19-5545

NO.

IN THE SUPREME COURT OF THE UNITED STATES

2019

TODD ALLEN WHEELER,

Petitioner,

v.

MICHIGAN,

Respondent.

ORIGINAL

Supreme Court, U.S.
FILED
MAY 17 2019
OFFICE OF THE CLERK

On Petition for Writ of Certiorari to the Michigan Supreme Court

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PETITION FOR WRIT OF CERTIORARI

BY: ***Todd A Wheeler 313894**
Appellant in Pro per
Gus Harrison Correctional Facility
2727 E. Beecher
Adrian, MI 49221

*This Document was prepared with assistance of the MDOC - ARF non Attorney Legal Writer Program in accordance with 05.03.116(R)

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER MR. WHEELER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERROR IN JOINING HIS CASE WITH DEFENDANT PARSLEY FOR TRIAL BEFORE A SINGLE JURY; TRIAL COUNSEL'S FAILURE TO MOVE FOR SEVERANCE DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?

II. WHETHER MR. WHEELER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE APPELLATE COUNSEL FAILED TO RAISE THE JOINDER OF THE TRIALS AS PLAIN ERROR AND WHETHER COUNSEL'S FAILURE PRECLUDED THE TRIAL COURT FROM GRANTING MR. WHEELER A NEW TRIAL?

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The December 21, 2018, opinion of the Michigan Supreme Court is published as People v Wheeler 920 N.W.32.d 586.

The April 24, 2018, opinion of the Michigan Court of Appeals is unpublished, People v. Wheeler 2018 Mich. App. Lexis 1814.

The July 24, 2017 opinion of the Michigan Supreme Court is published, People v Wheeler, 500 Mich. 1033.

The September 20, 2016 opinion and order of the Michigan Court of Appeals is, People v Wheeler. 2016 Mich. App. Lexis 1739

The Michigan Supreme Court's published opinions, the Michigan Court of Appeals' unpublished opinions, are all reproduced in the appendix to this petition.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Statement of the Case

On March 2, 2015, before the Honorable Mark A. Trusock, Kent County Circuit Court Judge, a jury trial was begun a matter of *People of the State of Michigan v Todd Allen Wheeler*, Kent County Circuit Court No: 14-10346FH.

Before the same jury, the matter of People of the **State of Michigan v Hooper Jackson Parsley**, Kent County Circuit Court No: 14-10337FH, was also heard.

Both defendants were charged in the information with the three counts of criminal sexual conduct, third degree, incapacitated person. MCL 750.520d(1)(c).

Appellant Wheeler was charged as a habitual offender, second felony offense. MCL 769.10.

It was alleged that on or about September 19, 2014, at 4090 Shaffer, Kentwood, Kent County, Michigan, defendant did engage in sexual penetrations (two counts of vaginal/penile, one count of penile/oral) with Emily Smith, defendant knowing or having reason to know she mentally incapable.

Defendant Parsley was charged with three counts of three counts of criminal sexual conduct, third degree, incapacitated person. MCL 750.520(1)(c), that on or about September 1 – September 19, 2014, at 4090 Shaffer, Kentwood, Kent County, Michigan, defendant did engage in sexual penetrations with Sabrina Wheeler.

The people were represented by Mr. Travis J. Earley, assistant county prosecutor; defendant by Mr. Donald C. Pebley; Mr. Howard G. Van Den Heuvel for defendant Parsley.

The following witnesses testified: Dale Smith, Emily Nicole Smith, Sabrina Jo Wheeler, Nicole Smith, Jason Maas, Kentwood Police Detective Amol Huprikar, Vicky Wilson, Doctor Jeffery Kieliszewski, and Hooper Parsley.

After a jury was empaneled, (I, 8-116), preliminarily instructed (II, 5-18), and opening arguments made (II, prosecutor, II, 18-25; defendant, II, 25-27; defendant Parsley, II, 27-30), the following testimony was taken:

Mr. Smith was the father of Emily, who was 18 years old. Sabrina was her friend for the past 4-5 years. Emily had been in special education classes since the second or third grade.

