In the

Court of Appeals

of the

State of Ohio

SECOND JUDICIAL DISTRICT
CLARK COUNTY

Case No. 06CA0023

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM NUCKLOS, M.D.,

Defendant-Appellant.

APPEAL FROM THE COURT OF COMMON PLEAS, CLARK COUNTY, OHIO
CRIMINAL CASE NO. 04-CR-0790

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES AND CONSTITUTIONS

OTHER AUTHORITIES

I. ASSIGNMENTS OF ERROR[1]

1. The Trial Judge Suffered from a disqualifying Conflict. (See generally Trial Transcript; Appendix 26-69)

2. The Jury Venire was not Impartial. (See Appendix 1-25).

3. The State introduced prior bad act evidence that was unduly prejudicial. (Tr. 1-1936; Tr. 2/22/06, 25-44; exclusive of Tr. 598-625, 629-698, and 1278-1430).

4. The evidence at trial was insufficient to support a conviction. (Tr. 598-625, 629-698, 1378-1430).

5. The Court failed to instruct the jury correctly as to the law. (Tr. 1894-1921)

6. The State withheld critical evidence from the Defendant at trial. (Appendix 70-78; Tr. 306-349, 1378-1430; 1671-1755, 1769-1782).

7. Defendant's Sentencing was unconstitutional and illegal. (Tr. 2/22/06, at 25-44)

II. STATEMENT OF THE ISSUES

A. Defendant was entitled to an impartial tribunal, to a fair trial, but the trial judge suffered a disqualifying conflict because of his recent association as an assistant to the prosecuting attorney; accordingly, we must now remand this case for retrial before another judge. (Error 1)

B. Defendant did not have an impartial jury; accordingly, a new trial must be ordered (Error 2)

[1] This Appeal Brief is dedicated to the late David Hamilton. Smith, Sr., M.D. (7/28/23-11/26/05), who gave his life to medicine and to his family.

C. The Prior "Bad Act" Evidence, the so-called civil judgment, was inadmissible and unduly prejudiced Defendant before the jury; the Court should have declared a mistrial at the beginning of the trial; now this Court must vacate the conviction, and remand for a new trial. (Error 3)

D. The State's character assassination continued with other "Bad Act" Evidence including a seized shot gun brandished before the jury, irrelevant patient medical records, slanderous expert testimony on the inadmissible records, faux pain patients (undercover agents), and objectionable hearsay allegations. (Error 3)

E. The Evidence was insufficient to support a conviction for Dr. Nucklos. (Error 4).

F. The Court failed to instruct the jury correctly as to the law. (Error 5)

G. The State withheld critical exculpatory evidence from the Defendant at trial in violation of Giglio. (Error 6)

H. Dr. Nucklos' sentencing was unconstitutional and illegal. (Error 7)

III. STATEMENT OF THE CASE

A. THE PROCEDURAL CONTEXT

1. The charge. Dr. William Nucklos was indicted in a 20- count indictment in October 2004, charging him with ten counts in violation of Section 2925.03 of Ohio's Revised Code Annotated, the so-called trafficking offenses counts, and ten counts in violation of Section 2925.23 of Ohio's Revised Code Annotated, the so-called "illegal processing counts".

2. The trial and sentence. On February 15, 2006, following a jury trial commencing on February 6, 2006, the jury returned a verdict of guilty on each of 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.

3. The Appeal. Dr. Nucklos accordingly filed his notice of appeal to this Court.

B. THE CASE

1. The Accused: Dr. Nucklos. Dr. William Nucklos, an African-American, 58, married, with three children, was a well-regarded physician, a graduate of Ohio State, with 29 years of medical experience, who treated patients who suffered serious injuries in sports and motor vehicle accidents, had challenges with weight management, or suffered from chronic pain.

2. The medical practice. Dr. Nucklos extended his regular medical practice from Columbus, Ohio to Springfield, Ohio in 2001 because he wanted to help patients who were less fortunate, indeed those who were in socio-economic despair.

3. The chronic pain patients – the focus of the twenty count Indictment.

Dr. Nucklos had three (3) patients that he treated for chronic pain in his Springfield, Ohio office, over the course of ten visits and these pain patients are the exclusive legitimate focus of the criminal charges in this case:

a. Ms. Swyers had been shot with a 3030 deer rifle, the slug piercing her posterior right shoulder in the area of the thoracic spine, leaving her with 40% use of her right upper extremity. She had restricted use of her shoulder and claimed that she had constant, unremitting pain.

b. Darrin Briggs had three gunshot wounds to his left hand, had reconstructive surgery, and suffered from "pain inhibition weakness" and he claimed severe pain.

c. Third, Billy Jo Booth had been in a head-on collision that seriously damaged her lower back, right hip, requiring multiple surgeries, and causing right lower extremity pain that she described as "severe".

Dr. Nucklos treated all three patients with OxyContin – just as they told him they had been treated before. When treating them, Dr. Nucklos did not know that any other physician was treating them.

4. Undercover agents posed as Chronic Pain Patients. Unbeknownst to Dr. Nucklos, in that same period that he was seeing Ms. Swyers, Mr. Briggs and Ms. Booth, in 2001-2002, the State was sending in three undercover agents who pretended to have chronic pain. They were quite convincing – as the record below shows – and they were treated for their "apparent" chronic pain. Dr. Nucklos has never been charged with any criminal misconduct for treating these undercover agents. Yet evidence of the entire undercover investigation was admitted at trial – over defense objection.

5. The seizure of patients' records. In 2002, the State conducted a general search of Dr. Nucklos' office, seizing everything from his medical office in Springfield, but not one of the hundreds of patients' files or the treatment of any patient, other than the three identified above, resulted in any criminal charges against Dr. Nucklos. The State nevertheless entered into evidence at trial all these patient files, doing so over Mr. Willis' defense objection.

6. The Chronic Pain Patients decide to testify. Following the search of Dr. Nucklos medical offices in 2002, the State prosecuted the three patients – Ms. Swyers, Mr. Briggs and Ms. Booth – for various criminal offenses. They said they had been to several physicians and convinced these other physicians, just as they had convinced Dr. Nucklos, that they had chronic pain, requiring treatment with OxyContin. Unbeknownst to Dr. Nucklos until after his own trial,

the State did not prosecute the other physicians. The three patients said they had lied to Dr. Nucklos as well, and that they had been convincing, and they believed they had fooled him. The State decided to prosecute Dr. Nucklos nevertheless.

7. Ineffective Assistance of Trial Counsel. Dr. Nucklos' first trial counsel died, and his second counsel failed to prepare for trial. James R. Willis, Esq., a seasoned criminal defense attorney, made his appearance as Dr. Nucklos' trial counsel only twenty days before this matter was set for trial on February 6, 2006; the trial court refused to grant Mr. Willis any continuance so that he could adequately prepare for trial, and while Mr. Willis' zeal was undiminished, there was not sufficient time to prepare for trial.

8. Trial by Ambush. On February 6, 2006, neither Dr. Nucklos nor Mr. Willis knew that the three patients, Swyres, Briggs and Booth, were the focus of the charges. There were no names identified in the Indictment.

