

**In the
Supreme Court of Ohio**

STATE OF OHIO,	:	Case No. 2007-0754
	:	
Plaintiff- Appellant	:	
	:	On Appeal from the
vs.	:	Clark County
	:	Court of Appeals
WILLIAM NUCKLOS, M.D.	:	2 nd Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. 06-CA-23

**MOTION TO DISMISS APPEAL
AS IMPROVIDENTLY ACCEPTED**

WILLIAM P. MARSHALL(0029498)

* Counsel of Record
Solicitor General
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980
wmarshall@ag.state.oh.us

STEPHEN SCHUMAKER

Clark County Prosecutor
Defendant - Appellee,
P.O. Box 1608
Springfield, Ohio 45502
937-521-1780
prosecutor@clarkcounty.ohio.gov

Counsel for Plaintiff-Appellant
STATE OF OHIO

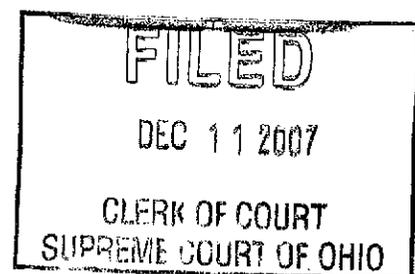
JOHN P. FLANNERY (pro hac vice)

CAMPBELL MILLER ZIMMERMAN, PC
19 East Market Street
Leesburg, VA 20176
Telephone: 703-771-8344
Facsimile: 703-771-1485
JonFlan@aol.com

LARRY W. ZUKERMAN (0029498)

Zukerman, Daiker & Lear Co., LPA
3912 Prospect Avenue
Cleveland, Ohio 44115
216-696-0900
216-696-8800 fax

Counsel for Defendant- Appellee,
DR. WILLIAM NUCKLOS



**In the
Supreme Court of Ohio**

STATE OF OHIO,	:	Case No. 2007-0754
	:	
Plaintiff- Appellant	:	
	:	On Appeal from the
vs.	:	Clark County
	:	Court of Appeals
WILLIAM NUCKLOS, M.D.	:	2 nd Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. 06-CA-23

**MOTION TO DISMISS APPEAL
AS IMPROVIDENTLY ACCEPTED**

COMES NOW Defendant-Appellee William Nucklos, M.D., by undersigned counsel, under Rule XII of the Rules of the Supreme Court of Ohio, to move this Honorable Court to dismiss the State's appeal as improvidently granted as there is no substantial constitutional question or question of public or great general interest and the same question, as the State has raised in the pending appeal, has been raised and passed upon in a prior appeal.

I. INTRODUCTION

Defendant-Appellee William Nucklos makes this motion to dismiss, in reliance on Rule XII of the Rules of the Supreme Court of Ohio, because it is critically important that the State not lead this Court into constitutional error.

In order to appreciate the basis for this assertion, we have both stated the argument that this Court has allowed, and why it has now been demonstrated that this

argument not only does not raise a substantial constitutional question, but that it would contravene the constitution, nor is it a question of public or great general interest, and that the same question has been raised and answered in prior decisions.

In addition we have fully set forth our statement of the facts and the argument that we respectfully submit that we wish to make to inform this Court's discretion.

1. The State's argument that Defendant-Appellee Nucklos hereby opposes:

The State claims that it did not have to prove a critical element of the charged crime of drug "trafficking", *see* R.C. 2925.03, namely, that the Accused had the specific intent, the *mens rea*, to "traffic" in controlled substances.

The State wrongly insists that, once the State shows that any physician wrote a prescription for controlled substances, that then it is the physician's burden to "affirmatively" prove that he was acting in "good faith."

The State argues that shifting this burden of proof to the Accused does not violate the Accused's right to due process under the Ohio State Constitution or the United States Constitution.

2. The basis for Dr. Nucklos' opposition.

Defendant-Appellee Nucklos charges that the State's statutory construction is constitutionally infirm, and that the State had to prove Dr. Nucklos' intent as an element of the crime, rather than require that he prove it as an affirmative defense.

The State formerly agreed with this legal analysis. It is only necessary to review what the State charged in its Indictment, what the State said in its opening argument to the jury, what the State requested for its jury instruction, and what the State trial counsel, David Rowland, said to the trial judge, expressing the State's concerns about the trial

court's proposal to shift the burden of persuasion to the Accused, since, according to Mr. Rowland, the trial court's instruction shifting the burden was at odds with *State v. McCarthy*, 65 Ohio St. 3d 589, 605 N.E.2d 911 (1992); during oral argument in the Court of Appeals, Mr. Rowland made a similar and consistent concession to the three-judge panel as to how he understood *McCarthy*.

The State, nevertheless, argued to this Honorable Court, in support of this discretionary appeal, that the State suffered from "conflicting guidance as to who bears the burden of proof." *See* State's "Memorandum in Support of Jurisdiction", at I, 2nd par.

The State, however, cannot find a single case in which any physician in Ohio has ever been required to prove as an affirmative defense what the case authority confirms is a necessary element that the State has to prove.

The statutory provision at issue presumed that a physician is not trafficking in drugs when writing prescriptions unless and until the State can demonstrate beyond any reasonable doubt, that the physician intended to act outside the course of professional medical practice; his practice and his person are presumed innocent.

II. STATEMENT OF THE FACTS AND THE CASE

In its "statement of the facts and case," the State misrepresents the statutory framework for illicit drug "trafficking" when a physician is the Accused, preferring a negligence standard by which to gauge the conduct of a prescribing physician, and treating what has been an essential element of the offense charged as an affirmative defense.

The State also makes broad and slanderous charges against Dr. Nucklos regarding the medical treatment of forty-nine patients overlooking the three patients who were

specifically “charged” in the Indictment. The review of the “other” patients is the latest rehearsal by the State of the prejudicial and inflammatory “bad act” evidence deemed inadmissible by the Court of Appeals for the Second District. *See State v. Nucklos*, 171 Ohio App. 3d 38, 51-54, 869 N.E.2d 674, 683-687 (2d Dist. 2007).

Defendant-Appellee Nucklos has made his own “statement” therefore to describe the the statutory context and case law, the relevant conduct of the State when drafting the charges, making its argument to the jury and to the trial court, and elaborating upon the only relevant facts that bear upon Dr. Nucklos’ alleged misconduct:

1. **The content of the “trafficking” statute.** The relevant criminal statute, R.C. 2925.03, provides that it is illegal drug “trafficking” for anyone “to sell or offer to sell a controlled substance” but that this prohibition does not apply to any “licensed health professional” whose “conduct is in accordance with Chapters 3719, ...4729, ... [and] 4731 ... of the Ohio Revised Code” (underscoring supplied).

2. **The *Sway* case.** In *State v. Sway*, 15 Ohio St. 3d 112, at 114-115 (1984), the Supreme Court of Ohio held “that a physician who unlawfully issues a prescription for a controlled substance not in the course of the bona fide treatment of a patient is guilty of selling a controlled substance in violation of R.C. 2925.03 (underscoring supplied).”

Thus was it clarified by this Court that a physician’s criminal intent (his lack of “good faith”) is a necessary element that the State must prove in any drug “trafficking” offense.

3. The *Sway* court disfavored limiting the elements of the criminal offense to the “trafficking” statute and its various provisions that “merely addresses the contents of a prescription...” as those do “not speak to the unlawful transfer of a prescription”. *Sway*,

supra, at 114. The State prefers the technical standard, however, as it is, in essence, a negligence standard.

4. **The McCarthy case.** In *State v. McCarthy*, 1991 WL 215641 (Ohio App. 2 Dist), the Court of Appeals panel for the Second District considered the sufficiency of jury instructions as to the physician's intent, his *mens rea*, whether McCarthy's "prescribing practices were bona fide." The appellate panel for the Second District found that the trial court's instruction, defining bona fide, was too limiting as it allowed the jury to find that "any deviation from the cited statutes and rules, no matter how slight, would have amounted to a lack of bona fide medical treatment sufficient to negate the [physician] exemption, and to impose criminal liability." Despite the *McCarthy* holding, that is precisely what the State is arguing that this Court should approve as the new rule of law, that any departure by a physician from statutes and rules is sufficient to impose criminal liability.

5. In *State v. McCarthy*, 65 Ohio St. 3d 589, 605 N.E.2d 911 (1992), this Court approved the appellate holding of the Second District, finding the trial court erred when it refused to instruct the jury with an appropriate definition of "bona fide" as an element of the State's case. This Court underscored the fact that: "The statutory scheme of R.C. Chapter 2925 does not and cannot make mere negligence in the prescribing of drugs a crime. Criminal intent must be shown in order to support a conviction thereunder" (underscoring supplied). *State v. McCarthy*, 65 Ohio St. 3d 589, at 591. The State may prefer negligence as a standard, but *Sway* and *McCarthy* require intent.

6. **The content of the Indictment.** The indictment the State filed in October 2004, in each and every count of the 20 counts charged, reflected the holdings in *Sway* and in

McCarthy, charging that Dr. Nucklos' "conduct was not in accordance with Chapters 3719, 4729, and 4731 of the Revised Code" (underscoring supplied).

7. The State made proof that the physician had not acted in good faith a necessary element of the charges in the Indictment.

8. Ten counts of the Indictment were in violation of Section 2925.03 of Ohio's Revised Code Annotated, the so-called "trafficking offenses counts", involving three (3) patients who received prescriptions. *Id.*

9. Another ten counts were in violation of Section 2925.23 of Ohio's Revised Code Annotated, the so-called "illegal processing counts", all relating to those same three (3) patients who, altogether, made 10 visits to Dr. Nucklos' office. *Id.*

10. **The State's Opening.** Mr. Rowland, in his opening to the jury, told the jury that Dr. Nucklos had "to have what's called a bona fide purpose, a legitimate medical treatment, a good faith treatment of the patient ..." (underscoring supplied). Tr. 27. Plainly, this goes beyond the narrow argument made to this Court by the State. Mr. Rowland told the jury in his opening that the State would prove that Dr. Nucklos acted "knowingly" and that he "knew what he was doing." Tr. 30. "You'll hear from the witness stand," Mr. Rowland said, "the various provisions [that] were violated when this doctor sold his drugs." Tr. 32. "And once you hear that," Mr. Rowland said, "you will have heard that the defendant has lost his ability to sell drugs cause ... as a doctor, you can only sell drugs if you do it in accordance with the law and for a bona fide good treatment of a patient for a legitimate medical purpose" (emphasis supplied). Tr. 32. He told the jury that, on the processing charges, they were "going to hear testimony as to

why they are not prescriptions because, as you will hear, prescriptions must be written for a legitimate medical purpose by a doctor acting in accordance with the law." Tr. 33.

11. **The State's Jury Instruction.** The State's jury instruction asked the trial court to instruct the jury as follows: "If you find that the defendant physician authorized prescriptions for a controlled substance not in the course of the legitimate treatment of a patient, and not having a bona fide or good faith intention to practice medicine, you must find that the defendant acted outside the scope of Chapters 4729, 4731, and 3719 of the Ohio Revised Code" (underscoring supplied). *See State v. Nucklos*, 171 Ohio App. 3d 38, 45, 869 N.E.2d 674, 680 (2d Dist. 2007). In other words, the State sought an instruction that made Dr. Nucklos' intent an element of the offense. Neither the State nor the Accused sought an instruction for an affirmative defense.

12. **The State's colloquy with the trial court.** Mr. Rowland informed the trial court before it gave the offending jury instruction that there was a difference between the "definition" of what constituted "bona fide treatment", and characterizing "bona fide treatment" as an "affirmative defense". More precisely, Mr. Rowland told the trial court: "I have the concern about it being an affirmative defense as opposed to a simple definitional matter" (Tr. 1796). Mr. Rowland drew the trial court's attention to his "concern" and advised the trial court of the relevant case authority: "I do not recall that [affirmative defense] being part of the [State v.] McCarthy [, 65 Ohio St.3d 589, 605 N.E.2d 911 (1992)] decision..." (Tr. 1795). Mr. Rowland was quite correct; *McCarthy* did not make the phrase, "bona fide treatment," an "affirmative defense". The Court itself commented that "bona fide" was "duplicative" as this was "one of the elements that the State's required to prove..." (Tr. 1798).

13. It is a remarkably sophistic pirouette therefore for the State, in its Brief before this Court, to treat this term, "bona fide," as an "affirmative defense" when this Court's "guidance" in *Sway* and *McCarthy* was to the contrary, and the State made this very argument itself to the trial court.

14. **The trial court's instruction** In this case, the trial court first required, by its instruction, that the State of Ohio present evidence and carry its burden of proof: "If you find that the defendant was not acting as a physician in the course of the bona fide treatment of a patient because he issued a prescription for some reason or reasons other than a legitimate medical purpose, you must find that his conduct was not in accordance with Chapters 3719, 4729, and 4731 of the Ohio Revised Code." *See* Judge's Charge, Jury Trial, Tr. 1901.

15. But then the Court went on to recast that issue as an affirmative defense and to allocate the burden of proof on the issue to the defendant. *See*, Judge's Charge, Jury Trial, Tr. 1903, 1906.

16. Regarding the charge of drug trafficking, the trial court instructed the jury: "If you find that the State proved beyond a reasonable doubt all the essential elements of trafficking in OxyContin, you will then go on to determine whether the defendant has established by a preponderance of the evidence the affirmative defense that he was a physician acting in the course of the bona fide treatment of patients. Judge's Charge, Jury Trial, Tr. 1903.

17. Regarding the charges of illegal processing of drug documents, the Court instructed the jury in a similar fashion: "If you find that the State proved beyond a reasonable doubt all the essential elements of illegal processing of drug documents, you

will then go on to determine whether the defendant has established by a preponderance of the evidence the affirmative defense that he was a physician acting in the course of the bona fide treatment of patients." See Judge's Charge, Jury Trial, Tr 1906.

18. It would take some extraordinary cognitive contortions by any jury or cross-section of trial lawyers or judges to reconcile and apply these inconsistent and contradictory instructions. If the State has to prove something beyond a reasonable doubt as an element of the offense, but the Accused also has to – somehow or other – disprove that same element by a preponderance of the evidence as an affirmative defense, that is a Gordian knot that defies unraveling. We insisted in the courts below and in this Court, that these instructions were confusing and inconsistent and they improperly transferred the burden of proof from the State to the Accused.

19. **The facts material to his prosecution:** As the State has made some elaborate characterizations of the Accused and his medical practice and the patients that Dr. Nucklos treated, we thought it absolutely necessary to clarify the record as to these matters.

20. **The Accused: Dr. Nucklos.** Dr. Nucklos, 59, a physician for 29 years, was born in Dumas, Arkansas, moved to Ohio when 2 years old, earning a BS at Bowling Green State, and an MA in psychology and a medical degree from Ohio State. Tr. 1625 – 1627. Dr. Nucklos has been married for 33 years, with three children. Tr., 2/22/06, at 20. Dr. Nucklos' wife, however, recently died of cancer, since his conviction was reversed.

