

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(SWARTZLE, P.J., and CAVANAGH and M.J. KELLY, J.J.)

In re Christopher Ross, Jr., minor

People of the State of Michigan,

Petitioner-Appellee,

v.

Christopher Ross,

Respondent-Appellant.

Case No. 158764

Court of Appeals Case No. 331096

Trial Court Case No. 14-826056-DL

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**The State Bar of Michigan Appellate Practice Section's
Amicus Brief in Support of Respondent-Appellant**

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INTRODUCTION

Appeal deadlines are one of the few things that will keep an appellate practitioner up at night. A missed deadline is a mistake of jurisdictional proportions, which can cost a client one of his most cherished privileges as a citizen: his day in court. For that reason, the rules governing appellate deadlines should be written clearly and with enough detail for all people, lay clients and lawyers alike, to understand. The Appellate Practice Section of the State Bar of Michigan respectfully submits that MCR 7.305 (and its Court of Appeals counterpart, MCR 7.204) fall short of that standard in the context of juvenile delinquency appeals.¹

When it comes to appeal deadlines, Rule 7.305 gives an appellate practitioner two options to choose from: one for “civil” cases and one for “criminal” cases. Unfortunately, if a century’s worth of scholarship and case law on juvenile proceedings has told us anything, it’s that juvenile delinquency proceedings are not quite either of those things. Christopher Ross, a juvenile respondent forced to choose between two options, prudently decided that his proceeding adjudicating him guilty of a criminal offense was a “criminal” proceeding. After all, his case resembled an adult criminal trial in many ways, and he enjoyed nearly all the constitutional protections that adult criminal defendants do. This Court should follow Mr. Ross’s lead and hold that delinquency proceedings are “criminal cases” for purposes of Rule 7.305.

Even if this Court has its reservations about declaring juvenile delinquency proceedings “criminal,” it should still decide this issue in Mr. Ross’s favor. Given the unique, dichotomy-defying nature of a juvenile delinquency proceeding, Rule 7.305’s choice between civil and criminal is a false one for juvenile delinquent respondents, one that carries significant risk for those who choose wrong (as the prosecutor argues Mr. Ross did here). Our court rules shouldn’t be snares for the unwary, and the confusion that inheres in the nature of delinquency

¹ Neither party’s counsel authored this amicus brief in whole or in part, nor contributed money that was intended to fund the preparation or submission of the brief. Further, no person has contributed money intended to fund the preparation and submission of this brief. See MCR 7.312(H)(4).

proceedings shouldn't deprive a juvenile respondent of his day in court. For that reason, this Court should rule on the merits of Ross's appeal and open up an ADM file to revise MCR 7.305 (and MCR 7.204) to specify the appeal deadlines for juvenile delinquency proceedings.

Even though a juvenile delinquency proceeding is not a criminal case in the purest sense, juveniles faced with a delinquency petition nonetheless are at risk of losing their liberty. Therefore, juvenile respondents must be afforded the same constitutional protections as adult criminal defendants. These protections include the right to effective assistance of counsel under *Strickland v Washington*, 466 US 668 (1984). In fact, *Strickland* also applies to parents in child welfare proceedings under the Juvenile Code, and there is no rational basis to exclude juvenile respondents from the constitutional protections afforded by *Strickland*. Juvenile respondents should be afforded, as the minimum baseline, the protections of *Strickland*. Similarly, juvenile respondents have the right to other constitutional and court-rule protections that apply to criminal defendants. In order to protect juvenile respondents' constitutional rights, the more expansive standard under MCR 6.431(B) should apply in these cases rather than the narrow standard contained in MCR 3.992(A).

INTEREST OF AMICUS

The State Bar of Michigan Appellate Practice Section is a voluntary section of the State Bar of Michigan consisting of over 700 attorneys with a special interest in appellate practice in state and federal courts in Michigan. The purpose of the Section is to promote the skillful, efficient and effective practice of appellate law. Through its governing body, the Section provides education, information, and analysis about issues of appellate practice, including procedures to advance the productive and competent operation of the appellate courts. The goal of this work is to advance the administration of justice in the appellate courts so that the Bench and Bar may better serve the public interest.

The Section files this brief on invitation by the Court because this case involves significant issues of appellate practice and procedure that affect the fair, equitable, and speedy administration of justice. This brief

reflects the position of the Appellate Practice Section, as determined by a vote of its Council members in accordance with its Bylaws.

ARGUMENT

I. Juvenile delinquency proceedings are “criminal” cases for purposes of the appellate deadline rules; even if they are not, Mr. Ross shouldn’t be faulted for the confusion that inheres in the nature of delinquency proceedings.

A. Faced with a binary choice between “civil” and “criminal,” the better view is that juvenile delinquency proceedings are “criminal” cases for appellate deadline purposes.

This Court has asked whether juvenile delinquency appeals are governed by the deadlines for civil cases or criminal cases. As telegraphed in the Court’s question, this Court’s appellate deadline rule, like its Court of Appeals counterpart, divides the universe of appellate cases into two groups: “civil cases” and “criminal cases.”² MCR 7.305(C)(2). The court rules do not define these terms, and this Court can, of course, consult dictionaries to confirm what it likely already intuits. But a more helpful starting point is the structure of the Michigan Court Rules themselves.

In addition to a chapter devoted to appellate practice, the Court Rules set out six chapters that govern practice and procedure in Michigan trial courts. As one would expect, they include chapters dedicated to “civil” and “criminal” procedure. But they also have chapters for cases that don’t quite fit either mold: Chapter 5 for “probate” matters and, most relevant here, Chapter 3 for “special proceedings and actions.” These chapters cover a wide range of legal proceedings in Michigan courts, from debtor-creditor actions and property partitions to adoptions and juvenile delinquency proceedings.

² The court rule also identifies termination of parental rights cases but refers to them as civil cases. See MCR 7.305(C)(2) (stating that an “application must be filed within 28 days in termination of parental rights cases [and] within 42 days in *other* civil cases” (emphasis added)).

So, how are these not-civil and not-criminal proceedings funneled into the appellate system through Chapter 7's civil/criminal dichotomy? For the vast majority, it's simple. Either the answer is self-evident (it requires no explanation, for instance, that a mortgage-foreclosure action is "civil") or the court rules make clear that any appeal taken is treated like a civil action. See, e.g., MCR 3.101(P) ("A judgment or order in a garnishment proceeding may be . . . appealed in the same manner and with the same effect as judgments or orders in other civil actions."); MCR 3.602(N) ("Appeals [from arbitration decisions] may be taken as from orders or judgments in other civil actions."); MCR 3.105(B) (same for claim-and-delivery actions); MCR 3.110(D) (same for stockholder liability proceedings).

But this case presents one notable exception: juvenile delinquency proceedings. Unlike other "special proceedings," the juvenile delinquency's appeal provision says nothing about how the case is treated for purposes of appellate proceedings. See MCR 3.993. And the nature of the proceeding defies easy categorization. There are, to be sure, aspects of juvenile delinquency proceedings that are similar to civil cases. See, e.g., MCR 3.922(D)–(E) (motion practice and pretrial conference procedure). But there are just as many, if not more, procedural facets that are borrowed from the criminal realm. See MCR 3.922(A)–(B) (mandatory pretrial discovery); MCR 3.922(C) (notice of insanity and alibi defense); MCR 3.933 (acquiring physical control over juvenile); MCR 3.934 (arraignment process); MCR 3.935 (preliminary hearing); MCR 3.936 (collection of biometric data); MCR 3.941 (plea process); MCR 3.942 (speedy trial, right to counsel, and proof beyond a reasonable doubt requirements); MCR 3.943(D) (crime victim's right to be present); MCR 3.943(E)(7) (mandatory detention for firearm use), and so on.

The fact is, juvenile delinquency proceedings are too much like criminal cases to be "civil" and too much like civil cases to be purely "criminal."

But the prosecutor presents a potential tiebreaker. In an effort to tug this case over to the civil side, the prosecutor cites MCL 712A.1(2), a provision in the Juvenile Code declaring that "proceedings under this

chapter are not criminal proceedings.”³ (Pet. Supp. Br., p. 25.) The Legislature has told us juvenile delinquency proceedings “are not criminal proceedings,” the argument goes; therefore, they must be civil. What the prosecution offers would undoubtedly be a tidy solution, but scratch the surface and two fatal flaws come out.

