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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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* Legal Research Fellow, UCLA Law Library. J.D., UCLA Law School, 2003; Ph.D., Rice University, 1997. I wish to thank Judge Richard A. Posner, Justice Norman L. Epstein, Judge Nora M. Manella, Judge John S. Wiley, Professor Susan W. Prager, Professor Norman Abrams, Professor Stephen C. Yeazell, and Linda Karr O’Connor for their help and assistance with this project in various ways. However, any flaws of reasoning or writing are my fault alone. This Article is dedicated to Judge Manella, who epitomized what a highly conscientious, professional district judge should be before her recently announced transfer to become Justice Manella of the California Court of Appeal.
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. As the Supreme Court stated in Richardson v. Marsh, “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. 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.” The Supreme Court and the various circuit courts all favor joint trials.

Yet joint trials can pose greater risks of prejudice to defendants. 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.”

Potential prejudice from joint trials can take many forms: prejudice to one defendant from a codefendant’s statement or confession (the Bruton

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2 481 U.S. 200.
3 Id. at 210.
4 FED. R. CRIM. P. 8(b); Zafiro, 506 U.S. at 537.
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

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\(^8\) 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).


\(^11\) 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).


\(^15\) Zafiro, 506 U.S. at 537-38.
well as “mutually antagonistic” defenses. 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.

**Footnotes:**

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. Kenenely, 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 Vitallo, 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. Doglass, Selected Issues in the Trial of a Drug Case, 162 PLI/C RIM 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.
Severance, Zwolinski, Berkowitz statement of the mandatory severance rule, and faulting the state court for not following (discussing a Pennsylvania state supreme court decision in the context of the Prejudice, and the Ineffectiveness of a Bare Limiting Instruction (1979). Showing the same mood of the times was Robert R. Calo, Georgetown stopped listing the various earlier decisions that found an abuse of discretion 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 unfair). Interestingly, in 1965—after De Luna but before Rhone, Zipperstein, 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

http://scholar.valpo.edu/vulr/vol41/iss1/3
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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—\textit{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

\textsuperscript{18} \textit{Zafiro}, 506 U.S. at 537-38; \textit{Richardson}, 481 U.S. at 209-10; \textit{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.

\textsuperscript{19} An article written by a disappointed criminal defense attorney after the \textit{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 \textit{Bruton} arguments, were so much more demanding. \textit{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.

\textsuperscript{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. 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. 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. Each defendant blamed the other as the sole culprit. However, counsel for the testifying defendant commented at length on

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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.”

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, reflected at length on the history, purpose, and evolution of the privilege against self-incrimination. 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. 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.”

Although the trial judge gave jury instructions sufficient to cure any prejudice in a normal case, 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.

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

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.
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 other and the reference to a “head-on collision” between the defendants and their defenses, *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.

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.

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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 239, 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. Zafiro38 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.

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. 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.

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. 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. Martinez and Zafiro also moved for severance on grounds of mutual antagonism. 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. 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.

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. 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. 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.” 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
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.\footnote{Id.}

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 \textit{Zafiro} was not such a case.\footnote{Id.} Rather, \textit{Zafiro} involved a “symmetrical situation” in which each member of each pair of defendants blamed the other.\footnote{Id.} 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).”\footnote{Id.} 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.”\footnote{Id.} He also added,

\begin{quote}
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
\end{quote}
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.
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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.’”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{77}

Thus, the majority opinion in \textit{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 \textit{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

\begin{footnotes}
\footnotetext{72}{\textit{Id.} at 539-40.}
\footnotetext{73}{\textit{Id.} at 540.}
\footnotetext{74}{\textit{Id.}}
\footnotetext{75}{\textit{Id.} (again quoting \textit{Richardson}).}
\footnotetext{76}{\textit{Id.} at 541.}
\footnotetext{77}{\textit{Id.}}
\end{footnotes}
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

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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 and United States v. Crawford, 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.” 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.

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.” 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.” 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

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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.” 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.”

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. 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.
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.”\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{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 \textit{Zafiro}. Other borrowing circuits generally had a poorer record of comprehending the significance of \textit{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 \textit{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 \textit{Zafiro}.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{91} Rhone v. United States, 365 F.2d 980 (D.C. Cir. 1966).
\item \textsuperscript{92} United States v. Swingler, 758 F.2d 477, 495 (D.C. Cir. 1985) (D.C. version a “somewhat stronger variant”).
\end{itemize}
\end{footnotesize}
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, 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. The court said no more about Rhone, but merely explained why there was little or no conflict in the defenses.

