No.

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIE BASSETT — PETITIONER

vs.

CONNIE HORTON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

WILLIE BASSETT JR, # 867835

In Pro Se

CHIPPEWA CORRECTIONAL FACILITY

4269 WEST-M-80

KINCHELOE, MI 49784

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

QUESTIONS PRESENTED..ii

JURISDICTION..iv

TABLE OF AUTHORITIES..v

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..............................vii

STATEMENT OF THE CASE..1

ARGUMENTS..3

REASONS FOR GRANTING THE WRIT..33

CONCLUSION..34

INDEX TO APPENDICES

APPENDIX A- UNITED STATES 6TH CIRCUIT COURT OF APPEALS RE-HEARING DENIAL

APPENDIX B- UNITED STATES 6TH CIRCUIT COURT OF APPEALS

APPENDIX C- UNITED STATES DISTRICT COURT EASTERN DIST. OF MICHIGAN

APPENDIX D- MICHIGAN SUPREME COURT

APPENDIX E- MICHIGAN COURT OF APPEALS

QUESTIONS PRESENTED

I.) DID THE COURT VIOLATE PETITIONER'S DUE PROCESS RIGHTS BY ASSUMING THE ROLE OF THE PROSECUTOR AND QUESTIONING SIX OF THE PROSECUTION WITNESSES, ASKING THEM EXTENSIVE QUESTIONS THAT SUGGESTED THE JUDGE'S BELIEF IN THE PROSECUTION'S CASE?

Petitioner says, "Yes"

II.) WAS THE PETITIONER DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WJHERE COUNSEL DID NOT OBJECT TO THE JUDGE'S EXTENSIVE EXAMINATION OF SIX PROSECUTION WITNESSES?

The Petitioner says, "Yes"

III.) WAS PETITIONER DENIED HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE TRIAL COURT ALLOWED THE INTRODUCTION OF PRIOR ACTS OF DOMESTIC VIOLENCE THAT WERE IRRELEVANT AND PREJUDICIAL?

Petitioner says "Yes"

IV.) WAS PETITIONER DENIED HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL BY THE ADMISSION OF EVIDENCE OF PETITIONER'S BAD CHARACTER, OF THE MOTHER'S GOOD CHARACTER, AND OF PRIOR INJURIES TO THE BABY, AND BY THE PROSECUTOR'S MISCONDUCT IN URGING JURORS TO CONVICT ON THIS BASIS?

Petitioner says, "Yes"

V.) DID THE TRIAL COURT REVERSIBLY ERR IN OVERULING THE DEFENSE OBJECTION TO A JURY INSTRUCTION ON AIDING AND ABBETTING, AS THE TRIAL EVIDENCE DID NOT SUPPORT ANY CLAIM THAT PETITIONER WAS AN ACCESSORY?

Petitioner says, "Yes"

VI.) IS PETITIONER ENTITLED TO A NEW TRIAL WHERE THE VERDICT IS AGAINST THE GREAT WEIGHT OF EVIDENCE, AND IT WOULD BE A MISCARRIAGE OF JUSTICE TO ALLOW PETITIONER'S CONVICTIONS TO STAND?

Petitioner says, "Yes"

JURISDICTION

The petitioner having timely filed all available avenues for relief now petitions, The United States Supreme Court for *Certiorari.* This court has jurisdiction under 28 U.S.C. §1254(1).

TABLE OF AUTHORITIES

CASES

Aggarwal v Ponce Sch. Of Medicine, 83 F2d 17, 22 (1st Cir. 1988) 9
Beasley v. United States, 491 F 2d 687 (6th Cir. 1974) 14
Berger v. United States, 295 US 78 (1935) 21
Brecht v Abrahamson, 507 U.S. 609; 113 S. Ct. 1710; 123 L.Ed.2d 353 (1993) 27
Corsa v. Anderson, 443 F. Supp 176 (ED Mich. 1977) 15
Donnelly v. DeChristoforo, 416 US 637, 639 (1974) 21
Doyle Vacuum Co v Siller and Co, 55 Mich App 601, 611 (1974) 30
eople v DeBolt, 269 Mich 39 (1934) 29
Garcia v United States, 289 US 466, 470 (1932) 8
Glasser v U.S., 315 U.S. 60, 83, 86 L. Ed. 680, 62 S. Ct. 457 (1942) 9
Gravely v. Mills, 87 F 3d 779 (6th Cir. 1996) 15
Hodge v Hurley, 426 F 3d 368 (CA 6, 2005) 14
Huddleston v United States, 108 S. Ct. 1496; 99 L.Ed 2d 771 (1988) 19
Hurd v People, 25 Mich 405 (1872); 21
in *People v Knox*, 469 Mich 502 (2004) 18
Kincade v Sparkman, 175 F3d 444 (CA 6, 1999) 21
Kowalak v. United States, 645 F 2d 534, 537-538 (6th Cir. 1981) 15
Lisenba v California, 314 US 219 (1941) 16
Michelson v Unite States, 335 US 469, 476 (1948) 25
People v Audison, 126 Mich App 829, 833-34 (1983) 8
*People v Bahoda,*448 Mich 261 (1995) 20
People v Blachura, 81 Mich App 399, 413-14 (1978) 11
People v Blackston, 481 Mich 451, 462 (2008) 16
People v Brown, 239 Mich App 735, 746, n 6 (2000) 30
People v Carines, 460 Mich 750, 763-764 (1999) 20
People v Conyers, 194 Mich App 395, 398-406 (1992) 8
People v Crawford, 458 Mich 376 (1998) 24
People v Eglar, 19 Mich App 563, 173 NW 2d 5 (1969) 11
People v Gillis, 474 Mich 105, 113 (2006) 27
People v Herbert, 444 Mich 466 (1993). 30
People v Houstina, 216 Mich App 70, 73 (1996) 20
People v Hudgins, 125 Mich App 140, 148-49 (1983) 8
People v Jordan, 23 Mich App 375, 387-388 (1970) 21
People v Katt, 468 Mich 272, 278 (2003) 16
People v Knox, 469 Mich 502, 512-513 (2004) 25
People v Kurazawa, 202 Mich App 462, 467 (1993) 31
People v Launsburry, 217 Mich App 358 (1996) 20
People v Legrone, 205 Mich App 77, 82 (1994) 20
People v Lemmon, 456 Mich 625, 642 (1998) 30
People v Mackay, 121 Mich App 748, 759-760 (1982) 28
People v Marshall, 53 Mich App 181, 218 Nw2d 847 (1974) 29

People v McLaughlin, 258 Mich App 635, 665-666 (2003) 25
People v Moore, 161 Mich App 615, 619 (1987 8
People v Moore, 161 Mich App 615, 619 (1987) 8
People v Neal, 290 Mich 123, 129 (1939) 8
People v Nettles, 41 Mich App 215, 222 (1972) 21
People v Olson, 13 Mich App 324, 330 (1968) 31
People v Parks, 57 Mich App 738, 743-745; NW2d 710 (1975). 28
People v Pattison, 276 Mich App 613 (2007) 18
People v Robinson, 475 Mich 1, 5 (2006). 27
People v Roby, 38 Mich App 387, 389-90 (1972) 10
People v Rockey, 237 Mich App 74, 76-77 (1999) 14
People v Sabin, 463 Mich 43, 55 (2000) 23
People v Stanaway, 446 Mich 643, 687 (1994) 20
People v Sterling, 154 Mich App 223, 228 (1986) 8
People v Stevens 498 Mich 162 (2015) 11
People v VanderVliet, 44 mich 52 (1994) 24
People v Weathersby, 204 Mich App 98, 109 (1994) 8
People v Weathersby, 204 Mich App 98, 111 (1994). 11
People v Wigfall, 160 Mich App 765, 771-775 (1987) 8
People v Williams #1, 45 Mich App 623 (1973) 29
People v Wilson, 163 Mich App 63, 65 (1987) 21
Raper v Mintzes, 706 F 2d 161 (CA 6, 1983) 21
Schad v. Arizona, 501 U.S. 624; 111 S.Ct. 2491; 115 L.Ed.2d 555 27
Stirone v United States, 361 US 212 (1960) 21
Strickland v Washington 466 US 668 (1984) 13
United States v Dockery, 943 F 2d 152, 157 (CA 1, 1991) 30
United States v Hickman, 592 F2d 931, 936 (CA 6, 1979) 8
United States v Pierce, 62 F 3d 818, 825-826 (CA 6, 1995) 30
United States v Young, 470 US 1 (1985 15
Washington v. Hofbauer, 228 F 3d 689 (6^{th} Cir. 2000), ... 13

Statutes

MCL 768. 27a 18
MCL 768.27b 16
MCL 770.1 30

Rules

FRE 403 19
FRE 404 19
FRE 404(a) 23
MCR 2.611(A)(1)(e) 30
MCR 6.431 30
MRE 403 16
MRE 404(a) 23

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VI

Trial of criminal cases; rights of accused.

