No. 18-1202

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

REPLY BRIEF FOR PETITIONER

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The State of Ohio's holding that strict liability can be imposed for the dissemination of child pornography is an affront to the precedent established by this Court. The State takes extreme liberties with the law it cites in order to propound the absurd proposition that Ohio's statute possesses a constitutionally sound element of scienter. Despite the State's contentions, knowledge of illicit materials is simply not enough to castigate a person as a distributor of illicit materials. There is not a scintilla of evidence that Petitioner Montalvo, a man with no prior criminal record, sold or distributed illicit materials. A file sharing program, which shared files found in a virus folder, is the basis for the dissemination conviction although no proof exists that the Petitioner installed this program or even knew of its existence. Computers in the modern age take on a life of their own and conduct activities without the user's knowledge or consent. For instance, we now know that cameras on laptop computers videotape the user often without their knowledge. Many smartphones have an active microphone which automatically records conversations between the user and other people. A strict liability standard for dissemination is *incredibly dangerous* whereas many computer users have "liked" an article they actually wanted to delete or inadvertently forwarded an email to the wrong person.

Remarkably, the State of Ohio concedes that numerous flagrant constitutional violations occurred and were condoned by the appellate court, but then argues that this Court's intervention is not needed

because these constitutional violations are not only routine but are routinely condoned by the appellate courts. The State vividly illustrates its cavalier belief that foreclosing a defendant from presenting a defense passes constitutional muster. The State's brief also highlights that the holdings of *Massiah v. United States*, 377 U.S. 201 (1964) along with *Doyle v. Ohio*, 426 U.S. 610 (1976) have clearly been ignored by the State of Ohio for so long that the State no longer recognizes these violations as anything out of the ordinary. This disturbing trend cannot continue.

I. Strict liability cannot be the new standard for the dissemination of illicit materials whereby one inadvertent click can lead to an unintentional and unknowing crime.

The State tries to paint its unconstitutional statute as in accord with federal law by claiming that the statute is "strikingly similar to a New York obscenity statute upheld by this Court in 1966." BIO.9. The State's reliance on *Mishkin v. State of N. Y.*, 383 U.S. 502 (1966) is not only misplaced, it is illogical. In *Mishkin*, a statute making distribution of obscene material a misdemeanor was challenged as unconstitutionally vague because, although the statute explicitly required "*intent* to sell, lend, distribute" obscene material, the statute was silent as to whether the defendant was required to have knowledge that the character of the material he or she intentionally distributed was obscene. *Id.* at 503 n.1(emphasis added). This Court found that New York courts had cured any infirmities in the wording of the statute because "[i]n *People v. Finkelstein*…the New York

Court of Appeals authoritatively interpreted s 1141 to require the 'vital element of scienter'" despite the omission of any language requiring knowledge of the nature of the material. *Mishkin* at 510 (citing *People v. Finkelstein*, 9 N.Y.2d 342, 345, 174 N.E.2d 470, 471 (1961)). In sum, New York interpreted a vague misdemeanor statute regarding obscenity distribution to require a scienter element to the crime. In contrast, Ohio has held that a felony statute requires no scienter and can impose strict liability. Clearly, the cases cited by the State only bolster the Petitioner's argument that Ohio's statute is unconstitutional because it lacks any scienter requirement for the act of dissemination.

The State then wholly sidesteps the issue of strict liability for dissemination in the computer era. *Mishkin* and *Finkelstein* were both decided in the 1960s – long before home computers, peer-to-peer networks and cloud computing became the norm. The State disingenuously argues that Petitioner's arguments are specious because the State still has to prove a defendant had knowledge that the material was obscene before it was accidentally disseminated. BIO.10. It is the State's argument that is specious and unsound. Any person who comes into inadvertent contact with child pornography will automatically know that it is obscene material. Once they try to discard it, they could be held liable under this strict liability scheme. Again, Mr. Montalvo's landlord threw away the catalogue with child pornography that mistakenly came into her possession. The Federal Trade Commission (FTC) warns that child pornography can inadvertently be downloaded when using a peer-to-peer network and unwittingly share this information

with others. A person who inadvertently downloads this type of illicit pornography, discovers it on their computer, tries to delete it, but an automated cloud backup distributes the illicit material could then be prosecuted under this unconstitutional Ohio statute.