In United States v. Hines, the court did not quote any language from Rhone, since the appellant invoked De Luna. 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[ ]”—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].” 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

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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).
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.
108 Id. at 1178.
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.’”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

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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).
119 United States v. Harrison, 931 F.2d 657, 671 (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,\textsuperscript{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.’”\textsuperscript{121} Nearly all subsequent D.C. Circuit opinions closely followed Zafiro,\textsuperscript{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.\textsuperscript{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,\textsuperscript{124} while the other two showed no awareness of it.\textsuperscript{125} Of these latter two, one opinion merely noted the absence of any showing or proffer about irreconcilable defenses in passing,\textsuperscript{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”—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,\textsuperscript{128}

\textsuperscript{120} 16 F.3d 423 (D.C. Cir. 1994).

\textsuperscript{121} Id. at 433 (quoting Zafiro).


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


\textsuperscript{126} Adegusun, 49 F. Supp. 2d at 14.

\textsuperscript{127} Gray, 292 F. Supp. 2d at 87.

\textsuperscript{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. 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. 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. 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.”

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, and they invoked De Luna as authority. The Kahn panel then discussed and carefully distinguished De Luna for over two full pages in their opinion. 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. 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. The Kahn court, like the Eighth Circuit panel in Hayes v. United States, 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.”

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 defenses.

\(^{140}\) *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.\(^\text{142}\) In the end, Kahn, like Zafiro, primarily stands for the principle that severance will be granted only on a “strong showing of prejudice.”\(^\text{143}\) 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.\(^\text{144}\) 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,\(^\text{145}\) 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].”\(^\text{146}\) In United States v. McPartlin,\(^\text{147}\) 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].”\(^\text{148}\) In United States v. Harris,\(^\text{149}\) 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.”\(^\text{150}\) 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.
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.\(^{155}\)

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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.” 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). Although many subsequent decisions followed Ziperstein in using “mandate/d” or similar terms such as “require/d,” others used weaker, less mandatory language, such as: “should”; “justify/ied”; “Joint trials may be found fundamentally unfair if codefendants present true ‘mutually antagonistic defenses’”; “[A] district court may grant severance if codefendants assert mutually antagonistic defenses”; or “Generally, where co-defendants assert mutually antagonistic defenses, severance must be granted [implying possible exceptions].” 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. 1989); 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. Hast, 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. Petrolio, 709 F.2d 1178, 1181-82 (7th Cir. 1983).

601 F.2d at 285.

See HOWARD POSPESEL, INTRODUCTION TO LOGIC: PROPOSITIONAL LOGIC 41-45 (2d ed. 1994).

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

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

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

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

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).

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, 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.

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.”

A similar example of turning innocent dicta into a rule occurred in United States v. Oglesby. 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

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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 inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.\footnote{Id. at 1276 (citations omitted).}

Initially, subsequent opinions recognized that Oglesby had laid out a non-exclusive list of situations where actual prejudice might arise.\footnote{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”).} 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.\footnote{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).} 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,\footnote{808 F.2d 1260 (7th Cir. 1987).} 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].”\footnote{Id. at 1263.} Although a few later opinions showed
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); Stommer 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. 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." 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. Ziperstein also offered De Luna as an example of mutually antagonistic defenses, 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, while others tended to indicate that the label “mutual antagonism” only applied to situations requiring severance.

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. Gironda, 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*. 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.

Yet other opinions still showed confusion as to the proper standards post-*Zafiro*. In the first post-*Zafiro* opinion, *United States v. Goines*, the court quoted *Zafiro*’s “mutually antagonistic defenses are not prejudical 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. Similarly, in *United States v. Mohammad*, the

however, only where the acceptance of one party’s defense precludes the acquittal of the other defendant.”; *see also* Stommer v. Kolb, 913 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’”).


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,\footnote{Id. at 1432 & n.5.} 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.\footnote{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).} 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.\footnote{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.}

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.\footnote{United States v. Taylor, 293 F. Supp. 2d 884, 891, 892 (N.D. Ind. 2003).} 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).\footnote{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.} 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.\footnote{Carman, 2004 WL 1638231, at *6.}

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
States v. Martinez, 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.