In the summer/fall of 2014, she had been spending time with Sabrina and at some point he learned of defendant, learned he was Sabrina's father, Emily was hanging out with him. Initially, he had no concerns but had some at some point as he was shown an inappropriate text from defendant to Emily. He began investigating because other similar texts messages had been from students.

He was aware defendant was taking the two girls places but thought nothing untoward because defendant was Sabrina's father. Eventually he met defendant, who asked if he could date Emily. He had learned through school that Emily was a little slow; for example, she could not accurately count money. He was attempting to obtain guardianship for her partly because she had difficulty with daily chores, cooking and cleaning and she would not dress the way he wanted (II, 33-41).

He did not give defendant his permission, in part due to the defendant's medical conditions (AIDS and hepatitis). He became upset and learned that she was spending time at defendant's place, and learned defendant was renting from Mr. Parsley.

Eventually he became concerned enough to contact the police. He learned additional information, learned she had skipped school so he kicked her out for a couple of days, later learning she had spent time at defendant's. He begged her to come back because in his opinion

she could not spend time on her own. She had obtained a new job, taking the bus to and from work with a prepaid car. (II,31-48).

She did not receive Social Security disability: the issue of guardianship came up after the case had begun. He agreed she had a mind of her own regarding clothing, agreed they would argue, but would talk as adults. He agreed she was able to use the bus, drive a moped, use a cell phone, was going to school, and working. He indicated his girlfriend or mother would discuss female matters with her, that she had received other sexual test messages from other boys. He agreed she had sexual education classes in school, agreed she sometimes didn't not always understand why she would be punished, agreed she did not think before she talked, but knows why she would be punished even if she did not agree with it. (II, 33-63).

Ms. Emily Smith was 18 years old and lived with her father and had known Sabrina Wheeler since kindergarten. She was introduced to her father, defendant in August, 2014, after her bicycle broke down while giving Sabrina a ride and he come to pick them up. She was 17 years old. She then started hanging out with him and Sabrina and were just friends.

She met Mr. Parsley when she went over to defendant's house. After she turned 18 they became more than just friends. They had talked about it and they waited until she turned 18 years old. She admitted defendant would buy her clothing. She did homework at the house and he would help her.

She was in special Olympics and played tennis, was a senior and had been in special education for the past six years. (II, 63-72)

She engaged in sexual relations with defendant after she turned 18 so neither of them would get into trouble. They had sex, and he would use a condom so she would not get hurt, but oral sex was without a condom. She agreed she had health classes in school. Defendant told her

he had a medical condition/disease that could get into her blood and she could die from it but she did not know what the disease was called. She did not know what semen was. Although defendant talked to her about it, she did not pay attention. The sex occurred in his bedroom. She thought Sabrina was generally around that time (II, 74-79).

She considered herself a tomboy, agreed when her phone was taken away as punishment, she had gotten mad but got over it, agreed she did not really want to do her chores, agreed she would go to McDonald's to use her tablet and would get on Facebook or play games. She got picked a lot and it was hard fore to have friends. She knew how to use a cell phone and how to text. She agreed she was kicked out of the house at one time, spending the night at defendant's, she preferred someone older because she thought they had more love and respect than people her own age. She felt safer with defendant. She was unable to transfer high schools because her father had to transfer her, even though she was overage. She agreed no one forced her to go the defendant's, forced her to have sex, and he would let her do her homework that she need to get done.

She agreed she wanted to wait before she had sex, agreed she wanted to have sex with defendant, that she thought it was up to her to decide whether to have sex with people. (II, 79-91).

Outside the presence of the jury, the court indicated she could not be questioned about any previous decisions regarding sexual relations. (II, 72-73).

Ms. Sabrina Jo Wheeler was defendant's daughter. She had been in special education classes with Emily and had met Mr. Parsley thought defendant, who was living at the house. Previously she had lived with her grandparents. She agreed she had spent the night in Mr. Parsley's room, admitted at some point she had sexual relations with him at his house, but could

not remember when it happened. She recalled telling the detective about the sexual contact. She and Mr. Parsley did not really discuss any future plans, agreed she was not forced, that it was her choice. She would do her homework at the house and Mr. Parsley knew she was in special education. Her grandparents eventually found out what was going on and told the police. She and Emily were still friends. (II 91-108).

Ms. Nicole smith was the school's social worker and knew both young ladies. She indicated Sabrina was emotionally and cognitively impaired while Emily was just cognitively impaired. (II, 114).

Sabrina had sometimes shown inappropriate behavior under normal circumstance, and was less mature for her age. When she turned 18, she considered herself and adult and did not have to follow the rules.

With Emily, she found she had a problem with daily living activities. In her opinion, Emily was more of a people pleaser and a follower. (II, 116). She agreed for the past two years she had two school related jobs. She was fired from the first one due to hygienic problems.

Both attended what was termed self–contained classes for the cognitively impaired, but did participate in other classes with others.

She indicated both were at first or second grade reading levels. The self-contained classes were intended to teach basic skills in math and reading and functioning so they would be able to get a part time job after graduation. Sabrina was receiving SSI payments; she hoped Mr. Smith would get SSI payments for Emily. (II,111-122)

She agreed Emily was currently working. Emily's previous job was a custodial one. She was aware that an IEP (Individualized Education Plan) was prepared each year. Emily's involved a family living class and was attending classes with a life skills curriculum as opposed

to a regular high school curriculum. The IEP, which was assessed every year dealt in specific goals to attain including social and emotional goals. Part of her concern with both girls was that they would 'friend' people on Facebook whether or not they knew them or not. She agreed some of their activities would be considered typical teenager activity. (II, 122-138).

Mr. Maas, was school psychologist and supervisor of the secondary special education calls for the Wyoming Public schools. He testified as an expert in psychology he was familiar with IEP. Generally, a child would be eligible for special education classes when they were assessed in grade school. The IEP was reviewed every three years to see whether special education is needed to continue and individualized education program that went to the family was updated at least once a year. Additionally, the family would get quarterly reports. He had been evaluating students for the past 13 years. He explained the testing.

He was familiar with both Sabrina and Emily. With regard to Emily, there was not a recent evaluation because there had been many evaluations done in the past. The current educational level was at first to second grade level. In his opinion Emily appeared to follow directions better than Sabrina and was able to obtain a job through the program, but could not fill out a job application, interview, and hold the job. The class was working with both of them on life skills, including money management.

In 2014. Emily's last IQ test (Vineland Adaptive Behavior Score) was 75. Between 2002-2008 she was in a range of 65 to 58, which would indicate she qualified for special education services. The average range for IQ test was between 90-109 (25th percentile to the 75th percentile). Thus Emily was within the first or second percentile. He agreed her current job indicated an improvement over her last appointment, agreed her oral skills were better than her written and reading skills. To determine whether a person forfeits the right to make decisions

about love, sex marriage, and family he would look at the adaptive skills the achievement levels, as well as program history and IQ level to determine whether or not the person was in a possible vulnerable position.

In his opinion, she was at a great risk for being vulnerable and taken advantage of, in that she was unable to appraise the long term physical or moral consequences of her actions (II,140-176).

Det. Huprikar was assigned to the case around September 20, 2014. He reviewed a report taken by an Officer Armstrong, contacted Sabrina's grandparent's, Mr. Smith, the school, learned defendant was renting from Mr. Parsley and both lived at home. The original report was taken on September 19, and the two girls were interviewed September 23rd. Both defendants came in for voluntary interviews. Defendant admitted to having a relationship with Emily of a sexual nature indicating he had sex with her three times in three weeks, that he got to know Emily through his daughter, Sabrina. Defendant had indicated he knew Emily and Sabrina were friends and both had similar conditions, that he was concerned about her driving and staying home by herself. (II,184). The officer indicated defendant knew Emily was in the same classes as his daughter. (II,177-192).

Recalled, he testified after interviewing the two young ladies, speaking to their school psychologist and searching the house, it was standard operation procedure to report the incident to adult Protective Services (ADP). (III,49-51).

Ms. Wilson testified as an expert in behavior psychology. The two were evaluated on January 15, 2015, at the request of Ms. Jones of ADP to determine where they could benefit from the services of a guardian. She reviewed the school educations records and administered several test, determined Emily was in the mild range of cognitive impairment or intellectual disability

(III, 15), that the verbal comprehension was at a second grade level as was her mathematical skills and comprehension was also around second grade level because Emily would require approval reminders on which to perform routine task, needed assistance in problem solving and expressed some difficulty in handling relationships. In her opinion, given Emily's functional limitations, she would benefit from having a partial guardian to manage matters (III, 7-22).

She indicated Sabrina would benefit from the same. (III, 31). (III. 7-45).

Defendant declined to testify. (III, 48).

Prosecution and defense rested. (III, 51).

Dr. Kieliszewski, licensed psychologist, testified as an expert in that area. He reviewed the school records related to Sabrina. His review of the reports indicated they did not address the ability of Sabrina to consenting to sexual relations. He agreed the cognitive disabilities would vary with each individual, that she was not evaluated specifically as to competency to consent to any sexual activity. (III, 52-60, 64-73).

Outside the presence of the jury it was agreed the doctor would testify as to whether the proper metrics/testing was used/not used. (III, 60-53).

Defendant Parsley testified he had met Sabrina though Emily and her father and did not become romantically involved until September. He did not see any signs she was not capable of apprising the physical and moral nature of sexual conduct, that he did not know she was in special education. He agreed defendant rented a room from him, that he would spend time with Sabrina because when he got home from work she would be there. He did not have any long term relationship plans with her, indicated that at one time she had tested at 71 on an IQ score but agreed he had to have help at time and get advice on how to handle certain matters. Sabrina had told him she was on birth control. When asked what her father would think, she indicated

she was 18 and was an adult and could do whatever she wanted. He broke off the relationship due to a no contact order by the court. (III, 74-94).

Closing arguments were made (prosecutor, III, 98-108, 125-130; defendant, III, 108-122; defendant Parley, III, 113-125) and the jury instructed. (III, 130-144).

Defendant was found guilty as charged. (IV, 4-5).

On April 16, 2015, before Judge Trusock, after the presentence report and sentence guidelines were reviewed, defendant was sentenced to concurrent terms of incarceration of 14 years to 22½ years.

Defendant-Appellant Wheeler appealed by right from his jury trial convictions in Kent County Circuit Court. On September 20, 2016, the Court of Appeals affirmed Mr. Wheeler's convictions, but reversed his co-defendant's convictions and remanded for new trial on the ground that the defendant's trials were improper joined. (Appendix E – prior COA Opinion, 9/20/16). Mr. Wheeler Sought leave to appeal in pro per, and the Michigan Supreme Court remanded Mr. Wheeler's case to the Court of Appeals with instructions for further review:

> ...to address the defendants claim, raised for the first time in this Court, that his appellate counsel was ineffective for failing to challenge on appeal: (1) the joinder of his and Hooper Jackson Parsley's trials; and (2) his trial counsel's ineffectiveness for failing to oppose that joinder. On remand, while retaining jurisdiction, the Court of Appels shall remand this cast e the Kent County Circuit Court to conduct an evidentiary hearing pursuant to People v Ginther, 390 Mich 436 (1973), to determine whether the defendant was deprived of his right to the effective assistance of trial and appellate counsel...[People v Wheeler, 500 Mich 1032 (2017) (#15477), Appendix F]

On remand from the Court of Appeals, the Circuit Court held a Ginther hearing and denied the defendant's motion for a new trial (Appendix L, trial court order, 12/1/17). The Court

of Appeals then affirmed Mr. Wheeler's convictions, in an unpublished opinion dated April 24, 2018. (Appendix M – COA opinion, 4/24/18). The Michigan Supreme Court subsequently denied the application on December 21, 2018. Petitioner filed a motion for enlargement of time within the 90 period of filing with this court which was granted extending his filing deadline to May 20, 2019.