After taking liberties with the law, the State of Ohio takes liberties with the facts of this case. The State did not argue that they proved intent to disseminate these illicit materials as they infer. BIO.10. Instead the State argued, and the Court of Appeals agreed, that the statute imposes strict liability for even inadvertent dissemination of illicit materials. Detective Steller did not testify that this download would not have been possible if Petitioner had decided to turn his file sharing software off. BIO.10. There was no indication of a decision made by Petitioner. There is no fact that shows Petitioner knew there was a file sharing program turned on. In fact, Detective Steller testified that "it could have been an automated process." Transcript, Vol. I, p. 152. If someone does not know that an automated system is turned on, how do they make a conscious decision to turn the automated program off? Indeed, Detective Steller acknowledged that he did not know who turned on file sharing or how long it had been turned on. Transcript, Vol. I, p. 155. The State's disingenuous factual argument also ignores that 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. Thereafter, the State comments that "Petitioner's computer contained a file sharing program called Frostwire" seeming to infer that this program qualifies as some proof of illicit intent. Frostwire is a legal file sharing program that is routinely used to share music and movies.[1] It is exactly the type of legal peer-to-peer network the FTC warns could mistakenly download malware or pornography and these programs can inadvertently share information you never intended to share.[2] The State of Ohio did not prove that Petitioner Montalvo intentionally or knowingly disseminated child pornography, instead the State argued that the statute imposes strict liability for dissemination regardless of the defendant's intent.

This Court's guidance is needed as such a Draconian standard is an affront to well-established Supreme Court precedent.

II. The complete blockade of a Defendant's sole defense can never be glossed over as mere harmless error.

The State completely sidesteps addressing this Court's holding regarding 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. The right to present a full defense is not mere harmless error – as grossly mischaracterized by the

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[1] *See*, https://en.wikipedia.org/wiki/FrostWire

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

State. BIO.11. When the error is of a constitutional dimension, the harmless error test requires the Government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Gov't of Virgin Islands v. Davis*, 561 F.3d 159, 165 (3d Cir. 2009)(citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). This Court has held that harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence, but instead is a question of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23.

The State acknowledged no legal basis existed to prevent the introduction of this critical evidence. The Ohio appellate court grudgingly acknowledged that there was no legal reason to preclude this critical evidence and *incredibly found that the exclusion of this evidence materially prejudiced Petitioner*. This was significant, game-changing evidence and it is not clear beyond a reasonable doubt that Mr. Montalvo would have been found guilty had the jury heard that his roommate had child pornographic materials mailed to the residence.

As set forth in *Chapman v. California*, "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot… be conceived of as harmless." 386 U.S. at 23–24. The same is true as to the exclusion of evidence. The Ohio Court of Appeals found material prejudice to Petitioner, but the State argues that appellate review should be foreclosed because evidence that another

person may have committed the crime was inconsequential to the jury's verdict. "[A] machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession." *Id.* at 26.

It is a legal travesty that a jury was prevented from hearing evidence that Petitioner Montalvo's roommate, who had unfettered access to his computer, had a catalogue with child pornography addressed to him. The jury was foreclosed from weighing the authenticity of the purported telephone confession because they were deprived of critical evidence that would have had substantial weight in determining whether the telephone call was made by Petitioner Montalvo or his roommate, Mr. Bowden (a roommate who had knowledge of the police search for pornography, knowledge of the indictment, and access to the phone).

Despite the State's proclamation that the exclusion of this evidence was harmless, a rational jury upon learning that Mr. Bowden (Petitioner's roommate) had a catalogue with child pornography sent to him, may have had reasonable doubt that Petitioner Montalvo downloaded these materials. The jury, by hearing critical evidence that another person may have committed this crime, could have concluded that the prosecution failed to meet its burden of sustaining the conviction beyond a reasonable doubt. Surely, this catalogue containing child pornography mailed to Mr. Montalvo's roommate would have played a critical role in the jury's determination. This critical evidence,

erroneously precluded by the trial court, treaded on Pedro Montalvo's constitutional right to present a defense. This was not mere evidentiary error of a minor issue. The precluded evidence was admissible, significant and materially prejudicial - as even the Ohio appellate court concluded. In sum, the right to present a defense has been neutered by our appellate courts and affirmances are cloaked under the guise that evidentiary errors are purportedly harmless. This rationale is dangerous and needs to be addressed by this Honorable Court.

III. The State's misguided argument that *Massiah* only applies to secret interrogations is in direct conflict with relevant decisions of this Court and highlights lower courts' growing indifference to a defendant's fundamental right to counsel.

The State argues that this case is "easily distinguished from *Massiah*" because "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques." BIO.12. Thereafter, the State "urges this Court to reject Petitioner's comparison of this case to *Massiah*." BIO.13. These statements only highlight the State's complete disregard of *Massiah* and its progeny.

Clearly, the State completely misunderstands the holdings in *Massiah* and its progeny. The State makes an absurd argument that the *Massiah* doctrine only prohibits the government from eavesdropping or using jailhouse snitches to circumvent the right to counsel and disingenuously argues that *Massiah* allows officers

to directly interrogate indicted defendants without counsel present and without advising defendants of their right to counsel. The State's faulty argument has already been addressed and found unavailing by this Court. This Court has explicitly held that the *Massiah* doctrine applies when the police directly elicit statements from a defendant outside the presence of counsel. *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977).