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

Citizenship; security of persons and property, due process and equal protection clauses.

Section 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.

STATEMENT OF THE CASE

Willie C. Bassett II was convicted of felony murder, MCL 750.316, first-degree child abuse, MCL 750.136b(2), and second-degree child abuse, MCL 750.136b(c), after a jury trial in the Wayne County Circuit Court, the Honorable James A. Callahan presiding. On March 4, 2013, Mr. Bassett was sentenced to life imprisonment for felony murder, 10-15 years for first-degree child abuse, and 2-4 years for second-degree child abuse.

Petitioner timely filed his appeal of right, on March 27th, 2013, as authorized by M.C.R. 6.425 (F)(3). The Michigan Court of Appeals denied all grounds raised, in their November 20th, 2014, unpublished opinion.

The petitioner then filed his timely application for leave to appeal to the Michigan Supreme Court on January 07th, 2015. The Michigan Supreme Court denied all grounds raised in the application in their September 09th, 2015, unpublished opinion.

Petitioner then filed a timely motion for reconsideration to the Michigan Supreme Court, for their September 09th, 2015 denial of the petitioner's application for leave to appeal, the Court denied the motion for reconsideration on February 02nd, 2016.

The petitioner then filed his habeas corpus to the Eastern District of Michigan (Southern Division) on September 09th, 2016 (served by U.S. mail). The petitioner then received a denial of the habeas petitioner on June 08th, 2017, additionally the court issued a denial declining to issue a certificate of appealability or leave to appeal *in forma pauperis*. The district court then denied a motion for reconsideration, dated July 13th, 2017.

The petitioner filed his appeal to the United States Court of Appeals for the 6^{th} Circuit on the court denied tie appeal on November 30^{th}, 2017. The petitioner filed a timely motion for rehearing *en banc,* the court then denied that motion on January 29^{th}, 2018.

ARGUMENTS

I. DID THE COURT VIOLATE PETITIONER'S DUE PROCESS RIGHTS BY ASSUMING THE ROLE OF THE PROSECUTOR AND QUESTIONING SIX OF THE PROSECUTION WITNESSES, ASKING THEM EXTENSIVE QUESTIONS THAT SUGGESTED THE JUDGE'S BELIEF IN THE PROSECUTION'S CASE?

Relevant Trial Testimony

In this case the Petitioner was prejudiced where throughout the trial, Judge Callahan conducted his own questioning of six of the prosecutor's witnesses- Ashley Thomas, Ronezza Thomas, Marvin Bassett, Dr. Angelilli, Dr. Diaz and Dr. Zerin. Petitioner has summarized this questioning below and made reference to the Trial Transcript as they provide the best indicator of the tone of this questioning. During his examination of four of these witnesses, Judge Callahan specifically admonished them to look at the jury while he was questioning them (Ashley Thomas: T II, 157, 161; T III, 19; Marvin Bassett: T IV, 125,126; Dr. Diaz: T IV, 58; Dr. Zerin: T IV, 74).

Judge Callahan's Examination of Ashley Thomas

After the parties had finished questioning Ashley Thomas, Judge Callahan extensively examined Ms. Thomas about how long she lived with Mr. Bassett before Brielle's birth, whether they were ever married, whether they "would party frequently", whether their relationship was monogamous, about Mr. Bassett's employment before Brielle's birth, whether Mr. Bassett acknowledged paternity of Brielle, whether he was on her birth certificate and filed legal paperwork in Probate Court regarding paternity, whether they were looking forward to Brielle's birth, how Mr. Bassett expressed his happiness regarding the baby, "Did he buy you presents? Did he shower you with love? Did he paint a room in your house or wherever you were staying in preparation of the child? Did he buy you a crib?" (T II, 162), did she have "a sonogram prior to the birth of Brielle to find out the status of the child when the child was in the womb?" (T II, 162), whether Mr. Bassett had a car, what was their emotional state after the birth, whether they would "continually go out with other people" after Brielle's birth, where Mr. Bassett would go when he occasionally left the house, how long Ms. Thomas was on maternity leave, whether Mr. Bassett drank "heavily" and when, and "Give us some ball park. Was he drunk everyday?" (T II, 167) (T II, 157-167)

With this last question by the judge, defense counsel asked if they could approach the bench. The trial judge then stated it was a good time to recess for the day (T II, 167). After the jury left the courtroom, defense counsel objected to the judge's questioning about Mr. Bassett's past alcohol use (T II, 167). Judge Callahan clarified his questioning as followed:

> "THE COURT: Mr. Evans, maybe you misunderstood my question or I didn't adequately express it to Ms. Thomas. My questions were after Brielle ws born."
>
> ***
>
> **"What I'm attempting to ferret out here,** honestly, is this lady decided to move back into this household with this gentleman after she had moved out of the house, after having been supposedly abused by him, knowing full well that he had a drinking problem to begin with, and he moves right back in with her. And not only that, but has left her child, an infant, in his care.
>
> MR. EVANS: Okay, Your Honor.
>
> THE COURT: **It will have bearing upon the credibility of her as well as the credibility of him, and it will shine a light, hopefully on the relationship that they had and how this poor child could have been injured by them.**
>
> MR. EVANS: Thank you, Your Honor for clarifying that.
>
> THE COURT: I mean certainly at some point in time you may be capable of taking up, but I think those questions were needed to be asked, and I got several more questions I intend to ask tomorrow.
>
> MR. EVANS: Very well, Your Honor." (T II, 168-169) (emphasis added).

At the end of the second day of trial, out of the presence of the jury, Judge Callahan remarked, "This poor child." (T II, 170).

On the third day of trial, Judge Callahan resumed his extensive questioning of Ms. Thomas in the morning. Judge Callahan questioned her about her siblings, whether she changed their diapers and gave them bottles, whether she ever worked as babysitter, regarding her parents' employment, regarding Mr. Bassett's employment, whether Ms. Thomas attempted to get a babysitter for Brielle when she went back to work, whether she knew that Mr. Bassett had a drinking problem when she allowed him to care for Brielle while she worked, her expectations of what child-care functions Mr. Basset would do while she was at work (feed, bathe, change diapers), why Ms. Thomas took Brielle and left home in July 2011, whether other adults (grandparents, babysitters) had contact with Brielle, how frequently was Brielle left with a babysitter, Ms. Thomas' expectations of the babysitter, regarding details (including frequency of) of the physical confrontations between Mr. Bassett and Ms. Thomas, whether Ms. Thomas "sense[d] that he [Mr. Bassett] believed that he was being put upon by" Ms. Thomas when she went back to work and was the caregiver (T III, 13), whether Mr. Bassett "readily accepted" his care giver role, whether his "watching Brielle interfere at all with his leaving the house, going out for entertainment or anything of this nature?" (T III, 14), whether Mr. Bassett stayed home or left the house while watching Brielle, how Ms. Thomas car became disabled and for how long, whether Mr. Bassett was still "heavily drinking" when Ms. Thomas returned to the home after going to her mother's on July 26, 2011, regarding Brielle's condition on August 2 and August 3, what she did on those two days regarding Brielle's condition, when Ms. Thomas believed it was appropriate to give a child Tylenol, whether Brielle had urinated and/or defecated in her diaper on August 3 when Ms. Thomas observed her on the bed, whether Ms. Thomas picked Brielle up at that point, and whether Mr. Bassett had made any statements to her about Brielle's condition. Judge Callahan told Ms. Thomas to demonstrate the prior occasion when Brielle's head hit the door as Ms. Thomas was walking through the door. Judge Callahan then questioned Ms. Thomas about how she knew Brielle's head hit the door, why she was so close to the door with her, whether she knew babies have weak necks, and whether she cradled Brielle's head with her hands. Judge Callahan then returned to questioning Ms. Thomas about the instant offense – whether she went to Henry Ford Hospital after her mother picked her up, whether Mr. Bassett was present when her mother picked her up, whether Ms. Thomas informed Mr. Bassett that she was going to her mother's house or the hospital, the age of her mother, whether "there was something pressing at home that Mr. Bassett had to stay at your house?" (T III, 21), the specific time that Ms. Thomas found Brielle in this condition, how long she waited to call her mother, how long she remained at her mother's house, whether she entered Henry Ford through the emergency room, what she told the triage nurse, who would care for Brielle when she would awaken during the night, who fed Brielle when Ms. Thomas was not at work, the distance between the top of Ms. Thomas' bed and the floor, the height of the mattress, and whether the floor had carpet (T III, 5-24).