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, 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. 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, 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.

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*. In *Johnson*, two defendants, Johnson and Smith, were tried jointly for passing counterfeit money. 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. In his confession, Smith stated that Johnson was with him at the scene of the crime. 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. Thus Smith provided the principal evidence to contradict Johnson’s non-presence defense. Smith’s attorney, and Smith while taking the stand and affirming his out-of-court confession, seized every opportunity to incriminate Johnson. 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. The district court denied all these motions.

On these facts, the *Johnson* court held that Johnson had been denied a fair trial and reversed for denial of severance. The court did not use the expression “second prosecutor,” but emphasized how Smith and his counsel aggressively portrayed Johnson as the villain. 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[,]” such that “Smith was the government’s best witness against Johnson.” The court noted reprovingly that the trial court admitted Smith’s confession with no deletions of the statements incriminating Johnson.

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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.
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.\textsuperscript{215}

Most crucially regarding the issue of mutually exclusive defenses, the \textit{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.’”\textsuperscript{216} Those particular circumstances include the unredacted confession, the aggressive second-prosecutorial stance, the apparent lack of limiting instructions (the \textit{Johnson} court never mentions this issue), and the sharply contradictory defenses. Additionally, the \textit{Johnson} court never mentioned the doctrine of mutually antagonistic defenses and cited no authority regarding it; in fact, the court cited \textit{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.”\textsuperscript{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 \textit{De Luna} was a Fifth Circuit opinion, the source for that circuit’s rule was imported and derived from \textit{De Luna} only indirectly, seemingly with no awareness of that indirect source. This may be because earlier Fifth Circuit case law properly understood \textit{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 \textit{Gurleski v. United States},\textsuperscript{218} the court noted that “[t]rue antagonistic defenses are exemplified in \textit{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

\textsuperscript{215} Id. at 1133-34.

\textsuperscript{216} Id. at 1134 (quoting Schaffer v. United States, 362 U.S. 511, 516 (1960)).

\textsuperscript{217} Id. at 1132-33, 1133 n.4.

\textsuperscript{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 *De Luna* 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.” In United States v. Marable, 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.” In United States v. Swanson, 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.” 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, 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. The court reasoned that one, the other, or both had to be in possession and it was impossible to claim ignorance. 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. 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. The trial court also overruled repeated motions for severance even after “the inevitability of prejudice should have become apparent.” Although the court found “evidence of each defendant’s individual guilt was strong, this joint trial was intrinsically
The court concluded that “[a] fair trial was impossible under these inherently prejudicial conditions.”

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.” 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. 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.” 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, 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

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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.” A later important decision, United States v. Romanello, became the next most frequently cited case on the issue in the Fifth Circuit, after Berkowitz. 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. But, some opinions, whether drawing on Berkowitz or its predecessors, used the “irreconcilable and/or mutually exclusive” language without the “core” language; some used only “mutually exclusive” with no “core” language; some used only “mutually antagonistic” with the “core” language; at least two opinions used just the “core” language alone; one decision used only “irreconcilable” with “core”; and one used only “mutually exclusive” with “core.” 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

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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. DeVeau, 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).

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,\textsuperscript{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.’”\textsuperscript{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 \textit{Nichols} court correctly recognized them to be different categories. \textit{Nichols} was the last time the “both are guilty” construction made an appearance in Fifth Circuit jurisprudence.

One Fifth Circuit opinion from the pre-\textit{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. \textit{United States v. Romanello}\textsuperscript{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.\textsuperscript{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.\textsuperscript{259} The majority concluded, “Obviously these defenses are irreconcilable and mutually exclusive. If the jury

\begin{footnotesize}
\begin{enumerate}
\item[255] 695 F.2d 86 (5th Cir. 1982).
\item[256]  Id. at 92-93 (citations omitted).
\item[257] 726 F.2d 173 (5th Cir. 1984).
\item[258]  Id. at 175, 177.
\item[259]  Id. at 177.
\end{enumerate}
\end{footnotesize}
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.\textsuperscript{260} The court emphasized the “second prosecutor” problem of codefendants weakening each others’ defenses and so strengthening the government’s case, and held that

\begin{quote}

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.”\textsuperscript{261}
\end{quote}

Although the \textit{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”\textsuperscript{262}—an important part of the equation for determining actual prejudice under \textit{Zafiro} and the D.C. Circuit’s version of the severance rule.

