ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0615

STATE OF OHIO	:	
Plaintiff	:	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
-vs-	:	
Ernesto Pena, Jr.	:	Court of Appeals Case No: L-12-1309
Defendant / Appellant	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ERNESTO PENA JR.

Mr. Ernesto Pena, Jr. # 669-079, ***Pro Se***

North Central Correctional Complex,

P.O. Box 1812,

Marion, OHIO 43302.

Pro-Se Defendant/Appellant.

David F. Cooper (#0006176)

Assistant Prosecuting Attorney

Lucas County Prosecutor's office

711 Adams St., 2nd Floor

Toledo, Ohio 43604.

Ph: 419 213 2061.

Counsel of Plaintiff/ Appelle, State of Ohio

FILED

APR 17 2014

CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED

APR 17 2014

CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTAINTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF CASE AND FACTS.....3

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW.....6

Proposition of Law No. I

Ineffective assistance of Counsel.....6

Proposition of Law No. II

Appellant received ineffective assistance of counsel 8

Proposition of Law No. III

Ineffective counseling, Abuse of discretion and Due process errors 9

CONCLUSION.....14

CERTIFICATE OF SERVICE.....14

Attached

APPENDIX

Judgement Entry on Motion of Reconsideration 26(A) (Mar 21, 2014)

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTAINTIAL CONSTITUTIONAL QUESTION

This cause presents two very important interrelated issues of linking domestic violence and extent of physical injuries (1) whether the evidence is sufficient enough to sustain a conviction (2) whether the Ohio court procedures and public defender system is barring the defendant to raise substantial constitutional errors and hence, supporting a fundamental miscarriage of justice.

In this case, all the evidences and testimonies in Trial No.1 (hung jury) and Trial No.2 (Conviction) points out to two types of investigations (1) **On Scene**, which indicates a simple bruise domestic violence injury [2919.25(A) physical harm] and confirmed by police officer as well as rescue quad and fire department. This type of evidences in the first trial led to a hung jury **(2) Post Scene** (after 3 to 5 hours at hospital), where police reported felonious assault [2903.11(A)(1) serious physical harm] based on severity of injuries, the severity documented in the hospital, but not verified by an expert physician. Systematic elimination of lead investigator's testimony, violating Sixth Amendment, which supported the on scene facts in the first trial and adding to it, a prejudicial 911 tape, (violation of fifth and fourteenth amendment of U.S. Constitution and Ohio Const. Art I, S. 2 & 16) and presenting a convincing post scene package, rushing through the trial and instructing the jury to redeliberate which led to a conviction.
>Was all the evidences and testimony added or eliminated from the first trial led to a conviction. Did the victim hide the truth of what happened during those 3 to 5 hours. Her intoxication was at .23, her whereabouts confirmed only by a family member.
>Was the serious physical harm appeared in the hospital after 3 to 5 hours <u>inflicted by the defendant</u>.
The Appellate court review on this matters needs corrected.

Domestic violence victim's perjuring affects the entire justice structure as well as the morals of the society. If a domestic violence victim is a male, the police and the courts are more likely to investigate the evidences of injuries onsite, but if it is a female, the crime is taken as granted and in cases like this, even more brutally charged, from a domestic violence to an assault. This case raises an important public interest question that, after the first trial which was a hung jury, and in the beginning of the second trial, the defendant Mr. Pena is given a plea deal on a lesser charge F3, so, Was that because the prosecutor and the judge doubted the extent of the injuries for the jury to convict. The judge himself seems like convincing the defendant to take

this deal. The defendant rejected the deal, which created a heated exchange of words between him and the judge, and then after the trial was rushed through in a way the court wanted it. In a similar case, **State V Bishop, Lucas County, trial court case no. CR 02008 03805 and 6th Appellate Dist. 2010 Ohio App. Lexis 1765**, Defendant allegedly assaulted his girlfriend over a period of six days. Defendant was tried on the offenses of felonious assault and domestic violence. He was only convicted of domestic violence. In affirming, the appellate court determined that the verdicts in this case were not inconsistent. Domestic violence under R.C.2919.25 (A) provided for physical harm, while felonious assault under R.C. 2903.11(A)(1) provided for serious physical harm. The girlfriend testified to the extent of her injuries, and her hospital records were introduced; however, there was no testimony by a treating physician about the type, extent or severity of those injuries. The jury found that defendant had caused physical harm to the girlfriend but that it did not rise to the level of serious physical harm. The decision in the 6th Appellate court of Lucas County was affirmed. The court decided, "A review of the record supports the jury's finding of domestic violence as defined in R.C. 2919.25(A). See R.C. 2901(A)(3) "physical harm.....The elements of domestic violence were present."

