

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant

v.

DANIEL BRADY, SR.

Appellee

CASE NO. 2007-0742

On appeal from the Ashtabula County Court of Appeals, Eleventh Appellate District

Court of Appeals

Case No. 2005-A-0085

MERIT BRIEF OF APPELLEE, DANIEL BRADY, SR.

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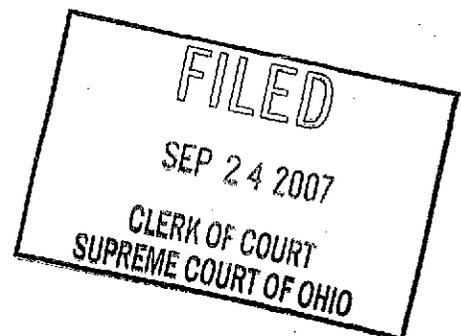


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The state must declare the child to be the most precious treasure of the people. As long as the government is perceived as working for the benefit of the children, the people will happily endure almost any curtailment of liberty and almost any deprivation.

--Adolph Hitler (Mein Kampf)

Child pornography is so repulsive a crime that those entrusted to root it out may, in their zeal, be tempted to bend or even break the rules. If they do so, however, they endanger the freedom of all of us. - United States vs. Coreas (2005), 419 F.3d 151, Rakoff, District Judge.

STATEMENT OF FACTS

Ohio omits key facts from its statement. It omits that Mr. Brady was found not guilty by a jury to all counts of gross sexual imposition in his bifurcated trial on those charges. The state's case was reliant exclusively upon witness testimony of extended relatives also the sole source for the claim that Brady placed the alleged contraband images on a computer in a house they all shared. Those witnesses, not believed by the jury in Brady's other trial, only disclosed the existence of these alleged contraband images to law enforcement months after Brady had moved out of the house and they had continued using the computer throughout that time.

Expert Witness work is a Federal Crime, Yet is Legal in Ohio

"The State later learned through contact with F.B.I agent Charlie Sullivan that [the potential defense expert] was under investigation for crimes involving child pornography...." (Br. at 1). The state omits that the defense expert was being "investigated" *solely related to conduct which the federal government admitted was performed as part of his duties as an expert witness or defense attorney in Ohio state and federal cases.* However, even the federal government, in its affidavit related to these matters, neglected to inform the federal magistrate signing that warrant, that the "suspect" performed his expert witness duties under Ohio state court orders and, in many cases, was paid by Ohio to perform those duties on behalf of indigent defendants. Therefore, it is hardly with clean hands that the state of Ohio approaches this matter after having paid for the expert to commit "crimes involving child pornography" according to the FBI. The law of conspiracy casts some culpability upon the state for that conduct, if this court is to find it criminal at all under the federal statute.

"[The defense expert] advised the trial court that he could not accept the compact discs for fear of being prosecuted." (Br. at 2). The state claims only this fact affected the expert's

performance. Were this the sole impediment to a fair trial, accommodations could have been made that, while unacceptable to defense counsel, would have likely been found acceptable to the trial court. The motion to dismiss brief reveals the extent of the unfairness to Brady.

“[1][The defense expert] is no longer able to accept receipt of copies of the evidence in this matter as the federal government deems that a violation of federal law....[2][The defense expert] is no longer able to conduct research, assisting counsel, into the possible exculpatory origin of the seized images. [3] He is no longer able to prepare digital image trial exhibits to assist in Mr. Brady's defense.” (Motion to dismiss at 4). The defense argued that many tasks, these three chief among them, could not be performed in Brady’s defense.

In addition to the tasks the Brady trial court found necessary, this court, in State v. Tooley, 2007-Ohio-3698 set out a list of tasks that are now necessary to perform in the defense of these cases. (See figure 1). These tasks are necessary to perform to attempt to answer the questions posed by this court in Tooley. (Id). They are also necessary to provide the items that this court felt were lacking in the Tooley record. (Id). This court in Tooley set a standard for what was not shown, and by implication must be shown, about digital images in these cases to persuade it of image indistinguishability. (Id). It is hypocrisy for the state to argue that the performance of tasks necessary to obtain information and generate exhibits designed to meet the Tooley standard is not necessary.

Many of the questions this court found wanting in Tooley cannot be answered without performing tasks that the Brady trial and appellate courts found necessary. (Establishing that legal/illegal images are indistinguishable, (Tooley at ¶22); Search online to determine if virtual child pornography is “widely available” (Id at ¶25); Create record that “digital images of simulated and actual child pornography visually are the same.” (Id. at ¶26); Establish it is

“absolutely impossible to distinguish between simulated and actual child pornography.” (Id at ¶27); Seek evidence that alleged contraband images were or could have been “generated without the use of a real child.” (Id. at ¶35); Establish “a substantial amount of virtual pornography exists.” (Id at ¶39); Seek and obtain text on the website where the [child] pornography was found.” (Id. at ¶40); Statutory protection to perform tasks for judicial purposes in child pornography cases (Id. at ¶43); Use defense expert to challenge prosecution evidence (Id. at ¶49); present evidence “experts cannot distinguish between actual and virtual child pornography.” (Id. at ¶49); Present evidence challenging claim “juries can decide” whether digital images are altered or not (Id. at ¶50-¶52); Present evidence “rapidly approaching” time has arrived regarding image technology (Id. at ¶58).

After presenting this list of tasks and answers to be sought in Tooley, the state now argues that performing tasks to deal with those issues, required by this court, should be prohibited. To rule in the state’s favor means that no defendant can ever meet any of the requirements this court put forth in Tooley.

<u>Item from Tooley</u>	<u>Task necessary to perform to address that item</u>
Establishing that legal/illegal images are indistinguishable, (<u>Tooley</u> at ¶22, ¶26, ¶27, ¶49, ¶50-¶52, ¶58)	Research the state of digital imaging technology and prepare digital image exhibits that “appear to be” contraband to contrast with those that are contraband demonstrating indistinguishability
Search online to determine if virtual child pornography is “widely available” (Id at ¶25, ¶35, ¶39);	Search websites, newsgroups and other locations and view, download and catalog content available at those sites. Determine, if possible, whether that content is contraband content or merely “virtual” child pornography.
Seek and obtain text on the website where the [child] pornography was found.” (Id. at ¶40);	Travel to the website of origin of indicted content, note the content there, download the text information, etc. from that site on pages where indicted images are hosted, if they are there.
Use defense expert to challenge prosecution evidence (Id. at ¶49)	(See Above)

All of the tasks listed by this court in Tooley or required to produce the evidence called for by this court in Tooley are illegal for defense counsel or its expert in Brady to perform. They are legal under Ohio law (see exceptions in R.C. 2907.321, R.C. 2907.322 and R.C. 2907.323) and performed in other previous Ohio cases. The federal government has utilized its discretion to investigate and threaten to prosecute defense counsel and defense experts, exclusively, for performing those otherwise legal tasks under Ohio law. Despite that reality, the state argues Brady can receive a fair trial.

The remaining omitted facts will be provided as appropriate within the relevant arguments.

FIRST PROPOSITION OF LAW: APPELLEE'S MOTION TO DISMISS WAS BASED ON FACTS THAT WENT BEYOND THE FACE OF THE INDICTMENT AND, THUS, WAS NOT PERMITTED UNDER THE OHIO RULES OF CRIMINAL PROCEDURE.

A. The Rule Regarding Dismissal

Brady's motion was governed by Criminal Rule 12. Brady was entitled to file the motion. (Crim.R. 12). Crim.R. 12(C) permits dismissal of criminal cases based upon matters "capable of determination without the trial of the general issue."

B. What the Trial Court May Consider

Crim R. 12(F) permits courts when ruling upon motions to dismiss to consider "briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means."

C. When a Defendant Waives Crim.R. 12 Arguments

Crim.R. 12(H) reads that failure to raise such "defenses or objections"..."shall constitute waiver of the defenses or objections...." Crim.R. 12 (C) re-iterates that a motion to dismiss must be filed prior to trial.

The state's proposition of law is contradicted by Crim.R. 12(F). If all such motions were confined to the words within the indictment, courts considering such motions *cannot consider* "briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means" as Crim.R. 12(F) clearly contemplates. To agree with the state's contention, this court must delete 12(F). It must also overturn years of case law throughout the state in which appellate courts affirmed trial courts that considered facts outside the indictment in ruling upon a variety of Criminal Rule 12 motions. (E.g. State v. Nichols, 2007-Ohio-3257 (Motion to dismiss for speedy trial violation must be filed prior to trial); State v. Smith, 2007-Ohio-3182 (Motion to dismiss for lack of personal jurisdiction must be filed prior to trial or plea); State v. Powell, 2006-Ohio-5031; State v. Brocious, 2004-Ohio-5808 (Crim.R. 12(C)(1) dismissal of charges for for improper use of an immunized statement); State v. McGrath, Sept. 6, 2001, Cuyahoga App. No. 77896. (In accordance with Crim.R. 12(E) "It was proper for the judge to determine the issue of double jeopardy at a pre-trial hearing on the record, absent a jury."))

Crim.R. 12 motions to dismiss contemplate all types of evidence gathering, testimony and hearings. Brady's motion did not rely on any facts, testimony or evidence relating to his guilt or innocence. Therefore, it was "capable of determination without the trial of the general issue." Crim.R. 12(C).

D. What Information was Brady Entitled to Present?

Given the state's proposition of law conflicts with Crim.R. 12(F), what information was Brady entitled to present in his motion to dismiss brief or resulting hearing? The state's position is – zero. Brady counters that he is entitled to present "briefs, affidavits...testimony and exhibits [and request] a hearing." (Crim.R. 12(F)).

Other appellate courts across the state have already spoken on this matter – and

unanimously so. As noted above, briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means are frequently relied upon to rule on Crim.R. 12 motions to dismiss.

The state supports its position with one case. “If a motion to dismiss requires examination of evidence beyond the face of the complaint, it must be presented as a motion for acquittal under Crim.R. 29 at the close of the state's case.” State v. Varner (1991), 81 Ohio App.3d 91. The key phrase here is “examination of evidence beyond the face of the complaint.” The state urges this court to read that phrase broadly, so broadly in fact, that it encompasses all facts of whatever type, including those wholly unrelated to the defendant’s guilt or innocence. No other appellate court, including the appellate court in Brady, makes that interpretation the state urges now. Doing so would overturn caselaw recognizing motions to dismiss permitting the examination of all types of evidence and require the deletion of Crim.R. (F). Brady’s motion to dismiss was proper under the rule as it relied on material explicit in Crim.R. 12(F).

“Brady was not challenging the sufficiency of the potential evidence to support the charges in the indictment. Rather, he was making a constitutional challenge, arguing his right to a fair trial was compromised....” (State v. Brady 2007-Ohio-1779 at ¶26). Brady’s motion to dismiss did not implicate any trial issues; thus, it was capable of determination prior to trial pursuant to Crim.R. 12. (Id. at ¶27).

The proof of this point, clear to the trial court and the appellate court, is manifest by reading Brady’s motion and the state’s response. Nowhere in either document are the parties arguing about any “trial issues” or facts touching on Brady’s guilt or innocence. This court does not know anything about the underlying alleged facts of Brady’s charges – nor should it. Those matters are irrelevant to the determination of Brady’s fair trial violation argument and have been

at all stages of this matter thus far.

Let us suppose the state's position was correct. Brady cannot make such a motion reliant upon anything other than the indictment. That proposition prohibits all the types of pre-trial motions noted above. It also creates the ridiculous procedure of Brady asserting a fair trial violation at the inception of his trial, but being required to conceal the basis for that motion from the trial court as it is information "outside the indictment." In fact, even after the state's case and Brady's case, if any, are presented to the jury, he still cannot make a fair trial motion reliant upon anything except the wording of the indictment. This proposition of law is should be rejected by this court as meritless.

SECOND PROPOSITION OF LAW: DUE PROCESS DOES NOT REQUIRE THE PROVISION OF EXPERT ASSISTANCE RELEVANT TO AN ISSUE THAT IS NOT LIKELY TO BE SIGNIFICANT AT TRIAL.

This proposition has two principal points. First, that due process did not require the provision of an expert for Mr. Brady. Second, even if an expert is required, the expert's research, advice, preparation of exhibits and testimony, at trial, is not likely to be significant.

Standard of Review – Necessity of an Expert

The determination of whether an expert witness is necessary for a defendant in a criminal case "is left to the sound discretion of the trial court." (Brady at ¶33). "On appeal, the state [did] not contest the trial court's decision that Brady was entitled to the services of an expert." The state (just as criminal defendants) cannot assert on appeal to the state's highest court a matter that it failed to raise at the trial or appellate levels of this matter. (Id at ¶ 31).

In State v. Awan (1986), 22 Ohio St.3d 120, syllabus, this court held: "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's

orderly procedure, and therefore need not be heard for the first time on appeal.” This proposition addresses an issue of constitutionality as it relates to whether “due process” requires the provision of an expert. The state has forfeited the right to argue that point. The expert was qualified by the court. The court found that Brady needed an expert in digital imaging. The state failed to argue otherwise to the court of appeals, therefore, the necessity of such an expert is undisputed and undisputable to this court. Anticipating this court may still entertain its argument anyhow, it will be addressed.

A trial court has broad discretion to grant or deny an indigent defendant's motion for the appointment of an expert witness or a state-funded investigator in a non-capital case, and this court reviews the trial court's decision to grant or deny such appointment for abuse of discretion. (State v. Blankenship (1995), 102 Ohio App.3d 534, 551, citing State v. Weeks (1989), 64 Ohio App.3d 595, 598).