Judge Callahan's Examination of Ronezza Thomas

Judge Callahan also questioned Ronezza Thomas. He questioned her about her job at Ace Controls, about Ashley's job there, about Ronezza's parenting advice to Ashley, whether Ronezza ever watched Ashley taking care of Brielle, about who's name the lease was in at the residence of Ashley and Mr. Bassett, about the events of July 26 and 27, about her advice to Ashley during that period when Mr. Bassett left for four days, about Brielle's condition on August 3, about whether Ronezza was paying attention when Ashley was speaking to the triage nurse at Ford Hospital, whether Ashley was "dog tired" when Ronezza dropped her off at home from work every day, whether shehad the impression that Ashley would go to bed right away, and about Ronezza's son, Brandon, caring for Brielle in July (T III,165-173)

Judge Callahan's Examination of Marvin Bassett

During Judge Callahan's questioning of Marvin Bassett, the judge successfully fettered out that Willie Bassett's friend that night was a woman named Stocha [which the prosecutor used during closing argument (T V, 26-27)]. Judge Callahan questioned Marvin Bassett regarding whose telephone number in his police statement was wrong, whether Stocha was a man or a woman, whether Willie Bassett told him he knew he had to contact Marvin, how Willie sounded on the phone, if Marvin could tell on the phone if Willie had been drinking, whether Marvin drove Willie to the hospital, whether their brother, Robert, drove Willie to the hospital (T IV, 125-127).

Judge Callahan's Examination of Dr. Angelilli

After the parties had completed their examination of Dr. Angelilli, Judge Callahan questioned her about whether Henry Ford Hospital made a referral to Child Protective Services, about the skeletal strength of a three-month-old child, whether the skull fractures on Brielle were the result of blunt force trauma to the head, whether the skull fractures and/or rib fractures could have been caused by someone rolling over on the child on a bed, whether she was familiar with how infants are transported from room to room at Henry Ford Hospital, how an infant would be transported from Ford Hospital to Children's Hospital, and whether Ford Hospital would document notes whether an injury occurred at Ford Hospital (T III, 101-104).

Judge Callahan's Examination of Dr. Diaz

After the parties had completed their examination of Dr. Diaz, Judge Callahan asked Dr. Diaz questions about his mentor in Philadelphia, the difference between gross examination and microscopic examination, whether radiology is normal use of pathology, whether radiology technology was brought into play during the autopsy of Brielle, the type of radiology technology, about Dr. Sarnaik's testimony regarding healing rib fractures, whether radiology was Dr. Diaz's area of expertise, regarding Dr. Sarnaik's testimony that the location of the fractures was in the posterior and whether that would involve the sternum (T IV, 57-62).

Judge Callahan's Examination of Dr. Zerin

After the parties had completed their examination of Dr. Zerin, Judge Callahan directed Dr. Zerin to draw a rib cage of this child and the areas where he saw the fractures. Judge Callahan then asked Dr. Zerin about the length of the fractures, what the healing fractures indicated, whether they were simple or linear fractures, or carrot stick fractures, whether they were displaced or non-displaced, the definition of simple fractures that were non-displaced, whether the fractures were through and through, and whether they went clean to the bone. Judge Callahan then directed Dr. Zerin to draw the skull and the location of the fractures. Judge Callahan asked whether there was an interconnection between the two fractures (T IV, 73-77).

Discussion

A criminal defendant is entitled to a trial before a "neutral and detached magistrate of justice". *People v Moore,* 161 Mich App 615, 619 (1987). A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or clear up some obscurity. In addition, a trial court may question a witness in order to clarify testimony or elicit additional relevant information. *People v Conyers,* 194 Mich App 395, 398-406 (1992). The court must exercise caution and restraint to ensure that iys questions are not intimidating, argumentative, prejudicial, unfair, or partial. A trial court may not assume the prosecutor's role with advantage's unavailable to the prosecution. *People v Weathersby,* 204 Mich App 98, 109 (1994).

A trial judge must avoid any invasion of the prosecutor's role and must exercise caution so that his comments will not be prejudicial, unfair, or partial. *People v Sterling,* 154 Mich App 223, 228 (1986). A judge's influence on a jury "is necessarily...of great weight and his slightest word or intimation is received with deference, and may be prove controlling." *Garcia v United States,* 289 US 466, 470 (1932); see also *United States v Hickman,* 592 F2d 931, 936 (CA 6, 1979). A judge destroys the right to a fair trial when he injects prejudicial comments or berates defense counsel in front of the jury. *Conyers, supra,* at 404; *i*); *People v Wigfall*, 160 Mich App 765, 771-775 (1987); *People v Neal*, 290 Mich 123, 129 (1939).

Several Michigan as well as Federal cases has found reversible error where the trial court, to the Petitioner's detriment, improperly interjected itself into a case and pierced the veil of judicial impartiality. See e.g., *People v Ross, supra*; *People v Sterling, supra*, at 228; *People v Audison,* 126 Mich App 829, 833-34 (1983); *People v Hudgins*, 125 Mich App 140, 148-49 (1983).

"Counsel for the defendant in a criminal case, is indeed in a difficult and hazardous predicament in finding it necessary to make frequent objections in the presence of a jury to questions propounded by the trial judge. The jury is almost certain to get the idea that the judge is on the side of the Government." *United States v Hickman, supra,* at 936.

Here, Judge James Callahan repeatedly and overwhelmingly strayed from the these principles when he extensively examined six of the prosecutor's witnesses in a manner that more resembled that of a second prosecutor than a detached and impartial judge. Judge Callahan had clearly deemed the examination by the prosecutor and the defense attorney to be inadequate; he made it crystal clear that his role was **"ferret out the facts"**. (T II, 168-169). The judge noted that his questioning of Ashley Thomas "will have bearing upon the credibility of her as well as the credibility of him, and it will also shine a light, hopefully on the relationship they had and how this poor little child could have been injured by them." (T II, 168-169).

Judge Callahan made it clear that his questioning was important, as he admonished that these witnesses should "look at the jury" while he questioned them (See Ashley Thomas: T II, 157, 161; T III, 19; Marvin Bassett: T IV, 125, 126; Dr. Diaz: T IV, 58; Dr. Zerin: T IV, 74). This extensive questioning by Judge Callahan cannot be deemed a simple attempt to promote expedition, or clear up some obscurity, or clarify testimony or elicit additional relevant information. Judge Callahan improperly injected himself into the trial as a second prosecutor and he obliterated the veil of impartiality.

The extensive questioning by Judge Callahan in this case goes beyond simple inquiry. "Furthermore, as we have pointed out in evaluating contentions such as those presented here, "it is necessary to consider isolated incidents in light of the entire transcript so as to guard against magnification on appeal of instances which were of little importance in their setting.'" *Aggarwal v Ponce Sch. Of Medicine,* 83 F2d 17, 22 (1st Cir. 1988) quoting *Glasser v U.S., 315 U.S. 60, 83, 86* L. Ed. 680, 62 S. Ct. 457 (1942).