First, if the prosecutor means to say juvenile delinquency proceedings are “civil” proceedings for purposes of MCR 7.305 because the Legislature said so, that can’t be true. *This Court*, not the Legislature, has the sole constitutional authority to promulgate rules governing practice and procedure in Michigan courts, including categorization of cases for purposes of setting appeal deadlines. See Mich Const 1963, art 6, § 5 (“The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.”); see also *McDougall v Schanz*, 461 Mich 15, 26 (1999) (“It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court.”). Accepting the prosecutor’s rationale would invite the Legislature to rewrite this Court’s procedural rules through legislation, in violation of fundamental separation of powers principles. Cf. *McDougall*, 461 Mich at 26 (“[T]he function of enacting and amending judicial rules of practice and procedure has been committed exclusively to this Court; a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will.” (citations omitted)).

That is not to say that the Legislature’s view is irrelevant. After all, it has the constitutional authority to create a juvenile justice system in whatever way it deems wise as a matter of policy. But this Court’s independent assessment of its handiwork—its decision of whether those proceedings are “criminal” or “civil” for purposes of its court rules—should focus on the nature and substance of the proceeding, not the label given to it. That’s precisely what the U.S. Supreme Court did when it examined whether the protection against self-incrimination—a right that, by its terms applies only in a “criminal case”—is guaranteed in juvenile delinquency proceedings: “[J]uvenile proceedings to determine

³ This statutory language is prefaced with the caveat, “[e]xcept as otherwise provided,” but more on that below.

‘delinquency,’ which may lead to commitment to a state institution, must be regarded as ‘criminal’ for purposes of the privilege against self-incrimination,” the Court said. “To hold otherwise would be to disregard substance because of the feeble enticement of the ‘civil’ label-of-convenience which has been attached to juvenile proceedings.” *In re Gault*, 387 US 1, 49–50 (1967), abrogated in part on other grounds in *Allen v Illinois*, 478 US 364 (1986).⁴

Second, division-of-labor issues aside, there is another, more practical problem with relying on the non-criminal label. The label has not prevented this Court from calling a juvenile delinquency proceeding a “criminal prosecution,” and to the extent it was ever an accurate description of the juvenile system, significant changes in the juvenile system over the last century have left the label a remnant of a bygone statutory scheme.

The legislative non-criminal label has been in the Juvenile Code since its inception in 1907, when Michigan enacted a package of laws creating juvenile courts. One law created juvenile courts in large, high-need localities like Detroit. See *Robison v Wayne Circuit Judges*, 151 Mich 315, 316 (1908). Another created a statewide juvenile court system, supplemented by the local juvenile courts. 1907 PA 325. And a third (and final) law created a uniform statewide juvenile justice system housed in the probate court. 1907 (Ex Sess) PA 6. The proceedings called for under each law were nearly identical, including the legislative reminder that the proceedings “shall not be deemed to be criminal proceedings.” 1907 PA 325 § 2; 1907 (Ex Sess) PA 6, § 2; *Robison*, 151 Mich at 318.

Less than a year after these laws were enacted, this Court was asked to confront the same basic question it asks today: “Are the proceedings provided for by this act criminal proceedings . . . ?” *Robison*, 151 Mich at

⁴ See also *Lebron v Nat’l RR Passenger Corp*, 513 US 374, 391–392 (1995) (holding that Amtrak is a “government agency,” despite statutory language declaring that Amtrak “will not be an agency or establishment of the United States Government,” and rejecting the statutory label as dispositive because “it is not for Congress to make the final determination of Amtrak’s status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions”).

324. The question arose because the statute creating the juvenile court in Detroit, like the companion statewide legislation, provided for a six-person jury, but Michigan’s Constitution guaranteed a jury twice that size in every “criminal prosecution.” *Id.* at 322; citing Mich Const 1850, art 6, § 28. Thus, if the answer to the Court’s question was “yes,” the statute’s jury-trial provision could not stand.

To answer this question, *Robison* had to grapple with the duality of juvenile justice system that still characterizes the proceedings today. “[I]t is true,” this Court first observed, that the statute “declares that the proceedings shall not be taken to be criminal proceedings in any sense[.]” *Id.* at 324. This Court acknowledged the “beneficent character of legislation.” *Id.* And it even suggested that, insofar as the proceedings were “but a transfer of the jurisdiction, which formerly reposed in the court of chancery, in the exercise of the right of the king as *parens patriae*,” they would not be “criminal.” *Id.* at 324–325.

“[A]nd yet,” the Court said, the statute authorizes trial courts to “place the case on trial, and impose a fine not to exceed \$25, with costs, etc.” *Id.* at 326. “This can have no other purpose than punishment for a delinquency,” something this Court said was “regrettable in view of [the law’s] beneficent purpose.” *Id.* Finding it “difficult to conceive of any element of a criminal prosecution which may be said to be lacking,” this Court concluded that the juvenile court established in 1907 was “criminal” enough to demand a twelve-person jury, the Legislature’s non-criminal label notwithstanding.

Robison sets the analytical course that this Court should follow today. This Court should acknowledge the Legislature’s “civil” label, but conclude that the practical operation and result of the proceedings make them “criminal” proceedings in substance.

In fact, it may have been close call whether the system in *Robison*’s day was “criminal” in nature, despite the non-criminal label, but not so anymore. Since its inception in 1907, Michigan’s juvenile justice system has become increasingly punitive, with juvenile respondents treated more and more like their adult criminal counterparts. A full accounting

of this historical evolution of the system is beyond the scope of this brief (and the authors' expertise),⁵ but a few examples should suffice.

Consider the prosecutor's involvement in juvenile delinquency proceedings. As originally enacted, the Juvenile Code provided that "the prosecuting attorney shall appear for the people when ordered by the court." 1907 (Ex Sess) PA 6, § 3. But by one leading account, that rarely happened. As reported in a 1952 survey of practice in Michigan juvenile courts, "No example of such an appearance [by the prosecutor] has been found for this study, and it is probable that it is almost entirely ignored in practice." Maxine Virtue, *Interim Report: Study of the Basic Structure for Children's Services in Michigan*, James Foster Foundation (1952), at 69.⁶ In stark contrast, today's top law enforcement official is a frequent, and often indispensable, participant in juvenile delinquency proceedings. MCR 3.914(B)(1)–(2) (providing that "[o]nly the prosecuting attorney may request the court to take jurisdiction of a juvenile under MCL 712A.2(a)(1)" and that "[t]he prosecuting attorney shall participate in every delinquency proceeding under MCL 712A.2(a)(1) that requires a hearing and the taking of testimony"). Prosecutors' increased presence throughout the process have heightened the criminal character of today's juvenile system.

Or consider the end result of juvenile delinquency trials: "adjudications." Once thought to be off-limits "in any civil, criminal or other cause or proceeding whatever in any court . . . for any purpose whatever," 1907 (Ex Sess) PA 6, § 1, today juvenile adjudications are used to increase an individual's punishment in a later criminal proceeding, see MCL 777.53–55 (PRVs 3, 4 and 5).⁷ What's more, that result *would* be unconstitutional under the Sixth Amendment, US

⁵ For such accounts, see, e.g., *People v Hana*, 443 Mich 202, 209–214 (1993); William T. Downs, *Michigan Juvenile Court: Law and Practice*, Ann Arbor: Institute of Continuing Legal Education, 1963 (available at <https://perma.cc/A9BU-EF9D>).

⁶ This source is available at: <https://perma.cc/MQ33-JA32>.

⁷ Cf. Pet. Supp. Br., at 25 n 31 (inaccurately suggesting that "[w]hen asked about prior convictions, . . . an individual does not have to list juvenile adjudications because they do not constitute criminal convictions").

Const, AM VI, see *People v Lockridge*, 498 Mich 358 (2015), but for the fact that they are considered “prior convictions,” see, e.g., *United States v Crowell*, 493 F3d 744, 749–750 (CA 6 2007) (holding that a juvenile adjudication qualifies as a “prior conviction” for purposes of the *Apprendi* exception)—yet another indication that juvenile delinquency proceedings are equivalent to adult criminal prosecutions.

