Ramirez* court's borrowed "rule"—antagonistic to the point of mutual exclusivity plus acceptance of one defense precludes acquittal of other defendant—became the standard statement of the rule in the Ninth Circuit, which proved more stable than the versions used in most other circuits. The great majority of decisions addressing mutual exclusivity used the same construction.⁴⁴⁶ In an important later case, *United States v.*

⁴⁴⁴ 710 F.2d 535 (9th Cir. 1984).

⁴⁴⁵ *Id.* at 546 (citations omitted).

⁴⁴⁶ *United States v. Angwin*, 271 F.3d 786, 795 (9th Cir. 2001); *United States v. Bochicchio*, No. 99-10610, No. 00-10280, No. 00-10355, No. 00-10371, 2001 U.S. App. LEXIS 26042, at *3-4 (9th Cir. Nov. 30, 2001); *United States v. Gillam*, 167 F.3d 1273, 1276 (9th Cir. 1999); *United States v. Hoang*, No. 95-50386, 1996 WL 195546, at *1 (9th Cir. Apr. 23, 1996); *United States v. Thierman*, Nos. 94-10279, 94-10293, 94-10307, 1996 WL 18638, at *2 (9th Cir. Oct. 17, 1995); *United States v. Mason*, Nos. 91-50690, 91-50691, 91-50702, 91-50706, 91-50712, 1994 WL 266102, at *3 (9th Cir. June 15, 1994); *United States v. Rodriguez-Ballardo*, No. 92-10395, 1993 WL 268444, at *1 (9th Cir. July 15, 1993); *United States v. Papraniku*, Nos. 91-30162, 91-30230, 1992 WL 149849, at *3 (9th Cir. July 1, 1992); *United States v. Pillion*, No. 91-10272, 1992 WL 144325, at *2 (9th Cir. June 26, 1992); *United States v. Marino-Biarreal*, No. 89-50444, 1992 WL 144727, at *1 (9th Cir. June 25, 1992); *United States v. Arzate*, No. 89-50553, 1992 WL 86487, at *2 (9th Cir. Apr. 27, 1992); *United States v. Radley*, Nos. 90-50249, 90-50383, 1991 WL 259965, at *1 (9th Cir. Dec. 4, 1991); *United States v. Bressette*, No. 90-50621, 1991 WL 216959, at *5 (9th Cir. Oct. 24, 1991); *United States v. Langarica-Figueroa*, No. 89-50606, 1991 WL 49681, at *1 (9th Cir. Apr. 9, 1991); *United States v. Garcia*, No. 89-50551, 1991 WL 17115, at *1 (9th Cir. Feb. 7, 1991); *United States v. Hernandez*, 952 F.2d 1110, 1116 (9th Cir. 1991); *United States v. Myers*, Nos. 89-10488, 89-10490, 1990 WL 161695, at *5 (9th Cir. Oct. 24, 1990); *United States v. Torres*, Nos. 86-5191, 86-5201, 86-5219, 1990 WL 56807, at *1 (9th Cir. May 3, 1990); *United States v. Linn*, 880 F.2d 209, 217 (9th Cir. 1989); *United States v. Jackson*, No. 86-5100, 1989 WL 150117, at *4 (9th Cir. Dec. 6, 1989); *United States v. Jackson*, No. 86-5100, 1989 WL 150117, at *4 (9th Cir. Dec. 6, 1989); *United States v. Lewis*, Nos. 88-5011, 88-5028, 88-5031, 88-5035, 88-5065, 88-5070, 1989 WL 85723, at *1 (9th Cir. July 20, 1989); *United States v. Williams*, Nos. 88-1318, 88-1330, 1989 WL 69388, at *1 (9th Cir. June 22, 1989); *United States v. Sherlock*, 962 F.2d 1349, 1362-63 (9th Cir. 1989); *United States v. Adler*, 879 F.2d 491, 497 (9th Cir. 1988) (rephrasing the second part of the *Ramirez* language slightly to "when acquittal of one defendant necessarily results in conviction of the other"); *United States v. Valles-Valencia*, 811 F.2d 1232, 1238 (9th Cir. 1987); *United*

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Sherlock,⁴⁴⁷ the court borrowed additional language from the Fifth Circuit—the *Berkowitz/Romanello* “irreconcilable and mutually exclusive” and “core of defense” constructions—and added them to the mix,⁴⁴⁸ as did some later opinions.⁴⁴⁹ Other opinions mixed and matched in various ways: only “precludes acquittal” from *Ramirez*;⁴⁵⁰ only “mutually exclusive”;⁴⁵¹ only “mutually exclusive” rephrased as “mutually antagonistic”;⁴⁵² “mutually antagonistic” plus “accept/preclude”;⁴⁵³ “accept/preclude” plus “core of defense”;⁴⁵⁴ or “irreconcilable and mutually exclusive” plus “accept/preclude.”⁴⁵⁵ Other panels offered slightly modified language, such as the new definition of “completely antagonistic” as “irreconcilable and mutually exclusive” in *United States v. Forcelledo*.⁴⁵⁶ In *United States v. Vasquez-Velasco*,⁴⁵⁷ the court ignored earlier Ninth Circuit opinions and cited only to an Eleventh Circuit opinion to support its observation that the “most common reason for severing a trial is where codefendants present mutually exclusive or irreconcilable defenses.”⁴⁵⁸ In *United States v. Gilbert*,⁴⁵⁹ the court merely noted that the moving defendant was the only witness who pointed an accusatory finger at another defendant, and thus suffered no prejudice due to mutually antagonistic defenses.⁴⁶⁰

After spending several years building a mandatory severance “rule” through *Ramirez*, *Sherlock*, and their progeny, the next major milestone in the Ninth Circuit’s development of the mutually exclusive defenses

States v. Van Cauwenberghe, 814 F.2d 1329, 1337 (9th Cir. 1987); *United States v. Polizzi*, 801 F.2d 1543, 1554 (9th Cir. 1986); *United States v. Gonzales*, 749 F.2d 1329, 1333 (9th Cir. 1984).

⁴⁴⁷ 962 F.2d 1349 (9th Cir. 1989).

⁴⁴⁸ *Id.* at 1362-63.

⁴⁴⁹ *See, e.g., Mason*, 1994 WL 266102, at *3.

⁴⁵⁰ *United States v. Navarro-Lopez*, Nos. 90-50655, 90-50622, 1991 WL 268924, at *2 (9th Cir. Dec. 13, 1991); *United States v. Marsh*, 894 F.2d 1035, 1040 (9th Cir. 1990).

⁴⁵¹ *United States v. Showa*, Nos. 50698, 91-50017, at *4 (9th Cir. Dec. 19, 1997); *United States v. Medina*, Nos. 88-1491, 88-1493, 1989 WL 154231, at *3 (9th Cir. Dec. 19, 1989).

⁴⁵² *United States v. Nunez-Hernandez*, No. 99-30006, 2000 WL 679256, at *1 (9th Cir. May 24, 2000).

⁴⁵³ *United States v. Andonian*, Nos. 91-50622, 91-50626, 1994 WL 377947, at *6 (9th Cir. July 19, 1994); *United States v. Buena-Lopez*, 987 F.2d 657, 661 (9th Cir. 1993).

⁴⁵⁴ *United States v. Gonzales-Nunez*, No. 90-10475, 1993 WL 394898, at *1 (9th Cir. Oct. 6, 1993).

⁴⁵⁵ *United States v. Cervantes*, No. 89-50575, 1990 WL 200238, at *1 (9th Cir. Dec. 7, 1990).

⁴⁵⁶ Nos. 89-30335 to 89-30338, 89-30340, 89-30342, 89-30343, 1990 WL 183692, at *4 (9th Cir. Nov. 20, 1990).

⁴⁵⁷ 15 F.3d 833 (9th Cir. 1994).

⁴⁵⁸ *Id.* at 846 (citing *United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990)).

⁴⁵⁹ No. 98-50101, 1998 WL 681391, at *1 (9th Cir. Aug. 26, 1999).

⁴⁶⁰ *Id.*

doctrine came in 1991 in *United States v. Tootick*.⁴⁶¹ In a rare moment of epiphany, the *Tootick* panel recognized that there was no such rule in the Ninth Circuit, and that any language on the issue in cases from the *Ramirez* and *Sherlock* lineage was only dicta:

Language in several Ninth Circuit opinions suggests that a finding of mutually exclusive defenses requires severance under Rule 14. [citing *Sherlock*, *Ramirez*, and other opinions]. The defendants argue that these cases establish a per se rule mandating severance whenever mutually exclusive defenses are pled. In none of the cited cases, however, does the language pertaining to severance constitute a holding. The present case is the first occasion in which this Circuit is required to decide whether severance is mandated in the context of mutually exclusive defenses.⁴⁶²

The *Tootick* court explored and analyzed the issue of mutually exclusive defenses carefully and thoroughly, considering foreign decisions such as *Romanello* and *Crawford* along with earlier cases from the Ninth Circuit.⁴⁶³ The court also discussed the prejudicial risks of antagonistic or irreconcilable defenses at length, noting the inevitability of second-prosecutorialism whenever codefendants blame each other.⁴⁶⁴ Nevertheless, the court ultimately decided, “While the joinder of trials in which defendants maintain mutually exclusive defenses produces heightened dangers of prejudice, we decline to adopt a per se rule against joinder in such cases. Instead, we hold that in order to establish an abuse of discretion, the defendants must demonstrate that clear and manifest prejudice did in fact occur.”⁴⁶⁵ The *Tootick* panel thus offered a rule that paralleled the Supreme Court’s later holding in *Zafiro*.

After rejecting a per se severance rule, the *Tootick* court nevertheless found clear and manifest prejudice in a case with extreme, gruesome facts in which each codefendant’s counsel acted aggressively in the second-prosecutorial mode.⁴⁶⁶ In *Tootick*, the two defendants were each charged with brutally stabbing and beating the victim and running him

⁴⁶¹ 952 F.2d 1078 (9th Cir. 1991).

⁴⁶² *Id.* at 1081 (citations omitted).

⁴⁶³ *Id.* at 1081-82.

⁴⁶⁴ *Id.* at 1082-83.

⁴⁶⁵ *Id.* at 1083.

⁴⁶⁶ *See id.* at 1080-85.

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over with a car; yet, somehow, the victim survived to testify.⁴⁶⁷ Each defendant's sole defense was the guilt of the other, and one defendant alleged that he had watched in horror as the other stabbed the victim twenty-three times, then gleefully licked the blood off the knife; the other responded in kind.⁴⁶⁸

Noting the inherent problems of joint trials with antagonistic defenses and second-prosecutorial blame-trading, the court observed, "Opening statements, as in this case, can become a forum in which gruesome and outlandish tales are told about the exclusive guilt of the 'other' defendant. In this case, these claims were not all substantiated by the evidence at trial."⁴⁶⁹ The court held that the case involved truly irreconcilable defenses, as in *Crawford*, because the evidentiary universe in the case was limited in such a manner that at least one of the defendants had to be guilty, and the jury could not acquit one defendant without disbelieving the other.⁴⁷⁰

The court found that this true mutual exclusivity was not sufficient grounds for severance in itself, however. Rather, the court emphasized the numerous actual prejudicial incidents at trial that made severance necessary. The court faulted the trial judge for insufficient use of admonitory jury instructions that "lawyer talk is not evidence," following each defendant's sharply accusatory opening statement directed at the other defendant,⁴⁷¹ and for failing to take steps to cure prejudice at other points in the trial.⁴⁷² Although the appellate panel, like the *Zafiro* Court, expressed faith in ordinary jury instructions to cure prejudice under normal circumstances, they noted that the circumstances of *Tootick*, a vicious second-prosecutorial brawl,⁴⁷³ required additional countermeasures to preserve any hope of a fair joint trial.⁴⁷⁴

In the end, *Tootick* stands for at least three major points: (1) the Ninth Circuit has no per se rule requiring severance of mutually exclusive defenses; (2) active use of jury instructions to cure potential prejudice sometimes may be adequate to ensure fairness even where codefendants with mutually exclusive defenses attack each other

⁴⁶⁷ *Id.* at 1080.

⁴⁶⁸ *Id.* at 1084-85.

⁴⁶⁹ *Id.* at 1082.

⁴⁷⁰ *Id.* at 1081.

⁴⁷¹ *Id.* at 1083-84.

⁴⁷² *Id.* at 1085.

⁴⁷³ *Zafiro v. United States*, 506 U.S. 534, 538 (1993).

⁴⁷⁴ *United States v. Tootick*, 952 F.2d 1078, 1085-86 (9th Cir. 1991).

aggressively as second prosecutors; and (3) severance is justified only where actual, incurable, “manifest prejudice” is shown.⁴⁷⁵

Early post-*Tootick* opinions in the Ninth Circuit involving claims of mutually exclusive defenses reflect uncertainty as to how to handle the *Tootick* holding. The first such opinion came only a week later and understandably did not attempt to comprehend *Tootick*'s significance, but merely repeated the traditional “rule” from *Sherlock*.⁴⁷⁶ Various unpublished decisions had no such timing excuse, but ignored *Tootick* anyway and repeated language from *Ramirez*, *Sherlock*, or their progeny as though *Tootick* had never happened.⁴⁷⁷ Another unpublished opinion miscited *Tootick* as authority in declaring, “Severance is also mandated if defendants present mutually antagonistic defenses.”⁴⁷⁸ Only one of these unpublished opinions showed a clear understanding of *Tootick*'s core significance: “[E]ven assuming antagonistic defenses, there is no per se rule requiring severance.”⁴⁷⁹

In the next Ninth Circuit published opinion to address the issue of irreconcilable defenses, *United States v. Buena-Lopez*,⁴⁸⁰ the court was well aware of *Tootick*, citing it for one proposition and distinguishing it for others.⁴⁸¹ In particular, the court reasoned,

In *Tootick*, each defendant claimed innocence and directly accused the other of committing the crime charged. We held that the defenses were mutually antagonistic, because “the acquittal of one [codefendant] necessitate[d] the conviction of the other.” We concluded that severance was required under the facts in that case, because the “jury could not have been able

⁴⁷⁵ *Id.* at 1086.

⁴⁷⁶ *United States v. Hernandez*, 952 F.2d 1110, 1116 (9th Cir. 1991).

⁴⁷⁷ *United States v. Gonzales-Nunez*, No. 92-10475, 1993 WL 394898, at *1 (9th Cir. Oct. 6, 1993); *United States v. Rodriguez-Ballardo*, No. 92-103951, 1993 WL 268444, at *1 (9th Cir. July 15, 1993); *United States v. Papraniku*, Nos. 91-30162, 91-30230, 1992 WL 149849, at *3 (9th Cir. July 1, 1992); *United States v. Pillion*, No. 91-10272, 1992 WL 144325 (9th Cir. June 26, 1992); *United States v. Marino-Biarreal*, No. 89-50444, 1992 WL 144727 (9th Cir. June 25, 1992) (saying that severance “may,” not must, be granted where defenses are mutually exclusive); *United States v. Arzate*, No. 89-50553, 1992 WL 86487 (9th Cir. Apr. 27, 1992).

