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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.
_____/

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

DEFENDANT-APPELLEE'S SUPPLEMENTAL REPLY IN OPPOSITION TO PLAINTIFF-APPELLANTS 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).

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COUNTER STATEMENT OF QUESTION PRESENTED

DID THE COURT OF APPEALS CLEARLY ERR IN IT'S APPLICATION OF *PEOPLE V HANA*, 447 MICH 325 (1994) TO THE DEFENDANTS' MOTIONS FOR SEPARATE TRIALS..

Defendant-Appellee answers this question "No".
Plaintiff-Appellant answered this question "Yes".

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COUNTER STATEMENT OF FACTS

Defendant-Appellee Alvin Bernard Jenkins ("Appellee") agrees with the statement of facts as set forth by Plaintiff-Appellee Saginaw County Prosecutor ("Appellant") in it's March 6, 2019 Supplemental Brief, together with any additional facts as may be set forth in the following argument.

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ARGUMENT

THE COURT OF APPEALS DID NOT CLEARLY ERR IN IT'S APPLICATION OF *PEOPLE V HANA*, 447 MICH 325 (1994) TO THE DEFENDANTS' MOTIONS FOR SEPARATE TRIALS.

Prior to the trial, both Mr. Jenkins' and Mr. Furline's trial attorneys moved for severance. After hearing arguments from counsel, the court denied the defense requests for separate juries at a joint trial. As noted in the Court of Appeals opinion:

> 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. 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.

At trial, however, Appellee's jury was exposed to evidence that would not have been heard by the jury had there been separate trials. As the Court of Appeals noted,

> 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

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> 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.

The current controlling precedent on severance based on antagonistic defense theories among co-defendants is *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994). In *Hana*, this Court considered two consolidated cases (the other case was *People v Gallina* and *People v Rode*). In the *Hana* case, the Court had to consider whether severance was mandated where two brothers were tried before a single jury for possession of a controlled substance, but each brother claimed he was not aware of nor in possession of the substance, and had given statements which tended to incriminate the other. Neither defendant testified at the trial, and both were convicted. In *Gallina*, each defendant accused the other of having fired the fatal shot in a homicide case, which was tried at a single trial but with separate juries. In each case, motions to sever the joint trial were denied.

In reviewing Michigan law on severance and joinder, the Court first noted the issue is governed by both statute and court rule, and the decision is for the discretion of the trial court.

The statute at issue, MCL 768.5, reads:

> When 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court.

MCR 6.121 reads, in its pertinent parts:

> (A) Permissive Joinder. An information or indictment may charge two or more defendants with the same offense.
>
> * * *
>
> (C) Right of Severance; Related Offenses. **On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant**.
>
> (D) 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

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> number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial. (Emphasis added).

The *Hana* Court reviewed prior Michigan law on severance, in particular the decision in *People v Hurst*, 396 Mich 1; 238 NW2d 6 (1976), in light of the more recent decision from the United States Supreme Court in *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 LEd2d 317 (1993). In *Hurst*, the Court held the trial judge reversibly erred in not ordering severance where the two co-defendants, the parents of a child who had died from abuse, each testified that the other was solely responsible for the homicide. The *Hurst* opinion, while agreeing a defendant does not have a right to severance from a co-defendant, found that severance should be granted when "the defenses of several defendants jointly indicted are antagonistic to each other." 396 Mich at 6.

In considering Michigan cases following the *Hurst* decision, the *Hana* Court concluded that many courts had taken *Hurst* to require that severance be granted whenever co-defendants accused each other of the charged offense, or testified in a manner which minimized their personal criminal responsibility in comparison to that of the other co-defendant[s].

The Court then discussed the *Zafiro* decision, which was released while the consolidated cases in *Hana* were pending before this Court. In *Zafiro*, the United States Supreme Court ruled on the standards for severance under Federal Rule of Criminal Procedure 14, which reads:

> [i]f it appears that a defendant or the government is prejudiced by a joinder of ... defendants ... for trial ... the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires

506 US at 538.

The *Zafiro* Court noted that several Federal Courts of Appeals had interpreted Rule 14 to require that severance is mandated if the co-defendants present "`mutually antagonistic' or ` irreconcilable'" defenses at trial. *Id*. at 538. The Court rejected the petitioner's argument that a "bright line" rule be established to mandate severance whenever co-defendants present "conflicting" defenses. *Id*. Instead, the Court set a higher standard for severance, in the discretion of the trial judge:

> We believe that, when defendants properly have been joined under Rule 8(b), 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

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prevent the jury from making a reliable judgment about guilt or innocence.

Id. at 539.

Turning to the facts of the case, the *Zafiro* Court noted the co-defendants at the joint trial each argued that they were innocent of the charged crime while the other was the guilty party. The Court held this situation did not mandate severance under Rule 14.