The list could go on. The point is, as two leading juvenile justice experts observed just last year, “In our past 40 years of practice, with the exception of United States Supreme Court decisions regarding juvenile life sentences, there has been a steady march toward treating delinquent children like adult criminals.” Jennifer Pilette & Bill Ladd, *Reflections on Representing Children*, Mich BJ, Nov. 2019, at 44–45. A third expert, observing that “[m]any of the newer provisions [of Michigan’s Juvenile Code] are clearly oriented to punish rather than to address a youth’s best interests,” concluded: “[T]he legislature clearly intends that delinquency proceedings exist largely to punish children for their violations of the law. . . . Unfortunately, Michigan’s appellate courts have been slow to recognize this simple fact.” Frank Vandervort, *When Minors Face Major Consequences*, Mich BJ, Sept. 2001, at 36.

This evolution hasn’t been limited to our statutory scheme. Outside of Michigan, tectonic shifts in constitutional landscape have gradually brought juvenile justice systems more in line with traditional adult criminal proceedings. Beginning in 1966, the U.S. Supreme Court decided a series of cases that “challenged the civil foundation of juvenile courts.” John M. Pettibone et al, *Services to Children in Juvenile Courts: The Judicial-Executive Controversy*, National Institute for Juvenile Justice and Delinquency Prevention, Office of Juvenile Justice and Delinquency Prevention, US Dep’t of Justice (1981), at 14.⁸ That year, the Supreme Court observed that, “[w]hile there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the

⁸ This source is available at: <https://perma.cc/XCX4-WT3W>.

immunity of the process from the reach of constitutional guaranties applicable to adults.” *Kent v United States*, 383 US 541, 555 (1966).

Over the next decade, the Supreme Court extended the core protections afforded to adult criminal defendants under the Fifth, Sixth, and Fourteenth Amendments to juveniles. US Const, Am V; US Const, VI; US Const, Am XIV. When the dust settled, it was clear that the Supreme Court had “caused a significant ‘constitutional domestication’ of juvenile court proceedings.” *McKeiver v Pennsylvania*, 403 US 528, 539 (1971). Today, a minor facing juvenile delinquency charge has many of the same constitutional protections as an adult criminal defendant, including:

- The right to notice of charges, *In re Gault*, 387 US at 33–34;
- The right to counsel, *id.* at 34–42;
- The right to confront witnesses, *id.* at 42–57;
- The right against self-incrimination, *id.*;
- The right against coerced confessions, *Gallegos v Colorado*, 370 US 49, 54 (1962);
- The protection against double jeopardy, *Breed v Jones*, 421 US 519, 528–531 (1975); and
- The presumption of innocence and protection from guilt except upon proof beyond a reasonable doubt, *In re Winship*, 397 US 358 (1970).

In short, whatever force there was in the “non-criminal” label (and this Court’s *Robison* decision would say, not much), it cannot change the reality that juveniles face in today’s system. See *Breed*, 421 US at 528 (“[T]here is a gap between the originally benign conception of the system and its realities.”). The constitutional ivy has crept across the juvenile

justice system, and as a result, today’s delinquency proceedings resemble “criminal” proceedings in nearly every way that matters.⁹

In fact, this Court can cut to the heart of this issue with one simple question of the prosecutor: “If you lose at trial, can you appeal?” (The answer is no). This asymmetry—a hallmark of criminal proceedings—tells this Court everything it needs to know about the nature of juvenile delinquency proceedings. It should therefore ignore “the feeble enticement of the ‘civil’ label-of-convenience,” *In re Gault*, 387 US at 49–50, and hold that, as between “civil” and “criminal,” juvenile delinquency proceedings are tantamount to criminal proceedings and therefore governed by the appellate deadlines applicable to criminal cases.

This Court would not be the first to do so, either. The Florida District Court of Appeal was presented with this very same dilemma in *In Interest of DJ*, 330 So 2d 34 (Fla Dist Ct App, 1975). The court there acknowledged the “many cases which discuss the question of whether juvenile proceedings are civil, rather than criminal, in nature[.]” *Id.* at 34. But, it said, “merely attaching a label will not necessarily resolve the problem.” *Id.* The court considered “the nature of the delinquency proceedings” and held that juvenile delinquency appeals were “criminal” for purposes of Florida’s appellate rules. *Id.* at 34–35; see also *D S K v State*, 396 So 2d 730, 731 (Fla Dist Ct App 1981) (reaffirming *In re DJ*).¹⁰

⁹ The prosecutor’s discussion focuses almost entirely on the early intentions of the juvenile justice system and, thus, overlooks the reality of the system that exists today. (See Pet. Supp. Br., at 23–25.)

¹⁰ Although some cases have questioned *DJ*’s vitality following a later Florida Supreme Court decision, *State v CC*, the latter decision involved a question of *legislative* intent and, thus, does not undermine *DJ*’s utility for this case. See 476 So 2d 144, 146 (Fla, 1985) (acknowledging that “juvenile delinquency matters are criminal in nature,” but holding that “[t]he legislature has exhibited no intent to have chapter 924 [of the Florida statutory code] apply to juvenile proceedings.”), superseded by statute superseded by statute as stated in *CLS v State*, 586 So 2d 1173 (Fla Dist Ct App 1991) (“While juvenile delinquency matters are ‘criminal in nature, they are separate proceedings that are controlled by Ch. 39, Florida Statutes.”). The same rationale also serves to distinguish

This Court should follow *In re DJ*'s example and hold that juvenile delinquency proceedings are “criminal” cases for purposes of our appellate rules.

B. If this Court concludes that juvenile delinquency proceedings transcend the civil/criminal dichotomy, it should amend its appellate rules to clarify the deadlines for such proceedings and reach the merits of Mr. Ross’s claims.

The foregoing is based on the assumption that, like Mr. Ross, this Court is constrained to choose between two options, civil or criminal. But that may not be the case. As noted above, juvenile delinquency proceedings are a unique hybrid in the law. In many ways, they are too criminal to be civil cases, but the fact remains that there are facets of the system that are borrowed from the civil realm. See Arthur E. Moore, *Jurisdiction and Responsibility of Juvenile Courts*, 24 Mich St BJ 644 (1945) (“The modern Juvenile Courts are only quasi-criminal courts[.]”). And there may be virtue to maintaining juvenile delinquency proceedings’ chameleonic status. For that reason, this Court may have reservations about stating definitively that juvenile delinquency proceedings are “criminal” proceedings.

If so, this Court should do two things:

First, it should amend its appellate rules to clearly identify the appeal deadlines for juvenile delinquency proceedings. That a council of appellate practitioners could not quickly and confidently determine from the face of the rules whether juvenile delinquency proceedings were subject to a 42- or 56-day appeal deadline suggests that clarification is necessary. See *People v McFarlin*, 389 Mich 557, 565 (1973) (“[L]aw should make sense to the people who must live with it.”). Although the

this Court’s decision in *In re Broughton*, which stated, in response to the contention that the juvenile respondent “was not permitted a trial as *provided by the statute*,” that “[t]he statute expressly provides that proceedings under the act shall not be deemed to be criminal proceedings. The rules governing criminal trials do not apply.” 192 Mich 418, 420, 424–25 (1916).

Section expresses no view on *what* that deadline should be (56, 42, or some other number of days), the deadline that applies to juvenile delinquency proceedings should be explicitly stated, either as a new provision in Subchapter 3.900 stating that “appeals from juvenile delinquency dispositions are treated as [civil/criminal] actions,” or as a new clause in Rule 7.305 and 7.204.

Second, regardless how this Court resolves the dilemma, it should not deprive Mr. Ross of his day in court. If the discussion above and the historical scholarship on juvenile justice establish nothing else, it’s that the nature of juvenile delinquency proceedings defies standard civil/criminal classification. As the Deputy of this Court’s Office of the Court Administrator lamented over 50 years ago, “[I]t is almost impossible to pin any legal label, drawn from the traditional legal concepts, on the juvenile court.” Downs, *Michigan Juvenile Court: Law and Practice*, at 52 (see n 5, *infra*). Mr. Ross and others in his position should not be expected to do what has long eluded courts and juvenile justice scholars (and now this group of appellate specialists): “correctly” identify whether juvenile delinquency proceedings are civil or criminal.