The case at bar presented the jury with a clear credibility battle – whether to believe Ashley Thomas' version that the baby was fine when she left for work that morning and that Petitioner was the only person who had access to the baby, or whether to believe the defense that the injury occurred days before the baby was put on life support when Petitioner was not the caregiver. This extensive examination of six prosecution witnesses by the judge went far beyond mere clarification of questions or answers. Instead, it took on a distinct tone of direct examination in a manner that made it appear as if Mr. Bassett was fighting two prosecutors. This clearly communicated to the jury that the judge had an unmasked expression of affinity with the prosecution.

This judge's examination of these six witnesses totally crossed the line. A trial judge may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 614(b); *Sterling, supra.* But the judge must exercise caution and restraint to ensure that his questions are not intimidating, argumentative, prejudicial, unfair, or partial. *Id.*

In *People v Roby*, 38 Mich App 387, 389-90 (1972) , the court stated the well-established proposition that "If an examination of the record reveals that the veil of judicial impartiality was pierced by the trial judge [in examining witnesses], the case must be reversed." Similarly, in *People v Smith, supra,* at 266-67, the Court admonished that a trial judge must be careful that his questions in front of the jury "do not indicate partiality" and should "avoid any invasion of the prosecutor's role." (Internal citations and quotations omitted).

People v Redfern, supra, is instructive. In that case, the defendant was trial for receiving and concealing stolen property and testified that cash found on him at the time of his arrest had been won at a local track. Following cross examination, the trial judge interceded and asked the defendant questions about the type of horses that were running at the track, and whether the defendant could say that the track was actually open during the time he claimed to have been there, *Id.* at 456. The Court reversed, ruling that the trial judge had exhibited improper bias against the defense through his questions, which ultimately usurped the prosecutor's role:

> In short, defendant argues that the judge's questions were, at bottom, thinly veiled expressions of disbelief in defendant's testimony which may have unfairly influenced the jury's verdict. Reluctantly, we must agree.
>
> ***
>
> [T]he judge's question's may well have implanted in the minds of the jurors doubts as to defendant's veracity. While the intonation in the judge's voice might well allay our concern were we able to hear the quoted colloquy as it took place, we nonetheless hold that a reversal and remand for new trial is the proper course. The

judge's questioning does not appear to have been an attempt to clarify ambiguous testimony but rather a clear usurpation of the prosecutorial role. As such, we believe the questions might have jeopardized defendant's righto a fair trial.

The defense counsel raised no objection to the questions posed by the court does not alter the result. *Smith, supra*, at 269-270 NW 2d 754, *People v Eglar*, 19 Mich App 563, 173 NW 2d 5 (1969). Understandably, counsel may be reluctant to criticize the judge's own behavior on the bench 'thereby possibly incurring the judge's displeasure.' *Id.* at 565, 173 NW 2d at 6. *Redfern, supra* at 456-57.

Although Mr. Bassett did not testify in this case, the above questions by the trial judge had the clear effect of signaling the judge's affinity with the prosecutor. It was abundantly clear that Judge Callahan's examination of the witnesses was a clear usurpation of the prosecutor's role. Indeed, it is difficult to distinguish between judge and prosecutor during the questioning by the judge, as he could just as well have been seated at counsel's table firing challenging questions at the witness in concert with the prosecutor. This judge exercised absolutely no caution or restraint when he barraged these witnesses with questions.

These lengthy exchanges with the witness were highly prejudicial, as they likely "influenced the jury to the detriment of defendant's case." *Sterling, supra* at 228 (internal quotations and citations omitted). A judge's "partial comments or questions are rarely innocuous" when made in front of the jury. *People v Weathersby,* 204 Mich App 98, 111 (1994). "Jurors are prone to follow the slightest indication of bias or prejudice on the part of the trial judge. Even inadvertent or thoughtless remarks by the trial judge may prove exceedingly prejudicial in a criminal trial." *Wigfall, supra.* at 772; see also *People v Blachura,* 81 Mich App 399, 413-14 (1978) . Since the jury no doubt gave full attention to the judge's prosecutorial examination, it was far more than a mere possibility that it was influenced by the lack of partiality. This clearly constitutes plain error which it affected Petitioner's substantial rights, and which seriously affected the fairness, integrity. Or public reputation of judicial proceedings. *People v Carines, supra,*774.

The Michigan Supreme Court decided a case strikingly similar in comparison to the case before you, see People v Stevens 498 Mich 162 (2015). That very case the scope in which the judge pierced that "veil" of impartiality was so severe that the

Michigan Supreme Court reversed and remanded the case for new trial. The petitioner has laid out in detail how egregious the line and form of questioning was to his case.

The questions elicited from the trial judge were designed to paint the victim's mother in such a light that she was a hard-working, honest going, family oriented and concerned parent. To the contrary the petitioner was painted to be a low-life, alcoholic, abusive and unemployed. This was designed to show a particular motive, intent or propensity to commit the offenses in which he was charged.

The judges questioning should have been to such an extent to clarify or correct information from the witness at hand, however, there was no material issue of dispute or need for clarification.

The judge's conduct instead showed that he was acting in the form of a second prosecutor and clearly established judicial misconduct.

As the Michigan Supreme Court held in the People v Stevens 498 MICH 162 (2015).

> "The question whether judicial misconduct denied the defendant a fair trial is a question of constitutional law that the appellate court reviews *de novo.* Once a reviewing court has concluded that judicial misconduct has denied the defendant a fair trial structural error has occurred and automatic reversal is required."

The court is yet to decide whether or not judicial misconduct occurred, however, the fact trial counsel did not object would not preclude the fact the court in fact committed a "structural-error" and a new trial should be granted regardless of actual guilt or innocence.

The trial court took no measure of caution when assuming the role of a second prosecutor when it extensively questioned several witnesses. The fact that defense counsel made no objection to this, further exasperated the errors in this trial. The fact that the petitioners counsel made no reasonable objection to the extensive questions presented to the witness' in this case did not serve as sound trial strategy or mere trial tactics. The fact counsel made no such objections in fact shows that counsel was not acting as counsel in the case. Petitioners counsel was ineffective for purposes of the *Strickland* standard, under Strickland v Washington 466 US 668 (1984), as his performance fell below a reasonable objectiveness standard. In *Washington v. Hofbauer,* 228 F 3d 689 (6th Cir. 2000), the Court held that "the label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel".

Because the judge's examination of the six prosecutor witnesses tended to add to considerable, noncumulative weight to the prosecutor's case, and contributed to the conviction, this Court should grant petitioners request for *CERTIORARI* requiring a new trial at which the judge shall not take on the prosecutor's role.

II. WAS THE PETITIONER DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WJHERE COUNSEL DID NOT OBJECT TO THE JUDGE'S EXTENSIVE EXAMINATION OF SIX PROSECUTION WITNESSES?

A criminal defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). U.S. Const., Amend. VI. The standard employed under *Strickland* asks two questions. First, were the attorney's advice and actions "within the range of competence demanded of attorneys in criminal cases," or, stated differently, were the actions and advice "reasonable under prevailing professional norms." *Strickland*, at 687, 688. The second question is whether the representation dfailing to meet these standards prejudiced the defendant.

In *Beasley v. United States,* 491 F 2d 687 (6th Cir. 1974), the court stated that to be constitutionally adequate:

> "Defense counsel must investigate all apparently substantial defenses available to defendant and must assert them in a timely manner."

The specific failings of defense counsel claimed in this issue are as follows:

Discussion

In the present case, as shown above in Issue I, Judge Callahan pierced the veil of impartiality by extensively examining six prosecution witnesses. *See* Issue I, *supra.* Defense counsel failed to object. As shown above, Judge Callahan's conduct was improper and significantly damaging to the defense.

Defense counsel did nothing to prevent this damaging misconduct from occurring, without any reasonable tactical basis. *Compare People v Rockey,* 237 Mich App 74, 76-77 (1999). The Sixth Amendment guarantees the right to counsel "in order to protect the fundamental right to a fair trial." *Strickland, supra,* at 684.In failing to object to these improprieties, counsel failed to protect Petitioner's fundamental right to a fair trial. As noted above, the misconduct was outcome determinative. Thus, in the event the above errors could be deemed forfeited for the failure to object, trial counsel was prejudicially ineffective, requiring reversal and remand for a new trial.

In *Hodge v Hurley*, 426 F 3d 368 (CA 6, 2005), the Sixth Circuit Court of Appeals found that a prosecutor's argument was improper and that counsel was ineffective for failing to object. The prosecutor in that case had commented on witnesses' credibility. The Sixth Circuit explained the prejudice that results from such comments:

> "As the Supreme Court explained in *Young* [*United States v Young,* 470 US 1 (1985)], there are two separate harms that arise from such misconduct. First, 'such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury.' *Young,* 470 US at 18. Second, 'the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.'" *Id.,* at 378.

The Sixth Circuit found prejudice because there was little evidence and the result of the trial turned on who the jury believed. In such a situation, held the Court, bolstering a prosecution witness' testimony "is particularly likely to affect the jury's verdict." *Hodge* at 387.

The critical failure of an attorney to object can be ineffective assistance of counsel if it deprives the defendant of an opportunity for dismissal of the case or for success on appeal. *Gravely v. Mills,* 87 F 3d 779 (6^{th} Cir. 1996); *Kowalak v. United States*, 645 F 2d 534, 537-538 (6^{th} Cir. 1981); *Corsa v. Anderson*, 443 F. Supp 176 (ED Mich. 1977).

In *Washington v. Hofbauer,* 228 F 3d 689 (6^{th} Cir. 2000), the Court held that "the label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel".

Here, the misconduct was by the trial judge. This trial turned on whether Petitioner was the person who had inflicted the injuries and whether he had the requisite intent for felony murder. The judge's repeated misconduct was a deliberate attempt to act as a second prosecutor, to bias the jurors against Petitioner Bassett, and to inflame their passions, thus preventing them from fairly evaluating the evidence. Defense counsel was ineffective and Petitioner is entitled to a new trial.

III. PETITIONERWAS DENIED HIS STATE AND FEDERAL CONSTITIONAL DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE TRIAL COURT ALLOWED THE INTRODUCTION OF PRIOR BAD ACTS OF DOMESTIC VIOLENCE THAT WERE IRRELEVANT AND PREJUDICIAL.

Standard of Review

Prior to trial, the prosecutor filed a "Notice and Request to Admit Prior Acts of Domestic Violence" under MCL 768.27b. Over defense counsel's objection, the motion was granted (MT 8/17/12, 2-7). The standard of review is abuse of discretion. *People v Katt,* 468 Mich 272, 278 (2003)

Discussion

Both the due process guarantees of Michigan and the United States constitutions require fundamental fairness in the use of evidence against a criminal defendant. Const 1963, art 1, § 17; US Const, Am XIV. *See generally, Lisenba v California,* 314 US 219 (1941).

MCL 768.27b allows for the admission of evidence of other acts of domestic violence for any relevant purpose in a prosecution for a domestic violence offense unless the evidence should be "otherwise excluded under Michigan Rule of Evidence 403". Per MRE 403, evidence is not admissible if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston,* 481 Mich 451, 462 (2008). In Petitioner's case, the prosecution regaled the jury with evidence of his behavior towards Ashley Thomas in two months prior to Brielle's death, such that unfair prejudice outweighed any probative value.

Specifically, the prosecution introduced evidence from Ashley Thomas that after the birth of Brielle, the relationship between Ms. Thomas and Petitioner changed around June. She testified that Mr. Bassett became physically abusive towards her [Ms. Thomas], including slappimg her, pushing her out of a chair and knocking her to the floor, and pulling her hair. She testified that she experienced violence every day (T II, 48-55). Judge Callahan also elicited testimony from her about details, including reasons for the frequency of the physical confrontations between Ms. Thomas and Mr. Bassett (T III, 13). Ashley's mother also testified about walking in during one of their arguments, and about Ashley coming to her mother's for four days (T III, 123-134).

This evidence then became a theme of the prosecutor, who argued in opening srtatement that Petitioner was "an angry and frustrated man who took out his frustrations on a three-month-old baby." (T II, 32). In closing argument, the prosecutor also argued that:

> "There is other evidence here that helps to prove beyond a reasonable doubt that Brielle was abused and killed by defendant. You can look, for one thing, at the parents' actions. Look at their words and look at the things we know about their relationship, because this was a relationship that was falling apart. Willie Bassett had disappeared for a few days in the week before Brielle's death. It was pretty obvious that he was no longer – if he ever was prepared to put his family first, he wasn't doing that any longer. And Ashley at that point had taken Brielle and gone to her parents. A week before Brielle's death, he was gone." (T V, 26).
>
> "Ronezza Thomas, Ashley's mother, was watching the relationship fall apart, and she told you about it. It was interesting to note Willie Bassett's reactions as opposed to Ashley Thomas' reactions to their problems. Because Ashley Thomas, if you think about it, was largely passive. Her mother found her lying on the floor crying while the defendant was aggressive, rude, angry and packing his things. When Willie Bassett took off, Ashley was passive again, leaving the home for her mother's and coming back home when Willie said, oh, he's back.
>
> The dynamics of what was happening in this home were both obvious and sad. Ashley was embarrassed, trying to deny it, trying to live with it somehow. And her mother, as you met her, she's a strong woman. But

> Ashley, she's 21 – was 21 at the time, and she just wasn't strong. She was really nothing more than a girl. She did not want to admit to her mother that she was abused; that Willie drank daily and hurt her when he drank. She was trying to deny that she was in danger and even more importantly that Brielle was in danger." (T V, 27-28).
>
> "Well sometimes, ladies and gentlemen. The truth comes out even when you're trying to lie, and that is the truth, because Willie Bassett was neither a father nor a man. And the evidence shows he was abusive, and because of his abuse, Brielle Bassett died." (T V, 30).

The Court has found that evidence of other domestic assaults is relevant per MCL 768.27b to portray a full and complete history of domestic violence. *People v Pattison*, 276 Mich App 613 (2007). However, in discussing MRE 403, the court made certain to "...caution trial courts to take seriously their responsibility to weigh the evidence's probative value against its undue prejudice in each case before admitting the evidence. See MRE 403." *Id.* 276 Mich App at 621. Although this statement referred specifically to MCL 768. 27a, a related statute, *Pattison* also involved 768.27b, and since 768.27b actually cites MRE 403 as a limiting factor, the caution certainly applies.

In the instant case, evidence of Mr. Bassett's domestic violence behavior against Ashley Thomas became the theme of the prosecution's case, such that it dominated the evidence. The prosecution drew a direct link from Mr. Bassett's behavior to the actual alleged abuse of Brielle.

Although there is no basis for such a link, the prejudicial nature of the evidence allowed for just such a logical leap. The Michigan Supreme Court's decision in *People v Knox*, 469 Mich 502 (2004) is instructive. The *Knox* Court emphasized the requirement that, for other bad act evidence to be admissible, it must be precisely relevant to the charges for which the defendant is being tried. The defendant in *Knox* was tried for felony murder, predicated on child abuse, for the death of a four-month-old baby boy. The victim died from shaken baby syndrome and a skull fracture resulting from hitting his head against an object. The defendant denied inflicting any injuries to the child. The prosecutor introduced evidence of the defendant's past exhibitions of anger and violence toward his girlfriend. The court reversed the conviction, holding that the evidence of the defendant's past demonstrations of anger toward his girlfriend was irrelevant to the charges that he harmed the baby, since there was no claim that he injured the child out of anger:

> [E]vidence of defendant's past demonstrations of anger were not relevant to any material fact at issue...[N]one of defendant's alleged manifestations of anger had any similarity to the acts that resulted in Xavier's death. The evidence showed that defendant had damaged walls and doors and, on one occasion, had shoved Kelley during an argument. Nothing about the evidence offered demonstrated any prior acts by defendant that were similar to the acts that were determined to have caused Xavier's injuries. Further, no evidence suggested that defendant was ever angry with his son or that he redirected his anger with Kelley to Xavier or Kelley's other child. No one testified to ever seeing defendant harm his son...Under these circumstances, the evidence of the defendant's past anger could only serve the improper purpose of demonstrating that he had a bad character or propensity to harm his son. *Id.* at 512-513.