The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. (Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, quoting State v. Adams (1980), 62 Ohio St .2d 151, 157).

Unreasonableness Standard

It is not unreasonable for the trial court to find Brady needed the assistance of a digital imaging expert in a case that involved – allegations of possession of illegal *digital images*. The state hired its own digital imaging expert. By implication, the state felt that the use of such an expert was reasonable. Its argument here is that solely Brady's use of such an expert was unreasonable. Ohio and federal courts have found the appointment of a digital imaging expert for an indigent defendant necessary in cases involving identical charges to those here. (See Figure 2). Finally, the state has not argued the trial court's decision was unreasonable.

Arbitrariness Standard

The court's decision is not arbitrary. The court did not appoint an expert in ballistics or DNA or fingerprint analysis, etc. It held a full hearing prior to deciding if Brady needed a digital imaging expert witness. The state was afforded a full opportunity to present evidence to the contrary. The appellate court affirmed that the trial court did not abuse its discretion. Just as with the reasonableness issue, the state has not argued the court's decision was arbitrary.

Not Unconscionable

There is nothing unconscionable about the finding that Brady needed a digital imaging expert either. Such a finding by this court would be contradicted by the state's conduct in this case and many others hiring its own digital imaging expert. (See Figure 2).

The state hired its own digital imaging expert, Hany Farid. It paid him for his services and he produced a report in anticipation of testifying. The state argues the authenticity of the sole evidence – digital images – is not likely to be a significant issue at trial. Despite this contention, it used taxpayer's money to pay Farid to receive, possess and analyze evidence that it alleges will not be significant at trial.

The state will not concede that the digital image evidence it will offer is fake. To do so destroys its case resulting in a dismissal or directed verdict. It will contend the digital images it seized are authentic. It will also argue Brady *knew* the images were authentic as opposed to altered or completely fake. (See required elements in R.C. 2907.321, et seq). Brady is entitled to the assistance of a digital imaging expert to determine and argue, if appropriate, the seized items are not authentic. He is entitled to that expert's assistance to demonstrate and argue that he did not know the digital images are authentic.

In preparation for trial, Farid can search the Internet and elsewhere to determine the

origin of the seized digital images. The state can produce exhibits demonstrating how difficult it is to create fake child pornographic images or how easy it is to detect same as this court noted in Tooley. It can choose to perform none of these tasks. Regardless, the trial court found that Brady was entitled to an expert (and defense counsel) able to perform all, some or none of these functions as his defense required. The boundaries of appropriate and necessary defense attorney and defense expert trial preparation are not defined by what tasks the state chooses to perform or hire expert to perform. It is not defined by tasks or research the state speculates will not “likely be significant at trial.” Such a constricted definition of a citizen’s right to defend defines a dictatorship, not a constitutional democracy.

The state clearly believed it needed the assistance of its own expert in this matter for whatever purposes yet to be discovered or perhaps never disclosed. It can choose to obtain advice, witness examination ideas and other information from Farid or whomever and merely use that at trial and omit his testimony. This is still the legitimate use of an expert witness.

The state’s decision to use a digital imaging expert makes unfair the ruling the state seeks finding the provision of an identical expert to Brady as unnecessary. Finding one necessary for the state and not for Brady reveals an argument in partiality of the most obvious form.

Counsel could not locate a standard the state must meet in order to reverse the trial court’s discretionary granting of a motion to appoint an expert. There is a standard that defendants must meet to establish their need for an appointed expert. That standard is an appropriate one to apply here.

A defendant seeking a court-appointed [expert] must establish the reasonableness of his request and some particularized need for the services of an investigator. (Blankenship at 551). “[V]ague arguments to the trial court [do] not establish a particularized need for an [expert].

(State v. Davis 2006-Ohio-193 at ¶ 13). It seems appropriate, at a minimum, to require the state to establish a particularized *lack* of need for an expert for Brady and something beyond “vague arguments.” (Id).

“Pursuant to Ake, it is appropriate to consider three factors in determining whether the provision of an expert witness is required: (1) the effect on the defendant’s private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government’s interest if the service is provided, and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided.” (State v. Mason, 82 Ohio St.3d at 149, citing Ake v. Oklahoma, 470 U.S. at 78-79).

The state does not contend the trial court failed to properly consider these factors. It has, therefore, waived any such argument at this stage. Despite the state’s failure to argue, the trial court met the Mason standard.

Effect on Defendant’s Private Interest In Accuracy of the Trial

Images that merely “appear to be” child pornography are constitutionally protected. (Ashcroft v. Free Speech Coalition (2002), 122 S.Ct. 1389, 535 U.S. 234). Images that depict *actual* minors are illegal. (R.C. 2907.321, R.C. 2907.322 and R.C. 2907.323). The key evidence against Brady was digital images alleged to depict *actual minors*. Any error in whether the digital image evidence is authentic deeply affects Brady.

This court recently held citizens and jurors, non-experts all, are able to detect whether a given digital image is altered or not. (State v. Tooley, 2007-Ohio-3698). Government digital imaging experts, including Farid, have repeatedly testified that they, *experts*, lack the capacity to determine whether a given digital image is altered. (U.S. v. Frabizio (August 11, 2006) 2006 WL 2384836 (D.Mass.) As a *technological fact*, citizens and jurors, as non-experts, cannot detect

whether a digital image is altered. (Id). This position is further supported by the complete absence of any case law finding a particular citizen or juror has that capacity, *based upon the testimony of a digital imaging expert witness* for either the prosecution or defense. All authority for this point is contrary to this notion of image indistinguishability as between an unaltered and altered digital image. In short, no one except a selection of ever increasing jurists, citing to each other in an echo chamber of disproven and disprovable positions, espouses the belief that anyone, experts or not, can reliably detect alterations in digital images. (See Figure 3).

While case law, although technologically flawed, has found that the state need not produce an expert witness in order to establish its evidence is authentic, that position does not foreclose a defendant from using an expert to debunk the state's evidence.

The state had two choices in this case regarding the use of a digital imaging expert – use one or not. It chose to use one. In fact, it hired another private citizen digital imaging expert, as did the defense. It did not seek any protective order relating to using this private citizen, Hany Farid, as its expert. It did not seek protection to transmit what it alleged was contraband to this private citizen expert. It did not inform or seek permission from federal authorities to do so either. It did not require its expert to come to its offices to review the indicted images. It sent copies of those indicted images to Farid, as it did to Brady's expert.

Without any notification or permission from anyone, the state duplicated alleged child pornography, transmitted it in interstate commerce, Mr. Farid received that alleged child pornography and he possessed it. Following the conclusion of his report, Mr. Farid transmitted that child pornography back to the state prosecutor. That conduct results in two federal crimes committed by the state prosecutor (duplication and transmission of alleged child pornography)

and three federal crimes committed by *private citizen* Farid (receiving, possessing and transmitting alleged child pornography). (See 18 U.S.C. 2252 and 2252(A)). Mr. Farid may also have duplicated it on his end as part of his analysis and report production resulting in yet another federal crime.

Mr. Farid is not an obscure expert with whom the federal government or state of Ohio is unacquainted. He has testified in two Ohio child pornography cases, one prior to Brady and one after Brady as the state's expert. (See State v. Heilman 2006-Ohio-1680 and State v. Harrison, 2005-CR-10-099, Madison County, Ohio). He is now a trainer for the federal government on these issues and an invited expert to their nationwide conferences. (Exhibit 1). He has testified as a digital imaging expert in federal cases after Brady as well. (See Frabizio).

Lack of Exception, Explicit or Implicit, in Federal Child Pornography Statute

The federal child pornography statute is clear on its face that, no person, may duplicate, transmit, receive or possess images of child pornography. (18 U.S.C. 2252, et seq). If this court gives any credence at all to the federal government's position that Brady's expert, in his capacity as an expert under the authority or protective order of Ohio state and Oklahoma federal court judges, committed federal crimes, then it must also acknowledge that Mr. Farid, **in this very case**, also committed several federal crimes. To accept Brady's expert committed federal crimes while rejecting that Farid did as well is logically bankrupt.

Implicit Exception In Federal Child Pornography Statute

The conduct of the federal government's search of Brady's defense expert's home and person also forecloses any implicit "judicial purposes" exception to the federal statute this court may desire to impute.

Ohio's General Assembly placed a carefully worded and intentional exception in its child pornography statutes. (See, e.g. R.C. 2907.321). That exception serves many important purposes. For example, it permits the legislature to seek and be provided information on the current state of child pornography and technology to revise its statutes to better protect children. It enables appropriate health care individuals to perform research to provide treatment for victims of the crime that child pornographic images capture. It permits law enforcement to gather information about such images, produce training materials and instruct officers about how to best combat the evils of child abuse. It permits, in the judicial purposes section, judges, juries, court reporters, clerks of court, couriers and the like to possess, albeit temporarily, alleged child pornography in order for the judicial process to function. It also permits expert witnesses in digital imaging to research the origin of alleged contraband images and create digital image exhibits to address issues of developments in digital imaging technology, including those this court found significant in Tooley.

A careful reading of the affidavit to the search warrant used in the search of Brady's expert's home and person reveals that the sole conduct which formed the basis for probable cause of a violation of federal law was conduct that fit squarely within the "judicial purposes" exception in R.C. 2907.321, R.C. 2907.322 and R.C. 2907.323. In fact, in each of the cases cited in that affidavit, that expert had the authority of either the Ohio state court or Oklahoma federal court to perform the precise conduct the federal government deemed a violation of federal law. At least for the Ohio matters cited in the federal affidavit for the search, it is certain that conduct fell within Ohio's exception. It was performed under the authority of state judges, at their request in some cases and paid for by state funds. (See Figure 2).

Without An Exception in Federal Statute, Why the Disparate Treatment of Defense Expert and State's Expert in Brady?

This does not need to be made explicit for logic's sake, but for the record, it will be. The federal government has discretion, as does the state, to prosecute whichever cases it deems appropriate.

Farid is committing federal crimes based upon the federal government's "no exceptions" application of 18 U.S.C. 2252 and 2252(A) to Brady's expert's conduct. Obviously, the federal government believes that Brady's expert is also committing federal crimes in his capacity as a defense attorney and digital imaging expert witness in Ohio and federal cases. (See Federal affidavit to search warrant).

The federal government is exercising its prosecutorial discretion to investigate, search and perhaps indict Brady's expert (and any other expert he would hire to perform the same necessary tasks). It is reasonable for Brady's trial counsel then and in the future to presume they too would be subject to federal indictment for performing similarly necessary investigatory tasks. The federal government is not exercising that discretion against the state's *private citizen* expert, and sometime federal digital imaging expert, Farid. It is not exercising that discretion against Mr. Santini or his then assistant Ms. Burnside. In fact, it relies upon Farid to train federal agents in child pornography cases (Exhibit 1) and regularly communicated with the state prosecutor despite their federal law violations. The only difference between Farid and Brady's expert's work is that Brady's expert is assisting a defendant and Farid is assisting a prosecutor.

It matters not that one expert may perform additional tasks that the other does not, what matters is that both are either committing federal crimes or they are not. Both are either properly pursued by federal authorities or they are not. The conduct of both is within the "judicial

purposes” exception to the Ohio statutes or it is not. As of the time of Brady’s motion to dismiss, only his expert was being pursued. Only his expert, a defense expert, and his defense attorney, risked federal prosecution for performing what the trial court found were necessary tasks. The trial court explicitly found that expert assistance was necessary and Brady’s expert needed possession of copies of the alleged child pornography. (Brady at ¶9-11). The appellate court explicitly found Brady’s expert’s testimony “was necessary in light of the United States Supreme Court’s decision in Ashcroft v. The Free Speech Coalition.” (Id. at ¶5).

Given Brady’s was Entitled to a Digital Imaging Expert, was the Fair Trial Standard Properly Applied?

The standard of review for a fair trial analysis is de novo. (State v. Palivoda 2006-Ohio-6494 at ¶4).

The state missates the problem presented to the trial court and its ruling.

The problem for Brady, and for any other Ohio citizen facing similar charges, is not that there were “limitations placed on upon *his* expert”, but that crippling and unfairly applied limitations were applicable to *any defense digital imaging expert* Brady would use and any defense counsel he had appointed if one could be convinced to risk federal prosecution to participate. This is repeatedly overlooked by the state and the appellate court’s dissent in this case. Defense attorneys are expected to perform some modicum of investigation to represent their client. A basic step in any investigation is determining whether the state’s evidence is authentic or not. In this case, defense counsel cannot even do that without fear of federal prosecution. He cannot go online, search for websites or locations where the indicted files may currently be available and review the information at that location, perhaps download representative samples of that site to establish the presence of a copy of that indicted image on the site and produce that evidence at trial if exculpatory. He cannot perform one of the explicit

tasks this court identified in Tooley. “To show recklessness, the state may offer evidence such as the Internet search terms the defendant employed to find the child pornography, the text on the website where the pornography was found, the file names and titles of the images, as well as whether an identifiable victim is portrayed, and any technological information regarding the images themselves.” (Tooley at ¶40).

To rebut such evidence, or perhaps find exculpatory evidence, Brady is entitled to locate view “the website where the pornography was found.” (Id). He is entitled to research the origin of the image to determine “whether an identifiable victim is portrayed....” (Id). He is entitled to obtain “any technological information regarding the images themselves.” (Id). Under federal law, visiting “the website where the pornography was found” is sufficient to initiate an investigation. Downloading information or other images from an alleged child pornography website to determine “whether an identifiable victim is portrayed...” can also trigger a federal investigation. Deciding otherwise places this court in the role of referee in every future child pornography case ruling, case by case, whether task A is necessary and illegal under federal law or can be accomplished by replacing it with task B and so on. Trial courts are best positioned to make such determinations just as the trial court did in this matter.