The uncertainty surrounding this issue, it’s important to note, stems not just from the language of the court rule, but from this Court’s application of it. In *In re Sasak*, the juvenile respondent made the same choice as Mr. Ross did here: he considered his proceeding “criminal” and filed his appeal in the Court of Appeals within the time allowed for criminal cases. *In re Sasak*, unpublished order of the Court of Appeals, entered Jan. 31, 2011 (Docket No. 301696). After the Court of Appeals dismissed his appeal for failing to comply with the deadlines for civil cases (citing MCL 712A.1(2), no less), see *id.*; *In re Sasak*, unpublished order of the Court of Appeals, entered Apr. 11, 2011 (Docket No. 301696) (denying reconsideration), this Court reversed and remanded the case for consideration on the merits, *In re Sasak*, 490 Mich 854, 854 (2011).

We don’t know why this Court reversed the Court of Appeals in *Sasak*, as the reasoning for its decision is not apparent from the face of the order. But even assuming that this Court did not disagree with the Court of Appeals’ rationale, it nonetheless remanded the case to allow the respondent to pursue his appeal, despite having missed the civil-

case deadline. Whatever equitable justifications that prompted this Court's decision in *Sasak* support the same result for Mr. Ross.

True, it's possible to distinguish *Sasak* as a special kind of juvenile delinquency proceeding called a "designated" case, which Mr. Ross's case was not. But this difference only adds more confusion into the mix. Recall that the Legislature's non-criminal label provision came with a caveat: "Except as otherwise provided . . ." MCL 712A.1(2). (See n 3, *infra*.) That caveat refers to "designated" proceedings (in which the prosecutor designates the case as one in which the juvenile will be tried in the Family Division in the same manner as an adult). See MCL 712A.2d(1), (7). Even assuming *Sasak* was a designated proceeding that the Legislature considers to be a "criminal proceeding," one wouldn't know it from the opinion or the appellate docket. *Sasak*'s caption features the case-type code for traditional delinquency proceedings ("DL"), not designated proceedings ("DJ"). Thus, from an outsider's perspective (like that of Mr. Ross), this Court in *Sasak* remanded a traditional juvenile delinquency appeal for consideration on the merits, despite the respondent having following the criminal appellate deadlines.¹¹ It is only fair that this Court do the same here.

The court rules support this result. MCR 1.105 states that the court rules "are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." Thus, when courts are pressed to choose between two equally compelling applications of a court rule, Rule 1.105 instructs them to pick the one that best achieves a "just, speedy, and economical determination," something this Court did just two Terms ago. See *People v Traver*, 502 Mich 23, 37 n 4 (2018).

¹¹ Even for the respondent in a particular case, it can be difficult to appreciate the difference between a traditional delinquency proceeding and a "designated" case, given the panoply of constitutional and procedural rights that are already afforded to juvenile delinquency respondents. Oftentimes, the only evidence that a case is a "designated" case will be the designation notice in the file, and an appellate attorney may not have the case file until *after* the time for filing a claim of appeal.

It should do the same here and find that the application of Rule 7.305's civil/criminal dichotomy to label-defying juvenile delinquency proceedings ought not deprive Mr. Ross of his chance to challenge the constitutionality of his adjudication. To paraphrase this Court: "It is difficult to imagine something more 'inconsistent with substantial justice' than requiring a [juvenile respondent] to [suffer a criminal adjudication] that is [the possible result of ineffective assistance of counsel]." *People v Jackson*, 487 Mich 783, 800 (2010), quoting MCR 1.105.

II. Constitutional protections that apply to criminal defendants should apply with equal force to juvenile respondents whose liberty interests are implicated by delinquency proceedings.

This Court asked in question (2) whether the standard for granting a new trial to a juvenile respondent in MCR 3.992(A) is the same standard as set forth in the criminal procedures, MCR 6.431(B), and further asked in question (3) whether a juvenile respondent can avail himself of the *Strickland v Washington* test for ineffective assistance of counsel. For the reasons set forth below, to protect the constitutional rights of juvenile respondents, juveniles should be afforded the protection of MCR 6.431 because the standard in MCR 3.992(A) is more restrictive than MCR 6.431(B), and juveniles should further be able to invoke the standard for ineffective assistance of counsel set forth in *Strickland v Washington*, 466 US 668 (1984).

As for a motion for new trial, the standards set forth in MCR 3.992(A) and MCR 6.431(B) are not the same. To grant a motion for new trial under MCR 3.992(A), which applies to juvenile delinquency proceedings, the motion must "present[] a matter not previously presented to the court, or presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case." MCR 3.992(A). In contrast, MCR 6.431(B), which applies to criminal defendants, provides a much broader new-trial standard. That rule states that a motion for new trial can be granted "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B).

Applying MCR 6.431(B), many procedural, factual, and legal errors might result in an appellate reversal. For example, if the verdict is against the great weight of the evidence, see, e.g., *People v Bean*, 259 Mich 427 (1932) (reversing conviction for assault with intent to murder because prosecutor failed to present evidence of any overt act to support defendant’s guilt, such that verdict was against the great weight of the evidence), if the trial court made an incorrect evidentiary ruling, see, e.g., *People v Uribe*, 499 Mich 921 (2016) (reversing trial court’s exclusion of proposed testimony under MRE 403), if the trial court abused its discretion, see, e.g., *People v Spagnola*, unpublished per curiam opinion of Court of Appeals, issued March 8, 2018 (Docket No. 330382) (reversing trial court for allowing prosecutor to make an improper closing argument), or if the trial court misapplied the law, see, e.g., *People v Skinner*, 502 Mich 89 (2018) (reversing juvenile’s life-without-parole sentence on constitutional grounds).

The “miscarriage of justice” standard in MCR 6.431(B) is similarly broad. For example, appellate courts have identified the following types of miscarriage of justice: *People v Stanaway*, 446 Mich 643, 695 (1994) (holding that officer’s hearsay testimony resulted in a miscarriage of justice); *People v Lemmon*, 456 Mich 625, 632 (1998) (concluding that lack of witness credibility resulted in miscarriage of justice); *People v Dupree*, 486 Mich 693, 697 (2010) (holding that trial court’s modified jury instruction constituted miscarriage of justice.).

Although MCR 3.992(A) on its face is the court rule that applies to juvenile respondents, because of the constitutional implications of a juvenile delinquency proceeding, the respondent juvenile should be afforded *more* protections than what is provided for in the narrow new trial standard of MCR 3.992(A). Rather, the broader language of MCR 6.431(B) should apply to juvenile delinquency proceedings in order to afford juvenile respondents the full panoply of constitutional rights granted to criminal defendants. As discussed above, it appears that is also the intent of the United States Supreme Court, as it has identified any number of constitutional guarantees that apply with equal force to juvenile delinquency proceedings.

In that same vein, this Court should also hold that, at the very least, the standard announced in *Strickland v Washington* applies to juvenile

delinquency proceedings. Juveniles, like criminal defendants and parents in child welfare proceedings, are entitled to effective assistance of counsel. *Strickland* set forth a framework for determining when an attorney has failed to provide the minimal level of competency that the Sixth Amendment's right to the assistance of counsel demands. *Strickland* has been applied to parents in child welfare proceedings. *In re Martin*, 316 Mich App 73, 85 (2016); *In re Trowbridge*, 155 Mich App 785 (1986). There is no rational basis that juvenile respondents shouldn't at least have the protections of *Strickland*, as juveniles should also be afforded their constitutional right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. US Const Am, VI; US Const Am XIV.

Because juvenile respondents should be afforded at least the same constitutional protections as criminal defendants, this Court should hold that the MCR 6.431(B) motion for new trial and *Strickland v Washington* ineffective assistance of counsel standards both apply to juvenile delinquency proceedings.

CONCLUSION

The Appellate Practice Section asks this Court to apply three basic rules—already well established for similarly situated adults—to juvenile delinquency proceedings: (1) the 56-day deadline for filing an appeal provided for in Rule 7.305; (2) the standard for granting a new trial provided for in Rule 6.431; and (3) the standard for ineffective assistance of counsel as set forth in *Strickland v Washington*.