⁴⁷⁸ *United States v. Andonian*, Nos. 91-50622 to 91-50626, 1994 WL 377947, at *6 (9th Cir. July 19, 1994).

⁴⁷⁹ *United States v. Prasad*, No. 93-50549, 1994 WL 232243, at *1 (9th Cir. May 31, 1994) (unaware of *Zafiro*, however).

⁴⁸⁰ 987 F.2d 657 (9th Cir. 1993).

⁴⁸¹ *See id.* at 660-61.

to assess the guilt or innocence of the defendants on an individual and independent basis."⁴⁸²

The court in *Buena-Lopez* found no such mutual antagonism or inability of the jury to assess the guilt or innocence of the defendants individually.⁴⁸³ By the time of the *Buena-Lopez* decision, the Supreme Court had decided *Zafiro*. The *Buena-Lopez* court was careful not to repeat the *Ramirez* mandatory severance rule, and also noted the rejection of such a rule in *Zafiro*.⁴⁸⁴ The court's discussion of *Tootick* is slightly ambiguous, in that it could be read to say either that the court concluded that severance was necessary because they found the defenses mutually antagonistic, or else that they ruled in favor of severance for other unidentified reasons in addition to the mutual antagonism. At any rate, the court showed recognition that *Zafiro* and *Tootick* had changed the legal landscape.

Soon after *Buena-Lopez*, in *United States v. Arias-Villanueva*,⁴⁸⁵ the court returned to the old "rule" and cited both *Sherlock* and *Buena-Lopez* for the proposition that to justify severance, a defendant "at a minimum" must "show that acceptance of his codefendant's defense would preclude his acquittal."⁴⁸⁶ The court upheld the trial court's denial of severance because the codefendants' defenses were not irreconcilable to that degree.⁴⁸⁷ The decision nowhere states outright that irreconcilable defenses automatically mandate severance, though it may imply that a showing of irreconcilable defenses is sufficient to demonstrate denial of a specific trial right.⁴⁸⁸ The *Arias-Villanueva* court quoted *Zafiro*'s "compromise a specific trial right" or "prevent the jury from making a reliable judgment" language, but not its holding that mutually antagonistic defenses are not prejudicial per se.⁴⁸⁹ The court did not mention *Tootick*.⁴⁹⁰ Thus, *Arias-Villanueva*, like *Buena-Lopez*, suggests that

⁴⁸² *Id.* at 661 (citations omitted).

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* at 660.

⁴⁸⁵ 998 F.2d 1491, 1507 (9th Cir. 1993).

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 1506.

⁴⁹⁰ In *Arias-Villanueva*, the appellant claimed a right to severance based upon mutually exclusive defenses, *id.*, unlike *Buena-Lopez*, where the appellants and court both equated "mutually antagonistic" with "the acquittal of one necessitat[ing] the conviction of the other." *United States v. Buena-Lopez*, 987 F.2d 657, 661 (9th Cir. 1993). This is but one example of the all-too-easy terminological confusion resulting from different courts and circuits sometimes using "mutually exclusive" and "mutually antagonistic" to mean the same thing.

Ninth Circuit panels were feeling uncertain how to tie *Zafiro* and *Tootick* together with the *Ramirez-Sherlock* lineage.

The 1994 opinion in *United States v. Koon*,⁴⁹¹ a case involving the officers charged in the infamous beating of Rodney King that triggered the Los Angeles riots of 1992, cited the *Ramirez-Sherlock* mandatory severance “rule” but showed some reticence about it, stating,

Although we have recognized that “mutually antagonistic” or “irreconcilable” defenses *may* be so prejudicial as to require severance, severance based on these grounds is *appropriate* only when “the acceptance of one party’s defense will preclude the acquittal of the other party. . . . [T]he essence or core of the defenses must be in conflict such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other. [citing *Sherlock*].”⁴⁹²

The *Koon* court found no mutual exclusivity and showed no awareness of *Tootick* other than to miscite it in passing, along with an Eleventh Circuit opinion for the proposition that mutually exclusive defenses require severance.⁴⁹³ In a footnote, the *Koon* court also noted briefly that mutually antagonistic defenses do not require mandatory severance under *Zafiro*.⁴⁹⁴

The *Koon* court was clear on at least one significant point. By referring to “mutually antagonistic” or “irreconcilable” defenses in relation to *Ramirez*’s “accept/preclude” language traditionally used to describe mutually exclusive defenses in the Ninth Circuit, the court showed an awareness that these terms all mean the same thing, and that *Zafiro* controlled them all. The court made this understanding more explicit in an unpublished 1995 opinion, *United States v. Fleener*.⁴⁹⁵ In *Fleener*, although the appellate panel was well aware of *Tootick* and discussed it at some length regarding “proper and timely” instructions to neutralize prejudice,⁴⁹⁶ it did not cite it on the issue of mandatory

⁴⁹¹ 34 F.3d 1416, 1436 (9th Cir. 1994), *aff’d in part and rev’d in part*, 518 U.S. 81 (1996).

⁴⁹² *Id.* at 1436 (emphasis added).

⁴⁹³ *Id.* at 1435 (citing *United States v. Rucker*, 915 F.2d at 1513 (11th Cir. 1990)).

⁴⁹⁴ *Id.* at 1436 n.17.

⁴⁹⁵ Nos. 94-10481, 94-10490, 1995 WL 496825 (9th Cir. Aug. 16, 1995).

⁴⁹⁶ *Id.* at *3.

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severance of mutually exclusive defenses. It did cite *Zafiro's* holding on that point, however.⁴⁹⁷

Buena-Lopez and *Koon* both demonstrated awareness of *Zafiro's* key holding regarding mutually antagonistic defenses, and even *Arias-Villanueva* showed at least some awareness of *Zafiro's* significance. Other unpublished post-*Zafiro* Ninth Circuit opinions, like *Fleener*, followed *Zafiro* more directly and relied on it primarily.⁴⁹⁸ Yet other opinions addressing mutually exclusive defense claims showed no awareness of *Zafiro*.⁴⁹⁹

Any dawning awareness of the significance of *Tootick*, and most awareness of the significance of *Zafiro*, was forcefully cast aside in 1996 in *United States v. Throckmorton*.⁵⁰⁰ In *Throckmorton*, a drug smuggling case, the court held that one defendant's government informant defense, which included active inculcation of a second defendant, was not irreconcilable at its core with that second defendant's insufficiency of evidence defense.⁵⁰¹ The court reasoned that there was nothing to suggest that the inculpatory testimony would not have been similarly available at a severed trial.⁵⁰² Ignoring *Tootick*, the court declared, "To be entitled to severance on the basis of mutually antagonistic defenses, a defendant must show that the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant."⁵⁰³

⁴⁹⁷ *Id.*

⁴⁹⁸ *United States v. Baldenegro*, Nos. 93-10538, 93-10542, 1994 WL 441757, at *2 (9th Cir. Aug. 15, 1994); *United States v. Oudomrak*, No. 93-50275, 1994 WL 202460, at *1 (9th Cir. May 24, 1994); *United States v. Rodriguez*, No. 92-50519, 1994 WL 196770, at *3 (9th Cir. May 18, 1994); *Miller v. Hames*, No. 93-35388, 1994 WL 126732, at *1 (9th Cir. Apr. 13, 1994).

⁴⁹⁹ *United States v. Hoang*, No. 95-50386, 1996 WL 195546 (9th Cir. Apr. 23, 1996); *United States v. Thierman*, Nos. 94-10279, 94-10293, 94-10307, 1996 WL 18638 (9th Cir. Oct. 17, 1995); *United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994); *United States v. Andonian*, Nos. 91-50622 to 91-50626, 1994 WL 377947 (9th Cir. July 19, 1994); *United States v. Mason*, Nos. 91-50690, 91-50691, 91-50702, 91-50706, 91-50712, 1994 WL 266102 (9th Cir. June 15, 1994); *United States v. Prasad*, No. 93-50549, 1994 WL 232243 (9th Cir. May 31, 1994) (but correctly following *Tootick*); *United States v. Gonzales-Nunez*, No. 92-10475, 1993 WL 394898 (9th Cir. Oct. 6, 1993); *United States v. Rodriguez-Ballardo*, No. 92-103951, 1993 WL 268444 (9th Cir. July 15, 1993).

⁵⁰⁰ 87 F.3d 1069, 1072 (9th Cir. 1996).

⁵⁰¹ *Id.* at 1072. In so holding, the *Throckmorton* court appears to contradict the holding in *United States v. Johnson*, 478 F.2d 1129, 1131-32, 1134 (5th Cir. 1973) (holding, in a case involving passing of counterfeit money, that non-presence defense of first defendant was mutually exclusive to government informant defense of second defendant where second defendant actively inculcated first defendant).

⁵⁰² *Throckmorton*, 87 F.3d at 1072.

⁵⁰³ *Id.*

The *Throckmorton* panel cited *Sherlock* for this proposition, without noting that the cited language was actually a quote from *Romanello*.⁵⁰⁴

The *Throckmorton* panel also subtly but significantly changed the language of *Romanello*. While *Berkowitz*, the original Fifth Circuit decision defining mutually exclusive defenses in terms of defenses irreconcilable at their cores, had defined these “cores” in terms of testimony, *Romanello* merely referred to the cores of the defenses, then interpreted these to include any theories or inferences counsel might propose, as the *Romanello* dissent complained.⁵⁰⁵ *Throckmorton* added “theory” directly to its definition, such that irreconcilability hinged not on the jury’s acceptance of evidence presented, but on a jury’s acceptance of a codefendant’s “theory” of defense.⁵⁰⁶ Like *Ramirez* and *Sherlock*, *Throckmorton*’s statement regarding mutually antagonistic defenses was not a holding. Although the *Throckmorton* court cited *Zafiro*, it did not recognize that *Zafiro* rejected the very sort of mandatory severance rule that *Throckmorton* stated. As in other circuits, the terminological uncertainty between “mutually antagonistic,” “mutually exclusive,” and “irreconcilable” defenses likely was to blame.

⁵⁰⁴ *Id.*; *United States v. Sherlock*, 962 F.2d 1349, 1363 (9th Cir. 1989).

⁵⁰⁵ *United States v. Romanello*, 726 F.2d 173, 182 (5th Cir. 1984) (Gee, J., dissenting).

⁵⁰⁶ This acceptance of “theory” rather than “testimony” raises the question whether a defendant could preemptively demand severance simply by fiat, by proclaiming that his theory of defense would heap all blame on a codefendant, regardless of whether he had any substantive evidence to prove the codefendant’s liability. The *Throckmorton* court’s finding of insufficient antagonism in the defenses seems to contradict its own loose, “theory”-based standard. Defendant *Throckmorton* defended on a theory of insufficiency of the evidence and argued that the prosecution did not prove its case. *Throckmorton*, 87 F.3d at 1072. Defendant *Calicchio* defended on a theory that he was acting as a government informant. *Id.* *Calicchio* aggressively inculpated *Throckmorton*, and his “testimony was devastating to *Throckmorton*’s defense.” *Id.* However, the *Throckmorton* court reasoned that “[t]hese defenses are not, at their core, irreconcilable,” because even if “the jury found that *Calicchio* was working for the DEA, it still could have acquitted *Throckmorton* for lack of evidence.” *Id.* In other words, notwithstanding that part of *Calicchio*’s theory that *Throckmorton* was guilty, a jury could believe both defendants simultaneously based on evidence. In so reasoning, the *Throckmorton* court seems to go against its own earlier language and that of *Romanello*, reverting instead to the “testimony”-based standard of *Berkowitz*. The *Throckmorton* court also slightly undercuts its own theory-based per se rule against joinder when it requires that a defendant seeking reversal of a denial of severance “must establish that the prejudice he suffered from the joint trial was so ‘clear, manifest or undue’ that he was denied a fair trial.” *Id.* at 1071-72. Various subsequent decisions cite *Throckmorton* for this proposition. See, e.g., *United States v. Tekle*, No. 00-50168, 2002 WL 187157, at *1 (9th Cir. Feb. 4, 2002); *Lambright v. Stewart*, 191 F.3d 1181, 1185 (9th Cir. 1999); *United States v. Showa*, Nos. 96-50698, 97-50017, 1997 WL 801452, at *4 (9th Cir. Dec. 19, 1997).

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Throckmorton soon became the dominant authority on irreconcilable defenses in the Ninth Circuit, with most subsequent opinions relying on it for a mandatory severance rule.⁵⁰⁷ Other opinions relied on pre-*Zafiro* authority, directly or indirectly, for a mandatory severance rule.⁵⁰⁸

With the ascendance of *Throckmorton*, both *Tootick* and *Zafiro* were mostly ignored or misconstrued in the Ninth Circuit. In *United States v. Cruz*,⁵⁰⁹ the court, in finding defenses based on reasonable doubt and entrapment, antagonistic but not irreconcilable,⁵¹⁰ offered the quote from *Throckmorton* as the Ninth Circuit's rule for when a "defendant is entitled to severance based upon mutually antagonistic defenses."⁵¹¹ Although it did not cite to *Buena-Lopez* for this particular proposition, the *Cruz* court followed that decision's reasoning in distinguishing *Tootick* by observing that in *Tootick*, "the court concluded that severance was necessary because '[e]ach defense theory contradicted the other in such a way that the acquittal of one necessitates the conviction of the other.'"⁵¹² Although the quotation from *Tootick* is accurate, it is taken out of context, since it implies that the severance question in *Tootick* was resolved solely based on a finding of mutual exclusivity—a per se rule—and it does not mention either the extensive second-prosecutorial excesses leading to manifest prejudice or the *Tootick* court's explicit refusal to create a per se

⁵⁰⁷ *United States v. Anderson*, No. 00-50551, 2002 U.S. App. LEXIS 10848, at *2 (9th Cir. June 5, 2002); *United States v. Johnson*, 297 F.3d 845, 858 (9th Cir. 2002) (citing *Throckmorton*'s language indirectly through *Hanley*); *United States v. Rashkovski*, 301 F.3d 1133, 1138 (9th Cir. 2002); see also *United States v. Stansberry*, No. 00-50199, 2002 U.S. App. LEXIS 25576, at *1 (9th Cir. Dec. 9, 2002) (alluding to a mandatory severance rule and citing *Throckmorton*); *United States v. Angwin*, 271 F.3d 786, 795 (9th Cir. 2001); *United States v. Wyner*, No. 98-10220, 2000 WL 1210150, at *2 (9th Cir. Aug. 25, 2000) (relying indirectly on *Throckmorton*'s construction and misciting *Tootick*); *United States v. Burns*, Nos. 98-50771, 98-50772, 98-50025, 2000 WL 898739, at *5 (9th Cir. July 6, 2000); *Schmid v. Hoyt*, No. 99-35628, 2000 WL 793996, at *1 (9th Cir. June 20, 2000); *United States v. Hanley*, 190 F.3d 1017, 1028 (9th Cir. 1999); *United States v. Briones*, Nos. 97-10369, 97-10370, 97-10371, 97-10372, 1998 WL 863026, at *1 (9th Cir. Nov. 30, 1998); *United States v. Venegas*, No. 97-10178, 1998 WL 862836, at *3 (9th Cir. Nov. 4, 1998); *United States v. Smart*, Nos. 97-50161, 97-50162, 97-50163, 97-50164, 97-50165, 97-50267, 97-50269, 1998 WL 833605, at *1 (9th Cir. Oct. 6, 1998); *United States v. Cruz*, 127 F.3d 791, 799 (9th Cir. 1997).