Evidence of Mr. Bassett's past violence was improperly admitted at his trial. This evidence seriously infected the trial and deprived him of any opportunity for a fair determination of whether he was guilty of the offenses for which he was being tried. This prejudicial evidence should not have been admitted under MCL 768.27b because it is simply more prejudicial than probative as to the abuse of an infant, in violation of MRE 403, Fed. R. Evid. FRE 403 and FRE 404 (a) Also see *Huddleston v United States,* 108 S. Ct. 1496; 99 L.Ed 2d 771 (1988).

For these reasons, Petitioner should be granted a new trial.

IV. PETITIONER WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL BY THE ADMISSION OF EVIDENCE OF PETITIONER'S BAD CHARACTER, OF THE MOTHER'S GOOD CHARACTER, AND OF PRIOR INJURIES TO THE BABY, AND BY THE PROSECUTOR'S MISCONDUCT IN URGING JURORS TO CONVICT ON THIS BASIS.

Summary of Argument

The primary suspects in Brielle's death were the primary caretaker (the father) and Ashley Thomas (the mother). The prosecutor admitted testimony that Petitioner was unemployed and had problems with drinking and anger management. The prosecutor portrayed the mother as a hard working young parent who worked long hours and was trying to have the dream family (T II, 26). The prosecutor argued that Petitioner, Mr. Bassett, had a problem with anger and frustration, and that he took out his frustration on Brielle (T II, 32). Under these circumstances, Petitioner was denied his due process right to a fair trial.

Standard of Review

Preserved evidentiary issues are reviewed for an abuse of discretion. *People v Bahoda,*448 Mich 261 (1995). The constitutional dimension of the issues is reviewed de novo, including the issue of prosecutorial misconduct. *Bahoda,* 267; *People v Houstina*, 216 Mich App 70, 73 (1996); *People v Legrone,* 205 Mich App 77, 82 (1994). Here, defense counsel objected to the questions about Petitioner's past alcohol use (T II, 167). However, defense counsel did not object to the evidence of Ashley Thomas' good character, or to the improper use of the evidence of healing rib fractures. Even where there is no objection to improprieties in the prosecutor's conduct at trial, appellate review is appropriate if failure to consider the issue would result in manifest injustice or if the resulting prejudice is so great that a curative instruction could not have counteracted it. *People v Stanaway,* 446 Mich 643, 687 (1994); *People v Launsburry*, 217 Mich App 358 (1996).

In *People v Carines,* 460 Mich 750, 763-764 (1999), the Michigan Supreme Court set forth an additional requirement for review of unpreserved constitutional errors: "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" When outcome-determinative error has caused one to be denied a fair trial, especially by deliberate misconduct on the part of the prosecuting authority, it necessarily impugns the "fairness, integrity, or public reputation of judicial proceedings." Thus, unpreserved issues of deliberate misconduct are always subject to appellate review if outcome-determinative. Review is appropriate on the particular facts of this case.

Discussion

It is well established that the prosecution has a duty not to simply seek convictions, but also to see that justice is done – for all concerned. *Berger v. United States,* 295 US 78 (1935), overruled on other grounds, *Stirone v United States,* 361 US 212 (1960). It is part of her duty to assure that the defendant has a fair and impartial trial. *People v Wilson,* 163 Mich App 63, 65 (1987); *Wallace, supra.* Indeed,

"The prosecuting officer represents the public interest, which never can be permitted by the conviction of the innocent. His object like that of the court, should be simply justice; he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community." *Hurd v People, 25* Mich 405 (1872); *People v Nettles,* 41 Mich App 215, 222 (1972); *People v Jordan,* 23 Mich App 375, 387-388 (1970).

Reversal of a conviction is warranted when prosecutorial misconduct results in the denial of an accused's right to a fair trial. US Const., Ams V, XIV; Const 1963, art 1 § 17; *Donnelly v. DeChristoforo,* 416 US 637, 639 (1974); *Berger, supra,* at 88-89; *Kincade v Sparkman,* 175 F3d 444 (CA 6, 1999); *Raper v Mintzes,* 706 F 2d 161 (CA 6, 1983).

Here, on direct examination, the prosecutor elicited testimony from Ashley Thomas that prior to Brielle's birth, she worked full time at Ace Controls for two years, and that Mr. Bassett was unemployed. She could not recall the last time he was employed. She did help him get a job at Ace Controls in May 2011, but it only lasted two weeks. Defense counsel's relevancy objection was overruled. After Brielle's birth, she took maternity leave for six weeks and then returned to work (T II, 46-48). The trial judge also questioned Ashley Thomas about Petitioner's employment before and after Brielle's birth. Ms. Thomas testified that Mr. Bassett was not employed before her birth, and that after her birth, he worked for two weeks at the same place as Ms. Thomas but then was fired (T II, 158-159; T III, 6-7). Judge Callahan also questioned Ashley Thomas about Petitioner's drinking. She testified that after Brielle was born, he drank heavily. The judge confirmed that she knew he had a "drinking problem" (T II, 166; T III, 7, 15). On direct examination of Ms. Thomas' mother, the prosecutor confirmed that Mr. Basset was unemployed, except for when he worked at Ace Controls in May (T III, 117-119). Ronezza also confirmed that Ashley worked at Ace Controls and that she started there when she was 18 years old (T III, 111). Ronezza Thomas also testified that Ashley "did very well in school" and she finished high school (T III, 110).

The prosecutor also elicited testimony that after the birth of Brielle, the relationship between Ms. Thomas and Petitioner changed around June; Mr. Bassett became physically abusive towards Ms. Thomas, including slapping her out of a chair and knocking her to the floor, and pulling her hair when he was angry. She testified that she experienced violence every day (T II, 48-55). She also testified that Mr. Bassett drank everyday before Brielle's birth, and that he seemed to drink more afterwards (T II, 50-51).

Concerning Ashley Thomas, the prosecution portrayed her in opening statements as a young girl who "supported her family, worked those typically long days in Farmington Hills every day, leaving at 5:30 and coming home after about ten hours of work. She did light factory work, and the defendant did not work." (T II, 26). She described Ashley Thomas as a 21 year old who "desperately wanted her family to flourish. You will come to understand that Ashley Thomas ignored and denied a lot in order to have her dream of a family unit." (T II, 26) The prosecutor in opening statement portrayed Mr. Bassett as "an angry and frustrated man who took his frustrations out on a three-month-old baby." (T II, 32). In closing argument, the prosecutor again argued that Mr. Bassett was an angry and abusive parent (T V, 27-30).

During examination of Dr. Angellili, Dr. Sarnaik, and Dr. Zerin, the prosecutor elicited evidence of old healing rib injuries to Brielle (T III, 85, 181, 188; T IV, 63-65). Judge Callahan questioned Dr. Zerin about what the healing fractures indicated (T IV, 73-75). During opening statement, the prosecutor noted that the instant injury was not the first time that Brielle had been abused-"The x-rays revealed some new and healing rib fractures. They were also suggestive of abuse" (T II, 30).

MRE 404(a) and FRE 404(a) both prohibit the use of bad character evidence to prove conduct in conformity therewith:

> Fed. R. Evid. 404 (a) **Character Evidence** (1) **Prohibited Uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
>
> MRE 404(a) "Evidence of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) *Character of Accused.* Evidence of a pertinent trait or character offered by an accused, or by the prosecution to rebut the same;
> (2) *Character of a Victim of a Crime Other Than a Sexual Conduct Crime.* Evidence of a pertinent trait of character of the victim of the crime, other than in a prosecution for criminal sexual conduct, offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.
> (3) *Character of Victim of Sexual Conduct Crime.* In a prosecution for criminal sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;

(4) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609." MRE 404(a).

The Rules of Evidence 404(b) prohibits proving action in accord with propensity through the use of other bad acts. In order to admit evidence that bears on the character of an accused, it must be (and the prosecution must articulate) a non-character theory to which the evidence is relevant. *People v Sabin,* 463 Mich 43, 55 (2000); *People v Crawford,* 458 Mich 376 (1998); *People v VanderVliet,* 44 mich 52 (1994); There must be an intermediate inference between the testimony and the ultimate fact to be proven that is independent of a propensity rationale. See, e.g., *Crawford, supra,* at 390-392 and *VanderVliet, supra,* at 64,74. Even so, that the evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice under MRE 403 and FRE 403. Id.