The \textit{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.\textsuperscript{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.\textsuperscript{264} By that standard, “at their core the defenses of Vertucci, Romanello and Mendez are quite consistent.”\textsuperscript{265} The dissent further noted, \textit{a la Zafiro}, that the district judge had properly instructed the jury not to rely on statements of counsel as evidence.\textsuperscript{266}

\begin{footnotes}
\item 260 \textit{Id.}
\item 261 \textit{Id.} at 181.
\item 262 \textit{Id.} at 177 n.4.
\item 263 \textit{Id.} at 182 (Gee, J., dissenting).
\item 264 \textit{Id.}
\item 265 \textit{Id.}
\item 266 \textit{Id.} at 183.
\end{footnotes}
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.” 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.” Allowable, but not mandatory? Perhaps. In United States v. Sheikh, 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.”

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.” 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 . . . .” But some opinions used the construction, “severance is required only if . . . ,” which in classical

267 United States v. Mota, 598 F.2d 995, 1001 (5th Cir. 1979).
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).
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].” 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”; “severance is warranted”; or “To justify severance.”

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, 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. 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. Even those opinions that did not as clearly follow the Zafiro


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

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, 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 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. 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. 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,”

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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).


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


285 585 F.2d 1, 5 (1st Cir. 1978).
among other reasons. For this proposition, the court cited United States v. Martinez, a First Circuit opinion which, ironically, never discusses inconsistent defenses directly.

In 1980, the First Circuit followed the example of most other circuits in borrowing the doctrine from other circuits. In United States v. Davis, 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." The Davis court cited United States v. Ehrlichman and United States v. Robinson from the D.C. Circuit, as well as United States v. Becker from the Fourth Circuit, which in turn cited only Robinson and Ehrlichman for the rule. In United States v. Talavera, a First Circuit panel cited Davis and Becker for the same supposed rule. 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.

A different version of the rule entered First Circuit jurisprudence with United States v. Arruda, 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
defendant. [See Talavera and Luna].” 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. Fusaro304 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. Berkowitz305 from the Fifth Circuit and United States v. Moschiano306 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 Pacheco308 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

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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, 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.” By contrast, in United States v. Merlino, 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.” 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. 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.” 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.

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).
318 Id. at 106 (citing Zafiro).
320 Id. at 90.
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 co-defendant 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. 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.’”

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. 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.” Later cases followed Tutino’s slightly amended version of the “rule.”

In 1990, the Second Circuit’s jurisprudence on mutually exclusive defenses entered a complicated new phase with its opinion in United States v. Serpoosh. 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. In Serpoosh, the court noted that the Second Circuit had described severance denials as “virtually unreviewable” because “appellants must show prejudice so
severe as to amount to a denial of a constitutionally fair trial.”\textsuperscript{331}

The court then stated the severance rule three ways:

\begin{quote}
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].\textsuperscript{332}
\end{quote}

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.”\textsuperscript{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

\textsuperscript{331} Id. at 837.
\textsuperscript{332} Id. at 837-38.
\textsuperscript{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, 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].

334 951 F.2d 474 (2d Cir. 1991).
335 Id. at 484 (citations omitted).
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).
341 16 F.3d 29 (2d Cir. 1994).
authorities “were recently overruled by the Supreme Court” in Zafiro.\textsuperscript{342} Subsequent cases cited Haynes on that point in tandem with Zafiro.\textsuperscript{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,\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{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;\textsuperscript{347} the other two showed no awareness of Zafiro.\textsuperscript{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,\textsuperscript{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.

\textsuperscript{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, Carpenter, and Berkowitz).
\textsuperscript{343} Montour, 1997 WL 570945, at *1; Diaz, 176 F.3d at 104.
\textsuperscript{344} 152 F.3d 88 (2d Cir. 1998).
\textsuperscript{345} Id. at 116.
\textsuperscript{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)).
\textsuperscript{349} No. 5502 CR 1237, 2005 WL 783357, at *5 (S.D.N.Y. Apr. 6, 2005).
Coffey, 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. Other recent decisions followed Zafiro.

