IRRECONCILABLE DIFFERENCES: THE NINTH CIRCUIT'S CONFLICTING CASE LAW REGARDING MUTUALLY EXCLUSIVE DEFENSES OF CRIMINAL CODEFENDANTS

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[Please cite as 8 BOALT J. CRIM. L. 2]

[Please pincite using paragraph numbers; e.g., 8 BOALT J. CRIM. L. 2, ¶ 11]

"'I saw a lizard come darting forward on six great taloned feet and fasten itself to a [fellow soul]. . . [T]hey fused like hot wax, and their colors ran together until neither wretch nor monster appeared what he had been when he began...'

"In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante's hell, they may become entangled and ultimately fuse together in the eyes of the jury, so that neither defense is believed and all defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants."

—— Circuit Judge Irving S. Goldberg, writing for the majority in

United States v. Romanello, 726 F.2d 173, 174 (5th Cir. 1984)

IRRECONCILABLE DIFFERENCES

(citing DANTE, THE INFERNO, Canto XXV, Circle 8,

Bolgia 7, lines 46-48, 58-60 (J. Ciardi, transl.))

I. Introduction

¶1. Joint trials of criminal defendants are integral to the federal criminal justice system.[1] As Justice Scalia observed in *Richardson v. Marsh*,[2] "Joint trials generally serve the interests of justice by . . . enabling more accurate assessment of relative culpability," "avoiding the scandal and inequity of inconsistent verdicts," and contributing to "both the efficiency and the fairness of the criminal justice system" by averting the inconvenience, cost, and trauma of multiple presentations of the same evidence and witnesses.[3] Thus, Rule 8(b) of the Federal Rules of Criminal Procedure states that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[4] Both the Supreme Court and the Circuit Courts of Appeal generally favor such joint trials.[5]

¶2. Yet joint trials also pose heightened risks of prejudice to defendants.[6] For this reason, Rule 14 allows severance even if defendants are properly joined under Rule 8(b).[7] Thus, Rules 8(b) and 14 pull in opposite directions to strike a balance between judicial efficiency and the risk of prejudice.

¶3. This tension between the rules relates to a deeper, more fundamental tension between competing constitutional rights. The Fifth and Sixth Amendments can pit one

codefendant's right to remain silent against another's right to explore and produce all exculpatory evidence. Other problems include: (1) prejudice to one defendant from a codefendant's statement or confession (the *Bruton* problem);[8] (2) the denial of Confrontation Clause rights arising out of one defendant's inability to cross-examine another's witnesses;[9] (3) prejudice from one defendant's manifest guilt rubbing off on another when there is a great disparity in the weight of evidence between codefendants;[10] (4) 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 (5) other factors that might prevent a jury from determining the guilt or innocence of defendants on an individual basis."[12]

¶4. Inconsistent, conflicting defenses are yet another factor posing risk of prejudice in joint trials.[13] Various courts have used different terms to describe the issue of conflicting defenses, but usually one of three constructions is used: mutually antagonistic defenses, mutually exclusive defenses, and irreconcilable defenses. These three terms often are used interchangeably, but they should not be. "Mutually antagonistic" defenses include all defenses that conflict, such that the jury's acceptance of one will make it harder for them to accept the other. "Mutually exclusive" and "irreconcilable" defenses represent an extreme subcategory of "mutually antagonistic" defenses: defenses that are truly irreconcilable, such that for the jury to believe and acquit one defendant, it must convict the other.[14] By contrast, other antagonistic defenses may be difficult but not impossible to reconcile. However, many decisions, including several addressed in the following discussion, fail to make that distinction.[15] This distinction is crucial, since

various circuits claim to have a rule requiring mandatory severance where defenses are mutually exclusive, but not where they are merely antagonistic.[16]

¶5. Unlike the more familiar *Bruton* problem, for which the Supreme Court over the years has developed a fairly clear set of instructions to trial courts,[17] the problem of mutually antagonistic defenses has been addressed only briefly.[18] In *Zafiro v. United States*, the Supreme Court considered the issue of mutually antagonistic defenses.[19] It noted various appellate court decisions suggesting that severance might be mandated in such situations, but the Court declined the petitioners' invitation to adopt a bright-line rule.[20] The Court held, "Mutually antagonistic defenses are not prejudicial per se. Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of relief to be granted, if any, to the district court's sound discretion."[21]

¶6. The Court in *Zafiro* did not distinguish "mutually antagonistic" and "irreconcilable" defenses, and did not even mention "mutually exclusive" defenses.[22] As such, *Zafiro* provides trial courts with no guidelines as to their discretion to determine when mutually antagonistic defenses are prejudicial and when they require severance.

¶7. Normally, this is not a significant problem. Instances of truly irreconcilable defenses are relatively rare, as *Zafiro* indicates.[23] Yet when they do arise, they inevitably create confusion for district and circuit court judges alike as to how to handle them properly. In an effort to simplify and set boundaries around the problem, various circuit courts have declared a per se rule that defendants must have separate trials when their defenses are mutually exclusive. The lines of cases that have developed in support of this rule are flawed because the original basis was pure dicta, and several cases cited

this dicta without recognizing it as such. Consequently, the entire line of cases has no firm legal basis.

¶8. The case law in the Ninth Circuit is especially problematic. In 1991, in *United States v. Tootick*,[24] an appellate panel tried to stop the reiteration of dicta passing as holdings. The court explicitly declined to adopt a per se rule against joinder in cases involving mutually exclusive defenses.[25] Subsequent decisions have mostly overlooked *Tootick*, and these more recent decisions repeatedly have cited the earlier per se rule rejected in *Tootick*.[26] At present, *Tootick* and its rivals all still stand as "good law" on the issue of mutually exclusive defenses. Thus, the Ninth Circuit's case law regarding irreconcilable defenses is itself irreconcilable.

II. Development Of The Doctrine of Mutually Exclusive Defenses: *United States v. DeLuna*

¶9. The issue of mutually exclusive defenses arose from the clash between two constitutionally protected rights. First, a defendant has a Fifth Amendment right to remain silent without a negative inference being drawn from this silence. Second, a defendant has a Sixth Amendment right to pursue all lines of inquiry that might prove his innocence. When codefendants are tried together and one defendant testifies while the other remains silent, these two rights often conflict. This situation occurred in *De Luna v. United States*, the seminal case in the development of the doctrine of mutually exclusive defenses.

¶10. In *De Luna v. United States*,[27] police saw one of two codefendants throw a package containing drugs out the window of a moving car.[28] At their joint trial on

drug-trafficking charges, codefendant Gomez, who threw the package out the window, testified that he had no knowledge of the package's contents.[29] He claimed that the other defendant, De Luna, had tossed it to him and ordered him to throw it out.[30] Each defendant blamed the other as the culprit.[31] At trial, Gomez's counsel commented at length on De Luna's refusal to testify, and De Luna's counsel strenuously objected to this argument as inflammatory and prejudicial.[32]

¶11. Writing for the appellate panel, Judge Wisdom offered a lengthy reflection on the history, purpose, and legal evolution of the privilege against self-incrimination.[33] Judge Wisdom drew on various Supreme Court decisions and held that the Fifth Amendment protection must be broadly construed.[34] He found that it was improper for a judge, prosecutor, or codefendant's counsel to comment on a defendant's refusal to testify and penalize him for exercising a constitutional right.[35] More controversially, Judge Wisdom also penned 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 codefendant to testify."[36]

¶12. The appellate court ruled that the prejudice to De Luna required separate trials for De Luna and his codefendant. The court held "it seems unrealistic" to think any jury instructions could cure the prejudice to De Luna, given "the head-on collision" between the two codefendants, the repetition of the comments by Gomez's counsel, and the extended colloquy over the comments between the trial judge and the lawyers.[37] Therefore, the court held that the defendants needed to be tried individually to "see the face of Justice."[38]

¶13. Notably, the *De Luna* court offered no general exceptions to the rules favoring joint trials for criminal defendants. The *De Luna* court explained that jury instructions were generally sufficient to cure potential prejudices in joint trials. In the decision, the court appears to explain that adequate jury instructions could even cure prejudices arising from mutually exclusive defenses between codefendants. The *De Luna* court held that jury instructions are only inadequate when: (1) sharply contradictory defenses are present, (2) the testifying defendant's counsel comments on the other defendant's silence, and (3) extended colloquy on trial severance occurs in the jury's presence. When these three factors existed the court found the resulting prejudice to the non-testifying defendant was beyond the curative power of jury instructions. These multiple factors were analyzed cumulatively, rather than as separate, independently sufficient grounds for severance. Aside from brief comments noting that each defendant blamed the other[39] and the reference to a "head-on collision" between the rights of the defendants,[40] the *De Luna* court says nothing about mutually antagonistic defenses. Specifically, the decision fails to detail at what point mutually antagonistic defenses become so mutually exclusive or irreconcilable that severance is automatically required.

¶14. Ultimately, the central issues at play in *De Luna* were (1) actual prejudice and (2) the assumption that counsel for a non-testifying defendant has a right to comment on a codefendant's silence — an assumption found highly questionable in the concurrence and various subsequent decisions.[41] While the presence of mutually exclusive defenses was a factor in prompting the severance of the defendants in *De Luna*; it was never asserted to be a separate, independently sufficient basis for severance. [42] Yet *De Luna*

has been applied as the foundation for the tangled lines of precedent standing for the per se rule of severance for mutually exclusive defenses.

