

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

STATE OF OHIO,

Appellant-Plaintiff

DANIEL BRADY, SR.

Appellee-Defendant

COURT OF APPEALS NO. 2005-CA-85

TRIAL COURT CASE NO. 2004 CR 349

BRIEF OF APPELLEE DANIEL BRADY, SR.

Dean Boland
18123 Sloane Avenue
Lakewood, Ohio 44107
216-529-9371 ph
216-803-2131 fax
dean@deanboland.com

Counsel for Appellee

Thomas L. Sardini (0001937)
Prosecuting Attorney
Shelley M. Pratt (0069721)
Assistant Prosecutor
Ashtabula County Prosecutor's Office
25 West Jefferson Street
Jefferson, Ohio 44047

Counsel for Appellant

TABLE OF CONTENTS

Table of Contents

ASSIGNMENTS OF ERROR	3
ASSIGNMENT OF ERROR 1: THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS, WHERE IT WAS BASED ON FACTS THAT WENT BEYOND THE FACE OF THE INDICTMENT.	3
ASSIGNMENT OF ERROR 2: THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS WHERE APPELLEE CLAIMS HE CANNOT RECEIVE A FAIR TRIAL DUE TO LIMITATOINS PLACED UPON APPELLEE'S EXPERT WITNESS.	3
ISSUES PRESENTED FOR REVIEW	4
ISSUE 1: DOES A CITIZEN RECEIVE A FAIR TRIAL IN OHIO WHEN FEDERAL LAW CRIMINALIZES NECESSARY INVESTIGATORY AND TRIAL PREPARATORY CONDUCT WHILE PERMITTING THAT SAME TYPE OF CONDUCT TO BE PERFORMED BY THE STATE OF OHIO AND ITS AGENTS.	4
STATEMENT OF THE CASE	5
LAW AND ARGUMENT	6
FIRST ASSIGNMENT OF ERROR.....	6
SECOND ASSIGNMENT OF ERROR.....	7
FEDERAL GOVERNMENT INVOLVEMENT	8

TABLE OF AUTHORITIES

Table of Authorities

Rules

App.R. 9(A).....	6
Crim. R. 12(C)	7
Crim.R. 52(B)	16
Evid.R. 103(D).....	16

Statutes

18 U.S.C. 2252.....	8, 13
R.C. 2907.321	9, 17
R.C. 2907.322	9, 17
R.C. 2907.323	9, 17

Cases

State v. Tooley 2005-Ohio-6709	7, 9, 14, 17
State v. Sparks CR-2002-12-3669	9
State v. Huffman B-0401503	9
State v. Simms 2003 CR 98	9
Ashcroft v. Free Speech Coalition (2002), 535 U. S. 234	10
U.S. v. Shreck, Case No. 03-CR-43-CVE	11
Strickland v. Washington (1984), 466 U.S. 668	11
Frank v Mangum, 237 U.S. 309, 347 (1915).....	16
State ex rel. Turner v. Marshall (1931), 123 Ohio St. 586.....	16
Offutt v. United States (1954), 348 U.S. 11.....	16
McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970).....	16
In re M.D. (1988), 38 Ohio St.3d 149.....	16
State v. Zuern (1987), 32 Ohio St.3d 56, 63, 512 N.E.2d 585, 592.....	16

Error! Bookmark not defined.Error! Bookmark not defined.ASSIGNMENTS OF ERROR

Error! Bookmark not defined.ASSIGNMENT OF ERROR 1: THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS, WHERE IT WAS BASED ON FACTS THAT WENT BEYOND THE FACE OF THE INDICTMENT.

Error! Bookmark not defined.ASSIGNMENT OF ERROR 2: THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS WHERE APPELLEE CLAIMS HE CANNOT RECEIVE A FAIR TRIAL DUE TO LIMITATOINS PLACED UPON APPELLEE'S EXPERT WITNESS.

Error! Bookmark not defined.ISSUES PRESENTED FOR REVIEW

Error! Bookmark not defined.ISSUE 1: DOES A CITIZEN RECEIVE A FAIR TRIAL IN OHIO WHEN FEDERAL LAW CRIMINALIZES NECESSARY INVESTIGATORY AND TRIAL PREPARATORY CONDUCT WHILE PERMITTING THAT SAME TYPE OF CONDUCT TO BE PERFORMED BY THE STATE OF OHIO AND ITS AGENTS.

Error! Bookmark not defined.STATEMENT OF THE CASE

Mr. Brady has no objection to the state's recitation of the statement of the case except for the following passage: "The State later learned through contact with F.B.I. agent Charlie Sullivan that Mr. Boland is currently under investigation for crimes involving child pornography." This item is neither a holding of the trial court nor any other court. It is not contained in evidence or testimony submitted to the trial court.

"RULE 9. The Record on Appeal

(A) Composition of the record on appeal. The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases."

The statement by the state does not comply with **Error! Bookmark not defined.App.R. 9(A)** and Mr. Brady respectfully requests it be stricken.

Error! Bookmark not defined.LAW AND ARGUMENT

Error! Bookmark not defined.FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS, WHERE IT WAS BASED ON FACTS THAT WENT BEYOND THE FACE OF THE INDICTMENT.

The state correctly quotes **Error! Bookmark not defined.**Crim. R. 12(C). Mr. Brady's motion to dismiss, however, was "capable of determination without the trial of the general issue." Crim. R. 12(C). The state cites cases equating Mr. Brady's motion to dismiss with a motion for summary judgment. The cited cases are inapplicable.

Mr. Brady's motion to dismiss was not based upon any facts *in his case*. The only facts supporting the motion to dismiss were presented at the pre-trial hearing on a constitutional issue. By definition, it is not a factual issue. This court has recently reversed a trial court's denial of a motion to dismiss that was reliant upon expert testimony that arguably went "beyond the indictment" in the same way the state argues here. **Error! Bookmark not defined.**State v. Tooley 2005-Ohio-6709. Therefore, the state's claim that a motion to dismiss is improper, under any circumstances, unless it is confined to the text of the indictment is incorrect.

The state's assertion that a Crim. R. 29 argument is the more appropriate time for such a motion is illogical. There is no place during the state's case for Mr. Brady to enter evidence regarding his inability to perform necessary investigative or trial preparatory tasks. If the trial court had deemed these prohibited tasks as unnecessary to a fair trial the case would have proceeded. This matter is a primarily a discovery problem at this point in the case. Mr. Brady cannot meaningfully prepare for trial because of the Fair Trial issues. Permitting a trial to go forward offering him the ability to argue this at the Crim R. 29 stage is inappropriate.

The state frames the decision on the motion to dismiss as "testing the sufficiency of the indictment." Appellant's Brief, p. 2. As this court can note from the transcript in the record, there was

no discussion regarding the facts *in this case* as part of the presentation of evidence at the motion to dismiss hearing. The only facts elicited were informational for the court regarding Mr. Brady's constitutional right to defend himself. That argument was not reliant upon the facts in this case. The *federal* child pornography statutes prohibit defense counsel and defense experts from engaging in necessary conduct to defend an Ohio citizen facing charges under Ohio's child pornography statute. See Affidavit to search warrant in Boland matter. A federal district court has held the same conduct elicited during this pre-trial hearing as necessary defense conduct and also illegal under federal law. Exhibit 1. The federal government has recently agreed with this conclusion in that case. Exhibit 2.

None of the state's offered cases apply to a situation, such as this one, in which the defendant is restricted from obtaining, preparing and presenting the very information that is critical to his defense. The Shreck case in Oklahoma directly addresses this issue. "Defense counsel and experts will not be forced to proceed under the Court's order at their peril." Exhibit 1 at 5.

The testimony, argument and evidence that Mr. Brady cannot now present was presented to this court of appeals in Tooley. In that case Mr. Tooley presented testimony and digital image exhibits which were both persuasive to the trial court and persuasive to this court on appeal. The state, therefore, cannot argue that Mr. Brady can obtain a fair trial now that the federal government has indicated it will prosecute any defense attorney or defense expert who obtains, prepares or uses that same Tooley evidence. See **Error! Bookmark not defined.** 18 U.S.C. 2252, Boland matter search warrant affidavit and Exhibit 2. In fact, the state itself alleges that the creation of such digital image exhibits is illegal under *Ohio* law. Appellant's brief, p. 6-7. If the state's assertion is accepted by this court, it is even more proof that Mr. Brady cannot obtain a fair trial. That assertion also obliterates the exception contained in all three of Ohio's child pornography statutes as discussed below.

Error! Bookmark not defined.SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS

WHERE APPELLEE CLAIMS HE CANNOT RECEIVE A FAIR TRIAL DUE TO LIMITATIONS PLACED UPON APPELLEE'S EXPERT WITNESS.

This court can read the testimony provided at the pre-trial hearing on the motion to dismiss to determine that this assignment of error misstates Mr. Brady's grounds for his motion.

Mr. Brady argued and established that *all defense attorneys and defense experts* are prohibited, by *federal law* from completing investigatory and trial preparatory tasks necessary for a constitutionally sufficient defense of Mr. Brady. See Transcript of pre-trial hearing on motion to dismiss. His argument is not that his particular expert witness was restricted, but that all defense expert witnesses and defense counsel are restricted from performing conduct that is necessary for a constitutionally sufficient fair trial.

That fact was communicated to Mr. Brady's expert witness via a raid by the Cleveland FBI on his home and person on June 24, 2005 and the affidavit in the search warrant related to that raid. See Boland matter search warrant affidavit. That conduct by the federal government communicated to all defense attorneys and defense experts that they may not engage in a variety of tasks in defense of citizens, even if those tasks are solely for court purposes. See list of tasks in Mr. Brady's motion to dismiss. Moreover, they may not engage in such tasks even when the Ohio statutes contain an exception permitting such conduct for "judicial" or other "proper purposes." See **Error! Bookmark not defined**.R.C. 2907.321, **Error! Bookmark not defined**.R.C. 2907.322 and **Error! Bookmark not defined**.R.C. 2907.323.

Mr. Brady's appointed digital imaging expert witness has been qualified as an expert in federal and state courts (including Ohio) numerous times. (State v. Tooley C03CR 0547 (2004, Portage County) – defendant found not guilty as to all counts related to seized digital images relating to Mr. Boland's testimony; **Error! Bookmark not defined**.State v. Sparks CR-2002-12-3669 (2004, Summit County) – defendant found not guilty as to all counts related to seized digital images; **Error!**

Bookmark not defined.State v. Huffman B-0401503 (2004, Hamilton County) – defendant found not guilty as to all counts related to seized digital images relating to Mr. Boland's testimony; **Error!**

Bookmark not defined.State v. Simms 2003 CR 98 (2004, Columbiana County) – following Mr. Boland's pre-trial testimony, state reduced 47 felony counts to one misdemeanor count not involving child pornography to which defendant plead guilty). He provided testimony and produced the same type of exhibits in Tooley. This appellate court and other federal and state trial courts have relied upon that testimony and exhibits in those cases *prior to June 24, 2005*. The trial court in this case labeled his anticipated work as "legitimate duties" of an expert witness or defense counsel. See Order of dismissal, p.7. The Ohio legislature recognized the necessity of this work by providing an exception in Ohio's child pornography statutes covering this defense investigation and preparation conduct. R.C. 2907.321.

Error! Bookmark not defined.Federal Government Involvement

On June 24, 2005, the Cleveland FBI raided the home of Mr. Brady's expert witness. Boland matter search warrant. The warrant specifically sought five digital image exhibits that Mr. Boland created in Ohio and used in Ohio courts and on April 15, 2004 in a federal case in Oklahoma during pre-trial testimony. *Id.* The government's affiant outlined cases in which the expert has testified and produced exhibits supporting that testimony. The affiant identified no other allegedly illegal conduct other than that which Mr. Brady's seeks to have his expert witness perform in this matter. Mr. Brady's expert witness was to be used to challenge the state's assertion that a citizen can merely view a digital image and know that it is prohibited by the Ohio statute versus protected by the First Amendment. See **Error! Bookmark not defined.**Ashcroft v. Free Speech Coalition (2002), 535 U. S. 234. Unfortunately, trials of this type require both parties to use digital image exhibits which are visually offensive. The affiant stated the federal government was conducting an investigation into the witness' possession of these digital image exhibits which the United States regarded as violative of the federal child pornography statutes. Boland matter search warrant. All the digital image exhibits were

created in Ohio. *Id.* They were used in Ohio courts presumptively under the protection of Ohio law. See exception within R.C. 2907.321, R.C. 2907.322 and R.C. 2907.323.

The Ohio Revised Code contains three provisions prohibiting the possession of what is defined as child pornography. *Id.* Each section contains the following exception:

“This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide 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.” *Id.* (Emphasis added). The statutory exception is meaningless unless it includes defense counsel and their expert(s) preparing to defend child pornography cases.

The federal child pornography statutes have no exception at all. See 18 U.S.C. 2252, 2256 et seq. The federal government, through this warrant and corresponding search, have communicated to all defense attorneys and defense expert witnesses that the creation and possession of said exhibits in ***Ohio*** is a violation of those ***federal*** child pornography statutes. The federal government has communicated that the existing exceptions in the Ohio law are pre-empted by the federal child pornography statutes. A federal court in Oklahoma recently held that it was "necessary for an adequate defense" of a federal defendant that defense counsel and defense expert "have access to the Internet, including sites that are arguably illegal, and be able to create and manipulate images that are arguably illegal." Exhibit 1. Further, the court found “it's also necessary for the defense lawyers and their attorneys and their experts to have some assurance from the government that they wouldn't be prosecuted for engaging in that activity.” *Id.* The government responded on Friday, February 3, 2006. It would not “acquiesce” to such conduct and declared that it was “imprudent to believe” that defense counsel or its experts needed to “violate the law” to defend a citizen facing federal child pornography

charges. Exhibit 2. Of course, the only reason such necessary investigatory and trial preparatory tasks are a “violation of the law” is because the federal law does not provide an exception for that conduct as Ohio law does.

The government stated in its rejection that the conduct the federal court and the trial court in this case found necessary is illegal under federal law even if performed by defense counsel or defense experts for defense purposes. *Id.* Further, it indicated that such conduct, even performed *inside* the United States Courthouse under supervision by the federal court, is still illegal. “Simply put, it is imprudent to believe that it is necessary for the defense counsel to *commit a crime* in order to properly, zealously, and assiduously defend his client.” *Id.* at 1. (Emphasis added). It is undisputed then, that were Mr. Brady's counsel or his experts to perform some or all of this necessary conduct, they face investigation, search, arrest and indictment by the federal government.

The Sixth Amendment right to counsel protects "the fundamental right to a fair trial." **Error! Bookmark not defined.**Strickland v. Washington (1984), 466 U.S. 668. "A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id.* Effective counsel is one who "plays the role necessary to ensure that the trial is fair," and "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

The state cannot offer any rebuttal to the assertions that this Ohio conduct by defense counsel and defense experts, solely for court purposes and previously permitted by various Ohio courts, is now deemed illegal by the federal government. It has claimed that such conduct is not necessary to Mr. Brady's defense. The Ohio and U.S. Constitution do not grant the state of Ohio the right to determine what is and what is not necessary for a constitutionally sufficient defense. The trial court has determined that the conduct is necessary. Many other Ohio courts have authorized the performance of

those tasks. A federal court has found such tasks constitutionally required. Exhibit 1.

The exhibits sought and seized in the raid of defense counsel were crucial to the exclusion of digital images offered by the state in the cases noted above including Tooley. Mr. Brady's inability to have that assistance in his case in that same way is indisputably prejudicial to his case. After all, this court found such testimony and exhibits persuasive in its recent opinion in Tooley. Mr. Brady cannot even make the Tooley arguments without those exhibits. In the event Tooley is overturned, Mr. Brady cannot make a different version of the Tooley argument still reliant upon those exhibits. Before the Ohio Supreme Court rules upon the Tooley case, the trial court here cannot meaningfully analyze that argument without seeing the same type of exhibits as the trial court in Tooley saw. Even to reject the Tooley factual conclusion, this trial court obviously needs to see the now illegal exhibits which support the argument.

As the testimony at the pre-trial hearing demonstrates, no other defense expert is willing to perform the activities outlined above either. This is not just a matter of Mr. Brady being denied a particular appointed counsel or appointed expert – he can have none who are able to perform clearly necessary defense tasks. These tasks are also the same as many performed by the state and its experts in the gathering of inculpatory evidence against Mr. Brady. The unfairness of that reality is self evident. And, just such unfairness has already unfolded in Mr. Brady's case.

The state hired Hany Farid from Dartmouth University. See report of Hany Farid. Without a protective order, the state sent CDs with copies of these allegedly contraband images, in interstate commerce, to Farid. *Id.* Farid is not a government employee. *Id.* Farid is a private citizen. *Id.* In his report, he admitted receiving the alleged contraband in interstate commerce. *Id.* He admitted possessing that alleged contraband. *Id.* Under the current federal child pornography statutes as applied to defense counsel and defense experts by the federal government Mr. Farid has committed two federal crimes. See 18 U.S.C. 2252, 2256 et seq. He has both received and possessed, in interstate commerce,

child pornography. *Id.* In addition, one or more members of the Ashtabula County Prosecutor's Office have committed a federal crime as well. *Id.* That person(s) shipped images of child pornography in interstate commerce *to a private citizen*. The plain reading of the federal child pornography statute makes this conduct a clear violation. *Id.* The statute has no exception for the state prosecutor's conduct. *Id.*

The state will agree that neither Farid nor the state prosecutor are under federal or state investigation for their conduct. Neither has had a raid conducted on their home or person by the FBI. It is reasonable to assume that had the state's *private citizen* witness or the state created digital image exhibits using this alleged contraband, researched its origin on the Internet, found websites containing these files and downloaded representative content from those sites or otherwise gathered inculpatory evidence, still, no federal investigation, search, arrest or indictment of either the state's witness or the state prosecutor would have occurred. It would be absurd to think that it is a proper exercise of the federal government's authority to thwart the effort of the state of Ohio to enforce its own laws. Likewise, it is absurd that the federal government exercises its authority thwarting the legitimate and constitutionally required investigatory and trial preparatory tasks and defenses of an Ohio citizen. This court cannot control or protect defense counsel from the federal government's Executive Branch. Defense counsel and its experts, however, must operate in recognition of that power and the threat it represents.

The state can ship allegedly contraband images to its expert for analysis. It can present his testimony. He can discuss his analysis of the alleged contraband images he received. He can present to the jury digital image exhibits derived from the alleged contraband images. He can present to the jury digital image exhibits derived from other sources to reinforce his testimony. He can explain at length how it is that a person can know that a digital image is prohibited by the statute versus protected by the First Amendment. The state can present the alleged contraband images as exhibits to the jury. The

state can investigate website information on the seized computer to determine what sites the computer operator visited or did not visit. The state can investigate websites to determine whether they contain alleged contraband or not. It can download representative content from those sites to demonstrate that the user of the computer visited child pornography sites if that is the case. The state can, if it has not already, send copies of the images to any of several databases to assist in its investigation. The state and its witnesses can regularly refer back to the seized images and prepared exhibits preparing for trial. Mr. Brady's counsel and its expert are restricted from *all such conduct* for fear of federal prosecution.

For example, if the state claims the user of the computer visited a child pornography website, the first time that Mr. Brady will hear that claim is from the witness in the midst of trial. And, more to the point, Mr. Brady is forced to rely upon that witness' accuracy and honesty as he is unable to confirm or refute that fact by visiting those websites and downloading representative content for use in preparing his defense or the impeachment of the state's case. Mr. Brady's counsel is reduced to ineffective. Mr. Brady's digital imaging expert witness, no matter whom he chooses, is reduced to ineffective. The state cannot argue that Mr. Brady's putative digital imaging expert witness' effectiveness is lessened, but sufficient. The effectiveness of such testimony has undeniably changed the outcome of identical cases throughout Ohio. In fact, as this court knows well, that exact testimony, supported by research, testimony, exhibits and argument was the basis for striking down two of Ohio's three child pornography statutes. **Error! Bookmark not defined.**Tooley, supra.

Prior to June 24, 2005, Mr. Brady's counsel presumed he too was entitled to possess the allegedly contraband items to review them, and other seized images, investigate their alleged authenticity, investigate their origin, seek exculpatory information about the images, create trial exhibits and otherwise contest the state's evidence.

The chill on the defense of this case is obvious and it is here to stay. Mr. Brady cannot get a fair trial no matter the prosecutor, defense counsel or defense expert witness involved in this case.

The state retains an extreme advantage while Mr. Brady's fatal disadvantage is clear. The state's private citizen experts retain that same advantage. The federal government has selectively chosen *not* to investigate, search, arrest or indict the following individuals who have clearly violated federal law:

1. Hany Farid, private citizen expert noted above who worked for the state in this case and has admitted under oath to the identical conduct in another Ohio case. State v. Heilman, 2003 CRB 458.
1. The state prosecutors who shipped alleged child pornography in interstate commerce in this case.
2. State court judges in the following counties who conspired with Mr. Brady's expert witness to violate federal law by authorizing the defense expert witness to create, possess, transport and display and copy *in Ohio* for all parties illegal digital image exhibits. (Portage, Summit, Hamilton, Columbiana, Miami, Clermont, Trumbull).

Mr. Brady is facing a loss of his liberty in the murkiest and most unbalanced of arenas imaginable. He cannot effectively contest the evidence. He cannot impeach the state's witnesses. He cannot have the services of an effective digital imaging expert as other citizens in Ohio have had. He cannot prepare trial exhibits. He is utterly without recourse except to sit and watch an inexorable march to conviction with his hands already handcuffed behind and the presumption of innocence an empty platitude.