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. The court rejected the defendant’s argument that denial of severance improperly prohibited him from calling his co-defendants as witnesses and further observed, “[T]he mere presence of hostility among defendants or the desire of one to exculpate himself by inculpating another have both been held to be insufficient grounds to require separate trials.” 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.

In 1982, the Third Circuit took a step toward importation of a mandatory severance rule for mutually exclusive defenses in United States v. Provenzano. 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.” Although this statement does not constitute a holding and does not even clearly

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).
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

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).

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.” 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.

Shortly after the Voigt decision, another panel of the Third Circuit followed Zafiro more closely in United States v. Balter. 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.\textsuperscript{370} The court also reaffirmed the point made in \textit{Voigt} that since \textit{Zafiro}, irreconcilable defense claims usually were found insufficient to warrant severance without a strong showing that such specific rights were impaired.\textsuperscript{371} However, the court’s task might have been made easier because the defendants at trial specifically claimed to have “‘mutually antagonistic defenses’”;\textsuperscript{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 \textit{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 \textit{Zafiro} for a no per se severance rule for mutually antagonistic defenses, quoted \textit{Provenzano} for mutually antagonistic defenses being those “where the defenses conflict ‘to the point of being irreconcilable and mutually exclusive,’” and then quoted \textit{Voigt} regarding mutually exclusive defenses and mutually antagonistic defenses that may require severance, before finding that defense counsel had not offered mutually antagonistic defenses.\textsuperscript{373} In another case, the court cited \textit{Zafiro} on mutually antagonistic defenses, then concluded that the defendants “did not have mutually antagonistic or mutually exclusive defenses.”\textsuperscript{374}

\textbf{H. The Fourth Circuit}

The Fourth Circuit began its foray into the mutually exclusive defenses doctrine by borrowing from the D.C. Circuit. In \textit{United States v. Becker},\textsuperscript{375} the court, in rejecting the defendant’s severance claim, followed \textit{Ehrlichman} and \textit{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

\begin{footnotesize}
\begin{enumerate}
\item Id. at 432-33.
\item Id. at 433.
\item Id. at 432.
\item 585 F.2d 703 (4th Cir. 1978).
\end{enumerate}
\end{footnotesize}
unjustifiably infer that this conflict alone demonstrates that both are guilty.”\textsuperscript{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.\textsuperscript{377} In \textit{United States v. Ferguson},\textsuperscript{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, \textit{a la} Zafiro, “\textit{[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.}”\textsuperscript{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.\textsuperscript{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.\textsuperscript{381} In \textit{United States v. Ricks},\textsuperscript{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.”\textsuperscript{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.\textsuperscript{384}

\begin{thebibliography}{10}
\bibitem{376} \textit{Id.} at 707 (quoting \textit{United States v. Ehrlichman}, 546 F.2d 910, 929 (D.C. Cir. 1976) and \textit{United States v. Robinson}, 432 F.2d 1351, 1351 (D.C. Cir. 1970)).
\bibitem{378} 778 F.2d 1017 (4th Cir. 1985).
\bibitem{379} \textit{Id.} at 1020 (citing \textit{Sellers}).
\bibitem{381} \textit{Id.}
\bibitem{382} 882 F.2d 885 (4th Cir. 1989).
\bibitem{383} \textit{Id.} at 894 (citing \textit{Spitler}).
\end{thebibliography}
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. A recent district court opinion similarly relied solely on *Zafiro*. But two other appellate opinions did not mention *Zafiro*, and one of these still gave the *Becker* version of the rule.

In 2002, in *United States v. Najjar*, 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. 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*.]” 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.

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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).

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. 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.” As authority, the Vinson court cited United States v. Perez, which basically says nothing regarding conflicting defenses or confusion or misleading of the jury. 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. Although later judges did rephrase the language in Vinson, the meaning remained constant through the 1990s.

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. Critten, 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. Crottinger, 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.”); Critten, 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.” 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. 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.” 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 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.”

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, 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)].” In United States v. Harris, 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 109937, 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).
definition of antagonistic defenses: where “one person’s claim of innocence is predicated solely on the guilt of a co-defendant.”