Merely Replacing Brady’s Expert Does Not Avoid the Fair Trial Problem

The state alludes to the resolution of this matter as a mere replacement of Brady’s expert. Let us assume this court finds that resolution attractive. What then? A new digital imaging expert is appointed. New defense counsel is appointed. They both seek and receive a protective order from the trial court identical to the one already provided here. They both review that protective order and see that it permits them to possess copies of the evidence, perform investigatory tasks, download relevant conduct from websites as research or exhibits, create

digital image exhibits as case-in-chief or cross examination material, etc. In short, they are entitled to perform whatever tasks the state prosecutor and Farid are entitled to perform. However, the trial court can only permit that conduct as within the exception under Ohio law. The trial court has no authority to prohibit the federal government from pursuing either of those individuals relating to that conduct. Brady's new counsel and new expert will not be provided a roadmap from anyone as to how to navigate the minefield of permitted and prohibited tasks, under *federal law*. The rational choice, therefore, is to do nothing. Do not possess copies of the evidence, perhaps do not even view it to insure the federal law is not somehow applied to that conduct. Clearly, they should not search for the origin of these images online or elsewhere. Regardless of technological truths like those testified to by government experts (frabizio citation), they dare not produce digital image exhibits demonstrating that reliably distinguishing altered from unaltered images of apparent child pornography is impossible. They dare not attempt to obtain the evidence this court identified as potentially persuasive in Tooley.

The Inadequacy of Imagined Half Measures

The state may reply that it can solve all of Brady's expert's and attorney's problems.

1. Both can view the digital image evidence on a prosecutor's or their expert's computer.
2. Brady's expert and defense counsel can perform all necessary online investigations on a computer at the prosecutor's office or detective's office.
3. Any digital image exhibits they seek to create can be created on the prosecutor's or detective's computers.
4. An adjunct to number 3 is the state's argument that it is not necessary to show images altered to appear to be child pornography in order for Brady's digital imaging expert to make clear his point that reliably distinguishing altered from unaltered images of that type is not

possible.

As a first response to each of these half measures is that the General Assembly has provided for an exception in Ohio law obviating the need for any of them. This court is not entitled to ignore the exceptions in R.C. 2907.321, et seq. It can rule those exceptions unconstitutional (although no basis has been argued by the state for such a ruling and none exists), but it cannot simply ignore them. The General Assembly's position on a fair trial contemplates permitting defense counsel and experts to perform functions for judicial purposes without fear of prosecution. The exception also recognizes the inherent unfairness and dramatic increase in cost for defendants of some means that pertains to requiring the gymnastics outlined above. These half measures are contrary to law. Lawyers do not become second class citizens of the bar when they move from prosecutor to defense counsel.

Viewing Digital Image Evidence at the Prosecutor's Office

In a case on point with this proposed measure, the Washington State Supreme court found "Providing a copy enables the expert to test that application or program using the same type and version of computer operating system as was used by the defendant, a difference that may alter how the program runs, stores data, and so forth...[citations omitted]...Analysis may also reveal that the images are not of children....This analysis requires greater access than can be afforded in the State's facility. Preparation may require lengthy access even where there are few images." (See *United States v. Frabizio*, 341 F.Supp.2d 47 (D.Mass.2004) (defense expert needed to reconstruct government expert's work). "The need for copies may flow also from constraints on experts such as access to the necessary tools and sufficient time." (*Washington v. Boyd*, May 17, 2007 (160 Wash.2d 424, 158 P.3d 54).

Viewing Issues Under Federal Law

It is a crime in Ohio to *view* images depicting minors in a state of nudity. (R.C. 2907.323). It is ambiguous as to whether the federal child pornography statute prohibits viewing. (See 18 U.S.C. 2252 and 2252(A)). Therefore, in an abundance of caution, defense counsel and any defense expert would be acting within reason to refuse to view the evidence in Brady's case. It is presumed this court would agree that counsel who is unable to view the evidence against his client is de facto ineffective in his assistance in a digital imaging case. Any defense counsel or defense expert for Brady is still required to take a risk. Indigent defendants should not be required to accept representation and expert assistance only from persons willing to risk federal indictment even if such persons exist.

Brady's expert and defense counsel can perform all necessary online investigation on a computer at the prosecutor's office or detective's office.

While at first blush this remedy seems workable, it is not. The federal child pornography statutes do not have any exception. That includes no exception that authorizes the viewing and downloading of potential child pornographic conduct by a person who is sitting in a state prosecutor's office. That conduct imperils defense counsel and Brady's expert as noted above. Let us assume this court finds that risk an acceptable one. What is to be done with the evidence, potential exhibits, screenshots and webpage information and graphics downloaded and organized on that state computer in preparation for trial? At some point, it has to be printed and brought to a courtroom for a trial. The federal child pornography statute also covers purely intrastate possession of such material. The prosecutor or detective would be required to bring those exhibits to the courtroom. Of course, this is not because they are exempt from prosecution under the federal statute, they are not. It is merely because the federal government chooses not to prosecute attorneys, detectives or private citizens who are assisting in prosecutions.

These items cannot be placed on defense counsel's table at all without another risk of

federal prosecution. Even a brief period of possession can satisfy that element. (See U.S. v. Marroquin, 73 F.3d 363 C.A.6 (Mich.), December 28, 1995, Holding that when determining possession, the duration of the possession is immaterial). To use his own exhibits and information, Brady's counsel or expert must travel to the prosecution's table, have the prosecution leaf through the exhibits for him, have the prosecution pull out the needed exhibit and then have the prosecution carry it to the witness, judge or whomever for its use. This would all be done, of course, in front of the jury who is likely to draw conclusions about the illegality of all material so treated long before the close of the case. Brady is already losing in the minds of jurors before the state's case or defense case is concluded. The very material the jury is supposed to analyze to determine if it depicts actual minors or not, is being treated as if it is radioactive making such a conclusion of contraband predestined.

To prepare any witnesses for their testimony using any relevant exhibits requires working out that preparation in the prosecutor's or detective's office while they handle the exhibits as the attorney and witness discuss testimony and perhaps tactical matters. The state knows Brady's entire case prior to trial as a result.

Any digital image exhibits Brady's defense counsel or experts seek to create can be created on the prosecutor's or detective's computers.

Mechanically, this can only be completed if the prosecutor's or detective's computers have the necessary software to create the exhibits Brady's defense deems necessary. The creation of such exhibits of apparent child pornographic conduct for judicial purposes is covered by the exception in Ohio's child pornography statutes. It is prohibited by the federal statute. The creation of those exhibits, even on a state computer, is prohibited by federal law. (18 U.S.C. 2252 and 2252(A)). Brady's expert or counsel could direct a state representative in the use of the proper software to make the necessary exhibits. Besides the extremely time intensive nature of

this clumsy task, it also provides the state complete knowledge of all impeachment exhibits Brady intends to use at trial. The state is not entitled to copies in discovery or otherwise of exhibits intended for use solely in impeachment of witnesses.

The Production of Apparent Child Pornographic Digital Image Exhibits is Not Necessary to Brady's Defense

To constitutionally apply any of Ohio's child pornography statutes to Brady, he must have the capacity to know what is legal from what is not. "Laws that are insufficiently clear are [unconstitutional and] void....*to avoid punishing people for behavior that they could not have known was illegal...*and...*to avoid any chilling effect on the exercise of sensitive First Amendment freedoms.*" (United States v. Williams, 444 F.3d 1286, 1305-06 (11th Cir. 2006)) (Emphasis added). Brady can demonstrate this lack of capacity by displaying for the court at a pre-trial hearing on the matter an array of digital image exhibits, some depicting actual minors (and thus illegal to otherwise possess) and digital image exhibits merely appearing to depict minors (constitutionally protected) and demonstrate his inability to reliably distinguish between the two.

Even if the trial court denies that pre-trial constitutional motion, Brady's defense requires the presentation of similar information at trial related to the elements of the child pornography offense. At trial the state must prove that Brady knew the indicted images depicted actual minors. Here again, the above demonstration is necessary to show that Brady lacks the capacity to know this fact. (See Figure 4).

The state may argue that simply using G-rated digital images enables points about indistinguishability to be made. This argument presupposes that if the indistinguishability of G-rated images was demonstrated, the state would concede the point as to child pornographic digital images. Perhaps it would. Perhaps it would not. One thing is certain – there is no legal

requirement for it to do so. In fact, it can follow this defense presentation with the argument to either the court or jury, “but the defense did not show you any digital image exhibits that looked like this!” (Holding up the most horrific of its chosen indicted images of apparent child pornographic content). The state’s advantage is clear. Brady is left to argue a critical technological point with benign images while the state can respond with repulsively graphic images of apparent children.

If the use of apparent child pornographic digital image exhibits is not necessary for Brady to obtain a fair trial, then it is also not necessary for the state to use such images for it to obtain a fair trial. It does not need to display any of the indicted images for the jury. After all, at the time it is presenting its exhibits to the jury, they are merely images of apparent contraband. The determination of whether they are actual contraband is determined only during deliberation. It can merely describe them and leave its digital image exhibits out. Again, it will never accept such a proposition and it has no legal reason to do so. It would be a clear tactical error for it to decline to show its offensive content to the jury. In many cases, the shock of those images alone undoubtedly leaves jurors searching for someone to punish as the defendant sits just a few feet away watching his expert organize his prepared images of landscapes and cartoon characters to combat the state’s graphic apparent child pornographic image evidence.

“[D]enial of appellee’s requested expert assistance would not result in an unfair trial because the [the defense expert’s work] would not be significant evidence at trial.” (State’s Memorandum at 8).

The state seizes on the appellate court’s dissent claiming the trial court engaged in speculation to reach its determination that Brady faced an unfair trial. The majority’s opinion “amounts to assumptions based on assumptions based on assumptions.” Brady dissent at ¶46.

“The court of appeals based its decision on alleged facts that had not yet occurred. (State’s Brief at 6). The state does not list the “alleged facts.” The trial court made its discretionary decision based upon evidence presented to it during the pre-trial hearing on the matter and in subsequent briefs to the court. At no time does the record reflect the court consulting an astrologist or crystal ball as the state implies. The evidence the trial court considered clearly meets the standard of competent, credible evidence to support its discretionary call that Brady needed an expert *and* that expert needed to perform specific tasks. These tasks were not created for Brady’s case. They were the identical tasks that were found persuasive and important to multiple prior state child pornography prosecutions as noted above.

The trial court based its decision on facts that had already occurred. It appointed a digital imaging expert in a case in which the state’s key evidence was digital images. That decision makes sense. It ordered the state to provide copies of the evidence to that expert. The state provided copies to its own expert as well. It found that the *defense expert* faced federal prosecution for continuing to perform the same tasks as the state’s expert *including possessing copies of the alleged contraband*. It found that the state’s expert faced no such threat for engaging in the same conduct. An affidavit, search warrant and executed search upon the person of the expert and his home support that discretionary call. All the facts that supported the trial court’s decision occurred. It did not predict what might happen at trial. It identified facts that had already occurred and reality as it was at the time the motion was granted. It was not speculation that Brady would be without a digital imaging expert at trial. The appointed expert testified he would not participate in the case or perform tasks necessary for the defense prior to trial. The reason was fairly easy to extend to any future expert and no abuse of discretion. i.e. other digital imaging experts are not going to participate in this case with a threat of federal

indictment for performing what the trial court found were “necessary tasks.” Even if the state, or this court, posits another way the trial court *could have* approached this problem, the way it did approach the problem is not arbitrary or capricious or an error of law.

After railing against the claimed speculation and hypotheticals in the appellate court majority’s decision, the state rests its argument on...speculation. “It appears that it is the appellee’s trial strategy” and “[a]ccording to the affidavit in support of search warrant [sic]” are the basis for the state’s disagreement with the trial court’s discretionary decision. (See State’s Brief at 8). What would the expert’s testimony have been? What work would he have done prior to trial? What would he have found had he been able to research the origin of the alleged contraband images? Would defense counsel only have used the defense expert’s work for cross examination of state witnesses, argument or both? Would the defense expert even have been used to testify depending on trial counsel’s chosen strategy? Would defense counsel have utilized the defense expert in support of pre-trial motions to dismiss on constitutional grounds as in Tooley? What would the court or jury have found when reviewing the expert’s testimony and prepared digital image exhibits at trial? The state has no idea and Ohio law does not require a trial court to have such answers prior to appointing an expert witness. The court did not abuse its discretion in appointing a *digital imaging* expert to analyze the key evidence against Brady which were *digital images*. The state paid for its own *digital imaging* expert, yet argues that Brady’s digital imaging expert was unnecessary. Its argument is internally inconsistent and nonsensical.

The state (and dissent) base their speculation about what Brady’s expert would provide at his trial upon an affidavit to a search warrant, *prepared by the federal government*. Federal search warrants are not written to comprehensively capture the tasks performed, results of those

tasks and value to a defendant of that information for a defense expert's work in criminal cases? Search warrant affidavits are not written for such purposes. They are written to justify searches. No part of that design of a search warrant contemplates inserting information about the value of an expert witness' work to the constitutionally required defense of all potentially charged citizens into the future. Those affidavits should not be relied upon, as the dissent apparently did, to serve such a purpose. The inaccuracy of that affidavit is an issue that is not properly before this court and the state's reliance upon it is inappropriate. The state focuses on what exhibits may or may not have been produced. It ignores that there are a variety of necessary pre-trial tasks that do not involve creating exhibits that Brady's digital imaging expert, any digital imaging expert he chooses, cannot perform. (Brady at ¶ 34).