III. Foreign Circuit Decisions Used By The Ninth Circuit In Support Of A Mandatory Severance Rule

¶15. In proclaiming a mandatory severance rule in cases with mutually exclusive defense, the Ninth Circuit mistakenly relied on dicta in Fifth and Seventh Circuit decisions.[43] The cases initially cited by the Ninth Circuit--*United States v. Salomon*,[44] *United States v. Marable*,[45] and *United States v. Romanello*[46] from the Fifth Circuit, and *United States v. Ziperstein*[47] from the Seventh--also incorrectly applied dicta as rules from earlier cases, particularly *United States v. Kahn*.[48]

A. *Kahn* and its progeny

¶16. In *Kahn*, the codefendants argued for severance based on the reasoning contained in *De Luna*. They did not directly raise the issue of irreconcilable defenses. In *Kahn*, three defendants--Kahn and two of his attorneys--were convicted of conspiring to illegally use funds from several federally insured financial institutions for their personal benefit, along with various lesser counts.[49] Kahn's lawyers argued on appeal that the trial court's refusal to sever their cases from Kahn's was prejudicial error.[50] They argued that this denied them the opportunity to comment on Kahn's refusal to take the stand or to call Kahn to the witness stand.[51] Kahn's lawyers further argued that this led to the introduction of evidence that would have been inadmissible against them in a separate trial.[52]

¶17. Since the codefendants relied on *De Luna* to make their arguments, the *Kahn* court carefully went through the *De Luna* court's reasoning, including the section on mutually exclusive defenses.[53] In a lengthy reflection on the risks of prejudice in conspiracy trials, the *Kahn* court rejected the codefendants' severance arguments.[54] They adopted the reasoning in Judge Bell's concurring opinion against the *De Luna* majority's presumption that a defendant has a clear constitutional right to comment on a codefendant's refusal to take the stand.[55]

¶18. The court in *Kahn* noted friction between the defenses of Kahn's lawyers, who sought to portray themselves as innocent dupes of a "dexterous mastermind, Kahn," and that of Kahn, who presented himself as acting in good faith with the advice and cooperation of "responsible and reputable individuals."[56] But the court distinguished *De Luna* regarding irreconcilability, finding that the "degree of antagonism" was not as great as in *De Luna*, "where the defenses were mutually exclusive. There, if one defense were believed, the other could not be."[57] By contrast, the court found it unclear that acquittal of his lawyers would have precluded acquittal of Kahn or vice versa. It noted the large volume of testimony and evidence presented to the jury, but concluded that the extensive evidence "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."[58]

¶19. Thus the *Kahn* court, addressing the issue only in passing, held that mutually exclusive defenses only arise when the acquittal of one defendant precludes acquittal of the other. This definition has become the standard in various circuits. However, the

Kahn court did not hold that such mutual exclusivity mandates severance, because it did not need to—as with most other cases, the defenses were not sufficiently antagonistic. Notably, it also framed the mutual exclusivity issue in terms of conflicting evidence, not just conflict in counsels' characterizations of defenses.[59] Finally, the end of the court's discussion frames the problem in *De Luna* in terms of comments on failure to testify, not mutual exclusivity alone.[60] In contrast to its brief reflections on mutual exclusivity, the *Kahn* court spent several paragraphs discussing and ultimately rejecting the *De Luna* dicta regarding a Sixth Amendment right to comment on a codefendant's refusal to testify.[61]

¶20. In the end, *Kahn* primarily stands for the principle that severance will be granted only on a "strong showing of prejudice."[62] Contrary to *De Luna's* implication that a defendant's inability to comment on a codefendant's silence is inherently prejudicial enough to justify severance by itself, *Kahn* holds that "[t]here must be a showing that real prejudice will result from the defendant's inability to comment."[63] To the extent *Kahn* discusses mutual exclusivity, it suggests that the mere possibility of mutual exclusiveness is not enough to mandate severance; rather, there must be actual prejudice.[64] In short, *Kahn*, like *De Luna*, does not clearly support a per se severance rule for mutually exclusive defenses. Despite this, both the Fifth and Seventh Circuits have interpreted *Kahn* to stand for a per se severance rule.

1. Fifth Circuit line of cases based on *Kahn*

¶21. In *Marable*, the Fifth Circuit, relying on *Kahn*, first noted the existence of a per se severance rule in cases where the defendants have mutually exclusive defenses.[65]

Marable involved a conspiracy to sell heroin.[66] Marable, who was not caught in the same room with the heroin as some other defendants were, argued that the evidence was insufficient to sustain his conviction for conspiracy.[67] He asserted that the trial court erred in denying his motion for severance on various grounds, including inconsistent defenses.[68] In upholding Marable's conviction, the court found no conflict in the defenses of Marable, who denied involvement in the conspiracy, and of a codefendant, who offered no defense.[69] The court stated,

> 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. Absent clear evidence that the defenses of defendant and codefendant will be conflicting, the denial of a motion for a severance on grounds of conflicting defense is not error.

In support of this rule, the court ultimately relied on the *Kahn* decision.[70] The Fifth Circuit's erroneous interpretation of *Kahn* became a fixture in Fifth Circuit caselaw when the court in *Salomon* cited this portion of the *Marable* decision.

¶22. In *Salomon*, the court cited *Marable* for the rule that mutually exclusive defenses mandate severance.[71] In *Salomon*, two codefendants were convicted of possessing PCP with intent to distribute.[72] After the prosecution rested, Salomon presented no evidence.[73] Instead, he moved for acquittal based on insufficient evidence.[74] Salomon's codefendant, Wood, then took the stand to argue that Salomon was "'the man'" in the drug operation, while he was merely entrapped into participating by government agents.[75] The court reversed Salomon's conviction, holding that he suffered incurable prejudice from Wood's testimony about earlier joint drug dealings that implicated Salomon.[76] The court specifically rejected Salomon's alternative argument

that the trial court had erred by denying his severance motion based on mutual exclusivity of the defenses.[77] It held that a codefendant's reliance on an entrapment defense, in itself, did not justify reversing the trial court.[78] In its holding, the *Salomon* court only cited *Marable* for the rule that mutually exclusive defenses mandate severance.[79] Thus, the line of precedent passing through *Salomon* and *Marable* regarding severance of mutually exclusive defenses is based on a decision from another circuit never formally incorporated in a holding by the Fifth Circuit.

2. Seventh Circuit cases based on *Kahn*

¶23. *Ziperstein*, from the Seventh Circuit, also cites *Kahn* for a per se severance rule for mutually exclusive defenses. Five defendants connected to a Medicaid fraud ring were convicted of mail fraud, conspiracy to defraud the United States, and conducting a criminal enterprise affecting interstate commerce.[80] The defendants appealed their conviction, arguing that their trials should have been severed from the trial of one of the acquitted defendants due to (1) mutually antagonistic defenses and (2) courtroom behavior of the acquitted defendant's counsel.[81] The court found insufficient antagonism to require severance even though the acquitted defendant, while denying participation in a criminal conspiracy, admitted the existence of the conspiracy. The court held that the jury's belief in the acquitted defendant's non-participation did not mandate the conclusion that an illegal conspiracy existed.[82] Like the *Salomon* court, the *Ziperstein* court acknowledged that even if the *nature* of the defenses did not require severance, the *conduct* of a defense still might cause prejudice to other defendants. Still it found no prejudicial error in the trial court's denial of severance.[83]

¶24. On the issue of antagonistic defenses, the court in *Ziperstein* stated, "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."[84] However, as support for this "well-established standard," the court offered only *Kahn* and another Seventh Circuit decision, which ultimately rested on the holding in *De Luna*.[85] The *Ziperstein* court then offered an 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."[86] The court neglected to note, however, that *De Luna* was not decided entirely, or even primarily, on the issue of mutual exclusiveness. Rather, the holding was based on the questions of Fifth Amendment privilege not to testify and the Fifth Circuit's presumption of a Sixth Amendment right to comment on an antagonistic codefendant's silence.

B. The *Crawford/Berkowitz* line of cases

¶25. The Ninth Circuit also applied a later Fifth Circuit decision, *United States v. Romanello*,[87] directly and indirectly to support a mandatory severance rule.[88] But *Romanello* leads down the same path as *Salomon*, *Marable*, and *Ziperstein*. The foundational decision in this line of cases is *United States v. Crawford*.[89]

1. Foundations of a per se severance rule

¶26. In *Crawford*, the Fifth Circuit actually confronted a case where the defenses presented by the codefendants were truly mutually exclusive. The *Crawford* majority found the defenses irreconcilable and mutually exclusive where police pulled over two defendants and discovered an unregistered sawed-off shotgun "partially hidden" under the dashboard of their car.[90] Because one, the other, or both defendants had to be in possession and it was impossible to claim ignorance, "[t]he sole defense of each was the guilt of the other." One defendant actively incriminated the second, while the second pinned possession exclusively on the first, each defendant presented witnesses hostile to the other, and the court concluded that "[a] fair trial was impossible under these inherently prejudicial conditions."[91] *Crawford* thus represents a rare case of true mutual exclusivity -- at least one of the defendants must be guilty.[92] The *Crawford* court also identified more than hypothetical antagonism; it identified actual compelling prejudice where each defendant "was the government's best witness against the other."[93] The trial court had overruled repeated motions for severance even after "the inevitability of prejudice should have become apparent."[94] Although the court found strong evidence of each defendant's individual guilt, "this joint trial was intrinsically prejudicial."[95]

¶27. Having found actual compelling prejudice, the court in *Crawford* could have reached its decision based on demonstrated prejudice without any per se rule requiring severance of irreconcilable defenses. Like the other Fifth Circuit decisions already mentioned, *Crawford* presumed such a rule rather than creating it. Interestingly, the *Crawford* court, unlike some others, clearly recognized that *De Luna* itself did not establish such a rule, but that the antagonism between the defenses was only "[o]ne of the

factors" favoring severance in that case.[96] The *Crawford* court did not address whether jury instructions and earlier, more active judicial control by the trial judge could have prevented the compelling prejudice it found.[97]

¶28. In *United States v. Berkowitz*, the Fifth Circuit conducted its most careful, thoughtful analysis of the considerations involved in mutually exclusive defenses.[98] Ultimately, however, this analysis relied on the dicta contained in *Crawford*.[99] *Berkowitz* is notable because it first offered the definition of mutual exclusivity as later applied (and extended) in *Romanello*:

> [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.[100]

The court continued on to frame the risk of prejudice chiefly in terms of the second-prosecutor problem: "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.'"[101]

¶29. In arriving at this definition of mutually exclusive defenses, *Berkowitz* synthesized various earlier Fifth Circuit decisions regarding what did or did not constitute irreconcilability.[102] Like most other decisions considering the issue of mutually exclusive defenses, *Berkowitz* found no significant conflict between the codefendants' noninvolvement defenses.[103] *Berkowitz's* clear emphasis on a jury's belief in the "core of testimony offered" requiring disbelief of a codefendant's "testimony," was eventually

used to support Judge Gee's dissent in *Romanello*—that the core or essence of a defense is defined by actual evidence presented, and not counsel's inferential pyrotechnics.[104] *Berkowitz* offered no holding as to the principle of mandatory severance of mutually exclusive defenses; instead the court presupposed this based upon various earlier decisions, like *Crawford*.[105] However, this did not prevent the court in *Romanello* from citing the *Berkowitz* decision for a per se severance rule.