3. Summit County Sheriff's Office employee Stan Smith who copied sealed court exhibits in the case of State v. Sparks CR-2002-12-3669 and transported those items to Detective Gregory King (Detective King committed the federal crime of receipt and possession of these same exhibits. See 18 U.S.C. 2252, 2256 et seq. in conjunction Boland matter search warrant.) in Cleveland initiating an investigation of the defense attorney and expert witness whose house was eventually raided. See Boland matter search warrant.

“Whatever disagreement there may be as to the scope of the phrase "due process of law" there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." U.S. Supreme Court Justice Oliver Wendell Holmes in **Error! Bookmark not defined.**Frank v Mangum, 237 U.S. 309, 347 (1915). "It is of vital importance that the litigant should believe that he will have a fair trial." **Error! Bookmark not defined.**State ex rel. Turner v. Marshall (1931), 123 Ohio St. 586. “[J]ustice must satisfy the appearance of justice.” **Error! Bookmark not defined.**Offutt v. United States (1954), 348 U.S. 11. Mr. Brady's belief that he will not have a fair trial is reasonable.

The U.S. Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." **Error! Bookmark not defined.**McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). Government violates the right to effective assistance when it *interferes* in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.

The U.S. Supreme Court has not elaborated on the meaning of the constitutional requirement of effective assistance. In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Constitutional Argument not made at the trial level

After the trial court's order of dismissal in this case, the 11th District Court of Appeals issued its decision in **Error! Bookmark not defined.**Tooley. Tooley considered the knowledge requirement and constitutionality of **Error! Bookmark not defined.**R.C. 2907.322 and **Error! Bookmark not defined.**R.C. 2907.323 among other issues. Tooley struck down two of those statutes as unconstitutionally vague and overbroad. The only other child pornography statute besides the ones involved in Tooley, is the one involved in Mr. Brady's case, **Error! Bookmark not defined.**R.C.

2907.321. The relevant wording of those statutes upon which the Tooley decision relied, is identical in R.C. 2907.321. Mr. Brady was not able to know that such a constitutional argument was available to him until the release of this court's opinion in Tooley. Therefore, the argument was not waived as it had no basis to be made based upon the timing of the Tooley opinion release and the procedural posture of this case. The motion to dismiss in Tooley was made with the support of expert testimony, argument and exhibits. None of that material was legal to produce in support of a similar motion here, thus, the motion to dismiss for fair trial was logically the first and only step in that regard.

Even if this court deems that argument waived, it still has the discretion to permit that argument and rule upon it.

An appellate court reserves discretion to consider constitutional issues even though they are deemed waived. **Error! Bookmark not defined.**In re M.D. (1988), 38 Ohio St.3d 149. The waiver doctrine is discretionary. In the criminal context, **Error! Bookmark not defined.**Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See, also, **Error! Bookmark not defined.**Evid.R. 103(D). Thus, even where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it. See, e.g., **Error! Bookmark not defined.**State v. Zuern (1987), 32 Ohio St.3d 56, 63, 512 N.E.2d 585, 592.

Mr. Brady respectfully requests this court also find the dismissal of this case appropriate as the indictment was reliant upon R.C. 2907.321 which is unconstitutionally vague and overbroad. *Id.* As held in Tooley, a citizen is not capable of knowing that a digital image is prohibited by the statute merely by visually examining it on his computer. Tooley, *supra*. That same logic applies to the statute in this case as it did to the statutes in Tooley. Mr. Brady recognizes that the Tooley decision is likely to be accepted by the Ohio Supreme Court as this court has certified a conflict as to same. In the event

the Ohio Supreme Court reverses Tooley, it would be most efficient to have this court's decision in this case to have addressed both the Tooley argument and the fair trial argument. Otherwise, the return of this case to the trial court based upon the reversal of the Tooley argument alone would result in the identical fair trial argument being made again to be addressed upon a second appeal to this court. In light of that, Mr. Brady respectfully requests that this court address both the fair trial argument and the argument related to Tooley.

Mr. Brady respectfully requests this court affirm the decision of the trial court because Mr. Brady cannot obtain a fair trial and R.C. 2907.321 is unconstitutionally vague and overbroad.

Dean Boland
18123 Sloane Avenue
Lakewood, Ohio 44107
216-529-9371 ph
216-803-2131 fax
dean@deanboland.com

CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular U.S. mail this 8th day of March, 2006 to the

following:

Shelley M. Pratt (0069721)
Assistant Prosecutor
Ashtabula County Prosecutor's Office
25 West Jefferson Street
Jefferson, Ohio 44047

Counsel for Appellant

Dean Boland (0065693)