Respectfully submitted,

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AMICUS'S APPENDIX

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1	C	6	<i>People v Spagnola</i> , unpublished per curiam opinion of the Court of Appeals, issued March 8, 2018 (Docket No. 330382)

Tab A: *In re Sasak*, unpublished order of the Court,
entered Jan. 31, 2011 (Docket No. 301696)

IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: **In re Douglas Brooks Sasak**
Docket No. **301696**
L.C. No. **09-045012-DL**

William B. Murphy, Chief Judge, acting under MCR 7.203(F)(1), orders:

The claim of appeal is DISMISSED for lack of jurisdiction because it was not filed within 21 days of the order being appealed from and no motion for postjudgment relief was filed within the initial 21-day appeal period. MCR 7.204(A)(1)(a). At this time, appellant may seek to appeal the November 10, 2010 order only by filing a delayed application for leave to appeal under MCR 7.205(F).



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 31 2011

Date

Sandra Schultz Mengel
Chief Clerk

Tab B: *In re Sasak*, unpublished order of the Court,
entered Apr. 5, 2011 (Docket No. 301696)

Court of Appeals, State of Michigan

ORDER

In re Douglas Brooks Sasak

Docket No. 301696

LC No. 09-045012-DL

Jane E. Markey
Presiding Judge

E. Thomas Fitzgerald

Henry William Saad
Judges

The Court orders that the motion for reconsideration is DENIED. Under MCL 712A.1(2), juvenile delinquency proceedings “[e]xcept as otherwise provided . . . are not criminal proceedings.” Thus, juvenile delinquency proceedings are generally treated as civil proceedings. Because appellant has cited no statutory or court rule provision directing that juvenile delinquency proceedings be treated as criminal cases for purposes of MCR 7.204, he has not established that this Court erred by dismissing the claim of appeal because it was not timely filed within the time limit of MCR 7.204(A)(1)(a), which applies in civil cases. Appellant’s citation of case law establishing that certain constitutional rights apply in juvenile delinquency cases does not establish that a state must classify such cases as criminal cases or that the time limit for filing an appeal of right in such cases must be the same as the time limit for filing an appeal of right in a criminal case. Further, appellant has not been deprived of the ability to take an appeal of right, but rather has failed to timely exercise the right to do so. We reiterate that appellant may seek to appeal the November 10, 2010 lower court order by filing a delayed application for leave to appeal under MCR 7.205(F). _



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

APR 05 2011

Date

Larry S. Royster
Chief Clerk

Tab C: *People v Spagnola*, unpublished per curiam opinion of the Court of Appeals,
issued March 8, 2018 (Docket No. 330382)

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 8, 2018

v

ANDREW JOSEPH SPAGNOLA,
Defendant-Appellant.

No. 330382
Macomb Circuit Court
LC No. 2014-003879-FC

Before: SHAPIRO, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

The prosecution charged that Andrew Joseph Spagnola abused his 11-week-old daughter, OS, by violently shaking her or intentionally banging her head on a hard surface. At trial, both parties' proofs centered on the radiologic images of OS's brain. The prosecution's expert witnesses, both pediatricians, testified that the images revealed the child was intentionally abused. The defense presented the testimony of a neuroradiologist who opined that radiologic studies demonstrated that OS's condition was chronic rather than acute, and likely related to the circumstances of her difficult birth rather than to intentional abuse. No one had ever witnessed any abuse. All of the experts acknowledged that because the child had no signs of abuse such as bruising or fractures, their opinions about what happened to OS hinged on the radiologic images.

During his closing argument, defense counsel stressed that the prosecution's two pediatric experts had offered conflicting interpretations of the radiologic images, the official radiology reports contradicted their conclusions, and that only the defense had presented the opinions of an actual radiologist. In rebuttal, the prosecutor first attacked the integrity of defense counsel and then proclaimed, with no evidentiary support, that the prosecution's radiology expert would have testified but for his vacation in Paris. Despite a proper objection to the latter improper comment, the court failed to give a curative instruction. The jury convicted Spagnola of first-degree child abuse, MCL 750.136b(2).

The prosecutor's grossly improper remarks were the last arguments the jury heard before deliberating, and remained uncorrected by the court. His deliberate misconduct so poisoned the proceedings that a new trial is required. Accordingly, we vacate and remand for further proceedings.

I. BACKGROUND

On March 2, 2013, Spagnola was home alone with his 11-week-old twin daughters when OS's body went limp and then rigid and she became unresponsive. The infant had suffered a seizure. In the days that followed, Children's Hospital of Michigan (CHM) conducted computed tomography (CT) scans, ultrasounds, and magnetic resonance imaging (MRI) studies, which revealed that OS had subdural hematomas (bleeding between the skull and the dura, the outermost covering of the brain). An ophthalmologic exam demonstrated retinal hemorrhages (bleeding in all layers of the retina of the eye). Later, edema (swelling) and new brain bleeding were detected on the radiological images. OS survived, but has permanent disabilities.

OS, a breech twin, had been delivered via an emergency cesarean section. At birth, her head circumference was at the 10th percentile. When the birth-related swelling subsided, OS's head circumference fell to the third percentile. At age 11 weeks, the child's head circumference rose to the 85th percentile, a rapid increase. And her first 11 weeks had not been easy. OS had been treated for excessive vomiting and sometimes cried uncontrollably for extended periods of time.

The prosecution's theory was that Spagnola caused his daughter's injuries by shaking her or banging her head against a hard surface, a condition now known as abusive head trauma (AHT). In support, the prosecution presented evidence that Spagnola called his wife rather than 911 when OS's neurological symptoms emerged. The prosecution also relied on text messages Spagnola and his wife exchanged after the twins' birth to demonstrate that Spagnola had a "short fuse" and little patience with his family.

The rest was a battle of the experts. Before trial, Spagnola sought to exclude the testimony of the chief prosecution witness, Dr. Mary Angelilli, a board certified pediatrician and chief of staff at CHM, pursuant to *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Spagnola challenged the validity of Dr. Angelilli's diagnosis, but the trial court ultimately denied his motion.¹

Dr. Angelilli testified at trial that she reviewed the various radiologic scans and the reports of OS's treating physicians at CHM. Dr. Angelilli perceived "a shearing injury" to OS's brain caused by "movement." She described that abrupt and violent motion, such as shaking a baby, can tear the brain's gray matter, resulting in the injuries OS displayed. In Dr. Angelilli's opinion, the pattern of injuries suffered by OS could have no natural cause. And as OS's parents reported no accident, the doctor deemed the injuries abusive.

Dr. Marcus DeGraw, the prosecution's second pediatric expert, maintained that OS had sustained "massive head trauma" consistent with "slamming" the child's head as hard as possible

¹ Spagnola did not contend that "Shaken Baby Syndrome," SBS/AHT, medicine is "junk science," likely because one of his own experts, Dr. Stephen Guertin, holds to its tenets. Instead, defense counsel questioned Dr. Angelilli about her theory of injury and explored her opinions about whether a chronic subdural could have caused OS's neurological deficits.

against a hard surface. When confronted with the radiology reports indicating that there was no bleeding inside OS's brain until several days after her hospital admission, Dr. DeGraw insisted that he interpreted the films differently than had the hospital radiologists:

Q. But your testimony is despite the CAT scan of March the 3rd and the MRI of March the 3rd or March 4th not mentioning that intraparenchymal blood, the blood inside the brain, you believe it is there?

A. Yes.

Q. And that is a critical component to your conclusions in this case?

A. Correct.^[2]

Dr. Stephen Guertin, who is board certified in pediatrics and pediatric critical care, testified for the defense at trial. He opined that the marked and abrupt expansion of OS's head circumference was consistent with a chronic subdural hematoma—a lingering collection of blood between the brain and the dura, located outside of the brain itself. Birth-related subdurals occur in up to 20% of deliveries, Dr. Guertin explained. Those subdurals that fail to recede in the weeks after birth may rebleed spontaneously, Dr. Guertin testified, absent any trauma.

