No. _____

In the Supreme Court of the United States

PEDRO MONTALVO, JR.,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Ohio's imposition of strict liability for even inadvertent, accidental or unknowing dissemination of child pornography violates due process and conflicts with the decisions of this Court requiring scienter in obscenity laws especially in light of the modern computer age.

2. Whether a defendant's fundamental constitutional right to mount a defense, as recently outlined in *Holmes v. South Carolina*, is violated whereby the State acknowledges that there was no evidentiary rule that precluded the admission of the evidence that another person may have committed the crime.

3. Whether this Court's seminal holding in *Massiah v. United States* was violated whereas the Ohio court ruled that a law enforcement officer can interrogate a defendant after he has been indicted without the presence of counsel and subsequently use this statement in the prosecution's case in chief.

4. Whether the Ohio court's decision conflicts with and violates this Court's landmark holding in *Doyle v. Ohio* wherein the prosecution first raised and violated the defendant's right to remain silent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Pedro Montalvo, Jr. respectfully petitions for a writ of certiorari to review the decision and judgment of the Court of Appeals of Ohio in this case, or in the alternative, Petitioner Pedro Montalvo, Jr. respectfully requests that this Honorable Court summarily reverse the decision and judgment of the Court of Appeals of Ohio pursuant to Supreme Court Rule 16.

OPINIONS BELOW

The Court of Appeals of Ohio, Fifth District, issued its opinion and judgment entry on August 6, 2018 and is reproduced at App.2-23. The opinion of the Court of Appeals of Ohio in *State v. Montalvo* is reported at 2018-Ohio-3142. The Supreme Court of Ohio declined to accept jurisdiction of the appeal on December 12, 2018 and the entry declining jurisdiction is reproduced at App.1. The entry declining jurisdiction in *State v. Montalvo* is reported at 2018-Ohio-4962, 154 Ohio St. 3d 1444, 113 N.E.3d 552.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction over Mr. Montalvo's case on December 12, 2018 and he has made a timely Petition for Writ of Certiorari. App.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the Constitution of the United States of America,

Amendment V, which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV, which states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio R.C. § 2907.322,[1] which states:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:…(2) Advertise for sale or dissemination, sell, distribute, transport, disseminate, exhibit, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

STATEMENT OF THE CASE

1. Factual and Procedural History

Pedro Montalvo, Jr. has a "long history of living a law abiding life" and did not have a criminal record prior to these felony convictions. Sentencing Memorandum, p. 9. Mr. Montalvo was a hard-working truck driver who was rarely at his apartment because

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[1] The full statutory text of R.C. § 2907.322 is set forth in App.30-32.

he was on the road for considerable periods of time. Transcript, Vol. I, p. 167. While he was driving for work, there was a sting operation that took place in his apartment that purportedly unearthed child pornography on a computer belonging to Mr. Montalvo. Transcript, Vol. I, pp. 138, 156, 167. The fact that child pornography was found on the computer was not at issue, rather the issue was whether Mr. Montalvo downloaded the illicit material.

At trial, Pedro Montalvo, Jr.'s landlord explained that Mr. Montalvo sublet the apartment to several people, including a Robert Bowden, who had unfettered access to the room where the computer was located. Transcript, Vol. I, p. 164, 225-26. Mr. Montalvo's roommates were present when the police descended upon the apartment in search for child pornography. Transcript, Vol. I, p. 168. During the search, these individuals were informed the officers were looking for child pornography and they each denied using or accessing any child pornography within the apartment. Transcript, Vol. I, p. 168.

One roommate, Robert Bowden, strenuously objected that he did not engage or download child pornographic materials. Transcript, Vol. I, p. 168. However, after Mr. Montalvo's arrest and after his roommates vacated the apartment, Mr. Montalvo's landlord received a catalogue of child pornography videos addressed to Robert Bowden – Mr. Montalvo's roommate. Transcript, Vol. I, pp. 229, 233. The landlord's testimony regarding the catalogue of child pornography addressed to Robert Bowden was

precluded by the trial court eviscerating Mr. Montalvo's constitutional right to assert a defense.

Additionally, during the trial, the prosecution elicited testimony from an Agent Bryant about a purported telephone conversation he had with someone who identified himself as Mr. Montalvo shortly after Mr. Montalvo's indictment. Defense counsel vociferously objected to the admission of this evidence but ultimately, the trial court overruled the objection and allowed this testimony. Transcript, Vol. I, p. 121-24. In this purported phone call, Agent Bryant claims that the caller admitted to searching for child pornography. Transcript, Vol. I, p. 198. Agent Bryant admitted at trial he had never spoken to Mr. Montalvo before this phone call and was unable to identify the voice of the caller. Transcript, Vol. I, p. 207. When asked if he knew for sure whether he was speaking with Mr. Montalvo, Agent Bryant stated, "I don't." Transcript, Vol. I. p. 207. Agent Bryant also testified that he did not know if anyone else had access to the phone used to make the call. Transcript, Vol. I, pp. 207-08. Despite all this uncertainty, the trial court allowed the testimony of this purported phone call to be admitted into evidence. Transcript, Vol. I, p. 124. The jury never heard the evidence that an envelope containing a catalogue of child pornography was addressed to Mr. Bowden. As such, the jury was unable to weigh this evidence in determining who actually made the purported phone call to Agent Bryant. This purported telephone conversation also occurred post-indictment and without any evidence that *Miranda* warnings were issued. Agent Bryant's testimony clearly showed he interrogated the caller