The state claims that the speculated, hypothetical pre-trial work and eventual testimony of Brady's expert would be illegal under R.C. 2907.323. Not knowing what work the expert would do, what research he would perform or exhibits he would create, the state's claim that the exhibits created would violate any Ohio law is rank speculation. At least one other Ohio court has specifically entered a protective order authorizing the performance of such tasks. (Exhibit 2). A Pennsylvania state court has also found such tasks necessary and part of a defendant's right to a fair trial. (Exhibit 3). In addition, the state's argument is beside the point.

A trial court is not required to scrutinize a defense expert inquiring as to each task he will perform, how it will be significant to the defense and then permit the state to rebut those claims prior to ruling a defendant is entitled to such an expert. It is inappropriate to require Brady to expose the majority of his defense merely in order to obtain funds necessary for an expert witness. Certainly the state would not submit to the same inquiry and defense examination of its experts prior to trial.

The speculation in the state's argument is repetitive:

"Section 2256(8)(C)...covers the type of morphed images [Brady's expert]...*would have used* in appellee's case." (Br. at 9). (Emphasis added).

"[Brady's expert's] testimony and trial exhibits *would only show*...." (Br. at 10). (Emphasis added).

"His testimony and trial exhibits *would not prove*...." (Id). (Emphasis added).

"Thus, [Brady's expert's] testimony and trial exhibits *would not help*...." (Id). (Emphasis added).

Quoting again from the dissent, "None of [Brady's expert's] 'activities qualify as actions *that are required to be performed by an expert* in digital imaging to ensure a defendant a fair trial.'" (Br. at 11). (Emphasis added). Really? Which hypothetical, not produced or known to the state or dissent, exhibit is being referenced here? No one one knows, including the state. No digital image exhibits were introduced in Brady as none could be created given the threat of federal prosecution.

Farid, the state's expert, possessed copies of the alleged contraband images and used his own particular chosen software to analyze those images. Those actions were "required to be performed" by the state's expert, yet they are not required of Brady's expert? The state is in no position to decide what are or are not required tasks of a defense expert. That is the trial court's discretionary decision. We have an *adversarial* system of justice. It is not consensus-building, group-think about what evidence is needed, what tasks each side needs to perform, etc. followed by all parties joining hands to sing songs prior to presenting the evidence to the jury. The state's burden is to present evidence as to each element of the offense. The defendant's **right** is to challenge each and every piece of that evidence. Ohio is poorly served by the state's position

that this court should dictate to trial courts precisely which tasks are and are not necessary for appointed expert witnesses. What tasks can an appointed forensic pathologist perform? An appointed fingerprint analyst or DNA analyst or psychologist or psychiatrist? Long prior to the state making its argument here, it failed to take the opportunity to offer *evidence* at the hearing of this matter that Brady's expert's tasks were unnecessary.

The state's argument here goes on step farther.

It asks this court do the following:

1. Speculate as to what Brady's counsel or defense expert *would do* in preparation for and as part of his testimony at trial, *if called as a witness by the defense*
2. Speculate as to what the state's presentation of evidence and testimony would be
3. Speculate as to what Brady will need to present, by way of cross examination or a defense case, to rebut the state's speculative presentation of evidence
4. Find that such speculated work of Brady's expert (and his counsel) is not necessary for Brady's defense
5. Find the trial court abused its discretion in finding Brady was entitled to the services of a digital imaging expert, including the performance of necessary tasks, in order for him to receive a fair trial.

The state's reference to State v. Bettis 2005-Ohio-2917 is inapplicable.

No federal or state case indicates *citizens have* the capacity to distinguish altered from unaltered images. (See Figure 3 for cases involving what "juries can decide"). Multiple state and federal cases quote *digital imaging expert witnesses* for both the defense and the government as stating that *even experts* lack this capacity. (See U.S. v. Frabizio 2006 WL 2384836 (D.Mass.)). There are two distinctions here.

The capacity of citizens to distinguish between real images and computer generated images is one question. The other is whether citizens have the ability to distinguish between two digital images (neither computer generated) where one image has been altered using Photoshop or some other program and one image is unretouched.

As to the first task, even Farid himself has conceded that the best “distinguishers” in his study were wrong 22% of the time distinguishing between real images and those generated entirely by computer software. (<http://www.cs.dartmouth.edu/farid/publications/vss07.html>). In Frabizio, the FBI’s leading expert admitted he could not reliably perform this task. Studies have found that even computer aided techniques have a 40% error rate when distinguishing altered from unaltered digital images. (Advances In Digital Forensics, pgs 259-270, Peterson, Gilbert, 2006 (“This research explores the ability to detect image forgeries created using multiple image sources and specialized methods tailored to the popular JPEG image format. These methods detected image forgeries with an observed accuracy of 60% [comparing] a mixture of 15 authentic and forged images.”))

There is no expert testimony or case law in the country holding that citizens can reliably detect alterations to digital images. The state’s expert in this case, Farid, provides ample examples of the impossibility of detecting such alterations on a continuously updated listing of such altered images published by major media organizations on magazine covers and in newspapers. (<http://www.cs.dartmouth.edu/farid/research/digitaltampering/>).

To the extent this court interprets its ruling in Tooley as a statement that *citizens* have the capacity to distinguish altered from unaltered images, that interpretation contradicts undisputed technological reality. (*Id.*). Noting that jurors have no special ability beyond that of ordinary citizens – since jury pools are derived from ordinary citizens – any cases which claim this point,

even on behalf of jurors, are also wrong on technology. The jury can decide proposition is weak as a legal matter as well.

In none of the “jury can decide” cases did any digital imaging expert testify. (See Figure 3). In each of those cases, including Tooley, the references to the “jury can decide” notion originate in an 1987 case and are merely blindly repeated by decision after decision thereafter. (Id). No expert testified in 1987 in United States v. Nolan, 818 F.2d 1015 (1st Cir.1987). More importantly, Nolan involved film photography. Digital imaging was not even available at that time. And, no expert has testified since in any of the cases that continually are referenced, including by this court, as support for what is universally recognized as a technological impossibility even by Farid, the state’s expert in this case.

The frequency of citation to the cases in Figure 3 does not increase the value of the false technological proposition they are used to bolster. 20 years has elapsed since Nolan, the sole case supporting the merely repeated “jury can decide” notion. No digital cameras, or mobile phones or the Internet itself were available to consumers in 1987. Photoshop, the leading digital image manipulation software, was invented 3 years after the decision in Nolan. (http://www.storyphoto.com/multimedia/multimedia_photoshop.html). Technology has dramatically changed since that 1987 opinion. Citation to Nolan in 2007, or to other cases that uncritically cited to Nolan regarding *digital image* technology abdicate a responsibility to recognize change.

On the technological point, the Bettis court is wrong as the Tooley decision’s point regarding technology was also wrong. It is urged the court reconsider that technological point and affirm the state’s expert’s position on this issue as well as Brady’s expert’s position and fix that error here.

The state quotes from Bettis must be considered in context. Bettis was decided in 2005. It relied upon several cases from 2004. Those cases, in turn, were reliant upon the “jury can decide” myth. (See Figure 3).

Brady Trial Court Did Not Find Expert in Morphing Technology was Needed

The trial court did not find that Brady was entitled to an expert to demonstrate “morphing technology.” The state cannot point to anything in this record supporting that claim. The trial court found that an expert was needed to perform several tasks (Brady at ¶ 34). None of those tasks involved “morphing.” Bettis’ comment about what jurors can or cannot do is irrelevant to Brady’s trial court’s discretionary finding that Brady was entitled to an expert witness who was, in turn, entitled to perform necessary expert witness functions.

The tasks critical to the defense in Tooley and that the Brady trial court found necessary have been performed on behalf of charged citizens and the state in several other Ohio cases. (See Figure 2 and State v. Heilman 2006-Ohio-1680; State v. Simms 2003-CR-00098 (2004, Columbiana County); State v. Sparks CR-2002-12-3669 (2004, Summit County); State of Ohio v. Beam, 04-CR-00379 (2005, Clermont County); State v. Huffman B-0401503 (2004, Hamilton County). In Sparks all digital image evidence was ignored by the court following the only testimony on that evidence provided by an appointed expert in digital imaging. Sparks was found not guilty on all digital imaging counts. The state’s claim of the lack of necessity of such work is properly considered in that context. Many state court judges who held hearings, reviewed exhibits and entertained the state’s arguments on this issue disagree with the state’s position regarding the necessity of a digital imaging expert’s work. Two federal courts have found the same digital imaging expert’s tasks necessary. (U.S. v. Hill, Case No. 4:04CR57 (Eastern District of Texas) and U.S. v. Shreck, Case No. 03-CR-43-CVE (Northern District of

Oklahoma)). The trial and appellate court's reliance upon digital imaging expert testimony and digital image exhibits was proper and necessary.

Certain Exhibits Produced by Brady's Expert in Other Cases Do Not Violate Ohio Law

The state claims that the exhibits used in the cases noted above, produced by Brady's withdrawn expert, would violate Ohio law.

"[The expert's] creation and use of these exhibits is a crime, thus making them contraband and preventing their use in trial. If [the expert] were permitted to use his exhibits in an Ohio court he would be committing a second degree felony [under] R.C. 2907.323(A)(1)." (Br. at 7).

It focuses on the fact that an affidavit relating to a search of Brady's expert's home *claims* that in past cases he has used images of actual minors and altered them to make a point in court as an expert witness. And, that he has performed these functions even though the "[t]he parents of these children....never gave [Brady's experts] permission to use them in the material, or to the transfer of the material and to the specific manner in which the material was to be used." (Br. at 8). "Based on these facts [Brady's expert's] trial exhibits are illegal and not significant to appellee's defense." (Id). The state's contention here rests on speculation as to what exhibits, if any, Brady's expert would produce and use as part of his work on Brady's case.

The state intended to use digital image exhibits in this case that it claims depict the sexual abuse of actual minors. The record of this case reveals the state did not contact "the parents of these children." Those parents "never gave [the state] permission to use [the images]...or transfer [the images] and to the specific manner in which the material was to be used." If this court is persuaded that Brady's expert's *speculative trial exhibits* as described would have violated Ohio law, it must also find the state prosecutor and detectives and others are violating the same statute

for the same reason by sending these alleged contraband images to a private citizen, Farid, for his intended use.

18 U.S.C. 2256(8)(C) Items and Use in Brady's Case

“*Ashcroft* did not strike down Section 2256(8)(C), which covers the type of morphed images [Brady’s expert] has used in past cases and *would have used* in appellee’s case....” (Br. at 9). (Emphasis added). The state’s use of “did not strike down” here implies consideration by the court. The U.S. Supreme Court has never considered whether so-called “morphed” legal images of children into “appear to be” contraband images of children is constitutional. “Respondents do not challenge [the definition of child pornography under 18 U.S.C. 2256(8)(c)], and we do not consider it.” (Free Speech Coalition at 1397).

Ohio law does not define child pornography to include the alteration of otherwise legal images resulting in an apparent contraband image. Even if this court interprets Ohio’s statutes to prohibit the creation of such exhibits by an expert witness or attorney for use in a judicial proceeding, this definition of a contraband image is unconstitutional.

Constitutionality of 18 U.S.C. 2256(8)(C)

The term “morphing” has no definition in the field in digital imaging. Courts have adopted the term as shorthand to identify a type of image created by altering the legal image of minor to make that minor appear to be engaged in sexual conduct. The state argues that Ohio law bans the creation of such an image, even as a court exhibit in a judicial proceeding. It cites federal law and the Free Speech Coalition decision as support for the constitutionality of that prohibition.

The “morphing” definition of child pornography is contained in 18 U.S.C. 2256(8)(c). It identifies as child pornography any depiction that “has been created, adapted, or modified to

appear that an identifiable minor is engaging in sexually explicit conduct.”

2256(8)(c), like the CPPA provisions struck in Free Speech Coalition, is “substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in [Ferber].” (Free Speech Coalition at 1398).

In Ashcroft v. Free Speech Coalition (2002), 535 U.S. 234, 122 S.Ct. 1389, the Supreme Court “consider[ed] [whether] 18 U.S.C. § 2251 et seq., abridges the freedom of speech.” (Id. at 1396). It did so by first analyzing whether the challenged provisions were directed at obscene speech. Its analysis of those provisions is analogous to 18 U.S.C. 2256(8)(c) and compels the same conclusion.

“As a general rule, pornography can be banned only if obscene, but under New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).” (Free Speech Coalition at 1396).

Like the sections considered in Free Speech Coalition, 2256(8)(c) “is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute.” (Id).

Under Miller the government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. (Miller at 24, 93 S.Ct. 2607). Just like the CPPA, 2256(8)(c) “extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the Miller requirements.” (Free Speech Coalition at 1399). Just as in the struck provisions of the CPPA, 2256(8)(c) materials “need not appeal to the prurient interest. Any depiction of [apparent] sexually explicit activity, no matter how it is presented, is proscribed.”

(Id. at 1400). By example, the court noted “[t]he CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse.” The state views 2256(8)(c) as applicable to court exhibits. The definition could equally apply to depictions used to explain the state of digital imaging technology submitted to state and federal legislatures considering changes to child pornography statutes. It would apply to materials used in training law enforcement to attempt to detect images depicting actual abuse of children versus those merely appearing to depict such abuse.