This Honorable Court has jurisdiction to consider this petition for leave to appeal

Further facts will be detailed, *infra*, where relevant.

(Arguments as stated in the MSC Brief After Remand)

ARGUMENT

I. MR. WHEELER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S ERROR IN JOINING HIS CASE WITH DEFENDANT PARSLEY FOR TRIAL BEFORE A SINGLE JURY; TRIAL COUNSEL'S FAILURE TO MOVE FOR SEVERANCE DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A. Introduction

Trial defense counsel, the prosecutor, and the trial judge are focused on a straw man, i.e. they are focused on whether Mr. Wheeler's and Mr. Parsley's defenses were antagonistic. Because of this misplaced focus, they failed to recognize that Mr. Wheeler's and Mr. Parsley's cases could not be joined because they were not related as required by the court rules. Moreover, because of this misplaced focus, they ae blinded to the other type of harm that can be inflicted upon defendant whose case is wrongfully joined with that of another defendant. Here, Mr. Wheeler was unfairly prejudiced by the erroneous joining of his case for trial with Mr. Parsley to

such a degree that he is entitled to a new trial, whether the issue is viewed in the context of ineffective assistance of trial counsel or plain error by the trial court.

B. Issue Preservation

This ineffective assistance of trial counsel issue is preserved. The Supreme Court remanded this case to the Court of Appeals with instructions to remand it to the trial court for a Ginther hearing, including on the question of whether trial counsel rendered ineffective assistance of counsel. (Appendix ___, MSC remand order). The Court of Appeals remanded the matter consistent with the Supreme Court's order. (Appendix G, COA remand order). The trial court held the Ginther hearing, made findings of fact and conclusions of law, and denied Mr. Wheeler's motion for new trial which raised these claims. (GH 38-39; Appendix K – TC order 12/1/17; Defendant-Appellant's motion for new trial filed in the circuit court).

C. Standard of Review

The question of whether defense counsel performed ineffectively is a mixed question of law and fact; and appellate court reviews the trial court's findings of fact for clear error and reviews the questions of law de novo. *People v Trakhtenberg*, 493 Mich 38, 47 (2012).

This Court reviews an unpreserved claim of that the trial court erred for plain error affecting the defendant's substantial rights *People v Carines*, 460 Mich (1999).

D. Discussion

Mr. Wheeler was entitled to effective assistance of counsel at trial. *US Const, Ams VI, XIV; Const 1963, art 1, § 20.* To prevail on an ineffective assistance of counsel claim, the defendant must establish that counsel's performance fell below an objective standard of reasonableness and the deficiency prejudiced the defense. *Strickland v Washington*, 466 US 668; 104 S Ct 2052 (1984); *People v Pickens*, 446 Mich 298, 314, 326; 521 NW2d 797 (1994)

(adopting Strickland prejudice standard as matter of state constitutional law); See also *Trakhtenberg, supra* at 51.

To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, supra at 694. The Strickland Court explicitly rejected an outcome determinative test, i.e. that counsel's deficient conduct more likely than not altered the outcome in the case. Id. at 693. In so doing the Court reasoned that the outcome of a case which includes deficient conduct is entitled to a lower presumption of accuracy and fairness. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, supra at 694.

E. Law of the Case and the Straw Man

The Court of Appeals has already held that the trial court erred by joining Mr. Wheeler's and Mr. parsley's cases for trial, because they were not "related" as defined for purposes of joinder pursuant to MCR 6.120 and MCR 6.121. (Appendix E, COA Opinion, 4-8). The Supreme Court did not disturb this aspect of the Court of Appeals' prior opinion. *People v Wheeler*, 500 Mich 1032 (2017), attached as Appendix F; *People v Parsley*, 500 Mich 1033 (2017). The Court of Appeal's prior holding in this regard is the law of the case that bound the trial court on remand and cannot be revisited on appeal absent some intervening change in the law, which has not occurred. *Sinicropi v Mazurek*, 279 Mich App 455, 465 (2008).