9. Disqualifying Conflict. The trial court judge had a disqualifying confict and should have withdrawn as the judge for this matter. He had been an assistant prosecuting attorney, and a subordinate to the prosecuting attorney who appeared before him to try the Nucklos prosecution. He had been in the prosecuting attorney's office while that prosecutor oversaw the undercover investigation of Dr. Nucklos, the search of Dr. Nucklos' medical offices, the prosecution of the three patients, and, on information and belief, when the charges against Dr. Nucklos were returned by the grand jury. The trial court judge then presided over the criminal proceedings involving the three patients, and he presided over the Nucklos trial conducted by his former boss.

10. An impartial jury. In Springfield, Ohio, Dr. Nucklos was denied a fair jury as well; the jury venire was disproportionately white, and the statistical deviation was significantly

disproportionate, favoring the statistical inference that there was not a fair representation of African-Americans in the jury venire.

11. The prior bad acts offered to inflame the jury. Only About 100 pages of the trial transcript are concerned with the three chronic pain witnesses, or only about 5% of the trial transcript; the remaining 1,900 pages of the trial transcript are devoted almost exclusively to uncharged bad acts, that are highly prejudicial, and with little probative value that the court permitted the jury to consider including.

- Allegations of six-figure program fraud;
- Hearsay testimony about other bad acts;
- A shotgun found in Dr. Nucklos office;
- The entire undercover investigation of Dr. Nucklos in Springfield, Ohio that did not result in any criminal charges.
- Evidence of all the other patients' files, discussed at length by the State's expert witness.

In other words, the State did not believe it had sufficient evidence of the counts at issue, and so the State unleashed highly inflammatory and questionable character evidence.

12. The State withheld critical trial evidence. Unbeknownst to Defendant Nucklos, the State permitted four other physicians who had prescribed pain medicine for Raymona Swyers to sign affidavits that they did not know that she was getting pain medicine from other physicians including Dr. Nucklos. These other physicians were not prosecuted. Dr. Nucklos was not given that same opportunity to sign. Only after his own trial did Dr. Nucklos uncover the pertinent police report disclosing this police report for Ms. Swyers. Appendix 70-78. In addition, one of the four exonerated physicians included Dr. David C. Romano, who was called by the State to

critique Dr. Nucklos' medical practices at trial. Appendix 74. The prosecution did not disclose to Court or counsel that Dr. Romano had himself been mislead by Ms. Swyers and been exonerated.

13. Jury charge. The jury charge misstated the law, and gave inconsistent and contradictory instructions in contravention of statutory and constitutional authority.

14. Sentencing error. The Judge sentenced Dr. Nucklos but not based on the offenses for which he had been tried but based on the inadmissible bad act evidence that the State had introduced to inflame the jury. Accordingly, Dr. Nucklos' twenty year sentence is infirm for statutory and constitutional reasons.

15. Media Hounds. Following Dr. Nucklos' conviction, the State Attorney General and Prosecuting Attorney made Dr. Nucklos their scapegoat for the State's ineffective efforts to control drug distribution in Ohio. Appendix 86.

16. **Appeal.** Dr. Nucklos filed this appeal for the reasons stated herein.

IV. STATEMENT OF THE FACTS

[Defendant-Appellant has sought to elaborate upon the Statement of the Case with citations as necessary; certain other transcript references have been incorporated in the arguments themselves for ease of reference and to avoid unnecessary repetition.]

1. The Accused: Dr. Nucklos. Dr. Nucklos, 58, a physician for 29 years, 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.

2. 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. Dr. Nucklos tried to make a difference for the better in his medical practice. Greg Groves was a cancer patient with grim prospects for recovery but Dr. Nucklos may have saved him. Tr., 2/22/06, at 7. Roman Harris, a 9 year old boy, receiving steroids with out effect, when Children's Hospital couldn't think of anything better, Dr. Nucklos did, and Roman is now well, and the 7th ranked tennis player in Ohio. Tr., 2/22/06, at 8-9. Margaret Eady was told that the only remedy for her physical disability was to have knee replacement, but Dr. Nucklos helped her walk without surgery. Tr., 2/22/06, at 12. Antonio Hall, now 23, and a professional football player, had major back surgery in 2004, and few thought that Mr. Hall would play football again, but Dr. Nucklos lodged him at his home for eight months, and treated him for free, bringing him back, so that he does play football again. Tr., 2/22/06, at 16-17.

In 2001, when Dr. Jenkins, at 85, succumbed to cancer, Dr. Nucklos considered taking over his practice, and focusing on weight management in that office; but that didn't work out, not even to use Dr. Jenkins' office space. Tr. 1634-1637, 1686.

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.

3. 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**, first came in first 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.[2]

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

[2] 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. Swyres. See generally, Testimony of Dr. Romano, Tr. 306-349.

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.

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 gun shot 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 Percocet. 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 Percocet for "break-through pain." Tr. 947. The first visit took from twenty to thirty minutes to render this diagnois. 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.

4. 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 concerns 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, Zanaflex 4mg twice a day, and Percocet 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.

5. 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.

The court instructed the jurors that they were going to hear evidence of prior acts that engulfed the charges in the case but that this additional evidence was "not admissible to prove the character of the defendant." Tr. 708.

The Court gave this instruction during the testimony of the State's expert witness, Dr. Theodore Parran. *Id.* Defense counsel asked what permissible exception allowed this evidence before the jury. T4. 822-823. And defense counsel moved for a mistrial based "on the super abundance of extraneous testimony", on the fact that the evidence had not been appropriately admitted, and that it had to confuse the jury. Tr. 824. The State said it was offering these files for all the reasons for which bad acts may be considered, Tr. 825, "to show things like motive, intent, absence of mistake. Tr. 829.

6. 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, OxyContins, 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 OxyContins 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 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.

8. The prior bad acts offered to inflame the jury. The State could never have persuaded a jury to convict Dr. Nucklos on the evidence that was material and relevant to the 20 counts in the Indictment; and that accounts for the State's wide-ranging efforts to introduce all manner of bad act evidence.

a. The state offered evidence of fraud

At the very outset of the trial, in its opening, the prosecutor said "you're going to hear from the Ohio Bureau of Workman's compensation. He's going to tell you that there was a civil judgment against the defendant several years ago, a very substantial judgment, a civil judgment that tells us an idea of what this doctor would practice the way you're going to hear he did" (emphasis supplied). Tr. 29.

Defense trial counsel charged at a side-bar conference at the time of the opening that the prosecutor had "poisoned the minds of these jurors in an inappropriate way," and thus "move[d] for a mistrial based on that [prosecutor's] statement alone." Tr.36.

Defense counsel objected: "I don't think any instruction the Court could possibly give could correct the situation, particularly since he [the prosecutor] indicated this was a motive for which the defendant committed these crimes. …. I feel the defendant has been damaged. I move for mistrial." Tr. 36-37.

The Court nevertheless allowed its admission as to "motive." Tr. 37.

Defense counsel objected that the prosecutor should have given some notice of this matter, but hadn't; the Court in response concluded it was "motive" testimony, and that it's probative value outweighed its prejudicial effect. Tr. 37.

The court said it would give a limiting instruction; defense counsel insisted the defense required a mistrial instead. Tr. 37.

As it turned out, there was no "civil judgment" at all, only a claim by the State of Ohio for funds, that, in truth and fact, did not involve any misconduct or liability by Dr. Nucklos himself; indeed, this dispute is still pending and remains unresolved, even as this appeal is being filed. The underlying claim involves a dispute about billing rates for services rendered patients. There appears to be no dispute that Dr. Nucklos filled out the correct billing rate, and that the billing agency that Dr. Nucklos employed increased the rate on its own. Tr. 167 -168. The only documentary evidence available confirms this fact. The State insists this claim amounts to a sum in excess of $600,000 but Dr. Nucklos did not receive notice of this exhorbitant claim, still pending, until 2004, within a few months of the Indictment that was filed in this case. Tr. 169.

While these are the facts, the testimony at trial was hardly so limited. Scott Clark of the Ohio Bureau of Workers' Compensation testified, over defense objection, that he began his "investigation" because of an unidentified complainant and went on to relate what he "heard" over the defense's overruled hearsay objection. Tr. 155. The Court allowed Mr. Clark to relate what he "heard" including the hearsay assertion that Dr. Nucklos billed for services that were never rendered. Tr. 156.

Mr. Clark was also permitted to testify that he had 53 undercover visits at Dr. Nucklos's Columbus office to confirm this overbilling scheme, and that Mr. Clark obtained a search warrant in 2000 to search Dr. Nucklos' Columbus office. Tr. 159-160.

When asked by the State what was the basis of the search warrant, over the defense objection, he was permitted to testify, Tr. 161, and to explain the upcoding fraud, and this testimony only remotely resembled what the State said in its opening abut a "civil judgment." Tr. 161-162.

Accordingly, defense counsel made his second motion for a mistrial, given the prejudice and confusion caused by Mr. Clark's unbridled hearsay testimony, because the prosecutor had led the jury to believe "that the motive for whatever the doctor supposed had done was based on the fact that he was aware that he owed the State a lot of money" but the testimony by Mr. Clark was wide-ranging, way beyond anything like that, full of inflammatory slanders, and should have been struck from the record. Tr. 172, Tr. 173. The Court denied the motion for a mistrial, and overruled the motion to strike the testimony. Tr. 174.

In his summation, the prosecutor said Dr. Nucklos "was getting more money from the Bureau of Workers' Compensation … than he was entitled." Tr. 1809. Flaunting his flagrant misconduct, the prosecutor told the jury: "I want to make it very, very clear, we're not trying to put that [evidence] in to establish any kind of bad character, anything like that. The only reason that is in is that he knows that he's going to owe a tremendous amount of money." Tr. 1810.

Having said the evidence was not about "proving" bad character, the prosecutor made it crystal clear that he had no other other objective, arguing to the jury,

> "It's just like the motive of an individual that stands in the corner and sells a rock of crack cocaine, just like the motive of an individual that runs a methamphetamine laboratory, just like the motive of someone that sells a bindle of heroin to be injected. It's money." Tr. 1810.

Obviously, if this case had been limited to what it was really about, namely the 10 office visits and $75 to several hundred dollars per visit, this "profit" motive would have seemed foolish. But the State was enabled to put anything at all it wanted into evidence, and thus this miscarriage occurred.

b. Inflammatory hearsay

Immediately after the opening, the prosecution introduced even more inflammatory hearsay testimony. When Jeffrey Flores, of the Springfield Police, was asked how he became

"aware" of Dr. Nucklos, defense counsel objected. Tr. 48. The prosecutor, on his own, rephrased the question and asked instead, "what type of contacts" caused Mr. Flores to investigate Dr. Nucklos. Tr. 48-49. The defense objected again. Tr. 49. The court overruled the objection, once again, and then Flores testified that "we started getting complaints, several different areas, confidential information that we were working with was telling us about a pill doctor who was prescribing OxyContin." Tr. 49. Defense counsel objected, and was overruled again. Tr. 49. Flores was allowed to testify that "we were being told by pharmacists – actually was told by emergency room personnel about some overdoses". Another defense objection overruled. Mr. Flores then testified that he "had a few parents call in cause of their children being addicted to OxyContins and was making a complaint that – how they got hooked by this doctor." Tr. 49-50. When Flores testified about surveillance in the vicinity of Dr. Nucklos' office, he was allowed to testify how "we were noticing a lot of people we've dealt with in the past." Tr. 50. And there's more.

c. Evidence of the Shotgun.

In the prosecution's opening, the State told the jury that "underneath the doctor's desk is a loaded 12-gauge shotgun" and said, "you got to wonder why." Tr. 35. The prosecution explained that Dr. Nucklos had that "gun underneath the table" because Dr. Nucklos "knew what he was dealing with" (emphasis supplied). Tr. 35. The prosecution had witnesses discuss the shotgun shells they found. Tr. 84. Over defense objection, the State witness testified it was a round "we'd use for destruction." Tr. 85-87. Defense counsel objected that these references plainly were not relevant under Rule 401, and otherwise violated Rule 403. Tr. 85-86. But the Court admitted the evidence. Tr. 86. In the final summation, the State insisted that Dr. Nucklos had that shotgun because "he was concerned about the people that were coming in to get the

OxyContin scripts." Tr. 1887. Keeping in mind that there were only three patients who were the subject of this prosecution, that's an extraordinary charge. But the wide-ranging license the State prosecutor enjoyed made this possible.

e. Evidence of the Undercover investigation. As already indicated, the government undercover agents testified about the undercover investigation, all of it, even thought it was not charged in the Indictment, as though these matters were prior bad acts. *See* paragraph IV, 4-c, and IV.5, *supra*.

f. The State offered evidence of the other patient's files.

Theodore Parran, the State's expert teaches mostly, and practices medicine little - if at all. Tr. 666-667. He is a hired gun for the government and testifies for federal or state authorities. Tr. 668, 731. His self-described expertise as an internist does not in the slightest justify any opinion that he might render on chronic pain medication; in fact, his claim to fame or expertise is that he is an addiction expert. Tr. 666. He testified, "I have taken care of patients whose cravings have been so strong that they have required either extensive detoxification and treatment or methadone maintenance." Tr. 840.

In this role, as an addictionologist, Dr. Parran searches for reasons not to prescribe, rather than to ease pain. See Tr. 662. He looks for what he believes to be signs of addiction in the form of "aberrant" behaviors and "red flags." Tr. 732. These "red flags" are not scientifically validated. For instance, when a spouse or loved one objects to the prescription, Dr. Parran considers this a "red flag," and advises that the physician should defer to the objecting spouse, and "cease and desist [prescriptions] on the spot." Tr. 732. Dr. Parran's approach presumes harm. Patients go to doctors when they run out of drugs. Tr. 815.

Dr. Parran reviewed and selected patient files, and prescriptions, about which he expressed various critical opinions of Dr. Nucklos' practice, although he never met with the patients himself. Tr. 700-701. This is the mischief of the Court's order admitting all this unrelated bad act evidence into the record. The majority of the patient files that Dr. Parran reviewed were those that the defense objected were inadmissible under Evid. Rule 404(b), as prior bad acts. Tr. 708. The Court nevertheless instructed the jurors that they could consider these other patients' files, and Dr. Parran could offer his opinions about them. Tr. 708. Without plainly identifying which patient files he relied upon, he broadly asserted objections about the method of record-keeping by Dr. Nucklos. Tr. 717. And then he identified some other patient files, by the initials of the patients, and critiqued their medical treatment as well. Tr. 739-740. It was a rambling critical review, knocking first one patient file, and then another. Tr. 741-747. When the defense counsel objected, he was overruled by the Court. Tr. 747.

Dr. Parran expressed opinions about alleged bad medical practices in Dr. Nucklos' office over counsel's objection. Tr. 710. Dr. Parran was permitted to say he thought that some of Dr. Nucklos' charts were "back-dated." Tr. 712. Dr. Parran impermissibly commented, as well, on the ultimate issue in the case, concluding that Dr. Nucklos did not comply with an applicable legal standard. Tr. 714. He impermissibly commented, in this context, that one patient "passed away" and, in Dr. Parran's view, that patient's treatment by Dr. Nucklos did not meet "minimal standards of care." Tr. 750-751. Dr. Parran said he had not reviewed a single patient file that met "minimal" standards. Tr. 817.

9. The State withheld critical trial evidence.

In the Statement of the case, Defendant Appellant outlined the State's misconduct. *See* par. III.12, and par. IV, 6.a, *supra*. The predicate for Defendant's concern is that Ms. Swyres

testified that she visited five doctors. But it was only after the trial that the defense learned who the other doctors were. See the probable cause Affidavit for Swyers, at Appendix 74. Only after the trial did the defense learn that the "other" doctors including Dr. Romano had "all signed statements stating that they did not have knowledge that the def. [Swyers] was seeing any other physicians or receiving pain medication from any other doctor at the time [each] doctor was treating the def [Swyers] and that each [doctor] feels that he/she was deceived by the def." See Appendix 74. At the trial, during his cross-examination, when Dr. Nucklos said he hadn't treated her any differently than the other doctors who had been fooled, the prosecutor misled the court and the jury and said, "If they [the other doctors] screwed up, then they have to be taken care of in their jurisdictions, right?" Tr, 1723. That cross-examination question was not in good faith, as the State knew full well, when the question put in the presence of the jury in open court, that no one of the other doctors had, or would be prosecuted. Tr. 1723, App. 74. And the outcome eve at this trial could have been very different had these doctors been known including Dr. Romano's role.

10. Sentencing error.

The jury charge is discussed further below but the problem with sentencing flows from the maladministration of the evidence at trail. Have had a wide-ranging array of uncharged "bad act" evidence as trial, the State presumed as much license at sentencing, insisting that the same improper and extraneous information of other "bad acts, be considered the "factual predicate" for the disproportionate and inapt sentence that the State demanded, "the maximum sentence of 50 years." Tr., 2/22/06, at 26.

At no time did Court or Counsel consider limiting the sentencing "recommendation" to the charges contained in the Indictment involving the three patients, Swyres, Briggs and Booth.

The trial court, thus, accommodated this wrong-headed sentencing impulse, and did not constrain the circumference of its sentencing decision to the actual charges that were the subject of the jury's guilty verdicts.

The State argued to the Court that a "large number of these people" who visited Dr. Nucklos were "drug seekers". Tr. 2/22/06, at 26.

The State demanded that the Court hold Dr. Nucklos accountable, not for whatever Swyers, Briggs or Booth paid for their visits, but for the "economic harm" to every other patient the State insisted had visited Dr. Nucklos. Tr., 2/22/06, at 27.

The most ambitious of the State's extraordinary claim, given the actual charges, was the State's sentencing demand that Dr. Nucklos be treated as an "offender [who] committed the offense for hire as part of an organized criminal activity." Tr. 2/22/06, at 29.

The State boot-strapped this argument by stating that, as a matter of law, "trafficking" is a "predicate for organized activity in the State of Ohio or for RICO charges, and it's considered organized activity." Tr., 2/22/06, at 29. No matter that the predicate had no legs.

Although the charges themselves did not involve "organized activity", were one-on-one transactions with three patients involving ten visits, the Court did nevertheless conclude that Dr. Nucklos had "committed the offenses as part of an organized criminal activity." Tr., 2/22/06, at 39. And concluded that "the defendant set up a major felony drug trafficking operation in our community." *Compare* Section 2929.12 (B)(7) of the Ohio Code Revised Ann.;Tr., 2/22/06, at 39.

While Section 2929.14(B) of the Ohio Code Revised Ann. makes it "mandatory" that the Court impose "the shortest prison term authorized for the offense," the Court side-stepped that directive by making "a finding" that "the shortest prison term will demean the seriousness of the

offender's conduct and will not adequately protect the public from future crime by the offender." Tr. , 2/22/06, at 40. The Court made this determination based on facts that were not proven beyond a reasonable doubt to the jury, that is, on the prior bad acts.

Compounding this error, the Court then concluded that the higher sentences should be "consecutive", in accordance with Section 2929.14 (E)(4) of the Ohio Revised Code Ann., based on the Court's finding that it was necessary "to protect the public from future crime" and "to punish the offender" and "that consecutive sentences are not disproportionate to the seriousness of the defendant's conduct" and "to the danger he poses to the community" and "that the harm caused was so great that no single term adequately reflects the seriousness of conduct." *Id.*

V. ARGUMENTS

A. DEFENDANT WAS ENTITLED TO AN IMPARTIAL TRIBUNAL, TO A FAIR TRIAL, BUT THE TRIAL JUDGE SUFFERED A DISQUALIFYING CONFLICT BECAUSE OF HIS RECENT ASSOCIATION AS AN ASSISTANT TO THE PROSECUTING ATTORNEY; ACCORDINGLY, WE MUST NOW REMAND THIS CASE FOR RETRIAL BEFORE ANOTHER JUDGE.

The Code of Judicial Conduct concerns itself with the appearance of impropriety as well as with actual bias and prejudice.

In this case, the trial judge suffered from a disqualifying conflict that he could not have overlooked, but that did not prompt him to withdraw.

The Supreme Court of Ohio has stated that "'[n]ext in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the judge.' " *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 471, 58 O.O. 315, 319, 132 N.E.2d 191, 197 (1946), quoting *Haslam v. Morrison*, 113 Utah 14, 20, 190 P.2d 520, 523-524 (1948).

Canon 3 of the Code of Judicial Conduct dictates that "[a] judge shall perform the duties of judicial office impartially and diligently" (emphasis supplied). As the language of the Canon is "shall," this is not a permissive "suggestion"; it is instead a mandatory directive.

Canon 3(C) sets forth the following standard by which we measure judicial conduct: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" (emphasis supplied).

Even before this ethical provision was re-written in 1997 supplanting the more forgiving term, "should," for the word, "shall," the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline explained that, what this meant, was that: "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is the basis for the judge's disqualification." Board of Commissioners on Grievance and Discipline Op. No. 91-20 at 2, quoting E. Thode (1973), Reporter's Notes to Code of Judicial Conduct 60.

Defendant submits that the circumstances in this case would lead any reasonable man to question the judge's impartiality, and thus should the trial judge have withdrawn.

The Canon specifies four separate "instances" that may constitute a basis for judicial disqualification.

By way of summary, in this case, the sitting judge, the Honorable Douglass M. Rastatter, served in the prosecuting attorney's office in Clark County, subordinate to Stephen A. Schumaker, as an Assistant Prosecuting Attorney to Mr. Schumaker who tried this case before Judge Rastatter. We have submitted materials in an Appendix supportive of these assertions, at Appendix 29-42.

Judge Rastatter had been a member of that Prosecuting Attorney's Office since 1994, and, more recently, during that time, from 2001-2002, when the undercover investigation was being conducted of Dr. Nucklos' medical offices, when the search warrant was prepared and the search conducted of Dr. Nucklos' medical practice in 2002, and when Judge Rastatter's former superior, the Prosecuting Attorney, Stephen Schumacher, was considering his charging decision against Dr. Nucklos. See Appendix 26-28, 29-41, 43-50.

Judge Rastatter was also a member of that Prosecuting Attorney's Office while each of Dr. Nucklos' three patients were under investigation, that is, Raymona Swyers, Darrin Briggs, and Billy Jo Booth. *See* Appendix 29-41, and 51-69.

It is as important a factor to consider, when considering the appearance of impartiality, that Judge Rastatter was a member of the Prosecuting Attorney's Office when that Prosecutor's Office made the decision not to prosecute the other four doctors who were permitted to sign affidavits, each stating that the lack of any "knowledge" that Raymona Swyers was obtaining prescriptions from any other physician; and Judge Rastatter was a member of the Prosecuting Attorney's Office when Dr. Nucklos was not given that same opportunity, to sign an affidavit. Id.

On information and belief, Judge Rastatter was a member of that Prosecuting Attorney's office when the Indictment herein was returned against Dr. Nucklos on October 19, 2004. Id.

On information and belief, Judge Rastatter was elected to the Common Pleas Court, 2nd District Court of Appeals, effective January 2, 2005, according to the 2004 Judicial Election Results, published by the Ohio Judicial Conference. Id.

On information and belief, once elected to the bench, Judge Rastatter was responsible for each of the criminal cases involving the three witnesses in the Nucklos' prosecution, that is,

Raymona Swyers, Billy Jo Booth, and Darrin Briggs, including the sentences, or reductions, that would be meted out to these witnesses. The docket sheets for each of these cases is attached hereto as part of the Appendix 51-69.

On information and belief, Judge Rastatter may have also been informed of the "other doctors" who prescribed medicine to Raymona Swyers including Dr. Romano who appeared at the trial of Dr. Nucklos. See Appendix 74.

Canon 3 (E)(1)(b) provides that a judge "shall disqualify himself from hearing a case in which his impartiality might reasonably be questioned, including" a situation where "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter."

Judge Rastatter served with the Prosecuting Attorney Schumaker when the Nucklos case was being investigated, when the search warrant was prepared for Dr. Nucklos' premises, when the charging decision was made, and when the principal witnesses against Dr. Nucklos were themselves prosecuted and cooperated.

In order to avoid suspicion as to the fairness and the integrity of the judicial process that might result from the judge's involvement in a case, such as occurred in this prosecution, the Supreme Court has mandated withdrawal or recusal. For this reason alone, this prosecution must be reversed.

The facts are uncontroverted and, insofar as counsel on appeal has stated the matter on information and belief, it is because it has been difficult to obtain information directly; indeed, counsel's staff was told by Judge Rastatter's office that there was no resume or background information on the judge available to confirm or deny the material facts contained in this Appeal,

particularly as to when he served with the Prosecuting Attorney and when he commenced to serve on the Court.

Nevertheless, we respectfully insist that the trial court violated his mandatory duty to disqualify himself from the case pursuant to Canon 3(E)(1)(b).

Concededly, when determining if disqualification is appropriate, the totality of the facts surrounding the prior association between the court and the prosecuting attorney should be examined, including the nature and extent of the prior association, a long one going back to 1994; the length of time since the Judge's association with the Prosecuting Attorney has been terminated, very recently, since January 2005; and any tangential personal association that may persist with the prosecuting attorney, a fact that is not known to counsel. Annotation, 85 A.L.R.4th 700, Section 2[a].

Based on the facts as we believe we have faithfully reported them, the public's confidence in this trial court's impartiality has been undermined to an extent requiring reversal. It is not necessary, in the making of such a reversal, to find that the trial court's prior association with the prosecuting attorney actually influenced his disposition of the case in any way. However, the appearance of impartiality, which is of independent significance, has been irrevocably compromised to an impermissible extent in the prosecution of this case.

Finally, Defendant seeks to underscore the fact that it is the legal obligation of the trial judge to disqualify himself. In *Cuyahoga Cty. Bd. of Mental Retardation*, 47 Ohio App.2d 28, 33-34, 351 N.E.2d 777 (8th District 1975), the Court said it was "not persuaded that these 'mandatory' and 'binding' standards were intended to be empty admonitions which a trial judge could openly disregard, subject only to retrospective disciplinary actions against himself, with no effect upon the improper actions which the canons were designed to protect against. Rather, we

find that the design and purpose of the Code was to impose a standard of conduct upon judges to which they must conform. The duty of a trial judge under [the successor Canon], similar to that provided under 28 USC Section 455 … controlling the disqualification of federal judges, is one placed solely upon the individual judge."

B. DEFENDANT DID NOT HAVE AN IMPARTIAL JURY; ACCORDINGLY, A NEW TRIAL MUST BE ORDERED.

In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1967), the Supreme Court extended the sixth amendment right to an impartial jury to defendants in state proceedings. Defining the elements of the sixth amendment that extend to the states, the Supreme Court has held "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 528, 95 S.Ct. 692, 697, 42 L.Ed.2d 690 (1975); *see also Teague v. Lane*, 820 F.2d 832, 837 (7th Cir.1987), *cert. granted*, 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 268 (1988).

The United States Supreme Court held that the right to a fair and impartial jury under the Sixth Amendment entitles criminal defendants to a jury drawn from a fair cross section of the community. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664 (1979).

As part of the basic Sixth Amendment right to a jury trial, a criminal defendant is entitled to a petit jury which is composed of a representative cross-section of the local community. *State v. Dickerson*, 9th Dist. No. 22536, 2005-Ohio-5499, at7.

Springfield, where this prosecution was tried, has an estimated population of about 65, 358 persons (reflecting a decline in population), and - of that population - 18.2% of the population is black or African American; Clark County containing Springfield, from whence the venire was drawn, has a population of about 142,613 persons, and - of that population – 8.9% of the population is black or African American; the jury venire in this case consisted of 49 white

jurors, and 1 black juror, or a 2% representation for African Americans, and this participation by persons of color is characteristic of the under-representation of blacks or African Americans in the jury venires in Clark County. *See* Appendix 1-25.

In order to establish a *prima facie* violation of this constitutional requirement, the defendant must show: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the representation is due to systematic exclusion of the group in the jury-selection process." *State v. Fulton*, 57 Ohio St.3d 120 (1991).

The Supreme Court of Ohio has expressly stated that African-Americans are considered a "distinctive" group for purposes of this analysis. *See State v. Jackson*, 107 Ohio St.3d 53, 836 N.E.2d 1173 (2005).

The statistics repeated above, and attached hereto in the Appendix, demonstrate that African-Americans constituted approximately about nine percent of the County population, and about 18 percent of the Springfield population, and only 2% of the venire was African American, and thus Blacks or African Americans were not reasonably represented in the venire.

As this occurs on a systematic basis in Clark County, we have a case of unconstitutional under-representation that is actionable. The underrepresentation on Clark County juries consistently represents a statistically significant deviation, and a deviation that would not have occurred -- unless there had been some form of systematic discrimination.

Defendant recognizes that "under-representation on a single venire is not systematic exclusion". *See Ford v. Seabold*, 841 F.2d 677, 685 (6th Cir. 1988); cf. *Duren v. Missouri*, 439 U.S. 357 (1979). But we insist that the exclusion here is systematic.

Insofar as this matter was not further developed in the trial court, Defendant invokes the ineffectiveness of his counsel, particularly given the twenty (20) days that Mr. Willis had before trial to prepare the case and to make appropriate objections.

In *State v. Pierce*, 127 Ohio App.3d 578, 586 (1998), the Court required that an appellant (or petitioner), when asserting a claim of ineffective assistance of counsel, had to submit material containing operative facts that demonstrate both prongs of the two-part test set forth in *Strickland v. Washington*, 446 U.S. 668, 687 (1984): (first) that counsel's performance was deficient, and (second) that the deficient performance prejudiced the defense.

If not for counsel's errors, this issue as to the venire would have been properly raised and briefed below; of course, this is not said in denigration of trial counsel, given the daunting obstacles that compromised his ability to prepare this motion and other apt applications.

C. THE PRIOR "BAD ACT" EVIDENCE, THE SO-CALLED CIVIL JUDGMENT, WAS INADMISSIBLE AND UNDULY PREJUDICED DEFENDANT BEFORE THE JURY; THE COURT SHOULD HAVE DECLARED A MISTRIAL AT THE BEGINNING OF THE TRIAL; NOW, THIS COURT MUST VACATE THE CONVICTION, AND REMAND FOR A NEW TRIAL.

Evid.R. 404(B) expressly provides that: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith" (emphasis supplied).

Evid.R. 404 makes the use of character evidence inadmissible, and thus evidence of other crimes, wrongs or acts must be construed against admissibility. *State v. Coleman*, 45 Ohio St. 3d 298, 544 N.E.2d 622 (1989).

Evid. R. 404(b) does, however, make "character evidence admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident" (emphasis supplied).

In *State v. Schaim*, 65 Ohio St.3d 51, 600 N.E.2d 661(1992), the court discussed the underlying rationale for the limited admissibility of "other acts" evidence as follows:

> "The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. *See State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720, 723 (1975). This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature, * * *." *Schaim*, 65 Ohio St.3d at 59.

The State in its opening in this case promised to the jury that "a witness" is "going to tell you that there was a civil judgment against the defendant several years ago, a very substantial judgment, a civil judgment." Tr. 29. But the State misled the Court, counsel and the jury. There was no evidence of any "civil judgment." And the jury never heard a witness fulfill the State's misleading promise, and testify there was one. The bad acts that the State finally sought to introduce were quite a bit less precise and much more inflammatory, and manifestly offered not to prove any "motive" at all, but as a transparent means to attack Dr. Nucklos' character.

The State had insisted that this chimerical "Civil Judgment" would fairly enable the fact-finder to conclude that Dr. Nucklos' financial obligation, his "motive," arising out of this "elusive" Civil Judgment, in and around 2000, accounted for Dr. Nucklos establishing his medical practice in Springfield in 2001.

But no specific demand was made, nor civil judgment filed against Dr. Nucklos by the State until October 2004, long after Dr. Nucklos had abandoned his Springfield practice in 2002, and this "demand" – if that's what you may call it - was an administrative demand that is still subject to litigation and still unresolved. Indeed, as the State witness conceded at trial, Dr. Nucklos marked the correct billing rate, and, it appears, that his billing company – and not Dr. Nucklos - may have charged more than Dr. Nucklos ever authorized.

The State's misrepresentations in its opening that this was a "judgment" withered by the time the evidence was presented, consisting of: (a) of anonymous civilian complaints alleging criminal wrongdoing, (b) undercover State agents investigating fraud in Dr. Nucklos' Columbus, Ohio practice, (c) a general search of Dr. Nucklos' Columbus medical practice for evidence of fraud, and (d) a complex inference, rather than any kind of "judgment", by which, according to the State, Dr. Nucklos should have taken this "search" of his Columbus medical offices as fair warning that his "wrongdoing" would obligate him financially someday, somehow or other, forcing him to pay some state administrative agency $600,000 – if not a lot more.

The admission of prior bad acts is never an invitation to try another case that has little to do with the one at the bar. But that's what happened here.

As Evid. Rule 404(b) is a slightly modified version of Federal Evidence Rule 404, we may find federal authority instructive in this case.

In *United States v. Merriweather*, 78 F.2d 1070, 1073 (6th Cir. 1996), Circuit Judge Ryan set out to explain "the close and careful analysis trial courts should undertake before ruling on the admissibility of evidence of 'other crimes, wrongs or acts under Federal Rule of Evidence 404(b)."

The Circuit Court instructs that, "upon objection by the defendant, the proponent of the evidence, usually the government, should be required to identify the specific purpose or purposes for which the government offers the evidence of 'other crimes, wrongs or acts.'" *Id.*, at 1076.

In this case, the State indicated the purpose was "motive."

Judge Ryan then recommends that, "[a]fter requiring the proponent to identify the specific purpose for which the evidence is offered, the [trial] court must determine whether the identified purpose, whether to prove motive or intent or identity some other purpose, is

'material'; that is, whether it is 'in issue' in the case." Id., at 1076-1077.

In this case, "motive" was not a material issue, not even necessary to prove the case.

But, even had motive been material, "the court must then determine, before admitting the other acts evidence, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Rule 403." Id., at 1077.

Not only was motive not material in this case, plainly, the prejudice of admitting the prior bad acts outweighed the probative value. In addition, there was a "substantial danger" that the jury would and likely did convict Dr. Nucklos "solely" because it assumed, from such prior bad acts, that the Accused had a propensity to commit criminal acts, and that he deserved punishment, because of these bad acts.

