

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,**

**Plaintiff-Appellant,**

**v.**

**JENNIFER GAINES,  
AND  
WILLIAM GAINES,**

**Defendants-Appellees.**

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**Case No. 2011-0774**

**On Appeal from the Clinton  
County Court of Appeals,  
Twelfth Appellate District**

**Court of Appeals Case Nos.  
CA2010-07-010 & CA2010-07-011**

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**THE STATE OF OHIO'S RESPONSE TO THE DEFENDANTS-APPELLEES' MOTION AND  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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**RECEIVED**  
JUN 06 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
JUN 06 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The Appellant, State of Ohio, herein responds to the Appellees, Jennifer and William Gaines, on the issue of jurisdiction, pursuant to S.Ct.Prac.R.<sup>1</sup> III § 2(B). This is not a case of public or great general interest. The Appellees are not public figures, nor is this case in the public eye. In addition, this case does not pose any substantial constitutional question that would affect the public. Moreover, this Court should not grant leave to appeal this felony case since the Appellees' propositions of law simply lack merit.

**STATEMENT OF THE CASE AND FACTS**

On August 5, 2009, Jennifer and William Gaines, the Appellees, were indicted by a Clinton County Grand Jury and formally charged with Extortion, R.C.<sup>2</sup> § 2905.11(A)(4), a felony of the third degree.

This case arose when Mrs. Gaines sent a letter dated July 14, 2009 to Ralph D. Fizer, Jr., the elected Sheriff of Clinton County, Ohio.<sup>3</sup> In the letter, she claimed that Larry Robert, Jr., had contacted the Sheriff and provided the Sheriff with a cell phone number. Mrs. Gaines claimed that the Sheriff had used the National Drug Intelligence Center (NDIC) to determine that the cell phone attached to the number was owned by the Gaines and had given this information to Mr. Roberts. In the letter, Mrs. Gaines claimed that she had contacted the Federal Bureau of Investigation (FBI) regarding the Sheriff's alleged activities. In addition, Mrs. Gaines demanded that a legal representative contact her and her husband, William Gaines, within 14 days and threatened that she would contact the United States Department of Justice, Criminal Division, and would contact

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<sup>1</sup> Rules of Practice of the Supreme Court of Ohio.

<sup>2</sup> Ohio Revised Code.

<sup>3</sup> From the face of the letter, it appears that Mrs. Gaines sent or attempted to send copies of the letter to Mr. Larry Roberts, Jr., and to R&L Carriers.

various local and national media outlets if the Sheriff did not contact her. In the Appellees' later motions, they claimed that Sheriff Fizer used the Law Enforcement Agencies Data System (LEADS) to uncover that the cell phone attached to the number provided by Mr. Roberts belonged to the Gaines.

After the Sheriff received the letter, he contacted the Clinton County Prosecuting Attorney, Richard W. Moyer, and Mr. Moyer's office began investigating the Gaines for Extortion. Eventually, the Bureau of Criminal Identification and Investigation (BCI&I) became involved. As part of the investigation, Andrew McCoy, an assistant prosecuting attorney with Mr. Moyer's office, had two telephone conversations with Mrs. Gaines, which were taped without Mrs. Gaines's knowledge. On July 21, 2009, during the first telephone conversation, Mr. McCoy stated that he represented Sheriff Fizer, and he attempted to elicit more information regarding the Gaines's accusations about the Sheriff. Transcript of Telephone Conversation, July 21, 2009, T.d., p. 2. Mrs. Gaines stated that she had contacted the Ohio Attorney General and had prepared a letter to send to the Department of Justice in the event an agreement could not be reached. *Id.* at 5-6. Mr. McCoy asked if an apology would suffice and Mrs. Gaines indicated that it would not. *Id.* at 7. After Mr. McCoy raised the subject of money, Mrs. Gaines stated that the Gaines wanted \$30,000.00 or \$40,000.00. *Id.* at 7-8. On July 22, 2009, during the second conversation, Mr. McCoy and Mrs. Gaines arranged a meeting at the Clinton County Prosecutor's Office for July 23. Transcript of Telephone Conversation, July 22, 2009, T.d., p. 2.