21. **The Medical Practice.** In 1997, Dr. Nucklos had an office in Columbus, Ohio and he met and collaborated with Dr. Jenkins who had a medical practice in Springfield.

Tr. 1632. Dr. Nucklos' practice in Columbus, Ohio consisted mostly of personal injuries from motor vehicle accidents. Tr. 1711.

22. Ms. Anderson, a patient, asked Dr. Nucklos to consider "opening up a place in Springfield because I have so many relatives ... need[ing] [your] care." Tr., 2/22/06, at

13. Ms. Anderson said that Dr. Nucklos "did not need to go to Woodland Avenue, but he chose that because he was trying to help the African Americans to get good care." Tr., 2/22/06, at 15.

23. **The chronic pain patients – the focus of the twenty-count indictment.**

a. Defined. Dr. K. Knott explained that chronic pain is "any pain that has lasted more than six months and is recurrent." Tr. 934. "If untreated, chronic pain usually does last a lifetime." Tr. 934. Dr. Knott testified, "it's very important to treat people with pain because you don't want it to become a chronic problem ... Patients start developing depression, develop anxiety." Tr. 920. Dr. Knott explained that "the problem with allowing too much pain ... is that it sensitizes the spinal cord neurons; and ... [the patients'] pain actually becomes worse and ... harder to treat." Tr. 935.

b. Treatment. Dr. Nucklos would administer prescriptions that involved opioids for chronic pain patients. Dr. Knott concurred that a physician should administer Oxycontin to patients "who have not responded to your normal regimen of lower grade opioids or other types of analgesics," that is, "[p]eople that have had pain more than six months." Tr. 921, 934. In Dr. Knott's expert opinion, you may prescribe OxyContin for a lifetime. Tr. 934. And there is not any medication better suited to treating chronic pain. Tr. 937. Dr. Nucklos would titrate the dosage, meaning increase the dosage over time, to treat the pain. Dr. Knott explained that a Patient "develop[s] a tolerance to

opioids, and a tolerance is not an addiction; a tolerance is not dependence; it's just that they [the Patients] need more medication to effect the same result – so that's why dosages are increased." Tr. 936.

c. Undertreatment. "There are a number of physicians around," said Dr. Knott, "that under-treat pain simply because they're scared of medical boards because medical boards are on one side saying, 'Don't give anything', and the physician is on the other saying, 'I've got to give pain relief.'" Tr. 935. At trial, Dr. Knott told the prosecutor that physicians fear to treat because of "people like you [the prosecuting attorney] and the Medical Board" and "that's the problem." Tr. 1037, 1064-1065. The American Academy of Pain Medicine, the American Pain Society, and the American Association of Addiction Medicine have warned that under-treatment is a significant health problem. Tr. 937. The downside of this wrong-headed public policy is life-threatening; not only does a chronic pain patient suffer pain, depression and anxiety, they commit suicide - when their pain persists. Tr. 938, 1065-1066.

d. The three patients – the focus of the Indictment:

i. **Raymona Swyers**, came in for pain evaluation, on July 19, 2001, with blood pressure 130 over 80, a pulse of 90, and, at five foot three, she weighed 249 pounds; the source of her pain was a shot with a 3030 deer rifle by an intruder on November 7, 1991; the slug had gone through her posterior right shoulder in the area of the thoracic spine, leaving her with 40% use of her right upper extremity and the pain she suffered only made worse by cold or wet weather. Tr. 945, 1660, 1663, 1664; Ex. 161.

Ms. Swyers described the shooting in detail, and showed Dr. Nucklos the scarring under her T-shirt. Tr. 1667. She had a "tremendous restricted range of motion

throughout her whole left shoulder girdle” with “significant weakness and tenderness.”

Tr. 1667.

When Ms. Swyers filled out a pain assessment, she complained “she had her pain as being everywhere.” Tr. 1660. It was as severe as could be, at a “10.” Tr. 1661. It was “constant” and Ms. Swyers thought about it “all the time.” Tr. 1662.

Dr. Nucklos considered whether Ms. Swyers had “RSD, Reflex Sympathetic Dystrophy,” because when a patient has had a severe injury like Ms. Swyers did “with the deer rifle,” what happens is “the pain fibers, they actually turn off.” Tr. 1661. Dr. Nucklos found that Ms. Swyers had “adhesions” which arise when you don’t move a part of your body, it suffers a “contracture” and you lose range of motion of that part. Tr. 1667.

Dr. Nucklos conducted an objective test of Ms. Swyers, and tested reflexes, manual muscle testing, and concluded that there was a “sensory and motor deficit.” Tr. 1664. Dr. Nucklos’ assessment was that Ms. Swyers had “chronic pain syndrome.” Tr. 992, 1664-1665. Dr. Nucklos prescribed “active assistive range of motion exercises”, as well as a gripping exercise. Tr. 1665-1666.

Dr. Nucklos prescribed OxyContin for Ms. Swyers at two week intervals. Tr.

1668.

While the government claimed that Dr. Nucklos had received notice from Job & Family Services to be concerned about Ms. Swyers, Dr. Nucklos never saw the notice that they insisted he had received; indeed, the entry in Ms. Swyer’s medical chart was not made by Dr. Nucklos but by a staffer, Trish Woodruff, instead. Tr. 1669, 1703. Another notice that might have led Dr. Nucklos to appreciate that Ms. Swyers was seeing other

physicians was not filed. Tr. 1706, 1707. Dr. Nucklos said that, had he received the notice, he would have discharged Ms. Swyers – just as he had discharged Mr. Briggs (see below); but he was not aware of any notice. Tr. 1704.

On another occasion, Ms. Swyers came in “early” for a visit, and while that’s something that has to be scrutinized, he credited her explanation that she was, in fact and truth, “going out of town.” Tr. 1705. Ms. Swyers also told the office once that she had reported to Detective Bowen that her meds had been stolen. Tr. 1721.

Dr. Nucklos did not refer Ms. Swyers to an addiction specialist because he did not suspect that she suffered from addiction; he believed that she required the pain medication she prescribed. Tr. 1722. Nor apparently did any of the other five physicians that she was visiting suspect that she was insincere in her complaints. Tr. 1723.¹

ii. **Darrin Briggs**, 36, who was referred by a friend to Dr. Nucklos, had three gunshot wounds to his left hand in 1994, and suffered from left hand pain, even after Dr. Perry did reconstructive surgery to his hand. Tr. 947; Tr. 1643-1644; Ex. 21. Mr. Briggs’ hand had “a tremendous deformity,” and “obvious loss of muscle.” Tr. 1645. His “left grip strength was virtually nonexistent.” Tr. 1645. Dr. Nucklos examined Mr. Briggs’ reflexes, sensation testing, and Manual Muscle Testing (“MMT”) of that left hand. Tr. 996; Tr. 1645. Dr. Nucklos is a musculoskeletal specialist, and conducted the examination himself. Tr. 1692, 1693.

¹ The prosecutor handled this testimony in an interesting fashion, wrongly implying that the other physicians would be prosecuted just as Dr. Nucklos had been prosecuted, saying, (first) – “You’re the one on trial here” and (second) – “If they screwed up, then they have to be taken care of in their jurisdictions, right?” But nothing whatsoever happened to any of the other physicians. Indeed, as indicated, one of those physicians, David C. Romano, M.D., gave testimony against Dr. Nucklos’ medical practice, without disclosing that he was one of the “other” physicians who had been deceived by Ms. Swyers. See generally, Testimony of Dr. Romano, Tr. 306-349.

Mr. Briggs suffered, according to Dr. Nucklos from “pain inhibition weakness.” Tr. 1645. Dr. Nucklos conducted a neurological exam on Mr. Briggs, tested Mr. Brigg’s sensory discrimination, and his wrist extensors. Tr. 1645, 1646. While you may not always find a “specific anatomical structure” that accounts for the pain, “gunshot wounds” may reflect the cause here. Tr. 1022. Pain that persists seven years after a gunshot wound, according to Dr. Knott, is chronic pain. Tr. 949. Mr. Briggs also had left knee, and left calf pain. Tr. 1645. Dr. Nucklos examined the medial gastrocnemius muscle., located below the knee where the calf is. Tr. 1646-1647. Mr. Briggs said that Dr. Perry had treated his pain with OxyContin and Percoset. Tr. 1644.

Dr. Nucklos rendered a diagnosis that Mr. Briggs’ status was post gunshot wound, suffering from chronic pain syndrome, and treated him in accordance with Harrison’ Principle of Internal Medicine, at pages 58 to 60 of the 14th and 15th edition. Tr. 1647-1648. Nucklos prescribed OxyContin and Percoset for “break-through pain.” Tr. 947. The first visit took from twenty to thirty minutes to render this diagnosis. Tr. 1649. Dr. Nucklos had given Mr. Briggs “an extra day [of OxyContin] .. in the event ... [he] wouldn’t be able to make the [next] appointment.” Tr. 1696.

When Mr. Briggs returned the next time, he complained of frequent break-through pain, in between the doses of OxyContin to combat the pain. Tr. 1649. Dr. Nucklos gave him manual muscle testing to gauge his grip strength, an objective test, and Mr. Briggs had decreased strength and increased pain. Tr. 1650.

When Dr. Nucklos received second hand information that Mr. Briggs was “doctor-shopping,” he discharged Mr. Briggs as a patient, as he had told him beforehand he would if he found such misconduct. Tr. 1668.

Dr. Nucklos later explained, “[i]f I knew that he was seeing five other doctors ... I wouldn’t have treated him ... [and] I discharged him when I found out he was seeing Dr. Burke.” Tr. 1686.

iii. Billy Jo Booth “injured herself in a car accident”, a head-on collision in 1988, that damaged “her lower back, right hip, and, from the lower back pain, she was having right lower extremity pain (“RLE”).” Tr. 941; Tr. 1653-1654, 1659; Exs. 4, 18. She’d had an orthopedic device placed in her leg for stability, and it was later removed. Tr. 943. Ms. Booth had had multiple surgeries on her right shoulder. Tr. 942. She’d had a right cystectomy, “a cyst removed from her right shoulder.” Tr. 1712.

Booth visited Mercy Hospital Emergency Room in 2001 with hip pain, but couldn’t recall who treated her, so she could not tell Dr. Nucklos. Tr. 942. Nor were they able otherwise to get her medical records. Tr. 1655. In the year before she visited Dr. Nucklos, she had been to the ER 10 to 15 times for “various medication” for pain. Tr. 942; Tr. 1655. Generally, Ms. Booth received Nubain injections that were effective for three to six hours. Tr. 1655.

When Ms. Booth saw Dr. Nucklos, her pain was eight out of a possible ten with the sharpest pain in her right hip. Tr. 944. On her pain assessment questionnaire, Ms. Booth confirmed her low back, right hip and low back pain and headaches, highlighting “severe” in brackets. Tr. 1651.

Dr. Nucklos’ debriefing of the patient allowed him to conclude that “either there were two separate injures or the pain from the back was being referred down the left lower extremity”. Tr. 1654.

Dr. Nucklos treated her with OxyContin 30 mg every 12 hours; Dr. Knott concluded she was eligible for OxyContin; Soma as needed, and Lortab 10 mg twice a day as need. Tr. 944, Tr. 1658.

As for drug abuse, Ms. Booth never indicated to Dr. Nucklos that she was a heroin user. Tr. 987. In fact, she told Dr. Nucklos that she didn't even use alcohol. Tr. 1657. As for trying to determine whether Booth could have misled the attending physician as to the seriousness of her pain, Dr. Knott testified "there's no way ever to tell that." Tr. 982. On her first visit, Dr. Nucklos spent twenty-five to thirty minutes. Tr. 1657.

24. Undercover agents posed as Chronic Pain Patients.

The State filed no charges for any of the visits by its undercover agents in the 2001 to 2002 period, but an extensive portion of the trial transcript concerned itself with agents who are surveilling police posing as chronic pain patients who visited Dr. Nucklos; these are the three police officers who posed as pain patients to Dr. Nucklos:

a. **Ashley Williams**, 31, reported to Dr. Nucklos an insidious onset of neck pain for four to six months with associated headaches, and back pain. Tr. 950; Exhibit 178. She told Dr. Nucklos that she had "throbbing shooting headaches." Tr. 433; Tr. 441; Tr. 446; Tr. 1005. She testified she had been prescribed Roxicodone 15 mg, Xaniflex 4mg twice a day, and Percoset 10 mg twice a day. Tr. 460; Tr. 1005. On her second visit, Ms. Williams reportedly suffered "inadequate pain control", and so her medication was increased. Tr. 1007. After taking the medication, Williams said she enjoyed "significant improvement." Tr. 1005. Ms. Williams was told to obtain a CT scan, an MRI, and to change her eating habits. Tr. 1052. Ashley Williams was a Springfield Police Officer,

unbeknownst to Dr. Nucklos. Tr. 1003. But she told Dr. Nucklos she cleaned houses. Tr. 1052.

b. **Sandra Miller**, 32, claimed she had headaches for six to seven months, that she described as “throbbing shooting pain in the temporal area – the side of the head.” Tr. 516-517, Tr. 530, Tr. 531, Tr. 953-954. She said that she had “some neck pain, some lower back pain, and headaches. Tr. 530. Her real name was Sandra Fent, a Deputy with the Springfield Police Department, a fact that was unknown to Dr. Nucklos when she presented herself for treatment. Tr. 516; Tr. 998. Dr. Nucklos had her “walk on [her] toes, walk on [her] heels, had [her] bend side to side ...” Tr. 531. The Government implied in its questioning that she was so fit that she ran a marathon the week before Dr. Nucklos’ examination. Tr. 1001. But her apparent physical fitness could have no bearing on the alleged cause of her pain, the extraordinary headaches – at least as she described them. Tr. 1054. It must be obvious that even athletes who may appear fit, and at the pinnacle of their sports game, may have to resign from the field of sport, because of chronic pain. Tr. 1054-1055. Dr. Nucklos prescribed OxyContin, and Dr. Knott explained that any other medicine might have had to be given more often -- and with unfortunate side effects. Tr. 1061.

c. **Linda Perez**, 44, also complained of headaches, three to four times a week, for the last six to seven months, but didn’t remember who had treated her in Chicago the year before, in 2001; she had borderline blood pressure, and pulse of 76. Tr. 956-957. Unbeknownst to Dr. Nucklos, Ms Perez was really Linda Powell, a Patrol Officer with the Springfield Police Division. Tr. 1073. Dr. Nucklos had her “move ... her head different directions” and “checked the strength” in her hands.” Tr. 1085. In truth, Ms.

Powell had to retire with disability from the Police because of cardiac and lung problems. Tr. 1074.

25. **The seizure of patients' records.** In 2002, the State seized all the patient records from Dr. Nucklos. The State did not prosecute Dr. Nucklos for anything found in any of the patients' files, exclusive of the three patients at issue in the Indictment. At trial, the State sought to introduce each and every patient record at the trial of Dr. Nucklos, that is, every one of the patients, other than Swyers, Briggs and Booth. Defense counsel objected to the Government admitting "all of the other charts, prescriptions, documents [Exhibits 7 to 235, the patient files, except for Exhibits 18, 21 and 166, having to do with Swyers, Briggs and Booth] ... offered for admission under Rule 404(B)". Tr. 1595. But to no avail. Tr. 1596-1597. In the end, this avalanche of irrelevant and prejudicial evidence was deemed inadmissible – but that was by the Court of Appeals.

26. **The Chronic Pain patients decide to testify.**

a. **Raymona Swyers.** After she was Dr. Nuckhol's patient, Ms. Swyers was imprisoned at Marysville Reformatory in 2003 for a two-year sentence and got out after eleven-months for her "deception to obtain [OxyContin]" Tr. 1380, 1401. Ms. Swyers claimed that she had impermissibly gotten prescription medicine, OxyContin, from five different doctors from 1989 through 2002. Tr. 1380. Dr. Nucklos was one of those doctors. But, at the time of trial, the other four doctors had not been identified. At trial, Ms. Swyers confirmed that she told Dr. Nucklos that she had been using OxyContin for years. Tr. 1402. She conceded that she had told Dr. Nucklos that she was "in pain" and "had been shot," Tr. 1382, that she endured all this pain, Tr. 1403, and that she'd been been "quite convincing" when misleading Dr. Nucklos. Tr. 1403. She told some

variation of the same lie, according to her trial testimony, to four other doctors. Tr. 1403, 1404. And all the doctors who were giving her medication, believed her, just as had Dr. Nucklos. Tr. 1405.

b. Darrin Briggs. In May 2003, while awaiting transportation to the penitentiary, the State authorities visited Mr. Briggs in prison and they asked if he would “cooperate” against Dr. Nucklos. Tr. 615. For the eight months before trial, Mr. Briggs was confined at the Southeastern Correctional Institute. Tr. 599. And, at the time of the trial, he had 15 more months to go before his release. Tr. 599. Mr. Briggs claimed that he saw a second doctor, other than Dr. Nucklos, that is, Dr. Stephen Burks. Tr. 601. True, he had told Dr. Nucklos that he “had gunshot wounds to [his] hand and leg” and he “was on medication” when he first came to visit Dr. Nucklos. Tr. 601-602; Tr. 615-616. Mr. Briggs reaffirmed that he “gave him [Dr. Nucklos] ... a legitimate reason to give me pain medication.” Tr. 617. He told Dr. Nucklos that he had problems with the grip in his hand, that he was a chronic pain patient, and that several other doctors had prescribed OxyContin for his pain. Tr. 617-618. Mr. Briggs repeated the complaints that he had told other doctors. Tr. 618; Tr. 626. And he said that he’d never been discharged by any other doctor. Tr. 622. But when the pharmacy discovered that Mr. Briggs was obtaining OxyContin from Dr. Nucklos and Dr. Burks, Dr. Nucklos had discharged him as a patient. Tr. 625. On information and belief, neither Dr. Burks, nor any other physician who treated Mr. Briggs was charged with any offense.

3. Billy Booth. For the six months prior to trial, Ms. Booth had been living in Marysville, Ohio for drug abuse. Tr. 629. She was in a drug rehabilitation program when the State asked Ms. Booth to cooperate. Tr. 651. Ms. Booth testified that Dr.

Nucklos had examined her, “would like have me walk, see if I had trouble bending or whatever.” Tr. 632. She told Dr. Nucklos, “It was my hip.” Tr. 632. She confirmed she also told him it was her lower back, and terrible headaches. Tr. 645. She confirmed that she’d told Dr. Nucklos that her pain was an 8 out of 10. Tr. 645. She said Dr. Nucklos asked for her “past medical records”, but she couldn’t get them because “they couldn’t find them.” Tr. 634. She explained why she was credible: “I walk with a slight limp so, I mean, I’m convincing.” Tr. 633; Tr. 645. In a transparent effort to be agreeable to the prosecutor, she testified that Dr. Nucklos had never examined her, when he obviously had, as noted above, and then she had to admit on cross that she had no explanation how Dr. Nucklos could have obtained the information that he had in her medical records if he hadn’t examined her. Tr. 646.

She explained that Dr. Nucklos “quit seeing me” because of drug charges filed against her in February 2002. Tr. 637.

Toward the end of her testimony, Ms. Booth said, even though she’d made up her complaints of pain, she didn’t think that would be right, if Dr. Nucklos had ignored her complaints of pain. Tr. 656. She thought that Dr. Nucklos should treat her -- even if she couldn’t get her medical records. Tr. 656. Summing it up, she said, “I don’t think it’s right that he should be punished” for writing prescriptions for her. Tr. 655.

27. **The trial and sentence.** On February 16, 2006, after a jury trial that began on February 6, 2006, the jury returned a verdict of guilty on each of the twenty counts, and the Court sentenced Dr. Nucklos on each of the first ten counts to serve consecutive two-year sentences. Thus, Dr. Nucklos was sentenced to twenty (20) years confinement in prison.

28. **Bail pending appeal.** Although the trial court remanded Dr. Nucklos, pending his original appeal, the Court of Appeals found that he was not a risk of flight, nor a danger to anyone else, and that there were substantial appellate issues; Dr. Nucklos has been free on bail since March 2006; obviously, there was no cause to change his bail conditions when his conviction was reversed by the Court of Appeals for the Second District.

III. ARGUMENT

SUMMARY

THIS COURT SHOULD PERMIT DEFENDANT-APPELLEE THE OPPORTUNITY TO ARGUE THAT THE TRIAL COURT WRONGLY INSTRUCTED THE JURY THAT DR. NUCKLOS HAD THE BURDEN TO PROVE HE ACTED IN GOOD FAITH

The undisputed facts of this case are that the defendant, Dr. Nucklos, was a properly licensed physician authorized to write prescriptions for his patients pursuant to Ohio Revised Code Section 3719.06. The only factual issue for the jury to decide was whether Dr. Nucklos' conduct conformed to the requirements of the law. Ohio Rev. Code, Section 3719.06; *see, also*, Ohio Rev. Code, Section 4731.052.

Because the trial court's instructions improperly allocated the burden of proof on that issue to Dr. Nucklos, this Court should uphold the Court of Appeals' decision, vacating Dr. Nucklos' conviction and remand the matter for a new trial with proper jury instructions.

A. OHIO'S DRUG TRAFFICKING STATUTE DID NOT CREATE AN AFFIRMATIVE DEFENSE FOR PHYSICIANS; THE STATUTORY EXEMPTION IS NOT AN AFFIRMATIVE DEFENSE.

The trial court treated the question of whether Dr. Nucklos' conduct fell within the accepted bounds of Ohio Revised Code Sections 3719.06 and 473 1.052 as an affirmative defense; the State now mimics the trial court's errors in this appeal.

The trial court wrongly allocated the burden of the production of evidence, and the burden of proof, to Dr. Nucklos.

Regarding the charge of drug trafficking, the Court instructed the jury:

“If you find that the State proved beyond a reasonable doubt all the essential elements of trafficking in OxyContin, you will then go on to determine whether the defendant has established by a preponderance of the evidence the affirmative defense that he was a physician acting in the course of the bona fide treatment of patients.” Judge's Charge, Jury Trial, Tr. 1903.

Regarding the charges of illegal processing of drug documents, the Court instructed the jury in a similar fashion:

“If you find that the State proved beyond a reasonable doubt all the essential elements of illegal processing of drug documents, you will then go on to determine whether the defendant has established by a preponderance of the evidence the affirmative defense that he was a physician acting in the course of the bona fide treatment of patients.” Judge's Charge, Jury Trial, Tr. 1906.

Whether an issue is an affirmative defense under Ohio law is governed by statute. Ohio Rev. Code, Section 2901.05(C).

The General Assembly has determined that an issue is an “affirmative defense” in two circumstances:

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence. *See* Ohio Revised Code, Section 2901.05 (C).

A careful review of the facts and law in this case demonstrates that the issue of whether Dr. Nucklos' conduct fell within the accepted bounds of Ohio Revised Code Sections 3719.06 and 4731.052 is neither expressly designated an affirmative defense by statute nor is it "particularly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." Ohio Rev. Code, Section 2901.05(C).

Furthermore, because the question of whether Dr. Nucklos' conduct fell within the conduct permitted by Chapters 3719, 4729, and 4731 of the Revised Code is essential to resolution of the question of whether or not Dr. Nucklos "knowingly" violated the statutes, that question is an essential element of the offenses charged and cannot be converted to an affirmative defense.

1. THE STATE MISAPPREHENDED THE LEGAL PROPOSITION THAT CHARGED OFFENSES DO NOT DELINEATE AFFIRMATIVE DEFENSES.

Dr. Nucklos was charged with ten counts of Trafficking in Drugs, in violation of Ohio Revised Code Section 2925.03, and ten counts of Illegal Processing of Drug Documents, in violation of Ohio Revised Code Section 2925.23(B).

In each and every count of the indictment, the grand jury charged that Dr. Nucklos' conduct "was not in accordance with Chapters 3719, 4729, and 4731 of the Revised Code."

Thus, the express language of the indictment allocates the burden of proof on this issue to the State, as the indictment charges that Dr. Nucklos' conduct fell below the statutory requirements.

The indictment was crafted in this manner based on the statutes allegedly violated. Ohio Revised Code Section 2925.03 does not contain any express statement of what constitutes an affirmative defense to the crime of Trafficking in Drugs.

Instead, it expressly states that the section does not apply if the defendant is a licensed health care professional:

"(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4731., and 4741 of the Revised Code." *See* Ohio Rev. Code, Section 2925.03.

By its express terms, then, Ohio Revised Code Section 2925.03 is not applicable to any physician whose conduct is in accordance with the appropriate Chapters of the Ohio Revised Code.

Thus, the burden is on the State of Ohio to prove, beyond a reasonable doubt, that the conduct of any physician-defendant is not in accordance with the appropriate Chapters of the Ohio Revised Code before the physician may be convicted of a drug trafficking offense. *See*, Ohio Rev. Code, Section 2901.05(A) [“Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution.”].

The General Assembly defined the crime of Illegal Processing of Drug Documents to provide various alternative means by which the offense may be committed. *See*, Ohio Revised Code Section 2925.23 (A) - (D).

The indictment charges Dr. Nucklos with ten counts of violation of Ohio Revised Code Section 2925.23(B), which provides:

“(B) No person shall intentionally make, utter, or sell, or knowingly possess any of the following that is a false or forged:

“(1) Prescription;”

See Ohio Rev. Code, Section
2925.23 (B) (1).

Thus, the crime of Illegal Processing Of Drug Documents charged against Dr. Nucklos does not contain any reference to the conduct of a physician acting within the bounds of Chapters 3719, 4729, or 4731 of the Ohio Revised Code. Ohio Rev. Code, Section 2925.23(B), *but see*, Section 2925.23(E) [(E) Divisions (A) and (D) of this

section do not apply to licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4725., 4729., 4731., and 4741. of the Revised Code.]

Therefore, before any physician may be convicted of Illegal Processing Of Drug Documents the State of Ohio must prove, beyond a reasonable doubt, that the prescription at issue was not “issued by a practitioner in the course of his or her professional practice and in accordance with the regulations promulgated by the director of the United States Drug Enforcement Administration.” *See Judge’s Charge, Jury Trial, Tr. 1905.*

Likewise, the State of Ohio must prove, beyond a reasonable doubt, that the “practitioner’s order, purporting to be a prescription, is not issued for the legitimate medical purpose, [and thus] it is not a prescription.” *See Judge’s Charge, Jury Trial, Tr. 1905 -1906.*

The statutes allegedly violated in this case contain no express designation of an affirmative defense. When the General Assembly intends to expressly designate something an affirmative defense, it chooses language that makes its intention clear. *Compare*, Ohio Revised Code Section 2919.21, [Felony non-support of children, wherein the General Assembly expressly delineated an affirmative defense: “It is an affirmative defense to a charge of failure to provide adequate support under division (A) of this section or a charge of failure to provide support established by a court order under division (B) of this section that the accused was unable to provide adequate support or the established support but did provide the support that was within the accused's ability and means.” Ohio Rev. Code, Section 2919.21(D).].

It is apparent, then, that the General Assembly did not expressly designate an affirmative defense to either Drug Trafficking (Ohio Revised Code Section 2925.03) or Illegal Processing of Drug Documents (Ohio Revised Code Section 2925.23 (B)).

2. NOR IS THE STATE CORRECT WHEN IT CHARGES THAT THE PHYSICIAN'S CONDUCT IS UNIQUELY WITHIN THE KNOWLEDGE OF THE ACCUSED.

The General Assembly adopted a second method by which we might identify whether something is an affirmative defense. If the defense involves an excuse or justification “peculiarly within the knowledge of the Accused, on which he can fairly be required to adduce supporting evidence”, then it is an affirmative defense. *See* Ohio Revised Code, Section 2901.05(C)(2).

Under this definition of an affirmative defense, the key issue is whether the factual determination of Dr. Nucklos' compliance with Chapters 3719, 4729, and 4731 of the Ohio Revised Code depends on facts “peculiarly within the knowledge of the accused . . .” *Id.*

To ask this question is to answer it: the evidence of whether any physician's conduct comports with those chapters of the Ohio Revised Code is routinely obtained by the Ohio State Medical Board as part of its oversight role for physicians. Indeed, the State makes much of this requirement in its Merit Brief, par. B, at pp. 4-5. Ironically, the State then turns this objective standard on its irrational head elsewhere in its Merit Brief, and insists it is the physician's subjective appreciation of what it takes to comply with these objective standards that makes it “peculiarly within the knowledge of the accused.” *See* Merit Brief, at p. 11.

Physicians are arguably required to maintain patient records that would allow an independent medical expert to review the conduct of the physician and opine whether, in any given case, the conduct of the physician-defendant fell below the requirements of the Ohio Revised Code. In other circumstances, the State has insisted that the proof of a physician's intent must be demonstrated by objective evidence.

In this very case, the Court, at least initially, required the State of Ohio to present evidence and to carry the burden of proof on this issue:

“If you find that the defendant was not acting as a physician in the course of the bona fide treatment of a patient because he issued a prescription for some reason or reasons other than a legitimate medical purpose, you must find that his conduct was not in accordance with Chapters 3719, 4729, and 4731 of the Ohio Revised Code.” *See* Judge's Charge, Jury Trial, Tr. 1901.

The trial court properly allocated the burden of proof on this issue to require that the State of Ohio prove “beyond a reasonable doubt” that Dr. Nucklos' conduct did not comport with the requirements of Chapters 3719, 4729, and 4731 of the Ohio Revised Code.

Inexplicably, he then went on to recast that issue as an affirmative defense and to allocate the burden of proof on the issue to the defendant. *See*, Judge's Charge, Jury Trial, Tr. 1903, 1906.

In so doing, the trial court deprived Dr. Nucklos of a fair trial and due process of law. *See* Sixth and Fourteenth Amendments, U.S. Const., Art. I, Sections 10 & 16, Ohio Const.

B. SHIFTING THE BURDEN OF PROOF TO THE ACCUSED WAS UNCONSTITUTIONAL AND VIOLATIVE OF THE ACCUSED'S DUE PROCESS RIGHTS.

The Court has long held that the due process clause of the Sixth Amendment requires the government to prove each and every element of the offense beyond a reasonable doubt:

“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, at 364 (1970).

That rule applies to Ohio, as to all states, by virtue of the Sixth and Fourteenth Amendments to the United States Constitution. *See* Sixth & Fourteenth Amendment, U.S. Const.

The State may not avoid its constitutional duty to prove its case beyond a reasonable doubt by simply recasting an element of the offense as an affirmative defense. *Mullaney v. Wilbur*, 421 US 684 (1981). Indeed, the State would have this Court change the law on its say-so, in contravention of extant authority, with a single case that supports its novel proposition. Compare Plaintiff-Appellant’s Merit Brief, at p. 13.

In order for an affirmative defense to constitutionally allocate the burden of proof to the defendant, it must require the proof of facts and circumstances that are distinct from the offense conduct. *See, United States v. Beasley*, 346 F.3d 930, 933, 935 (9th Cir. 2003); *United States v. Brown*, 367 F. 3d 549, 555 – 556 (6th Cir. 2004).

**1. THE STATE CONFOUNDS THE LEGAL RELATIONSHIP
BETWEEN “KNOWING” CONDUCT AND CONDUCT “NOT IN
COMPLIANCE” WITH CHAPTERS 3719, 4729 AND 4731 OF THE
REVISED CODE**

It is black-letter law that the State must bear the burden of proof as to every element of the offense, and may not define an affirmative defense in such a way as to allow the State to avoid its burden of proof regarding those elements:

It is axiomatic, of course, that the government must prove all elements of a crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Furthermore, if an affirmative defense bears a necessary relationship to an element of the charged offense, the burden of proof does not shift to defendant. *Patterson v. New York*, 432 U.S. 197, 210-11, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *United States v. Brown*, 367 F.3d 549, at 556 (6th Cir. 2004). The State’s reliance on a case upholding a classic affirmative defense (self-defense) is misplaced in the context of this case. *See Martin v. Ohio*, 480 U.S. 228 (1987); *see* Plaintiff-Appellant’s Merit Brief, at p. 11.

Here, the issue of whether or not Dr. Nucklos’ conduct comported with the requirements of Chapters 3719, 4729, and 4731 of the Ohio Revised Code was an essential element of the offenses charged. Both Trafficking in Drugs and Illegal Processing of Drug Documents requires that the State prove that the defendant acted “knowingly.” *See*, Ohio Revised Code, Sections 2925.03 (A), 2925.23 (A).

“Knowing” conduct is conduct that occurs when the defendant “is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” *See* Judge’s Charge, Jury Trial, Tr. 1900.

The State makes an astonishing argument, that it is sufficient “knowledge” that the physician admits “selling [prescribing] the controlled substance.” *See* Plaintiff-Appellant’s Merit Brief, at p. 15. By this standard, no physician who prescribes controlled substances to any patient lacks the requisite knowledge or intent. A physician who knows he has prescribed controlled substances, according to the State, must then resort to proving his “excuse”, that he was in truth treating a patient, to defend against the criminal charge. *See* Plaintiff-Appellant’s Brief, at p. 15. But that’s not the law in Ohio. Nor is this harsh formula constitutional.

In truth and fact, if the physician believes that his or her conduct is sanctioned by Chapters 3719, 4729, and 4731 of the Ohio Revised Code, then he or she cannot be said to have “knowingly” violated either the Drug Trafficking statute or the Illegal Processing of Drug Documents statute.

Thus, the question of whether or not Dr. Nucklos’ conduct comported with the requirements of Chapter 3719, 4729 and 4731 of the Revised Code “bears a necessary relationship to an element of the charged offense[s]”, and the burden of proof on that issue may not constitutionally be allocated to the defense. *Patterson v. New York*, 432 U.S. 197, at 210-211; *United States v. Brown*, 367 F.3d 549, at 556.

The United States Supreme Court affirmed the vitality of the doctrine announced in *Patterson*. in *United States v. Dixon*, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006). In *Dixon*, the Court upheld a determination that duress was an affirmative defense because “the

defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly . . . " *Dixon, supra*, at 2442.

Since the United States was still required to prove that the defendant acted knowingly, and the duress defense did not bear "a necessary relationship to the element of the offense", duress was properly an affirmative defense, even under the rationale of *Patterson*. *Dixon, supra*, at 2441.

Dixon teaches us two things: (1) *Patterson* remains viable law, and (2) when the so-called affirmative defense bears a direct relationship to the essential elements of the offense, it violates the due process clause of the Sixth Amendment.

**2. THE SPECIFIC STATUTORY PROVISIONS, AS TO DRUG
TRAFFICKING AND ILLEGAL PROCESSING DRUG DOCUMENTS,
REQUIRED PROOF OF *MENS REA***

As to the charge of Trafficking in Drugs, the statute defining the offense exempts any physician who acts within the restrictions of Chapters 3719, 4729, and 4731 of the Ohio Revised Code from the operation of the statute. *See*, Ohio Revised Code, Section 2925.03 (B) (1).

Thus, in order to show that this prosecution was against a person subject to the statute, the State was required to prove "beyond a reasonable doubt" that the conduct it alleged violated the statute was not the conduct of "licensed health care professionals . . . whose conduct is in accordance with Chapters 3719, . . . 4729, . . . [or] 4731 . . . of the Revised Code." *See* Ohio Revised Code, Section 2925.03 (B) (1).

Therefore, when the trial court recast that issue as an affirmative defense, as the State strenuously argues on appeal, it deprives Dr. Nucklos of a fair trial and due process

of law. *United States v. Brown*, 367 F.3d at 549; *Mullaney v. Wilbur*, 421 US 684; *In re Winship*, 397 US at 364; Sixth and Fourteenth Amendments, US Constitution; Article I, Sections 10 and 16, Ohio Const.

Although the State was not required to prove that Dr. Nucklos' conduct failed to meet the requirements contained in Chapters 3719, 4729, and 4731 of the Revised Code by the express terms of the Illegal Processing of Drug Documents offense, it was required to meet that burden in order to prove that the prescriptions issued by Dr. Nucklos were "false." *See*, Ohio Revised Code, Section 2925.23 (B) (1).

That fact - that the prescription was "false" - was an essential element of the offense of illegal processing of drug documents. The State was required to prove, beyond a reasonable doubt, that Dr. Nucklos' conduct failed to meet the requirements contained in Chapters 3917, 4729, and 4731 in order to meet its burden of proof on the issue of whether the prescriptions at issue were "false."

Therefore, when the trial court recast that issue as an affirmative defense, it deprived Dr. Nucklos of a fair trial and due process of law. *United States v. Brown*, 367 F.3d at 549; *Mullaney v. Wilbur*, 421 US 684; *In re Winship*, 397 US at 364; Sixth and Fourteenth Amendments, US Constitution; Article I, Sections 10 and 16, Ohio Const.

C. THE JURY INSTRUCTION CAUSED CONFUSION

The problem with the instructions as given in this case is that they led to jury confusion.

First, the jury was told that it must determine whether the State had proved, beyond a reasonable doubt, that Dr. Nucklos "was not acting as a physician in the course of the bona fide treatment of a patient because he issued a prescription for some reason or

reasons other than a legitimate medical purpose . . . “ See Judge’s Charge, Jury Trial, Tr. 1901.