A second defense expert, Dr. Mark David Herbst, agreed with Dr. Guertin that OS had sustained a birth-related subdural hematoma. Dr. Herbst is board certified in radiology and subspecializes in neuroradiology. He reviewed all of OS's CT scans, MRIs and ultrasounds, and concluded based on the appearance of the blood that OS's chronic subdural hematoma bled acutely on the day she was first admitted to the hospital. That bleeding triggered a seizure, which in turn led to a prolonged period of hypoxia (lack of oxygen). Dr. Herbst further observed that when OS was admitted to the hospital, the tissue of OS's brain (the parenchyma) was entirely normal. And if OS had sustained a traumatic injury due to shaking or striking, the films would have shown blood *inside* her brain, Dr. Herbst asserted. Her brain did bleed a few days later, the films demonstrated, while OS remained hospitalized. That bleeding was precipitated by lack of oxygen (hypoxic ischemic injury) consistent with a stroke. In Dr. Herbst's view, the radiology images definitively ruled out a shearing injury that would have been visible on hospital admission had the child been violently shaken.

Dr. Herbst's interpretation of the images was entirely consistent with that of the CHM radiologists who authored the official radiology reports in OS's medical record. The record supplied to the court and the defense appears to be incomplete, in that it does not include reports of all of the images obtained during OS's hospitalization. Nevertheless, it includes several radiology reports stating that the images obtained on the day of admission revealed only subdural

² Dr. DeGraw was not qualified as a radiologist; indeed, he admitted that "I would not qualify myself as a radiologic expert." He claimed that he reviewed the films on his own, and never showed them to a radiologist.

hematomas; two days later, the CHM radiology reports call out the presence of a “**New** large intraparenchymal hematoma.” (Emphasis added.)³

Other scientific evidence supported that OS had a birth-related subdural that bled, triggering a seizure and prolonged hypoxia, rather than a traumatic injury caused by shaking as theorized by the prosecution. When OS underwent neurosurgery to drain the subdural hematomas, the surgeons found straw-colored fluid. Dr. Guertin testified that it “usually takes a month to two months” for subdural blood to change to that color. This testimony was not refuted. Furthermore, all of the medical experts agreed that OS had no bone injuries, bruises, or other indications of abuse. Dr. Angelilli conceded that 85% of abused children have other detectable injuries.

On cross-examination, Dr. Angelilli agreed with the central premise of the defense—that it was “certainly possible” for a baby to have an undiagnosed birth-related subdural hematoma that rebled.⁴ She conceded that OS’s CT scan revealed bilateral subdural hemorrhages of at least two different ages, one being chronic. Dr. Herbst testified that CT scans and certain MRI images can detect even slight trauma to the skull, and that no such evidence appeared on OS’s films.

Two additional medical findings generated controversy during the trial. The experts agreed that a traumatic shaking injury is often accompanied by an injury to a child’s neck, similar to whiplash. A single CHM radiology report stated that one set of neck images were “suggestive of ligamentous injury” to the neck. Dr. Herbst explained that in radiology lingo, the term “suggestive” means that a closer look is needed before a true finding can be confirmed. Subsequent images, he opined, ruled out the presence of a neck injury. Once again testifying beyond his pediatric qualifications, Dr. McGraw asserted that an MRI scan showed a strain of OS’s neck ligaments. Dr. Angelilli testified that she had not taken any possible neck injury into consideration when rendering her opinion “since it was not confirmed.”

OS also displayed bilateral retinal hemorrhages, which proponents of SBS/AHT science believe to be virtually diagnostic of trauma. Dr. Guertin advised the jury that he falls into the camp of physicians who agree with the conventional approach to AHT diagnosis. However, he pointed out, chronic subdural effusions can also cause retinal hemorrhaging.

³ Dr. Luis Goncalves authored the report, which described the injury as “[a] new hyperdense lesion . . . in the right temporoparietal region . . . consistent with a fresh intraparenchymal hemorrhage.” Dr. Goncalves is a pediatric radiologist, see <<http://www.phoenixchildrens.org/find-a-doctor/luis-f-goncalves-md>> (accessed February 6, 2018).

⁴ Dr. Angelilli admitted that she had never reviewed OS’s birth or pediatric records. When confronted with evidence of the change in OS’s head circumference, Dr. Angelilli conceded that the numbers were consistent with “something wrong in the head or the brain.” Dr. Angelilli’s incomplete review of the facts went unchallenged during the trial.

The prosecution's remaining evidence consisted of a number of messages exchanged in January and February of 2013 suggesting that Spagnola was not adjusting well to the introduction of two newborns into his life. The prosecutor quoted other text messages in which Spagnola's wife expressed concerns about defendant's anger. The prosecutor also quoted text messages sent and received shortly before Spagnola noticed that OS was unresponsive.

This trial was a battle of the experts. The underlying science was complex and the images on which the experts relied were not readily interpretable by lay persons. The radiologic evidence was critical to the outcome.

II. THE ATTORNEYS' ARGUMENTS

Spagnola challenges the propriety of several of the prosecutor's emotionally-charged statements to the jury, as well as his personal attacks on defense counsel and his introduction of a critical fact not predicated on any trial evidence.

The prosecutor began his opening statement sentimentally, quoting from a book he "read to [his] children at night": "For those who can't speak for themselves, use big, bold voices." The prosecutor continued by declaring the proceedings "[OS]'s case;" telling the jurors that she was too young to testify before them but that they would "hear from doctors" and other witnesses and would "be able to piece it altogether and you are going to listen to [OS]'s voice." Later, the prosecutor informed the jurors that they would learn that Spagnola was home alone with his daughters at the time of OS's injury. He urged the jury, "Remember the times that you weren't patient enough and remember the times that that child was just so fussy you don't think there was anything else you could do, and remember those times that you loved that child enough to put the child down."

In closing argument, the prosecutor continued along this vein. He quoted from a Martina McBride song: "The statue stands in the shaded place. An angle [sic] girl with an upturned face. A name is written on a polished rock. A broken heart the world forgot." He also informed the jury: "I think about [OS], and I think about her growing up with her sister. I think about her asking questions: Why aren't I the same? What happened? Who did this to me?" The answer, the prosecutor stated, was that "[OS] was betrayed by her father."

Defense counsel began his closing with his strongest argument—the prosecutor's failure to present the testimony of a radiologist:

[A]s you think about my comments and you think about the entire case and you deliberate, ask yourself: Well, why did the prosecutor not call any of the specialist[s]? Where was the radiologist from Children's Hospital? Where was the neuroradiologist from Children's Hospital?

I mean, he had a child abuse expert masquerading as a radiologist telling you things that we know are just not true because you yourself were shown the films.

Ask yourselves: Well, if it was that clear cut, where were they? Where were the radiologists? Where was the neurologist? Where was the expert on the

brain? Where was the neurosurgeon? Why did the defense have to call the child's pediatrician?

There was one doctor of the four who came in to testify about something other than whether or not this could have been abuse. Dr. Herbst, an expert in neuroradiology.

Counsel then pointed out that "one side gave you an actual specialist who got up there, and showed you why he thought and concluded" what he did. Counsel highlighted Dr. Angelilli's concession that the neck injury had not been confirmed, and that other evidence supported that OS had not sustained any trauma. He criticized Dr. DeGraw's theory that OS had undergone a violent, physical, slamming trauma, asserting:

The problem is, folks, is not a single specialist came into this courtroom to tell you that, in fact, is even possible.

In fact, the only specialist who came into this courtroom, Dr. Herbst, said in this case with these bleeds, it is not only not possible, it is impossible because the injuries were not there.

Defense counsel devoted most of his remaining argument to a review of the radiologic findings and the other medical evidence. He pointed out that even after being advised of possible trauma, the CHM radiologist noted that there was "no definitive evidence for intraparenchymal hemorrhage," and that none of the other radiology reports supported the prosecution's case. He reminded the jury that:

Two child abuse doctors who are not radiologists are trying to tell you that something is there that an expert in neuroradiology came to court and told you is not true.

And more importantly, their own radiologist that they base their opinions on tells you it is not true.

Instead of responding to this entirely proper closing argument with a response relevant to the evidence of defendant's guilt, the prosecutor began his rebuttal as follows:

Over and over and over again, always the same old dog and pony show. The same old magic show. The same old red herring. The same old smoke and mirrors. The same old "he didn't do it." He didn't prove his case.

I picked, I left each one of you on this jury because you are not stupid. Don't be stupid. Don't believe what you just heard.

Defense counsel did not object to these statements. The prosecutor immediately continued:

Mr. Hosbein: I hope that you appreciate that I didn't extend this trial because my radiologist is in Paris. Would that would have been a long trip back?

