

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Supreme Court No. 158298

ALVIN BERNARD JENKINS, SR.,

Defendant-Appellee.

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Saginaw Circuit Court No. 2016-042044-FH  
Michigan Court of Appeals Docket No. 336203

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DEFENDANT-APPELLEE'S REPLY IN OPPOSITION TO  
PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER STATEMENT OF APPELLATE JURISDICTION

Appellee was convicted in the Wayne County Circuit Court by jury trial. A judgment of sentence was entered December 11, 2014. A claim of appeal was filed January 9, 2015 by the trial court pursuant to his request for appointment of appellate counsel, received January 2, 2015, as authorized by MCR 6.425(F)(3). The Michigan Court of Appeals had jurisdiction in this appeal of right pursuant to Mich Const 1963, art 1, §20; MCL 600.308(1), MCL 770.3, MCR 7.203(A), MCR 7.204(A)(2). This application is made within 56 days after the Court of Appeals decision. This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.301(A)(2).

COUNTER STATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY VACATED APPELLEE’S  
CONVICTIONS AND REMANDED HIS CAUSE FOR A NEW TRIAL WHERE  
APPELLEE WAS PREJUDICED WHEN TRIED ALONG WITH APPELLEE  
FURLINE IN A JOINT TRIAL BEFORE A SINGLE JURY.

Defendant-Appellee answers this question "Yes".  
Plaintiff-Appellant answered this question "No".  
The trial court answered this question "No".  
The Michigan Court of Appeals answered this question "No".

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## COUNTER STATEMENT OF FACTS

Defendant-Appellee Alvin Bernard Jenkins (“Appellee”) and Defendant Terrance Anthony Furline (“Furline”) were charged with conducting a criminal enterprise [MCL 750.159i], third degree arson [MCL 750.74], conspiracy to commit third degree arson [MCL 750.157a], first degree retail fraud [MCL 750.356c] and conspiracy to commit first degree retail fraud. On April 14, 2016, Furline’s motion for a separate trial was denied. On September 13, 2016 they jointly appeared for trial before a single jury. On September 20, 2016 they were convicted as charged. From terms of 320 months to 50 years, Appellee appealed of right to the Michigan Court of Appeals. In an opinion dated July 3, 2018, the Court of Appeals vacated Appellee’s convictions and remanded his cause to the Saginaw Circuit Court for a new trial. Relevant portions of the Court of Appeals opinion state:

Furline’s counsel motioned the court for separate trials on April 14, 2016, based on discovery he received of Jenkins’s recorded interview statements to detectives that disavowed involvement in the Saginaw Home Depot theft and fire, and blamed both events on Furline. Furline’s counsel contended that Furline’s theory of the case was that Jenkins acted alone in committing the arson and retail fraud. The motion went on to argue, that in the event Jenkins’s videotaped statements were played for the jury, he would be denied his right to confrontation and a *Bruton* situation would arise.<sup>1</sup> Furline’s counsel concluded that defendants’ defenses were mutually exclusive and antagonistic, and requested severance of their trials to avoid the prejudice that would result to Furline should he be forced to defend against Jenkins and the plaintiff. Furline made the same claims in his affidavit supporting the motion. Plaintiff’s May 5, 2016 response argued Furline failed to demonstrate that severance was necessary, and replied that it did not intend to introduce statements made by either codefendant. At the hearing on the motion, Jenkins’s counsel had no objection to separate trials. Plaintiff reiterated it had no intention to introduce the statements at trial and stated the statements would not be admissible through any other witness, unless either defendant testified. The court took the matter under advisement and later denied the motion. Noting that the plaintiff averred that it would not offer the statements of either defendant at trial, the court found that a joint trial would not “prejudicially pit one defendant against the other.” The court viewed Furline and Jenkins’s positions as, at best, “antagonistic claims as to who was responsible for setting the fire.” It resolved that codefendant statements would only be introduced in the event either defendant chose to take the witness stand and then, subject to cross-examination.

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<sup>1</sup>A *Bruton* situation is in reference to *Bruton v. United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). “In *Bruton v. United States*, *supra*, the Court held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating unredacted confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant.” *People v Banks*, 438 Mich 408, 415; 475 NW2d 769 (1991).

With the benefit of hindsight, we find that the court's decision to deny severance as having resulted in the codefendants being prejudiced at trial. The mutual exclusivity of the codefendants' positions was admitted at trial beyond counsels' opening and closing arguments with each codefendant having to prove the other's culpability through each witness's testimony. Walker in particular testified that Furline was not involved in the Flint Home Depot incident, that Jenkins told her he set the fire there, that Furline had only known Jenkins for about a week, and that Jenkins wanted to repeat the Flint arson and retail fraud the next day at the Saginaw store. Without Furline having to testify himself, his mother's testimony was evidence that promoted his defense that it was Jenkins idea to commit arsons and thefts at home improvement stores and he had nothing to do with Jenkins' plan. Jenkins did not have a similar witness in his corner, but did cross-examine Walker and point out Furline's participation in the crimes through Joy Royal's testimony that Furline signed for a no receipt return at the Burton Lowe's. This situation created what *United States v Tootick*, 952 F2d 1078 (CA 9, 1991), referred to as a subtle effect of joining defendants who have asserted mutually exclusive defenses. "All evidence having the effect of exonerating one defendant implicitly indicts the other. The defendant must not only contend with the effects of the government's case against him, but he must also confront the negative effects of the codefendant's case." *Id.* at 1083.

Plaintiff maintains that the act of finger pointing is to be expected by codefendants charged under an aiding and abetting theory, and does not establish mutually exclusive defenses. By definition however, mutual exclusivity of defenses does not concern codefendants' finger pointing, but whether the evidence at trial is such that "in order to believe the core of the evidence offered on behalf of one defendant, [the jury] must disbelieve the core of the evidence offered on behalf of the co-defendant." *Hana*, 447 Mich at 349-350. Significantly, in *Hana* the Court found it dispositive that neither brother/codefendant blamed the other, and in *Rodes and Gallina*, where the codefendants did testify, the Court found the use of separate juries sufficient to guard against prejudice. In the instant case, each defendant denied involvement in all incidents that occurred at the Saginaw store and completely blamed the other for what transpired. Further, they were not afforded any type of severance. Given that plaintiff's theory was one of aiding and abetting blaming both codefendants, and each codefendant attempted to introduce evidence blaming the other, the jury question turned from not whether the individual codefendants acted in concert to commit the crimes alleged, but which of the two was guilty. "That dilemma is not presented to dual juries." *Id.* at 360. When a dual jury procedure is employed, "[e]ach jury is concerned only with the culpability of one defendant." *Id.* In other words, each separate jury is able to find its' own defendant innocent or guilty "without the uneasiness of inconsistency that would be presented to a single jury in a joint trial. The chance for prejudice is therefore significantly lessened." *Id.* At the least, these codefendants should have been granted separate juries to evaluate the evidence against each defendant. The court's decision to predicate the possibility of prejudice on the defendants' right to testify did not protect either defendant from the latent prejudice that would arise as each defendant pursued his mutually exclusive defense at trial. Accordingly, Furline and Jenkins should be afforded new trials, this time with some device of severance.

The Saginaw County Prosecutor applied for leave to appeal that decision. Appellee replies, praying this Honorable Court deny leave or, in the alternative, that it affirm the Court of Appeals.

## ARGUMENT

THE COURT OF APPEALS PROPERLY VACATED APPELLEE'S CONVICTIONS AND REMANDED HIS CAUSE FOR A NEW TRIAL WHERE APPELLEE WAS PREJUDICED WHEN TRIED ALONG WITH APPELLEE FURLINE IN A JOINT TRIAL BEFORE A SINGLE JURY

The due process clauses of the Michigan and federal constitutions guarantee an accused's right to a fair trial. US Const Ams V, XIV, Mich Const 1963, art 1, §17. Joint trials are favored because of their benefit to judicial economy. *People v Carroll*, 396 Mich 408, 414; 240 NW2d 722 (1976); *People v Jones*, 126 Mich App 191, 202 NW2d 889 (1983). The decision whether to grant separate trials to two or more defendants jointly charged is generally left to the trial judge's discretion, except under some circumstances severance is mandatory. MCL 768.5; MCR 6.121(C). Where the codefendants' separate defenses are antagonistic, severance of trials should be granted. A defendant moving for severance bears the burden of proving that substantial rights that will be prejudiced in a joint trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976).

MCR 6.121(C) provides for mandatory severance “on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.” MCR 6.121(D) provides for discretionary severance:

On the motion of any party, the court may sever the trial of defendants on the ground 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. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of the witnesses, and the parties' readiness for trial.

In *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994), this Court concluded that severance is only mandated under MCR 6.121(C) where the defendant provides the court with a supporting affidavit, “or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice.” *Hana, supra*, at 346. Finding that there is no per se rule for severance when co-defendants present antagonistic defenses, the court stated that “[i]nconsistency of defenses is not enough to mandate severance; rather, the defenses must be ‘mutually exclusive’ or ‘irreconcilable’.