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. Only three opinions from the early years after Zafiro did not cite it, and two of these relied instead on the parallel Vinson rule, while the other was the peculiar Harris decision.

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. 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.’” 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.

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406 Id. at 501.
408 United States v. Critten, 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.
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).
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

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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

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

432 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.

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

434 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, 15 F.3d 1436 (8th Cir. 1993).


436 416 F.3d 811 (8th Cir. 2005).
gave the Gutberlet rule, via United States v. Mickelson, on mandatory
severance of irreconcilable defenses. 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. 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.” At least one rare early case
from the Ninth Circuit, United States v. Roselli, 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. 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.

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).
Sherlock, 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, as did some later opinions. Other opinions mixed and matched in various ways: only “precludes acquittal” from Ramirez; only “mutually exclusive”; only “mutually exclusive” rephrased as “mutually antagonistic”; “accept/preclude”; “accept/preclude” plus “core of defense”; or “irreconcilable and mutually exclusive” plus “accept/preclude.” Other panels offered slightly modified language, such as the new definition of “completely antagonistic” as “irreconcilable and mutually exclusive” in United States v. Forcelledo.

In United States v. Vasquez-Velasco, 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.” In United States v. Gilbert, 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.

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.
456 15 F.3d 833 (9th Cir. 1994).
457 Id. at 846 (citing United States v. Rucker, 915 F.2d 1511, 1513 (11th Cir. 1990))
459 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.
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.
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, uncurable, “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, the court was well aware of Tootick, citing it for one proposition and distinguishing it for others.480 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).
478 United States v. Andonian, Nos. 91-50622 to 91-50626, 1994 WL 377947, at *6 (9th Cir. July 19, 1994).
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.”

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. 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. 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, 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.” The court upheld the trial court’s denial of severance because the codefendants’ defenses were not irreconcilable to that degree. 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. 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. The court did not mention Tootick. 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.
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 inculpation 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.
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 inculpated 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 “[i]f these 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).
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


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

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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.


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.\textsuperscript{520} In \textit{Mayfield}, both defendants had access to an apartment where drugs were found,\textsuperscript{521} and the court found that the facts of the case created a situation like that in \textit{De Luna} or \textit{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.\textsuperscript{522} At trial, both defendants were convicted and sentenced to lengthy terms.\textsuperscript{523} The \textit{Mayfield} court reversed, and offered three grounds for their decision: (1) mutually exclusive defenses that made denial of severance reversible error;\textsuperscript{524} (2) denial of Confrontation Clause rights;\textsuperscript{525} and (3) manifestly prejudicial, non-harmless error.\textsuperscript{526}

In reaching its decision, the \textit{Mayfield} court quoted \textit{Throckmorton} and \textit{Sherlock}’s language affirming a mandatory severance rule for mutually exclusive defenses along with \textit{Tootick}’s and \textit{Zafiro}’s language declining to adopt such a rule.\textsuperscript{527} For instance, the court said, “As we stated in \textit{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 \textit{Zafiro} ‘declin[ed] to adopt a per se rule against joinder.’ ” [citing \textit{Tootick}]. Instead, ‘defendants must demonstrate that clear and manifest prejudice did in fact occur.’”\textsuperscript{528} In so doing, the \textit{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 \textit{Tootick} and \textit{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.\textsuperscript{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.

\textsuperscript{520} Id. at 897-900.  
\textsuperscript{521} Id. at 897-98, 900.  
\textsuperscript{522} Id. at 900.  
\textsuperscript{523} Id. at 899.  
\textsuperscript{524} Id. at 900.  
\textsuperscript{525} Id. at 906.  
\textsuperscript{526} Id.  
\textsuperscript{527} Id. at 899, 903, 905.  
\textsuperscript{528} Id. at 903.  Ironically, the \textit{Mayfield} majority juxtaposed the irreconcilable \textit{Tootick} and \textit{Ramirez-Sherlock} language without noting \textit{Tootick}’s explicit rejection of the \textit{Ramirez-Sherlock} "holding."  
\textsuperscript{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. Defense 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-possession 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).
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].

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) Ninth Circuit panels began primarily following Zafiro and refraining from stating a mandatory severance rule in cases involving claims of mutually exclusive defenses. However, recent district court opinions from the Ninth Circuit have continued to rely heavily on Throckmorton to state a per se severance rule.

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. In Walton, the court agreed with language from the D.C. Circuit’s opinion in Rhone 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. 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.
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 incriminating 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.\textsuperscript{540}

The Walton court found no prejudice and did not incorporate the Rhone court’s statements regarding irreconcilable defenses in any way.\textsuperscript{541}

Later, in \textit{United States v. Roberts},\textsuperscript{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 \textit{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.”\textsuperscript{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.”\textsuperscript{544} The Roberts court thus came fairly close to stating the same rule that the Zafiro Court would later state.\textsuperscript{545}

The Tenth Circuit took a more dangerous step in 1981 in \textit{United States v. Calabrese}.\textsuperscript{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.’”\textsuperscript{547} Although this was far from a holding, it helped to set in motion the process that led later

\textsuperscript{540} \textit{Id.} at 1360-61 (citations omitted).
\textsuperscript{541} \textit{Id.} at 1361.
\textsuperscript{542} 583 F.2d 1173 (10th Cir. 1978).
\textsuperscript{543} \textit{Id.} at 1177.
\textsuperscript{544} \textit{Id.}
\textsuperscript{546} 645 F.2d 1379 (10th Cir. 1981).
\textsuperscript{547} \textit{Id.} at 1384 (quoting Becker (4th Cir. 1978) and Ehrlichman (D.C. Cir. 1976)).
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

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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. Swingler555 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.
the Fifth Circuit (Romanello, Crawford, and Johnson). 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.” 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.”

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, concluding that all three Fifth Circuit reversals had a common ingredient lacking in Swingler: at least one defendant directly accusing another. 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. In Smith, the court followed McClure in observing how the Tenth Circuit had “suggested that ‘irreconcilable defenses may require that
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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
sightly 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.
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 co-defendants “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].

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).” 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. Another short branch of the tree followed Burrell and Esch in stating that mutually exclusive defenses mandated severance.

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

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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).
States v. Linn.\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{580}

In Linn, the defendants apparently made the unfortunate mistake of labeling their defenses “mutually antagonistic.” In United States v. Dirden,\textsuperscript{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,\textsuperscript{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.\textsuperscript{583}

\begin{footnotes}
\textsuperscript{578} 31 F.3d 987 (10th Cir. 1994).
\textsuperscript{579} Id. at 992.
\textsuperscript{580} Id.
\textsuperscript{581} 38 F.3d 1131 (10th Cir. 1994).
\textsuperscript{582} Id. at 1141.
\end{footnotes}
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.\footnote{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-Alparo, No. 90-2240, 1993 WL 76266, at *5 (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).} 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.\footnote{Brantley, 986 F.2d at 383 n.2; Scott, 37 F.3d at 1580.} Later, in the wake of Dirden, 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.\footnote{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. Dirden, 38 F.3d 1131, 1141 (10th Cir. 1999).} And, as in other circuits, some Tenth Circuit opinions ignored or overlooked Zafiro altogether.\footnote{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).} Yet encouragingly, two recent district court decisions from the Tenth Circuit relied primarily on Zafiro.\footnote{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).} M. The Eleventh Circuit


adopted as binding precedent all decisions of the former Fifth Circuit,\textsuperscript{590} and in 1982, it further adopted as precedent all decisions of the former Unit B of the Fifth Circuit.\textsuperscript{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 \textit{Berkowitz} decision came from Unit B, this meant a heavy reliance on its “to believe core of one defense, must disbelieve other” construction. In \textit{United States v. Riola},\textsuperscript{592} the court borrowed two constructions from \textit{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,”\textsuperscript{593} and

\textit{[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.}\textsuperscript{594}

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

\textsuperscript{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).
\textsuperscript{591} Stein v. Reynolds Sec., 667 F.2d 33, 34 (11th Cir. 1982); \textit{Rucker}, 915 F.2d at 1513 n.1.
\textsuperscript{592} 694 F.2d 670 (11th Cir. 1983).
\textsuperscript{593} \textit{Id.} at 672 (quoting \textit{Berkowitz}).
\textsuperscript{594} \textit{Id.}
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{597} United States v. Cassano, 132 F.3d 646, 652 (11th Cir. 1998) (ironically citing \textit{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.
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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,” while others rephrased the language to read “mutually exclusive and irreconcilable.” 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. Other opinions used only the term “irreconcilable” in their statements of the “rule,” 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 1569, 1574-75 (11th Cir. 1985); United States v. McElroy, 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 880, 882 (11th Cir. 1983); United States v. Bovain, 708 F.2d 606, 610 (11th Cir. 1983).