⁵⁰⁸ *United States v. Bochicchio*, Nos. 99-10610, 00-10280, 00-10355, 00-10371, 2001 U.S. App. LEXIS 26042, at *4-*5 (9th Cir. Oct. 18, 2001) (citing *Gillam*); *United States v. Gillam*, 167 F.3d 1273, 1276 (9th Cir. 1999) (citing *Adler*); *United States v. Showa*, 1997 WL 801452, at *4 (9th Cir. Dec. 19, 1998) (citing *Gonzales*).

⁵⁰⁹ 127 F.3d 791, 799 (9th Cir. 1997).

⁵¹⁰ *Id.* at 799-800.

⁵¹¹ *Id.* at 799.

⁵¹² *Id.* at 800 (quoting *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991)).

rule on severance.⁵¹³ Although the *Cruz* court cited *Zafiro*, it did not show an awareness of *Zafiro*'s holding on mutually antagonistic defenses or the impact that had on *Throckmorton*'s mandatory severance rule. Other opinions also miscited or misquoted *Tootick* for a mandatory severance rule.⁵¹⁴ One notable exception was *United States v. Gillam*,⁵¹⁵ in which the court avoided the trap of characterizing *Tootick* as a decision creating a per se severance rule and correctly emphasized the importance of insufficient jury instructions and *Tootick*'s "extraordinary record" to the decision.⁵¹⁶ However, the *Gillam* court also helped to breathe life back into the *Ramirez* "holding" through one of *Ramirez*'s progeny, contrary to the intentions of the *Tootick* panel to lay that whole line of precedent to rest. Various post-*Throckmorton* decisions failed to mention *Zafiro*.⁵¹⁷ Those that did, like *Cruz*, usually did not discuss its holding on mutually antagonistic defenses or its significance.⁵¹⁸

In 1999, a Ninth Circuit panel bravely attempted to harmonize *Sherlock*, *Tootick*, *Throckmorton*, and *Zafiro* all in one case in *United States v. Mayfield*.⁵¹⁹ *Mayfield* was a complex decision that involved denial of

⁵¹³ *Id.* See also *United States v. Wyner*, No. 98-10220, 2000 WL 1210150, at *2 (9th Cir. Aug. 25, 2000) ("Severance is necessary when '[e]ach defense theory contradicts the other in such a way that the acquittal of one necessitates the conviction of the other.' [citing *Tootick*, 952 F.2d at 1081]. That is not the situation here."); *Showa*, 1997 WL 801452, at *4 (finding defenses were not mutually exclusive, distinguishing *Tootick*, and implying that the decision in *Tootick* was based solely or primarily on the presence of mutually exclusive defenses).

⁵¹⁴ *United States v. Wyner*, No. CR-94-00539-1-MHP, 2000 WL 1210150, at *2 (9th Cir. Aug. 8, 2000) ("Severance is necessary when '[e]ach defense theory contradicts the other in such a way that the acquittal of one necessitates the conviction of the other.' [citing *United States v. Tootick*]"); *United States v. Venegas*, No. 97-10178, 1998 WL 862836, at *3 (9th Cir. Nov. 4, 1998) ("The *Tootick* court reversed the denial of the motion for severance, reasoning that 'the acquittal of one necessitates the conviction of the other.'"); see also *Showa*, 1997 WL 801452, at *4 (slightly more ambiguous on this point).

⁵¹⁵ 167 F.3d 1273 (9th Cir. 1999).

⁵¹⁶ *Id.* at 1276-77.

⁵¹⁷ *United States v. Stansberry*, No. 00-50199, 2002 U.S. App. LEXIS 25576 (9th Cir. Dec. 2, 2002); *United States v. Nunez-Hernandez*, No. 99-30006, 2000 WL 679256 (9th Cir. May 24, 2000); *Wyner*, 2000 WL 1210150; *United States v. Gilbert*, No. 98-50101, 1999 WL 681391 (9th Cir. Aug. 26, 1999); *United States v. Hanley*, 190 F.3d 1017 (9th Cir. 1999); *United States v. Briones*, Nos. 97-10369, 97-10370, 97-10371, 97-10372, 1998 WL 863026 (9th Cir. Nov. 30, 1998); *United States v. Smart*, Nos. 97-50161, 97-50162, 97-50163, 97-50164, 97-50165, 97-50267, 97-50269, 1998 WL 833605 (9th Cir. Oct. 6, 1998); *Showa*, 1997 WL 801452, at *4.

⁵¹⁸ *United States v. Angwin*, 271 F.3d 786 (9th Cir. 2001); *United States v. Burns*, Nos. 98-50771, 98-50772, 98-50025, 2000 WL 898739 (9th Cir. July 6, 2000); *Schmid v. Hoyt*, No. 99-35628, 2000 WL 793996 (9th Cir. June 20, 2000); *United States v. Gillam*, 167 F.3d 1273 (9th Cir. 1999); *Venegas*, 1998 WL 862836.

⁵¹⁹ 189 F.3d 895 (9th Cir. 1999). For more detailed discussion of this opinion, see Dewey, *supra* note 16.

confrontation rights issues, second-prosecutorial abuses, and insufficient limiting instructions together with sharply antagonistic defenses.⁵²⁰ In *Mayfield*, both defendants had access to an apartment where drugs were found,⁵²¹ and the court found that the facts of the case created a situation like that in *De Luna* or *Crawford* where at least one of the defendants had to have possession, such that the only defense for each defendant was the guilt of the other.⁵²² At trial, both defendants were convicted and sentenced to lengthy terms.⁵²³ The *Mayfield* court reversed, and offered three grounds for their decision: (1) mutually exclusive defenses that made denial of severance reversible error;⁵²⁴ (2) denial of Confrontation Clause rights;⁵²⁵ and (3) manifestly prejudicial, non-harmless error.⁵²⁶

In reaching its decision, the *Mayfield* court quoted *Throckmorton* and *Sherlock*'s language affirming a mandatory severance rule for mutually exclusive defenses along with *Tootick*'s and *Zafiro*'s language declining to adopt such a rule.⁵²⁷ For instance, the court said, "As we stated in *Sherlock*, '[a]ntagonism between defenses is insufficient [to mandate severance]; the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive.' . . . Even then, this circuit prior to *Zafiro* 'declin[ed] to adopt a per se rule against joinder.' [citing *Tootick*]. Instead, 'defendants must demonstrate that clear and manifest prejudice did in fact occur.'"⁵²⁸ In so doing, the *Mayfield* court was less than perfectly clear as to whether mutually exclusive defenses constitute such clear and manifest prejudice in themselves, or whether such actual prejudice required additional factors to be present. The court also drew on *Tootick* and *Zafiro* in discussing at length the obligation of trial judges to actively supervise trials and repeat limiting instructions in the wake of prejudicial events as necessary.⁵²⁹ This suggests an understanding that even where defendants offer true mutually exclusive defenses and attack each other in court, the trial judge still has a chance to effect a fair joint trial and so might not have to sever.

⁵²⁰ *Id.* at 897-900.

⁵²¹ *Id.* at 897-98, 900.

⁵²² *Id.* at 900.

⁵²³ *Id.* at 899.

⁵²⁴ *Id.* at 900.

⁵²⁵ *Id.* at 906.

⁵²⁶ *Id.*

⁵²⁷ *Id.* at 899, 903, 905.

⁵²⁸ *Id.* at 903. Ironically, the *Mayfield* majority juxtaposed the irreconcilable *Tootick* and *Ramirez-Sherlock* language without noting *Tootick*'s explicit rejection of the *Ramirez-Sherlock* "holding."

⁵²⁹ *Id.* at 905-06.

The *Mayfield* court's conscientious efforts to harmonize facially contradictory authority resulted in a relatively lengthy, complicated opinion that likely only added to the confusion surrounding mutually exclusive defenses rather than dispelling it. At one level, the message of *Mayfield* is obvious, and similar to that of *De Luna*: severance and retrial is proper where a defendant faces mutually exclusive defenses, and codefendant's counsel extensively elicits inadmissible evidence to engage in aggressive and abusive second-prosecutorial excesses, and the court takes insufficient steps to control such abuses or admonish the jury, and clear prejudice results. Like *De Luna*, the decision ultimately rests on multiple interwoven factors. Yet *Mayfield* is somewhat less clear than *De Luna* on how exactly to handle mutually exclusive defenses in isolation from the other factors; for unlike *De Luna*, the structure of the *Mayfield* decision gives the impression that mutually exclusive defenses might constitute a separate, independently sufficient ground for reversal in themselves. *Mayfield* approvingly cites and applies *Throckmorton's* language effectively offering a mandatory severance rule for mutually exclusive defenses even as it notes *Tootick's* explicit rejection of such a rule, indicating uncertainty as to what would constitute a mandatory severance rule.⁵³⁰

Whatever the *Mayfield* court may have intended to say about mutually exclusive defenses, subsequent decisions took its language as affirming the mandatory severance rule offered in *Throckmorton*.⁵³¹ In *United States v. Angwin*,⁵³² the court followed *Mayfield* in citing *Sherlock* and *Throckmorton* together with *Tootick* and *Zafiro*:

To warrant severance on the basis of antagonistic defenses, codefendants must show that their defenses are irreconcilable and mutually exclusive. *See Sherlock*. Defenses are mutually exclusive when "acquittal of one codefendant would necessarily call for the conviction of the other." [citing *Tootick*]; *see Throckmorton* (noting that

⁵³⁰ Judge Trott vigorously dissented in *Mayfield*, arguing that the core of the defenses—presence without possession (*Gilbert*) as against non-presence without possession (*Mayfield*) were not irreconcilable, and that because there was overwhelming evidence of *Mayfield's* guilt, the antagonism of the defenses caused *Mayfield* no prejudice. *See id.* at 908-09 (Trott, J., dissenting).

⁵³¹ *See generally* *United States v. Wyner*, 2000 No. 98-10220, 2000 WL 1210150 (9th Cir. Aug. 25, 2000) (citing *Mayfield* for the *Throckmorton* definition and quoting *Tootick* for a mandatory severance rule); *United States v. Nunez-Hernandez*, No. 99-30006, 2000 WL 679256 (9th Cir. May 24, 2000) (citing *Hanley*); *United States v. Hanley*, 190 F.3d 1017 (9th Cir. 1999) (quoting *Mayfield*, quoting *Throckmorton*).

⁵³² 271 F.3d 786 (9th Cir. 2001).

a defendant must show that the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant)]. Even when defendants present antagonistic defenses, such defenses "are not prejudicial per se." [citing *Zafiro*].⁵³³

This juxtaposition suggests that the *Angwin* court was drawing a terminological distinction between mutually exclusive defenses, deserving severance, and "antagonistic defenses" discussed in *Zafiro*; it also obviously overlooks what *Tootick* had to say about the *Sherlock* "rule."

Starting a hopeful trend in late 2002, some (though not all)⁵³⁴ Ninth Circuit panels began primarily following *Zafiro* and refraining from stating a mandatory severance rule in cases involving claims of mutually exclusive defenses.⁵³⁵ However, recent district court opinions from the Ninth Circuit have continued to rely heavily on *Throckmorton* to state a per se severance rule.⁵³⁶

L. The Tenth Circuit

The Tenth Circuit hesitantly began its dance with the doctrine of mutually exclusive defenses in 1977 in *United States v. Walton*.⁵³⁷ In *Walton*, the court agreed with language from the D.C. Circuit's opinion in *Rhone*⁵³⁸ declining to reverse where a defendant claimed he was prejudiced by his codefendant testifying when the defendant did not fail to argue for severance either before or during trial.⁵³⁹ The *Walton* court then went on to observe how the *Rhone* court

⁵³³ *Id.* at 795 (citations omitted).

⁵³⁴ *Id.*

⁵³⁵ *Phillippi v. Castro*, No. 01-56236, 2002 U.S. App. LEXIS 24010, at *3-*4 (9th Cir. Nov. 21, 2002); *Olson v. Stewart*, No. 00-16983, 2002 WL 31085260, at *1 (9th Cir. Sept. 18, 2002). The basic research for *Dewey*, *supra* note 16, was completed and made public for the first time in April of 2002, although the timing is almost certainly coincidental.

⁵³⁶ *Anderson v. Hickman*, No. C 99-4125 MHP, 2004 WL 883403, at *15 (N.D. Cal. Apr. 23, 2004); *Van Nguyen v. Knowles*, No. C02-1219VRW (PR), 2004 WL 911787, at *10 (N.D. Cal. Apr. 22, 2004); *United States v. Son Van Nguyen*, No. CR. S-99-0433 WBS, 2002 WL 32103063, at *1 (E.D. Cal. Nov. 7, 2002) (also citing *Sherlock* and *Tootick*).

⁵³⁷ 552 F.2d 1354 (10th Cir. 1977).

⁵³⁸ 365 F.2d 980, 981 (D.C. Cir. 1966).

⁵³⁹ *Walton*, 552 F.2d at 1360.

recognized the wide variety of circumstances that prejudice may result from in relation to joinder of defendants . . . where one defendant makes an inculpatory statement inadmissible against a co-defendant . . . ; where defendants present conflicting and irreconcilable defenses and there is a danger the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty; and where one defendant testifies and urges the jury to draw an adverse inference from his co-defendant's silence.⁵⁴⁰

The *Walton* court found no prejudice and did not incorporate the *Rhone* court's statements regarding irreconcilable defenses in any way.⁵⁴¹

Later, in *United States v. Roberts*,⁵⁴² a Tenth Circuit panel moved slightly closer toward a severance rule for mutually exclusive defenses when it cited the Fifth Circuit's opinion in *United States v. Johnson* for the proposition, "An antagonistic defense from a codefendant may require severance, particularly if that defense admits to some or all of the elements of the charge."⁵⁴³ But the *Roberts* court found no prejudice where the defenses were essentially consistent and the "trial judge carefully instructed the jury that nothing said by any of the attorneys could be considered evidence in the case and that the jury's view of the evidence, not the attorneys' views, was to control the decision."⁵⁴⁴ The *Roberts* court thus came fairly close to stating the same rule that the *Zafiro* Court would later state.⁵⁴⁵

The Tenth Circuit took a more dangerous step in 1981 in *United States v. Calabrese*.⁵⁴⁶ In *Calabrese*, in the course of discussing how the defendants' defenses were not directly antagonistic such that severance was not required, the court borrowed language from the Fourth and D.C. Circuits when it added, "Therefore, it was not the case that the defenses were irreconcilable, or that 'the jury (would) unjustifiably infer that this conflict alone demonstrates that both are guilty.'"⁵⁴⁷ Although this was far from a holding, it helped to set in motion the process that led later

⁵⁴⁰ *Id.* at 1360-61 (citations omitted).

⁵⁴¹ *Id.* at 1361.

⁵⁴² 583 F.2d 1173 (10th Cir. 1978).

