STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v.

TERRANCE ANTHONY FURLINE **No. 158296**
Defendant-Appellee,

and

ALVIN BERNARD JENKINS, SR.
Defendant-Appellee. **No. 158298**

_____/

L.C. Nos. 16-42043-FH; 16-42044-FH
COA Nos. 335906; 336203
_____/

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

Mutually exclusive defenses are not prejudicial per se, and severance should be granted only if there is a serious risk that a joint trial would 1) compromise a specific trial right of one of the defendants, or 2) prevent the jury from making a reliable judgment about guilt or innocence, cautionary instructions ordinarily being sufficient. Here the defenses were not mutually exclusive in any event, and no specific trial right of one of the defendant's was compromised. Were the strong cautionary instructions given adequate to guide the jury to a reliable judgment about guilt or innocence?

Amicus answers: YES

Statement of Facts and Proceedings

Amicus concurs in the facts as stated by the People of the State of Michigan.

Argument

I.

Mutually exclusive defenses are not prejudicial per se, and severance should be granted only if there is a serious risk that a joint trial would 1) compromise a specific trial right of one of the defendants, or 2) prevent the jury from making a reliable judgment about guilt or innocence, cautionary instructions ordinarily being sufficient. Here the defenses were not mutually exclusive in any event, and no specific trial right of one of the defendant's was compromised. The strong cautionary instructions given were adequate to guide the jury to a reliable judgment about guilt or innocence.

Introduction

This Court has directed that the parties address "whether the Court of Appeals clearly erred in its application of the principles of *People v. Hana*, 447 Mich. 325, 524 N.W.2d 682 (1994), to the defendants' motions for separate trials."[1] Amicus agrees with the People that the Court of Appeals did so err. This case also provides an opportunity for the Court to clarify *Hana*. *Hana* seems to suggest that the establishment of mutually exclusive or irreconcilable defenses—either by testimony, or, it appears, even by defense theory—is sufficient of itself to require severance of defendants.[2] Such a rule would be inconsistent with the *Zafiro*[3] decision of the United States Supreme Court, which this Court appeared to be following and applying in

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[1] *People v. Furline*, 921 N.W.2d 538 (2019).

[2] "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *People v. Hana*, 447 Mich. 325, 349 (1994).

[3] *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). The Supreme Court specifically rejected a claim that severance is required "as a matter of law when codefendants present 'mutually antagonistic defenses.'" Id., at 535, 113 S. Ct. at 936.

Hana, and with many jurisdictions post-*Zafiro*. To the extent *Hana* can be so read this Court should clarify that the rule to be applied is that mutually antagonistic or exclusive or irreconcilable defenses are not prejudicial per se; when defendants properly have been joined, a trial court should grant a severance 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.[4]

Amicus begins with *Zafiro*.

A. Under *Zafiro* severance does not follow as a matter of law when mutually exclusive or irreconcilable defenses are alleged

Under FRCP 8(b), governing the joinder of defendants, an "indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count." Relief from permissive joinder is provided by FRCP 14(a) if the joinder of defendants for trial "appears to prejudice a defendant or the government," and then "the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires."

The facts of *Zafiro* demonstrate that mutually exclusive defenses do not require severance under that decision. Zafiro and three others, Martinez, Garcia, and Soto, were charged with distributing drugs, primarily from Soto's bungalow and Zafiro's apartment. On a particular day, Soto and Garcia were observed putting a large box into Soto's car, and then driving from Soto's

[4] Id, at 538–539, 113 S. Ct. at 938.

bungalow to Zafiro's apartment. Agents followed them as they carried the box up the stairs; when the agents identified themselves, the two dropped the box and ran into the apartment. The agents pursued, and found all four defendants in the living room. The box that Soto and Garcia had dropped contained 55 pounds of cocaine. The apartment was then searched after a search warrant was obtained. Discovered were 16 pounds of cocaine, 25 grams of heroin, and 4 pounds of marijuana inside a suitcase in a closet. Next to the suitcase was a sack containing $22,960 in cash. Police officers also discovered 7 pounds of cocaine in a car parked in Soto's garage.[5] Soto claimed that he had supplied Garcia with a box on his request, but did not know the contents of the box when they carried it, and knew nothing of any drug conspiracy. Though Garcia did not testify, his lawyer argued that the box was Soto's and Garcia did not know what was in it. The two asked for severance, then, claiming their defenses were mutually antagonistic.

Zafiro and Martinez also claimed that their defenses were mutually antagonistic. Zafiro said she was Martinez's girlfriend, and that she allowed him to keep things in her apartment, including the suitcase, which was his, the contents of which she was unaware. Martinez did not testify, but his lawyer argued that the apartment where the suitcase was found was that of Zafiro, and Martinez was unaware their were drugs in the suitcase and apartment. To put the matter finely, Soto and Garcia possessed a box, and each claimed ignorance of its contents, implicitly pointing the finger at one another. There was a suitcase with drugs in the apartment of Zafiro, who said the suitcase belonged to Martinez and that she was unaware of its contents, while Martinez argued that the suitcase was in Zafiro's apartment, and so it and the contents must be hers. The motions for severance were denied.

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[5] Id., at 536, 113 S. Ct. at 936.

That the Court was considering defenses which might be said to be mutually exclusive or irreconcilable, drawing no distinction between "mutually antagonistic" and "mutually exclusive" defenses is clear, the Court noting that federal circuit courts had "frequently . . . expressed the view that *'mutually antagonistic' or 'irreconcilable' defenses* may be so prejudicial *in some circumstances* as to mandate severance."[6] The basis of a claim that these defenses require severance is, said the Court, the "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 least one of the two must be guilty without regard to whether the Government has proved its case beyond a reasonable doubt,"[7] so that, as a bright-line rule, severance is required. The Court rejected this argument, holding specifically that these defenses *"are not prejudicial per se*," so that even where alleged in a proper motion for severance a trial court should grant severance "only if there is a serious risk that a joint trial would 1) *compromise a specific trial right* of one of the defendants, or 2) prevent the jury from making a *reliable judgment about guilt or innocence*."[8] The Court also addressed when prejudice might occur requiring severance under this test; namely, when

> - evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. . . . When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened.

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[6] Id., at 538, 113 S. Sct. at 937 (emphasis added).

[7] Id., at 540, 113 S. Ct. at 938.

[8] Id., at 539, 113 S.Ct. 938 (numbering and emphasis added).

- Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice.

- A defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial.

- Trial courts may find prejudice in some other situations.[9]

And even "[w]hen the risk of prejudice is high, [so that] a district court is more likely to determine that separate trials are necessary . . . *less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice*."[10] The Court also emphasized that "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials," and that the joinder and severance rules are designed "to promote economy and efficiency and to avoid a multiplicity of trials, [so long as] these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial."[11]

In the cases before it, the Court determined that "even if there were some risk of prejudice, here it is of the type that can be cured with proper instructions."[12] And the trial court had instructed the jury that the prosecution had "the burden of proving beyond a reasonable doubt" that each defendant committed the crimes with which he or she was charged, and that the jury had to "give separate consideration to each individual defendant and to each separate charge against him," as "'[e]ach defendant is entitled to have his or her case determined from his or her

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[9] Id.

[10] Id.

[11] Id., at 540, 113 S.Ct. at 938.

[12] Id., at 540, 113 S.Ct. at 939.

own conduct and from the evidence [that] may be applicable to him or to her.'" These instructions, held the Court, "sufficed to cure any possibility of prejudice."[13]

The rule of *Zafiro*, then, is that an allegation in a motion to sever for mutually antagonistic defenses, including those that are supposedly "exclusive" or "irreconcilable," does not, as a matter of law, require severance, as the fact of such defenses is not prejudicial per se. Rather, there must be shown to be a serious risk that a joint trial would 1) compromise a specific trial right of one of the defendants, or 2) prevent the jury from making a reliable judgment about guilt or innocence; further, even then, proper jury instructions will ordinarily suffice in a given case to cure the risk of prejudice.[14]

B. The 7th Circuit's decision, affirmed in *Zafiro*, is instructive that severance does not follow as a matter of law when mutually exclusive or irreconcilable defenses are alleged

The Supreme Court in *Zafiro* affirmed the decision of the 7th Circuit, and that court's decision[15] is itself instructive on the point. The court took note of the then-existing body of federal case law 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," but "not when the defendants are engaged merely in 'finger-pointing,'" saying that "[t]his formulation has become canonical." But, said the Court, "we recall Justice Holmes's warning that to rest upon a formula is a slumber that prolonged

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[13] Id., at 540-541, 113 S.Ct at 938-939.