At the very outset of this trial, defense counsel warned the Court about "the poison" that the State had released into the proceedings, and thus into the jury's mind. As the trial court did not grant a mistrial, Defendant Nucklos was denied a fair trial, was unfairly convicted, and so he must now perforce respectfully request that this Court vacate his conviction, and remand the matter for another trial.

D. THE STATE'S CHARACTER ASSASSINATION CONTINUED WITH OTHER "BAD ACT" EVIDENCE INCLUDING A SEIZED SHOT GUN BRANDISHED BEFORE THE JURY, IRRELEVANT PATIENT MEDICAL RECORDS, SLANDEROUS EXPERT TESTIMONY ON THE INADMISSIBLE RECORDS, *FAUX* PAIN PATIENTS (THE UNDERCOVER AGENTS), AND OBJECTIONABLE HEARSAY ALLEGATIONS;

Defendant repeats and incorporates by reference the legal argument above, as to the inadmissibility of prior bad acts under Evid.R. 404(B).

Defendant objects that the State did not stop with the prior bad acts that were the inflammatory "civil judgment" (the last preceding argument), nor the IRS claims referenced in tandem, but instead offered an array of "other" bad acts, having nothing whatsoever to do with

the three patients and the ten visits that were the exclusive subject matter of the twenty counts in the charging document.

The State's purpose, in admitting these other bad acts, was, like a three-card Monty dealer, seeking to misdirect the attention of the jurors away from the insufficiency of the State's evidence -- as to the counts actually charged in the Indictment, that is, away from the fact that Dr. Nucklos did not "knowingly" prescribe any controlled substance that he thought inapt -- any more than had the other physicians who prescribed pain medicine to these same patients.

The State told the jury in its summation that the entire case was about the "three individuals that are presented in the indictments." Tr. 1802. But consider what the State did, rather than what it said. The State devoted virtually its entire presentation of evidence, and most of its summation, to the prior bad acts, to character assassination. The State spent a paltry 102 pages of the remaining trial transcript, and a small fraction of the argument, on the testimony of Ms. Swyres, Mr. Briggs and Ms. Booth. Tr. 598-625, 629-658, and 1378-1430.

The State may have assured the jury: "We wanted to keep this as simple as possible" Tr. 1802. But nothing could have been farther from the truth.

The State knew from the start that, if this case was tried only on the pertinent facts alone, and as "simply" as possible, then Dr. Nucklos would be acquitted.

The State therefore set out to smear Dr. Nucklos with evidence of other bad acts that they hoped would destroy his character and credibility with the jury. The "civil judgment" slanders were not inflammatory enough. The State also wrongly included his past IRS obligations. And more.

First, the State misdirected the jurors' attention to a "shotgun" the State mentioned at every opportunity, in its argument and in testimony, and brandished it in court. In its summation,

the State told the jury that Dr. Nucklos didn't trust his patients, referring to all his patients, and the State alleged, absent any evidence at all, that Dr. Nucklos had this shotgun -- "one of the high .. powered weapons of choice of a Special Operations team" -- to protect himself from his patients. Tr. 1808. It is difficult to understand how a shotgun could be relevant to an Indictment concerned only with three patients, absent any threats from them. It is easier to understand how it might inflame and confuse a jury.

The defense objected to this evidence, and the Court permitted it. Tr. 85-86. The defense objected it was not relevant under Evid. Rule 401. The defense also objected that even relevant "evidence is not admissible if its probative value * * * substantially outweigh [s] * * * the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). And this evidence presented a high danger of prejudice, of confusion, and of misleading the jurors.

Generally, the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987). While an appellate court might ordinarily be reluctant to disturb a trial court's evidentiary ruling, in the context of this trial court's judicial decisions favoring the easy admission of such prejudicial material, there is cause to find a systematic abuse of discretion by the trial court, that is, an unreasonable, arbitrary and unconscionable series of decisions, that collectively denied Defendant Nucklos a fair trial, rather than any mere error of law or judgment. *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). .

Second, the State piled on even more prior acts for the jury to consider, indeed the files of each and every patient of Dr. Nucklos, that is, other than Swyers, Briggs and Booth. Defense counsel objected to "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. The defense argued that these files were not relevant to the charges that related to the three patients. Tr. 1595. The manifest prejudice to the Defendant was overwhelming. Under Evid. Rule 403, the confusion and prejudice was enormous. And yet the Court overruled that objection and upheld the admission into evidence of this veritable haystack of unrelated materials, relating to Dr. Nucklos' other patients, under Evid. Rule 404(b). Tr. 1596-1597. This ruling was also an abuse of discretion.

Third, the expert testimony of Dr. Parran is dependent on the Patient's files that should have never been admitted into evidence in the first place.

Fourth, the testimony of the undercover agents was admitted but should have been stricken, and

Fifth, the hearsay allegations that review in some detail past bad acts that the Court should have never admitted but did; combined with the "civil judgment" and IRS debt evidence, the prejudice was enormous. Any one of these categories of bad acts would be enough, in and of itself, to wreak havoc and confusion at trial, combined it is a perfect storm of injustice.

E. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR DR. NUCKLOS

Defendant Nucklos respectfully insists that the reason this extraneous and prejudicial evidence, discussed above at length, was presented to the jury was to inflame their deliberations and to preclude a full and fair examination of the evidence as it applied to those counts in this prosecution that were rightly before them. Nor did it assist the trier of fact to consider the sufficiency of the evidence, that the instructions that the court rendered were in error (discussed below).

Nevertheless, if the jury had before it only the counts that were charged, and not all of this extraneous and inflammatory material, and had the jury been properly instructed, Defendant respectfully submits, then they would have found that the evidence was insufficient to convict.

Defendant asks this Court to consider whether, in the light of the law, that it doesn't find the evidence wanting – insufficient – as we respectfully suggest.

When reviewing a case to determine whether the record contains sufficient evidence to support a criminal conviction, it is necessary for an appellate panel "to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991); See, also, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

By this standard, Defendant is persuaded that the evidence is still wanting.

This test raises a question of law and does not allow the deliberating panel of this court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Rather, this test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

But this judicial exertion will also require that this panel consider the applicable law for this offense when, as here, the Defendant Appellant is a physician who is acting on "knowledge" that his conduct is professional and apt.

Section 2925.03 (A) of Baldwin's Ohio Revised Code, one of the two criminal statutory that applies here, states in relevant part that:

"No person shall knowingly … sell or offer to sell a controlled substance (underscoring added)".

We submit there is a coincidence of law and common sense in this statutory standard, namely, that the evidence of what Dr. Nucklos "knew" was that the three patients who he treated were chronic pain patients. He could know nothing else for, as their physical conditions suggested, and each of the patients explicitly said, even once they were "cooperating" with the State, they had set out to "fool" Dr. Nucklos and almost seemed to take pride as to how "convincing" they were. We reviewed at some length, in reliance on the trial transcript, the way each patient presented himself or herself, and what Dr. Nucklos did in response, and there is no question that Dr. Nucklos did not "know" that the persons he treated were anything but what they appeared to be. While we have reviewed the testimony of the three witnesses, analyzed it, if you will, since it only takes up 102 pages of the whole trial, and it is a much less onerous task for an appellate court to review than is often the case, we suggest that the court may easily confirm the truth of what we are saying about these counts on appeal.

