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 Court of Appeals of Ohio, Knox County

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner Montalvo seeks review of his convictions under one of Ohio's child pornography statutes, Ohio Rev. Code Ann. 2907.322, Pandering Sexually Oriented Matter Involving a Minor. Despite Petitioner's bold contentions, the decision of the court below did not tread on new constitutional ground, nor did it trample Petitioner's constitutional rights.

Respondent State of Ohio asserts that the Petitioner was convicted under a statute that has a scienter element that is supported by this Court's jurisprudence in *Mishkin v. New York*, 383 U.S. 502 (1966). Furthermore, the other assignments of error brought in this petition were reviewed below under a harmless error or plain error analysis. This Court's cases lead to a conclusion that these standards were appropriate to the appellate review by the Ohio Fifth District Court of Appeals, and their review of the record led to findings of harmless error or no prejudice to the Petitioner.

Upon jurisdictional review, the Ohio Supreme Court unanimously declined to accept jurisdiction of Petitioner's appeal.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Respondent agrees with the following procedural history as found by the Ohio Fifth District Court of Appeals:

> On November 17, 2014, the Knox County Grand Jury indicted Pedro Montalvo, Jr. on one count of Pandering Sexually Oriented Material Involving a Minor in violation of R.C. § 2907.322(A)(2), a felony of the second degree. (*See* Indictment, Case No. 14CR11-0185). The matter was set for a change of plea on May 19, 2015, but subsequently reset for trial after a substitution of counsel on May 28, 2015.
>
> The State of Ohio moved to dismiss the case without prejudice on August 26, 2015 and the motion was granted on August 27, 2015.
>
> On November 3, 2015, the Knox County Grand Jury re-indicted Pedro Montalvo, Jr. in Case No. 15CR11-019. The indictment included 18 counts. Count One was a charge of Pandering Sexually Oriented Material Involving a Minor in violation of R.C. §2907.322(A)(2), a felony of the second degree. Counts Two through Eighteen were all charges of Pandering Sexually Oriented Material Involving a Minor in violation of R.C. §2907.322(A)(5), felonies of the fourth degree. (*See* Indictment, Case No. 15CR11-0192).

> Other than discovery motions and a motion for a bill of particulars, there were no pre-trial motions filed by Appellant before the case proceeded to trial on November 1-2, 2016.
>
> On November 2, 2016, following deliberations after the conclusion of all evidence, the jury found Appellant guilty on all counts.
>
> On December 16, 2016, the trial court sentenced Appellant to serve seven (7) years of imprisonment on Count One and seventeen (17) months imprisonment on each count for Counts Two through Eighteen. These sentences were ordered to run concurrently. (Sent. Entry, Dec. 20, 2016).

State v. Montalvo, 2018-Ohio-3142, ¶13-¶18, 2018 Ohio App. LEXIS 3383, *5-7, 2018 WL 3752177.

Petitioner filed his state court appeal on October 2, 2017. The Ohio Fifth District Court of Appeals affirmed the judgment of the Knox County Court of Common Pleas on August 6, 2018. *Id.*

Petitioner filed a notice of appeal to the Ohio Supreme Court on September 19, 2018. After jurisdictional briefing by the parties, the Ohio Supreme Court unanimously declined to exercise jurisdiction over the case. *State v. Montalvo*, 2018-Ohio-4962, Dec. 12, 2018.

II. FACTUAL BACKGROUND

Respondent agrees with the facts found by the Ohio Fifth District Court of Appeals:

> The investigation into Appellant Pedro Montalvo began on October 3, 2014, when Detective Rick Steller was checking law enforcement software which had downloaded child pornography from a computer in Mount Vernon, Ohio. (T. at 134). Det. Steller is a member of the Grove City Police Department, assigned to the Franklin County Internet Crimes Against Children (ICAC) Task Force. (T. at 127-128). The file downloaded on October 3, 2014, was titled "Sally 4YO to 8yo.mpg." (T. at 141). Det. Steller testified at trial that he determined by viewing the file that it contained child pornography. (T. 136).
>
> Detective Steller determined the Internet Protocol address from which the file had been downloaded, which was IP 184.57.52.51. (T. at 136). He also determined based upon a Google search that the IP address was owned by Time Warner Cable. (T. at 137). Based upon that knowledge, Det. Steller obtained a subpoena from the Franklin County Municipal Court for the subscriber information related to the IP address. (T. at 136). Time Warner's response indicated that the subscriber for IP 184.57.52.51 was Pedro Montalvo, located in Mount Vernon. (T. at 138). The response also indicated that the Pedro Montalvo's address was 308 West Vine Street in Mount Vernon, and that there were two phone numbers associated with Montalvo's

account: (740) 358-5861 and (740) 358-0000. (T. at 153-154).

Mount Vernon Police Det. Sgt. Beth Marti testified that she was contacted by Det. Bumpus of the ICAC task force, who provided her with information about the initial investigation. (T. at 157-158). This information included Montalvo's name, address, IP address, internet service provider, and telephone number. (T. at 158-159). She investigated the home address and found that Montalvo had a vehicle registered to him at the address, and that he had been registered to vote there since 2011. (T. at 159-160). Det. Bumpus also provided Det. Marti with a copy of the downloaded file of child pornography, which she viewed so that she could testify to its content. (T. at 160). Based upon that information, Det. Marti obtained a search warrant from the Mount Vernon Municipal Court. (T.at 161).

Det. Marti was part of the law enforcement team that executed the warrant, a team that also included Det. Bumpus and Special Agent Cameron Bryant of Homeland Security. (T. at 162). When the warrant was executed, there were three people present at the residence: Robert and Wendy Bowden, and a female named White Dove. (T. at 163). Those persons identified Pedro Montalvo's bedroom, wherein they located two computers. (T. at 163, 166).

Det. Marti testified that she informed the resident the officers were there on a child

pornography investigation. (T. at 168). Resident Robert Bowden emphatically denied looking at child pornography, and provided the detectives with his cell phone and laptop computer. These devices were examined and found to contain no child pornography. (T. at 168).

Detective Marti was the only witness who personally met Pedro Montalvo. She identified Montalvo based upon viewing his picture on law enforcement databases and meeting with him at the Knox County Jail. (T. at 169). In the course of that testimony, Det. Marti stated that Montalvo declined to make a statement. (T. at 169). This is the only reference to his silence in the record. (*See* Transcript). No objection was raised to this testimony. (T. at 169). Det. Marti then proceeded to identify the Defendant in open court. (T. at 169).

Special Agent Cameron Bryant of Homeland Security Investigations also participated in the execution of the search warrant at 308 W. Vine Street in Mount Vernon on November 12, 2014. (T. at 177, 179). His role was to examine the computers for evidence of child pornography. (T. at 182). When he examined the HP Desktop computer belonging to Pedro Montalvo, he recovered over 600 images of child pornography, 70 + digital movies containing child pornography and 197 images or videos that depicted known victims of child pornography investigations. (T. at 190). There was no argument that the child pornography files charged in the indictment

were found on Appellant's computer. The State of Ohio and Appellant stipulated to the dates, titles, and the content of the files containing images of minors engaged in sexual activity. (T. at 194).

As to the computer itself, Agent Bryant testified that the HP desktop computer was password protected. (T. at 196). The computer also contained a file sharing program called Frostwire. (T. at 199).

Special Agent Bryant testified that while he never met Pedro Montalvo during his investigation, he did leave several messages on Montalvo's phone. (T. at 196). Agent Bryant stated that he received a return call from (740) 358-5861 at 8:42 p.m. on November 17, 2014, while at home. (T. at 197). The caller identified himself as Pedro Montalvo. *Id.* He acknowledged receiving Bryant's messages and stated that he learned that he had been indicted. (T. at 197). He also stated that he was an over-the-road truck driver and was in Wisconsin. (T. at 198). He admitted to having child pornography on his home computer and that he used Frostwire and BitTorrent to download child pornography. (T. at 198-199). He stated he used computer search terms including PTHC (preteen hard core), PTSC (preteen soft core), 09YO for nine year old, 08YO, 05YO and 0YO. (T. at 199). He further stated that when he used 0YO, he received videos of adult men engaging in sexual conduct with babies. (T. at 199).

State v. Montalvo, 2018-Ohio-3142, ¶4-¶12, 2018 Ohio App. LEXIS 3383, *1-5, 2018 WL 3752177.

Respondent contests Petitioner's factual allegation that his roommate had "unfettered access to his computer." (Petition at 12-13). While there was testimony that Petitioner's computer was password protected (T. at 196), the trial transcript is devoid of testimony that anyone other than Petitioner knew this password.

In addition, Respondent notes that the record contains testimony by Det. Steller of the Ohio Internet Crimes Against Children Task Force that in order to share child pornography on a peer-to-peer computer network, a user would need to have file sharing software and that software would have to be turned on by the user. (T. at 143-144).

REASONS FOR DENYING THE WRIT

I. OHIO REVISED CODE ANN. 2907.322(A)(2) POSSESSES A CONSTITUTIONALLY SOUND ELEMENT OF SCIENTER.

This Court has settled the issue that Ohio may constitutionally proscribe the possession and viewing of child pornography. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (reviewing Ohio Rev. Code Ann. 2907.323). As part of a child pornography prohibition, 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).

Petitioner challenges the constitutionality of Ohio Rev. Code Ann. 2907.322(A)(2), which provides:

> (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.

(emphasis added). The scienter involved in this statute is knowledge of the character of the material or performance involved. This type of mens rea requirement is strikingly similar to a New York obscenity statute upheld by this Court in 1966.

In *Mishkin v. New York*, 383 U.S. 502 (1966), this Court examined the New York Court of Appeals construction of Penal Code Section 1441:

> A reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised . . . ." (Emphasis added.)

Id. at 510, quoting *People v. Finkelstein*, 9 N. Y. 2d 342, 344-345, 174 N. E. 2d 470, 471 (1961). This Court held that the New York definition of the scienter required by § 1141 fully meets the demands of the Constitution. *Mishkin* at 511.

Petitioner's principal argument is that Ohio's statute will punish unwitting distribution of child pornography over the internet, however, like the New

York law, Ohio's statute requires the defendant to know what he is making available to others. Accordingly, Petitioner's argument that a father could be held strictly liable for allowing a child's search result to be shared over a peer-to-peer network is specious, because the State would have to show that the father was aware of the material on his computer before it was shared.

Here, there was plenty of evidence that Petitioner knew the nature of the content he had made available to others over a peer-to-peer sharing network. *State v. Montalvo*, 2018-Ohio-3142, ¶12. His search terms and results of pornography including infants that he discussed with Agent Bryant demonstrated that he was aware of what was on his computer. *Id.* Detective Steller, who began the investigation by initiating a download of a child pornography file from Petitioner's computer, testified that this download would not have been possible if Petitioner had decided to turn his file sharing software off. (T. at 133-134). Petitioner's computer contained a file-sharing program called Frostwire. *State v. Montalvo*, 2018-Ohio-3142, ¶11.

This Court should decline Petitioner's invitation to find Ohio Rev. Code Ann 2907.322 void for vagueness just as it rejected the challenge to the New York statute in *Mishkin*.

II. THIS COURT HAS HELD THAT ERRONEOUS EXCLUSION OF EVIDENCE IS SUBJECT TO HARMLESS ERROR ANALYSIS.

This Court has held that the erroneous admission of evidence in violation of the Fifth Amendment's guarantee against self-incrimination, and the erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth Amendment, are both subject to harmless-error analysis. *Neder v. United States*, 527 U.S. 1, 18 (1999), citing *Arizona v. Fulminante*, 499 U.S. 279 (1991), and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). In *Crane v. Kentucky*, 476 U.S. 683 (1986), this court cited *Van Arsdall* for the proposition that harmless error analysis extends to the exclusion of evidence sought to be introduced by a criminal defendant. *Crane,* 476 U.S. at 691. "[M]ost constitutional errors can be harmless." *Fulminante*, 499 U.S. at 306. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579 (1986).