Moreover, in this case, at the beginning of the first trial, defendant asks for a different counsel, which was rejected. At the appellate process, the appellate counsel submitted the Brief without defendant's view on errors. On communication, the appellate counsel refuses to amend the brief. The motion to remove appellate counsel and appoint a new counsel is denied by the court on February 4,2014. The appeal is denied around the same time on February 7,2014. Mr. Pena's Appellate attorney sent out this judgment entry on February 11,2014 and Mr.Pena received on February 13,2014. Mr. Pena then files a Motion for Reconsideration (26A) on February 18,2014 the prosecution opposes as untimely which Mr. Pena receives it on March, 11,2014. Mr.Pena sends a reply (rebuttal) on the same day, March, 11,2014 and the clerk of courts files it on March 20,2014, nine (9) days after. The reconsideration was denied as untimely on March 21, 2014 but sent out by regular U.S. mail on March 24, 2014. Ohio courts seem to not differentiate between an E-Journalizing and U.S. regular mail. No matter, how Mr. Pena tried to input his errors, he was procedurally barred doing so. The question of public interest is,

>Do Ohio Appellate courts procedurally default incarcerated inmates, who tries to prove their innocence through genuine errors in spite showing of good cause.

>Are these errors substantially proves beyond a reasonable doubt the factors of U.S. Constitutional issues like ineffective counseling, due process and his innocence. 'The presumption of innocence, although not articulated in the constitution, is a basic component of a

fair trial under our system of criminal justice.' **Estelle V Williams, 425 U.S. 501, 96 S.Ct.1691, 48 L.Ed.2d 126**. Both the motions filed in 6th Appellate District include this errors and the explanation with exhibits of why Mr.Pena filed it late. **In State V Hicks 2005, Ohio 2947; Ohio App. Lexis 2753**, "The time restraints provided in the rule are not jurisdictional, the court has the authority under both App. R.26 and App. R. 14(B) to expand time for good cause shown. The 'good cause' shown was the exhibit of the mail sent at the particular time as well as the merits of errors. If these errors were without merit, why are the court and the attorney hesitant to consider. This appeals court decision needs to be corrected.

STATEMENT OF THE CASE AND FACTS

Appellant Ernesto Pena and Dawn Boes had been dating for three years prior to June 3,2012. (Trans. Sept.10, 2012 p.142). About four months prior to that date, Appellant and Ms. Boes lived together at 314 Arcadia, Toledo, Lucas County, Ohio. During the late hours of June 2, Ms. Boes was at home, had taken some anxiety medicine and been drinking rather heavily. Ms. Boes testified that the two of them were arguing that night. Ms. Boes told the jury, over objection of Appellant's Trial counsel, that two of them were arguing over her dropping "charges" against him. Ms. Boes testified that Appellant used the back of his hand, his fists, and his open hand to hit her repeatedly over her head: face, eyes, jaw and that this went on for over a period of two hours. *Id* at p. 145-146. She said they were the only two in the home at that time. *Id* at 146.

After this, she said, Appellant wanted her to do his laundry. *Id* at p. 147. She said that the Appellant wanted her to stay close the entire time, so that she could not leave, but while they were in basement, Ms.Boes got an opportunity to run to neighbors house and call 911, but could not remember the name of the neighbor. On 911 call, she said, her eyes was swollen shut .*Id* at 149. The Fire department was the first agency to respond to her 911 call. According to her, they checked her eyes, and gave her an ice pack, and believed that her injuries were not serious. Toledo Police Officer Schwirzinski testified Ms. Boes was hysterical and intoxicated and had a little bit of a knot near one of her eyes. He had a hard time getting a clear story out of her, because he was going back and forth between two incidents. *Id* at 166. When Officer Schwirzinski was shown a hospital photograph exhibit at the trial, he said that the bruising that appeared on Ms. Boes later after 3 to 5 hours, in the hospital was not the bruising Officer Schwirzinski saw at the scene. Id at p. 168. He said, he did not remember seeing an injury like

that on scene, and if he had, he would have noted it on his report. *Id* at 174. After her injuries being treated and assessed by Fire department, Rescue Squad and Police Officers and just given an ice pack to treat her minor bruise, Ms. Boes goes to her mother's place, Jane Snyder.