2. Evolution of the early per se severance rule

¶30. *Romanello*, the most recent case borrowed by the Ninth Circuit regarding the per se severance rule, rests on the dicta in *Crawford* and *Berkowitz*.[106] In *Romanello*, the court stated,

> The Fifth Circuit has developed a fairly consistent litany of tests for determining whether severance is required in the 'antagonistic defense' situations. . .When co-defendants have antagonistic defenses, the courts have applied very specific tests to determine whether the trial was unfair. 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 other. . .Such compelling prejudice does not arise where the conflict concerns only minor or peripheral matters which are not at the core of the defense.[107]

The *Romanello* court then found irreconcilability where one defendant in a gold jewelry heist (Vertucci) claimed to have been robbed at gunpoint by unknown persons similar in appearance to the other two codefendants (Romanello and Mendez), while these two codefendants claimed that they merely had been hired, not by the other defendant, to transport the gold and did not know it was stolen.[108] The court held,

> Obviously these defenses are irreconcilable and mutually exclusive. If the jury 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.[109]

Emphasizing the "second prosecutor" problem where codefendants weaken each other's defenses and so strengthen the government's argument, the court concluded,

> Although the core of his codefendants' defense was not his own guilt, they nevertheless had to undermine Vertucci's defense to establish their own innocence. We hold that a defendant like Vertucci deserves a new, severed trial when:
> 1. the core of his defense is the guilt of his codefendant;
> 2. to disprove his defense would establish his guilt;
> 3. his defense and the defense of his codefendant are irreconcilable and mutually exclusive;
> 4. the codefendant actively attacks his defense at trial; and
> 5. he suffers compelling prejudice as a result.[110]

Romanello also included other characteristic problems of joint trials: allegations of error in admission of witnesses' testimony and an alleged violation of Sixth Amendment confrontation rights in denial of severance where Vertucci did not testify.[111] Notwithstanding their reversal of the trial court's denial of severance on procedural grounds, the *Romanello* court held that "the evidence was sufficient to support the verdicts against all three defendants."[112]

¶31. However, the *Romanello* panel was sharply divided. Judge Gee offered a stinging and cogent dissent.[113] Deriding the majority's "colorful if inapposite language" that described the defendants as " 'wretches in Dante's hell' and 'clawing into each other with antagonistic defenses,'"[114] Judge Gee noted, "While the defenses are to some extent antagonistic, in sober fact they are not antagonistic to the point of being irreconcilable or

mutually exclusive," as required for severance.[115] Referring to an earlier decision,[116] he argued that the "defenses were 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.[117] That Romanello and Mendez were the robbers was only an inference offered by Vertucci's counsel.[118] Thus, Judge Gee disagreed with the other two judges as to how to define the core of a defense.

¶32. Judge Gee argued that the core should be based on the evidence offered, not inferences and allegations proposed: "The core of Vertucci's defense was that he was robbed. Statements that merely imply that Romanello and Mendez perpetrated that robbery are clearly 'minor or peripheral matters which are not at the core of his defense[.]'"[119] Citing *Berkowitz*, Judge Gee reasoned, "We held that the *core* of their defenses was noninvolvement in the criminal activity even though, as here, each implied that the other was guilty.[120] Like these, at their core the defenses of Vertucci, Romanello and Mendez are quite consistent."[121] Gee charged the *Romanello* majority with misinterpreting the *Berkowitz* rule on defenses irreconcilable at their cores:

> The majority opinion radically expands the concept of core defense to include not only the essence of a defense (Vertucci was robbed), but also any elaboration of that defense devised by counsel's ingenuity that could possibly implicate a codefendant (Vertucci was robbed by *Romanello and Mendez*). As this result is not compelled by precedent in this field and seems to me both unfortunate and unnecessary, I respectfully dissent.[122]

¶33. As a conspiracy trial, *Romanello* involved greater dangers from mere association of defendants in the minds of jurors than would a non-conspiracy trial. Whether or not

the *Romanello* majority improperly extended the definition of mutual exclusivity to include any far-flung theories of counsel as well as actual evidence--and Judge Gee's definition of the core of a defense frankly seems more convincing than that of the majority--*Romanello* did not represent a holding as to mandatory severance of mutually exclusive defenses. Rather, the court presumed the existence of such a rule rather than creating it and relied on earlier cases, *Berkowitz* and *United States v. Crawford*,[123] for that rule.[124] In its own five-part holding (where the first three parts were different ways of expressing the basic idea of irreconcilability) *Romanello*, like *De Luna*, wove together additional factors. Instead of giving a clear per se severance rule for irreconcilable defenses, the court held that a defendant is entitled to severance if the cores his and his codefendants' defenses are mutually exclusive, a codefendant actively attacks his defense at trial, *and* he suffers compelling prejudice as a result.[125]

¶34. Thus, in both the Fifth and Seventh Circuits, there are occasionally intersecting lines of precedent supporting the proposition that irreconcilable defenses require severance, mostly comprised of cases presenting no discussion about how to handle mutual exclusivity. These lines only lead back to cases that do not create a mandatory severance rule for mutually exclusive defenses, notably *Kahn*. All such cases also ultimately depend on *De Luna*, which similarly provides no such clear rule.

IV. Emergence Of A Per Se Severance Rule For Mutually Exclusive Defenses in Ninth Circuit Case Law: *Ramirez* and *Sherlock*

¶35. Language suggesting that mutually exclusive defenses mandated severance first appeared in Ninth Circuit case law in *United States v. Ramirez*.[126] Defendants

Ramirez, Reynolds and three other codefendants were indicted for various charges in connection with the theft of two airplanes from the Long Beach, California airport and use of those planes to import half a ton of marijuana from Mexico into the United States.[127] Two codefendants entered into plea agreements and testified for the government; another codefendant was tried and acquitted.[128] Ramirez was convicted as the instigator and financier of the criminal scheme; Reynolds was convicted of foreign transportation of stolen aircraft.[129] Ramirez offered an insufficient evidence defense, while Reynolds claimed he was working as a government informer for the Los Angeles Police Department at the time the conspiracy was formed.[130] Among other arguments on appeal, Ramirez contended that his defense was irreconcilable with that of Reynolds, who admitted the acts alleged.[131] The court found that the jury's acceptance or nonacceptance of Reynolds's informer defense was irrelevant to the determination of Ramirez's guilt or innocence, noting that since the acquitted defendant also raised an insufficient evidence defense, Ramirez could not show that Reynolds' defense was mutually exclusive to his own.[132] Also, Reynolds, who took the stand in his own defense, repeatedly denied Ramirez's complicity.[133] Although Reynolds' convoluted testimony apparently helped the government's case, the court noted that the same might have occurred in a separate trial and held that regardless, Ramirez had failed to show that the joint trial violated his substantive rights.[134]

¶36. In rejecting Ramirez's claim of a right to a severed trial, the court observed, "Antagonism between defenses is not enough [to require severance], even if the defendants seek to blame one another. Rather it must be shown, on the facts of the

individual case, that the defenses 'are antagonistic to the point of being mutually exclusive.'" [135] To mandate severance, it must be shown that "the acceptance of one party's defense will preclude the acquittal of the other party [citing *Salomon* and *Ziperstein*]."[136] Because no mutual exclusivity was found in Ramirez's case, the decision offers no holding as to how mutual exclusivity should be handled if it is found. Nevertheless, the imported rule in *Ramirez* on mandatory severance of mutually exclusive defenses was offered in passing in various subsequent Ninth Circuit cases finding no mutual exclusivity, which were themselves later cited for the same proposition.[137] The *Ramirez* "holding" also appeared in various unpublished decisions of the early 1990s finding no mutual exclusivity.[138]

¶37. The 1989 decision in *United States v. Sherlock*[139] imported into Ninth Circuit case law additional decisions from foreign circuits regarding mutually exclusive defenses. *Sherlock* quoted the usual language from *Ramirez*, adding the term "irreconcilable" and equating it with mutually exclusive.[140] The *Sherlock* court drew on *Romanello*, a post-*Ramirez* Fifth Circuit decision, for support on mandatory severance of irreconcilable defenses.[141] The court also offered the Fifth Circuit's modified definition of mutual exclusivity: "The defendant must show that '[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'"[142]

¶38. In *Sherlock*, defendants Sherlock and Charley were convicted of assault with intent to commit rape on an Indian Reservation.[143] They allegedly had coerced intercourse with two young women from off the reservation during a beer-drinking party

on Navajo land in Arizona.[144] The court reversed Sherlock's conviction on the ground of compelling prejudice.[145] The trial court had failed to give a curative instruction when the prosecutor, in closing argument, violated a limiting instruction and urged the jury to consider a statement incriminating to Sherlock made by Sherlock's nontestifying codefendant, Charley.[146] The court rejected all other arguments, including one based on antagonistic defenses. Each defendant argued that he had not performed the alleged act.[147] The court found the core of each defense "not so antagonistic as to be mutually exclusive" where the jury could believe that neither, both, or only one of the two defendants committed the acts alleged.[148] Further, noting Fifth Circuit decisions stating that the primary purpose of requiring severance of irreconcilable defenses was avoiding the "second prosecutor" problem—where a joint criminal defendant faces attack from counsel for an antagonistic codefendant as well as from the government—the *Sherlock* court held that there was no such problem where each counsel directed examination of witnesses toward establishing the innocence of his client, not the guilt of the codefendant.[149] Thus, *Sherlock*, like *Ramirez*, was another decision holding mutual exclusivity absent, not deciding what to do with mutual exclusivity if present.[150]

V. The Ninth Circuit's Explicit Rejection Of A Per Se Severance Rule: *United States v. Tootick*[151]

¶39. *Tootick* was the first Ninth Circuit case to explicitly consider whether mutually exclusive defenses required severance per se. The two defendants, Tootick and Frank, were each charged with brutally stabbing and beating the victim and running him over with a car.[152] The victim survived to testify.[153] Each defendant's sole defense was

the guilt of the other, since there was no evidence that any other person was present.[154] Frank testified that he had watched in horror as Tootick stabbed the victim twenty-three times and then gleefully licked the blood off the knife.[155] Tootick did not testify, but his counsel claimed that he was heavily intoxicated and was passed out or asleep during the entire episode.[156] From opening statements onward, the defendants' respective counsel were engaged in a vicious second-prosecutorial slugfest, each accusing the other defendant and using gruesome details to maximum effect.[157]