Thus, the question for the court below was the inquiry set out in *Neder*: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18.

Here, Petitioner challenged the trial court's ruling on a best-evidence objection by the state that disallowed a defense witness from testifying to the

content of a purported catalog of child pornography allegedly mailed to Petitioner's roommate. The evidence was preserved in the record via proffer for appellate review. *State v. Montalvo*, 2018-Ohio-3142, ¶29. The Ohio Fifth District Court of Appeals, conducting a harmless error review, found the error to be harmless and stated that "We do not find, based on the other evidence presented at trial, that the outcome of the proceedings would have been different." *Id.* In making the finding, the court noted that the testimony concerning the catalog concerned "what an unidentified person may have sent to Petitioner's roommate after the time period of the investigation and resulting charges in this matter." *Id.*

This Court has stated that it undertakes harmless error review sparingly. *United States v. Hastings*, 461 U.S. 499, 510 (1983). Respondent asserts that this case should not be accepted for review because the proper standard was applied to the record by the appellate court below, and the Ohio Supreme Court unanimously declined to review this assignment of error.

III. THE LOWER COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S CASES CONCERNING THE *MASSIAH* DOCTRINE OR *DOYLE* VIOLATIONS.

A. THIS CASE IS EASILY DISTINGUISHED FROM *MASSIAH*.

The primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. *Kuhlmann v. Wilson*, 477 U.S. 436, 459

(1986). This Court's prohibition in *Massiah* concerned confessions "deliberately elicited" from a defendant after indictment and in the absence of his counsel. *Massiah v. United States*, 377 U.S. 201, 206 (1964). The 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, *United States v. Henry*, 447 U.S. 264, 274 (1980) (emphasis added).

Here, the Petitioner initiated a telephone call to Agent Bryant indicating that he knew he had been indicted. *State v. Montalvo*, 2018-Ohio-3142, ¶12. During that call, he discussed his search terms for child pornography and the presence of file sharing programs on his computer. *Id.* This case does not involve the government using listening devices or jailhouse snitches like *Massiah* and its progeny.

As the court below noted, "[T]he Sixth Amendment right to counsel may be waived by the defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent." *State v. Montalvo*, 2018-Ohio-3142, ¶34, citing *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). The court below held that "it is clear that Appellant initiated the conversation with Special Agent Bryant when he returned the telephone call, thus indicating Appellant's statements were voluntary and admissible against him at trial." *Montalvo*, at ¶35.

Accordingly, Respondent urges the Court to reject Petitioner's comparison of this case to *Massiah*.

B. THIS COURT HAS MADE IT CLEAR THAT *DOYLE* VIOLATIONS ARE SUBJECT TO HARMLESS ERROR ANALYSIS.

While Petitioner argues that a *Doyle* violation can never be harmless error, (Petition at 29) this Court has held that "Doyle error fits squarely into the category of constitutional violations which we have characterized as 'trial error.'" *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993), citing *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991). Trial error is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Id.* Trial-type constitutional errors are reviewed under the harmless-beyond-a-reasonable-doubt standard. *Id.,* citing *Chapman v. California*, 386 U.S. 18 (1967).

The Ohio Supreme Court cases applied below in the Ohio Fifth District Court of Appeals both cite the harmless beyond a reasonable doubt standard for review of *Doyle* issues. *See State v. Zimmerman*, 18 Ohio St.3d 43 (1985), 47 N.E. 2d 862, *State v. Treesh*, 90 Ohio St.3d 460 (2001), 739 N.E.2d 749. However, the Ohio Fifth District Court of Appeals applied a plain error analysis to the *Doyle* issue in this case, because there was no objection in the trial record.

This Court has stated that a plain error review under Criminal Rule 52(b) normally requires the same kind of inquiry as a harmless error review "with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of

appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *United States v. Olano*, 507 U.S. 725, 734 (1993).

Here, the Fifth District Court of Appeals found that based upon the facts of the case and the "overwhelming evidence of Appellant's guilt of the crimes," the outcome of the trial would not have been different. *State v. Montalvo*, 2018-Ohio-3142, ¶52.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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