Approximately four and a half hours after the alleged incident, her mother Jane Snyder for the treatment of her injuries took Ms. Boes to the hospital, this time, serious injuries. At the Hospital, the injuries were assessed as well as Ms.Boes's alcohol level, which was .23 after five (5) hours of alleged incident. Toledo Police Officer Mary Seng was called and she interviewed Ms. Boes at the hospital and informed the detective bureau that Ms. Boes injuries were worse than they initially appeared and that she was unsure whether to charge the Appellant Mr. Pena with a domestic violence or Assault. *Id* at p.181.

The Lucas County Grand Jury indicted Appellant on one count of Felonious Assault in violation of R.C. S2903.11(A)(1), a felony of second degree. On the first trial, Detective Applin, the lead investigator from Detective Bureau, who is assigned the case, testifies that he never went to the scene to conduct a survey, and never assessed Appellant's hands right after the incident. (Trans. Sept. 4, 2012 Vol I at p.125-130). The extent of his investigation in this case was the verification of her injuries with the doctors. *Id* at 130. The jury in the trial could not reach a verdict and on September 6, the trial court declared a hung jury. (Trans. Sept. 6, 2012, Vol III at p. 185-186). The first trial being a hung jury, and now, at the beginning of the second trial, Mr. Pena is being explained a lesser offense plea deal of F3 Felony. There was a heated argument between Mr.Pena and the judge when Mr.Pena refused the deal and asked for second trial. The second trial is scheduled on September 10, 2012, but the jury is not given instruction or a lesser offense option of F3 to decide on.

At the second trial, the State of Ohio assures everybody that Detective Applin will be present to testified filling up the empty seat. But after all the witnesses of State testified, Appellant's Trial counsel noted that Detective Applin did not appear to testify on behalf of the State. Appellant's trial counsel also states that they have relied on State's subpoena to secure the Detective's testimony, and so did not subpoena Detective. *Id* at p. 187-191. The trial continues the next day. The prosecutor states that, he called Detective last night and he is 250 miles away in Michigan and was unaware of the schedule for retrial. *Id* at 196. The trial proceeds to the closing arguments without the detective. Trial counsel also noted that she filed a subpoena for the Detective the previous afternoon once the Trial court continued the case. *Id* at 202. the trial court denied the request, citing that it is up to the parties to secure their own witnesses, and that

Trial Counsel appeared to have done nothing to secure Detective appearance prior to the beginning of the second trial. *Id* at 205.

About four hours after the Jury retired to deliberate, they sent a note to the Trial Court, indicating that they could not reach a verdict. *Id* at 247. The trial court reinstructed the jury and sent them back in the Jury room for further deliberations. Id at p. 249-251. Again, the jury is not given instruction or a lesser offense option of F3 to decide on. Over an hour later, the Jury returned a verdict of Guilty to the sole count of the indictment. *Id* at 252.

At sentencing, the trial court sentenced Appellant to prison term of six years, and a mandatory term of three years on post-release control. It is from this conviction, Appellant had brought timely appeal to Sixth district court of appeals, a 26(A) reconsideration and now to the Supreme Court of Ohio.

The court of appeals erred to determine on the issues of (1) the conviction is against the manifest weight of evidence (2) Appellant received ineffective assistance of counsel for not subpoenaing witness, not cross examining state's witness, failing to investigate on petit jury array and to inquire into voir dire and 404(B) evidentiary issues. (3) Abuse of discretion, violation of due process for inefficient voir dire and for allowing 911 tape under violating Ohio Evidence rules.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I

Appellant's conviction fell against the manifest weight of the evidence.

Defendant Ernesto Pena was indicted On F2, Felonious Assault in violation of R.C. Sec. 2903(A)(1). The case proceeded to Jury trial on September 4,2012. Evidences like **911 tape** was not played, **Detective Applin testified** into Defense advantage and alleged victim's mother **Jane Snyder was cross examined** into defense's advantage. The Jury on September 6, 2012 did not reached the verdict and the trial court declared a Hung jury (Transcript Sept 6,2012, Vol. III of page 185-186).