Like the CPPA, 2256(8)(c) “prohibits speech despite its serious literary, artistic, political, or scientific value” (Id).

The standard for the determination of First Amendment protection regarding these images is within Ferber. “Ferber recognized that the State had an interest in stamping...out [child pornography images] without regard to any judgment about [their] content.” (Free Speech Coalition at 1401). The court in Free Speech Coalition reminded the government that in Ferber it was “[t]he production of the work, not its content, [that] was the target of the statute.” (Id). Ferber cited two reasons permitting the prohibition on the production and distribution of such images. It found that such images were a permanent *record of a child's abuse*. The continued circulation of the image harms the child who had participated in the depicted conduct. Like a defamatory statement, new publication of the speech would cause new injury to the child's reputation and emotional wellbeing. (See *id.*, at 759, and n. 10, 102 S.Ct. 3348). Its second rationale was the economic motive for the production of such images. It found the state had an interest in closing the distribution network.

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were “intrinsically related” to the sexual abuse of children in

the two ways listed above. (Ferber at 759, 102 S.Ct. 3348).

The exhibits the state speculates about in this case, as those described in Free Speech Coalition, are no “record of sexual abuse” and are “not ‘intrinsically related’ to the sexual abuse of children, as were the materials in Ferber.” (Free Speech Coalition at 1402). In Free Speech Coalition the government asserted various grounds to support the banning of the “appears to be” material despite the failure to satisfy Miller and Ferber. The court rejected all of them. (Id).

Images banned by 2256(8)(c) are not “intrinsically related” to the sexual abuse of children. By definition, no child participates in any prohibited conduct to produce the image as required in Ferber. The only possible harm to any depicted minor in such images is emotional or psychological. That harm is only realized when such images are disclosed to either the person depicted or the public such that the person depicted eventually learns of the image itself. While Ferber recognized such harm as a legitimate rationale to ban such images, it was necessarily coupled with the fact, crucial in Ferber, that the objects of that emotional harm were physically harmed in the first instance to create the image. “Ferber’s judgment about child pornography was based upon **how it was made, not on what it communicated**. [W]here the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.” (Id). (Emphasis added).

In Ferber, the depicted minor was physically and psychologically harmed **during the production of the image**. The obvious psychological harm from enduring that injury continued in some form as that image lived on during its illicit public distribution. 2256(8)(c) images are not the result of any such physical harm in the first instance. Court exhibits demonstrating morphing and its indistinguishability from images of actual abuse are not the source of any psychological harm to anyone. This is especially the case if the source images are publicly

available and unknown to the expert or court room attendees and jury. This leaves the image as a random apparent minor used as an exhibit to explain a technological point. If this court views that as a legitimate harm worthy of a criminal penalty, the state has a serious problem prosecuting these cases in the future.

In every child pornography prosecution, the state sacrifices the psychological well being of the alleged actual minors whose images are used by displaying them to detectives, its own experts, the court, jurors and allowing the court reporter to take possession of those exhibits during trial.

The state's claim about the illegality of these images means they need not even be publicly disseminated to be criminal. Their very creation satisfies the Ohio statute. Without the depicted person in the exhibit becoming aware their image was so used, no possible psychological harm can result. The state, therefore, is arguing that the creation of a digital image exhibit, never shown to anyone, even in a courtroom, harms the person whose image was manipulated. And, it harms that person so severely, a criminal sanction for the very creation of that image is appropriate. 2256(8)(c) "morphed" images can therefore be prohibited without any harm resulting to anyone. The only possible conduct being regulated by 2256(8)(c) images is thought.

This morphing argument is being used to prohibit the expression of a technologically reality, that apparent child pornographic images can be created without the physical harm to any actual minor. This fact calls into question the ability of a charged citizen to know whether he is in possession of an illegal versus legal image. This is matter of constitutional concern for state and federal judges, juries, prosecutors and defense counsel. The state's argument bans such exhibits used exclusively to educate state and federal court judges about the reaches of digital

imaging technology. There is no indication in the Ohio legislative or federal congressional record that either Ohio law or 18 U.S.C. 2256(8)(c) was drafted with the intent to prohibit the creation and use of **court exhibits**.

The court in Free Speech Coalition struck the “appears to be” and “conveys the impression” provisions of 18 U.S.C. 2252, et seq. It also rejected the government’s reliance on an affirmative defense to save those provisions of the statute. It found such a defense unable to save the statute. Even when “the defendant can demonstrate **no children were harmed in producing the images**,...the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute.” (Free Speech Coalition at 1405). 2256(8)(c) images by definition cause no harm to anyone in their production, yet the state argues Ohio law and the 2256(8)(c) definition can constitutionally prohibit their creation and possession as court exhibits.

The court found that “appears to be” images cover “materials beyond the categories recognized in Ferber and Miller, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.” (Id). The so-called “morphing” images of 2256(8)(c) also cover materials beyond those recognized in Ferber and Miller. Potential psychological harm is not a recognized exception to the First Amendment. By definition, such “morphing” images require no actual harm, psychological or otherwise, to any person to satisfy a conviction. It is the criminalization of embarrassment.

Emotional or Psychological Harm Rationale

There are a variety of manipulations to the image of an actual minor that can cause embarrassment or humiliation to that minor. (Depicting child harming an animal, injecting themselves with drugs, with a disfigurement, much shorter or taller than they are, a Muslim girl holding hands with an Orthodox Jewish boy, and the list of potentially embarrassing and humiliating images is as long as the imagination of people on Earth). The state's argument as well as 2256(8)(c) images only criminalize one type of embarrassment – that referencing sexual conduct. If adopted by this court as an interpretation of the type of images prohibited by Ohio's child pornography statutes, Ohio has specifically chosen one presumably embarrassing message to prohibit, while leaving all remaining expressions, equally embarrassing to some minors and adults, legal to create, possess and disseminate.

Ohio's statute, therefore, prohibits the expression of a specific idea, selecting that idea over others with equal potential negative effects. The statute does not require actual embarrassment or psychological harm. The creation or possession of an image, never seen by anyone but the creator, is prohibited. In such a situation, absolutely no embarrassment or psychological harm could possibly come to a person depicted in such an image, yet the statute prohibits its possession. This becomes a statute prohibiting the expression of an idea, an agreeably repugnant idea, but an idea nonetheless whose harm is speculative at best and does not even have to occur to prove a violation.

The statute also prohibits legitimate First Amendment expression commenting on the marrying age existent in many U.S. states and countries. A person wishing to criticize the practice of permitting minors to marry can best express that disgust by depicting a married 14-year-old in a sexual situation with her new 35-year-old husband. 14-year-olds are permitted to marry in states like Utah and other countries such as Canada and Mexico. This statute prohibits

the creation of that image merely because of the potential psychological harm. This is true despite the fact that a married 14-year-old is undoubtedly engaging in sexual acts with her 35-year-old husband within the law. It is doubtful this statute could withstand scrutiny under the First Amendment to prohibit the creation and possession of images of that sexual conduct given the participants are legally married. The state argues Ohio's statutes include such images within their prohibition.

The U.S. Supreme Court explicitly noted that “[p]ictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.” (Free Speech Coalition at 1393). It rejected the “appears to be” definition because it prohibited “speech having serious redeeming value, proscribing the visual depiction of an idea--that of teenagers engaging in sexual activity--that is a fact of modern society and has been a theme in art and literature for centuries.” Likewise, a political statement of manipulating the image of a married 14-year-old and her 35-year-old husband to comment on the impropriety of such a young marriageable age has serious redeeming value under the First Amendment. Despite that fact, the state argues Ohio's statutes can prohibit the creation of such images. “This is inconsistent with an essential First Amendment rule: A work's artistic merit does not depend on the presence of a single explicit scene.” (*Id.*). Consistent with Free Speech Coalition, the production by Brady's expert of such images cannot be viewed out of context.

“Under Miller, redeeming value is judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. [citations omitted]. The CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the obscenity definition.” (*Id.* at 1393-1394).

Digital image exhibits demonstrating morphing to educate courts about the reaches of digital imaging technology must be considered as a whole. They cannot be rendered obscene or prohibited “though the scene in isolation might be offensive.” (Id). It is not offensive to educate courts about the state of digital imaging technology especially in the confines of a judicial proceeding. The court in Free Speech Coalition expressly recognized that the foundation for the prohibition on images of actual child sexual abuse, Ferber, was the basis for rejecting the government’s attempt to criminalize the “appears to be” images.

“First, Ferber's judgment about child pornography was based upon **how it was made, not on what it communicated.** [Ferber] reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the First Amendment's protection. See *id.*, at 764-765, 102 S.Ct. 3348. Second, Ferber did not hold that child pornography is by definition without value. It recognized **some works in this category might have significant value**, see *id.*, at 761, 102 S.Ct. 3348, but relied on virtual images--the very images prohibited by the CPPA--as an alternative and permissible means of expression, *id.*, at 763, 102 S.Ct. 3348. Because Ferber relied on the distinction between actual and virtual child pornography as supporting its holding, it provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well. Pp. 1401-1402.” (Free Speech Coalition at 1394) (Emphasis added).

Digital image exhibits categorized as “morphed” images have significant value to educating courts as well as establishing valid defenses to charges under Ohio’s statutes claiming indicted images depict actual minors. They have significant value to charged citizens’ fair trial fights. (See Brady appellate trial and appellate opinions).

In striking the “appears to be” sections of 18 U.S.C. 2252 the court in Free Speech Coalition re-iterated its adherence to the Miller standard. “(1) The CPPA is inconsistent with

Miller. It extends to images that are not obscene under the Miller standard, *which requires the Government to prove* that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value, 413 U.S., at 24, 93 S.Ct. 2607.” (Id. at 1393). (Emphasis added).

Under the state’s argument, “morphed” materials need not appeal to the prurient interest or be patently offensive in light of community standards to be criminal. Given that such images, if they were created at all, would be created by Brady’s expert exclusively for use as court exhibits or under a court’s protective order, they do not qualify as appealing to prurient interest and they retain significant scientific and educational value.

No One in This Case is “Escaping Prosecution”

“This dismissal has essentially provided Brady and any other like-minded individual with a free pass to possess...any type of pornography without fear of prosecution. The ramifications of plunging down the slippery slope of the majority’s analysis are many.” (State v. Brady 2007-Ohio-1779 at ¶ 55). “It is incredible to me that the majority would allow Brady to escape prosecution under these circumstances.” (Id. at ¶ 46). “Escape prosecution” “providing” Brady a “free pass to possess...any type of pornography...” are not phrases consistent with a presumption of innocence. The dissent accepts Brady’s indictment as guilt. The Ohio and U.S. Constitution prohibit such a conclusion.

The dissent broadly misstates the law claiming the majority decision will enable citizens to possess “any type of pornography [sic]” without fear or prosecution. (Id. at ¶ 55). Of course, the 1st amendment permits citizens to possess every type of *pornography* without fear of prosecution. It is presumed the dissent meant “child pornography”, however, the failure to make this legal/constitutional distinction between adult pornography and child pornography is critical.

The dissent's confusion of these two terms calls into question the value of the state's exclusive reliance upon that dissent justifying this court overturn the appellate court decision. The state wants this court to substitute its judgment for the trial court.

Threat of Federal Prosecution

The dissent found "Brady may have been able to find another expert willing to work under *threat of federal prosecution*." (Brady at ¶ 54). (Emphasis added). The state nor the dissent provides the name or address of a qualified digital imaging expert. Even if it did, Brady's defense counsel and expert should not be made to work under such a threat. The dissent and state of Ohio want this court to substitute its judgment for the trial court's in determining that no expert is available for Brady at trial. Their argument boils down to "Brady or the trial court should try harder" to find an expert. Failure to "try hard enough" is not abuse of discretion.

Application of the Fair Trial Standard

The trial court properly applied the Fair Trial standard.

When a trial court determines in its sound discretion (Mason) that an expert witness is necessary to a charged citizen's defense and that expert cannot perform functions the court determines are necessary, the citizen cannot get a fair trial. This is an easy call. This court has already made that determination in prior cases. (State v. Mason (1998), 82 Ohio St.3d 144 citing to Ake v. Oklahoma (1985), 470 U.S. 68). Therefore, the trial court's ruling here, as well as the appellate court's ruling, are consistent with this court's own position on the matter. The state is not advocating this court overturn its decision in Mason. Mason compels a finding the trial court properly applied the Fair Trial standard.

The Fair Trial issue does not change *at all* from prior to the state's case occurring until after it has rested its case. Perhaps the state will argue, until its case is rested, the trial court

really cannot know whether Brady needs a digital imaging expert. So, the ruling on that issue as well as the fair trial issue should occur only after the state concludes its case. That sounds logical, until you consider its mechanics.

Waiting for the state to conclude its case before a ruling on the Fair Trial motion is unworkable. Assume the state concludes its case and the trial court rules that Brady is entitled to a digital imaging expert. The trial, at that point, must be stayed. All jurors are sent home awaiting a future date to return and resume their jury duties. Weeks go by during which Brady finds an expert, has counsel meet with the expert and even more time elapses waiting for the expert to perform whatever work he deems necessary while under threat of federal prosecution. The expert may need time to evaluate evidence, evaluate the testimony of some of the state's witnesses and perhaps produce a report. The state will need time to review that report, consider challenging the expert at a Daubert hearing and then it will be ready for that expert to take the stand. At the conclusion of those weeks or months of delay, the trial is resumed.