On July 23, 2009, Jennifer and William Gaines met with Mr. McCoy at the prosecutor's office. Transcript of Meeting, T.d., p. 1. At the meeting, Mr. Gaines accused the Roberts family of engaging in numerous criminal activities such as soliciting murder-for-hire, illegally dumping of hazardous waste, and operating illegal trailers in Clinton County. *Id.* at 2. During the meeting, Mr. Gaines stated

If I connect the Sheriff with the Roberts', (sic) then in my opinion they all need to go to jail. If I connect the Sheriff to the Roberts' (sic) in everything else they've done, it doesn't matter what the Sheriff has done – it's going to look like he has cooperated with the Roberts and it's going to make him look bad. It's going to look bad for the County, his whole family, and his father before him.

*Id.* at 5. Near the end of the meeting, Mr. Gaines stated that he would “settle” with the Sheriff for \$30,000.00 and that he wanted Mr. Roberts to pay off his house. *Id.* at 10. After the meeting, the Appellees were arrested.

On September 2, 2009, prior to the Warren County Prosecuting Attorney's involvement in the case as special prosecutor, the Appellees filed a Motion to Dismiss the Indictment claiming that the indictment was insufficient because it did not state a crime. In their motion, the Appellees argued that the threat to pursue legal action against someone can never be extortion in the State of Ohio and/or that threats uttered during settlement negotiations can never be extortion in the State of Ohio. Thus, the Appellees reasoned that the indictment was defective because the facts as stated in the indictment could not constitute the offense of Extortion.

The motion to dismiss, along with numerous other defense motions, was set for an evidentiary hearing before Judge R. Alan Corbin, a visiting judge. At the hearing, the Appellees called Assistant Prosecutor Andrew McCoy, as if on cross-examination; Prosecutor Richard W. Moyer, as if on cross-examination; Colonel Brian Prickett of the Clinton County Sheriff's Department, as if on cross-examination; and Sheriff Fizer, as if on cross-examination. Evidentiary Hearing on Motion to Suppress, T.p. While on cross-examination, these witnesses testified regarding the investigation and the merits of the case pending against the Gaines.

After hearing the testimony of the witnesses and considering the parties' post-hearing briefs, Judge Corbin filed a judgment entry dismissing the indictment. Judge Corbin cited and relied on *State v. Brady*, 119 Ohio St. 3d 375, 2008-Ohio-4493, 894 N.E.2d 671, for the proposition that a trial court, in resolving a motion to dismiss the indictment in a criminal case, may consider

evidence beyond the face of the indictment if the matter is capable of determination without trial of the general matter. Judgment Entry Granting Defendants' Motions to Dismiss, T.d., p. 6. Based on the evidence, Judge Corbin determined that the actions taken by the Gaines as set forth in the indictment, bill of particulars, and from the testimony of the State's witnesses at the evidentiary hearing did not constitute the crime of Extortion; thus, Judge Corbin dismissed the indictments against the Appellees. *Id.* at 8-9.

After Judge Corbin dismissed the indictments against the Appellees, the State appealed to the Clinton County Court of Appeals, Twelfth Appellate District, which reversed the trial judge's decision in *State v. Gaines*, Clinton App. Nos. CA2010-07-010 & CA2010-07-011, 2011-Ohio-1475. Now, the Appellees seek jurisdiction to appeal this case to this Court.