The court proceeded on a retrial. On retrial, **911 tape was allowed to be played under rule 404(B), Detective Applin did not testified** and **Jane Snyder was not cross examined**. On retrial (Sept 11, 2012), the Jury did not reach a verdict (Trans Sept 10, pg 247). The trial court **re-instructed** the jury and sent them back into the jury room for further deliberations, (ID at p. 249-251) on which over an hour later, the jury returned a verdict of Guilty. Defendant was sentenced to six years in Prison and three years of Mandatory Post- release control. Defendant appealed his conviction in this court of Sixth Appellate district, which affirmed the conviction.

Mr. Pena hereby argues that the appellate court as a thirteenth juror, erred to determine that the conviction is not against the manifest weight of evidence. Comparing to the first trial, the second trial had four (4) witnesses. 'Number of witnesses supporting claim of one or the other parties is not to be taken as a basis for determination of disputed fact issues. **State V Linder, 165 N.E. 2d 460, 111 Ohio app. 146, 12 O.O.2d 107**. 'Mere number of witnesses alone supporting claim of one side is not the test to determine if evidence was sufficient to satisfy requisite degree of proof, but degree of proof must be determined by impression which testimony of witness or witnesses makes upon the trier of facts and character of testimony itself. **In re Soeder's Estate, 220 N.E.2d 547, 7 Ohio App. 2d 271, 36 O.O.2d 404.**

1. Dawn Boes(alleged victim)- Alleged victim's testimony was contradicting to Police officer Carl Schwirzinski, about the severity of the injuries. Moreover, the 911 tape contradicted her testimony of severity of the injuries. Alleged victim was identified drunk at the time of calling 911 operator and was verified by a physician alcohol .23, much above the normal limits after 3 to 5 hours of the alleged incident. Witness' testimony, which is positively contradicted by physical facts, cannot be given probative value by the court. **Lovas V General Motors Corp. 212 F2d 805.**

2. Toledo Police officer Carl Schwirzinski did not perjured on the stand or consented that he was mistaken in identifying the severity of injuries. He testified the truth as a law-abiding citizen. The truth was that the severity of the injuries was just a 'bruise' and not the 'eyes swollen shut'." According **to R.C. S 2935.03(B)(3)(b)** and **(d)** a police officer on the site determines the 'primary aggressor' in a domestic violence situation by considering "the comparative severity of any injuries suffered by the persons involved in the alleged offense". "Evidence of failure to see or hear is in some circumstances substantial evidence of nonexistence of fact" **Norfolk & W. Ry. Co. V. Collingsworth, 52 F2d 827.**
3. Jane Snyder, who was alleged victim's mother, was motivated to over exaggerate the injuries to prove her daughter right. She is the person other than the victim who knows where those severe injuries came from and why her daughter's alcohol level was up to .23 in the morning, after 3 to 5 hours of alleged incident." In considering the testimony of a witness, the jury may consider: (1) Whether his(her) story is in itself reasonable and bears the marks of plausibility and truth (2) Whether it is confirmed by the testimony of other witnesses, and other facts and circumstances as they are found (3) Whether he(she) has any **interest, bias, or prejudice** that might color or affect his testimony". **State V Strothers, 8 Ohio Dec.357, 7 Ohio N.P. 228.**
4. Mary Seng (police reporter), a straightforward complaint recorder, who wrote what alleged victim told, in the hospital, again, 3 to 4 hours after the alleged incident. She called the detective bureau for an advice about the severity of the injuries. (Transcript page 181,line 15-21), <u>She is not sure of the injuries herself and whether to charge a misdemeanor or a felony</u>. She passed on the investigation to Detective Applin who did not testified at second trial. "A preponderance of evidence' is not alone determined by number of witnesses, but by the opportunities of witnesses for knowing the things about which they testified, their conduct and demeanor, their interest in result, and probability of truth of their statements. **McKeown V Cincinnati St. Ry.Co., 2,Dec.Repr.388.**

Exhibits presented as evidence was not reliable to justify the alleged incident occurred exactly or severely as decided by this court." Evidence is unfairly 'prejudicial' if it will induce the jury to decide the case on an improper basis rather than on the evidence presented." **U.S. V Miles, 207 F3d 988 (7th Cir, 2000).**

1. No.1, No. 2. No. 3 photographs- were all taken after hours of the incident in the hospital. There were no evidential photos at the incident site nor a police car recording video shown which proves the severity of the injuries.

2. Medical records- were not verified by an expert witness and therefore those records cannot be considered proven evidences.
3. 911 tape was a tape which is proven untrustworthy by the alleged victim herself, firstly because she was drunk very much over the limit, and secondly she perjured about the severity of injuries, 'eyes swollen shut' remark in her testimony is technically not verified by the tape. Moreover, First responder Toledo Police officer Carl Schwirzinski also verifies the tape's untrustworthiness. Not to mention that, nobody, not prosecution, nor defense nor the investigators thought to bring any evidences from other First responders, Fire Department and Rescue squad on the scene, who only gave an ice pack to the victim and left.

This honorable panel of judges should correct the decision of the appeals court based on truth of the evidence. "In determining whether a conviction is against the manifest weight of the evidence, we do not view the evidence in a light favorable to the state. Instead, we sit as a 'thirteenth juror' and scrutinize ' the fact finder's resolution of the conflicting testimony.'" **State V Robinson, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, 15** citing **State V Thomkins, 78 ohio st. 3d (1997) at 388**. Reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." **Thomkins at 387, quoting State V Martin, 20 Ohio app 3d (1st dist. 1983) at 175.**

Proposition of Law No. II

Appellant received ineffective assistance of counsel

1) Transcript page 188 line 1-4 states that Defense Counsel subpoenaed Detective Applin on the first trial but did not bother to subpoenaed him in the second trial.

2) On page 188, line 9-13, the judge thinks that Detective Applin's testimony is important, but then he abuses his discretion on page 204, line 17-23 by saying that Det. Applin's testimony is not relevant according to rule 401, 402 and 403. He also uses the rule 16(I) and overrules the request to comment about Det. Applin during the closing arguments. Transcript Pg 205, line 21-24, the judge's comment about the Defense counsel "The unfortunate part about that is it appears that the defense did nothing to secure the presence of the detective for their own purposes and was relying upon the calling of the detective by the state." Ineffectiveness of defense counsel for failing to subpoenaed Det. Applin because he investigated this injuries as a Detective (leading) and not as an officer. Officer Mary Seng's testimony in the second trial clearly refers that the investigation was passed over to Det. Applin because she was unsure about <u>what charges to bring in whether Misdemeanor or Felony</u>. Detective's not testifying meant that the second jury just took an

unverified Officer Seng's testimony as granted to decide on verdict. 'Essential difference between expert and lay witnesses is expert's ability to answer hypothetical questions.' **U.S. V Henderson, 409 F3d 1293 (11th cir 2005).**

3) There were two sides of witnesses in the second trial

#1. **On-scene** investigation- officers, included Officer Carl Schwirzinski, Fire Department (not subpoenaed) , Rescue squad(not subpoenaed), Neighbors (911 phone call) (not subpoenaed)

#2 Post-Scene investigation- officers, included Lead Detective Steve Applin (not subpoenaed and did not appear) , Officer Mary Seng, i.e. Hospital event recorder, Physician (not subpoenaed).Detective Applin's testifying would have clarified Jury's mind furthermore of the facts about the differences of non-severity of injuries during the **On-Scene** investigation and **Post-scene** (hospital, 4 to 5 hours later) investigation and would have added negative evidence which would have helped Mr. Pena. Jury verdict is not given 'free pass', and if the evidence, when viewed in the light most favorable to the government, gives equal or nearly equal circumstantial support to theories of guilt and innocence, convictions must be reversed. **U.S. V Martin, 228, F3d (1st cir, 2000).**

4) Detective Applin being a state's witness and therefore in the team of the accuser. Mr. Pena's **Sixth Amendment** right to cross-examine a state's witness and face the accuser was violated because, On cross-examination, defendant's counsel would have exposed the negligence of Detective to perform in-dept investigation of the victim and absolutely no investigation of the defendant. "Cross-examination of a government 'star' witness is important, and a presumption favors free cross-examination by a defendant on possible bias, motive, ability to perceive and remember, and general character for truthfulness." **U.S. V Novation, 271 F3d 968 (11th cir 2001).**

Proposition of Law No. III

Ineffective counseling, Abuse of discretion and Due process errors

1) **In Mr. Pena's case, not examining Jane Snyder (victim's mother) is an error for ineffectiveness of trial counsel rather than strategy.**

Page 178, line 19-22, For not cross-examining Jane Snyder (Victim's mother) which would have helped to find out the truth during what actually happened, that is, How did the bruising identified by the first responders, Fire Department (Paramedics) and Toledo Police officer, Carl Schwirsinski at 11:55 pm, turns into an emergency face fracture injuries in about four (4) hours. On the scene, Toledo P.O. Carl Schwirsinski did not saw the extent of brushings that appeared on the pictures taken in the emergency room. Page 167, line 17-19,"But when I saw the pictures that she had that

wasn't the bruising that I saw." This clearly states that the bruising (eye socket fracture) happened between those interim period between 11:55pm to 3:30 am at her mother's house. On 11:55 pm, the experienced Toledo Fire Department just gave her an icepack, which proves the injuries were not serious. Ineffective counseling because Defense counsel decided not to cross examine victim's mother, Jane Snyder, to find out what happened in that interim period. "Criminal defendant's entitlement to cross-examine witness increases in sensitivity in direct proportion to witness's importance to prosecution's case". **Ellsworth V Warden, New Hampshire state Prison, 318 F3d 285 (1st cir 2003).**

2) **In Duren V Missouri 439 U.S. 351 (1979),** the supreme court held that to establish a **prima facie** violation of fair cross section requirement, the defendant must show that 1) the group allegedly excluded is a "distinctive" group in the community 2) the group was not fairly represented in the venire from which the petit jury was chosen 3) and the derepresentation resulted from a systematic exclusion of the group in the jury selection process. E.g. **U.S. V Lara, 181 F3d 183 192 n.1 (1st cir 1999)** Hispanic is a distinctive group. In **Duren**, 439 U.S. at 364. To establish that a group was not fairly represented, a defendant must proffer statistical evidence demonstrating "percentage of the community made up of the group alleged to be underrepresented". "In order to establish a violation of the fair representative cross-section of the community requirement for a petit jury array under the Sixth and Fourteenth Amendments, a defendant must prove: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the representation is due to systematic exclusion of the group in the jury-selection process:" **State v. Fulton, 57 Ohio St. 3d 120, 566 N.E.2d 1195 1991 Ohio LEXIS 183 (1991).**

Since Mr.Pena was incarcerated, helpless and a layman, he requested his Defense counsel to investigate into matters of fair representation as per community requirement for a petit jury array, and because the Defense counsel did not investigate, resulted into ineffectiveness. "The pre-trial period constitutes a "critical period" in criminal proceedings because it encompasses counsel's constitutionally imposed duty to investigate the case." **Mitchell V Mason, 325 F3d 732 (6th Cir 2003).**

3) **Abuse of discretion and ineffective counseling: Jurors were inefficient to decide on verdict. There was a prima facie violation. Voir Dire inquiry into racial prejudice was not held. According to 2945.45-Causes of challenging of jurors states that 'A person called as juror in a criminal case may be challenged for following cause (H) That he is a chronic alcoholic or**

drug dependent person. Juror #6, Mr Gutowski, on Page 56, line 22-25 says that he is a recovering alcoholic but then on page 57, line 1-18, he states that he is still consuming alcohol, if he gets around, which means he was inefficient and should have been disqualified.

According to 2313.17 Examination of Jurors; causes for challenges (B) (9) That the person discloses by the person's answer that the person cannot be fair and impartial juror or will not follow the law given to the person by the court. (C) Each challenge listed in division (B) of this section shall be considered as a principal challenge, and its validity tried by the court. Juror # 11, Mr. Allison should be disqualified based upon a statement made by other juror Mr. Nicholson " He must be disqualified"(Pg48,line16). This statement raises a grave doubt whether Mr. Allison is an efficient juror at all and is qualified to decide on somebody's life on trial. 'Juror misconduct is presumed prejudicial'. **State V Hart, 57,ohio app.3d4, 566 N.E.2d 174 (1988).** Moreover, it was ineffective counseling because"Where a biased juror was impaneled, prejudice under STRICKLAND was presumed in counsel's failure to move to strike the juror for cause, and a new trial was required." **Hughes V U.S., 258 F3d 453 (6th cir 2001).**

4) **Rule 404(B) - 911 tape and mention of (motive, intent) "Dropping charges" was more prejudicial than probative.**

Ohio R. Evid. 609, rather than Ohio R. Evid. 404(B), governs admission of prior convictions to attack the credibility of a witness, and though defendant witness' conviction had some probative value, its admission was an abuse of discretion;. **State v. Martin, 2003 Ohio 6551, 2003 Ohio App. LEXIS 5847 (2003)**

"The admission at trial of tape recordings rests within the sound discretion of the trial court" **U.S. V Wilkinson 53 F3d 757, 761 (6th Cir 1995).** "that discretion presumes as a prerequisite to admission, that the tapes be authentic, accurate and trustworthy." **United States V Robinson, 707 F2d 872, 876 (6th Cir 1983).** Recordings are not admissible "if unintelligible portions are so substantial as to render the recording as a whole untrustworthy." ID (quotation marks and citation omitted). "Regardless of the reason for which the court and the prosecutor thought the evidence was being offered, the prejudice inquiry asks whether 'the jury [was] likely to consider the statement for the truth of what was stated with significant resultant prejudice." **United States V Evans, 216 F3d 80, 87, 342 U.S. App D.C. 189 (D.C. Cir.2000).**

Pg 2, line 15-16, prosecutor asks for renewal of motion in limine to use 911 tape. Judge states that 911 tape have "Generic References". On Pg 6, line 15-16, The ruling of the Judge allows 911 tape for 404(B) motive purposes only and states "That's noted for the record in case it is looked at again" which means the honorable panel of Judges of this Court of Appeals should look at this

"Generic References"(Pg 5,line 15,16) of the word "Dropping charges" which is more prejudicial than probative because, the victim perjured on 911 tape that 'her eyes was swollen shut' which was proven wrong by First responder, Toledo Police Officer Carl Schwirsinski's testimony during the trial. **In State V Sims, 191, Ohio app 3d 622, 2010 Ohio 6228, 947, N.E. 2d 227**, defendant's prior domestic violence incidents were not admissible under Rule 404(B) on the theory that they showed victim's state of mind and why she did not try to escape from the defendant; the victim's own testimony demonstrates that she physically struggled with the defendant that she did try to escape. "Denial of due process occurs where state allows false evidence to go uncorrected". **Hall V Director of Corrections, 343, F3d 976 ((th Cir 2003).**

"From the fact that the first trial ended in a mistrial as well as the fact that the jury deliberated for a considerable amount of times in the second trial, the judges infer that the question as to the defendant's guilt or innocence was a close one in both trials." **Kennedy V Lockyer 379 F3d 1041 (CA92004).**

The 911 tape led to defendant's conviction in the second trial, because it was not used during the first trial, which led to a hung jury. "Evidence of past criminal activity is inadmissible to show propensity" **U.S. V Lattner, 385 F3d 947 (6th Cir 2004).** "Where the State charged defendant with felony domestic violence, in violation of RC 2919.25, it met its burden of proof during direct examination of defendant's ex-wife when it questioned her regarding defendant's conviction for the prior offense, as she was the victim thereof. The subsequent testimony by the ex-wife regarding the details of defendant's prior domestic violence conviction was inadmissible under **Ohio R. Evid. 404(B),** and based on the nature of defendant's conduct during that incident which tended to infer that he was uncontrollable, the testimony was highly prejudicial, such that it was an abuse of the trial court's discretion to have allowed such testimony and it was also ineffectiveness of defendant's trial counsel in violation of Ohio Const. art. I, 10 for not objecting thereto". **State v. Feathers, Ohio App. 3d , 2007 Ohio 3024, N.E. 2d , 2007 Ohio App. LEXIS 2778 (June 15, 2007).**

In Mr. Pena's trial, during closing arguments, the prosecutor mentions "Dropping charges" three (3) different times on Pg 215 (line 16-17), Pg 218 (line 12) and Pg 230 (line 6 of closing arguments) prosecution states "It's an ugly truth that the defendant is one of those people that's willing to use physical violence in order to control somebody in a relationship. It's just that simple."- which is highly prejudicial because it portrays a character of 'Abusive person' other than proving a motive or intent. Ordinarily, on cross-examination, details of defendant's prior

convictions should not be exposed to jury. **U.S. Williams, 272 F3d 845 (7th cir 2001).** Hence, once again the prejudicial value outweighs the probative value.