Crim. R. 12 does not impose such a requirement on other pre-trial motions to dismiss as noted above. The court should not impose such a requirement here, merely because of the nature of the charges in the indictment. Moreover, the trial court here made a determination based upon the specific information presented to it. Other cases of this type will have different facts requiring different analysis and perhaps reaching a different conclusion. Nothing in the state's presentation of evidence changes the trial court's discretionary decision that Brady needs a digital imaging expert witness. Even if the state withdraws its own digital imaging expert, it changes nothing. The key evidence remains digital images and digital videos. Brady is entitled to use a digital imaging expert for the value it provides to Brady regardless of the state's strategic choice to withdraw their expert. The state's trial strategy cannot and does not dictate the limits

of Brady's defense.

The documenting in images of the sexual abuse of minors is a horrific act. Downloading and possession of such images is illegal under state and federal law and unprotected by the First Amendment. (Ferber). Brady is not stating or implying that either of those facts should change. Hitler's philosophy of curtailment of liberties and deprivations of rights as necessities to "protect the children" should be rejected by this court. The very rights that a reversal would damage are the same constitutional rights that today's children would hope to inherit in their adulthood. Protecting the children means preserving our constitutional rights for their future.

First Amendment Protection

The Ferber court found possession and exhibition of images depicting actual sexual abuse of actual minors is permissible under certain circumstances.

[T]he exhibition of [child pornography images or videos] before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection. The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context. (Ferber, Stevens, J., concurrence).

Certainly the presentation of "morphed" images for court purposes is as worthy as the purposes approved by the court above. A state or federal courtroom is a "context" issue related to a determination of the preparation and use of such exhibits are protected by the First Amendment despite the wording of Ohio's statutes.

Other federal courts since Ferber have followed the U.S. Supreme Court's lead. "[P]recedence indicates [the federal child pornography statute] is not a 'strict liability' statute." (U.S. v. Reeder (1999), 1999 WL 985177 (N.M.Ct.Crim.App.)). "As applied" defenses have

been recognized by other courts as well. One court has held that the possession of child pornography pursuant to research undertaken in the capacity of a psychiatrist at a correctional facility was a valid defense. (United States v. Lamb, 945 F.Supp. 441 (N.D.N.Y.1996.)).

Given the First Amendment protection and context issues identified in Ferber, the preparation and use of such exhibits in a state or federal criminal case are protected by the First Amendment as well as the Sixth Amendment protecting a charged citizen's rights. Ohio's statutory exception reflects that First Amendment protection.

Preemption

Which statutes control the conduct of expert witnesses and defense attorneys in Ohio courtrooms in child pornography cases, the state statutes or the federal statute? The Ohio and federal statutes conflict. The trial and appellate courts noted that conflict. Ohio expert witnesses and Ohio attorneys need guidance from this court whether the federal statute preempts the state statute or not.

State Courts Permitted to Make Preemption Rulings

Federal courts have held that state courts are empowered to rule upon preemption issues. "State courts normally have concurrent jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute." (Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478-79, 101 S.Ct. 2870, 2875-76, 69 L.Ed.2d 784 (1981); Chivas Products Ltd. v. Owen, 864 F.2d 1280, 1282-86 (6th Cir.1988)).

"We reject the oft-repeated assertion that the federal courts have 'unique expertise' in adjudicating preemption claims because they are 'comparatively more skilled at interpreting and applying federal law and are much more likely to correctly ascertain congressional intent.'" (Note, The Preemption Dimension of Abstention, 89 Colum.L.Rev. 310, 322-23 (1989)). "State

judges are not inferior to federal judges. They have the ability to interpret federal statutes, however complex. Though preemption is a constitutional issue, it is not of a different order of magnitude than due process, first amendment and other constitutional issues which often arise during the course of a state or federal administrative and judicial proceeding. To hold that a state court may decide federal constitutional issues generally but should not decide preemption issues makes little sense.” (CSXT, Inc. v. Pitz (1989), 883 F.2d 468).

Standard regarding Pre-emption Issues

The principle of federal pre-emption of state law arises directly from the Supremacy Clause of the United States Constitution. “[T]he Laws of the United States * * * shall be the supreme Law of the Land * * *, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (Clause 2, Article VI, United States Constitution). Thus, under this constitutional authority, Congress may pre-empt state law. (See Gollihue v. Consol. Rail Corp. (1997), 120 Ohio App.3d 378, 390). Although Congress does have the power to pre-empt state law, *there is a strong presumption against pre-emption.* (Id. (Emphasis added)).

Consideration of pre-emption issues begins with the “assumption that the historic police powers of the States [are] not to be superseded by * * * [a] Federal Act unless that [is] the clear and manifest purpose of Congress.” (Rice v. Santa Fe Elevator Corp. (1947), 331 U.S. 218, 230). The U.S. Supreme Court has summarized the various standards for determining whether a federal law pre-empts a state law as follows:

“Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated

comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.” (Louisiana Pub. Serv. Comm. v. F.C.C. (1986), 476 U.S. 355, 368-369).

While the Court articulated these various standards, it emphasized that the “critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.” (Id. at 369, citing Rice, 331 U.S. at 230).

The legislative history of the federal child pornography statute (18 U.S.C. 2252, 2256, et seq.) contain no statements whatsoever indicating an intent by Congress to supersede state law. Two state courts have addressed this issue and held that there is no federal preemption.

“In addition, neither the language nor the legislative history of 18 U.S.C. 2252(a)(4)(A) indicates any Congressional intent to completely ‘occup[y] the field.’” (U.S. v. Wagner, 52 M.J. 634). (See, also Protection of Children From Sexual Predators Act of 1998, H.R.Rep. No. 105-557 (1998), reprinted in 1999 U.S.C.C.A.N. 684; Crime Control Act of 1990, H.R. Rep. No. 101-681(I), reprinted in 1990 U.S.C.C.A.N. 6472; Protection of Children Against Sexual Exploitation Act of 1977, S.Rep. No. 95-438 (1977), reprinted in 1978 U.S.C.C.A.N. 40. “Accordingly, we find the preemption doctrine to be inapplicable.” (Id).

In Wisconsin v. Bruckner (1989), 151 Wis.2d 833 the court held that “federal and state regulation of child pornography results in a partnership that enhances rather than retards the underlying goal of protecting children from sexual exploitation. Indeed, as we have already mentioned, Congress specifically anticipated this partnership with approval.” (Citing to Senate Report at 10, 1978 U.S.Code Cong. & Admin.News at 48).

“Although Congress has specifically announced that its comprehensive regulation of

controlled substances was not meant to preempt non-conflicting state laws, 21 U.S.C. sec. 903, such a specific disclaimer of preemptive intent apparently was not deemed to be necessary in the child-pornography area, given this legislative history.” (Id). The court summed up by finding that “nothing in the federal statutes regulating child pornography, or in their legislative history, that permits even an inference, much less the required “unambiguous congressional mandate that Congress meant to preempt regulation of this problem.” (Id).

In People v. Gilmour (1998), 177 Misc.2d 250 a New York state court addressed the pre-emption question and found exactly as the Wisconsin court did. “[The Defendant] has failed to establish to the satisfaction of this court that New York's attempt to proscribe the possession of child pornography in Penal Law 263.16 has been preempted by federal legislation....”

One Ohio court and one Pennsylvania court have also found the federal child pornography statute did not preempt the state's child pornography statutes. (See Exhibits 2 and 3). Another Ohio court found the threat of federal prosecution sufficient to order the state to obtain immunity for defense counsel and expert or face dismissal of its case. (Exhibit 4). The state voluntarily dismissed its case.

After a diligent search, counsel failed to locate any state or federal case finding to the contrary of these two cases.

State must concede there is no pre-emption

If this court found pre-emption, Brady's case must be dismissed as it is premised upon a voided statute pre-empted by the federal statute. The state must concede there is no federal pre-emption.

Likewise, it is Brady's position that the federal statute does not preempt Ohio's. Therefore, the conduct of his defense counsel and defense experts for “judicial purposes” is

properly interpreted under the Ohio's statute and its inherent exceptions. However, that presumption is insufficient protection for defense counsel and its experts to proceed in receiving, reviewing, investigating the origin of and producing digital image exhibits regarding such material without a this court declaring no preemption. That order could then be the basis for a declaratory judgment action in federal court to settle the question.

CONCLUSION

The trial court did not abuse its discretion in ruling that Brady was entitled to a digital imaging expert. It did not err in applying the Fair Trial standard to this matter following its ruling that Brady was entitled to a digital imaging expert. The appellate court should be affirmed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been served via ordinary U.S. Mail, postage prepaid, this 24th day of September, 2007, upon Shelley M. Pratt, Counsel for Appellant, at 25 West Jefferson Street, Jefferson, Ohio 44047.

A handwritten signature in cursive script that reads "Dean Boland". The signature is written in black ink and is positioned above a horizontal line.

Dean Boland (0065693)

EXHIBITS

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at the Nation's foremost conference on responding to the victimization of children.



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*Presented by the Dallas Children's Advocacy Center
and the Dallas Police Department*

AGE PROGRESSION, REGRESSION AND FACIAL RECONSTRUCTION

Presented by: Stephen M. Loftin

Monday 3:00–4:30 pm (3B)

Wednesday 1:00–2:30 pm (10B)

This presentation will demonstrate techniques used at NCMEC for age progressing long term missing children and also the age regression of detectives who use photos of themselves to investigate Internet crimes.

CROSS EXAMINATION OF WITNESSES IN ICAC CASES

Presented by: Tracy Thompson Braum & Judy Johnston

Monday 3:00–4:30 pm (3C)

Thursday 8:00–9:30 am (12D)

This workshop will address effective cross examination techniques for expert witnesses in ICAC cases.

STRATEGIES FOR EFFECTIVE CASE REVIEWS AND STAFFINGS

Presented by: Selena Munoz

Monday 3:00–4:30 pm (3E)

This session will examine the need for the case review/case staffing process and explore successful strategies for establishing the same.

METHAMPHETAMINE AND CHILDREN: A TOXIC COMBINATION

Presented by: Emma Raizman, MD

Monday 3:00–4:30 pm (3F)

Tuesday 1:00–2:30 pm (6F)

This presentation will discuss Methamphetamine: the dynamics of a meth lab, medical effects on adults and children, risks to children exposed to the drug in utero and the relationship between drug use and child abuse.

MEDICAL ANALYSIS OF CHILD PORNOGRAPHY

Presented by: Sharon Cooper, MD

Monday 3:00–4:30 pm (3H)

Tuesday 8:00–9:30 am (4H)

This presentation will discuss how child pornography is a link to various forms of child sexual exploitation and will emphasize the “normalization” of sexual harm being promoted to kids via the media.

THE MAKING OF A CHILD ABUSE DETECTIVE

Presented by: Brian Killacky

Monday 3:00–4:30 pm (3P)

Tuesday 10:00–11:30 am (5P)

This presentation will discuss the necessary skills and talents that those responsible for investigating crimes against children should possess or develop to reach their professional capacity.

ADVANCED ISSUES IN FORENSIC INTERVIEWING, PART I & II

Presented by: Martha Finnegan & Catherine Connell

Tuesday 8:00–11:30 am (4A-5A)

This workshop will review the pitfalls, difficulties, and concerns of interviewing victims in child pornography and Internet traveler cases.

INTERNATIONAL FAMILY ABDUCTION

Presented by: Julia Alanen

Tuesday 8:00–9:30 am (4B)

Thursday 8:00–9:30 am (12B)

This presentation will discuss civil and criminal legal remedies to international parental/family abduction.

DIGITAL IMAGING FORENSICS: FROM PHOTONS TO PIXELS TO PHOTOSHOP

Presented by: Hany Farid, PhD

Tuesday 8:00–9:30 am (4C)

Tuesday 1:00–2:30 pm (6C)

This presentation will discuss visual and computational techniques for detecting tampering in digital media. Implications of computer graphics technology to the recent “virtual porn” debate will also be discussed.

FAST FORENSIC ACQUISITIONS

Presented by: Steve Branigan

Tuesday 8:00–9:30 am (4D)

This session will cover tips and techniques for performing forensic acquisitions fast.

THE USE OF PLAY THERAPY IN THE ASSESSMENT AND TREATMENT OF SEXUALLY ABUSED CHILDREN, PART I & II

Presented by: Eliana Gil, PhD

Tuesday 8:00–11:30 am (4E-5E)

This workshop will explore specific ways in which play therapy can advance therapeutic goals when working with abused children.

THE 5 B'S OF CHILD ABUSE: BRUISES, BURNS, BONES, BELLY & BRAIN, PART I & II

Presented by: Cindy Christian, MD

Tuesday 8:00–11:30 am (4F-5F)

Wednesday 8:00–11:30 am (8F-9F)

This presentation will provide an overview of the medical evaluation of abusive injuries including patterns of injury, role of diagnostic studies, and conditions mistaken for abuse.

CASE STUDY: THE GREEN RIVER KILLER, PART I & II

Presented by: Jeffrey Baird & Robert Wheeler, PhD

Tuesday 8:00–11:30 am (4i-5i)

Wednesday 8:00–11:30 am (8i-9i)

This presentation will discuss what can be learned from the investigation, prosecution and forensic psychological evaluation of the serial killer Gary Ridgway who pled guilty to 48 counts of murder.

DEFENSIVE TACTICS FOR NON-LAW ENFORCEMENT PERSONNEL, PART I & II

Presented by: Billy Hataway & Tom Popken

Tuesday 8:00–11:30 am (4J-5J)

This session will provide information and examples of defensive tactics that may be utilized in the event a situation is encountered that requires self defense.