¶40. The *Tootick* panel found the defenses to be truly irreconcilable: acquittal of one defendant necessitated conviction of the other.[158] Although Tootick did not directly accuse Frank, the court reasoned that by claiming he was innocent, Tootick simultaneously accused his codefendant because there was no suggestion of intervention by a third party.[159] Despite holding that the defenses presented by Tootick and Frank were truly irreconcilable, the court rejected automatic severance of the defendants.[160] The court found that the *Ramirez* and *Sherlock* holdings on mutually exclusive defenses were dicta and noted that *Tootick* was the first case to require a holding on the issue.[161]

¶41. The court discussed the prejudicial risks of antagonistic or irreconcilable defenses at length, noting the inevitability of second-prosecutorialism whenever codefendants blamed each other.[162] Nevertheless, the court ultimately refused to adopt a per se rule against joinder in cases where two defendants adopted mutually exclusive defenses, instead holding that "in order to establish an abuse of discretion, the defendants must demonstrate that clear and manifest prejudice did in fact occur."[163]

¶42. The court found clear and manifest prejudice in *Tootick*.[164] It emphasized 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,[165] and for failing to take steps to cure prejudice at other points in the trial.[166]

¶43. The appellate panel expressed faith in ordinary jury instructions to cure prejudice under normal circumstances, and even professed belief that jury instructions could have cured prejudice in the abnormal circumstances in *Tootick*.[167] To do so would have required additional countermeasures that were absent, such as active judicial supervision and proper and timely instructions given or repeated immediately after each prejudicial event.[168]

¶44. Thus, *Tootick*, explicitly or implicitly, 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 can be adequate to ensure fairness even where codefendants with mutually exclusive defenses attack each other aggressively as second prosecutors; and (3) severance is justified only where actual, incurable, "manifest prejudice" is shown.[169]

VI. Reemergence Of The Per Se Severance Rule: Post-*Tootick* Decisions

¶45. *Tootick*'s rule against the per se severance of irreconcilable defenses was largely ignored.[170] Starting with *United States v. Hernandez*, subsequent Ninth Circuit opinions chipped away at the *Tootick* holding.[171] In *Hernandez*, a case decided shortly

after *Tootick*, the Ninth Circuit returned to the *Sherlock* and *Ramirez* of mandatory severance when one party's defense precluded acquittal of the other.[172] Due to the brief time frame between *Hernandez* and *Tootick*, the *Hernandez* court can be excused for failing to follow the newly crafted *Tootick* holding; however, the cases that followed *Hernandez* similarly ignored *Tootick*.

¶46. In the next Ninth Circuit decision to address the issue of irreconcilable defenses, *United States v. Buena-Lopez,* a cocaine-distribution conspiracy case, the court was well aware of *Tootick*.[173] The *Buena-Lopez* court even cited it before it moved on to distinguish the *Tootick* opinion.[174] 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 to assess the guilt or innocence of the defendants on an individual and independent basis.' [175]

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.[176] Although codefendant Rodarte testified that Buena-Lopez induced him to sell cocaine to a government agent, and Buena-Lopez offered an insufficient evidence defense, the court concluded that the jury could have believed both defendants and still have acquitted Buena-Lopez on conspiracy charges if it found that Buena-Lopez was merely present during the narcotics transaction and did not know what was being sold.[177]

¶47. Ironically, *Buena-Lopez* seems to interpret *Tootick* in such a manner as to affirm, rather than reject, the *Ramirez-Sherlock* line of decisions. This interpretation is incorrect. The *Tootick* court did find that the defenses were mutually exclusive, not just mutually antagonistic, and that the jury was unable to assess the defendants' guilt or innocence individually. However, contrary to the suggestion of above from *Buena-Lopez*, the prejudice did not flow automatically from a finding of mutually exclusive defenses. Rather, the reversible prejudice found by the *Tootick* court resulted from the "facts in that case" and, in particular, the prejudicial events at trial.[178]

¶48. Soon after *Buena-Lopez*, in *United States v. Arias-Villanueva* the court cited both *Sherlock* and *Buena-Lopez* for the proposition that a defendant is entitled to severance where he "show[s] that acceptance of his codefendant's defense would preclude his acquittal."[179] Here, instead, the court upheld the trial court's denial of severance because "Orantes-Arriaga's and his codefendant's defenses were not irreconcilable—both could have been either acquitted or convicted based on their theories of defense."[180] *Tootick* was never mentioned.[181]

¶49. The *Buena-Lopez* and *Arias-Villanueva* decisions both came after the Supreme Court's decision in *Zafiro*, which may have had a dampening effect on use of language from *Ramirez* and *Sherlock* presupposing a mandatory severance rule.[182] However, the *United States v. Koon* case, decided one year later, showed no such forbearance.[183]

¶50. *Koon* was an appeal by officers involved in the notorious 1991 beating of African-American motorist Rodney King.[184] The appellants, who defended based on no use of excessive force, argued that a fellow officer, Briseno, had offered a mutually

antagonistic defense in the separate state-court trial.[185] In the separate trial, the officer testified that he tried to prevent his fellow officers' use of excessive force.[186] The court found antagonism, but not irreconcilability.[187] It found that the jury could have believed Briseno's testimony and also acquitted the other officers if the jury decided that the force used either was not excessive or not willful.[188] The court cited *Sherlock* in declaring that severance based on "'mutually antagonistic' or 'irreconcilable' defenses" was appropriate only if: (1) the acceptance of one party's defense would preclude acquittal of the other party, and (2) the cores of the defenses conflicted such that the jury could only believe one or the other, not both.[189]

¶51. Another roughly contemporaneous, unpublished decision, *United States v. Fleener*, similarly reveals judicial uncertainty as to how to handle mutually exclusive defenses.[190] In *Fleener*, two brothers were convicted of bank robbery.[191] Each accused the other of being the one who went into the bank and robbed it.[192] Thus, facially, the defenses were mutually exclusive; believing one defendant required convicting the other. On appeal, the defendants claimed severance was required because their defenses were "'mutually antagonistic.'"[193] However, the *Fleener* court cited language from *Koon* in interpreting "mutually antagonistic as that phrase is ordinarily understood" to mean that "'acceptance of one party's defense will preclude acquittal of the other party.'"[194] On that basis, the court interpreted *Zafiro*'s holding, "'[m]utually antagonistic defenses are not prejudicial per se,'" to mean that mutually exclusive defenses are not prejudicial per se, which was not necessarily what the Supreme Court meant in *Zafiro*.[195] Notably, the *Fleener* court was well aware of *Tootick* and discussed the "proper and timely" instructions to neutralize prejudice in finding that the

trial judge in *Fleener* had done so, but it did not mention it with regard to antagonistic defenses.[196]

VII. Bypassing *Tootick*: *United States v. Throckmorton*

¶52. The *Tootick* holding, rejecting a per se rule on irreconcilable defenses, was more forcefully cast aside in *United States v. Throckmorton*.[197] In this drug smuggling case, the court held that a defense offered by a government informant against a codefendant was not irreconcilable at its core with that second defendant's insufficiency of evidence defense.[198] The court reasoned that there was nothing to suggest that the testimony implicating the codefendant would not have been similarly available at a severed trial.[199] Ignoring *Tootick*, the court declared, "[t]o 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."[200] The *Throckmorton* panel cited *Sherlock* for this proposition, without noting that the cited language was actually a quote from *Romanello*.[201]

¶53. The *Throckmorton* panel also subtly but significantly changed the language of *Romanello*.[202] While *Berkowitz*, the original Fifth Circuit decision defining mutually exclusive defenses in terms of "cores," had defined these "cores" in terms of testimony, *Romanello* ignored that limitation. As discussed by the *Romanello* dissent, the resulting broader definition allowed any theories or inferences counsel might propose to qualify as a "core" of the defense.[203] *Throckmorton* added "theory" directly to its definition. By adding "theory" to the definition of core defenses, the *Throckmorton* court explicitly

allowed for the broad definition that the dissent in *Romanello* decried. Due to the addition of the term "theory," a determination of irreconcilability shifted from one that hinged on the jury's acceptance of evidence presented to one that hinged on a jury's acceptance of a codefendant's "theory" of defense.[204] Like *Ramirez* and *Sherlock*, *Throckmorton's* statement regarding mutually antagonistic defenses was not a holding.

¶54. *Throckmorton's* construction of the severance rule has been accepted and cited in subsequent decisions. The most notable of the cases that follow *Throckmorton* is *United States v. Cruz*.[205] In *Cruz*, a case involving the possession of methamphetamine and conspiracy to distribute, the court found a defense based on reasonable doubt and lack of credibility of government witnesses to be antagonistic but not irreconcilable with an entrapment defense.[206] It offered the quote from *Throckmorton* as the Ninth Circuit's rule for when a "defendant is entitled to severance based upon mutually antagonistic defenses."[207] Although it did not cite *Buena-Lopez* for this particular proposition, the *Cruz* court followed the *Buena-Lopez* court's reasoning in distinguishing *Tootick*. Like *Buena-Lopez*, the *Cruz* court stated 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.'"[208] Although the quotation from *Tootick* is accurate, it lacks proper context. The court in *Cruz* used this quotation to imply that the severance question in *Tootick* was resolved based solely on a finding of mutual exclusivity—a per se rule. The *Cruz* court failed to mention either the extensive second-prosecutorial excesses leading to manifest prejudice or the *Tootick* court's explicit refusal to create a per se rule on severance.[209]

VIII. An Effort At Reconciliation? *United States v. Mayfield*

¶55. In *United States v. Mayfield*, the court attempted to reconcile *Sherlock*, *Tootick*, and *Throckmorton*.[210] The *Mayfield* court drew extensively upon all three decisions in working through the implications of mutually exclusive defenses at considerable length. Given the irreconcilable differences between these cases on the issue of mandatory severance for mutually exclusive defenses, the outcome was bound to be problematic in spots.

