

In the  
**Supreme Court of Ohio**

STATE OF OHIO : Case No. 2007-0754  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : On Appeal from the  
 : Clark County  
 : Court of Appeals,  
 WILLIAM NUCKLOS, : Second Appellate District  
 :  
 Defendant-Appellee. : Court of Appeals Case  
 : No. 06-CA-23  
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MOTION TO RECONSIDER JURISDICTION OF PROPOSITION No. 2

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## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	ii
MOTION TO RECONSIDER.....	1
CERTIFICATE OF SERVICE.....	unnumbered

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>State v. Dinozzi</i> , 2003 Ohio 2012 .....	2
<i>State v. Parker</i> , 1995 Ohio App. LEXIS 4621 .....	2

## **MOTION TO RECONSIDER**

This case presents the Court with two issues vital to prosecutors in convicting doctors who traffic in controlled substances: whether the “doctor’s exception” to trafficking is an affirmative defense—presented as Proposition of Law No. 1, and whether evidence of multiple instances of trafficking, not indicted, can be admitted under Rule of Evidence 404(B)—presented as Proposition of Law No. 2. On August 29, 2007, the Court granted jurisdiction over Proposition No. 1, but denied Proposition No. 2.

Plaintiff-Appellant the State of Ohio moves this Court to reconsider its decision on Proposition No. 2, and to grant jurisdiction over that Proposition also. The Court’s decision to grant jurisdiction over Proposition No. 1 correctly recognized the need to clarify the allocation of the burden of proof in complex cases involving alleged trafficking activities by physicians. But without a decision on Proposition No. 2, both prosecutors and defendants will be unsure how to carry their respective burdens of proof in physician trafficking cases.

The most important issue in these cases is the physician’s intent in writing the disputed prescriptions: whether he intended to engage in the bona fide practice of medicine or intended instead to traffic in drugs. In adjudicating this issue, the allocation of the burden of proof is critically important, as the Court has recognized by taking Proposition No. 1. But the amount and quality of the evidence needed to carry that burden is equally important, and thus resolving the question of whether multiple examples of trafficking, not indicted, are admissible is equally critical to providing clarity in this area.

For a prosecutor to disprove a physician’s good faith—or prove his bad faith—he needs evidence demonstrating that the indicted incidents of prescribing were not inadvertent, but part of a pattern of misconduct. For example, in the case at bar, three patients received prescriptions that were allegedly outside the standard of medical care. To show that these were part of an

overall pattern of intent to traffic in drugs, the prosecutor submitted evidence of hundreds of other instances of improper prescription of the same type of drug, rather than charging Nucklos separately for each act. The Second Circuit disallowed the “other acts” evidence.<sup>1</sup> Accordingly, to properly evaluate and bring these cases in the future, a prosecutor needs to know whether evidence of multiple acts will be admissible under 404(B) to carry that burden, or whether he must charge the defendant for each separate act.

Therefore, as helpful as guidance on the affirmative defense issue will be, the need for guidance from the Court on the status of the Rule 404(B) evidence issue remains. This is illustrated by the following hypothetical situations:

- 1) The “doctor’s exception” is held to be an affirmative defense, and Rule 404(B) is held to allow “other acts” evidence to prove a pattern. In this case, prosecutors will confidently indict a few violations, knowing they can bring in other incidents to show a pattern of intent—either in the case in chief, or as rebuttal to the doctor’s affirmative defense.
- 2) The “doctor’s exception” is held to be an element of the offense, and “other acts” evidence is held to be admissible. The prosecutor, with a higher burden of proof, will indict more than a few, but a manageable number of violations, again knowing that he can bring in other incidents to show a pattern.
- 3) The “doctor’s exception” is held to be an element of the offense, and “other acts” evidence is held inadmissible. In this case, the prosecutor will indict as many violations as he can, because indictment will be the only way he can get in evidence to carry his burden of proof.

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<sup>1</sup> As mentioned in earlier briefing, the Second District’s 404(B) holding conflicts with the Ninth District in *State v. Parker*, 1995 Ohio App. Lexis 4621. It also conflicts with the Twelfth District in *State v. Dinozzi*, 2003 Ohio 2012 (404(B) evidence relevant to prove motive in dentist trafficking case).

4) The “doctor’s exception” is held to be an affirmative defense, and “other acts” evidence is held inadmissible. Here, the prosecutor can try to rebut the doctor’s affirmative defense, but will not have the “other acts” evidence he needs to do so. He therefore will still indict a large number of cases to get in the “other acts” evidence.

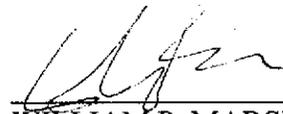
These hypotheticals illustrate the intertwined nature of the two issues in this case—if both issues are resolved, prosecutors will have guidance in how to indict and present physician trafficking cases. But as long as one of the two issues remains unclear, prosecutors will be forced into a Hobson’s choice: indict a few incidents of improper prescriptions and risk the possibility that evidence of the others will be excluded, or indict hundreds or even thousands of violations, for fear that it may be the only chance to bring in evidence needed to carry the burden of proof.

Moreover, the *defendants* in physician trafficking cases need guidance on the Rule 404(B) issue, especially if, as the State will argue, the “doctor’s exception” is an affirmative defense. Rule 404(B) applies to “other acts,” good or bad. If the physician has the burden to show that his actions are within the bona fide practice of medicine, he may need to show that the few examples indicted by the prosecutor are inadvertent mistakes. To carry that burden he must be able to show evidence of other acts in his practice, and thus also needs clarification of 404(B).

In short, it is impossible either for the physician proving his good faith or for a prosecutor disproving his good faith to do so without the ability to present evidence showing that the prescription history of a particular patient was or was not part of a pattern of misconduct. The resolution of the issue in Proposition No. 1 will be helpful and needed guidance, but incomplete without the additional resolution of the issue in Proposition No. 2. The Court should reconsider and take jurisdiction of Proposition No. 2.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Motion to Reconsider Jurisdiction of Proposition No. 2 was served by U.S. mail this 7th day of September, 2007, on the following counsel:

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