COURTROOM PSYCHOLOGY: HOW TO BE A GOOD WITNESS AND SURVIVE IN THE COURTROOM

Presented by: Lawrence Braunstein

Tuesday 8:00–9:30 am (4L)

Wednesday 3:00–4:30 pm (11L)

This program will address issues such as body language, the importance of what you say and how you say it, demonstrative evidence and effective presentation, the trial as theatre, feeling comfortable in the courtroom, how to defend yourself on cross examination and how to protect yourself in the witness box.

COLD CASE CHILD DEATH INVESTIGATION

Presented by: Brian Killacky & Ron Laney

Tuesday 8:00–9:30 am (4P)

This presentation will discuss the importance of a cold case or long term investigative approach into the death of children.

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2006 JUN 22 PM 1:52
STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS

CASE NO. CR-2005-11-4175

JUDGE BRENDA BURNHAM UNRUH

PROTECTIVE ORDER

DENNIS OLIVER

On this 22 day of June, 2006, this matter comes before me, the undersigned Judge Brenda Burnham Unruh Summit County Court of Common Pleas, Summit County, Ohio, pursuant to a motion made by Defendant. The Court orders as follows:

PROPER PERSONS

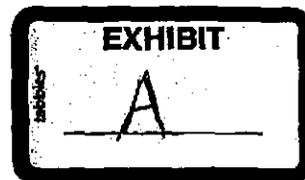
1. Defense Counsel and Defendant's designated computer forensics and digital imaging experts are proper persons as defined by this order and Ohio Revised Code 2907.321(B)(1), 2907.322(B)(1), and 2907.31(C)(1).
2. Counsel for the State of Ohio and its designated computer forensics and digital imaging experts are proper persons as defined by this order and Ohio Revised Code 2907.321(B)(1), 2907.322(B)(1), and 2907.31(C)(1).
3. Those "proper persons" possession, review, use of, provision to experts of materials related to this case are within the "judicial purposes" exception of Ohio Revised Code sections 2907.321, 2907.322 and 2907.323.

AUTHORIZATION FOR PROPER PURPOSES

All proper persons identified herein are authorized and protected as follows.

- 1) To receive, possess and copy as necessary for judicial purposes a complete copy of all seized media in this matter
- 2) To receive and possess copies of the alleged contraband digital images seized in this matter.
- 3) To make copies of said alleged contraband digital images as necessary and create digital image exhibits addressing the technological issues of this case for use at the trial of this matter. Said copies and/or digital image exhibits may be produced by either party for judicial purposes and must be maintained within the control of the proper persons as herein defined.
- 4) The Court finds that the above-referenced provisions are to be deemed proper purposes pursuant to this order and Ohio Revised Code 2907.321 (B)(1), 2907.322(B)(1), and 2907.31(C)(1).

DISPOSITION



- (a) Originals, if any, and all copies of alleged contraband are to be returned to the Summit County Prosecutor's Office.
- (b) All state and defense digital image exhibits containing all or some portion of the alleged contraband seized in this matter are to be submitted to the court for safekeeping pending any appeals.
- (c) Within 7 days, a letter from all parties covered by this order shall be filed with this court confirming that all terms of this order have been complied with.

NO FEDERAL PREEMPTION

- 7) The Ohio Revised Code governs the conduct of the State of Ohio, its experts, defense counsel and its experts in this matter.
- 8) Any federal statute(s) to the contrary of the relevant statutes in the Ohio Revised Code do not preempt the provisions and protections in the Ohio Revised Code and this protective order. (See Order of June 1, 2006).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion is granted; the above findings are the order of this Court and will govern the rights, duties, and obligations of the parties, as well as provide protection to the parties for the proper purposes as defined by this Order.


HON. BRENDA BURNHAM UNRUH

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL LAW

COMMONWEALTH OF PENNSYLVANIA)
)
 VS.)
)
 SHAWN G. STEWART)

Nos. CP-14-CR-323-2006
CP-14-CR-324-2006
CP-14-CR-325-2006

Commonwealth Attorney: Lance T. Marshall, Esquire
Defense Attorneys: Joseph L. Amendola, Esquire/Dean Boland, Esquire

COPY
FILED FOR RECORD
JUL 20 P 4:50
DEBRA C. JIMEL
PROthonotary
CENTRE COUNTY, PA

ORDER

AND NOW, to wit, this 19 day of July, 2006, counsel for the

Defendant in the above-captioned matters having requested a Protective Order and this Court concluding that such an Order is appropriate, this Court enters the following Order:

A. Proper Persons

1. Mr. Stewart is entitled to receive from the Commonwealth a mirror image copy of all seized computers and other media ("case materials").
2. The Commonwealth's counsel and experts are proper persons to possess, review, use and provide to other relevant experts the case materials.
3. Mr. Stewart's defense counsel and experts are proper persons to possess, review, use and provide to relevant experts the case materials.
4. Such conduct is exempted from prosecution as provided in the "judicial purposes" exception of 18 Pa. C.S.A. Section 6312(f).

B. Authorization for Proper Purposes

5. To receive, possess and copy as necessary for judicial purposes a complete copy of all seized media in this matter.

6. To receive and possess copies of the alleged contraband digital images seized in this matter.

7. To make copies of the alleged contraband digital images as necessary and create digital image exhibits addressing the technological issues of this case for use at trial in this matter. Said copies and/or digital image exhibits may be produced by either party for judicial purposes and must be maintained within the control of the proper persons as herein defined.

8. To research the origin of the alleged contraband images.

9. The Court finds that the above-referenced provisions are to be deemed proper purposes pursuant to this Order and 18 Pa. C.S.A. Section 6312(f).

10. The above tasks are necessary for a fair trial as to both the Commonwealth and the Defendant.

C. Disposition

11. At no time during the pendency of this matter at the trial level or upon appeal shall any of the material covered by this Order be distributed to any persons beyond those covered by this Order.

12. At the conclusion of this matter at the trial level:

a. Originals, if any, and all copies of alleged contraband are to be returned to the District Attorney's Office.

b. All Commonwealth and defense digital image exhibits containing all or some portion of the alleged contraband seized in this matter are to be submitted to the Court for safekeeping pending any appeals.

c. No later than seven (7) days following the conclusion of the trial and any appeals, a letter signed by each party covered by this Order shall be filed with this Court confirming that all terms of this Order have been complied with.

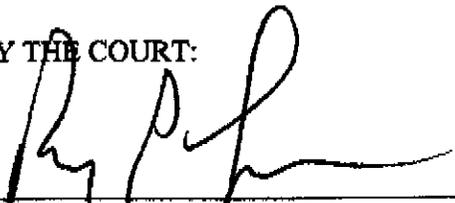
C. No Federal Preemption

13. The Pennsylvania Code governs the conduct of the Commonwealth, its experts, defense counsel and its experts in this matter.

14. Any federal statute(s) to the contrary of the relevant statutes in the Pennsylvania Code do not preempt the provisions and protections in the Pennsylvania Code and this Protective Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for Protective Order is granted; the above findings are the Order of this Court and will govern the rights, duties, and obligations of the parties, as well as provide protection to the parties for the proper purposes as defined by this Order.

BY THE COURT:



Hon. Bradley P. Lunsford, Judge

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

THE STATE OF OHIO, :

Plaintiff, :

-vs- :

ROBERT A. LESCALLEET, :

Defendant. :

Case No. 06 CR I 06 0287

JAN ANTONIOPLOS
CLERK

2007 JUN -5 PM 12: 53

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED

JUDGMENT ENTRY

This case is before the Court on three motions filed by the Defendant. All three motions request the Court to dismiss the charges against the Defendant relating to digital imaging. A hearing was held on the Defendant's motions on January 26, 2007, and March 26, 2007.

The first Motion to Dismiss, filed on June 28, 2006, asserts that the sections of the Ohio Revised Code under which the Defendant is charged, i.e. R.C. 2907.322(A)(1) and R.C. 2907.323(A)(3), are overbroad, and that certain items therein are protected speech pursuant to the First Amendment to the United States Constitution. This motion was supplemented by a July 28, 2006 motion.

The Defendant's second Motion to Dismiss, filed on July 28, 2006, supplemented the first motion on overbreadth, as well as asserted that the aforementioned statutes are unconstitutionally vague.

The Defendant's third Motion to Dismiss, also filed July 28, 2006, asserts that the Court should dismiss the charges because the Defendant cannot obtain a fair trial. Specifically, the Defendant is not able to obtain an expert to examine the alleged

pornographic images because to do so, said expert would be subject to prosecution under federal authority.

The Defendant bases his overbreadth argument on the United States Supreme Court decision in *Ashcroft v. Free Speech Coalition* (2002), 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403, as well as the Ohio Eleventh District Court of Appeals decision in *State v. Tooley* (2005), 11th Dist. App. No. 2004-P-0064, 2005-Ohio-6709.

In *Ashcroft*, the United States Supreme Court held that virtual child pornography was protected speech under the First Amendment to the United States Constitution and, therefore, could not be banned under the child-pornography statutes. *Ashcroft*, supra, at 253-256.

The U.S. Supreme Court ruled that two sections of the Child Pornography Prevention Act of 1996 ("CPPA"), Sections 2256(8)(B) and (D), were unconstitutional. *Id.* "Section 2256(8)(B) prohibits 'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture' that 'is, or appears to be, of a minor engaging in sexually explicit conduct.'" *Id.* at 241. The Supreme Court determined that the statute was overbroad because it attempted to ban protected speech. *Id.* at 256.

Section 2256(8)(D) banned "depictions of sexually explicit conduct that are 'advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.'" *Id.* at 257. The Supreme Court also determined that Section 2256(8)(D) was overbroad due to the fact that it prohibited a significant amount of protected speech. *Id.* at 258.

The Court in *Ashcroft* stated that “[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” *Id.* at 255. The Supreme Court further stated that “[w]here the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors.” *Id.* at 255-256.

In *State v. Tooley*, the Ohio Eleventh District Court of Appeals held, based on *Ashcroft*, *supra*, that the statute making it a criminal offense to pander sexually oriented matter involving a minor is unconstitutionally overbroad, and the statutory provision making it a criminal offense to possess or view any material or performance that shows a minor who is not the person’s child or ward in a state of nudity is unconstitutionally overbroad. *Tooley* at syllabus.

The *Tooley* court found, based on the testimony of the defendant’s expert, as well as statements made in the Congressional findings, that experts may not be able to distinguish between the quality of virtual pornography and child pornography using actual children; therefore, asking a jury to make such a determination by simply viewing the image in the courtroom is “patently unfair to the defendant.” *Tooley*, at ¶ 40.

Ohio Revised Code Section 2907.322 provides that “

(A) No person with knowledge of the material or performance involved, shall do any of the following: * * * (5) Knowingly solicit, receive, purchase, exchange, possess, or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality; * * * (B)(3) In a prosecution under this section, the trier of fact may infer that a person in the material or performance is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor.

R. C. 2907.322. Despite the fact that several Ohio appellate districts have upheld R.C. 2907.322 as constitutional, the language of the statute mirrors the “appears to be”

language which the U.S. Supreme Court held unconstitutional in *Ashcroft*. See *Tooley* at ¶ 48-52. Essentially, R.C. 2907.322 allows the trier of fact to make an inference as to whether or not an image contains minors; the exact approach that the U.S. Supreme Court prohibited. See *Tooley* at ¶ 53. Accordingly, the *Tooley* court found R.C. 2907.322 to be unconstitutionally overbroad. *Id.* at ¶ 54.

R.C. 2907.323 provides that

(A) No person shall do any of the following: * * * (3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies: (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance. * * * (b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and the manner in which the material or performance is used or transferred.

R. C. 2907.232. Despite the fact that several Ohio appellate districts have also concluded that R.C. 2907.323 is not unconstitutional, the Eleventh District in *Tooley* disagreed. See *Tooley* at ¶ 62. The Supreme Court of Ohio determined that the culpable mental state required for a violation of R.C. 2907.323(A)(3) is reckless. *State v. Young* (1988), 37 Ohio St.3d 249, 525 N.E.2d 1363, paragraph three of the syllabus. The *Tooley* court found that R.C. 2907.323(A)(3) coupled with the holding in *Young*, supra, "effectively chills the First Amendment right of individuals to view virtual child pornography," and accordingly, found that R.C. 2907.323(A)(3) to be unconstitutionally overbroad. *Tooley* at ¶ 69-70.

Turning to the present case, the Court heard testimony on behalf of the Defendant from Dean Boland, a licensed attorney and expert in the analysis of digital imaging. Boland testified about the ways in which digital images are created, as well as the ways in which digital images can be altered. Boland stated that the alterations for digital images are infinite and that that no method exists to determine if a digital image has been altered.

Particularly, Boland surmised that no method of analyzation exists, nor does any expert have the capacity, to determine if alterations have been made to a digital image. That is, there can be no reasonable degree of digital expert certainty. Finally, Boland concluded that no computer software or hardware exists that can distinguish between an original and an alteration of a digital image.

Boland demonstrated to the Court how easily a digital image can be manipulated without detection to make a person appear younger or older. In essence, Boland testified that it is virtually impossible to determine an original digital image unless a live witness can identify it from personal knowledge. Boland further testified that manipulation of a digital video image requires a higher skill level and is considerably more difficult than the manipulation of a digital image.

With regard to defense expert witnesses, Boland testified, based on his personal experience, that the federal government will not permit a defense attorney or defense expert to view or recreate the virtual child pornographic images for trial purposes; however, the prosecuting attorney or state's expert is permitted to do so. Finally, Boland testified that it is impossible to determine what is contained in a file, based upon the file name, without actually opening the document.