Mr. Satawa: Objection. What evidence is there that the radiologist was in Paris. That is completely inappropriate.

The Court: There was a discussion about the radiologist didn't testify. So let's move on.

There is no reference in the record of a "discussion" about the radiologist's absence that occurred in the presence of the jury. Furthermore, the medical records reflect that several different CHM radiologists authored the relevant reports. And the prosecution never identified any radiologist as a potential witness, even at the onset of the proceedings.

III. PROSECUTORIAL MISCONDUCT

"A prosecutor has a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials." *United States v LaPage*, 231 F3d 488, 492 (CA 9, 2000). The line between prosecutorial vigor and prosecutorial excess is not always easy to draw. A memorable line in *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935), differentiates between "hard blows" and "foul ones." Another part of the same opinion instructs:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. [*Id.*]

The Supreme Court has frequently reminded that a prosecutor's comment "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." *United States v Young*, 470 US 1, 18-19; 105 S Ct 1038; 84 L Ed 2d 1 (1985).

Even so, a prosecutor is generally given "great latitude regarding his or her arguments and conduct at trial." *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). "[P]rosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). "Emotional language may be used during closing argument and is an important weapon in counsel's forensic arsenal." *Id.* at 679 (citation and quotation marks omitted). But, "[a] prosecutor may not appeal to the jury to sympathize with the victim. Nor may a prosecutor urge the jury to convict as part of its civic duty or on the basis of its prejudices." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008) (citation omitted).

Several of the prosecutor's statements crossed the line between proper and improper appeals to the jurors' sympathy. The prosecutor's recitation of music lyrics invoking the image of the grave of a murdered and forgotten child was improper. The prosecutor's other naked appeals to sympathy were attempts to divert the jurors' attention from the facts of the case and to inflame their passions. Standing alone, these statements would not demand a new trial. Even without an objection from the defense, the trial court instructed the jury that it "must not [allow] sympathy or prejudice [to] influence your decision." "Curative instructions are sufficient to cure

the prejudicial effect of most inappropriate prosecutorial statements.” *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

The prosecutor’s statements during rebuttal closing argument, however, flagrantly violated legal rules and professional norms. A prosecutor should always avoid argument intended to inflame rather than enlighten. Rebuttal argument deliberately directing the jury’s attention away from the evidence demands heightened scrutiny for two reasons. Not only is defense counsel deprived of any ability to respond, the improprieties are the last words the jury hears before beginning deliberations. See *United States v Holmes*, 413 F3d 770, 776 (CA 8, 2005); *United States v Williams*, 836 F3d 1, 15 (DC Cir, 2016) (“And the remark’s potential for prejudice was even more pronounced because it occurred during the government’s rebuttal—allowing the defense no opportunity to respond.”).

The prosecutor began his rebuttal by disparaging defense counsel and the case defendant presented. The prosecutor characterized defense counsel’s arguments as “the same old dog and pony show,” “[t]he same old magic show,” “[t]he same old red herring,” “[t]he same old smoke and mirrors,” and “[t]he same old ‘he didn’t do it.’ ” Because defense counsel raised no objection to these remarks, they are subject to review for plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only when plain error results in the conviction of an innocent person, or seriously affected “the fairness, integrity, or public reputation” of the proceedings. *Unger*, 278 Mich App at 235. These comments impugned the integrity of the trial.

Because the prosecutor unleashed these improper comments during rebuttal, defense counsel had no opportunity to respond to this direct—and utterly baseless—attack on his integrity and that of the defense experts. Second, taken in full context—including the prosecutor’s admonition that the jurors would be “stupid” to believe what defense counsel had argued—the prosecutor improperly expressed a personal opinion of Spagnola’s guilt and the character of his counsel.

A prosecutor “may not personally attack defense counsel,” *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), or the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or “suggest that defense counsel is intentionally attempting to mislead the jury,” *Unger*, 278 Mich App at 236 (quotation marks and citation omitted). Here, the prosecutor did all three. The prosecutor repeatedly charged that defense counsel had made up the defense. Nothing could have been farther from the truth. The defense presented the unobjected-to testimony of two well-qualified experts whose testimony was not challenged as irrational, unreasonable, or scientifically suspect. The result in this case hinged on the expert testimony. In such cases, our Supreme Court has recognized that “it is especially important to protect against prosecutorial misconduct designed to impugn the credibility of the defendant’s expert witness.” *People v Tyson*, 423 Mich 357, 376; 377 NW2d 738 (1985). Simply put, no evidence or fair inferences supported the prosecutor’s allegations.

Standard 3-6.8 of the American Bar Association Criminal Justice Standards for the Prosecution Function, Fourth Edition, informs our analysis:

(c) The prosecutor should not make arguments calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

(d) If the prosecutor presents rebuttal argument, the prosecutor may respond fairly to arguments made in the defense closing argument, but should not present or raise new issues. If the prosecutor believes the defense closing argument is or was improper, the prosecutor should timely object and request relief from the court, rather than respond with arguments that the prosecutor knows are improper.

Characterizing defense counsel's argument as "smoke and mirrors," "the same old dog and pony show," and a "magic show" is nothing more than the expression of a personal belief that the defense and its witnesses have lied, or deliberately engaged in deceptive tactics. Indisputably, a prosecutor may argue to a jury that a defense claim lacks merit because it is unsupported by evidence, or because it is illogical or contradicted by other evidence. The prosecutor's name-calling did none of those things. Rather, the prosecutor belittled defense counsel and the defense witnesses, implying that the testimony was part of some common defense scheme to hoodwink jurors. There is nothing remotely fair in this argument.

Were that the prosecutor's sole transgression, likely we would still conclude that reversal is unwarranted. But combined with what came on the heels of these plainly improper comments, we can reach no other conclusion but that defendant was denied a fair trial.

Regardless of whether a radiologist the prosecution wanted to call really was "in Paris," the prosecutor's comment was highly improper. The prosecutor implied that had the radiologist been present at the trial, he or she would have testified in a manner consistent with the prosecution's theory of the case. No evidence whatsoever supported this proposition, and the prosecutor knew it. This was deliberate and calculated misconduct, and the prosecutor engaged in it precisely because the case was extraordinarily close. The prosecutor no doubt recognized the central weakness in his presentation and the strength of the defense: the radiology. Defendant had a radiology expert, the prosecution did not. Defendant presented cogent and compelling arguments that the radiology exonerated him. The prosecutor met this argument with prejudicial and inflammatory denigration of defense counsel and his witnesses, and then introduced evidence outside the record that a radiologist would have supported the prosecution's case but for a planned vacation to Paris.

We are unwilling to minimize the prosecutor's transgression or to chalk it up to a moment of unfettered zeal. In personally attacking counsel and the defense witnesses and introducing evidence outside the record the prosecutor did not properly respond to any argument made by defense counsel. Defense counsel's objection-free argument focused on the prosecution's failure to support its case with radiologic evidence and the centrality of that evidence to proof of what happened to OS. The prosecutor met defense counsel's reasoned argument with an invitation that the jury instead believe that a witness who never testified would have supported the prosecution's case. This flouted fundamental ethical precepts. Despite counsel's objection, the trial court permitted the inference of favorable testimony to remain unsullied.

Although preserved, to warrant reversal, prosecutorial misconduct must deny the defendant a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).⁵ This analysis requires an examination of the entire case, focusing on the context of the remarks. *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003).

This was a well-trying case. It was also an extraordinarily close case. Other than the radiology reports, the prosecutor had only scant and relatively unpersuasive evidence (text messages reflecting parental exhaustion) that Spagnola deliberately abused his child. When it came time for argument, the prosecution and defense arguments converged on the medicine, as both recognized that the prosecution's case would rise or fall on what the jury believed had caused OS's brain injury. Much of the expert testimony for counsel's review, however, was complex and abstruse. After the testimony of four experts (which consumed the vast majority of the trial time), both counsel undoubtedly understood that closing argument represented a vital opportunity to translate the testimony into understandable concepts, to highlight the strengths and weaknesses of the experts' presentations, and to motivate the jurors to view the evidence in a certain way. The United States Supreme Court has recognized the critical role that argument often plays:

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. [*Herring v New York*, 422 US 853, 862; 95 S Ct 2550; 45 L Ed 2d 593 (1975).]