about the subject matter of the charges after Mr. Montalvo had been indicted without any evidence proffered by the State to show the caller was read *Miranda* warnings and knowingly and voluntarily relinquished his right to counsel. Transcript, Vol. I, pp. 197-200.

At trial, the lead detective on this case acknowledged it was impossible to determine who initiated the download of the illicit materials. Transcript, Vol. I, p. 149. He also acknowledged that he did not know whether Mr. Montalvo was operating the computer or whether Mr. Montalvo was even in Knox County, Ohio when these videos were downloaded to the computer. Transcript, Vol. I, p. 145.

The jury rendered a verdict finding Mr. Montalvo guilty of several felony counts of pandering sexually oriented material involving a minor. App.24-25. He was sentenced on December 16, 2016 to serve "a definite term of imprisonment of seven (7) years on Count One and seventeen (17) months on each count, Counts Two through Eighteen" with the sentences to be served concurrently. App.26-28.

After trial, Mr. Montalvo was granted permission to file a delayed appeal. The Court of Appeals of Ohio, Fifth District, affirmed his conviction on August 6, 2018. App.2-23. Mr. Montalvo filed a timely Notice of Appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court on September 19, 2018. On December 12, 2018, the Ohio Supreme Court denied the request to accept jurisdiction. App.1.

2. How the federal questions sought to be reviewed were raised.

On direct appeal to the Court of Appeals of Ohio, Petitioner Montalvo argued that the statute, R.C. § 2907.322, "is unconstitutionally vague because it does not include a scienter requirement for dissemination of illicit materials." App.19. Petitioner argued that "a person could unknowingly share information with other parties through 'peer to peer' computer networks." App.20. Rather than finding the statute unconstitutionally vague, the Court of Appeals upon review, created a *new precedent* finding that the statute "imposes strict liability for the acts that are prohibited." App.20.

On direct appeal to the Court of Appeals of Ohio, Petitioner Montalvo argued that the trial court deprived Mr. Montalvo of his constitutional right to assert a defense. App.8. The sole issue at trial was whether the child pornography found on Mr. Montalvo's computer was downloaded by Mr. Montalvo. Mr. Montalvo's trial counsel proffered evidence that the landlord received an envelope which contained a catalogue of child pornographic materials addressed to Robert Bowden. App.39-40. The prosecution immediately provided a kneejerk objection without any basis. App.36. Thereafter, the prosecution claimed that the evidence was not admissible on the absurd basis that it was hearsay and violated the best evidence rule. App.36. The trial court erroneously ruled in favor of the prosecution and sustained these objections. App.36. On direct appeal, Mr. Montalvo argued that there was no evidentiary basis for precluding the

landlord's testimony regarding the catalogue of child pornography addressed to Robert Bowden and that the trial court eviscerated Mr. Montalvo's constitutional right to assert a defense. App.8-11. The Court of Appeals found that there was *no evidentiary basis* for excluding this evidence and that there was *material prejudice* to the defendant, but then still refused to reverse the conviction finding that exclusion of the evidence was harmless error. App.11. Although the constitutional issue of the violation of Mr. Montalvo's right to mount a defense was fully briefed by both sides (App.8), the Court of Appeals did not address the issue regarding this fundamental, constitutional right in its decision. App.8-11.

On direct appeal to the Court of Appeals, Petitioner Montalvo raised the issue that his Sixth Amendment right to counsel was violated in violation of the *Massiah* doctrine established in *Massiah v. United States*, 377 U.S. 201 (1964), and its progeny. App.12-17. The violation occurred when the trial court allowed an Agent Bryant to testify as to a purported telephone confession. Mr. Montalvo's trial counsel objected to the testimony on evidentiary grounds rather than a constitutional basis. App.14-17; Transcript, Vol. I, p. 121-24. The evidentiary grounds were that the telephone call had no indicia of reliability, could not be authenticated and constituted impermissible hearsay under Ohio rules of evidence. App.14-17; Transcript, Vol. I, p. 121-24. In sum, Agent Bryant was permitted to testify at length about a purported telephone confession even though he did not know Mr. Montalvo's voice and did not know whether others, such as Mr. Montalvo's roommates, had access to the phone which

placed the call. Transcript, Vol. I, pp. 207-08. On appeal, Mr. Montalvo raised the blatant violation of the precedent set forth by this Court in *Massiah*. App.12. The testimony elicited at trial revealed that the purported telephone confession had taken place *after Mr. Montalvo was indicted* and Agent Bryant testified that he asked the caller questions that are part of the "typical interview when we are interviewing suspects." Transcript, Vol. I, p. 200. The Court of Appeals decided the constitutional issue creating a decision in direct conflict with the precedents set by this Court in *Massiah* and *Montejo v. Louisiana*, 556 U.S. 778 (2009). App.12-13. The Court of Appeals upended this Court's precedent by holding that a police interrogation *after indictment* is permissible because a defendant can waive the right to counsel even when he has not been advised of his right to counsel through *Miranda* warnings. App. 12-13.