Agent Cameron Bryant of the Department of Homeland Security, special agent in immigration customs enforcement, testified on behalf of the State. Bryant prepared a report on the Defendant's case following his forensic investigation of the Defendant's computers conducted on July 8, 2005. Bryant's report, which is based solely on inadmissible hearsay unless authenticated by a live witness with actual knowledge as to the identity of the victim, details the analyzation of three computers found in the Defendant's home; a Dell Dimension 8400 ("8400"), a Dell Dimension 4100 ("4100"), and a Hewlett Packard HP A700N ("HP"). The Defendant resides with his mother, father, brother and brother's girlfriend.

The investigation conducted on the 8400 resulted in negative findings.

The forensic examination of the HP revealed eighteen (18) images of suspected child pornography, (4) digital movies containing child pornography, and one digital movie and eight (8) digital images containing bestiality. Two images, identified as being known by the National Child Victim Identification Program ("NCVIP") were also identified on the hard drive. The users for the HP were identified as "angela," "hoss," and "Josh," and no one was listed as the registered owner of the Windows XP operating system.

The forensic examination of the 4100 revealed five (5) images of suspected child pornography, eight (8) digital movies containing child pornography, one digital movie containing bestiality, and one image identified as being known by the NCVIP. The users for the 4100 were identified as "Jimmy," "Josh," and "Ryan." Josh LesCalleet, the Defendant's brother, is listed as the registered owner of the Windows XP operating system.

Bryant testified that he is familiar with several series of child pornographic images and videos; however, he has no personal knowledge of those contained in the digital images and videos obtained from the computers found in the Defendant's home. Bryant testified that the three known NCVIP images detected on the Defendant's computers were from the Sabin series, originating in Brazil. The agent who could identify the child victims in Brazil from the images and videos is retired and no longer is available to testify.

Based upon the record of this case, this Court does not see how the State can legally circumvent *Ashcroft* and *Tooley* unless it produces live witnesses who can testify from first hand knowledge as to the images being real children. Boland's testimony, as well as the testimony of Bryant on behalf of the State, both confirm that there is no other way to differentiate between virtual images protected under *Ashcroft*, *supra*, versus actual images of child pornography which are prohibited. In fact, Bryant testified that he does not have personal knowledge of any of the alleged children in the images or movies and cannot testify that they are real children. Therefore, based upon *Ashcroft*, and *Tooley*, if the State does not identify, within thirty (30) days, which witnesses it will produce at the time of trial, with *actual knowledge* that the children contained in the seized images and movies are in fact *real* children, the indictment will be dismissed.

Moreover, should the State produce witnesses who can authenticate the children as real, the State shall secure the proper "immunities" from both the federal and state prosecution for the Defendant's attorney, as well as any defense expert so they may be permitted to view the alleged child pornographic material prior to trial in order to prepare a defense on behalf of the Defendant.

Should the State fail to comply with either of these "due process" requirements,
the charges will be dismissed.

Dated: June 5, 2007.


W. DUNCAN WHITNEY, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

PAUL L SCARSELLA, ASSISTANT PROSECUTING ATTORNEY
O. ROSS LONG, DEFENSE COUNSEL

FIGURES

CHRONOLOGY OF CASE DEFENSE ARGUMENT V. STATE'S CASE LAW

CITIZEN ON THE INTERNET

DOWNLOADS IMAGE SEEKING TO EXERCISE
CONSTITUTIONAL RIGHT

CITIZEN VIEWS IMAGE ON SCREEN

CITIZEN MUST DECIDE IF IMAGE IS
CONTRABAND OR CONSTITUTIONALLY
PROTECTED IF CITIZEN HAS CAPACITY

CITIZEN GUESSES IMAGE IS
CONSTITUTIONALLY PROTECTED

CITIZEN DOWNLOADS IMAGE

CITIZEN COMES TO ATTENTION OF LAW
ENFORCEMENT

COMPUTER IS SEIZED

COMPUTER IS SEARCHED

IMAGE IS LOCATED

LAW ENFORCEMENT DETERMINES
IMAGE IS CONTRABAND

CITIZEN IS INDICTED

CITIZEN HAS TRIAL

GOVERNMENT PRESENTS EVIDENCE IMAGE
IS CONTRABAND

GOVERNMENT PRESENTS EVIDENCE, IF
ANY, THAT CITIZEN KNEW
IMAGE WAS CONTRABAND

JURY ASKED TO DECIDE:
1. IS IMAGE CONTRABAND; AND
2. DID CITIZEN KNOW IT

JURY VIEWS IMAGE AND MAKES A GUESS
WHETHER IMAGE IS REAL AND WHETHER
CITIZEN KNEW

CITIZEN'S MOTION TO DISMISS ARGUMENT
AND RELATED CASE LAW ADDRESS THIS
CONSTITUTIONAL QUESTION

DOES CITIZEN HAVE THE CAPACITY TO
KNOW IF IMAGE IS CONTRABAND OR
CONSTITUTIONALLY PROTECTED?

IF NO CAPACITY TO KNOW, STATUTE
CANNOT BE APPLIED TO CITIZEN

SEE WILLIAMS CASE IN CITIZEN'S BRIEF

NO EXPERT HAS EVER TESTIFIED
NO COURT HAS EVER HELD
NON-EXPERT CITIZEN HAS THIS CAPACITY

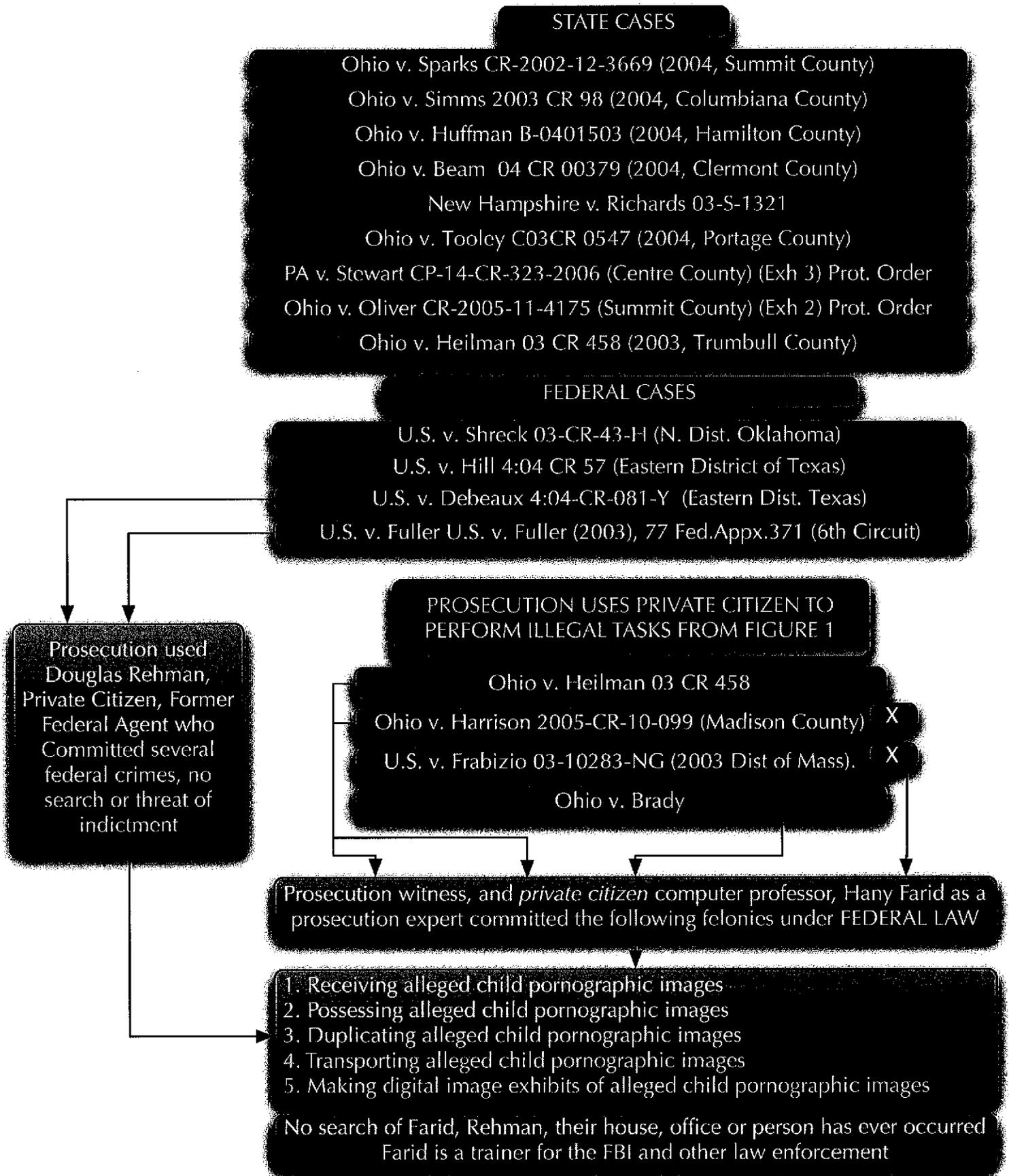
ALL GOVERNMENT CASE LAW
ADDRESSES SUFFICIENCY

ON RULE 29 MOTION OR APPEAL
SUFFICIENCY ARGUMENT
ANSWERED HERE

IF EVIDENCE IS INSUFFICIENT
ACQUITTAL/REVERSAL IS REQUIRED

FIGURE 2

PRE-BRADY COURTS THAT AUTHORIZED TASKS BY DEFENSE AND PROSECUTION FROM FIGURE 1 THAT ARE NOW ILLEGAL ONLY FOR DEFENSE COUNSEL AND DEFENSE EXPERTS



X Post-Brady hearings or trials, private citizen prosecution experts (for both state and federal prosecutors) still violating federal law with no threat of prosecution

JURY CAN DECIDE TAXONOMY

FIGURE 3

U.S. v. Nolan, 1987
818 F.2d 1015

"But his uncorroborated speculation that some undefined technology exists to produce these pictures without use of real children, is not a sufficient basis for rejecting the lower court's determination founded on reasonable inferences derived from experience and common sense."

"Ordinary people in today's society are quite accustomed to seeing photographs and to distinguishing them from other forms of visual representations. We believe it to be within the range of ordinary competence for someone not a photography expert to determine that she is viewing a photograph rather than, say, an artistic reproduction."

1980s

U.S. v. Vig 1999
167 F.3d 443

1990s

2000s

2003

U.S. v. Deaton
May 9, 2003
328 F.3d 454

U.S. v. Hall
May 16, 2003
979 F.2d 77

U.S. v. Kimler
July 7, 2003
335 F.3d 1132

U.S. v. Fuller
Oct. 9, 2003
77 Fed.Appx. 371

2004

U.S. v. Stanina
Jan. 28, 2004
359 F.3d 356

U.S. v. Cervini
Aug. 11, 2004
379 F.3d 987

U.S. v. Farely
Oct. 23, 2004

2005

U.S. v. ...
2005 F.3d ...

U.S. v. ...
2005 F.3d 832

U.S. v. ...
62 M.J. 52

U.S. v. ...
2005 F.3d ...

U.S. v. ...
2005 F.3d 401

2006

U.S. v. ...
2006 WL 238994
(S.D.N.Y.)

U.S. v. ...
Feb. 8, 2006
62 M.J. 334

NO EXPERT WITNESS TESTIFIED IN ANY OF THESE CASES

FIGURE 1

Tasks Required (According to Trial Court in Brady)	Legal Treatment		Indictment Risk Attorney or Expert	
	Ohio	Federal	Defense	Prosecution
Defense Counsel and Expert Possess Copies of <i>alleged</i> contraband ¶ 9	Legal	X	YES	No
Prosecution and its private citizen expert Possess Copies of <i>alleged</i> contraband ¶ 13	Legal	X	YES	No
Defense Counsel and Expert Create Digital Image Exhibits for Trial ¶ 37	Legal	X	YES	No
Defense Counsel and Expert Research Origin of <i>alleged</i> contraband images ¶ 37	Legal	X	YES	No
Tasks Provided by Ohio Supreme Court (Tooley)				
Establish that legal/illegal images are indistinguishable ¶ 22	Legal	X	YES	No
Search online to determine if virtual child pornography is "widely available" ¶ 25	Legal	X	YES	No
Create record that "digital images of simulated and actual child pornography visually are the same." ¶ 26	Legal	X	YES	No
Establish "absolutely impossible to distinguish between simulated and actual child pornography." ¶ 27	Legal	X	YES	No
Seek evidence that alleged contraband images "generated without the use of a real child." ¶ 35	Legal	X	YES	No
Establish "a substantial amount of virtual pornography exists." ¶ 39	Legal	X	YES	No
Seek and obtain "text on the website where the [child] pornography was found." ¶ 40	Legal	X	YES	No
Statutory protection to perform tasks for judicial purposes in child pornography cases ¶ 43	Legal	X	YES	No
Seek evidence that caused Tooley arguments to "founder." ¶ 45	Legal	X	YES	No
Use defense expert to challenge prosecution evidence ¶ 49	Legal	X	YES	No
present evidence "experts cannot distinguish between actual and virtual child pornography." ¶ 49	Legal	X	YES	No
Present evidence challenging claim "juries can decide" whether digital images are altered or not ¶ 50-¶ 52	Legal	X	YES	No
Present evidence "rapidly approaching" time has arrived regarding image technology ¶ 58	Legal	X	YES	No

Legal

X Illegal