¶56. In *Mayfield*, law enforcement officers executed a search warrant at an apartment and found defendant Gilbert inside and defendant Mayfield leaving through the back door.[211] Rock cocaine and drug paraphernalia were found in the apartment.[212] Mayfield was found with keys to the apartment; however, the apartment was rented in the name of Gilbert's girlfriend and an old phone bill in Gilbert's name was found.[213] When police entered, Gilbert was holding his girlfriend's infant while allegedly trying to hide traces of the drugs.[214] Only Gilbert's fingerprints were found on the drug paraphernalia.[215] Upon arrest, Gilbert made a statement identifying the other defendant as Mayfield, "the main man," admitting to selling for Mayfield, and stating that Mayfield had gotten a delivery of drugs that day.[216]

¶57. Before, during, and after the subsequent joint trial, Mayfield repeatedly requested severance that was denied.[217] Mayfield also objected to the government's introduction of Gilbert's statement and alternately requested redaction of his name and a proper limiting instruction to the jury.[218] The court granted the latter request.[219] However, the government elicited from a testifying police officer that Gilbert was helping "an

individual" sell cocaine.[220] On cross-examination of this witness, Gilbert's counsel further brought out that Gilbert had referred to a "main man," that that male individual had gotten a shipment the day of the arrest.[221] The court never admonished the jury to consider these statements only with regard to Gilbert.[222] Gilbert's counsel also disregarded a pretrial agreement not to discuss the basis for the search warrant. The lawyer for Gilbert elicited testimony that a confidential informant had notified authorities that Mayfield would be receiving a drug shipment, that Mayfield's name and not Gilbert's was on the search warrant, and that the police officer testifying recognized Mayfield.[223] Upon Mayfield's objection, the court gave a limiting instruction that the witness's testimony only should be considered regarding the officer's state of mind, not its truth.[224] Both defendants were convicted and sentenced to lengthy terms.[225]

¶58. On appeal, the Ninth Circuit reversed the trial court.[226] The court offered three grounds for their decision: (1) mutually exclusive defenses making denial of severance reversible error; (2) denial of Confrontation Clause rights under *Bruton* and its progeny; and (3) manifestly prejudicial, non-harmless error.[227] The court also offered a prolonged discussion distinguishing Zafiro from the facts at hand.[228]

¶59. Regarding mutually exclusive defenses, the court reasoned that although Gilbert's defense was mere presence at the apartment, the facts of the case precluded a mere presence defense and instead created a situation where belief in one defendant precluded acquittal of the other.[229] Several facts weighed against the innocence of Gilbert: he admitted selling drugs for Mayfield; he was most closely linked to the apartment; he was allegedly seen hiding evidence; and he had left fingerprints on the drug paraphernalia.

Due to the strength of this evidence, Gilbert's only viable defense was to try to pin all blame for possession and control of the drugs on Mayfield.[230] Thus, for Gilbert to be acquitted, the jury would have to both believe him and disbelieve (and convict) Mayfield.[231] The court further noted, "Gilbert's counsel frankly told the district court that her defense was to prosecute Mayfield, which should have put the district court on notice that it was required to grant Mayfield's severance motions or employ other means of stemming the prejudice flowing from Gilbert's mutually exclusive defense."[232] As such, the court, citing *Zafiro*, concluded, "Mayfield has shown both that he was denied a specific trial right and that Gilbert's mutually exclusive defense prevented the jury from making a reliable judgment about his guilt or innocence."[233]

¶60. In its discussion of irreconcilable defenses, the *Mayfield* court did not make entirely clear whether such defenses always automatically entitled a defendant to severance, or whether the details of the facts and defenses in *Mayfield* made it a special case. In describing a situation where the acquittal of one defendant required the conviction of the other, the court offered the classic definition of mutually exclusive defenses. The *Tootick* court had noted the same fundamental property of irreconcilable defenses before rejecting a per se severance rule.[234] In *Mayfield*, the court, quoting *Throckmorton*, stated, "We have held that severance should be granted when the defendant 'shows 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'"[235] If the quote from *Throckmorton* is merely the definition of mutually exclusive defenses, as *Tootick* and the *Ramirez-Adler* line of cases would generally agree, then *Throckmorton* presumes exactly the per se severance rule

that *Tootick* rejected. In citing and applying *Throckmorton's* (and *Sherlock's*) standard, *Mayfield* seemingly accepts such a rule.[236]

¶61. The *Mayfield* court further reinforced the impression that irreconcilable defenses require automatic severance in drawing extensively on *Tootick* to discuss how "Gilbert's mutually exclusive defense prevented the jury from making a reliable judgment about Mayfield's guilt."[237] Quoting *Tootick* at length, the court discussed the second-prosecutor problem and how mutually exclusive defenses complicate the jury's efforts to determine codefendants' guilt or innocence "on an individual and independent basis."[238] It then declared,

> In short, the situation envisioned by *Tootick* is precisely what happened here. Gilbert's counsel used every opportunity to introduce impermissible evidence against Mayfield, and her closing argument barely even addressed the government's evidence against her client and instead focused on convincing the jury that Mayfield was the guilty party, not her client.[239]

¶62. Yet, in finding the "situation envisioned by *Tootick*," the *Mayfield* court was in fact only finding a case of mutually exclusive defenses. The quotation from *Tootick* about the jury's problems assessing guilt or innocence on an independent basis appears there in the context of a discussion of prejudice in general, not just mutually exclusive defenses.[240] The *Tootick* court's later rejection of a per se rule against joinder of irreconcilable defenses makes clear that the panel held that such defenses were not prejudicial per se.[241] The other language from *Tootick* quoted in *Mayfield*, which does specifically concern the potential prejudicial dangers of joint trials involving mutually exclusive defenses, including the second-prosecutor problem, is followed immediately in

Tootick by the explicit rejection of a per se severance rule.[242] Moreover, the *Tootick* court accepted second-prosecutorialism as basically inevitable in a trial involving "[d]efendants who accuse each other."[243] Thus, *Tootick* makes it clear that even the presence of second-prosecutorial activity using cross-examination and closing statements to emphasize the guilt of a codefendant does not, in itself, create manifest prejudice necessitating severance.[244]

¶63. Elsewhere, the *Mayfield* court expressed a clear awareness that *Tootick* rejected a per se severance rule. In discussing and distinguishing *Zafiro* regarding conflicting defenses, the court observed,

> [W]e have recognized that sometimes defenses can rise to the level of being "mutually exclusive." As we stated in *Sherlock*, "[a]ntagonism between defenses is insufficient [to mandate severance]; the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive." Even then, this circuit prior to *Zafiro* "declin[ed] to adopt a per se rule against joinder." Instead, "defendants must demonstrate that clear and manifest prejudice did in fact occur."[245]

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

¶64. Even in the discussion of mutually exclusive defenses noted above, *Mayfield* includes language suggesting that the prejudicial risks of such defenses could be addressed satisfactorily by means other than severance. The footnote where the court observes that Gilbert's counsel's forewarning of acute second-prosecutorialism put the court on notice that it must either sever or "employ other means of stemming the

prejudice flowing from Gilbert's mutually exclusive defense" indicates that other such suitable means exist.[246] This comment parallels the *Tootick* court's reasoning that notwithstanding the mutually exclusive defenses there, any resulting prejudice might have been cured by additional jury instructions and more active control of counsel's second-prosecutorial antics.[247] It also dovetails with *Zafiro's* holding that "Rule 14 does not require severance even if prejudice is shown"; rather, it leaves the tailoring of relief to be granted, if any, to the "district court's sound discretion," which indicates that the tailor has more tools than just scissors.[248] In the later discussion of *Zafiro*, the *Mayfield* court drew extensively on *Tootick* regarding the district judge's obligation to "'actively supervise the trial and, if necessary, reiterate instructions in the wake of prejudicial events,'" faulting the judge for the "erroneously admitted evidence" and declaring, "The district court should have sternly admonished the jury immediately after Gilbert's inflammatory closing argument."[249]

¶65. The *Mayfield* court also noted not just that the defenses were irreconcilable, but that "Gilbert's counsel used every opportunity to introduce impermissible evidence against Mayfield."[250] In addition to mutually exclusive defenses, *Mayfield* involved clear second-prosecutorial abuses that went uncured and uncontrolled, and these were the primary source of the demonstrated prejudice that compromised Mayfield's trial rights. So the section on mutually exclusive defenses actually runs together with the section on denial of confrontation rights and the serious and unmitigated prejudice from improper admission and use of evidence involving the search warrant, confidential informant, and Gilbert's statement.[251]

¶66. *Mayfield* remains slightly mysterious. The overall impact of the decision is clear enough: severance and retrial is proper where a defendant faces mutually exclusive defenses, codefendant's counsel extensively elicits inadmissible evidence to engage in aggressive and abusive second-prosecutorial excesses, the court takes insufficient steps to control such abuses or admonish the jury, and clear prejudice results. Like *De Luna*, the decision rests on multiple interwoven factors. Yet the decision is somewhat less clear on how exactly to handle mutually exclusive defenses in isolation from the other factors, for unlike *De Luna*, the structure of the decision gives the impression that both mutually exclusive defenses and Confrontation Clause violations might constitute separate, independently sufficient grounds for reversal in themselves. *Mayfield* approvingly cites and applies *Throckmorton's* language, in effect offering a mandatory severance rule for mutually exclusive defenses even as it notes *Tootick's* explicit rejection of such a rule.[252]

IX. Return To The Per Se Severance Rule: *Mayfield*'s Aftermath

¶67. 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*. In a 1999 telemarketing fraud case, the court, finding no irreconcilability, quoted *Mayfield* quoting *Throckmorton* in declaring that a criminal defendant is entitled to a separate trial on the ground of mutually antagonistic defenses only if the *Throckmorton* standard regarding "cores" and "theories" of defenses is satisfied.[253] Thereafter, an unpublished decision in a drug-trafficking conspiracy case found no conflict of defenses and cited the 1999 telemarketing case for the proposition

that "[g]enerally, a defendant is entitled to a severance by demonstrating that his defense is mutually antagonistic to another defendant's defense."[254] Another unpublished decision finding no irreconcilability cited *Mayfield* for the *Throckmorton* language regarding the cores of the defenses.[255] It then cited *Tootick* as holding that "[s]everance 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'"—a per se rule against joinder.[256]

