

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant

v.

DANIEL BRADY

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

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MOTION FOR RECONSIDERATION

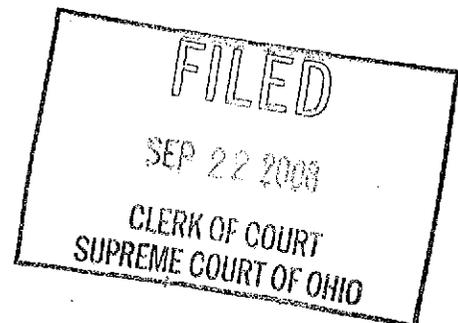
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## POINTS UNADDRESSED IN COURT OPINION

This court's opinion in this matter addressed solely the task of reviewing alleged contraband image evidence. Ohio law, and several prior trial court decisions, have explicitly authorized defense counsel and defense experts to possess such alleged contraband. Federal law does not permit this possession. This court's resolution to that dilemma was to require only defense counsel and their experts to conform to federal law.

### PREEMPTION

Based upon the court's ruling, the exception contained in Ohio's child pornography statutes (to wit: R.C. 2907.321, R.C. 2907.322 and R.C. 2907.323) has been entirely or partially preempted by federal law. If it has not been preempted by federal law, then the court's opinion indicating that it is proper to require defense attorneys and their experts to be required to comply with federal law instead seems unnecessarily cloudy. The exceptions in these statutes no longer apply to Ohio lawyers and their defense experts as the court's decision makes clear. The court did not address whether the exceptions still apply to medical personnel, prosecutors, researchers and others. In addition, the court did not address if this partial or complete preemption only applied to the exceptions in the statute or the entire statute itself. If the entire statutory scheme is preempted by federal law, the the trial court would benefit from an order from this court directing a dismissal of Brady's case as it is premised on a now null statute.

If only part of the statutory scheme is preempted by federal law and its requirements as applied uniquely to defense attorneys and their experts, the court has the opportunity to so state in a clarified opinion.

The Ashtabula County Court and Brady's counsel at his upcoming trial need clarification from this court as to what law ought to be complied with by defense counsel and defense experts. The court's opinion, thus far, implies, but does not so state, that federal law is the controlling law for these defense attorney and defense expert issues. As this court will note, federal law has many differences from the Ohio statutory scheme. Federal law has a different discovery procedure, different and more detailed definitions of what is or is not contraband, many different cases interpreting that federal law differently than similar provisions in Ohio law. In short, the court's current opinion will result in these issues being again addressed by the trial court and returning to this court some years in the future still unresolved.

#### TASKS NOT ADDRESSED IN OPINION

The court's opinion solely addressed whether and how defense attorneys and their experts can possess *alleged* contraband for analysis prior to trial. The court's solution was, don't possess it at all despite Ohio's statutory scheme and prior trial courts explicitly authorizing that possession and finding it necessary. This court reasoned that viewing the material at the prosecutor's office eliminates the possession problem. The trial can go forward.

Setting aside the possession of such material for analysis, there are still two other important tasks the court's opinion did not address.

1. Online research into the origin of the alleged contraband images
2. Preparation of exhibits that "appear to be" contraband to contrast them with that which the state argues is actual contraband.

### Online Research

It has been and will continue to be relevant in these cases for defense counsel and their experts to gather information about the origin of alleged contraband material. For material alleged to have been obtained online, that research must occur online. Ohio's statutory scheme and exceptions, along with many prior trial court decisions, have explicitly authorized that research. That authority has been granted in the statute and by courts despite the fact that such research can put the defense attorney or expert in contact with what appears to be contraband images on various websites, newsgroups and other online locations. Although this task was outlined in Brady's merit brief, it was not addressed by the court's opinion.

The state is entitled to present all the evidence it has uncovered that bears on the issue of the authenticity of the alleged contraband. It can and does search for that information from a variety of sources, including online. The defense in prior Ohio cases has always been entitled to search for such evidence consistent with the exceptions in Ohio's statutory scheme. Federal law prohibits Ohio attorneys in Ohio cases from performing such research because of the recognized risk of unintentionally viewing or obtaining contraband material during that

investigation. While the court did not explicitly state the federal child pornography statute preempts Ohio's statutory scheme, the absence of clarity on that point leaves the permissibility of this task unknown. The task is in compliance with Ohio law, but potentially contrary to federal law. Did the court's opinion mean to reach this task and also prohibit it since it is not consistent with federal law? Is consistency with *federal law* the proper inquiry the trial court should make when passing on such questions in Brady's pre-trial stage?