[14] See cases cited at fn 25 and fn 26, infra.

[15] *United States v. Zafiro*, 945 F.2d 881 (CA 7,1991).

means death."[16] Presaging the opinion of the Supreme Court, the court said that "persons charged 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."[17] And the court saw two situations as fitting the bill. The first is the complex case with many defendants, where some are only peripherally involved. "Here, the danger is that the bit players may not be able to differentiate themselves in the jurors's minds from the stars."[18] But even here this danger is weighed against the interest in trying all members of a conspiracy together so that the jury may get "a complete picture and the government can save the expense of conducting multiple trials to break a single ring. This counterweight has invariably prevailed in the appellate cases."[19] The second situation identified by the court is where "a joint trial is likely to throw the jury off the scent is where exculpatory evidence essential to a defendant's case will be unavailable—or highly prejudicial evidence unavoidable—if he is tried with another defendant," with the admission of a confession of a nontestifying defendant under *Bruton v. United States*[20] an example where severance or some other remedy is required.[21]

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[16] Id., at 885.

[17] Id.

[18] Id.

[19] Id.

[20] *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

[21] *Zafiro*, 945 F.2d at 886.

In the case before it, "[e]ach member of each pair of defendants (Soto–Garcia and Martinez–Zafiro) was accusing the other of being the drug dealer." Though, in a sense "each defendant had to defend himself against the prosecutor and one other defendant," each "at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, 'Don't convict me, convict Garcia,' and Garcia's lawyer could say, 'Don't convict my client, convict Soto.' This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing no one could question is that the government had found 75 pounds of cocaine on premises connected with these defendants." And so "no defendant was placed at a net disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial"; further, "the benefit of the joint trial went beyond the avoidance of duplication. The jury was given the full picture."[22]

So here.

C. *Hana* should be clarified to make clear that severance does not follow as a matter of law when mutually exclusive or irreconcilable defenses are alleged

In *Hana* this Court undertook a reexamination of *People v. Hurst*[23] with regard to antagonistic defenses and severance, a "reexamination . . . prompted, in part, by issuance of . . . *Zafiro v. United States*."[24] Three cases were consolidated for consideration. In *Hana* the defendant and his brother moved for severance, each claiming that drugs in a safe in the house

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[22] Id.

[23] *People v. Hurst*, 396 Mich. 1 (1976).

[24] *Hana*, at 337-338.

belonged to the other; the motion for severance was denied. There was evidence that Hana's brother had opened the safe after he went to a back bedroom while Hana was sleeping. While his brother opened the safe, defendant asked the individual who was with his brother whether the person outside was a police officer, and whether that person had dealt with that individual before concerning purchasing narcotics. Hana's brother took a plastic bag from the safe, mixed it with the contents from some other bags, and gave it to the individual accompanying him. That person delivered the drugs to an the individual outside, who gave him marked money in exchange, and a surveillance team of law enforcement officers moved in and arrested all the participants, including defendant and his brother. Defendant's brother eventually supplied the combination to the safe, and defendant admitted that it was his.[25]

In the other case considered by this Court, severance was denied, but two juries were empaneled, each of which heard all the evidence, but decided the case of only one defendant. Rode and Gallina were riding around in a Camaro with some high school friends. Gallina was seated in the front passenger seat, and Rode in the back seat on the passenger side. A car pulled next to them and the occupants indicated they wanted to race; shouting back-and-forth then occurred, and an occupant of the other car said "You're lucky we don't pull our gun out and shoot you." Gallina then pulled a gun and fired it out the window more than once. Rode then took the gun from Gallina and Gallina testified that Rode said "If you are not going to shoot at them, I will" and fired the gun toward the tires of the Mustang. Rode testified that after he did so the gun went back to Gallina, who fired again. Rode then reloaded the gun with bullets supplied by Gallina. The driver of their vehicle stopped suddenly, and either Rode or Gallina pulled himself