In *Brewer v. Williams*, the government argued that *Massiah* did not apply because the government directly elicited statements from a defendant and not surreptitiously. 430 U.S. at 400-01. This Court specifically held "[t]hat the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant. … Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." *Id.* In *Fellers v. United States*, this Court held because officers' conversation with a defendant "took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of his Sixth Amendment rights, the officers' actions violated the Sixth Amendment standards established in *Massiah, supra,* and its progeny." 540 U.S. 519, 520 (2004). This law was explicitly set forth in the Petitioner's Reply Brief filed with the Ohio Court of Appeals when the State first raised this identical, unfounded argument. As such, the State's argument is simply ridiculous and against the weight of overwhelming law. Despite this, the Court of Appeals ignored this Court's clear precedent.

Apparently, *Massiah* violations are so normalized in Ohio that the State does not even recognize the precedent set forth by this Court.

In defending the *Massiah* violation, the State then argues "[t]he Government violates a defendant's right to counsel when it intentionally creates a situation likely to induce a defendant to make incriminating statements without the assistance of counsel." BIO.13. The Record here shows that Agent Bryant requested a callback from Petitioner. Agent Bryant admitted to asking the person who identified himself as Pedro Montalvo questions that are clearly indicative of an interrogation. Finally, it was Agent Bryant who *knowingly called a suspect who had been indicted.* This is a classic *Massiah* violation.

In another distortion, the prosecution here claims Petitioner Montalvo waived his right to counsel. No such occurrence is reflected in the Record. Indeed, the Record here shows that Petitioner invoked his right to remain silent after he was read his rights as evidenced by the testimony of Detective Marti. Transcript, Vol. I. p. 169. Sadly, the Ohio appellate court accepted the absurd argument of the State that purportedly Pedro Montalvo waived his right to counsel. There is not a scintilla of evidence that Special Agent Bryant Mirandized the caller he believed to be Pedro Montalvo. Not a scintilla of evidence that he informed Mr. Montalvo of his right to counsel. Instead, Special Agent Bryant describes an interrogation. He testified that he asked the caller about his web search habits and stated that the caller was asked questions that were "part of our typical interview when we are

interviewing suspects." Transcript, Vol. I, pp. 198-200. The Ohio appellate court concluded that Mr. Montalvo failed to prove that he had not waived his right to counsel. That is alarming whereas the burden of proving an intelligent, knowing and voluntary statement is a *burden for the State to overcome.* This new standard will destroy whatever remains of our Sixth Amendment right to counsel.

This case is a perfect vehicle to reaffirm the expansive holding in *Massiah* which protects an individual's constitutional right to counsel.

IV. The State's purposeful violation of a Defendant's constitutional right to remain silent cannot be conveniently categorized as careless, harmless error.

Doyle errors can be held as harmless error, but does that legal standard still apply *when it is the prosecutor that purposefully* raised the issue of the Defendant's silence at trial? In most circumstances, *Doyle* violations have only been held as harmless where an errant remark is made by a witness - often a police officer not familiar with the *Doyle* holding. However, in this case, the prosecution pointedly asked a witness whether Petitioner invoked his right to remain silent. This is a shocking, purposeful violation of one's Fifth Amendment right to remain silent. Have we now watered-down *Doyle* violations to such an extent? Let us be frank, *Doyle* violations are rampant in our State and Federal courts. These violations of our Fifth Amendment rights are condoned by appellate courts if they were not highlighted by the prosecution in its closing. Incredibly, many *Doyle* violations have now

been *initiated by the prosecutor* and this cannot be condoned by our appellate courts. The Ohio appellate court viewed the purposeful *Doyle* violation as harmless error. Such a cavalier attitude regarding *Doyle* violations infects our court system. This Court has a perfect opportunity to clarify when a *Doyle* violation is harmless error and when it is not. Otherwise, prosecutors will engage in a dangerous game of "catch me if you can" gamesmanship. This gamesmanship will result in countless citizens losing their right to remain silent and clearly appellate courts will not remedy this egregious wrong. This ongoing travesty cannot continue.

The prosecution's claim that the evidence here was overwhelming is nothing more than a recitation of shocking pornographic materials found on a computer at the residence of Mr. Montalvo and Mr. Bowden. The computer was accessible to both residents - including others who were found at the residence at the time of the law enforcement raid. The shocking and egregious constitutional violations are the glaring overwhelming pattern that plagued Mr. Montalvo's trial. A man, with no prior criminal record, was deprived of his liberty and lingers in prison because his constitutional rights and protections were violated by the State on numerous occasions.

CONCLUSION

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

Respectfully submitted,

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