Also, under Evidence rule **608(B)**, particular instances of conduct, though not subject of a criminal conviction may be inquired into on cross-examination of a principal witness. However the potential of abuse is high, through unfair prejudice, confusion of issues, and misleading of the jury, safeguards are erected in the form of requiring that the instances inquired into must be clearly probative of truthfulness or untruthfulness. **State v Williams, 1 Ohio app 3d 156 1 Ohio B. 467, 440 NE 2d 65 (1981).** The untruthfulness in Dawn Boes's 911 tape was the bruising (eyes swollen shut) which makes the entire 911 tape untruthful and prejudicial. Therefore it was abuse of discretion on judge's part to allow the 911 **tape as a whole** and also instances referring to it such as "dropping charges" into closing arguments 3 times. Morever the court's curative instruction (at the end on pg 236,line 21on to pg 237 line 11) when allowing such evidences is not enough. Infact, "A limiting instruction will minimize to some degree the prejudicial nature of evidence of other criminal acts; it is not, however, a sure-fire panacea for the prejudice resulting from the needless admission of such evidence. **U.S. V Garcia-Rosa, 816 F2d 209, 222 (1st cir 1989)** judgment vacated in part sub. nom. By **Rivera-Feliciano V United States, 498 U.S. 954, 112 L.Ed. 2d 391, 111 S.Ct. 377 (1990)** (holding that the prejudicial effect of the evidence of the defendant's other criminal acts was so severe that it could not "be remedied merely through a limiting instruction" and further stating that "if limiting instructions could remedy all such errors, the government would easily be able to circumvent Rules 404(b) and 403"). **U.S. V Haywood 280 F3d 715 (6th Cir 2002).**

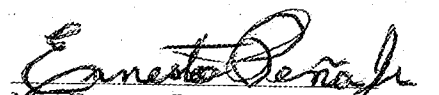
The 911 tape in Mr. Pena's trial mislead the jury. In a domestic violence case, a jury should not have been permitted to hear evidence of another incident in which defendant allegedly struck his girlfriend. The trial court improperly admitted this evidence infer Evid. R. 404(B) because the only plausible use for the evidence was to draw an impermissible character inference (decided under former analogous section) **State V Knight, 131 Ohio App 3d 349, 722 N.E. 2d 568, 1998 Ohio App. Lexis 2442 (1998).** "Evidence is unfairly "prejudicial" if it will induce the jury to decide the case on an improper basis rather than on the evidence presented." **U.S. V Miles, 207 F3d 988 (7th Cir 2000).**

CONCLUSION

The errors mentioned above are prejudicial and constitutes to a fundamental miscarriage of justice and therefore, the appeal should be reconsidered and justice served.

Although violations of the rules of evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial: **State v. DeMarco, 31 Ohio St. 3d 191, 31 Ohio B. 390, 509 N.E.2d 1256 (1987).** Pursuant to the cumulative error doctrine, the existence of multiple errors which may not individually require reversal may violate a defendant's right to a fair trial: **State v. Karl, 142 Ohio App. 3d 800, 757 N.E.2d 30 2001 Ohio App. LEXIS 2373 (2001).**

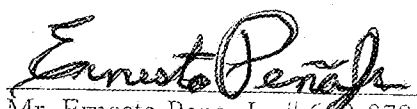
Respectfully submitted,



Mr. Ernesto Pena, Jr. # 669-079, *Pro Se*
NCCC, P.O. Box 1812,
Marion, OHIO 43302.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum of support was served on Lucas county Prosecutor, David Cooper, by U.S. Mail to 711 Adams St., 2nd Floor, Toledo, Ohio, 43604 14th day of April, 2014.



Mr. Ernesto Pena, Jr. # 669-079, *Pro-Se*
NCCC, P.O. Box 1812,
Marion, OHIO 43302.

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Ernesto Pena, Jr.

Appellant

Court of Appeals No. L-12-1309

Trial Court No. CR0201201965

DECISION AND JUDGMENT

Decided: MAR 21 2014

* * * * *

This matter is before the court on appellant's App.R. 26(A)(1) application for reconsideration. The state has filed a memorandum in opposition. For the reasons that follow, we deny appellant's application for reconsideration as untimely.

App.R. 26(A)(1) provides that an application for reconsideration "shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment in question and made a note on the docket of the mailing as required by App.R. 30(A)."

On February 7, 2014, we issued a decision affirming the judgment of the trial court in *State v. Pena*, 6th Dist. Lucas No. L-12-1309, 2014-Ohio-423. A notation on the

E-JOURNALIZED

MAR 21 2014

docket indicates copies of the decision were delivered to Pena's counsel on the same day. Pena filed his application for reconsideration on February 25, 2013. The deadline under the rules was February 18, 2013. Pena filed his application seven days late. Accordingly, we find Pena's application for reconsideration not well-taken and it is denied as untimely.

It is so ordered.

Arlene Singer, J.

Thomas J. Osowik, J.

James D. Jensen, J.
CONCUR.

JUDGE

JUDGE

JUDGE