[25] Id., at 333.

up out of the passenger-side window and shot several times over the roof of their vehicle at the other car, a shot striking and killing an occupant of the other car. Both Rode and Gallina denied firing the shots over the roof of their vehicle that caused the death of the occupant of the other car, each blaming the other for those shots. The driver of their vehicle said that Gallina did not fire those shots, and that Rode said after the shots were fired "I know I hit him." A backseat passenger of their vehicle said he did not see Rode fire those shots but saw Gallina reach out the window and fire the gun once the other vehicle had passed. The middle passenger of the back seat testified that it was Gallina who fired the gun over the roof as the Mustang was passing, and then defendant Rode leaned out the window and fired the gun as the Mustang drove off.[26]

Under MCR 6.121an information or indictment may charge two or more defendants with the same offense and may charge two or more defendants with two or more offenses when each defendant is charged with accountability for each offense, or the the offenses are related. An offense is related as set out in MCR 6.120(B) if based on the same conduct or transaction, or a series of connected acts, or a series of acts constituting parts of a single scheme or plan. Unrelated offenses must be severed on request under MCR 6.120, but on related offenses the court must sever defendants only "on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." The trial court also retains the discretion to sever defendants on a finding that severance is "appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants."

As this Court noted, the federal and Michigan court-rule schemes for joinder and severance of defendants are substantively compatible; indeed, "MCR 6.121(C) actually imposes

[26] Id., at 35-336.

a heightened requirement in that severance is mandated only when a defendant makes 'a showing that severance is necessary to avoid prejudice to substantial rights of the defendant," so that a defendant "must not only demonstrate that 'substantial rights' have been detrimentally affected, but also that severance is 'necessary,'" i.e., *that there is no other available avenue of relief*.[27] The Court concluded that the Michigan court rule standards "bear close resemblance to the *Zafiro* standard," and that in fact the standard laid out in *Zafiro* was "comparable to the standard that already exists in Michigan."[28]

In the cases before it, the Court affirmed. With regard to Hana and his brother, the Court said that

> the affidavit submitted by defendant in support of his motion for severance was conclusory in nature. It lacked sufficient specificity to enable the trial court to accurately determine what the defenses would be, how the defenses would affect each other, and whether the defendants' respective positions were indeed mutually exclusive or merely inconsistent. Potentially prejudicial evidence, either physical or testimonial, was not substantiated by the affidavit or at the hearing. A trial court ruling on a pretrial motion must have concrete facts on which to base a ruling; mere finger pointing does not suffice. In the absence of proof that clearly, affirmatively, and fully demonstrated that defendant's substantial rights were prejudiced and that severance was necessary, we will not interfere with the trial court's discretion.
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> With the benefit of hindsight, we further find that defendant was not irretrievably prejudiced at trial. Neither defendant testified, so there were no express cross-accusations. Indeed, apart from the noted comments of respective counsel in their opening statements

[27] Id., at 345.

[28] Id., at 345-346.

> and summations, there was nothing inherently antagonistic in the evidence adduced at trial.[29]

With regard to Rode and Gallina, where separate juries were empaneled each of which heard all the evidence, the Court determined that:

> the defendants . . . fail to demonstrate what trial rights were violated by the dual-jury procedure or how the juries' determinations were unreliable. There is no indication that either defendant was restricted in his presentation of a defense, nor was either jury exposed to evidence that would have been barred from their considerations in separate trials.
>
> The presence of two juries in the defendants' cases is significant. Where mutually antagonistic defenses are presented in a joint trial, there is a heightened potential that a single jury may convict one defendant, despite the absence of proof beyond a reasonable doubt, in order to rationalize the acquittal of another. That dilemma is not presented to dual juries.
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> The risk of prejudice is reduced even more in these cases by the significant fact that the prosecutor charged defendant Gallina as an aider and abettor . . . and did not contend that he fired the fatal shot. Fingerpointing by the defendants when such a prosecution theory is pursued does not create mutually exclusive antagonistic defenses. The properly instructed jury could have found both defendants similarly liable without any prejudice or inconsistency because one found guilty of aiding and abetting can also be held liable as a principal.[30]