### **ARGUMENT**

**Response To Propositions Of Law I & II: The Clinton County Court of Appeals, Twelfth Appellate District, correctly applied this Court's holding in *State v. Brady*, 119 Ohio St. 3d 375, 2008-Ohio-4493, 894 N.E.2d 671, to this case.**<sup>4</sup>

In their first proposition of law, the Appellees claim that under Crim.R.<sup>5</sup> 12(C), a trial court can consider evidence beyond the face of the indictment in resolving a motion to dismiss because it is a legal question whether the alleged acts of the Appellees constituted the crime of Extortion. In their second proposition of law, the Appellees claim that the "general issue" language does not apply to Crim.R. 12(F).

In *Brady*, the defendant was facing 34 counts of pandering obscenity involving a minor and 16 counts of pandering sexually oriented material involving a minor. 2008-Ohio-4493, at ¶4. The defendant moved the trial court to dismiss the indictment because he could not receive a fair trial

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<sup>4</sup> The State has combined its response to Appellees' first and second propositions of law for the purpose of judicial economy.

<sup>5</sup> Ohio Rules of Criminal Procedure.

without the benefit of expert testimony. *Id.* at ¶7. At an evidentiary hearing, the defendant's expert testified that the FBI had seized 50 digital-image exhibits that the expert had prepared for the defendant's trial, and the expert testified that he could not possess copies of the State's evidence for fear of federal prosecution for possessing child pornography. *Id.* at ¶5-¶6. The expert attested that he could not perform his duties as a defense expert by viewing the State's evidence at the prosecutor's office since he would not have the necessary software to analyze the State's evidence; he would have only limited opportunities to examine the evidence; and he would be required to testify about the State's evidence from memory. *Id.* at ¶6. The expert also opined that the defendant would not be able to secure any other expert willing to analyze the State's evidence since undertaking such an analysis would run the risk of federal prosecution. *Id.*

The trial court determined that the risk of federal prosecution to his expert deprived the defendant of effective assistance of an expert witness and deprived the defendant of effective assistance of counsel. *Id.* at ¶8. The trial court determined that the defendant could not receive a fair trial; thus, it granted his motion to dismiss the pandering charges. *Id.* The State appealed to the Ashtabula County Court of Appeals, Eleventh Appellate District, which affirmed the trial court's decision. *Id.* at ¶10. The State sought and was granted discretionary appeal by this Court. *Id.* at ¶11.

Citing *State v. O'Neal* (1996), 114 Ohio App. 3d 335, 683 N.E.2d 105, and *State v. Varner* (1991), 81 Ohio App. 3d 85, 610 N.E.2d 476, the State argued, because the defendant's Crim.R. 12 motion to dismiss went beyond the face of the indictment, it constituted an impermissible motion for summary judgment. *Brady*, 2008-Ohio-4493 at ¶12. This Court determined that *O'Neal* and *Varner* were factually distinguishable since those cases involved pretrial motions to dismiss that required the trial court to consider the general issue for trial. *Id.* at ¶18. This Court determined that the defendant's motion to dismiss did not involve the general issue at trial but involved the FBI's

potential enforcement of federal child pornography laws against the defendant's expert which compromised the defendant's constitutional right to a fair trial. *Id.* Since the defendant's pretrial motion did not require determination of the general issue for trial, this Court determined that Crim.R. 12(C) allowed the trial court to consider evidence beyond the face of the indictment in order to resolve the defendant's motion to dismiss. *Id.*

In this present case, the Appellees were indicted for Extortion. So, in order for the State to convict the Appellees, the State is required to prove each element of the crime beyond a reasonable doubt as to their conduct. In other words, the State must prove to a trier of fact that the Gaines's actions constituted Extortion. The Appellees argued that their actions could not constitute Extortion; thus, the indictment was not sufficient to state a crime. To this end, the Appellees asked for and received an evidentiary hearing where they were allowed to call the State's witnesses and attempted to elicit testimony as to the merits of the case.

In Judge Corbin's judgment entry, he relied on *Brady* for the proposition that a trial court, in resolving a motion to dismiss the indictment in a criminal case, may consider evidence beyond the face of the indictment if the matter is capable of determination without a trial of the general matter. While Judge Corbin correctly stated the holding of *Brady*, he misapplied it. Judge Corbin determined that the Gaines's conduct as set forth in the indictment, bill of particulars, and from the testimony of the State's witnesses at the evidentiary hearing did not constitute the crime of Extortion. Judgment Entry Granting Defendants' Motions to Dismiss, T.d., pp. 8-9.

In *Brady*, this Court held

Crim.R. 12 permits a court to consider evidence beyond the face of an indictment when ruling on a pretrial motion to dismiss an indictment if the matter is capable of determination without trial of the general issue.

*Brady*, 2008-Ohio-4493 at ¶3. So, a trial court may only consider evidence beyond the face of the indictment if said evidence does not concern the general issue of the case—the guilt or innocence

of the defendant. In this present case, the Appellees attempted to elicit testimony regarding the elements of Extortion. This evidence went directly to the general—and the ultimate—issue of this case, and Judge Corbin used this evidence to determine that the Gaines's actions did not constitute extortion, the ultimate issue in this case. Judge Corbin's actions were contrary to this Court's holding in *Brady*. Thus, the Twelfth District correctly reversed Judge Corbin's decision to dismiss the indictment.

In the Appellees' memorandum, they rely on *State v. Chappell*, Cuyahoga App. No. 92455, 2009-Ohio-5371, *State v. Young*, Stark App. No. 2005CA00009, 2005-Ohio-3925, and *State v. Pointer*, Montgomery App. No. 24210, 2011-Ohio-1419.

In *Chappell*, the prosecution stated in a bill of particulars that the defendant's alleged criminal purpose regarding Possession of Criminal Tools was the defendant's intention to violate federal copyright law. 2009-Ohio-5371 at ¶6. The defendant filed a motion to dismiss. *Id.* at ¶7. The trial court concluded that an offender's intent to use an item criminally must be based on an intended violation of Ohio law not federal law. *Id.*

In *Chappell*, the defendant, in his motion to dismiss, made a legal argument that did not embrace the general issue for trial, whether the defendant's conduct constituted Possession of Criminal Tools, and, thus, was permissible under Crim.R. 12(C) and *Brady*. But, in this case, Judge Corbin specifically addressed and specifically decided whether the Appellees' conduct constituted the crime of Extortion. This was the general and ultimate issue in this case, and, by addressing it, Judge Corbin violated Crim.R. 12(C) and *Brady*. The *Chappell* case is distinguishable and does not support the Appellees' bid for jurisdiction.

In *Young*, the defendant was convicted of Illegally Manufacturing or Processing Explosives for constructing a "bottle bomb". 2005-Ohio-3925 at ¶1-¶2. The defendant filed a motion to dismiss, arguing that the "bottle bomb" was not an "explosive" as defined by R.C. § 2923.11(M),

but the trial court denied the motion. *Id.* at ¶5. The Stark County Court of Appeals, Fifth Appellate District, held a “bottle bomb” did not fit under the definition of “explosive” found in R.C. § 2923.11(M). *Id.* at ¶11. The Fifth Appellate District never addressed Crim.R. 12(C).

In *Young*, the defendant’s motion addressed a legal question, which did not embrace the general issue for trial. In this case, Judge Corbin heard evidence as to the merits of this case and specifically decided that the Appellees’ conduct did not constitute the crime of Extortion, the general and ultimate issue for trial in this case. The *Young* case is distinguishable and does not support the Appellees’ memorandum in support of jurisdiction.

The *Pointer* case is like *Chappell* and *Young*; it addressed a collateral legal issue, which was permissible under Crim.R. 12(C) and *Brady*. Unlike the trial courts in *Pointer*, *Chappell*, and *Young*, Judge Corbin specifically addressed and specifically decided the general and ultimate issue in this case. Thus, *Pointer* does not support the Appellees’ proposition of law.

The Appellees’ first and second propositions of law are without merit, and this Court should not accept jurisdiction regarding them.

**Response To Proposition Of Law III: The Clinton County Court of Appeals, Twelfth Appellate District, correctly held that Evid.R.<sup>6</sup> 408 does not apply to criminal cases.**

In the Appellees’ third proposition of law, they cite *State v. Shipley* (1994), 94 Ohio App. 3d 771, 641 N.E.2d 822, and *State v. Burke* (June 1, 1993), Franklin App. No. 92AP-1792, 1993 Ohio App. LEXIS 2830, and claim that Evid.R. 408 applies to both criminal and civil cases.

In *Shipley*, the defendant struck and killed a pedestrian along Interstate 70. 94 Ohio App. 3d at 772-773. The next day the defendant called a Columbus attorney and told the attorney that he had struck and killed the pedestrian. *Id.* at 773. The attorney called the Ohio State Highway Patrol and disclosed to a state trooper the information that the attorney had learned from the

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<sup>6</sup> Ohio Rules of Evidence.

defendant. *Id.* The state trooper recorded the conversation with the attorney. *Id.* The prosecution subsequently filed a notice of intent to use the recorded conversation between the defendant's attorney and the state trooper. *Id.* The defendant filed a motion to suppress. *Id.* The trial court denied the motion regarding the recorded conversation reasoning that the attorney was acting as an agent of the defendant and the attorney's statements were made within the scope of the agency relationship and were admissible under Evid.R. 801(D)(2)(d). *Id.* at 774.

On appeal, the Licking County Court of Appeals, Fifth Appellate District, held that the information given to the attorney by the defendant fell within the attorney-client privilege; that the defendant had not waive the privilege; and that the attorney did not have the authority to waive the privilege, so the information was inadmissible. *Id.* at 775-776. As an afterthought, the Fifth District stated that the attorney disclosed the privileged information during compromise negotiations and that Evid.R. 408 prohibited such evidence from being used against the defendant. *Id.*

In *Shipley*, the prosecution sought to use statements made by the defendant's attorney to a state trooper that contained incriminating information about the defendant. And the Fifth District analyzed the issue under the attorney-client privilege and held that the attorney's statements were inadmissible pursuant to that privilege. Here, in this case, the Appellees made incriminating statements in a letter sent to the Clinton County Sheriff and made incriminating statements to Assistant Prosecutor McCoy while Mr. McCoy was acting as a law enforcement agent carrying on an active criminal investigation against the Appellees. While the Appellees vociferously claim that their incriminating statements were made during "settlement negotiations", the evidence adduced in this case demonstrate that the Appellees made those incriminating statements during an active criminal investigation. The facts and the legal analysis in the *Shipley* case are so dissimilar to this case that the *Shipley* case simply has no application.

Furthermore, while the *Shipley* court mentioned Evid.R. 408 in its opinion, it did not

analyze the issue of the attorney's statements to the state trooper under that rule. As such the Fifth District statement about Evid.R. 408 was not necessary to resolve that issue on appeal. See *Heisler v. Mallard Mechanical Co., LLC*, Franklin App. No. 09AP-1143, 2010-Ohio-5549, ¶13. As such, the Fifth District's statement regarding Evid.R. 408 was merely dicta that went beyond the facts of that case, and, as such, it is not binding in subsequent cases as legal precedent. *Id.* Since the Fifth District's statement about Evid.R. 408 was mere dicta and, thus, not authoritative, it has no application to this case.

In *Burke*, the defendant and a co-defendant threatened the two victims with a knife and took the victims' fishing equipment. 1993 Ohio App. LEXIS 2830 at \*1. After the defendant was arrested but before trial, "some negotiations had occurred between the parties for either a return of the fishing equipment or payment for the equipment in exchange for a request to dismiss the pending criminal charges." *Id.* at \*3. At trial, the defendant moved to introduce evidence of these negotiations. *Id.* at \*4. The trial court denied the defendant's motion. *Id.* at \*6. On appeal, the Franklin County Court of Appeals, Tenth Appellate District, cited Evid.R. 408 and Evid.R. 410 and held that evidence of negotiations between the victims and the defendant to settle this matter was inadmissible. *Id.*

In 1993 in *Burke*, the Tenth District appeared to have held that Evid.R. 408 was applicable to criminal cases. However, in 2010, the Tenth District cited *State ex rel. Celebrezze v. Howard* (1991), 77 Ohio App. 3d 387, 602 N.E.2d 665, reiterated its holding in that case, and held that Evid.R. 408 applies only to civil cases. *State v. Cassell*, Franklin App. No. 08AP-1094, 2010-Ohio-1881, ¶64. Thus, the Tenth District's holding in *Cassell* abrogates *Burke*. Since *Burke* has been abrogated, it is not authoritative regarding Evid.R. 408. As such, *Burke* has no application to this case.

The Appellees' third proposition of law is without merit, and this Court should not accept

jurisdiction regarding it.

**Response To Propositions Of Law IV: The Clinton County Court of Appeals, Twelfth Appellate District, correctly determined that the conduct of the Clinton County Prosecutor's Office did not rise to the level of outrageous government conduct.**

In their fourth proposition of law, the Appellees argue that the conduct of the Clinton County Prosecutor's Office, specifically Mr. McCoy's conduct, during the investigation of the Appellees' actions constituted outrageous government conduct.

In addressing the doctrine of outrageous government conduct, the Twelfth District noted that it was an extraordinary defense available only in the most egregious of circumstances, and the doctrine is not to be invoked each time the government acts deceptively or participates in a crime that it is investigating. *Gaines*, 2011-Ohio-1475 at ¶44. The Twelfth District also noted that, in most cases where outrageous government conduct has provided a valid defense, there was government creation of the crime and substantial coercion. *Id.*

Subsequently, the Twelfth District held that

[w]e find that the state's conduct in contacting Jennifer and talking to her on the phone on two separate occasions, followed by the state meeting with the Gaines, while investigating the allegations raised by Jennifer in her letter to the sheriff, and while probing what kind of settlement the Gaines were seeking, did not constitute outrageous government conduct. We cannot say the state's conduct in its investigation of the Gaines was outrageous and clearly intolerable as to shock the universal sense of justice. [*United States v. Mosley* (C.A.10, 1992), 965 F.2d 906, 910.] Thus, the outrageous government conduct doctrine does not provide the Gaines with a defense to their prosecution.

*Gaines*, 2011-Ohio-1475 at ¶45. In this case, the Twelfth District was correct that the actions of the Clinton County Prosecutor's Office simply did not rise to the level of outrageous government conduct.

The Appellees' fourth proposition of law is without merit, and this Court should not accept jurisdiction regarding it.

**CONCLUSION**

For the foregoing reasons, this Court should affirm the decision of the Clinton County Court of Appeals, Twelfth Appellate District, and neither accept jurisdiction nor grant leave for the Gaines's appeal since their propositions of law lack merit. Moreover, this Court should not accept jurisdiction over this appeal because the Appellees have neither raised a substantial constitutional question nor presented an issue of public or great general interest.

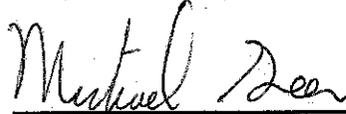
Respectfully submitted,

A handwritten signature in cursive script that reads "Michael Greer". The signature is written in black ink and is positioned above a horizontal line.

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**CERTIFICATE OF SERVICE**

I, hereby certify that a copy of the foregoing was mailed by ordinary U.S. mail to Appellant's attorneys, Mr. Dwight D. Brannon and Mr. Matthew C. Schultz, Brannon & Associates, 130 West Second Street, Suite 900, Dayton, Ohio 45402 on this 2nd day of June, 2011.



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MICHAEL GREER (0084352)  
Assistant Prosecuting Attorney