Additionally, on direct appeal, Petitioner Montalvo argued "that his constitutional right to remain silent was violated" when "Detective Marti stated that she advised Appellant of his Miranda rights at the Knox County jail and that he subsequently refused to make a statement." App.17-18. The statement was not objected to in the trial court, but Petitioner argued that the statement constituted "plain error and the trial court's failure to uphold his constitutional right to remain silent constitutes reversible error." App.18. The Court of Appeals decided the issue and found that the blatant *Doyle* violation as set forth in *Doyle v. Ohio*, 426 U.S. 610 (1976), constituted harmless error in direct conflict with precedent set by this Court. App.18-19.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals of Ohio creates new constitutional standards that are in direct conflict with decisions of the Supreme Court of the United States. In addressing Mr. Montalvo's argument that Ohio's criminal statute regarding pandering sexually oriented matter involving a minor, R.C. § 2907.322, is unconstitutionally void for vagueness, the Court of Appeals of Ohio created a new and dangerous strict liability standard under R.C. § 2907.322 which would criminalize unintentional and even unknown behavior.

The decision of the Court of Appeals of Ohio is also of great public interest and is of broad general significance because it creates a precedent wherein prosecutors can violate well established constitutional rights and flagrantly disobey the holdings of the Supreme Court of the United States. This erroneous decision by the Court of Appeals creates new precedent which would impinge upon and violate the well-established constitutional rights of every citizen of the State of Ohio. In this felony case, the trial court precluded Mr. Montalvo from mounting a defense in violation of a fundamental constitutional due process right and the decision of the Court of Appeals permitted this error to stand despite finding material prejudice and no evidentiary reasons to preclude this evidence. The implications of the decision affect a defendant's fundamental, constitutional right to mount a defense set forth *Washington v. Texas*, 388 U.S. 14, 19 (1967) and its progeny. Mr. Montalvo's Sixth Amendment right to counsel as well as his Fifth Amendment right to remain silent were also blatantly

violated. These blatant constitutional errors were allowed to stand because the Court of Appeals created a new appellate standard of review requiring a defendant to prove he would have prevailed at trial even when there are clear, admitted evidentiary errors and a finding of material prejudice to the defendant.

I. The Court of Appeals of Ohio Has Created an Unconstitutional, Strict Liability Standard for the Dissemination of Child Pornography Which Will Have Dangerous and Far Reaching Consequences.

The State of Ohio has created a dangerous, new precedent which criminalizes innocuous or accidental behavior and even goes so far as to criminalize unknown behavior. The decision of the Court of Appeals has declared that Ohio's child pornography statute requires no intent to disseminate pornographic materials, but instead imposes strict liability for even inadvertent, accidental or unknowing dissemination of child pornography. This unreasonable and unconstitutional standard violates the due process rights of every citizen of Ohio and flagrantly disregards the realities of living in today's modern computer era. The implications of this decision can be far reaching and are inherently dangerous.

The Federal Trade Commission states that peer-to-peer technology is a way to "share music, video and documents, play games, and facilitate online telephone conversations."[2] The Federal Trade Commission

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[2] *See*, https://www.ftc.gov/tips-advice/business-center/guidance/peer-peer-file-sharing-guide-business

explains that "[t]he technology enables computers using the same or compatible P2P programs to form a network and share digital files directly with other computers on the network. Because virtually anyone can join a P2P network just by installing particular software, millions of computers could be connected at one time."[3] The Federal Trade Commission warns on its website that when you download a peer-to-peer network to share games and music, you could mistakenly download malware or pornography and these programs can inadvertently share information you never intended to share.[4] Colleges now routinely warn students about utilizing peer-to-peer software and about allowing fellow students to borrow their computer.[5] In Britain, a man who was arrested for having 172 indecent pictures of children on his hard drive was acquitted after forensic experts found a Trojan horse virus had infected his computer.[6]

Mr. Montalvo has always maintained that he did not download child pornography, let alone disseminate it. The trial court refused to allow him to introduce evidence that his roommate, who had unfettered access

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[3] *See*, https://www.ftc.gov/tips-advice/business-center/guidance/peer-peer-file-sharing-guide-business