... Moreover, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.* at 349, quoting *United States v. Yefsky*, 994 F2d 885, 896 (CA 1, 1993). In order to grant severance based on the theory of antagonistic defenses, a defendant

[M]ust demonstrate that his or her defense is so antagonistic to the co-defendants that the defenses are mutually exclusive. Moreover, defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant. *Id.*, quoting *State v Kinkade*, 140 Ariz 91, 93, 680 P2d 801, 803 (1984).

The court noted that the risk of prejudice faced by multiple defendants tried together may be addressed by the use of dual juries, a partial form of severance, to be evaluated under the same standards applicable to motions for separate trials. *Id.* at 351. The court followed the reasoning of the United States Supreme Court in *Zafiro v United States*, 506 US 534, 538; 113 S Ct 933; 122 L Ed 2d 317 (1993), which held that mutually antagonistic defenses are not per se grounds for severance. Rather, *Zafiro* held that the appropriate standard for evaluating a motion for severance is that of "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." *Id.* at 539.

Here, Appellee's defense was irreconcilable with the defense of Furline. As the Court of Appeals noted,

In the instant case, each defendant denied involvement in all incidents that occurred at the Saginaw store and completely blamed the other for what transpired. Further, they were not afforded any type of severance. Given that plaintiff's theory was one of aiding and abetting blaming both codefendants, and each codefendant attempted to introduce evidence blaming the other, the jury question turned from not whether the individual codefendants acted in concert to commit the crimes alleged, but which of the two was guilty. "That dilemma is not presented to dual juries." *Id.* at 360. When a dual jury procedure is employed, "[e]ach jury is concerned only with the culpability of one defendant." *Id.* In other words, each separate jury is able to find its' own defendant innocent or guilty "without the uneasiness of inconsistency that would be presented to a single jury in a joint trial. The chance for prejudice is therefore significantly lessened." *Id.* At the least, these codefendants should have been granted separate juries to evaluate the evidence against each defendant. The court's decision to predicate the possibility of prejudice on the defendants' right to testify did not protect either defendant from the latent prejudice that would arise as each defendant pursued his mutually exclusive defense at trial.

\* \* \*

The mutual exclusivity of the codefendants' positions was admitted at trial beyond counsels' opening and closing arguments with each codefendant having to prove the other's culpability through each witness's testimony. Walker in particular testified that Furline was not involved in the Flint Home Depot incident, that Jenkins told her he set the fire there, that Furline had only known Jenkins for about a week, and that Jenkins wanted to repeat the Flint arson and retail fraud the next day at the Saginaw store. Without Furline having to testify himself, his mother's testimony was evidence that promoted his defense that it was Jenkins idea to commit arsons and thefts at home improvement stores and he had nothing to do with Jenkins' plan. Jenkins did not have a similar witness in his corner, but did cross-examine Walker and point out Furline's participation in the crimes through Joy Royal's testimony that Furline signed for a no receipt return at the Burton Lowe's. This situation created what *United States v Tootick*, 952 F2d 1078 (CA 9, 1991), referred to as a subtle effect of joining defendants who have asserted mutually exclusive defenses. "All evidence having the effect of exonerating one defendant implicitly indicts the other. The defendant must not only contend with the effects of the government's case against him, but he must also confront the negative effects of the codefendant's case." *Id.* at 1083.

Because Appellee's defenses were mutually exclusive to the defenses presented by Furline, there was a serious risk the jury could not make "a reliable judgment about guilt or innocence" as to Appellee. The spillover was simply too overwhelming, and far from incidental. At a separate trial, the jury would not have been exposed to the mutual exclusivity of the codefendants' positions. Appellee and Furline should have been granted separate trials or at least given separate juries.

Because of the substantial, unfair prejudice that resulted from joinder, Appellee was deprived of "substantial rights," *Hana, supra*, 447 Mich at 345, that is, his due-process rights to a fair trial by an impartial jury. Accordingly, this Court should either deny leave or affirm the Court of Appeals.



RELIEF REQUESTED

WHEREFORE, Defendant-Appellee Alvin Bernard Jenkins prays this Honorable Court deny Plaintiff-Appellant's application for leave to appeal or, in the alternative, affirm the decision of the Michigan Court of Appeals vacating Appellee's convictions and remanding his cause to the Saginaw Circuit Court for a new trial.

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