#### Preparation of Necessary Exhibits

It has been and will continue to be relevant in these cases for defense counsel and their experts to prepare and present digital image exhibits for a variety of reasons. Notions that juries can tell whether a given image of apparent child pornography has been altered - a farce, but one that must be addressed - can only be addressed by preparing exhibits that appear to be, but are not, illegal under Ohio law. (e.g. The alteration of the image of adult to make an apparent minor. The alteration of two images of adults in the same image to make one appear to be a minor. The creation of a digitally painted image on a blank screen of what appears to be a minor or a minor and an adult in photo-realistic fashion). Each of those exhibits, since they do not involve an actual minor or the image of an actual minor are covered by the exception in Ohio's statutory scheme. Depending on how federal law is interpreted, the creation of those exhibits may be violations or may not. Are the trial court and all counsel expected to assess this conduct in terms of what the federal statutes prohibit based upon cases interpreting the federal child

pornography statute? Although this task was outlined in Brady's merit brief, it was not addressed by the court's opinion.

The state is entitled to present all the evidence it has uncovered that bears on the issue of the authenticity of the alleged contraband. It can and does prepare and present exhibits demonstrating the malleability of digital images and methods to detect alterations, if any exist. The defense in prior Ohio cases has been entitled to prepare and present such exhibits. The task is in compliance with Ohio law, but potentially contrary to federal law. Did the court's opinion mean to reach this task and also prohibit it since it is not consistent with federal law? Is consistency with *federal law* the proper inquiry the trial court should make when passing on this question in Brady's pre-trial stage?

#### Performing such tasks in the Prosecutor's Office

The two investigatory and trial preparatory tasks above, even if they could be performed by Brady's counsel and experts in the comfortable confines of a prosecutor's office, are still potentially illegal under federal law. One of the justices asked this precise question at oral argument and received that precise answer. Online research of this type and the preparation of these necessary exhibits, even if performed in the state prosecutor's office, offers no protection from federal prosecution for the "violateur."

Are these two tasks now simply off limits to defense attorneys and their experts? Are they off limits while the state and its experts, including private

citizens like Mr. Farid, are free to perform them for their preparation for trial?

Does federal law explicitly prohibit these tasks?

These tasks were performed in several Ohio cases prior to Brady. They were critical to the outcomes of those cases as noted in Brady's merit brief. Their performance is explicitly permitted under the exceptions in Ohio's child pornography statutes. These two additional tasks were outlined in the expert's testimony as part of the fair trial hearing in this matter. These two tasks were addressed in detail in Brady's merit brief. These are two tasks that Brady's counsel and expert, back in Ashtabula County at the upcoming trial, will seek a protective order from the trial court to perform yet again. These tasks, as noted in Brady's merit brief, are legal under Ohio's child pornography exceptions. Also as noted in Brady's merit brief, these tasks are permitted for the state's expert witnesses and attorneys. They are not permitted under federal law, solely for Brady's counsel and experts to perform. The federal government is permitted, should it choose, to prosecute Brady's counsel and/or experts for performing these necessary tasks. would have likely been found acceptable to the trial court.

Brady respectfully requests this court reconsider its decision to provided necessary clarity on these issues to avoid needless delay of this matter at the trial court level. The court's current opinion has embarked on a novel legal theory of some netherworld between Ohio law being preempted and federal law not preempting Ohio law. Counsel for Brady could find no authority that tracks the notion of state defense attorneys and experts being required to follow a federal law

that has not preempted a state law when the two are obviously in conflict. It appears a reconsidered opinion that clearly states that either Ohio law is preempted or it is not and, therefore, adherence to the requirements of the conflicting federal law are unnecessary.

As noted in the oral argument, this case is about so much more than child pornography law. It is about state's rights. A reconsidered opinion from this court ought to make a strong statement that Ohio state law governs the conduct of attorneys and experts participating in Ohio cases in Ohio courts and non-preempting federal law is of no significance. If this court feels federal law should control, it should state so clearly. Without such a statement, this case represents a creeping slide into a practice of having all law emanate from a central authority in our nation's capital. That is clearly a governmental structure our founders left behind in their native lands and fought, died and gave their treasure to insure would not be resurrected here.

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 21st day of September, 2008, upon Shelley M. Pratt, Counsel for Appellant, at 25 West Jefferson Street, Jefferson, Ohio 44047.

*Dean Boland*

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