[4] *See*, https://www.consumer.ftc.gov/articles/0016-p2p-file-sharing-risks

[5] *See*, https://legal.uncc.edu/policies/up-311.4 and https://security.calpoly.edu/content/faq/dmca-faqs

[6] *See*, https://www.theregister.co.uk/2003/10/28/suspected_paedophile_cleared_by_computer/

to his computer, had received a catalogue of child pornography in the mail. App.9-11. In fact, the testimony elicited shows that the peer-to-peer files found on Mr. Montalvo's computer were contained in a "virus" folder. Transcript, Vol. I, p. 220. The testimony elicited at Mr. Montalvo's trial shows that "peer to peer" computer networks can unwittingly remain on a person's computer without their knowledge and accordingly can unknowingly share information with other parties. Transcript, Vol. I, p. 152.

Despite this fact, Ohio law R.C. § 2907.322 which involves "[p]andering sexually oriented matter involving a minor" states: "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:…(2) Advertise for sale or dissemination, sell, distribute, transport, disseminate, exhibit, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality." R.C. § 2907.322(A)(2) (emphasis added). The trial court judge defined "disseminate" as "to circulate, disperse, or distribute, to make public, or to give out." Transcript, Vol. II, p. 283. Dissemination, in the realm of the computer world, however, can be inadvertent, unintentional and often unwanted.

On appeal, Petitioner Montalvo challenged the constitutionality of the statute on the basis that the statute, as written, has no mens rea requirement for dissemination and criminal statutes were not intended to punish accidental behavior. The Ohio Court of Appeals doubled-down on this dangerous statute and held that R.C. § 2907.322 imposes strict liability under

the statute because in reviewing the "scienter, or *mens rea*, element required, found that the knowledge requirement applied to the character of the material involved and that remainder of the statute imposes strict liability." App.22. In essence, once child pornography comes into your possession, even unintentionally, any dissemination of this illicit material, even if unintentional, will result in a lengthy prison sentence.

While the statute's vague standard for dissemination invites a jury to convict an individual for dissemination without any scienter requirement, the decision of the Court of Appeals now demands a conviction. The Court of Appeals has now held that the statute imposes strict liability whether or not there is an intent by a defendant to disseminate illicit material. This is a dangerous and far reaching precedent. Dissemination can be established by virtue of numerous scenarios in the modern-day computer era and the strict liability standard created by the Court of Appeals requires a conviction even for unintentional or accidental behavior.

The statute as written can subject individuals who inadvertently download pornography through a computer virus or even while searching for legal, adult pornography to a conviction for dissemination. A college student could loan their computer to a classmate. If that classmate downloads some music while the computer is in his or her possession, the classmate can also inadvertently download illicit child pornography. When that computer automatically backs up the files to cloud storage, the college student

who loaned the computer to his or her classmate could be prosecuted for dissemination under a strict liability standard. Indeed, most computers now automatically back up all the computer files to cloud storage. Even when a person disables cloud storage, the computer will reset the back-up default upon every computer update without fail. Parents who allow their eleven or twelve-year-old child to use the computer unsupervised can uncover that their child inadvertently downloaded illicit material when trying to find a video of their favorite pop star. If this child's search result is downloaded from a peer-to-peer network, the child's father can be held strictly liable for dissemination because the father's IP address shows it was his computer and his child kept the peer-to-peer default open-access setting in place. The dangers of this holding are painfully obvious.

In *State v. Maxwell*, the dissent noted that, in the modern computer era, "[t]oday, it is possible for an unsuspecting person to possess child pornography without even knowing it…as frightening as it is, innocent Internet users can possess pornography of any type, child pornography or other, with no intention of doing so." 2002-Ohio-2121, ¶ 49, 95 Ohio St. 3d 254, 262, 767 N.E.2d 242, 249. Although the court in *Maxwell* was addressing a different issue and a separate child pornography statute, the dissent proffered numerous examples of unsuspecting conduct that could result in the inadvertent downloading of child pornography. For example, "[i]f a user receives an e-mail with an attachment containing child pornography, that image can be on the hard drive of the user's computer before the file is even opened." *Id.*

"Further, an Internet user can type in seemingly innocent search terms into a search engine and pull up pornographic material. For example, a child searching for 'Little Women' by Louisa May Alcott may retrieve x-rated websites." *Id.* Taking those examples and adding the advent of peer-to-peer networks, automatic iPhone backups to iCloud, and the continuing worldwide move to cloud computing, any number of individuals can be held strictly liable for dissemination of child pornography. This irrational statute will ensnare many innocent individuals under its unconstitutional net. Under this absurd statute and many other similar statutes around our country, numerous individuals may be looking at several years in prison for one accidental click.