⁵⁴³ *Id.* at 1177.

⁵⁴⁴ *Id.*

⁵⁴⁵ *Zafiro v. United States*, 506 U.S. 534, 538-39 (1993). See also *United States v. Petersen*, 611 F.2d 1313, 1331 (10th Cir. 1979).

⁵⁴⁶ 645 F.2d 1379 (10th Cir. 1981).

⁵⁴⁷ *Id.* at 1384 (quoting *Becker* (4th Cir. 1978) and *Ehrlichman* (D.C. Cir. 1976)).

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panels of the Tenth Circuit to assume that there was indeed such a holding at some point.

The Tenth Circuit went further down the path toward a per se severance rule in 1983 in *United States v. Burrell*.⁵⁴⁸ In an opinion upholding the district court's finding of insufficiently antagonistic defenses and thus no prejudice, the *Burrell* court noted, "In analogous cases where codefendants rely on different defenses, severance is not required unless the defendant proves that the defenses are so antagonistic that they are mutually exclusive. [citing *Mulherin* (11th Cir. 1983); *Banks* (7th Cir. 1982); *Calabrese*; *Roberts*]." ⁵⁴⁹ The *Burrell* panel might have slightly strengthened and mischaracterized the tentative statements on the issue in *Calabrese* and *Roberts*. But neither that, nor the court's brief allusion to what some foreign circuits had done, constituted anything close to a holding or a clear adoption of the foreign circuits' rules.

Other early Tenth Circuit decisions involving the issue of antagonistic defenses were more careful not to use language that could be read as a mandatory severance rule. One brief opinion, in answering defendants' claims of inconsistent and antagonistic defenses, simply stated, "We find no such inconsistency or antagonism" without invoking any authority.⁵⁵⁰ In *United States v. McClure*,⁵⁵¹ the court cited *Calabrese* in noting, quite tentatively, "This court has indicated, however, that *irreconcilable defenses* may require that defendants be tried separately."⁵⁵² Responding to the joint defendants' arguments, the *McClure* court continued,

Noting that we have never specifically defined or found such defenses [hence, no holding], [defendants] rely heavily upon [*United States v. Crawford* (5th Cir. 1978)], and [*United States v. Johnson* (5th Cir. 1973)] as cases demonstrating "irreconcilable and mutually exclusive defenses mandating severance." . . . Assuming *arguendo* that [defendants] presented, in theory, "irreconcilable

⁵⁴⁸ 720 F.2d 1488 (10th Cir. 1983).

⁵⁴⁹ *Id.* at 1492.

⁵⁵⁰ *United States v. Falcon*, 766 F.2d 1469, 1477 (10th Cir. 1985); *United States v. Woody*, 690 F.2d 678, 680 (10th Cir. 1982). See also *United States v. Puckett*, 692 F.2d 663, 671 (10th Cir. 1982); *United States v. Dill*, 693 F.2d 1012, 1014-15 (10th Cir. 1982).

⁵⁵¹ 734 F.2d 484 (10th Cir. 1984).

⁵⁵² *Id.* at 488.

and mutually exclusive” defenses, a review of the record reveals little, if any, actual prejudice.⁵⁵³

Regarding the question of whether the defendants had indeed made such a showing in theory, the court added in a footnote,

We are unconvinced that [defendants] have made even this showing. In our view, such a showing would require that the acceptance of one party’s defense would tend to preclude the acquittal of the other. Conversely, such a showing would seemingly require that the guilt of one defendant tends to establish the innocence of the other. [citing *Petullo* (7th Cir. 1983); *Crawford* (5th Cir. 1978); *Hyde* (5th Cir. 1971)]. In the present case, neither [defendant’s] abstract assertions of innocence necessarily tended to prove the other guilty . . . The jury could have logically accepted both theories. . . .⁵⁵⁴

Thus the *McClure* court was careful not to state a mandatory severance rule, and similarly careful not to adopt any holding from a foreign circuit. While the panel did spell out its thoughts regarding what would be required for a preliminary showing of irreconcilability in theory, it also made clear that such a showing would not be sufficient to demonstrate actual prejudice. Yet, although the *McClure* court could hardly have been more careful or more clear, later panels would take its language out of context as proof of a mandatory severance rule for irreconcilable defenses.

The court in *United States v. Swingler*⁵⁵⁵ was similarly circumspect. It cited *Roberts* in noting that the Tenth Circuit had “suggested” in the past that an “antagonistic defense from a codefendant may require severance,” and also noted *Calabrese* in passing.⁵⁵⁶ But, the *Swingler* court continued, “[E]xtensive research has disclosed that cases where the presence of antagonistic defenses has provided the basis for actual reversal of the denial of severance constitute an exceedingly small minority of all the cases in which courts of appeals have considered this issue.”⁵⁵⁷ The court noted that there were only three examples, all from

⁵⁵³ *Id.* at 488-89.

⁵⁵⁴ *Id.* at 488 n.1.

⁵⁵⁵ 758 F.2d 477 (10th Cir. 1985).

⁵⁵⁶ *Id.* at 494.

⁵⁵⁷ *Id.* at 495.

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the Fifth Circuit (*Romanello, Crawford, and Johnson*).⁵⁵⁸ The *Swingler* court then quoted *Romanello* for its classic statement of the Fifth Circuit's rule: "To compel severance the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive. . . . The essence or core of the defenses must be in conflict such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other."⁵⁵⁹ The *Swingler* court further observed, "Other circuits, when confronted with this problem, recite substantially similar language or a somewhat stronger variant originating in the former District of Columbia Circuit which requires that the conflict between co-defendant defenses be so intense that there is a danger the jury will unjustifiably infer from the conflict alone that both defendants are guilty."⁵⁶⁰

The *Swingler* court noted that the different results in the three Fifth Circuit cases grew out of the facts in those cases. It then lengthily reviewed those facts,⁵⁶¹ concluding that all three Fifth Circuit reversals had a common ingredient lacking in *Swingler*: at least one defendant directly accusing another.⁵⁶² The *Swingler* panel concluded, citing *McClure*, "In sum, neither Richardson's nor Houser's defense contained the sort of direct accusation that would have logically prevented the jury from accepting both theories, . . . and there is insufficient basis for finding such actual prejudice as would require us to hold the trial judge abused his discretion in denying the severance. [citing *McClure* for both propositions]." So the *Swingler* court carefully reasoned that the case at issue was not analogous to those in which a Fifth Circuit panel reversed for denial of severance; it never adopted the Fifth Circuit's mandatory severance rule or any other. It also followed the *McClure* court in distinguishing between what would be required to show logical or theoretical conflict between defenses versus actual prejudice, and it indicated that the former would be insufficient to require severance without the latter.

The last of the Tenth Circuit's circumspect opinions was *United States v. Smith*.⁵⁶³ In *Smith*, the court followed *McClure* in observing how the Tenth Circuit had "suggested that '*irreconcilable defenses* may require that

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.* at 495-96.

⁵⁶² *Id.* at 496.

⁵⁶³ 788 F.2d 663 (10th Cir. 1986).

defendants be tried separately.”⁵⁶⁴ The *Smith* court began to transform the *McClure* court’s footnote into a firmer rule:

To sustain a claim of error under this theory, a defendant must make a factual demonstration, not an abstract allegation, that “the acceptance of one party’s defense would tend to preclude the acquittal of other,” or that “(c)onversely, such a showing would seemingly require that the guilt of one defendant tends to establish the innocence of the other.”⁵⁶⁵

However, the *Smith* court still recognized that this showing was a necessary, but not a sufficient condition to gain severance, requiring a factual demonstration, not a mere abstract allegation. Later opinions gradually transformed this weak, “tends to” dictum regarding a necessary preliminary showing into another version of the per se severance rule, though this branch of the precedential tree withered soon after *Zafiro*.⁵⁶⁶

After *Smith*, Tenth Circuit jurisprudence on mutually antagonistic defenses began to go haywire. In *United States v. Esch*,⁵⁶⁷ the court declared, “Severance is not required where co-defendants rely on different defenses unless the defenses are so antagonistic that they are mutually exclusive.”⁵⁶⁸ This repeated language from *Burrell* as an unalloyed rule and dropped the qualifying language, “In analogous cases where codefendants rely on different defenses,” along with any mention of the supposed rule’s origins. *Esch* continued, “The conflict between co-defendant defenses must be so intense that there is a danger the jury will unjustifiably infer from the conflict alone that both defendants are guilty. [citing *Swingler*].”⁵⁶⁹ *Esch* thus treats *Swingler* as having adopted the D.C. Circuit rule that the *Swingler* court merely

⁵⁶⁴ *Id.* at 668.

⁵⁶⁵ *Id.*; see also *United States v. Brown*, 784 F.2d 1033, 1038 (10th Cir. 1986) (an opinion slightly earlier than *Smith*, but showing similar reasoning).

⁵⁶⁶ *United States v. Flanagan*, 34 F.3d 949, 951 (10th Cir. 1994) (stating the *McClure* language as a mandatory severance rule) (“Such prejudice [to require severance] is shown where the defendant demonstrates that his theory of defense is mutually antagonistic to that of a codefendant, in that ‘the acceptance of one party’s defense would tend to preclude the acquittal of [the] other’, or that ‘[c]onversely, such a showing would seemingly require that the guilt of one defendant tends to establish the innocence of the other.’ [quoting *Smith* and *McClure*]”); *United States v. Johnson*, 977 F.2d 1360, 1381 (10th Cir. 1992); *United States v. Peveto*, 881 F.2d 844, 857 (10th Cir. 1989).

⁵⁶⁷ 832 F.2d 531 (10th Cir. 1987).

⁵⁶⁸ *Id.* at 538.

⁵⁶⁹ *Id.*

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mentioned. Thus *Esch* stated as a rule what no Tenth Circuit panel had ever held previously: that severance is required where defenses are so antagonistic as to be mutually exclusive, and that mutual exclusivity is measured by the D.C. Circuit's "unjustifiable inference both are guilty" formula, ignoring the Fifth Circuit's "believe core of one, disbelieve other" version. Although the "both are guilty" rule never caught on that strongly in the Tenth Circuit, at least two subsequent opinions did follow *Esch* on that point.⁵⁷⁰

The progression from *Walton*, *Roberts*, and *Calabrese* through *Burrell*, *McClure*, *Swingler*, and *Esch* culminated in the opinion in *United States v. Peveto*.⁵⁷¹ In *Peveto*, two defendants accused each other of selling drugs, with one claiming that he was innocent and was held against his will by the other at a house where drugs were found, while the other claimed that he was in the process of becoming a police informant and was setting up drug dealers, such as his codefendant, when the house was searched.⁵⁷² The court found these to be mutually exclusive defenses sufficient to cause actual prejudice because to believe one defense, the jury had to disbelieve the other.⁵⁷³

In reaching its conclusion, the *Peveto* court stated numerous versions of the severance rule as though they were all established in the Tenth Circuit, and as though they were all in harmony:

Severance may be necessary when defenses are "so antagonistic that they are mutually exclusive." [citing *Esch* and *Burrell*, though both opinions ignored the "may" construction used in *Roberts* and instead implied that severance was mandatory where defenses are mutually exclusive]. A mere conflict of theories or one defendant's attempt to cast blame on another does not require severance. [citing *McClure* (10th Cir. 1984)]. Rather, [to mandate severance] the conflict between codefendants "must be so intense that there is a danger the jury will unjustifiably infer from the conflict alone that both defendants are guilty." [citing *Esch* and (mis)citing *Swingler*]. The defendant must demonstrate that the acceptance of one party's defense would tend to preclude the acquittal of the other, or that the guilt of

⁵⁷⁰ *United States v. Martinez*, 979 F.2d 1424, 1431 (10th Cir. 1992); *Peveto*, 881 F.2d at 857.

⁵⁷¹ 881 F.2d 844 (10th Cir. 1989).

⁵⁷² *Id.* at 857-58.

⁵⁷³ *Id.* at 858.

one defendant tends to establish the innocence of the other. [citing *Smith* and *Swingler*]. When mutually exclusive defenses are presented there is a chance that the jury will infer from the conflict the guilt of both parties. [citing *Walton*].⁵⁷⁴

Further on, the *Peveto* court also invoked the *Romanello* formula: “(defenses are mutually exclusive where the core of one defense is the guilt of another defendant).”⁵⁷⁵ The court noted that each defense tended to preclude acceptance of the other, and that the jury had found both defendants guilty. What the court apparently did not consider is that the D.C. Circuit’s version of the rule—so prejudicial the jury finds both guilty—is inconsistent with the version of the rule proclaimed in various other circuits—that to believe one, the jury must disbelieve the other. The slightly mushy language from the *McClure* court’s footnote—belief in one defense “tends” to preclude acquittal of the other defendant, or guilt of one “tends” to establish the innocence of the other—confuses the matter a little, but still, in essence, one version of the rule requires the jury to believe one defendant and not the other, while the other version requires them to disbelieve both. The *Peveto* court also did not consider other possibilities later discussed in *Zafiro* and other decisions: the possibility of curative instructions to mitigate prejudice, or whether the prosecution’s evidence against all defendants was so overwhelming that the prejudice the *Peveto* court found from a codefendant’s accusation was not really harmful, anyway.

In the wake of *Peveto*, Tenth Circuit jurisprudence on mutually antagonistic defenses went in various directions. One branch of the tree followed the language of *Roberts*, *McClure*, and *Smith* that irreconcilable defenses “may” require severance.⁵⁷⁶ Another short branch of the tree followed *Burrell* and *Esch* in stating that mutually exclusive defenses mandated severance.⁵⁷⁷

Yet another branch of the Tenth Circuit’s tangled tree of severance rules for mutually antagonistic defenses started after *Zafiro* with *United*

⁵⁷⁴ *Id.* at 857 (citations omitted).

⁵⁷⁵ *Id.* at 858.

⁵⁷⁶ *Id.* at 857. See also *United States v. Briseno-Mendez*, Nos. 96-2218, 96-2145, 96-2172, 1998 WL 440279, at *4 (10th Cir. July 17, 1998); *United States v. Martinez*, 979 F.2d 1424, 1431 (10th Cir. 1992); *United States v. Dirden*, 38 F.3d 1131, 1140 (10th Cir. 1994); *United States v. Johnson*, 977 F.2d 1360, 1380 (10th Cir. 1992); *United States v. Lane*, 883 F.2d 1484, 1499 (10th Cir. 1989).

⁵⁷⁷ *United States v. Verners*, 53 F.3d 291, 297 (10th Cir. 1995); *United States v. Schlapman*, No. 91-1086, 1992 WL 151808, at *4 (10th Cir. July 2, 1992).

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States v. Linn.⁵⁷⁸ The *Linn* court transformed the *Swingler* court's noncommittal reference to the Fifth Circuit's *Romanello* holding into a rule: "Defendants' claim that their defenses are mutually antagonistic. In this circuit, the conflict between codefendants' defenses must be such that 'the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other.' [citing *Swingler*]." ⁵⁷⁹ But the *Linn* court also recognized that *Zafiro* controlled their decision, that "[m]utually antagonistic defenses are not prejudicial *per se*," and that limiting instructions often will suffice to cure any risk of prejudice.⁵⁸⁰

In *Linn*, the defendants apparently made the unfortunate mistake of labeling their defenses "mutually antagonistic." In *United States v. Dirden*,⁵⁸¹ the court played a trick on itself by changing its terminology in such a way that it mistakenly thought that *Zafiro* was not controlling. The *Dirden* court properly quoted *Zafiro* as to *mutually antagonistic* defenses being not prejudicial *per se*,⁵⁸² but then went on to distinguish *mutually exclusive* defenses from mutually antagonistic ones: "The defenses truly must be mutually exclusive, such that the jury could not believe the core of one defense without discounting entirely the core of the other. [citing *Linn* and *Swingler*]." In other words, the *Dirden* court acknowledged that mutually *antagonistic* defenses are *not* prejudicial *per se*, but declared that mutually *exclusive* defenses *are*. The court thus took the *Linn* court's definition of mutually antagonistic defenses, which the *Linn* court recognized to be subject to no mandatory severance rule under *Zafiro*, and transformed it into a separate mandatory severance rule for the presumably separate category of mutually exclusive defenses. Various subsequent Tenth Circuit opinions followed the *Dirden* court's construction—acknowledging *Zafiro* on mutually antagonistic defenses but stating a different mandatory severance rule for mutually exclusive defenses.⁵⁸³

⁵⁷⁸ 31 F.3d 987 (10th Cir. 1994).

⁵⁷⁹ *Id.* at 992.

⁵⁸⁰ *Id.*

⁵⁸¹ 38 F.3d 1131 (10th Cir. 1994).

⁵⁸² *Id.* at 1141.

⁵⁸³ *United States v. Dazey*, 403 F.3d 1147, 1165 (10th Cir. 2005) (ignoring *Zafiro*); *Carter v. Gibson*, No. 00-6177, 2001 U.S. App. LEXIS 26938, at *33 (10th Cir. Dec. 18, 2001); *Jump v. Gibson*, No. 00-6350, 2001 U.S. App. LEXIS 22354, at *5 (10th Cir. Oct. 15, 2001); *Fox v. Ward*, 200 F.3d 1286, 1293 (10th Cir. 2000); *Plantz v. Massie*, Nos. 99-6075, 97-CV-963-R, 2000 WL 743677, at *6 (10th Cir. June 9, 2000); *Arbuckle v. Dorsey*, No. 98-2262, 1999 WL 672274, at *3 (10th Cir. Aug. 30, 1999); *United States v. Briseno-Mendez*, Nos. 96-2218, 96-2145, 96-2172, 1998 WL 440279, at *4 (10th Cir. July 17, 1998).

After the *Zafiro* ruling, various Tenth Circuit panels dutifully relied on it, though such opinions tend to be clustered in the years immediately after *Zafiro*.⁵⁸⁴ Although most of these opinions only addressed the question of “mutually antagonistic” defenses, two of them understood that *Zafiro* also controlled on “mutually exclusive” defenses.⁵⁸⁵ Later, in the wake of *Dirден*, Tenth Circuit panels increasingly tended to follow that decision in citing *Zafiro* regarding mutually antagonistic defenses, or at least noting its existence, but stating a different rule regarding mutually exclusive defenses.⁵⁸⁶ And, as in other circuits, some Tenth Circuit opinions ignored or overlooked *Zafiro* altogether.⁵⁸⁷ Yet encouragingly, two recent district court decisions from the Tenth Circuit relied primarily on *Zafiro*.⁵⁸⁸

M. The Eleventh Circuit

The Eleventh Circuit was formed by splitting off the eastern portion of the old Fifth Circuit (Unit B) in 1981.⁵⁸⁹ In 1981, the Eleventh Circuit

⁵⁸⁴ United States v. Morris, No. 00-5255, 2002 U.S. App. LEXIS 12567, at *16 (10th Cir. June 25, 2002); United States v. Yazzie, 188 F.3d 1178, 1194 (10th Cir. 1999); United States v. Gutierrez, No. 95-6013, 1996 WL 36273589, at *3 (10th Cir. June 28, 1996); United States v. Chitwood, No. 94-6142, 1995 WL 216900, at *2 (10th Cir. Apr. 12, 1995); United States v. Fairchild, No. 93-3090, 1995 WL 21608, at *3 (10th Cir. Jan. 12, 1995); United States v. Williams, 45 F.3d 1481, 1484 (10th Cir. 1995); United States v. Linn, 31 F.3d 987, 992 (10th Cir. 1994); United States v. Scott, 37 F.3d 1564, 1580 (10th Cir. 1994); United States v. Brantley, 986 F.2d 379, 383 & n.2 (10th Cir. 1993); United States v. Dominguez-Alparо, No. 90-2240, 1993 WL 76266, at *3 (10th Cir. Mar. 16, 1993); United States v. Holland, 10 F.3d 696, 698 (10th Cir. 1993); see also United States v. Guebara, No. 00-3048, 2001 U.S. App. LEXIS 11764, *9-*10 (10th Cir. June 5, 2001).

⁵⁸⁵ *Brantley*, 986 F.2d at 383 n.2; *Scott*, 37 F.3d at 1580.

⁵⁸⁶ United States v. Dazey, 403 F.3d 1147, 1165 (10th Cir. 2005) (noting *Zafiro*, but not specifically regarding mutually antagonistic defenses); *Carter*, 2001 U.S. App. LEXIS 26938, at *33; *Fox v. Ward*, 200 F.3d 1286, 1293 (10th Cir. 2000); *Plantz v. Massie*, Nos. 99-6075, 97-CV-963-R, 2000 WL 743677, at *6 (10th Cir. June 9, 2000); *Arbuckle v. Dorsey*, No. 98-2262, 1999 WL 672274, at *3 (10th Cir. Aug. 30, 1999); United States v. *Dirден*, 38 F.3d 1131, 1141 (10th Cir. 1994).

⁵⁸⁷ *Jump v. Gibson*, No. 00-0350, 2001 U.S. App. LEXIS 22354, at *5 (10th Cir. Oct. 15, 2004) (though quoting *Fox* for *Zafiro*'s statement that “Mutually antagonistic defenses are not prejudicial *per se*”); United States v. *Verners*, 53 F.3d 291, 297 (10th Cir. 1995); United States v. *Flanagan*, 34 F.3d, 949, 951, 952 (10th Cir. 1994).

⁵⁸⁸ United States v. *Mower*, 351 F. Supp. 2d 1225, 1231 (D. Utah 2005); United States v. *Hernandez-Sendejas*, 268 F. Supp. 2d 1295, 1304 (D. Kan. 2003).

⁵⁸⁹ The Fifth Circuit lost Georgia, Alabama, and Florida to the new Eleventh Circuit under a federal statute that went into effect on October 1, 1981. See United States Court of Appeals for the Eleventh Circuit, *General Order Number 1*, <http://www.ca11.uscourts.gov/documents/pdfs/GO%201.pdf> (last visited Aug. 31, 2006); United States Court of Appeals for the Fifth Circuit, http://en.wikipedia.org/wiki/Fifth_Circuit_Court_of_Appeals (last visited Aug. 31, 2006); United States Court of Appeals for the Eleventh Circuit, http://en.wikipedia.org/wiki/Eleventh_Circuit_Court_of_Appeals (last visited Aug. 31, 2006).

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adopted as binding precedent all decisions of the former Fifth Circuit,⁵⁹⁰ and in 1982, it further adopted as precedent all decisions of the former Unit B of the Fifth Circuit.⁵⁹¹ The Eleventh Circuit thus inherited the Fifth's body of precedent regarding mutually exclusive defenses and followed it closely for many years. Particularly since the *Berkowitz* decision came from Unit B, this meant a heavy reliance on its "to believe core of one defense, must disbelieve other" construction. In *United States v. Riola*,⁵⁹² the court borrowed two constructions from *Berkowitz*: "[T]o compel severance the defenses must be more than merely antagonistic — they must be antagonistic to the point of being mutually exclusive . . . or irreconcilable";⁵⁹³ and

'[T]he defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant . . . Ultimately, the test is whether the defendant received a fair trial.'⁵⁹⁴

Various Eleventh Circuit opinions used only the first of these constructions,⁵⁹⁵ others used only the second,⁵⁹⁶ and most used both as in *Riola*.⁵⁹⁷

⁵⁹⁰ *United States v. Rucker*, 915 F.2d 1511, 1513 n.2 (11th Cir. 1990); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

⁵⁹¹ *Stein v. Reynolds Sec.*, 667 F.2d 33, 34 (11th Cir. 1982); *Rucker*, 915 F.2d at 1513 n.1.

⁵⁹² 694 F.2d 670 (11th Cir. 1983).

⁵⁹³ *Id.* at 672 (quoting *Berkowitz*).

⁵⁹⁴ *Id.*

⁵⁹⁵ *United States v. Garcia*, 405 F.3d 1260, 1272 (11th Cir. 2005); *United States v. Beasley*, 2 F.3d 1551, 1558 (11th Cir. 1993); *United States v. Gutierrez*, 931 F.2d 1482, 1492 (11th Cir. 1991); *United States v. Casamayor*, 837 F.2d 1509, 1512 (11th Cir. 1988); *United States v. Puig*, 810 F.2d 1085, 1088 (11th Cir. 1987); *United States v. Andrews*, 765 F.2d 1491, 1498 (11th Cir. 1985); *United States v. Reme*, 738 F.2d 1156, 1165 (11th Cir. 1984); *United States v. Pirolli*, 742 F.2d 1382, 1385 (11th Cir. 1984); *United States v. Mulherin*, 710 F.2d 731, 736 (11th Cir. 1983); *United States v. Walker*, 720 F.2d 1527, 1534 (11th Cir. 1983); *United States v. Vadino*, 680 F.2d 1329, 1335 (11th Cir. 1982).

⁵⁹⁶ *United States v. Garate-Vergara*, 942 F.2d 1543, 1552 (11th Cir. 1991); *Smith v. Kelso*, 863 F.2d 1564, 1568 (11th Cir. 1989); *United States v. Caporale*, 806 F.2d 1487, 1510 (11th Cir. 1986); *United States v. Badolato*, 701 F.2d 915, 923 (11th Cir. 1983).

⁵⁹⁷ *United States v. Cassano*, 132 F.3d 646, 652 (11th Cir. 1998) (ironically citing *Zafiro* for the proposition that a better chance of acquittal does not justify severance, but ignoring it with regard to mutually exclusive defenses); *United States v. Frost*, 61 F.3d 1518, 1526 (11th Cir. 1995); *United States v. Knowles*, 66 F.3d 1146, 1159 (11th Cir. 1995); *United States v.*

Of the opinions citing some or all of *Berkowitz's* language regarding defenses being antagonistic to the point of being mutually exclusive or irreconcilable, although Eleventh Circuit panels generally were careful to use both terms as in *Berkowitz*, some linked them with “or,”⁵⁹⁸ while others rephrased the language to read “mutually exclusive and irreconcilable.”⁵⁹⁹ This would be wholly insignificant, except for the unfortunate tendency of courts in various circuits to treat the two terms as different categories rather than two different ways of saying basically the same thing. The use of the two terms with either “and” or “or” tended to raise a certain ambiguity as to whether they are the same or different; the use of “or” perhaps made it easier for courts to treat the terms as different categories. Perhaps reflecting an understanding that the two terms were effectively identical, or else reflecting confusion over the issue, various opinions used only “mutually exclusive,” either taking only one of the two terms directly or indirectly from *Berkowitz* or drawing on earlier Fifth Circuit precedent.⁶⁰⁰ Other opinions used only the term “irreconcilable” in their statements of the “rule,”⁶⁰¹ though some of these decisions sidestepped *Berkowitz* and instead drew on an earlier, much shakier Fifth Circuit decision for authority — *United States v.*

Cross, 928 F.2d 1030, 1038 (11th Cir. 1991); *United States v. Perez-Garcia*, 904 F.2d 1534, 1547 (11th Cir. 1990); *Rucker*, 915 F.2d at 1513; *United States v. Castillo-Valencia*, 917 F.2d 494, 498 (11th Cir. 1990); *United States v. Farrell*, 877 F.2d 870, 876 (11th Cir. 1989); *United States v. Gonzalez*, 803 F.2d 691, 694 (11th Cir. 1986); *United States v. Sawyer*, 799 F.2d 1494, 1504 (11th Cir. 1986); *United States v. Carter*, 760 F.2d 1568, 1574-75 (11th Cir. 1985); *United States v. Esle*, 743 F.2d 1465, 1476 (11th Cir. 1984); *United States v. Magdaniel-Mora*, 746 F.2d 715, 718 (11th Cir. 1984); *United States v. Stephenson*, 708 F.2d 580, 582 (11th Cir. 1983); *United States v. Bovain*, 708 F.2d 606, 610 (11th Cir. 1983).

⁵⁹⁸ *Cassano*, 132 F.3d at 652; *Cross*, 928 F.2d at 1038 (misquoting *Castillo-Valencia*); *Rucker*, 915 F.2d at 1513; *Perez-Garcia*, 904 F.2d at 1534 (misquoting *Magdaniel-Mora*); *Sawyer*, 799 F.2d at 1504; *Carter*, 760 F.2d at 1574; *Stephenson*, 708 F.2d at 582; *Esle*, 743 F.2d at 1476.

⁵⁹⁹ *Frost*, 61 F.3d at 1526; *Gutierrez*, 931 F.2d at 1492; *Farrell*, 877 F.2d at 876; *Casamayor*, 837 F.2d at 1512; *Puig*, 810 F.2d at 1088; *Andrews*, 765 F.2d at 1498; *Magdaniel-Mora*, 746 F.2d at 718; *Reme*, 738 F.2d at 1165; *Walker*, 720 F.2d at 1534.

⁶⁰⁰ *Knowles*, 66 F.3d at 1159 (citing *Castillo-Valencia*); *Garcia*, 405 F.2d at 1272 (quoting *Knowles*); *Beasley*, 2 F.3d at 1558 (citing *Castillo-Valencia*); *Castillo-Valencia*, 917 F.2d at 498 (citing *Berkowitz*); *Gonzalez*, 804 F.2d at 695 (antagonistic and mutually exclusive); *Pirolli*, 742 F.2d at 1385 (quoting *Berkowitz*); *Bovain*, 708 F.2d at 610 (quoting *Crawford* on that point, though quoting *Berkowitz* for its “core of defense” language); *Mulherin*, 710 F.2d at 736 (citing *Salomon*); *Vadino*, 680 F.2d at 1335 (citing *Salomon*).

⁶⁰¹ *United States v. Thomas*, 987 F.2d 697, 704 (11th Cir. 1993) (citing *Harmas*); *United States v. Harmas*, 974 F.2d 1262, 1269 (11th Cir. 1992) (citing *Bovain*, but changing “mutually exclusive” in *Bovain* to “irreconcilable”); *United States v. Badolato*, 701 F.2d 915, 923 (11th Cir. 1983) (citing *Capo* for irreconcilable conflict of defenses while also quoting *Berkowitz* for the “core of defense” language); *United States v. Badolato*, 701 F.2d 915, 923 (11th Cir. 1983) (citing *Capo* for irreconcilable conflict of defenses while also quoting *Berkowitz* for the “core of defense” language); *United States v. Capo*, 693 F.2d 1330, 1335 (11th Cir. 1982) (citing *Herring* (5th Cir. 1979)).

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Herring,⁶⁰² which represented almost the only instance of a brief and abortive attempt to introduce the “both are guilty” version into Fifth Circuit jurisprudence.⁶⁰³ Interestingly, the last “irreconcilable-alone” language appears just before the *Zafiro* holding.

The Eleventh Circuit did explore other possible versions of the severance “rule” in the pre-*Zafiro* years, though less than most other circuits. In *United States v. Caporale*,⁶⁰⁴ the court lumped together the *Berkowitz* “believe core of one, must disbelieve other” language with the “both are guilty” version of the rule borrowed from *Herring* to form a compound, hybrid, possibly internally inconsistent rule, as in other circuits.⁶⁰⁵ This new “rule” had a short history in the Eleventh Circuit.⁶⁰⁶ In *United States v. Walker*,⁶⁰⁷ the court stated that “[s]everance may be required” when defenses are “mutually exclusive and irreconcilable” or “when under all the circumstances of the case and as a practical matter the jury cannot keep separate the evidence relevant to each defendant and render a fair and impartial verdict as to each.”⁶⁰⁸ The *Walker* court concluded that the evidence against the appellant was so overwhelming that it was “impossible to conclude that he was convicted as a result of an unfair trial.”⁶⁰⁹ As a result, the *Walker* court suggested a more cautious rule on severance that was closer to the later *Zafiro* holding and also somewhat echoed the Eighth Circuit’s *Gutberlet* construction. However, no other Eleventh Circuit panels embraced it. Similarly, in *Smith v. Kelso*,⁶¹⁰ the court cited *Berkowitz*’s “core” language, then offered a systematic test for applying the rule from *Berkowitz*:

We believe that proper application of this test requires that courts move step-by-step through the following four-step analysis.

- (1) Do the alleged conflicts with co-defendants’ defenses go to the essence of the appellant’s defense?

⁶⁰² 602 F.2d 1220 (11th Cir. 1979).

⁶⁰³ *Id.* at 1225.

⁶⁰⁴ 806 F.2d 1487 (11th Cir. 1986).

⁶⁰⁵ *Id.* at 1510.

⁶⁰⁶ *United States v. Cross*, 928 F.2d 1030, 1038 (11th Cir. 1991); *see also Capo*, 693 F.2d at 1335 (also invoking *Herring*).

⁶⁰⁷ *United States v. Walker*, 720 F.2d 1527 (11th Cir. 1983).

⁶⁰⁸ *Id.* (emphasis added) (citing *United States v. Tillman*, 406 F.2d 930, 935 (5th Cir. 1969) for the latter proposition).

⁶⁰⁹ *Id.* at 1534.

⁶¹⁰ 863 F.2d 1564 (11th Cir. 1989).

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(2) Could the jury reasonably construct a sequence of events that accommodates [sic] the essence of both defendants' defenses?

(3) Did the conflict subject the appellant to compelling prejudice?

(4) Could the trial judge ameliorate the prejudice?⁶¹¹

Applying this test, the court found no error in denial of prejudice. Notably, the *Kelso* test required consideration of possible cure or mitigation of prejudice by the trial judge, just as the *Zafiro* holding later would, while the third step also might be read to require a showing of actual prejudice beyond the mere fact of sharply conflicting defenses. But no other Eleventh Circuit panel ever adopted this test.

In *United States v. Gossett*,⁶¹² the court suggested a rule that in many cases would bypass most of the mutual exclusivity analysis before it even got started. The court noted that both defendants' motions for severance on grounds of "antagonistic and mutually exclusive" defenses were "vague and conclusory, presenting no information upon which the court could determine that the defenses were irreconcilable. When a defendant fails to provide the court with any basis to grant his motion for severance, such as the nature of his defense and in what respect, if any, his defense is irreconcilable with that of his co-defendant, his motion should be denied. [citing *United States v. Spitler* (4th Cir. 1986)]."⁶¹³ But no other Eleventh Circuit panels made use of this helpful shortcut.

Thus the Eleventh Circuit's jurisprudence on mutually antagonistic defenses was relatively uniform in its reliance on *Berkowitz* and related opinions up to the time of the *Zafiro* holding, with only relatively minor variations in terminology or limited explorations of other rules. The various opinions based on *Berkowitz* still contain a latent potential ambiguity, in that opinions that state, in one form or another, that to compel severance, a defendant must show that defenses are mutually exclusive, or that severance is compelled where defenses are mutually exclusive, do not also state explicitly that such a showing is sufficient in

⁶¹¹ *Id.* at 1568.

⁶¹² 877 F.2d 901 (11th Cir. 1989).

⁶¹³ *Id.* at 904.

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itself to mandate severance and no other showing is required.⁶¹⁴ Yet to any reader not specifically looking for such ambiguity, the Eleventh Circuit's jurisprudence would have presented a very clear mandatory severance rule for mutually exclusive defenses.

In the wake of *Zafiro*, certain Eleventh Circuit panels had flashes of bold insight, recognizing the full significance of *Zafiro* to an extent some other circuits did not. In *United States v. Stollar*,⁶¹⁵ the court declared, "Finally, the Supreme Court has put to rest the question of severance whenever codefendants have conflicting defenses."⁶¹⁶ The *Stollar* court quoted *Zafiro* regarding how mutually antagonistic defenses are not prejudicial per se, how Rule 14 does not require severance even if prejudice is shown but leaves tailoring of relief to the district court, how severance should only be granted where there is a serious risk that joint trial would compromise a specific trial right of a defendant or prevent the jury from making a reliable judgment about guilt or innocence, and how proper limiting instructions sometimes could cure any resulting prejudice.⁶¹⁷ Later, in *United States v. Talley*,⁶¹⁸ the court went farther. Responding to defendants' reliance on *United States v. Rucker*,⁶¹⁹ a 1990 case in which the Eleventh Circuit reversed for denial of severance based upon mutually exclusive defenses alone,⁶²⁰ the *Talley* court observed that *Zafiro* had "undercut severely" the *Rucker* court's reasoning, which was

⁶¹⁴ The degree of this latent ambiguity varies slightly with different language. See, e.g., *United States v. Knowles*, 66 F.3d 1146, 1159 (11th Cir. 1995) ("In order to compel severance, the defenses of co-defendants . . . 'must be antagonistic to the point of being mutually exclusive.'"); *United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990) ("A defendant may prove compelling prejudice by showing that he and his co-defendants advanced defenses so antagonistic as to be 'irreconcilable or mutually exclusive.' [This leaves little, if any, ambiguity]."); *United States v. Andrews*, 765 F.2d 1491, 1498 (11th Cir. 1985) (To show compelling prejudice, "[i]t is necessary that the two defenses be mutually exclusive and irreconcilable."); *United States v. Carter*, 760 F.2d 1568, 1574 (11th Cir. 1985) ("In order to justify severance due to conflicting defenses, a defendant must demonstrate that the defenses are antagonistic to the point of being mutually exclusive or irreconcilable."). This does not rule out the possibility that something else may be required also. *United States v. Reme*, 738 F.2d 1156, 1165 (11th Cir. 1984) ("To obtain a severance on grounds of conflicting defenses a defendant must show that the defenses . . . are mutually exclusive and irreconcilable."); *United States v. Mulherin*, 710 F.2d 731, 736 (11th Cir. 1983) ("To require severance the defenses must be so antagonistic that they are mutually exclusive." This could be either a sufficient condition in itself, or merely a necessary but insufficient condition.)

⁶¹⁵ 10 F.3d 1574 (11th Cir. 1994).

⁶¹⁶ *Id.* at 1578.

⁶¹⁷ *Id.* at 1578-79.

⁶¹⁸ 108 F.3d 277 (11th Cir. 1997).

⁶¹⁹ 915 F.2d 1511 (11th Cir. 1990).

⁶²⁰ *Id.* at 1513.

based upon the assumption that mutually antagonistic defenses compel severance.⁶²¹ As in *Stollar*, the *Talley* court closely followed *Zafiro*, including its recognition of the curative powers of limiting instructions and that defendants would not face prejudice from mutually antagonistic defenses where the government offered sufficient independent evidence of guilt.⁶²² Finally, in *United States v. Blankenship*,⁶²³ the court not only closely followed *Zafiro*, but also correctly stated that *Zafiro* implicitly overruled both *Rucker* and *Esle*,⁶²⁴ both of which gave the “mutually exclusive or irreconcilable” and “core” language from *Berkowitz*.⁶²⁵ The *Blankenship* court explicitly recognized that a recent post-*Zafiro* opinion from the Eleventh Circuit, *United States v. Cassano*, had cited the old *Berkowitz* rule, ignored *Zafiro*, was in conflict with *Stollar*, but clearly rejected *Cassano* in favor of *Stollar* and *Zafiro*.⁶²⁶

However, various other post-*Zafiro* panels of the Eleventh Circuit missed the point of *Zafiro* along with the *Cassano* panel. Most of these did not mention *Zafiro* at all.⁶²⁷ In the most recent opinion from the Eleventh Circuit involving mutually exclusive defenses, *United States v. Garcia*,⁶²⁸ the court seemingly tried to play it safe by stating the first portion of the old *Berkowitz* rule via *United States v. Knowles*⁶²⁹— “[T]o compel severance, the defenses of co-defendants must be more than merely antagonistic, they ‘must be antagonistic to the point of being mutually exclusive’”—but then following it with *Zafiro*’s language requiring a serious risk that joint trial would compromise a specific trial right or prevent the jury from making a reliable judgment and noting the *Zafiro* court’s faith in the curative powers of limiting instructions.⁶³⁰ But like various other earlier efforts in various circuits to make a compound rule by cobbling together inconsistent standards, the mandatory severance language from *Knowles*/*Berkowitz* cannot coexist with *Zafiro*.

Even though they preceded *Blankenship*, two relatively recent district court opinions from the Eleventh Circuit that address the issue of

⁶²¹ *United States v. Talley*, 108 F.3d 277, 279-80 (11th Cir. 1997).

⁶²² *Id.* at 280-81.

⁶²³ 382 F.3d 1110 (11th Cir. 2004).

⁶²⁴ *Id.* at 1122 & n.23.

⁶²⁵ *Rucker*, 915 F.2d at 1513; *United States v. Esle*, 743 F.2d 1465, 1476 (11th Cir. 1984).

⁶²⁶ *United States v. Blankenship*, 382 F.3d 1110, 1125 n.27 (11th Cir. 2004).

⁶²⁷ *United States v. Frost*, 61 F.3d 1518, 1526 (11th Cir. 1995); *United States v. Knowles*, 66 F.3d 1146, 1159 (11th Cir. 1995); *United States v. Beasley*, 2 F.3d 1551, 1558 (11th Cir. 1993).

⁶²⁸ 405 F.3d 1260 (11th Cir. 2005).

⁶²⁹ 66 F.3d 1146, 1159 (11th Cir. 1995).

⁶³⁰ *Id.*

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mutually exclusive defenses followed *Talley* and *Zafiro* and properly rejected appellants' invocations of pre-*Zafiro* precedent.⁶³¹

N. Concluding Summary: The Circuits' Experiences with Mutually Exclusive Defenses

Thus, in exploring and borrowing the mandatory severance rule for mutually exclusive defenses, the circuits wove a tangled web and got enmeshed in it. From an innocent observation regarding situations in which prejudice from joinder of defendants may arise, the D.C. Circuit inexorably arrived at a mandatory severance rule whenever "defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." The Seventh Circuit, after toying with the D.C. Circuit's version, misread *Kahn* and *McPartlin* in *Ziperstein* to declare into existence a "well-established" mandatory severance rule whenever "the acceptance of one party's defense will preclude acquittal of the other." Similarly, the Fifth Circuit dabbled in the D.C. Circuit's jurisprudence before borrowing and similarly misreading *Kahn* to assume the mandatory severance rule into existence.

After the original sins of the pioneering circuits, the borrowers only compounded the problems. The First Circuit first borrowed the D.C. Circuit's "both are guilty" rule directly from the D.C. Circuit and indirectly from a different borrower. Then it imported the alternate version—mandatory severance where "defenses are so inconsistent that the jury would have to believe one defendant at the expense of the other"—while citing only earlier First Circuit decisions that did not support the alternate version. Only later did the First Circuit import the main version directly from the Fifth and Seventh Circuits. The Second Circuit imported the main version from the Fifth Circuit, then later, ironically, imported the D.C. Circuit version from the Fifth Circuit as well. The Third Circuit, despite a relatively clean record, first imported a mandatory severance rule after *Zafiro*, and ironically took the "acquit one, convict other" version from the Ninth Circuit's *Tootick* opinion, which rejected such a rule, while also borrowing the D.C. Circuit's "both are guilty" version from *Harris* (one of the very few cases where the Sixth Circuit got the issue of mutually exclusive defenses wrong). The Fourth Circuit borrowed from the D.C. Circuit. The Eighth Circuit borrowed from the D.C. Circuit and the Fifth Circuit. The Ninth Circuit borrowed

⁶³¹ *United States v. Aiken*, 76 F. Supp. 2d 1346, 1357-58 (S.D. Fla. 1999); *United States v. Bodie*, 990 F. Supp. 1419, 1423-24 (S.D. Fla. 1997) (noting that the *Talley* court's rejection of *Rucker* also applied to *Kelso*).

from the Fifth and Seventh Circuits. Early on, the Tenth Circuit did its best not to borrow recklessly from foreign circuits, and then threw caution to the wind by misreading its earlier decisions as having adopted both the D.C. Circuit and Fifth and Seventh Circuits' versions of the rule. The Eleventh Circuit, having been split off from the Fifth, was born with the latter circuit's *Berkowitz* rule.

In this process of borrowing and assuming the mandatory severance rule into existence, most circuits never recognized that there was no proper holding to support the supposed rule. Even in those rare cases before *Zafiro* in which courts recognized the absence of a holding, as with *Tootick* in the Ninth Circuit and *McClure* in the Tenth, this did not stop subsequent panels from ignoring such warnings and following other panels in assuming the rule into existence. And in those few cases in which appellate courts reversed for failure to sever due to irreconcilable defenses—the only situations in which a holding on the issue was required—the courts did not consider the issue anew, but merely followed their predecessors in assuming a preexisting rule. As such, except for *Tootick*, there never was a real holding on the issue in any of the circuits.

Post-*Zafiro*, despite what should have constituted a very major wake-up call, the performance of some circuits hardly improved, while various others had spotty records of obeying the Supreme Court's command. The pioneer circuits largely cleaned up their acts and followed *Zafiro*. The Eighth, Ninth, and Tenth Circuits, though often showing awareness of the existence of *Zafiro*, frequently ignored or misunderstood it on the crucial question of whether or not there is a mandatory severance rule for mutually exclusive defenses. The First and Second Circuits have frequently shown post-*Zafiro* confusion over how to handle the issue and the Third and Fourth Circuits have sometimes shown the same confusion. The Eleventh Circuit has shown remarkable perceptiveness in explicitly stating that *Zafiro* had indeed overruled some of its earlier case law on the issue, although competing cases have kept the mandatory severance rule still alive there. All the while, the Sixth Circuit has continued mostly unswervingly in its stately indifference to the frenzy of borrowing and confusion that has afflicted other circuits.