In his concurring opinion in *Zafiro*, Justice Stevens, while agreeing that Rule 14 does not mandate severance whenever there are conflicting or inconsistent defense theories presented by co-defendants at a joint trial, recognized the heightened degree of prejudice where truly "mutually antagonistic" defense theories are presented:

> Most important here, it is also possible that both persons lacked knowledge of the contents of the relevant container. Moreover, that hypothesis is compatible with individual defenses of lack of knowledge. There is no logical inconsistency between a version of events in which one person is ignorant, and a version in which the other is ignorant; unlikely as it may seem, it is at least theoretically possible that both versions are true, in that both persons are ignorant. In other words, 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.
>
> * * *
>
> I would 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. Because the facts here do not present the issue squarely, I hesitate in this case to develop a rule that would govern the very different situation faced in cases like *People v. Braune*, 363 Ill. 551, 557, 2 N.E.2d 839, 842 (1936), in which mutually exclusive defenses transform a trial into "more of a contest between the defendants than between the people and the defendants." Under such circumstances, joinder may well 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.
>
> Joinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor, in two general ways. First, joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary. Second, joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to 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. Though the Court is surely correct that this second risk may be minimized by careful instructions insisting on separate consideration of the evidence as to each codefendant, ante, at 938-939, the danger will remain relevant to the prejudice inquiry in some cases.

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506 US at6 542-544. (Emphasis in original). (Footnotes omitted).

The *Hana* Court, in comparing the ruling in *Zafiro* to the existing law in Michigan, held the language of FRCP 14 is "substantively compatible" with MCR 6.121(C) and (D), and that the Michigan rule adds a requirement that the defendant show that severance is necessary to avoid prejudice to the substantial rights of the accused. 447 Mich at 345. The Court wrote:

> We therefore hold that, pursuant to MCL § 768.5; MSA. § 28.1028, and MCR 6.121(D), the decision to sever or join defendants lies within the discretion of the trial court. Severance is mandated under MCR 6.121(C) only when a 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.

Id. at 346.

In order to mandate severance under MCR 6.121(C), according to the *Hana* majority opinion, the defense theories of the co-defendants must not only be conflicting or inconsistent, but must be "mutually exclusive" or "irreconcilable." The Court explained when this standard is met:

> Inconsistency 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." *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). The "tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Id.*, at p. 897. Otherwise stated,
>
> > "It is natural that defendants accused of the same crime and tried together will attempt to escape conviction by pointing the finger at each other. Whenever this occurs the co-defendants are, to some extent, forced to defend against their co-defendant as well as the government. **This situation results in the sort of compelling prejudice requiring reversal, however, only when the competing defenses are so antagonistic at their cores that both cannot be believed**. Consequently, we hold that a defendant seeking severance based on antagonistic defenses must 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. at 349-350. (Emphasis added). (Citations omitted).

Applying that standard to the facts of the two cases in front of them, the *Hana* Court held that

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in neither case did the trial judge abuse his or her discretion in denying the motions for severance. In particular, as to the *Hana* prosecution, this Court held that severance was not mandated because the jury, on this record, could have believed both defendants, and because the actual evidence presented at the trial did not include actual accusations by the brothers against each other. 447 Mich at 352-356. As to the *Gallina* and *Rode* case, the Court not only found the defense theories were not mutually exclusive, but also that any prejudice was significantly minimized by the use of separate juries. *Id*. at 356-363.

In the case at bar, however, the record clearly establishes that the specific defense theories argued to the joint jury on behalf of Mr. Jenkins and Mr. Furline, respectively, were "mutually exclusive" and "irreconcilable." As the Court of Appeals opinion noted, " 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." Just as predicted at the pre-trial hearing on severance, these two theories were diametrically opposed to each other under law and fact. This was not a case, as in *Hana* or *Zafiro*, where the co-defendants did not deny that the charged offenses did occur, but each claimed innocence and accused the other of being the guilty party. In those situations, as the appellate courts held, the jury could have believed both defendants, and found neither responsible for the crime. In the case at bar, however, it was factually impossible for the joint jury to have believed both theories. The respective defense theories in this case were not just inconsistent or conflicting – there were factually mutually exclusive and irreconcilable, as those terms are defined in both *Hana* and *Zafiro*. Accordingly, the trial judge abused his discretion when he denied severance (and separate juries), and required a single jury to consider both theories. MCR 6.121(C).

The prejudice to Appellee from the denial of severance was significant. The Ninth Circuit Court of Appeals succinctly summarized the situation where one co-defendant's theory depends on

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the jury finding the other co-defendant guilty:

> Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant. In order to zealously represent his client, **each codefendant's counsel must do everything possible to convict the other defendant.** The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor.

United States v Tootick, 952 F2d 1078, 1082 (CA9, 1991). (Emphasis added).

In the case at bar, each trial counsel openly and continually did everything possible to convince the jury that the other defendant commit the charged offenses. That strategy was not unethical nor improper – counsel had to make as strong a case as possible in defense of his own client and theory. At a separate trial, or at least before a carefully instructed and protected separate jury, the defense would not have posed any prejudice to the other defendant. However, in front of the joint jury, the prejudice was blatant. That strategy began as early as possible, beginning in opening statements and continued throughout the trial, culminating with closing argument to the single jury. The record is replete with instances of both counsel doing all they could to portray the other defendant in the worst possible light. The defense theories were mutually exclusive and irreconcilable. The joint jury could not believe both theories. *Hana, supra*; *Zafiro, supra*.

On this record, the trial judge should have granted severance under MCR 6.121(D) and MCL 768.5. The denial of severance created manifest prejudice to substantial rights of Appellee, which only could have been prevented by separate trials or separate juries. It was a miscarriage of justice for the co-defendants to be tried before a single jury, as it was more probable than not that the result of the trial would have been different had not the jury considered Mr. Furline's antagonistic defense. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Appellee's convictions should remain be reversed, and the matter remanded for a new and separate trial as ordered by the Court of Appeals.

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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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Dated: March 25, 2019