Even outside of the computer realm, if strict liability were imposed, according to the State's reasoning and a plain reading of the statute, any person coming across child pornography who attempts to discard it by throwing it in the trash, as Mr. Montalvo's landlord did, should be prosecuted under the statute because the law holds that placing items in the trash is considered a conveyance to a third party and open to public consumption. *California v. Greenwood*, 486 U.S. 35, 40 (1988). Without a scienter requirement on the dissemination element of the statute, the statute is open to arbitrary enforcement and can lead to the prosecution of any individual who inadvertently comes into possession of child pornography. Clearly, the legislature intended to criminalize intentional acts and not subject its citizens to prosecution for computer viruses or unsolicited materials. As written, the statute is unconstitutionally

void for vagueness. Without a scienter requirement on the dissemination element of the statute, the statute is open to arbitrary enforcement. Clearly, the legislature intended to criminalize intentional acts and not subject its citizens to strict liability for inadvertent behavior. Rather than address the blatant constitutional failings of the statute as written, the Court of Appeals wrote a decision escalating the dangerous language contained in the statute which could imperil numerous citizens of Ohio.

The decision of the Court of Appeals is also in direct conflict with United States Supreme Court precedent. "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *New York v. Ferber*, 458 U.S. 747, 765 (1982)(citing *Smith v. California*, 361 U.S. 147 (1959); *Hamling v. United States*, 418 U.S. 87 (1974)). The "existence of mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Smith v. California*, 361 U.S. 147, 150 (1959). Strict liability is often reserved for statutes that do not involve lengthy prison sentences. When interpreting federal statutes, this Court has stated that "absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*." *Staples v. United States*, 511 U.S. 600, 618 (1994). At common law, "early cases have argued that offenses punishable by imprisonment cannot be understood to be public welfare offenses, but must require *mens rea*." *Id.* at 617. Indeed, "the concept of the public welfare offense almost uniformly involved statutes that

provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." *Id.* at 616. Under the Ohio statutory scheme, Petitioner Montalvo's conviction for dissemination of child pornography resulted in a seven-year prison sentence. App.27. Clearly, making the dissemination statute a strict liability crime punishable with a seven-year prison sentence cannot be countenanced. This is especially dangerous given the modern computer era where forced dissemination of computer files, including smart phone files, via cloud computing and shared networks, is the norm rather than the exception.

The Ohio Court of Appeals' decision exacerbates rather than remedies the constitutional infirmities of R.C. § 2907.322. The statute itself remains unconstitutionally vague with regard to the scienter requirement for dissemination of illicit materials. Due process principles advise that a penal statute is void for vagueness if it does not clearly define its prohibitions. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 2556 (2015). United States Supreme Court cases clearly "establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Id.*; *Kolender v. Lawson,* 461 U.S. 352, 357–58 (1983). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement,

consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process.'" *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 2556–57 (2015)(citing *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926)). The statute simply has no scienter requirement for dissemination. As written, the public is wholly unaware that they could be committing a felony. Indeed, if the statute is given its plain meaning, Mr. Montalvo's landlord could be convicted if prosecuted. She acknowledged that she inadvertently received child pornography, knew the character of the material upon receipt, and placed it in the trash where anyone could find it. This plain reading of the statute would lead to absurd and dangerous results. It is time this Court intervened and clearly set forth the constitutional requirements for statutes dealing with obscenity laws in the modern-day computer age. Without this Court's guidance, we will continue to linger in a sea of confusion which will result in unconstitutional convictions and incredibly unfair results.

II. The Court of Appeal's Decision Is in Direct Conflict with Decisions of this Court Eliminating a Defendant's Constitutional Right to Mount a Defense Without Any Legal Basis.

The decision of the Court of Appeals creates new constitutional standards that are in direct conflict with decisions of the Supreme Court of the United States. The implications of the decision affect a defendant's fundamental, constitutional right to mount a defense

set forth in *Washington v. Texas*, 388 U.S. 14, 19 (1967) and its progeny. In this felony case, the trial court precluded Mr. Montalvo from mounting a defense in violation of a fundamental constitutional due process right, and the decision of the Court of Appeals permitted this error to stand *despite finding material prejudice*.

The decision of the Court of Appeals threatens the rights of citizens of the State of Ohio to their constitutional right to mount a defense. The decision attempts to couch the violation of a fundamental constitutional right as a mere evidentiary ruling creating the ideal vehicle for Ohio courts to violate citizens' constitutional rights without redress. App.8-11. Mr. Montalvo is a hard-working man with no prior criminal record who was precluded from asserting his defense. Mr. Montalvo's entire defense surrounded upon the fact that someone else downloaded the pornography onto his computer. Pedro Montalvo's roommates had unfettered access to his computer while he was away most days of the months working. His landlord was set to testify that she received a catalogue of child pornography addressed to Robert Bowden – Mr. Montalvo's roommate. The trial court summarily denied the introduction of this highly relevant evidence denying Mr. Montalvo his constitutional right to mount his defense.