V. WHAT WENT WRONG?

The question remains: exactly what went wrong, and why? How did so many conscientious, top-notch federal judges and clerks assume

an unfounded rule into existence, then entrench it so deeply in case law that even the Supreme Court could not blast it out?

The first point to emphasize in attempting to answer these questions is that with rare exceptions, the tangled doctrinal mess regarding mutually exclusive defenses was not the fault of particular individuals, chambers, or panels. Certainly specific identifiable errors helped greatly to set the whole process in motion—a Seventh Circuit panel’s groundless announcement of a “well established standard” and wholesale misreading of *Kahn* in *Ziperstein*, the Fifth Circuit’s similar misreading of *Kahn* in *Wilson*, and a Tenth Circuit panel’s disregard of the cautious language from *McClure* and *Swingler* in *Esch* leap to mind. Yet beyond such individual mistakes, error mostly occurred and piled ever higher as a result of individuals working conscientiously within a judicial system which largely lacked mechanisms for detecting and cleaning out such error, and instead tended to magnify and reinforce the error cumulatively over time. The system showed these flaws both in the initial development of the doctrine of mutually exclusive defenses and after the Supreme Court’s effort to clarify the situation in *Zafiro*. And ironically, in some cases, the more conscientious the judges and judicial adjuncts, the more trouble into which they got themselves.

All in all, the federal circuits behaved like a computer network with no antivirus software, allowing the error to multiply and jump freely from circuit to circuit almost entirely without challenge. If certain panels were like surveyors who hammered in their markers in the wrong places, most subsequent panels thenceforward dutifully and religiously observed those markers without question in their own triangulations. As such, the story of the federal mutually exclusive defenses doctrine calls for the consideration of altered practices and techniques to help busy judges and clerk avoid the sort of confusion and error that arose in this situation. For most courts did what the system demanded. But the system broke down.

So what were the causes of this breakdown? There are many possible factors, and the following list may not be entirely complete. But among the primary factors are: (1) A focus on recentness in legal research that allows error to become quickly embedded in case law and concealed by more recent decisions, and hence almost undiscoverable; (2) Connected with (1), a herd instinct in judicial process that leads judges to place excessive faith in the holdings (or dicta) of other courts, to seek security in the statements of other courts without considering the issues afresh, and to create the illusion of such security by declaring into

existence “established rules” that have never been established; (3) Connected with (2), unrelenting hydraulic pressure by the judiciary to transform more general commentary into ironclad rules, or to turn inclusive lists of factors into exclusive checklists; (4) Also connected with (2), a tendency to repeat rules, holdings, or dicta without fully considering what they actually mean or their congruence with other rules; (5) Inadvertent linguistic errors, such as taking language out of context and linguistic drift in the phrasing of rules that leads to linguistic confusion, instability in definitions, and the inability to recognize the common meaning and origins of superficially different terms; (6) Connected with (1) and (2), a reliance on other panels’ interpretations of a Supreme Court ruling in place of revisiting that ruling, and the failure to recognize the full significance of the ruling; (7) Connected with (2), a tendency to ignore other panels’ warnings about problems with a supposed rule; (8) Discussing issues that do not strictly need to be decided; (9) Connected with (2) and (5), difficulty distinguishing dicta from holdings.

A. *The Pursuit of Recentness*

As anyone who ever has worked as a clerk or extern in a federal district or circuit court will know, busy judges and clerks facing crowded dockets are interested in learning what the “correct” (i.e., current) legal rule on some issue is at the time when a decision must be made on that issue in a particular case. Regardless of intellectual curiosity that otherwise might make them probe a particular issue deeper, judicial officers seldom have the time to indulge it. So judges and clerks typically round up one or a few very recent cases to cite as proof of the currency of a rule, then go on to the next issue. Rarely will they track down the original “rule,” particularly when addressing peripheral issues in a decision.

In district courts, judicial officers typically seek out their circuit’s most recent pronouncements on an issue, or, if the circuit has not spoken, they will look for recent statements from the Supreme Court, other district courts within the same circuit, or holdings from foreign circuits. Federal appellate judges typically seek the most recent statements on the issue from other panels within their circuits, the Supreme Court, or other circuits. Although the courts generally try to properly respect judicial hierarchy, the main emphasis tends to be on the recentness of decisions. This is all to avoid reversal. As anybody who has worked with judges will also know, partly because they are generally so bright and conscientious and strive hard to be professional,

judges hate the very thought of being reversed. So they seek safety from that dreaded event by carefully following the most recent authorities. The judicial system expects these commendable efforts to stay current and avoid reversal.

Unfortunately, such a focus on novelty, not origins, can be quite unhelpful for catching or correcting error, especially error more than a few years old. Rather, as with mutually exclusive defenses, the pursuit of recentness can magnify and accelerate error. If an erroneous holding (or dicta posing as a holding) is cited for a year or two without the error being discovered, other courts soon will stop even checking into the state of the rule before that holding. As further precedential affirmation of the “holding” accretes, the original erroneous holding soon becomes buried under its own progeny, and courts are unlikely to remember or find out where the holding originated.

Of course, to some extent, this is the way a common law system works—they evolve gradually through the accretion of court decisions. And such evolutionary capabilities may be desirable in many ways, at least if the newly evolved rules harmonize with a society’s notions of substantive justice. Yet just because a nation has a common law system does not mean that judges have free license to err with impunity, or to disregard commands from the Supreme Court. And as the tale of mutually exclusive defenses doctrine shows, this process of judicial forgetting can happen within only a few years.

Successful living organisms must have means of going back to repair harmful errors that occur in the process of DNA replication. Although the mandatory severance rule for mutually antagonistic defenses may not have been a particularly harmful error in the judiciary’s precedential “genetic code,” its power, persistence, and recurrence, even after the Supreme Court’s holding in *Zafiro*, indicates that the federal judiciary’s mechanisms for catching and correcting error are lacking.

And at any rate, evolution in a common law system is not supposed to happen in a Darwinian fashion, by accident; it is supposed to occur through “intelligent design,” with courts changing the rules only after making reasoned decisions to do so. Whether or not there may be any utilitarian justifications for courts changing the law without knowing or admitting that they are doing so, such a process necessarily calls the legitimacy of the judicial system into question. As to mutually exclusive defenses, even though later decisions found fatal prejudice from denial of severance and thus required a holding on the issue of mutually

exclusive defenses, since these decisions invariably relied on the assumption that a rule already existed rather than going through the reasoning process necessary to properly establish that rule, these decisions did not ground the rule any more than earlier decisions that offered only dicta.

In each circuit, a careful checking back through the precedential lineage could have revealed problems or doubts about the doctrine of mutually exclusive defenses. In the early years of the doctrine's emergence, such a check would have been easy to do. After decades, it became a much larger project. And of course, most judges and clerks are busy just keeping on top of their dockets. Yet the research has become much easier than it once was, thanks to the online databases that are now the mainstay of legal research. And if judges and clerks simply do not have the time to dig back to the origins of certain doctrines that are producing perplexing results, then perhaps the profession needs some persons or agencies who will do that systematically. While judges are deciding individual cases, which must be done rapidly, they are also building the whole edifice of the law, which should be done carefully. For the law to function properly, it needs an adequate system to root out wholly unnecessary error. As to mutually exclusive defenses, the system was clearly less than adequate.

B. The Herd Instinct and the Illusion of Security in Numbers

Given their terror of reversal, judges try to find safety in numbers along with recentness. If various other courts and panels have the same rule, that should improve the probability that that rule is correct, and a court that wrongly follows the group will at least have many companions in error. Indeed, it is to some extent a fundamental part of judges' roles to follow others most of the time, and to follow properly established rules. Certainly judges do not have the time to give full reconsideration to every issue each time it arises in a case. They must rely on other judges and the accuracy and cogency of their legal research and analysis to a considerable degree.

Yet, as the irreconcilable defenses doctrine reveals, sometimes judges' faith in other judges is misplaced. As such, just as there is a need for checking of other courts' legal research, there is a place for more judges and panels to stick their necks out and rethink the issues afresh from time to time. That, too, is part of the judge's role. Judge Posner and his fellow panel members were right to do that in *Zafiro*, as were the panel members in *Tootick*.

Although running with the herd and sticking to established rules is usually justified, incorrectly invoking the supposed authority of a never-established rule is never justified. Yet the desire for the safety of numbers and preexisting authority sometimes leads judges to do just that.⁶³² In this story, the classic example of this is *Ziperstein*, but it is hardly the only one. If such assuming rules into existence is the result only of accident and wishful thinking, then obviously courts should be more careful. If it is done knowingly and deliberately, then it would seem to be somewhat unprofessional and also unnecessary, since courts have the power to create new rules for previously unconsidered issues. Obviously, courts should have the courage to lay down new rules as needed without creating the illusion of preexisting authority. That gives other courts the chance to inspect and consider the rule-making court's reasoning on its merits. To change the law by declaring it to already be a way it is not is merely a less bold and forthright variety of judicial legislation, a practice most judges rightly disavow. But the fact that courts do sometimes invoke nonexistent authority gives all the more reason why other courts should check both their research and their reasoning afresh.

An example of trying to find security in numbers that is especially prominent in this story is the free borrowing of language from opinions from other circuits. Of course it is commendable for courts to seek insight from other circuits. Yet that is no substitute for independent reasoning processes leading to proper holdings. Without the latter, whatever is said in some foreign circuit is mostly irrelevant. Yet most circuits borrowed other circuits' language and supposed rules without holdings, and often seemingly without questions. If anything, the courts' self-policing function seemed to break down even worse in the context of foreign circuits' opinions. Most error in most circuits initially grew out of dicta using another circuit's dicta, and those circuits that were most free from error were those that borrowed the least—particularly the Sixth.

C. Manufacturing Rules Out of Case-Specific Reasoning or General Commentary

The nearly automatic application of settled rules is efficient; reasoning case by case is less so. Perhaps for that reason, many judges with crowded dockets long for settled rules and thus are often disappointed by the determination of higher judges, notably Justice

⁶³² For an example of this same process taking place in the highest court in the land, see Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 796-97, 803 (1994).

Sandra Day O'Connor, to approach cases individually on their facts. Such judges eager for clear rules also sometimes go ahead and turn another court's opinion into a source of a clear rule or checklist when it does not really provide either. The tentative language of *Rhone* gradually hardening into an ironclad rule in the D.C. Circuit, or the cautious commentary in *McClure* and *Swingler* being transformed more suddenly into a rule in the Tenth Circuit, are examples of this process. Perhaps even more striking is when later courts turn a court's inclusive, non-exclusive list of factors to consider into an exclusive checklist for near automatic application, as happened with *Oglesby* in the Seventh Circuit.⁶³³ This longing for clear rules also probably helps explain why certain circuits long clung to their mandatory severance rules notwithstanding *Zafiro*.

D. Repeating Rules Without Analyzing Them

Judge Posner's invocation in *Zafiro* of Justice Holmes' warning against resting upon a formula and call to "dig beneath formulas" applies not only to that case, but to the whole body of federal case law on mutually exclusive defenses. Partly because the issue was relatively peripheral in most cases, courts tended to repeat the supposed mandatory severance rule without question or analysis before rejecting the defendant's motion for denial. This entrenched the doctrine ever deeper without many courts ever stopping to consider just what the doctrine meant or how it would work in practice. But courts also repeated the rule without thinking it through, even in cases in which the issue was more significant. Ironically, this effect was particularly pronounced in some cases in which the court was trying to be particularly conscientious. In many of those cases in which a court did additional research into the issue, the court found that there were two main different versions of the rule—the D.C. Circuit version, and everybody else's.

But rather than stopping to consider whether one or the other version was correct, or indeed whether the two versions could coexist harmoniously, such courts often cobbled together compound versions of the "rule," with the two competing versions offered either as equally valid available alternatives,⁶³⁴ or—more strikingly—with both versions

⁶³³ A former professor of mine, Arthur Rosett, pointed out this recurrent phenomenon in a Contracts course years ago.

⁶³⁴ See, e.g., *United States v. Najjar*, 300 F.3d 466 (4th Cir. 2002); *United States v. Cardascia*, 951 F.2d 474 (2d Cir. 1991); *United States v. Serpoosh*, 919 F.2d 835 (2d Cir. 1990); *United States v. Nichols*, 695 F.2d 86 (5th Cir. 1982).

thrown together in the same rule as though there was no real difference between them.⁶³⁵ In this situation, as in others, the existence of differing rules in different circuits was a standing invitation to explore the issue and determine whether one rule was better or more legally correct, but as with many treatises, the courts never moved beyond listing “what” to ask “why.”⁶³⁶ The story of the case of the missing holding shows a regrettable tendency of courts to never stop and consider whether a rule really makes any sense. That, along with usually following rules, is also properly part of judges’ jobs. This makes Judge Posner’s reconsideration of the issue, even where the prosecution accepted the presumed rule, all the more admirable.

E. Incautious Use of Language: Language Taken Out of Context and Linguistic Drift

The example of federal irreconcilable defenses doctrine showcases the unfortunate tendency of courts often to take language out of context and so twist its meaning. Again, perhaps the most salient and inexcusable example of this is *Ziperstein’s* wholesale misreading of *Kahn* and other Seventh Circuit decisions to declare a rule into existence. Another striking example is the misreading of *Tootick* as affirming a mandatory severance rule by various panels within and without the Ninth Circuit. Admittedly, *Tootick* was a very complex decision, and *Kahn* was not easy. But it is obviously a central part of judges’ and clerks’ mission to be able to read and comprehend complex language, reasoning, and argumentation in context. Facing hectic schedules and crowded dockets, many judges and clerks, like lawyers in general, probably pride themselves on being able to quickly read and grasp key issues. But for some situations, more careful reading is required, and speed reading is not good enough. The *Tootick* example, in particular, indicates that various judges or clerks were not able to change gears sufficiently to understand the case properly. The other alternative is that these judicial officers fell into the common trap of feigning knowledge of the case based on a reading of somebody else’s summary of it. If so, shame on them. As with doing deeper research into the origin of doctrines, if judges’ and clerks’ busy schedules do not leave them the time to read and understand cases in context, and slowly and carefully as

⁶³⁵ See, e.g., *United States v. Hartmann*, 958 F.2d 774 (7th Cir. 1992); *United States v. Peveto*, 881 F.2d 844 (10th Cir. 1989); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *United States v. Berkowitz*, 662 F.2d 1127 (5th Cir. 1981).

⁶³⁶ Admittedly, just listing “what” different rules and holdings (or pseudo-holdings) exist in the law on some issue is often a major undertaking, yet asking “why” more often might help to prune some of the excess accumulation of sometimes needlessly various precedent.

needed, then they had better delegate that necessary responsibility to some other agency.