By telling the jury that he had expert testimony that would have refuted the defense experts but was prevented from presenting it due to unfortunate circumstances outside of his control, the prosecutor used the power of his office to circumvent the rule that only properly admitted evidence may be considered. Unfortunately, the trial court implied that the evidence actually existed ("There was a discussion about the radiologist didn't testify. So let's move on.") rather than instructing the jury to disregard the prosecutor's unfounded insinuation.

Spagnola draws our attention to other prosecutorial comments that he claims crossed the line between proper and improper argument. The prosecutor insinuated that Spagnola's hiring an attorney and Spagnola's brother's Internet research into SBS evidenced Spagnola's consciousness of guilt. In rebuttal, the prosecutor argued that after learning that there was "no

⁵ Because prosecutorial misconduct implicates constitutional due process, we question whether the harmless error standard should instead apply. Under that standard, a new trial would be unwarranted only if the prosecution demonstrated that the prosecutorial misconduct was harmless beyond a reasonable doubt. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008).

explanation” for OS’s injuries, Spagnola conducted Internet research and “comes up with some terminology.” Defense counsel objected because the trial evidence was that Spagnola’s brother conducted this research, not Spagnola. After the court sustained the objection, the prosecutor continued undeterred, “All points, point to Andrew Spagnola.”

Spagnola contends that this argument, too, violated his constitutional rights by implying that his attempt to protect himself from adverse legal proceedings reflected his consciousness of guilt. As Spagnola did not raise this challenge below, it is unpreserved and our review is limited to plain error affecting his substantial rights. *Brown*, 294 Mich App at 382. Spagnola relies primarily on *State v Angel T*, 292 Conn 262, 281-282; 973 A2d 1207 (2009), in which the Supreme Court of Connecticut held that the prosecutor violated the defendant’s due process rights by arguing that his prearrest consultation with an attorney indicated his guilt. The court acknowledged that a defendant’s Sixth Amendment right to counsel “does not attach until the commencement of adversary judicial proceedings via the filing of the information at the arraignment . . . and the separate and distinct fifth amendment right to counsel is limited to custodial interrogations by government agents” *Id.* at 282. The court concluded that “because these particularized rights had not yet attached when the defendant contacted his attorney, they are not implicated directly by the prosecutor’s conduct in the present case.” *Id.* at 283. However, the court further concluded that the prosecutor’s argument was “highly prejudicial, as it is likely to give rise to the improper inference that a defendant in a criminal case is, or at least believes himself to be, guilty.” *Id.* at 283. Although the defendant in *Angel T* failed to assert a timely objection, the court concluded that “[t]he prosecutorial impropriety deprived the defendant of a fair trial because it was pervasive, uninvited by the defendant, and was not subjected to specific curative measures as a result of what the defendant considers to be the [i]nexplicabl[e] failure of his trial counsel to object.” *Id.* at 295 (quotation marks omitted). The court articulated several factors that made the defendant’s guilt a close question, creating a possibility that the prosecutor’s improper argument tipped the balance in the prosecution’s favor. These factors included a lack of physical evidence corroborating the defendant’s guilt, concerns that the complainant’s mother’s bias against the defendant adversely affected her credibility, and “multiple reports of jury deadlock” indicating that “the fact finder itself did not view the state’s case against the defendant as particularly strong.” *Id.* at 293-295.

The Connecticut court’s decision is persuasive because it is consistent with the firmly established principle that “prosecutorial references to a defendant’s post-arrest, post-*Miranda*[*v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966),] silence violate a defendant’s due process rights under the Fourteenth Amendment of the United States Constitution.” *People v Shafier*, 483 Mich 205, 212-213; 768 NW2d 305 (2009). In *Shafier*, our Supreme Court stated:

The United States Supreme Court has explained the rationales behind the constitutional prohibition against the use of a defendant’s post-arrest, post-*Miranda* silence. To begin with, a defendant’s silence may merely be the defendant’s invocation of the right to remain silent, as opposed to a tacit acknowledgement of guilt. “[E]very post-arrest silence is insolubly ambiguous. . . .” Further, *Miranda* warnings provide an implicit promise that a defendant will not be punished for remaining silent. Once the government has assured a person of his right to remain silent, “breaching the implied assurance of

the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires.”

Consistent with these rationales, a defendant’s post-arrest, post-*Miranda* silence cannot be used to impeach a defendant’s exculpatory testimony, or as direct evidence of defendant’s guilt in the prosecutor’s case-in-chief. “What is impermissible is the evidentiary use of an individual’s exercise of his constitutional rights after the State’s assurance that the invocation of those rights will not be penalized.” There are limited exceptions to this general rule, but none applies here. This Court has adopted this understanding of a defendant’s due process rights and stated that post-arrest, post-*Miranda* silence “may not be used substantively or for impeachment purposes since there is no way to know after the fact whether it was due to the exercise of constitutional rights or to guilty knowledge.” [*Id.* at 213-214 (citations omitted).]

We agree with the court in *Angel T* that these principles also preclude a prosecutor from arguing that a defendant’s consultation with an attorney before his arrest suggests consciousness of guilt. Although the prosecutor’s argument in this scenario does not implicate a defendant’s specific constitutional rights to counsel under the Fifth and Sixth Amendments, such arguments unfairly insinuate that a defendant’s efforts to proactively safeguard his legal rights should be construed as evidence of guilt.

In this case, however, the prosecutor did not directly make this argument as defense counsel interrupted and objected on different grounds. Accordingly, the prosecutor did not actually violate Spagnola’s rights in this manner.

The prosecutor also summarized the text messages between the Spagnolas and argued their importance for the first time in rebuttal. Defense counsel objected because he had not raised them in his closing, making them an improper topic for rebuttal. But the trial court overruled the objection and the prosecutor argued at length that the Spagnolas were experiencing marital problems “culminat[ing] to this explosion on March 2nd.” Spagnola also contends that the prosecutor presented a chart during rebuttal, which he must have created earlier, demonstrating that he intended all along to withhold certain argument until rebuttal.

MCR 2.513(L) limits the scope of the prosecutor’s rebuttal closing argument “to the issues raised in the defendant’s argument.” Defense counsel made no mention of the text messages during his closing argument. Therefore, the prosecutor’s summary of that evidence on rebuttal was improper and in violation of the court rule. This belated and evidently planned ambush denied Spagnola the opportunity to raise any argument in response. This was yet another example of the prosecutor’s abuse of his rebuttal argument.

All of these actions, sometimes met with objection and sometimes not, fell outside the bounds of ethical conduct. And the prosecutor likely engaged in this course of misconduct because he knew his case was far from open-and-shut. In this context—a weak case with a strong defense—uncured prosecutorial misconduct is likely to tip the scales. An experienced prosecutor certainly would have understood that claiming to have supportive evidence that was not presented is misconduct; the “Paris” comment was unquestionably deliberate. The

prosecutor knew—or hoped, at least—that the jury would value his unsworn testimony, despite the prosecutor’s likely awareness that he had broken a cardinal rule. The trial court did nothing to mitigate the impact of the prosecutor’s improprieties, despite several objections. Because that comment combined with other misconduct denied Spagnola a fair trial, a new trial is required.

IV. VALIDITY OF SBS/AHT EVIDENCE

On appeal, Spagnola contends that the trial court should have precluded Dr. Angelilli’s testimony because the science behind SBS/AHT diagnoses has been debunked. Although Spagnola challenged the validity of the science in his motion for a *Daubert* hearing, he essentially abandoned that argument at the hearing, focusing on the deficiencies in Angelilli’s qualifications to diagnose OS. We find no reversible error on this ground.

V. REMAINING ISSUES

Given our resolution of these issues, we need not consider whether the trial court erred in denying Spagnola an opportunity to present surrebuttal testimony from Dr. Guertin in response to Dr. DeGraw. And Spagnola’s challenge to the prosecution’s production during discovery as a “document dump” is now a moot point. Defense counsel has now had more than adequate time to review the voluminous medical records and communications contained on 10 CDs provided during pretrial discovery. Moreover, contrary to the defense’s complaint, the disks’ contents were not so disordered as to be burdensome.

We vacate Spagnola’s conviction and sentence and remand for a new trial. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher