

“Daddy, Can You Go My Bail?”
Forensic Experts in the FBI’s Crosshairs
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“Daddy, can you go my bail?” is a vintage country music line – soon it may be crooned by a forensic examiner near you.

Until recently, the authors didn’t worry much about going to jail. Generally, if you think of yourself as a law-abiding citizen, you don’t fret about how you’d look in an orange jumpsuit. Then we read (with horror) a recent decision of an Ohio appellate court, *State v. Brady* (Ohio App. 11Dist.,2007 WL 1113969, April 13, 2007).

Stay with us, because the case takes a bit of explaining. Daniel Brady, the defendant, had been indicted on 50 counts, all having to do with child pornography. He was indigent, so the trial court appointed lawyer Dean Boland (who is an expert in digital imaging and sometimes serves as an expert in these cases) to be an expert witness for Brady.

The salient part of the background is this: Mr. Boland has presented to courts, on multiple occasions, evidence of how easy it is to use technology to combine the image of an real 18 year-old (perhaps underdeveloped and slender) and to morph onto that adult body the face of a minor – he used faces grabbed at random from the Internet for his demonstrations. His testimony and exhibits were presented to bolster the attorney’s argument to the court that individuals lack the capacity to know if they are looking at a real child pornographic image or one that merely “appears to be” real. Several courts in Ohio found this argument persuasive and dismissed charges against defendants accused of possessing child pornography. In Ohio, unlike some other states, this evidence is crucial, as the state must prove that the images are of real children. The courts reasoned that since it was obvious from the exhibits that merely visually examining a digital image is insufficient to determine whether it is real or not, the court itself was unable to do so as well. Without testimony as to its authenticity (which the state was unable to provide), the images were out.

This technological truth and its application to the benefit of defendants apparently attracted the attention of the federal authorities

Back to the story involving Mr. Brady: the Ohio state court, having appointed Mr. Boland as an expert witness, also issued a protective order allowing Boland to have the contraband in his possession for analysis. Shortly thereafter, Boland was leaving a seminar on June 24, 2006, when he was detained by FBI agents. Simultaneously, FBI agents, with badges and guns, raided his home where he lives with his wife and three young children. After 6 hours, they emerged with a collection of boxes and bags. As it happened, Boland had the contraband (contained on a CD) on his person at the seminar, so the raid yielded nothing other than exhibits prepared for the Brady trial. It is quite possible that the FBI hoped to find child pornography in addition to that involved in the Brady case, but they came up empty. The thought that the FBI was trying to smear

Boland is further underscored by the fact that a TV crew appeared to record the FBI raid and broadcast it on that evening's news – who tipped them off? Who had an interest in making Boland look like he was affiliated with child porn? Thankfully for Boland, if this was the intent, it didn't work. He was exactly what he held himself out to be – a lawyer/expert aggressively working on behalf of a client.

The subpoena issued in support of the search warrant alleged that Boland violated Section 2252A, Title 18, U.S. Code. The federal statute, unlike several state statutes (including Ohio's), does not contain the exemption allowing a “proper person” using contraband for a bona fide purpose to possess the contraband. Until this case, forensic experts (including the authors!) assumed that a state protective order was sufficient to allow them to examine contraband in the fulfillment of their duties.

After taking possession of the evidence, the FBI held the possibility of federal charges over Boland's head. Therefore, Boland told the state trial court that he could not accept another copy of the prospective evidence exhibits, could not research their origin and could not prepare the necessary digital image exhibits for the defense. Essentially, he resigned from his position, and noted that no other forensic expert would touch the evidence under the threat of federal prosecution. As no expert would work with Brady, he moved to dismiss the charges, arguing that his due process rights to a fair trial had been violated. The trial court agreed and dismissed the charges - the state appealed.

The appellate court affirmed the lower court's ruling, essentially setting up a major confrontation between the state and federal government. Does the federal child pornography law trump all the state laws? We may find out shortly, since the state has now asked the Ohio Supreme Court to review the appellate decision.

The appellate court was resolute in its protection of constitutional rights, pointing out that Brady had been denied the services of any competent expert in light of the federal threat. Moreover, it noted Boland's testimony that any attorney representing Brady would be ethically bound to inform any potential expert of the threat of federal prosecution. The state argued that Boland could examine the contraband materials at the prosecutor's office. This was rejected by the court for a host of reasons – it still didn't allow Boland to create his trial exhibits and the prosecutor didn't have Boland's analysis software. Worse yet, it could be argued that Boland “received” child pornography while working in the prosecutor's office, in violation of Sections 2232(a)(2)(A) and/or 2252A(a)(2) of Title 18, U.S. Code. If he were to investigate the websites from which the images originated (as an example, to see if the websites claimed that everyone depicted was over the age of 18, negating intent), he might then be found to be in violation of Sections 2252(a)(2)(A) and 2252A(a)(2), Title 18, U.S. Code, which prohibit receiving any images of child pornography that have traveled in interstate or foreign commerce, “including by computer.” Finally Boland testified that he couldn't record his findings and would therefore have to memorize his entire analysis of hundreds or perhaps thousands of images.

The authors would add the following: the forensic examiner is handicapped by not having a complete library of their reference materials available, by not having all of their forensic equipment and tools available, and by the inability to start long searches which they ordinarily might leave running overnight, collecting the results in the morning. Additionally, the cost to the defendant (or in many cases, the taxpayer) is at least two to three times higher when the expert has to go onsite and effectively “babysit” the forensic analysis process while various searches or routines are running. “Babysitting” charges don’t apply back at the expert’s home lab, where they can walk away and work on another case, obviously after securing the contraband!

When we called Boland to interview him for this article, he was relieved (of course) that there was no longer a threat of federal prosecution. However, to make that threat go away, the federal authorities required him to sign a deferred prosecution agreement, the most notable part of which is that he had to agree not to create any further exhibits of “adult to child morphed images.” Apparently the FBI was interested in Boland only for the purposes of shutting down what had been a very effective argument in court.

So how careful was the FBI with the same contraband? Read and cringe. The state prosecutor, in the Brady case, sent the contraband to its own expert via mail, its own form of federal crime (transport of contraband in interstate commerce) and allowed its own expert, a Dartmouth computer science professor by the name of Hany Farid, to possess the evidence for purposes of analysis, which he then returned by mail with his report. Did we mention that Professor Farid often lectures to federal law enforcement? What’s good for the goose should be good for the gander guys – how come Professor Farid was allowed to do everything Boland was not?

So how did we end up with this inane federal law that keeps experts (and attorneys) from effectively doing their jobs when hired by defense counsel in child pornography cases? In the usual convoluted manner of Congress, this revision of a previous law (which **did** allow attorneys and experts to hold contraband) was buried in an omnibus bill and passed without any consideration of its Constitutional consequences. The defense bar and forensic experts throughout the country have been waiting for a case to reach the U.S. Supreme Court in hopes that the Court would declare the federal law unconstitutional. Will the Brady case make it there? We’ll see – if the Ohio Supreme Court upholds the appellate decision, the case ends there. If they reverse, Boland has indicated that his client would certainly file a writ.

One has to wonder why, with the enormous increase in child pornography in this country, the FBI would choose to target not the criminals but their experts. There’s something upside-down about that kind of decision. In point of fact, any defense expert who handles child porn cases will tell you that they feel like they are working for the prosecution most of the time. Generally, they find more damning evidence than law enforcement found, and their reports are used by defense counsel as a baseball bat with which to club the defendants into seeing the wisdom of accepting a plea, thereby saving tax dollars and getting them behind bars. Only once has any expert at Sensei testified that he believed

that the defendant was innocent and had been framed – and indeed, he was found not guilty. Do we really want to deprive someone who is innocent of competent expert help?

The federal law, as it currently stands and as enforced in Brady, certainly seems to nibble away at the heart of the Constitutional right of due process.

But if the FBI is reading this, all child pornography previously held in accordance with rigorous security protocols under court order at Sensei Enterprises, Inc. is now gone for fear that we too would be raided. Are we still doing analysis on federal sites? Yes, albeit a tad nervously. After reading all of the above, is it beyond the pale to think that the FBI might raid its own federal sites to charge someone authorized by both a court and federal authorities to examine the evidence? Perhaps not. You have to think these highly trained federal agents have something better to do.

Have mercy guys, we look lousy in orange jumpsuits.

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