Hana contains some language, however, that is inconsistent with *Zafiro*. *Zafiro* makes plain that even irreconcilable defenses are not prejudicial per se, and do not, as a matter of law, require severance. *Hana* says that, as to cases that had "interpreted *Hurst* as authority for a severance rule per se when antagonistic defenses are alleged, we disavow such a rationale,"

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[29] Id., at 355.

[30] Id., at 360-362.

which is well and good, but the Court went on to say that "[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable,'"[31] suggesting, it seems, that in this circumstance severance would follow automatically.[32] This is not consistent with *Zafiro,* as understood by a number of federal cases.

- "Even irreconcilable defenses 'are not prejudicial per se.' *Zafiro*, 506 U.S. at 538, 113 S.Ct. 933)."[33]

- "Even if we were to conclude that their defenses were mutually antagonistic and irreconcilable, severance would not have been required because such 'conflict alone' would not have caused the jury to infer that both Robinson and his codefendants were guilty."[34]

- "The law is that defendants indicted together generally should be tried together; the fact that a defendant's chances of acquittal are materially better in separate trials is not enough; a defendant is not entitled to a severance merely because of antagonistic or mutually exclusive defenses; and a defendant must show that the joint trial caused him such compelling prejudice that he was deprived of a fair trial."[35]

- "The occurrence of mutually antagonistic defenses is generally not sufficient grounds to require severance. . . . . 'The courts have reversed relatively few convictions for failure to grant a severance on grounds of

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[31] Id., at 349.

[32] *Hana* cites *United States v. Tootick*, 952 F.2d 1078, 1082 (CA 9, 1991) with approval. That decision itself holds that "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." Id., at 1083 (emphasis supplied).

[33] *United States v. Anderson*, 783 F.3d 727, 743 (CA 8, 2015).

[34] *United States v. Martin*, 777 F.3d 984, 995 (CA 8, 2015).

[35] *United States v. Hill*, 643 F.3d 807, 834 (CA 11, 2011).

mutually antagonistic or irreconcilable defenses.... Mutually antagonistic defenses are not prejudicial per se.'"[36]

- "Even a showing that two defendants have 'mutually antagonistic defenses,' that is, *that the jury's acceptance of one defense precludes any possibility of acquittal for the other defendant*, is not sufficient grounds to require a severance unless the defendant also shows prejudice to some specific trial right."[37]

There are state decisions are to the same effect:

- "In order to be entitled to severance based on mutually exclusive defenses, 'the defendant must show real prejudice, rather than merely note that each defendant is trying to exculpate himself while inculpating the other.'"[38]

- "Even a defendant who is arguing that the existence of mutually exclusive or antagonistic defenses resulted in prejudice entitling him or her to severance must meet the high burden of showing that '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.'"[39]

- "It is fair to suggest that Colon's and Perez's defenses were antagonistic because acceptance of Colon's defense tended to preclude the jury from accepting Perez's; likewise, acceptance of Perez's defense tended to preclude the jury from accepting Colon's. Although the defenses were antagonistic, such defenses are, in themselves, insufficient to establish prejudice. . . . Moreover, the district court instructed the jury that the State had 'the burden of proving beyond a reasonable doubt' that each defendant committed the crimes with which he or she was charged, that '[e]ach charge and the evidence pertaining to it should be considered separately,' that '[t]he fact that [the jury] may find a defendant guilty or not guilty as to one of the offenses charged should not control [its] verdict as to any other offense charged.'"[40]

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[36] *United States v. Souffront*, 338 F.3d 809, 831 (CA 7, 2003).

[37] *United States v. Mietus*, 237 F.3d 866, 873 (CA 7, 2001) (emphasis added).

[38] *State v. Foster*, 839 N.W.2d 783, 797–798 (Neb., 2013).

[39] *State v. Clark*, 842 N.W.2d 151 (Neb, 2013).