Second, if the jury found that the State had met its burden of proof on that issue, it was then instructed “you must find that [Dr. Nucklos’] conduct was not in accordance with Chapters 3719, 4729, and 4731 of the Ohio Revised Code.” *Id.*

Even though the jury had, presumably, already decided the issue at that point, the Court then instructed the jury that Dr. Nucklos had the burden of proof, by a preponderance of the evidence, to show that his conduct occurred while “he was a physician acting in the course of the bona fide treatment of patients” and that if Dr. Nucklos met that burden, he must be found not guilty. Judge’s Charge, Jury Trial, Tr. 1903.

The two statements were and remain inconsistent.

Either the State had the burden of proof to show “beyond a reasonable doubt” that Dr. Nucklos’ conduct fell outside the ambit of Chapters 3719, 4729, and 4731 of the Revised Code, or Dr. Nucklos had the burden to show “by a preponderance of the evidence” that his conduct fell within that approved by Chapters 3719, 4729, and 4731 of the Revised Code.

The danger here is that the jury became so confused by the contradictory jumble of “instructions” the trial court provided that jurors simply followed the last instruction given and improperly allocated the burden of proof to Dr. Nucklos; of course, no can divine what any jury would or could do to reconcile these instructions in a rational manner, and there’s the rub.

The State makes the argument that this confusion was harmless. See Plaintiff-Appellant Merit Brief, at p. 18. Instructions can't instruct meaningfully if they can't be understood, and jury's deliberations arbitrarily conducted in "accord" with such confusing instructions must perforce be unreliable. In the end, therefore, the confusion is anything but harmless.

Tragically, this entire issue could have been avoided had the trial court simply adopted the instructions approved by the Seventh Circuit in *United States v. Green*, 511 F. 2d 1062 (7th Cir. 1975).

In *Green* the physician-defendant was charged with a violation of 21 USC Section 841, the federal equivalent of Ohio Revised Code Section 2925.03.

In *Green*, the Court upheld the following jury instruction:

"Federal law authorizes a licensed physician to prescribe controlled substances of the kinds charged in the indictment, if the drug is prescribed in the course of the physician's professional practice.

"The defendant Pay Ming Leu is a licensed physician.

"It is therefore a defense to the charges in this indictment that the controlled substances were prescribed by him in the course of his professional practice.

"A controlled substance is prescribed by a physician in the course of his professional practice, and therefore lawfully, if the substance is prescribed by him in good faith in medically treating a patient.

"In order to determine whether or not a prescription or prescriptions were issued in the course of a defendant physician's professional practice, you may consider all of the evidence of circumstances surrounding the prescribing of the substance in

question, the statements of the parties to the prescription transaction, any expert testimony as to what is the usual course of medical practice, and any other competent evidence bearing on the purpose for which the substances in question were prescribed.

“Unless you find beyond a reasonable doubt that an act of prescribing charged in the indictment against a physician defendant was not done by the defendant physician in the course of his professional practice, then you should find him not guilty.

Green, 511 F.2d at 1071.

Defense counsel at trial requested an instruction substantially in this format, citing directly to *Green*. See, Motion for Judgment of Acquittal or in the Alternative for A New Trial, Request 59, filed Feb 21, 2006 (collecting defense instructions proffered during trial).

The State of Ohio filed proposed jury instructions that made no mention of an affirmative defense. See, Proposed Instructions, Request 37, filed February 14, 2006.

Of importance here is that the State’s proposed instruction properly focused the jury’s attention on the question of whether Dr. Nucklos’ conduct that allegedly violated Chapters 3719, 4729, and 4731 of the Revised Code was knowing conduct:

“Before you can find the defendant guilty of Trafficking in Drugs, you must find, beyond a reasonable doubt, that on or about the dates specified in the indictment, William Nucklos knowingly sold a controlled substance, either directly or by prescription, not in accordance with Chapters 3719, 4729, and 4731 of the Revised Code. A physician acts outside the scope of these provisions when he knowingly violates the provisions therein and unlawfully issues a prescription for a controlled substance not in the course of the bona fide treatment of a patient. ‘Bona Fide’ means in or with good faith; honestly,

openly and sincerely; without deceit or fraud.” State’s Proposed Jury Instructions, Request 37, Filed February 14, 2006.

Thus, the trial court had before it proposed instructions from both the State of Ohio and the defense.

Neither proposed an affirmative defense instruction.

Each properly focused the jury’s attention on the issue of whether Dr. Nucklos knowingly violated his duty as a physician, albeit in different ways.

While the trial court was not obligated to adopt the instruction proffered by either party verbatim, it was required to properly instruct the jury as to who bears the burden of proof (the State) and what that burden is (proof beyond a reasonable doubt).

Here, the trial court inserted an affirmative defense instruction that had not been proffered by either party. In this respect, the record is clear that neither party asked for an affirmative defense instruction prior to the charging conference.

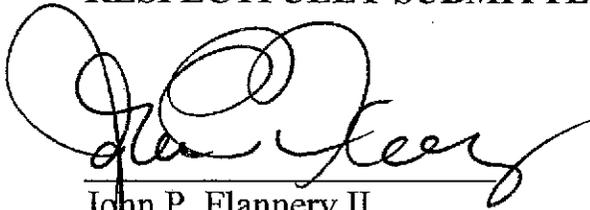
Because the trial court had before it a request for proper instructions, the issue was properly preserved for appeal. *Beavercreek Local Schools v. Basic, Inc.*, 71 Ohio App. 3d 669, at 692 – 693 (2nd Dist. 1991); *Walker v. Conrad*, 2004-Ohio-259, 2004 WL 102591 (2004). The Court’s failure to instruct properly has made a reversal, remand and retrial necessary.

CONCLUSION

Based on the arguments and pleadings herein, Defendant-Appellee respectfully requests that this Honorable Court dismiss the pending appeal as the State’s argument that R.C. 2925.03(B) is an affirmative defense is a frivolous argument, affirm the

decision of the court below on that same issue, and grant such other relief as this Court deems fit and just.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "John P. Flannery II". The signature is written in a cursive style with large, looping letters.

John P. Flannery II

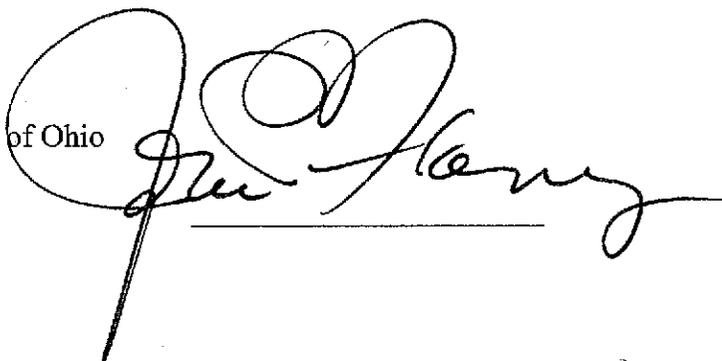
Counsel for Defendant-Appellee William Nucklos, M.D.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Motion to Dismiss Appeal as Improvidently Accepted," was served by U.S. Mail, postage prepaid, this 18th day of December, 2007, upon the following counsel:

William P. Marshall
Solicitor General
30 East Broad Street, 17th Floor
Columbus, OH 43215
614-466-8980
614-466-5087 fax
wmarshall@ag.state.oh.us

Counsel for Plaintiff-Appellant, State of Ohio

A handwritten signature in black ink, appearing to read "W. P. Marshall", written over a horizontal line. The signature is stylized with large loops and a long tail.