Significantly, Rule 404(a) not only prohibits the use of bad character evidence against a defendant, it also prohibits bolstering of a witness' credibility by adducing evidence of that witness' good character, with certain limited exceptions which do not apply here. This was not impeachment by either attorney, nor was the character of any witness being attacked.

In *Washington v. Hofbauer*, 228 F 3d 689 (CA 6, 2000), the Sixth Circuit granted a writ of habeas corpus to a Michigan defendant who had been convicted of criminal sexual conduct against his daughter, based almost entirely on his daughter's testimony. There, the irrational behavior... That he's living in her home, driving her car, kind of smacks her around when something doesn't quite suit him. Does that sound like a logical compassionate family type of person or does that sound like someone who lives a little bit out of control, someone who has no control in fact over there [sic] own life, someone who doesn't act according to logic.... Whether the motivation is a pervert, a child molester or just a selfish alcoholic inhumane, for whatever reason the results are the same on the victim...." *Hofbauer,* 228 F3d at 696-697.

Defense counsel did not object, as his strategy was to portray the daughter as fighting for her mother, accusing her father of sexual misconduct to stop the physical and emotional abuse against her mother. *Id.* at 703-704.

The Sixth Circuit found that the bad character testimony itself was admissible for certrain limited purposes, namely that it showed her fear of the defendant and thus, explained why she had not discussed the acts to others. *Id.* at 698-699. The Court did, however, find clear misconduct in the prosecutor's use of that evidence in closing arguments, where he "implied that the jurors should consider Washington's unseemly character when rendering their verdict" and explicitly urged them to do so on rebuttal. *Id.* at 699-700. The prosecutor also improperly bolstered the victim's credibility by arguing without record support that the complainant's story stayed consistant over time, which the court described as "a clear attempt to boost the credibility of [the complainant] and the believability of her story." *Id.* at 701.

Whether a prosecutor's misconduct creates an unfair trial such that reversal is warranted depends on several factors:

> "1) the likelihood that the remarks would mislead the jury or prejudice the accused; 2) whether the remarks were isolated or extensive; 3) whether the remarks were deliberate or accidentally presented to the jury; 4) whether other evidence against the defendant was substantial." *Hofbauer,* 228 F 3d at 708.

Here, as in *Hofbauer*, there was an extremely high likelihood that the evidence and the prosecutor's remarks would prejudice Petitioner, Mr. Bassett, as propensity evidence is typically excluded precisely because it is prone to overvaluation. *Michelson v Unite States,* 335 US 469, 476 (1948); *Crawford,* 458 Mich at 384. Nevertheless, the prosecutor here cast Mr. Bassett as being an angry and frustrated man who took out his frustration on Brielle. In contrast, Ashley Thomas was portrayed as a good mother who did well in school, graduated, worked long hours, was trying to have the dream family, and thus would never do such a thing because of her character. Action in conformity with character formed the linchpin of states's case. Through Ashley Thomas, the prosecutor continually developed the theme that Mr. Bassett was a violent, angry person, who was chronically unemployed and who had a drinking problem.

The evidence of Petitioner's past demonstrations of anger and his history of unemployment and drinking were not relevant to any material fact at issue and did not meet the requirements set forth in *Sabin* for admissibility. See *People v Knox*, 469 Mich 502, 512-513 (2004); *People v McLaughlin,* 258 Mich App 635, 665-666 (2003). None of Petitioner's alleged manifestations of anger had any similarity to the acts that resulted in Brielle's death. Further, no evidence suggested that Petitioner was ever angry with his daughter or that he redirected his anger with Ashley to Brielle. No one testified to ever seeing him harm his daughter. There was no proper purpose for admitting the evidence. There was no proper (non-propensity) theory put before the jury from which they could infer something proper from the evidence. Left to make the obvious connection – then told directly by the prosecutor that Petitioner's anger and frustration was a plausible explanation for the homicide, it is unsurprising that the jury came to the conclusion it did.

1. This evidence was irrelevant to truthfulness or any other proper issue, and it was not admissible under any exception of Rule 404.

2. The prosecutor committed misconduct in putting in this inadmissible evidence and in emphasizing it in opening and closing.

3. The judge himself emphasized this evidence during examination of Ashley Thomas and Ronezza Thomas.

Under these circumstances, the evidence of Mr. Bassett's past anger could only serve the improper purpose of demonstrating that he had bad character or propensity to harm his daughter. Furthermore, it was plain error to permit the introduction of evidence regarding Ashley Thomas' good character. The prosecution presented this evidence in its case-in-chief. It was logically irrelevant to the prosecutor's case-in-chief, was improper evidence under MRE 404(a), FRE 404(a), and did not serve one of the non-character purposes listed in Rule 404(b).

Turning to the evidence of Brielle's prior rib injuries, the prosecutor was allowed to use this evidence for an improper purpose. The prosecutor introduced the evidence of prior injury not to only show that earlier events were abusive, but also to convince the jury that Petitioner had caused those prior injuries, despite absence of any evidence that he had committed the past abuse. The trial court committed plain error in failing to prevent the prosecutor from improperly using the evidence of prior abuse. See *Knox, supra,* at 513. During closing argument, the prosecutor maintained that the baby was "squeezed tight by someone strong enough to break ribs,: that the prior rib injuries showed a pattern of abusing Brielle, and that on August 3, Petitioner was alone with her and "culminated in injuries that led inevitably to her death." (T V, 28-29; see also T V, 54).

The improper admission of the evidence of Ashley's good character, like the admission of Petitioner's problems with anger, drinking and unemployment, and the evidence regarding Brielle's prior injuries, created far too great a risk of affecting the outcome of the case, given ther absence of any direct evidence that Mr. Bassett committed the acts that resulted in Brielle's death. For these reasons, the Court should grant relief for a new trial.

V. THE TRIAL COURT REVERSIBLY ERRED IN OVERRULING THE DEFENSE OBJECTION TO A JURY INSTRUCTION ON AIDING AND ABETTING, AS THE EVIDENCE DID NOT SUPPORT ANY CLAIM THAT PETITIONER WAS AN ACCESSORY.

Standard of Review

This issue was preserved by defense counsel's objection (T V, 3-8). A trial court's decision whether to issue a jury instruction is reviewed for an abuse of discretion. *People v Gillis,* 474 Mich 105, 113 (2006). The determination whether the requirements of aiding and abetting were met is a question of law subject to review de novo. *People v Robinson*, 475 Mich 1, 5 (2006). The incorrect ruling on the state law question meant that Petitioner's constitutional due process right to have the court instruct on proper state law defenses was abrogated. U.S. Const., Amend. XIV.

Discussion

Petitioner submits that the error "had a substantial and injurious effect or influence in determining the jury's verdict" and was a trial error under *Brecht v Abrahamson*, 507 U.S. 609; 113 S. Ct. 1710; 123 L.Ed.2d 353 (1993). In *Schad v. Arizona,* 501 U.S. 624; 111 S.Ct. 2491; 115 L.Ed.2d 555 the Court held: "[t]he absence of a lesser included offence instruction increases the risk that the jury will convict...simply to avoid setting the defendant free...The goal of the *Beck* rule, in other words is to eliminate the distortion of the fact finding process that is created when the jury is forced into an all-or-nothing choice". In the instant case, the judge did not give a lesser included offense but rather another offence to increase the possibility that the jury would convict.

On the last day of trial, Judge Callahan sue sponte supplied the attorneys with "potential jury instructions relative to aiding and abetting." (T V, 3). Defense counsel objected, noting that aiding and abetting was not requested by the prosecutor or by the defense, that the aiding and abetting instruction was not included in the judges preliminary instructions to the jury or on the judge's comprehensive list of instructions, that there was no evidence in the record that Petitioner was aiding and abetting, and that it was not the prosecutor's theory at trial (T V, 3-8). The prosecutor acknowledged that she had not advanced a theory of aiding and abetting, but she maintained Petitioner's statement to the police and the defense expert provided some evidence of aiding and abetting (T V, 6-7). Judge Callahan ruled that because Petitioner was the father of the child, he had an affirmative duty to protect the child, and that the aiding and abetting instruction would be given. The judge also noted the presence of healing fractures, and that the child was primarily cared for by Petitioner (T V, 7-8).