¶68. The most recent Ninth Circuit decision to address mutually exclusive defenses, like *Mayfield*, cites to *Sherlock*, *Tootick*, and *Throckmorton*. In *United States v. Angwin*, two codefendants, Angwin and Khamis, were stopped in their motorhome at a California checkpoint north of the United States-Mexico border.[257] Immigration agents searched the motorhome and found fourteen Mexican citizens who had entered the United States illegally.[258] At trial, Angwin testified that he had acted under duress after the illegal passengers threatened him and entered the motorhome against his will at a rest stop in Mexico.[259] Khamis claimed ignorance.[260] Both were convicted of trafficking in illegal aliens.[261] On appeal, Angwin argued that the cases should have been severed based on antagonistic defenses.[262] The court noted that courts have regularly rejected the argument that a defense based on ignorance is irreconcilable with a defense based on a lack of guilty intent, and it agreed with them.[263] As to mandatory severance, the court observed,

> To warrant severance on the basis of antagonistic defenses, codefendants must show that their defenses are irreconcilable and mutually exclusive. Defenses are mutually exclusive when 'acquittal of one codefendant would necessarily call for the conviction of the

> other.' Even when defendants present antagonistic defenses, such defenses "are not prejudicial per se."[264]

¶69. The *Angwin* court's use of the verb "warrant" is interesting, because it might (or might not) be seen as having a weaker meaning than the other verbs used in similar contexts over the years: "mandate," "require," "necessitate," "entitle," and so on. Perhaps the use of "warrant" shows a degree of hedging and uncertainty, implying that severance is merely optional and advisable in such circumstances, rather than mandatory. Regardless, the decision falls into the same trap as most earlier decisions—missing both *Tootick's* explicit rejection of the *Ramirez-Sherlock* "holding" and *Throckmorton's* similar oversight in reviving *Sherlock* as if *Tootick* had never happened. Whether or not the verb is softened, this trio of cases remains problematic, and *Tootick* remains irreconcilable with both *Sherlock* and *Throckmorton* without some further help or clarification from the Ninth Circuit.

X. Conclusion

¶70. It is easy to understand how the mandatory severance rule for mutually exclusive defenses spread so rapidly through the case law of the Ninth and other Circuits. Busy judges and clerks with crowded dockets, seeking a clear, straightforward rule to help define the boundaries of a relatively unfamiliar issue arising only infrequently, eagerly seized upon language that provided such conceptual orientation, usually before proceeding to reject defendants' claims of mutual exclusivity. Earlier decisions in the Ninth Circuit had held mutual antagonism of defenses alone to be insufficient to require severance.[265] But this holding naturally begged the question: what would require severance? The per se severance rule that the *Ramirez* court imported from the Fifth and

Seventh Circuits seemed to provide a clear answer. In this way, a rule not properly grounded in any holding was able to jump from case to case and from circuit to circuit, spreading like a computer virus, or an unsubstantiated rumor. Although the *Tootick* court took great pains to think through the issue of mutual exclusivity and tried to stop the per se severance rule's metastasis, their thoughtful, complex discussion apparently could not compete with the straightforward ease and simplicity of the *Ramirez* rule.

¶71. Ease and simplicity aside, in order to make their case law regarding mutually exclusive defenses consistent, the Ninth Circuit must either reaffirm *Tootick's* holding rejecting a per se rule against joinder or else formally overrule *Tootick* on that point and offer a proper, formal holding for the rule, whether in its *Ramirez*, *Throckmorton*, or other manifestation. In so doing, the Ninth Circuit might agree with various earlier Ninth Circuit and other circuit decisions that the clarity of the per se rule is too useful to give up. In particular, a properly grounded rule following the *Throckmorton* construction that irreconcilable theories of defense mandate severance could help trial court judges by allowing them to sever defendants before trial, rather than having to sit through part or all of a joint trial until a manifestly and incurably prejudicial event forces severance. Yet such a theory-based rule potentially could also allow defendants to game the system and gain severance by pleading irreconcilable theories, regardless of their supporting evidence.[266]

¶72. By contrast, both the system envisioned under *Tootick* and the current system used in practice—severance only after manifest prejudice has occurred—are necessarily retroactive, forcing district judges to do damage control after problems have arisen rather

than avoid problems by severing preemptively. A district judge thus is in the uncomfortable position not only of having to sit through all or part of a trial to see whether serious actual prejudice appears, but also of having to wait and wonder whether the Ninth Circuit will see such prejudice where she did not. Under *Tootick*, such a judge additionally will face reversal if an appellate panel finds the jury instructions or other means short of severance that she used to cure prejudice insufficient. Given the relative rarity of truly irreconcilable defenses, this may not be an unduly great burden for district judges to bear. Yet, if the Ninth Circuit were to reaffirm or extend *Tootick*, it would be helpful if the court would build upon the commentary in *Tootick* and *Mayfield*. This would shed additional light on jury instructions and other means of curing prejudice without severance, how and when to use them properly, and what sorts of prejudicial events they can cure.

¶73. Given the rarity of truly irreconcilable defenses, efficiency would seem to tilt in favor of the approach in *Tootick*. With a clear understanding that cases generally may go ahead to completion even where there is a significant likelihood of mutually exclusive defenses, trial judges would be freed, in large measure, from worrying unnecessarily over what are, in the end, usually only nuisance arguments for severance on grounds of antagonistic defenses. In our criminal justice system, with its steadfast reliance on juries and jury instructions, trial judges have the tools to control most second-prosecutorial abuses just as we expect them to control actual prosecutors. *Tootick's* focus on actual prejudice, rather than on theoretical prejudice, also better fits the reality of court trials. Under this common-sense standard, for instance, if the evidence against a codefendant is overwhelming, then the judicial process would not be derailed, nor a new trial required,

simply because a few arguable instances of second-prosecutorial excess went without sufficient curative measures. Cases that involve both truly irreconcilable defenses and incurable, compelling actual prejudice might still occur, but these would be rare indeed.

¶74. Whether the Ninth Circuit follows the *Tootick* approach or the *Ramirez-Sherlock-Throckmorton* approach, it should follow the reasoning in *Berkowitz* and the *Romanello* dissent by clarifying or overruling the "theory" language in *Throckmorton* to make it clear that irreconcilability in the cores of defenses will be measured by evidence proffered, not mere theory or rhetoric. Since we are chiefly concerned with avoidance of actual prejudice, a finding of a strong risk of such prejudice should depend on what counsel can prove, not just what they can dream up. Moreover, evidence, unlike loose lawyer-talk, cannot properly be cured by instructions and admonitions. A clear evidence-based standard, together with a requirement of true irreconcilability, would tend to keep cases of reversible error due to failure to sever quite rare even under a mandatory severance regime.

¶75. Whichever path the Ninth Circuit might choose to reconcile its current irreconcilable case law regarding mutually exclusive defenses, conscientious district and appellate judges in all the circuits that share the Ninth Circuit's uncertain mooring regarding the issue likely would benefit from additional guidance regarding prejudice from mutually exclusive defenses, how to cure it if possible, and generally how to exercise the "district court's sound discretion" to which the Supreme Court left the issue in *Zafiro*.[267]

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[1] *See*, *e.g.*, Richardson v. Marsh, 481 U.S. 200, 209-210 (1987); Zafiro v. United States, 506 U.S. 534, 537-38 (1993).

[2] 481 U.S. 200.

[3] Id. at 210.

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

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

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

[7] FED. R. CRIM. P. 14(a) provides, "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."

[8] Bruton v. United States, 391 U.S. 123 (1968); *see, e.g.*, Gray v. Maryland, 523 U.S. 185, 192-93 (1998); United States v. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999); United States v. Peterson, 140 F.3d 819, 821-22 (9th Cir. 1998).

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

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

[11] Zafiro v. United States, 506 U.S. 534, 539 (1993); United States v. Gay, 567 F.2d 916, 918-20 (9th Cir. 1978); United States v. Kaplan, 554 F.2d 958, 966 (9th Cir. 1977).

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

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

[14] *See, e.g.*, United States v. Ramirez, 710 F.2d 535, 546 (9th Cir. 1983); United States v. Sherlock, 962 F.2d 1349, 1363 (9th Cir. 1989); Tootick, 952 F.2d at 1081.

[15] *See* George J. Cotsirilos & Matthew F. Kennelly, "When Should Birds of a Feather Flock Together?: Problems in Defending Multiple Defendant Prosecutions," 4 CRIM. JUST. 2, 4-5 (1990); Hon. Lewis L. Douglass, "Selected Issues in the Trial of a Drug Case," 162 PLI/CRIM 131, 166 (1991).

[16] *See, e.g.,* United States v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996); United States v. Romanello, 726 F.2d 173, 177 (5th Cir. 1984); United States v. Ziperstein, 601 F.2d 281, 285 (7th Cir. 1979).

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

[18] There apparently is relatively little scholarship on the topic of mutually antagonistic defenses, and those sources that address the issue usually do so briefly. The fullest discussion, which includes treatment of irreconcilable defenses in both state and federal courts, is Wade R. Habeek, "Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Cases," 82 ALR 3d 245 (1978). Also helpful for providing an overview are the Georgetown Law Journal's Annual Reviews of Criminal Procedure. *See*, *e.g.,* Richard Vorosmarti, "Joinder and Severance," 89 GEO. L.J. 1307, 1315 n.935 (2001); Robert Innes, "Joinder and Severance," 88 GEO. L.J. 1138, 1146 n.942 (2000); David P. Murray, "Joinder and Severance," 73 GEO. L.J. 455, 462 n.1209 (1984). Further discussion or useful background may be found in 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); James Farrin, "Rethinking Criminal Joinder: An Analysis of the Empirical Research and its Implications for Justice," 52 L. & CONTEMP. PROBS. 325 (1989); Douglass, 166; Cotsirilos & Kennelly, 4-5.

[19] 506 U.S. 534 (1993).

[20] *Id.* at 538.

[21] *Id.* at 538-39.

[22] Id. at 537.

[23] *See also* United States v. Mayfield, 189 F.3d 895, 908 (9th Cir. 1999)(Trott, J., dissenting).

[24] 952 F.2d 1078 (9th Cir. 1991).

[25] *Id*. at 1083.

[26] *See, e.g.,* United States v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996); United States v. Gillam, 167 F.3d 1273, 1276 (9th Cir. 1999); United States v. Hanley, 190 F.3d 1017, 1028 (9th Cir. 1999).

[27] 308 F.2d 140 (5th Cir. 1962).

[28] *Id*. at 142.

[29] *Id.* at 141.

[30] *Id*.