The Court of Appeals then mischaracterizes the appellate review presented by Mr. Montalvo on this issue. The Court of Appeals classifies Mr. Montalvo's inability to present this important testimony as a mere evidentiary error where in fact, the preclusion of this

critical testimony embodies a violation of Mr. Montalvo's right to present a defense. App.8-11. This has become an alarming trend in criminal trials throughout this country. The flagrant violations of Mr. Montalvo's constitutional rights make this case of great general interest as the public at large is entitled to a judiciary that ensures their fundamental due process rights are protected at both the trial level and when seeking appellate review. If this precedent is allowed to stand, trial courts will be allowed to violate a defendant's constitutional right to mount a defense with impunity.

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), this Court found that a defendant's fundamental, constitutional right to present a complete defense was violated where the trial court precluded testimony that another man may have beaten, robbed and raped the 86-year-old victim. *Id.* In *Holmes*, the evidence included the defendant's palm print in the victim's apartment, a mixture of the defendant and the victim's blood on the victim's tank top, and DNA analysis excluding 99.99% of the population other than defendant and the victim. *Id.* at 322. Despite this strong evidence submitted by the prosecution, the U.S. Supreme Court found that because the defendant's fundamental "right to have 'a meaningful opportunity to present a complete defense'" had been violated, it was clear error for the trial court to preclude the testimony. *Id.* at 320 (citations omitted).

"When a trial court's evidentiary rulings substantially infringe upon the right to present a defense, the court necessarily violates the defendant's

due process rights." *Smithart v. State*, 988 P.2d 583, 586 (Alaska 1999)(citing *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973)). The law is clear - "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may determine where the truth lies" is the crux of a defendant's Sixth Amendment right to present a defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). The law holds that "[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.*

In its decision, the Court of Appeals failed to utilize the appropriate standard of review by completely side-stepping the constitutional issue raised on appeal. The law holds when evidentiary issues are of a "constitutional dimension, it will require a new trial unless we are convinced the error was harmless beyond a reasonable doubt after assessing the record as whole." *United States v. Remigio*, 767 F.2d 730, 735 (10th Cir. 1985). Furthermore, it is the State's burden to prove the error harmless beyond a reasonable doubt under the constitutional test. *State v. Davis*, 44 Ohio App.2d 335, 348, 338 N.E.2d 793, 803 (8th Dist. 1975). Rather than applying the well-established constitutional precedent and appropriate standard of review, the Court of Appeals classifies Mr. Montalvo's inability to present this critical testimony as a mere evidentiary error where in fact, the preclusion of this critical testimony is a clear violation of Mr. Montalvo's right to present his defense. Too many defendants

suffer the same fate in our judicial system. Constitutional rights are trampled upon under the guise of evidentiary rulings. Adding insult to injury, the Court of Appeals of Ohio agreed that the evidentiary objections lodged by the prosecution were groundless. App.11. Consequently, Mr. Montalvo's constitutional right to mount a defense was denied even though no legal basis existed to deny Mr. Montalvo's right to mount a defense.

Rather than applying the correct constitutional test, the Court of Appeals instead created a new standard of review for clear evidentiary errors that conflicts with overwhelming law. The Court of Appeals found no evidentiary basis for the preclusion of the evidence, found the preclusion of the evidence "materially prejudiced" Mr. Montalvo, but then found that Mr. Montalvo needed to prove he would have won at trial to obtain a reversal. App.11. Indeed, in its decision, the appellate court explicitly states, "we do find that the exclusion of testimony as to what an unidentified person may have sent to the Appellant's roommate after the time period of the investigation and resulting charges in this matter *materially* prejudiced Appellant." App.11 (emphasis added). This alone is the basis for a reversal. The Court of Appeals also states that this evidence was admissible under evidentiary rules. App.11. In fact, the State withdrew its hearsay objection in its opposition papers and conceded at oral argument that the best evidence rule could not preclude the introduction of this evidence. As a result, this was admissible evidence, clear error was present and material prejudice was found, yet Mr. Montalvo was not afforded a new trial. App.11.

Rather than affording Mr. Montalvo a new trial, the Court of Appeals simply speculated that the omission of materially prejudicial evidence could not change the outcome of the proceeding. App.11. Indeed, the right to a defense is a constitutional right guaranteed by the Sixth Amendment and the Due Process Clause in the United States Constitution. The courts have noted when an issue is of "constitutional dimension it will require a new trial unless we are convinced the error was harmless beyond a reasonable doubt after assessing the record as a whole." *United States v. Remigio*, 767 F.2d 730, 735 (10th Cir. 1985). "Whether [the] error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that [exclusion of] the evidence … might have contributed to the conviction." *Columbus v. Obasohan*, 175 Ohio App.3d 391, 2008-Ohio-797, 887 N.E.2d 385, ¶ 23 (10th Dist.).