During the final instructions, Judge Callahan did instruct the law concerning aiding and abetting. (T V, 75-76). Defense counsel renewed his objection to the instruction (T V, 80-81).

The trial judge abused his discretion in giving the jury the option to convict Petitioner under an accessory theory. The prosecutor asserted that anyone but Petitioner was the principal offender, and never presented any evidence that anyone other than Petitioner inflicted the head injury to Brielle Bassett. While there was some evidence by Dr. Dragovic that the injury to the skull could have occurred within days, rather than hours, of Brielle being placed on life support on August 3, at no point did the prosecution allege or present any evidence that someone other than Petitioner inflicted the injury. On this record, the jury was erroneously permitted to convict Petitioner under an accessory theory **unsupported by the evidence**.

Michigan law holds that the trial judge errs if he gives an aiding and abetting instruction where there is insufficient evidence presented showing that someone other than the charged defendant committed the offense. In *People v Mackay,* 121 Mich App 748, 759-760 (1982), the Court of Appeals reiterated the controlling rule:

> The general rule governing jury instructions on aiding and abetting given sua sponte is described in *People v Parks,* 57 Mich App 738, 743-745; NW2d 710 (1975). In *Parks,* the Court held that it was reversible error to instruct on aiding and abetting where there is no evidence to support such a theory:
>
> "In order to warrant such an instructed, there must exist some evidence of a 'concert of action' between the defendant and the principal in the commission of a crime. *People v Marshall,* 53 Mich App 181, 218 Nw2d 847 (1974).
>
> "The sine qua non of aiding and abetting is that more than one person must be criminally involved either before, during, or after the commission of a crime. A defendant cannot aid abet himself in the commission of his crime. In order to sustain a charge of aiding and abetting against an accessory, the guilt of another person as principal must be shown. *People v DeBolt,* 269 Mich 39 (1934); *People v Williams #1*, 45 Mich App 623 (1973).
>
> In this case, there was no evidence, except a suspicion thrown out by counsel, to justify the giving of an aiding and abetting instruction. On retrial, unless evidence appears that there was a principal, this instruction should not be given".

In the instant case, as in *Mackay*, *supra*, there was no evidence that Petitioner could be guilty as an accessory to the murder. The prosecutor admitted that she had not advanced a theory of aiding and abetting (T V, 6-7). At no point did the prosecutor even suggest that someone other than Petitioner inflicted the injuries to Brielle, and the prosecution did not present any direct evidence of a concert of action or any pre-injury discussions between Petitioner and any other person.

This evidence was legally insufficient to support the giving of an aiding and abetting instruction. Trial counsel for Petitioner timely objected to the instruction as unsupported by the record. Judge Callahan's decision to give the standard instruction, without a request from the prosecution, is reversible error. Petitioner is entitled to relief and a new trial.

VI. PETITIONER IS ENTITLED TO A NEW TRIAL WHERE THE VERDICT IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE, AND IT WOULD BE A DENIAL OF DUE PROCESS AND A MISCARRIAGE OF JUSTICE TO ALLOW PETITIONER'S CONVICTIONS TO STAND.

Standard of Review

The standard of review is plain error, as trial counsel did not move for a new trial. *People v Carines,* 460 Mich 750 (1999)

Discussion

Petitioner submits that the jury's verdict is against the great weight of the evidence. A trial judge is authorized to grant a new trial if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); MCR 6.431. See *also* MCL 770.1. In making this determination, a judge examines all the evidence and re-weighs it. *Doyle Vacuum Co v Siller and Co,* 55 Mich App 601, 611 (1974). A judge has wide discretion a motion for a new trial on this ground, far broader that in determining if there has been insufficient evidence, and he may grant it even though there was enough evidence to take the case to the jury. *People v Brown, 239* Mich App 735, 746, n 6 (2000). See also *United States v Pierce,* 62 F 3d 818, 825-826 (CA 6, 1995). If "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result," a new trial can be granted on this basis. *People v Lemmon,* 456 Mich 625, 642 (1998). See also *United States v Dockery,* 943 F 2d 152, 157 (CA 1, 1991).

In *People v Herbert, supra,* the Michigan Supreme Court granted leave to appeal to consider whether to overturn the standard for great weight of the evidence motions previously set forth in *People v Herbert*, 444 Mich 466 (1993). In *Herbert,* the Court utilized a "thirteenth juror" standard, permitting the trial judge to grant a new trial if the judge disagreed with the jury's determination as to the relative credibility of the witnesses. The *Lemmon* Court opted to reject the "thirteenth juror" standard in favor of a heightened standard focused on the relative weight of the opposing evidence. The court nonetheless recognized that all such motions by necessity implicate the question of credibility to some degree. *Id* at 638.

In evaluating the evidence, the question is not simply one of quantity; the quality of the evidence is relevant as well. *Cf, People v Olson,* 13 Mich App 324, 330 (1968) (Fitzgerald, PJ< dissenting) ('[T]he concern here is not with the quantity of the evidence, but with the quality. If... there is a question of its validity which is resolved against it, then the jury verdict based on such evidence certainly cannot stand and a new trial should be granted."); *People v Kurazawa,* 202 Mich App 462, 467 (1993) ("A review of the overall record reveals that the quality and quantity of evidence introduced was totally insufficient to suggest that the defendant was actually involved in the murder.") *See also People v Bailey,* 265 Ill App 3d 262, 271 (1994) (a reviewing court must reverse when the evidence is so improbable or unsatisfactory as to raise a reasonable doubt of guilt).

Analyzing the evidence in the instant case under the above standards, the credible trial evidence weighs against the jury's verdict. Dr. Diaz of the Wayne County Medical Examiner's Office testified that he was unable to determine the time of the injury with any medical certainty, as the patient was treated in the hospitals for 20 hours and the autopsy was delayed until August 7 due to organ donation (T IV, 45-46). He opined that no expert would be able to look at the slides and determine the time of the injury (T IV, 46).

Dr. Dragovic of the Oakland County Medical Examiner's Office opined that the injury to the head was sustained probably in the vicinity of several days, rather than hours. He estimated that it would be more than 36-48 hours because there was gross evidence of the clot to the inner surface of the hard covering of the brain (T IV, 150, 158). He could not identify the time frame with great specificity because there was not enough information provided in the diagnostic work-up (T IV, 151-152). In order to formulate such an opinion, he would have needed samples of the hard coverings of the brain with the blood that was adherent to the inner surface of the hard covering, and assess the morphological findings under the microscope. He also would nave needed some special stains to look for the presence or absence of iron. These items would not have provided an exact time, but would have allowed for the range. (T IV, 152-153).

Although Dr. Sarnaik, one of the treating doctors at Children's Hospital opined that death would have occurred within six hours of the injury (T III, 208-212), this was not confirmed by the autopsy. Because the timing could not be established, the weight of the evidence suggests that someone other than Petitioner could have inflicted the injury leading to death. Pursuant to *Lemmon, supra,* reversal is required because there was no credible evidence to support the jury's verdict. It would be a miscarriage of justice to allow the verdict to stand. Petitioner asks that relief be granted.

REASONS FOR GRANTING THE PETITION

This petition involves important matters of law and questions which this court should weigh in on. This also involves several matters already decided by this court, that lower courts have refused to follow and have caused the petitioner severe prejudice in allowing this conviction to stand.

The petitioner was forced to fight a case in which he effectively had to battle two prosecutors and a judge who intermingled himself in the proceedings to such an extent that it is impossible not to find that a structural error occurred that requires an automatic reversal and new trial.

The petition also cites several instances where trial counsel was not effective in moving through the trial process where he did not object to the trial judges intermingling in the proceedings.

Additionally the petition involves several instances of improper use of prior bad acts or improper use or introduction of evidence which prejudiced petitioner. Lastly the evidence used did not support a conviction of first-degree murder nor actual guilt on the part of the petitioner.

CONCLUSION

This Court should grant Writ of Certiorari in this case under Rule 10 which states:

> (a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resorts; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers.
>
> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> * * *
>
> (c) a state court or a United States court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgment of the court below. The petition for a writ of certiorari should be granted as Petitioner was denied his federal constitutional rights.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Willie Bassett

Willie Bassett, Jr. #867835