[31] *Id*.

[32] *Id*. at 142-43.

[33] *Id*. at 144-54.

[34] *Id.* at 150.

[35] *Id*. at 151-52.

[36] *Id*. at 142, 143.

[37] *Id*. at 154.

[38] *Id*. at 155.

[39] *Id*. at 142.

[40] *Id*. at 154.

[41] *Id*. at 155-56 (Bell, J., concurring specially) ("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."); *see also* 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."); United States v. McKinney, 379 F.2d 259, 265 (6th Cir. 1967) ("We agree with the concurring opinion in De Luna . . . to the effect that such comment by the attorney would not be permissible."); Hayes v. United States, 329 F.2d 209, 221-22 (8th Cir. 1964) (distinguishing De Luna); United States v. 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. Sandoval, 913 F. Supp. 498, 500-01 (S.D. Tex. 1995).

[42] In Gurleski v. United States, 405 F.2d 253, 265 (5th Cir. 1968), cert. den., 395 U.S. 981 (1969), the court noted that "[t]rue antagonistic defenses are exemplified in De Luna," *id*. at 265, that 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," *id*., that a "duty [to comment on a codefendant's

refusal to testify] arises only when the arguments of the codefendants are antagonistic," *id*., and that "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*. The court then described how the Gurleski trial presented no such situation and created no such duty. *Id*. The court also approvingly cited Hayes, 329 F.2d 209 (8th Cir. 1964), *cert. den*., 377 U.S. 980, 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 codefendants." *Id*. at 491 n.1. *See generally* De Luna, 308 F.2d 140.

[43] United States v. Ramirez, 710 F.2d 535, 546 (9th Cir. 1983).

[44] 609 F.2d 1172, 1175 (5th Cir. 1980).

[45] 574 F.2d 224, 231 (5th Cir. 1978).

[46] 726 F.2d 173, 177 (5th Cir. 1984).

[47] 601 F.2d 281, 285 (7th Cir. 1979).

[48] United States v. Kahn, 381 F.2d 824 (7th Cir. 1967).

[49] *Id.* at 828.

[50] *Id*. at 838.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 839-841.

[54] *Id*.

[55] *Id*. at 840.

[56] *Id*.

[57] *Id.* at 840-41.

[58] *Id*. at 841.

[59] *Id.*

[60] *Id.*

[61] *Id*. at 839-40.

[62] *Id*. at 839.

[63] *Id*. at 840 (citing Hayes v. United States, 329 F.2d 209, 221 (8th Cir. 1964), *cert. den*., 377 U.S. 980 (1964) [distinguishing De Luna]).

[64] While mutually exclusive defenses often might be inherently prejudicial, sometimes they might not be—as when there is already overwhelming evidence of a codefendant's guilt from other sources. *See* Mayfield, 189 F.3d at 909 (Trott, J., dissenting).

[65] United States v. Marable, 574 F.2d at 226-228 (5th Cir. 1978).

[66] *Id.*

[67] *Id*. at 228-229.

[68] *Id*. at 228-229.

[69] *Id*. at 231.

[70] 381 F.2d at 840.

[71] *Id*. at 1175.

[72] 609 F.2d at 1173.

[73] *Id*. at 1174.

[74] *Id*. at 1174, 1174 fn. 1.

[75] *Id*. at 1174-1175.

[76] *Id*. at 1175.

[77] *Id*.

[78] *Id*. at 1175.

[79] *Id*. at 1175.

[80] United States v. Ziperstein, 601 F.2d at 284-285 (7th Cir. 1979).

[81] *Id*. at 285.

[82] *Id*. at 285-286.

[83] *Id*. at 286. Defense counsel in his opening statement alluded to the deaths of two unindicted co-conspirators who had been murdered, noted that his client would take the stand since "'an innocent man almost invariably is eager to take the witness stand,'" and intimated that other defendants had attempted to tamper with witnesses. The defendants on appeal also claimed prejudice from testimony elicited by the acquitted defendant that buttressed the government's case. *Id*. at 286-287.

[84] *Id*. at 285.

[85] United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979).

[86] Ziperstein, 601 F.2d at 285. Note conflation of mutual antagonism with mutual exclusivity.

[87] 726 F.2d 173, 177 (5th Cir. 1984).

[88] United States v. Sherlock, 962 F.2d 1349, 1363 (9th Cir. 1989, amended in 1992).

[89] 581 F.2d. 489, 491 (5th Cir. 1978).

[90] *Id*. at 490.

[91] *Id*. at 492.

[92] The Crawford court's holding overlooks the possibility of a "Rampart"-type defense of blaming the police for planting the weapon based on racism, corruption, or the like, allowing a jury to find both defendants innocent of possession. Judge Clark dissented in Crawford that the mutual finger pointing of each defendant was insufficient to justify severance because there was a third option reconciling the conflicting defenses: joint possession. *Id*. However, while this presents a third option to a "one must be guilty" situation, it does not break out of the "if the jury believes one, it must convict the other" box.

[93] *Id.* at 492. Of course, such finger pointing is a typical feature of any mutually antagonistic defenses, even those not rising to the level of mutual exclusivity. *See* discussion of mutually exclusive defenses and the second-prosecutor problem in Tootick, 952 F.2d at 1082-83.

[94] Crawford, 581 F.2d at 492.

[95] *Id*.

[96] Crawford, 581 F.2d at 491 n.1.

[97] This is in keeping with De Luna's conclusion that jury instructions had no chance of curing the prejudice there, *see* De Luna, 308 F.2d at 154-55, but contrary to the Ninth Circuit's stronger reliance on the curative power of jury instructions in Tootick and Mayfield (*see infra*).

[98] 662 F.2d 1127 (5th Cir. 1981).

[99] *See id.*

[100] *Id.* at 1134.

[101] *Id*. (quoting United States v. Eastwood, 489 F.2d 818, 822 (5th Cir. 1973) (quoting United States v. Robinson, 432 F.2d 1348, 1351 (D.C. Cir. 1970).).

[102] *Id*. at 1133-34.

[103] *Id.* at 1134.

[104] *See* United States v. Romanello, 726 F.2d 173, 182-83 (5th Cir. 1984) (Gee, J., dissenting).

[105] *See* Berkowitz, 662 F.2d 1127; *see also* Crawford, 581 F.2d at 491.

[106] *See* Romanello, 726 F.2d at 177.

[107] *Id.*

[108] *Id*. at 175, 177.

[109] *Id*. at 177.

[110] *Id*. at 181.

[111] *Id*. at 176 n.3.

[112] *Id*. at 177 n.4.

[113] *Id*. at 182-3 (Gee, J., dissenting).

[114] *Id*. at 174.

> The joint trial of conspiracy defendants was originally deemed useful to prove that the parties planned their crimes together. However, it has become a powerful tool for the government to prove substantive crimes and to cast guilt upon a host of co-defendants. In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante's hell, they may become entangled and ultimately fuse together in the eyes of the jury, so that neither defense is believed and all defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants. *Id*. at 174.

[115] *Id*. at 182 (Gee, J., dissenting).

[116] United States v. Berkowitz, 662 F.2d 1127 (5th Cir. 1981).

[117] Romanello, 726 F.2d at 182 (Gee, J., dissenting) (emphasis in the original).

[118] *Id*.

[119] *Id*.

[120] Romanello, 726 F.2d at 182-83 (Gee, J., dissenting).

[120] *Id.*

[121] *Id.* at 182 (emphasis in original).

[122] *Id*. at 183.

[123] 581 F.2d 489 (5th Cir. 1978).

[124] Romanello, 726 F.2d at 177.

[125] *Id*. at 181.

[126] 710 F.2d 535 (9th Cir. 1983).

[127] *Id*. at 537-538.

[128] *Id*. at 538.

[129] *Id*.

[130] *Id*.

[131] *Id.*

[132] *Id*. at 546.

[133] *Id*. at 546.

[134] *Id*. at 546-547.

[135] *Id.* at 546 [quoting *United States v. Marable*, 574 F.2d 224, 231 (5th Cir. 1978)].

[136] *Id*. Notably, Salomon never defines mutual exclusivity as being where acceptance of one defendant's defense precluding acquittal of the other defendant. 609 F.2d at 1175. In Salomon, which involved one defendant's entrapment defense and the blaming of another entirely, the court cited earlier holdings that a codefendant's reliance on an entrapment theory was insufficient to require severance. *Id*. Rather, the Salomon court found prejudice requiring severance from a codefendant's implication of Salomon in earlier drug dealings. *Id*.

[137] United States v. Gonzales, 749 F.2d 1329, 1333-34 (9th Cir. 1984) (quoting the identical passage from Ramirez and including specific citation to Marable); United States v. Polizzi, 801 F.2d 1543, 1554 (9th Cir. 1986) ("To justify severance on the ground of antagonistic defenses, there must be a showing of 'mutual exclusivity'—Polizzi's acquittal had to preclude Matranga's acquittal") (citing Ramirez and Gonzales); United States v. Valles-Valencia, 811 F.2d 1232, 1238 (9th Cir. 1987) (citing Ramirez); United States v. Van Cauwenberghe, 827 F.2d 424, 432 (9th Cir. 1987), *cert. den*., 484 U.S. 1042 (1988) (quoting Ramirez); and United States v. Adler, 879 F.2d 491, 497 (9th Cir. 1988) ("Severance is required when coconspirators' defenses are mutually exclusive; that is, when acquittal of one defendant necessarily results in conviction of the other.") (citing Van Cauwenberghe and Ramirez).

[138] *See* United States v. Myers, 917 F.2d 29, 1990 WL 161695 (9th Cir. (Nev.)) at **5; United States v. Langarica-Figueroa, 930 F.2d 30, 1991 WL 49681 (9th Cir. (Cal.)) at **1; United States v. Navarro-Lopez, 951 F.2d 364, 1991 WL 268924 (9th Cir. (Cal.)) at **2.

[139] 962 F.2d 1349 (9th Cir. 1989), *cert. den. sub nom*., Charley v. United States, 506 U.S. 958 (1992), as amended, 1992.

[140] *Id*. at 1362-63.

[141] *Id*. at 1362-63. *See* United States v. Romanello, 726 F.2d 173, 177 (5th Cir. 1984).

[142] Sherlock, 962 F.2d at 1363 (citing Romanello, 726 F.2d at 177).