The Court of Appeals found material prejudice here but then tries to downplay the importance of the evidence excluded at trial. The court attempts to downplay the evidence by stating "an unidentified person may have sent this to the Appellant's roommate." App.11. A commercial catalogue of child pornographic materials of the type sent to Mr. Bowden would not generally have a return address. Thus, the appellate court's reasoning here belies common sense. The appellate court also reasons that because Robert Bowden never received this child pornographic materials that somehow this diminishes its evidentiary value. Again, this is a nonsensical argument whereas the landlord would not have received these illicit

materials and would not have known they existed unless Mr. Bowden had moved out of the apartment. In another attempt to downplay the significant evidentiary value of this testimony, the Court of Appeals takes note that this evidence became known after the time period of the police investigation. This reasoning is simply flawed and is of great general significance because it could impact the public at large. Courts could use this new precedent created by the Court of Appeals to preclude highly relevant evidence in numerous criminal cases. If evidence were only relevant during the time the police conduct their initial investigation, then witnesses to a crime who become known after the initial police investigation ceases could be precluded from testifying. DNA evidence exonerating a defendant could be precluded because it was found after a certain date. Under this logic, there would be no reason for any post-conviction relief based on new evidence because only evidence found during the initial police investigation is relevant. This rationale is dangerous and needs to be addressed by this Honorable Court.

III. The Longstanding *Massiah* Doctrine and this Court's Doctrine Regarding *Doyle* Violations Have Been Eviscerated by the Court of Appeals' Decision.

On direct appeal to the Court of Appeals of Ohio, Mr. Montalvo raised the issues that his Sixth Amendment right to counsel as well as his Fifth Amendment right to remain silent were also blatantly violated. App.8-9. The decision of the Court of Appeals is of great public interest and is of broad general

significance because it creates a precedent wherein prosecutors can violate well established constitutional rights and flagrantly disobey the holdings of the Supreme Court of the United States and defendants will find no relief on direct appeal. Additionally, this erroneous decision creates new precedent which would impinge upon and violate the well-established constitutional rights of every citizen of the State of Ohio.

A. The Ohio court condoned a clear violation of the *Massiah* doctrine, which has become a disturbing judicial trend, that ultimately destroyed the defendant's Sixth Amendment right to counsel.

The decision of the Court of Appeals eviscerates the *Massiah* doctrine and the Sixth Amendment right to counsel. If this perilous holding is allowed to stand, police would be permitted to interrogate defendants after an indictment without informing them of their right to counsel in direct contravention of United States Supreme Court precedent. The *Massiah* doctrine forcefully holds that a defendant's Sixth Amendment right to counsel attaches once an adversarial proceeding has commenced against a defendant and explicitly holds that once the right attaches, police may not elicit statements from the accused that incriminate him as to the crime charged. *Massiah v. United States*, 377 U.S. 201 (1964). This Court has expressly forewarned "[d]epriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial

of counsel during the trial itself." *Spano v. New York*, 360 U.S. 315, 325 (1959). This Court has noted that when a defendant "is deprived of that right after indictment and before trial, he may indeed be denied effective representation by counsel at the only stage when legal aid and advice would help him." *Id.* at 326. Additionally, this Court has forcefully set forth "[r]ecognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, 'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" *Maine v. Moulton*, 474 U.S. 159, 170 (1985)(citations omitted).

The law also holds that before a purported confession is admissible, it is incumbent upon the state to show that a valid waiver of the defendant's Sixth Amendment right to counsel was obtained. The Court of Appeals reasons that a clear violation of the *Massiah* doctrine was permissible because it improperly and dangerously shifts a burden of proof that lies with the prosecution onto the defendant. For post-indictment interrogations and the fruits of those interrogations "to be admissible in a prosecution's case in chief, the State must prove a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel." *Michigan v. Harvey*, 494 U.S. 344, 348 (1990); *Patterson v. Illinois,* 487 U.S. 285, 292, and n. 4, (1988). The burden here clearly is placed upon the prosecution. The Court of Appeals radically changes the law and flips this burden onto the defendant and erroneously claims that the defendant can waive their right to counsel without the state having to prove this

waiver ever took place citing *Montejo v. Louisiana*, 556 U.S. 778, 786–87 (2009) and *Michigan v. Harvey,* 494 U.S. 344, 352–53 (1990). App.13. The Court of Appeals' reliance on *Montejo* is misplaced as that case specifically states that waiver of a defendant's Sixth Amendment right to counsel can only be deemed knowing and intelligent after he is given *Miranda* warnings. *Montejo v. Louisiana*, 556 U.S. 778, 786–87 (2009). In fact, in *Michigan v. Harvey,* this Court takes the presumption against waiver even further explaining that if a defendant waives his right to counsel "even if voluntary, knowing, and intelligent under traditional standards—[it] is presumed invalid if secured pursuant to police-initiated conversation. We held that statements obtained in violation of that rule may not be admitted as substantive evidence in the prosecution's case in chief." 494 U.S. 344, 345 (1990). In this case, a post-indictment purported confession in the absence of *Miranda* warnings was permitted to be used in the prosecution's case in chief. The prosecution never showed that *Miranda* warnings were provided during the phone call. As such, the prosecution could not prove a knowing and intelligent waiver of the right to counsel. The Court of Appeals decision completely upends the clear holdings of the Supreme Court of the United States and is violative of overwhelming constitutional law creating a new standard where the prosecution does not need to show a voluntary and knowing waiver.