[40] *Perez v. State*, 373 P.3d 950 (Nev, 2011).

- Sexton essentially argues that joinder was prejudicial per se because of his and Daluz's incompatible and irreconcilable defenses—a contention that, without more, is not persuasive."[41]

The Court should make clear that even with mutually exclusive or irreconcilable defenses severance is not required as a matter of law; rather, there must be shown to be a serious risk that a joint trial would 1) compromise a specific trial right of one of the defendants, or 2) prevent the jury from making a reliable judgment about guilt or innocence, and proper jury instructions may well suffice in a given case to cure the risk of prejudice.[42]

D. The defenses here were not mutually exclusive, no specific trial right of one of the defendant's was compromised, and the strong and repeated cautionary instructions given were adequate to guide the jury to a reliable judgment about guilt or innocence

Amicus joins the argument of the People that the defenses here were not mutually exclusive or irreconcilable in any event, and that the motions and affidavits were insufficient on which to find an abuse of discretion on the part of the trial judge in denying the severance motion, and will thus no belabor the point. Amicus would only emphasize the extensive instructions given the jury on the point.

In *Zafiro*, the Court took note of the limiting instructions given by the trial court. The trial court had instructed that the prosecution had "'the burden of proving beyond a reasonable

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[41] *State v. Sexton*, 159 A.3d 335, 342 (Me, 2017).

[42] See Scott Hamilton Dewey, "The Case of the Missing Holding: The Misreading of Zafiro v. United States, the Misreplication of Precedent, and the Misfiring of Judicial Process in Federal Jurisprudence on the Doctrine of Mutually Exclusive Defenses," 41 VAL. U. L. REV. 149, 152–153, 267 (2006) ("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 . . . . The definition of mutually antagonistic defenses used in *Zafiro* is the same as the principal definition of mutually exclusive and irreconcilable defenses."

doubt' that each defendant committed the crimes with which he or she was charged"; that the jurors "must "give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her"; and that "opening and closing arguments are not evidence and that [the jury] should draw no inferences from a defendant's exercise of the right to silence." The Court concluded that "*These instructions sufficed to cure any possibility of prejudice*."[43]

Compare the instructions given here (and compare the nature of the conflicting defenses in *Zafiro* with those here). The *first thing* the court told the jurors in the *preliminary* instructions, after the jury was selected and thus even before it heard any evidence, was "There are two defendants in this case and you must consider each defendant separately."[44] Further, still in its preliminary instructions to the jurors, setting the stage for their reception of evidence, the court admonished them that "There is more than one defendant in this case. *The fact that they are on trial together is not evidence that they were associated with each other or that either one is guilty. You should consider each defendant separately.* Each is entitled to have his case decided on the evidence and the law that applies to him. If any evidence was limited to one defendant you should not consider it as to any other defendant."[45] And the very first thing the court told the jurors in the *final* instructions directly before the jurors went out to deliberate was "There are two

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[43] *Zafiro v. United States*, at 541, 113 S. Ct. at 939.

[44] I, 109.

[45] I, 130 (emphasis supplied).

defendants in this case and you must treat each defendant individually."[46] The court told the jurors that "The prosecutor and defendants' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories."[47] The court further instructed that "Terrance Furline and Alvin Jenkins are both on trial in this case. *The fact that they are on trial together is not evidence that they are associated with each other, or that either one is guilty. You should consider each defendant separately*. Each defendant is entitled to have his case decided on the evidence and law that applies to him."[48] The court again instructed the jurors that "Each defendant in this case is entitled to have his guilt or innocence decided individually"[49] and that "Remember, you must consider each defendant separately."[50] These instructions—of which the Court of Appeals took no note—are far more than given the jurors in *Zafiro*, and, as in that case, "sufficed to cure any possibility of prejudice."

The Court of Appeals should be reversed, and the convictions affirmed.

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[46] Instructions, 41.

[47] Instructions, 43.

[48] Instructions, 47.

[49] Instructions, 58.

[50] Instructions, 63.

Relief

Wherefore, amicus joins the request of the People that this Court reverse the Court of Appeals and reinstate the convictions.

Respectfully submitted,

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