[143] *Id.* at 1352.

[144] *Id*.

[145] *Id.* at 1361-62.

[146] *Id*.

[147] *Id*. at 1363.

[148] *Id*.

[149] *Id*.

[150] None of the other circuit cases, cited in Sherlock for other propositions, do any more than cite to Ziperstein from the Seventh Circuit or Romanello and Berkowitz from the Fifth Circuit. *Id.* at 1362-63.

[151] 952 F.2d 1078 (9th Cir. 1991).

[152] *Id.* at 1080.

[153] *Id*.

[154] *Id*. at 1081.

[155] *Id*.

[156] *Id*. at 1081.

[157] *Id*. at 1083-85.

[158] *Id*. at 1081.

[159] *Id*.

[160] *Id.*

[161] *Id*.

[162] *Id*. at 1082-83.

[163] *Id*. at 1083.

[164] *See Id*. at 1080-85.

[165] *Id*. at 1083-84. Regarding the inherent problems of joint trials with antagonistic defenses and second-prosecutorial blame trading, the Tootick 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." *Id*. at 1082.

[166] *Id*. at 1085.

[167] *Id.*

[168] *Id*. at 1085-86 (citations and quotations omitted).

[169] *Id*. at 1086.

[170] Sherlock became the favorite source to cite regarding mandatory severance of mutually exclusive defenses during the years after Tootick and before the 1996 decision in Throckmorton (*see infra*), perhaps because the Supreme Court denied certiorari and Sherlock reappeared in amended form in 1992.

[171] 952 F.2d 1110, 1116 (9th Cir. 1991). Hernandez followed the Tootick decision by only a week and hardly could have been expected to incorporate its holding.

[172] *Id*.

[173] 987 F.2d 657, 658 (9th Cir. 1993).

[174] *See id.* at 660-61.

[175] *Id*. at 661.

[176] *Id*.

[177] *Id*. at 661.

[178] The Buena-Lopez court also found no significant second-prosecutorial excesses, contrary to Tootick. Buena-Lopez, 987 F.2d at 661.

[179] 998 F.2d 1491, 1507 (9th Cir. 1993).

[180] *Id*.

[181] In Arias-Villanueva, the appellant claimed a right to severance based upon mutually exclusive defenses, *id*. at 1506, unlike Buena-Lopez, where the appellants and court both equated "mutually antagonistic" with "the acquittal of one necessitat[ing] the conviction of the other." Buena-Lopez, 987 F.2d 661. 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.

[182] *See* Buena-Lopez, 987 F.2d at 660 ("In Zafiro, the Supreme Court expressly rejected the argument that severance is always required whenever defendants present mutually antagonistic defenses."); Arias-Villanueva, 998 F.2d at 1506.

[183] 34 F.3d 1416, 1436 (9th Cir. 1994), *aff'd* in part and *rev'd* in part on other grounds, 518 U.S. 81.

[184] *Id*. at 1424.

[185] *Id.* at 1445.

[186] *Id*.

[187] *Id.* at 1436.

[188] *Id*.

[189] *Id*. at 1436.

[190] 65 F.3d 176, 1995 WL 496825 (9th Cir. (Ariz.))

[191] *Id.*

[192] *Id.*

[193] *Id*. at **2-3.

[194] *Id*. Interestingly, the Fleener court stated that acceptance of one brother's defense did not preclude acquittal of the other brother, since the government presented evidence to show that one brother drove the getaway car, such that either brother could be found guilty of bank robbery regardless of who entered the bank. *Id*. From the information given in the case, this appears to be a non sequitur. Finding both guilty would entail rejection of both defenses and would not change the fact that acceptance of one defense would necessitate rejection of the other.

[195] *Id*.

[196] *Id.* at **3.

[197] 87 F.3d 1069, 1072 (9th Cir. 1996).

[198] *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 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).

[199] Throckmorton, 87 F.3d at 1072.

[200] *Id*.

[201] *Id*.; Sherlock, 962 F.2d 1349, 1363 (9th Cir. 1989).

[202] Throckmorton, 87 F.3d at 1072; United States v. Romanello, 726 F.2d 173, 182 (5th Cir. 1984).

[203] Romanello, 726 F.2d at 182 (Gee, J., dissenting).

[204] This acceptance of "theory" rather than "testimony" raises the question whether a defendant could preemptively demand severance simply by fiat, by proclaiming that his theory of defense would heap all blame on a codefendant, regardless of whether he had any substantive evidence to prove the codefendant's liability. The Throckmorton court's finding of insufficient antagonism in the defenses seems to contradict its own loose, "theory"-based standard. Defendant Throckmorton defended on a theory of insufficiency of the evidence and argued that the prosecution did not prove its case. Throckmorton, 87 F.3d at 1072. Defendant Calicchio defended on a theory that he was acting as a government informant. *Id*. Calicchio aggressively inculpated Throckmorton, and his "testimony was devastating to Throckmorton's defense." *Id*. However, the Throckmorton court reasoned that "[t]hese defenses are not, at their core, irreconcilable," because even if "the jury found that Calicchio was working for the DEA, it still could have acquitted Throckmorton for lack of evidence." *Id*. In other words, notwithstanding that part of Calicchio's *theory* was 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.,* Lambright v. Stewart, 191 F.3d 1181, 1185 (9th Cir. 1999); United States v. Tekle, 2002 WL 187157 (9th Cir. (Cal.)), at **1; United States v. Showa, 133 F.3d 930, 1997 WL 801452 (9th Cir. (Cal.)), at **4.

[205] 127 F.3d 791, 799 (9th Cir. 1997).

[206] *Id*. at 799-800.

[207] *Id*. at 799.

[208] *Id*. at 800 (quoting Tootick, 952 F.2d at 1081).

[209] *Id*. *See also* United States v. Showa, 133 F.3d 930, 1997 WL 801452 (9th Cir. (Cal.)), at **4 (finding defenses were not mutually exclusive, distinguishes Tootick and

also implies that the decision in Tootick was based solely or primarily on the presence of mutually exclusive defenses); United States v. Wyner, 230 F.3d 1368, 2000 WL 1210150 (9th Cir. (Cal.)) at **2 ("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.").

[210] 189 F.3d 895 (9th Cir. 1999).

[211] *Id*. at 897.

[212] *Id*.

[213] *Id*. at 897-98, 900.

[214] *Id*. at 897, 900.

[215] *Id*.

[216] *Id*. at 898.

[217] *Id*. at 899.

[218] *Id*. at 898.

[219] *Id*.

[220] *Id*.

[221] *Id*.

[222] *Id*.

[223] *Id*. at 898-99.

[224] *Id*. at 899.

[225] *Id*.

[226] *Id*. at 907.

[227] *Id*. at 899, 900, 906.

[228] *Id*. at 903-906.

[229] *Id*. at 900.

[230] *Id*.

[231] *Id*.

[232] *Id* at 900 n.1.

[233] *Id*. at 899.

[234] United States v. Tootick, 952 F.2d 1078, 1081, 1083 (9th Cir. 1991) ("Mutually exclusive defenses are said to exist when acquittal of one codefendant would necessarily call for the conviction of the other.") (*citing* United States v Adler, 879 F.2d 491).

[235] United States v. Mayfield, 189 F.3d 895, 899 (9th Cir., 1999).

[236] *Id*. at 899, 900 ("Gilbert's defense and Mayfield's defense were mutually exclusive because 'the core of the codefendant's defense is so irreconcilable with the core of [Mayfield's] own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.'").

[237] *Id*. at 899.

[238] *Id*.

[239] *Id*. at 900.

[240] United States v. Tootick, 952 F.2d 1078, 1082 (9th Cir. 1991).

[241] *Id*. at 1083.

[242] *Id*.

[243] *Id*. at 1082-83.

[244] *Id*.

[245] United States v. Mayfield, 189 F.3d 895, 903 (9th Cir., 1999).

[246] *Id*. at 900 n.1.

[247] Tootick, 952 F.2d at 1083-85.

[248] Zafiro v. United States, 506 U.S. 534, 538-39 (1993).

[249] Mayfield, 189 F.3d at 905. Further on, the Mayfield court reaffirms this point even more vigorously:

> As indicated by Tootick and Sherlock, the district court had a duty to police the tactics of Gilbert's counsel, whose goal was to secure an acquittal for her client by proving Mayfield's guilt. . . . Even the government recognized the risk of prejudice and accordingly objected to some of Gilbert's counsel's tactics out of fear of 'run[ning] into mistrial territory. Under these circumstances, the district court abused its discretion by failing to sever or use more rigorous and timely jury instructions to mitigate the prejudice.

Id. at 906.

[250] *Id*. at 900.

[251] *See* i*d*. at 901-03. The evidence from Gilbert's statement regarding "an individual," the "main man," and related points also constituted a Bruton violation under the standards for acceptable redaction of a codefendant's confession developed in Richardson v. Marsh and Gray v. Maryland. *See* Gray, 523 U.S. 185, 191-92. (1998); *see also* Richardson, 481 U.S. 200 (1987).

[252] Judge Trott vigorously dissented in Mayfield, arguing that the core of the defenses—presence without possession (Gilbert) as against non-presence without possession (Mayfield) were not irreconcilable, and that because there was overwhelming evidence of Mayfield's guilt, the antagonism of the defenses caused Mayfield no prejudice. *See* Mayfield, 189 F.3d at 908-09 (Trott, J., dissenting).

[253] United States v. Hanley, 190 F.3d 1017, 1028 (9th Cir. 1999).

[254] United States v. Nunez-Hernandez, 221 F.3d 1349, 2000 WL 679256 (9th Cir. (Mont.). Again, note the conflation of mutual antagonism with mutual exclusivity.

[255] United States v. Wyner, 230 F.3d 1368, 2000 WL 1210150, **2 (9th Cir. (Cal.).

[256] *Id*.

[257] 271 F.3d 786, 792-93 (9th Cir. 2001).

[258] *Id*.

[259] *Id*. at 793.

[260] *Id*. at 795.

[261] *Id*. at 794.

[262] *Id*. at 794-795.

[263] *Id*. at 795.

[264] *Id*. at 795.

[265] *See, e.g.,* United States v. Brady, 579 F.2d 1121, 1128 (9th Cir. 1978), *cert. den*., 439 U.S. 1074 (1979).

[266] *See supra* note 210.

[267] 506 U.S. at 539.