The Court of Appeals also confuses the issue of procedural waiver. The difference between waiver and forfeiture is that waiver precludes review, whereas forfeiture permits the court to correct an error under a

plain error standard. *United States v. Olano,* 507 U.S. 725, 732–34 (1993). "Forfeiture occurs by accident, neglect, or inadvertent failure to timely assert a right… Waiver occurs when a defendant or his attorney manifests an intention, or expressly declines, to assert a right." *United States v. Doyle*, 693 F.3d 769, 771 (7th Cir. 2012). Even if there were a waiver, the Ohio criminal rules provide that the "court for good cause shown may grant relief from the waiver." Ohio Crim. R. 12.

The consequences of the Court of Appeals' erroneous decision with regard to its radical alteration of the *Massiah* doctrine will now allow police or the district attorney's office to interrogate defendants after they have been formally charged without the presence of counsel which is a clear violation of our constitution. As such, this Court's intervention is required here.

B. **A violation of a defendant's right to remain silent, especially if the violation is initiated by the prosecutor, can never be categorized as mere harmless error.**

The appellate court readily acknowledges that plain error took place with regard to the clear *Doyle* violation. App.18-19. That is, a prosecutor cannot make any reference nor submit any evidence with regard to a defendant's decision to remain silent. This Court has reaffirmed "*Doyle* and subsequent cases have thus made clear that breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986). This Court has also explained that "[n]ot only

is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice." *United States v. Hale*, 422 U.S. 171, 180 (1975).

This bedrock rule is found in the federal constitution. The Court of Appeals' decision dilutes the seminal holding in *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). This Court's intervention is needed here because the appellate court's decision creates a dangerous new law that blatant *Doyle* violations are permissible as long as they are not a central theme of the prosecution's case. Consequently, this decision invites prosecutors to mention a defendant's invocation of his or her right to remain silent in every case because it will only constitute reversible error if the prosecution makes it a central theme.

To affirm this wrongful conviction, the appellate court claims that "a single comment by a police officer as to a suspect's silence without any suggestion that the jury inferred guilt from the silence constitutes harmless error." App.18-19. A single reference to a defendant's post-arrest silence is enough to constitute reversible error. The courts have held that a *Doyle* violation "does not establish a threshold quantity of a proper questioning to qualify as a constitutional violation." *United States v. Shannon*, 766 F.3d 346, 359 (3d Cir. 2014). A *Doyle* violation is rarely condoned by the courts because "it is a decidedly heavy burden … to demonstrate that reversal is not warranted." *Id.* at 355. Finally, a "*Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than

the exception." *Williams v. Zahradnick*, 632 F.2d 353, 363 (4th Cir. 1980).

The decision of the Court of Appeals in this case mimics the decisions of many other appellate courts that condone *Doyle* violations as harmless error. As a result, prosecutors have been invited to violate the Fifth Amendment in pursuit of a conviction knowing that appellate courts will ignore the blatant violation of a defendant's Fifth Amendment rights under the guise of harmless error. This cannot be condoned, and this Court must intervene to ensure that the right to remain silent is honored within the Ohio trial and appellate courts. Unless this Court intervenes, *Doyle* violations will continue to infect criminal trials nationwide whereas state and federal courts continue to treat *Doyle* violations as a non-issue. This Court's holding in *Doyle* has become a toothless tiger.

This case presents the ideal vehicle for this Court to address the growing trend of creating procedural loopholes to excuse flagrant constitutional violations. In this case, through an unconstitutional contortion of evidentiary rules, the Ohio trial court gave the prosecution carte blanche leeway to violate Mr. Montalvo's Sixth Amendment right to counsel and Fifth Amendment right to remain silent. The evidentiary rules were then again contorted against the defense precluding Mr. Montalvo from introducing highly relevant evidence and eviscerating his constitutional right to mount a defense. The Court of Appeals then couched these flagrant constitutional violations as mere evidentiary errors affirming the convictions because the Court summarily concludes

that purportedly overwhelming evidence made the trial errors harmless. It is tough to stomach the Court of Appeals summation that harmless error was present at a trial afflicted with a violation of Mr. Montalvo's right to remain silent, a violation of his right to counsel and the trial court's wrongful exclusion of evidence that another person may have committed these crimes - which the court readily agrees took place. A fair trial did not take place here whereas only one side was able to present their case. Mr. Montalvo was not afforded a fair trial, but instead was subjected to a show trial. This Court should not countenance such a brazen disregard for the precedent set by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 7, 2019