The questions left open by the Supreme Court's order were whether defense counsel for Mr. Wheeler had a sound strategic reason for not challenging the joinder and whether Mr. Wheeler, and similarly Mr. Parsley, was prejudiced by the improper joinder such he is entitle to a

new trial. *People v wheeler*, 500 Mich 1032 (2017), attached as Appendix F; *People v Parsley*, 500 Mich 1033 (2017).

The Ginther hearing evidence that trial defense counsel, the prosecutor, and the trial judge are all focused on a straw man, i.e. whether the defendant' defenses were antagonistic. (GH generally). Trial defense counsel and the judge, at least, appear to be under the mistaken impression that any case can be joined with any other case as long as the defenses are not antagonistic or inconsistent. They do not seem to recognize that only related cases, as defined by the applicable court rules, may be joinder, and that even those cases that are eligible for joinder under the court rule must instead be severed if the defendant's defenses are antagonistic. MCR 6.120; MCR 6.121; *People v Tobey*, 401 Mich 141, 153 (1977), superseded on other grounds as stated in *People v Williams*, 483 Mich 226; 769 NW2d 605 (2009); *Williams, supra; People v Abraham*, 256 Mich App 265, 271 (2003). See the Court of Appeal's prior opinion, Appendix E. See also *People v Hana*, 447 Mich 325 (1994).

F. Strategy Formed on the Basis of a Mistake of Law is Not Entitled to Deference

Mr. Pebley acknowledged that it had not been his strategy going in for Mr. Wheeler to have him jointly tried with Mr. Parsley. (GH 12). However, Mr. Pebley did not believe that there was a ground to oppose the joinder once it occurred as he did not believe that their defenses were antagonistic or inconsistent. (GH 8).

Mr. Pebley's trial strategy was to show that the complainant in Mr. Wheeler's case, Ms. Smith, was eighteen years old and competent to make decisions regarding sex. (GH 9). It appeared to Mr. Pebley that Mr. Parsley's counsel strategy would be the same in relation to the complainant in his case, Ms. Wheeler. (GH 9)

Mr. Pebley testified that nothing about having the two cases joined changed his strategy. He testified that the joinder did not deprive Mr. Wheeler of a substantial defense or even make it more difficult to execute his pre-existing strategy (GH 9-10).

Mr. Pebley also testified that: "In one sense, I thought they were almost better tried together." (GH 10). When asked to explain why, Mr. Pebley responded: "Because the two girls had – they had different abilities, but they worked together, and I think It showed that the – they were able to make decisions, and they – they usually made them together. And so I - I didn't think there – there was that antagonistic part of it". (GH 10).

For his part, Mr. Wheeler testified that during trial he wrote a note to Mr. Pebley asking why he was being tried with Mr. Parsley. He testified the Mr. Pebley wrote back something about antagonistic. (GH 29-32).

In the trial court's ruling, the judge indicated that there was no error and no harm in joining the cases as the defenses were not antagonistic. (GH 38 -39).

The law provides that two cases that are eligible to be joined under the court rules may nevertheless need to be severed because of antagonistic defenses. It does not follow that only cases with antagonistic defenses must or should be severed. Stated another way, antagonistic defenses are one type of harm that can flow from joining defendant's cases. Mr. Pebley and the trial court do not recognize that only related case may be joined and that there are other harms beyond exposing a jury to antagonistic defenses that a defendant can suffer from having his case improperly joined with another's.

The Court of Appeals wrongfully held that Mr. Pebley's failure to move for severance was entitled to deference. Because trial counsel, Mr. Pebley was operating under a mistaken impression of the law, his decision not to move to sever the cases is not entitled to deference as