In addition to the occasional misciting of *Tootick*, the broader ignoring of that decision in the Ninth Circuit and citing of *Throckmorton* instead shows another unfortunate if understandable tendency of judicial officers. Given the choice between a complex, difficult case and an easier, more straightforward one, hurried and harried judges and clerks will select the latter to cite as authority. *Throckmorton* also had the added advantage of being more recent than *Tootick*. But *Throckmorton* also had nowhere near the depth of analysis that *Tootick* had. Its “holding” also was diametrically opposed to that of both *Tootick* and *Zafiro*. Yet *Throckmorton* long prevailed as the dominant statement of the Ninth Circuit’s mandatory severance “rule,” while panels in that circuit ignored or misunderstood *Tootick* and *Zafiro*.

Besides language taken out of context, the case of the missing holding also reveals a dangerous tendency toward linguistic drift in judicial process. Judicial rephrasing of earlier holdings or dicta, while perhaps stylistically elegant or intellectually stimulating for court staff, is clearly dangerous, and unnecessarily introduces ambiguity or entirely new meanings. If a legal rule is a good rule, there is no need whatsoever to rephrase it even slightly. Just like mathematical rules, legal rules normally should be stable and should be altered only by reasoned decisions to change the rule or add a corollary, not as a result of imprecision or forgetfulness. Seemingly harmless rephrasing, coupled with the forgetting of original authorities and the tendencies to take language out of context and to manufacture settled rules out of unsettled commentary, over time can break connections between properly connected terms and concepts and lead to the generation of effectively new rules by sheer imprecision and forgetfulness rather than reasoned analysis. This can happen in subtle ways, such as the replacement of “and” with “or” or vice versa, the deletion of a term from a list of terms that was supposed to show the terms to be related or identical, or the use of alternate terms to describe the same thing followed by a forgetting that they do describe the same thing.

In the present story, the delinking of mutually exclusive defenses and irreconcilable defenses from mutually antagonistic defenses is the most salient example of this effect. It left various circuits unable to recognize that the Supreme Court’s statement regarding mutually

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antagonistic defenses in *Zafiro* controlled the other categories as well.⁶³⁷ Indeed, because on its face, “mutually antagonistic” (implying hostility, but not necessarily to the degree of mutual exclusivity or irreconcilability) does not necessarily have as strong a meaning as “mutually exclusive” or “irreconcilable,” panels trying to make sense of the coterminous coexistence of *Zafiro* with pre-*Zafiro* authorities had to assume incorrectly that the terms must have different meanings.⁶³⁸

Such terminological drift could have absurd results, such as a defendant summarily losing on a motion for severance on the basis of *Zafiro* because his attorney used the wrong magic words—“mutually antagonistic”—while a similarly situated defendant with equally valid or invalid arguments might gain severance, or at least fuller consideration of his arguments, by using the other constructions. The Third Circuit’s opinion in *Balter* and the Tenth Circuit’s opinion in *Linn* may have involved such unlucky defendants.

In sum, legal rules should not be created or altered by a haphazard and confused process that resembles the gradual garbling of a whispered message going around the table at a dinner party playing the “telephone game.”

F. (Misplaced) Reliance on Other Panels’ Interpretations of *Zafiro* and Failure To Recognize Its Significance

Overall, most circuits showed a relatively poor record of getting the main points of *Zafiro* or recognizing explicitly that *Zafiro* effectively overruled nearly all of their pre-*Zafiro* precedent regarding mutually exclusive defenses. One circuit, the Eighth, ignored it almost entirely; some circuits followed it sporadically and erratically; and most seemingly never recognized the full force of *Zafiro* in rejecting a mandatory severance rule for mutually antagonistic (or mutually exclusive, or irreconcilable) defenses.

⁶³⁷ Again, examples of the seeming loss of this terminological connection may be found in various circuits: the Second Circuit post *Salameh*; the Third Circuit in *Voigt* and *Quintero*; the Seventh Circuit in *Goines*, *Mohammed*, and the *Oglesby* lineage; the Eighth Circuit post *Gutberlet*; and the Tenth Circuit post *Dirden*.

⁶³⁸ This is exactly the mistake I made in an earlier study focused primarily on the Ninth Circuit, in which I did not study *United States v. Zafiro* or *Zafiro v. United States* carefully enough to recognize that the Seventh Circuit’s definition of mutually antagonistic defenses is basically the same as the Ninth (and other) Circuit’s definition of mutually exclusive or irreconcilable defenses.

Even in some circuits that markedly straightened out after *Zafiro*, such as the D.C. and Seventh Circuits, there was never a clear acknowledgement that *Zafiro* superseded earlier case law, which increases the probability that some of that old, bad case law can bubble up and cause confusion again in the future. And certain panels' incorporation and interpretation of *Zafiro* meant that subsequent panels tended to turn to those interpretations rather than reading and comprehending *Zafiro* afresh—and perhaps getting its full meaning more correctly. In the Eleventh Circuit, a conscientious panel was almost apologetic in pointing out that an earlier panel had ignored the language in *Zafiro* and thus implicitly interpreted *Zafiro* not to be controlling, and that this would be binding on subsequent panels, except that fortunately, an even earlier Eleventh Circuit panel had actually gotten the point of *Zafiro*, so the conscientious panel could follow that authority rather than the obviously incorrect one.⁶³⁹ To those not initiated in the intricacies of judicial process, it would likely seem strange that a properly conscientious panel should ever even face the possibility of being bound by a patently erroneous prior decision. And if local rules within a circuit do mandate such an absurd result, then that would seem to indicate that such rules preventing appropriate review and reconsideration by subsequent panels should be relaxed or replaced.

⁶³⁹ *United States v. Blankenship*, 382 F.3d 1110, 1125 n.27 (11th Cir. 2004) (discussing *Cassano* (incorrect) and *Strollar* (correct)). The full text of this footnote reads as follows:

We acknowledge that our holding in *Cassano* comes to the opposite conclusion. Citing several pre-*Zafiro* Eleventh Circuit cases, *Cassano* states that “[t]he assertion of mutually antagonistic defenses may satisfy the test for compelling prejudice . . . [when] the essence of one defendant’s defense [is] contradicted by a co-defendant’s defense.” The *Cassano* court’s discussion of mutually antagonistic defenses did not cite *Zafiro* at all, and seems to be simply a reflection of our pre-*Zafiro* policy. We would nevertheless be bound to follow *Cassano* under our prior panel rule, except that in an earlier case, *United States v. Strollar*, 10 F.3d 1574, 1578 (11th Cir. 1994), we expressly adopted the Supreme Court’s *Zafiro* analysis and held that “mutually antagonistic-defenses are not prejudicial *per se*.” We further recognized that the best solution in such situations is not severance, but for the trial judge to issue proper limiting instructions. Thus, given this conflict between our 1998 holding in *Cassano* and our 1994 holding in *Strollar* as to whether mutually antagonistic defenses are prejudicial and can warrant severance, we follow our earlier holding, which is luckily in accord with the Supreme Court’s pronouncements on the subject.

Id. (citations omitted). See *Clark v. Housing Auth. of Alma*, 971 F.2d 723, 726 n.4 (11th Cir. 1992) (“Where circuit authority is in conflict, the earliest panel opinion resolving the issue in question binds this circuit until the court resolves the issue *en banc*.”).

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Some circuits did properly and forthrightly state that *Zafiro* overturned prior case law on mutually exclusive defenses. The Eleventh Circuit was particularly insightful in this regard,⁶⁴⁰ but the Second Circuit had the same epiphany.⁶⁴¹ Even in those circuits, however, the recognition of *Zafiro*'s full significance was not enough to prevent backsliding. And notwithstanding all the borrowing of dicta that went on among the circuits on the issue of irreconcilable defenses, there is no indication that other circuits ever borrowed these accurate insights.

G. *Ignoring Other Panels' Warnings*

Along with ignoring or misunderstanding *Zafiro*, many courts failed to take hints from other panels in the same circuit regarding problems with the doctrine of irreconcilable defenses. Again, *Tootick*, its clear rejection of a mandatory severance rule, and its aftermath in the Ninth Circuit is the classic example. The clear explanations of the Tenth Circuit panels in *McClure* and *Swingler* that the Tenth Circuit had no mandatory severance rule were similarly ignored. The Eleventh Circuit offers a striking post-*Zafiro* example. The decision in *Cassano*, which ignored *Zafiro* and cited the traditional mandatory rule as though *Zafiro* had never happened, should have been impossible after the Eleventh Circuit's perceptive rulings regarding the significance of *Zafiro* in *Strollar* and *Talley*. These examples imply that all too often, circuit panels are not getting the point of opinions from other panels in their circuits. Also, as with the recognition that *Zafiro* overruled pre-*Zafiro* case law on irreconcilable defenses, despite all the borrowing that has gone on between circuits, there is no indication that the perceptive warnings of some panels in some circuits ever enlightened other circuits.

H. *Discussing Issues that Need Not Be Decided*

One of the central tenets of cautious judging is that you do not decide what you do not have to. Various panels took advantage of this rule by simply noting that defendants' defenses were not mutually antagonistic without getting further into explication of what the rule would be if they were mutually antagonistic. Some others merely noted what the appellant claimed the rule to be, or observed what other circuits had declared the rule to be, but did not state the rule before rejecting the appellant's argument for lack of sufficient antagonism. Ironically, this happened more often in unpublished decisions. In published decisions,

⁶⁴⁰ See *Blankenship*, 382 F.3d at 1125 n.27; *United States v. Talley*, 108 F.3d 277, 279-80 (11th Cir. 1997).

⁶⁴¹ *United States v. Haynes*, 16 F.3d 29, 31-32 (2d Cir. 1994).

courts were more likely to work through the supposed mandatory severance rule more carefully before concluding that it did not apply anyway. Such courts were more likely to get themselves into trouble as such, and as with the compound rules including both the D.C. Circuit version and the “believe one, convict other” version, the most conscientious panels often got even more entangled in the tainted doctrine. Of course, most panels had no reason to suppose that there was any problem with what appeared to be a well-established rule. Nevertheless, unless a court is determined to do very careful research into an issue and its history, it might be wisest to follow the example of those panels that did not say what needed not be said. And because courts not only decide individual cases but also take part in the gradual construction of the whole edifice of the law, even statements made in passing on minor issues can impact that edifice—especially given the tendency of courts to transform dicta into rules.

I. Difficulty Distinguishing Dicta from Holdings: Improper Borrowing

Connected with taking language out of context, various courts that participated in the rise and fall of the federal doctrine of mutually exclusive defenses showed a marked and unfortunate tendency to transform dicta into holdings and rules, apparently without realizing they were doing so. This happened in nearly every circuit, and involved borrowing language from foreign circuits—which would remain dicta in the borrowing circuit even if it represented a proper holding in the home circuit unless and until the borrowing circuit formally adopted it in a proper holding—as well as misreading of dicta from other panels in the same circuit.

This record implies that courts should be more careful about delineating what is dicta and what is holding in their opinions. Many law students may have experienced frustration at one point or another in having trouble determining what the holding of a case really is. Sometimes this is due to inexperience, but sometimes it is the fault of the opinion. Because legal research is now dominated by online research in electronic databases, it would benefit the entire legal profession if judges (and clerks) themselves would write their opinions with an eye toward including attributes that would make holdings as readily and accurately searchable and cross-indexable as possible. This might include explicit labeling of holdings, whether by the use of certain stock “marker” language, or by the inclusion of a summary paragraph that lays out explicitly what the opinion decides and what it does not. This simple process might even help judges clarify in their own minds just which

issues really need deciding. It also might help other judges and panels in quickly checking the legal research and analysis of other panels, as discussed above. Lest judges think this absurd because their decisions are already clear and straightforward enough, the story of irreconcilable defenses makes it clear that judges themselves often have had trouble keeping straight what is holding and what is mere dicta. Nor is it adequate to leave this duty to the online legal database services, for all the good service they provide. Computer science theory offers basic rules for tagging or labeling files to enhance searchability in complex databases. Legal research is now primarily done in online databases, and any judges, and nearly all clerks, now have a basic level of computer savvy. There is no reason not to better design court opinions for searchability from the ground up.

The tangled record on irreconcilable defenses also suggests that courts should have clearer rules on borrowing from other circuits, to remind judges that what another jurisdiction said on an issue does not mean a thing unless it is properly adopted and incorporated by a reasonably clear and formal process. Undigested bits of language from one circuit should not be able to jump like a computer virus to all other circuits and take root as local rules without proper monitoring. The patterns of this borrowing are sometimes striking in the context of irreconcilable defenses, as when a long-forgotten case already dead and buried in its home circuit washes up on the shore of a different circuit and is treated with full honors as valid law—like when the Fifth Circuit's anomalous *Herring* decision (1979) echoing the D.C. Circuit's "both are guilty" rule resurfaced in the Second Circuit in *Serpoosh* (1990). Such abrupt reappearances probably result mostly from appellants' briefs using dated treatises (and perhaps not going to the effort of finding more appropriate authorities from the home circuit), although there may be other avenues. At any rate, because absent proper incorporation such foreign circuit opinions do not have the same dignity within another circuit as that circuit's own decisions, language from such cases should be bracketed in some fashion to clearly indicate their secondary status and separate them from holding language.

Given the trouble other circuits ran into with their freewheeling importation and transmutation of dicta to make suspect rules, the case of the missing holding suggests that all in all, the Sixth Circuit's approach—slow, careful evolution of legal doctrine, with limited borrowing from outside the jurisdiction—may be the wisest course.

VI. CONCLUSION

Given how bright, talented, conscientious, and hard-working federal judges and clerks generally are, it might seem presumptuous for anyone outside that cadre to question their research and analysis. Yet, the story of the emergence of the federal doctrine of mutually antagonistic defenses clearly reveals many things that happened, but should not have. Such errors arose from systemic flaws. To fix these flaws would require only relatively minor adjustments to a system that is highly effective and professional overall. But such adjustments should be undertaken to help prevent recurrence of the sorts of unnecessary errors found in the case of the missing holding.

Judges and their adjuncts should double-check the research, analysis, and language use of other panels and circuits more carefully and systematically for error. Rules with differing versions, or rules that may not make sense, should send up warning flares rather than being repeated automatically in reliance upon other courts. Dicta and holdings should be more carefully separated from each other, and judges should be more on guard against the fabrication of new and unintended rules by taking language out of context or by gradual linguistic drift. In short, although there is necessarily a balance between the need to decide ephemeral individual cases quickly and efficiently and the need to construct the lasting edifice of the law carefully, that balance needs to shift in the latter direction.

If such additional research and monitoring duties are beyond the available time and energy of busy judges and clerks, then perhaps the circuits should add staff to conduct such specialized, more in-depth research as needed. These could be along the lines of research librarians at academic institutions, who have much more developed research skills in certain areas than judges or clerks, and they might be attached to the existing court librarian's office. Although that would entail additional costs at a time of sparse government funding, it might prove more efficient in the long run. Certainly the misbegotten federal doctrine of mutually exclusive defenses unnecessarily wasted the time and energy of a good many federal circuit and district judges and clerks, and hence also wasted taxpayers' money, over the past four decades. It is past time that courts extend it no further than what the Supreme Court allowed in *Zafiro*. The rest of the doctrine finally should be laid to rest.