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; Andreas, 765 F.2d at 1498; Magdaniel-Mora, 746 F.2d at 718; Reme, 738 F.2d at 1165; Walker, 720 F.2d at 1534.

Knowles, 66 F.3d at 1159 (citing Castillo-Valencia); Garcia, 405 F.2d at 1272 (quoting Knowles); Basley, 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).

Knowles, 66 F.3d at 1159 (citing Castillo-Valencia); Garcia, 405 F.2d at 1272 (quoting Knowles); Basley, 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).

Knowles, 66 F.3d at 1159 (citing Castillo-Valencia); Garcia, 405 F.2d at 1272 (quoting Knowles); Basley, 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).
Herring, which represented almost the only instance of a brief and abortive attempt to introduce the “both are guilty” version into Fifth Circuit jurisprudence. 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, 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. This new “rule” had a short history in the Eleventh Circuit. In United States v. Walker, 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.” 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.” 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, 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?

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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).
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).
(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?  

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, 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)].” 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

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611 Id. at 1568.
612 877 F.2d 901 (11th Cir. 1989).
613 Id. at 904.
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. Strollar,615 the court declared, “Finally, the Supreme Court has put to rest the question of severance whenever codefendants have conflicting defenses.”616 The Strollar 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. As in *Strollar*, 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. Finally, in *United States v. Blankenship*, the court not only closely followed *Zafiro*, but also correctly stated that *Zafiro* implicitly overruled both *Rucker* and *Esle*, both of which gave the “mutually exclusive or irreconcilable” and “core” language from *Berkowitz*. 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 *Strollar*, but clearly rejected *Cassano* in favor of *Strollar* and *Zafiro*.

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. In the most recent opinion from the Eleventh Circuit involving mutually exclusive defenses, *United States v. Garcia*, the court seemingly tried to play it safe by stating the first portion of the old *Berkowitz* rule via *United States v. Knowles*—“[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. 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

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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 Id. at 1159.
626 Rucker, 915 F.2d at 1513; United States v. Esle, 743 F.2d 1465, 1476 (11th Cir. 1984).
627 United States v. Blankenship, 382 F.3d 1110, 1125 n.27 (11th Cir. 2004).
628 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).
629 405 F.3d 1260 (11th Cir. 2005).
630 66 F.3d 1146, 1159 (11th Cir. 1995).
mutually exclusive defenses followed Talley and Zafiro and properly rejected appellants’ invocations of pre-Zafiro precedent.\textsuperscript{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

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
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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. 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. 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.” 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
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 Salamet; 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 \textit{Zafiro}, such as the D.C. and Seventh Circuits, there was never a clear acknowledgement that \textit{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 \textit{Zafiro} meant that subsequent panels tended to turn to those interpretations rather than reading and comprehending \textit{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 \textit{Zafiro} and thus implicitly interpreted \textit{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 \textit{Zafiro}, so the conscientious panel could follow that authority rather than the obviously incorrect one.\footnote{United States v. Blankenship, 382 F.3d 1110, 1125 n.27 (11th Cir. 2004) (discussing \textit{Cassano} (incorrect) and \textit{Strollar} (correct)). The full text of this footnote reads as follows: We acknowledge that our holding in \textit{Cassano} comes to the opposite conclusion. Citing several pre-\textit{Zafiro} Eleventh Circuit cases, \textit{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 \textit{Cassano} court’s discussion of mutually antagonistic defenses did not cite \textit{Zafiro} at all, and seems to be simply a reflection of our pre-\textit{Zafiro} policy. We would nevertheless be bound to follow \textit{Cassano} under our prior panel rule, except that in an earlier case, \textit{United States v. Strollar}, 10 F.3d 1574, 1578 (11th Cir. 1994), we expressly adopted the Supreme Court’s \textit{Zafiro} analysis and held that “mutually antagonistic defenses are not prejudicial \textit{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 \textit{Cassano} and our 1994 holding in \textit{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 \textit{en banc}.”).} 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.
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 Serpooshi (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.