In addition, we have some guidance, by the fact, that other physicians – if you will - did not "know" any better, at least in the case of Ms. Swyers and in the case of Mr. Briggs.

There is also something else about this statute that has not been rigorously considered. And it is the manner of its writing and whether it applies to Dr. Nucklos - at least as it is written.

Section 2925.03 (B) states that Section 2925.03 (A) "does not apply to any of the following … [1] Manufacturers, [2] licensed health professionals authorized to prescribe drugs, [3] pharmacists, [4] owners of pharmacies, and [5] other persons whose conduct is in accordance with Chapters 3719, 4715, 4723, 4729, 4730, and 4741 of the Revised Code (underscoring and brackets added)."

Plainly, Dr. Nucklos is a "licensed health professional authorized to prescribe drugs." By the express terms of the statute, Section 2925.03 (A) does not then apply to Dr. Nucklos.

Now the initial reaction may be to say that there is a qualifier in that statute that modifies whether Dr. Nucklos is constrained by its qualifying terms.

There is no question that the Court instructed the jury in that fashion, stating that the jury had to consider whether Dr. Nucklos' conduct was "not in accordance with Chapters 3719, 4729 and 4731 of the Ohio Revised Code". Tr. 1901.

We respectfully submit that that instruction was, however, wrong as a matter of law, and that qualifying language did not apply in this case, since Dr. Nucklos was a "licensed health professional authorized to prescribe drugs."

In construing R.C 2925.03 (B), we are guided by certain basic rules of statutory constructions, namely, that "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." RC. 1.42.

The construction we propose as apt in this case is based on the grammatical fact that the statutory phrase, "in accordance with Chapters 3719 …[and certain other specified Chapters] of the Revised Code", modifies and makes reference only to the last identifiable group in the series, set aside from the other categories, and thus relates only to "other persons."

Ohio has considered this precise question of statutory construction, and it is crystal clear that "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries, Inc.*, 156 Ohio App.3d 644, 808 N.E.2d 434 (6th Dist. Wood County 2004); *Indep. Ins. Agents of Ohio,Inc. v. Fabe*, 63 Ohio St.3d 310, 314, 587 N.E.2d 814 (1992);

Carter v. Youngstown, 146 Ohio St. 203, 209, 65 N.E.2d 63 (1946); 2 Sutherland on Statutory Construction, 3d Ed., 448, Section 4921.

There is no contrary intention expressed in this statute, and, in this specific instance, there is good and sufficient reason to construe the last qualifying phrase – the "not in accordance" language – as exclusively applicable to "other persons" by reference to the subject matter of the Code sections referenced, namely, Chapter 3719 refers to the general provisions regarding "controlled substances", Chapter 4715 relates to "dentists and dental hygienists", Chapter 4723 to "nurses", Chapter 4729 to the "practice of pharmacy", seemingly, other than pharmacists and owners of pharmacies, Chapter 4730 relates to "physician assistants", Chapter 4731 to the State Medical Board, and Chapter 4741 to the "practice of veterinarians".

Accordingly, it was error for the Court to instruct the jury that they had to find "his conduct [was] not in accordance with Chapters 3719, 4729 and 4731 of the Ohio Revised Code."

As Dr. Nucklos had every good reason as a physician to rely on the physical condition of the patient who appeared before him, and the confirming representations as to the chronic pain they had, he cannot be said to have "knowingly" done anything inapt.

The remaining ten counts are predicated upon Section 2925.23 of the Ohio Revised Code Ann, and that provides in relevant part that "no person shall knowingly make a false statement in any prescription, order, report, or record required by Chapter 3719 or 4729 of the Revised Code."

Again, by strictly reviewing the evidence, by which Dr. Nucklos "knew" the condition of his patients, Ms. Swyres, Mr. Briggs, and Ms. Booth, Dr. Nucklos "knew" that each of his patients needed and required the treatment he prescribed.

Nor is that result altered by reference to Section 2925.23(B) stating that "No person shall intentionally make, utter or sell, or knowingly possess any of the following that is a false or forged … prescription."

Dr. Nucklos did not ever "knowingly" issue a prescription he "knew" to be false. And when he had cause to discharge any of these patients, he did, as the record of the trial confirms.

Accordingly, Defendant respectfully submits there was insufficient evidence to sustain these convictions, when focusing on the only facts that really mattered at the trial of this case.

F. THE COURT FAILED TO INSTRUCT THE JURY CORRECTLY AS TO THE LAW

Generally, a trial court has broad discretion in deciding how to fashion jury instructions.

The trial court must not, however, fail to "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990).

There were a series of errors in the instructions to the jury. What the jury was told was not the law. The instructions were also so terribly confusing.

The errors are as follows:

1. Definition of "Sale". When the Court instructed the jury as to what a "sale" of controlled substances was, it chose one of at least two definitions found in the Ohio Code that, with slight variance, seem to concur, one with the other, but the Court added a sentence to that definition of "sale" that made "any prescription" a "sale" of controlled substances, an instruction that, on its face, withdraws the question of fact from the jury's deliberation.

The disputed portion of the instruction, at Tr. 1900, states as follow:

"'[1] Sale' includes delivery, barter, exchange, transfer, or gift of the offer thereof; and each such transaction made by any person, whether as principal, proprietor, agent, servant or

employee. [2] The issuing of a prescription for controlled substances constitutes a sale of controlled substances" (emphasis and bracketing supplied).

The portion of the definition that is labeled [1] corresponds to a preference for one of two versions found in the code in Section 3719.01 (AA) and Section 4729.01 (J).

But neither of these definitional versions, as found in the code, contains the language that defines a "prescription" as the equivalent of a "sale" of drugs -- at least not as a matter of definition.

In *Ohio v. Sway*, 1984 WL 4187 (Ohio App. 1 Dist.), concededly an older case, referencing an earlier statutory framework, the Court in that *per curiam* opinion, was unable to construe Section 2925.03 (A)(1) so that the sale of written prescription orders or forms was the legal equivalent of the physical sale of controlled substances, viz., drugs because, the Court concluded, "prescription and sale have separate and distinct meanings."

Indeed, in another portion of the Court's instruction, "prescription" was defined separately and quite apart. Tr. 1905.

In any case, it cannot be the law in Ohio that every "prescription" written for controlled substances is, itself, the equivalent of the "sale" of controlled substances.

2. The "not in accordance" language. Defendant incorporates by reference his argument from the last section, and questions the jury instruction found at Tr. 1901, where the Court instructed the jury that a physician loses his exemption when his conduct is "not in accordance" with select Chapters of Ohio's revised Code; we respectfully submit that the statutory construction makes the "not in accordance" language applicable to "other persons" and not to "licensed health professionals."

3. Legitimate medical purpose .

The Court erred when instructing the jury as follows: that "to be effective, a prescription must be issued for [a] legitimate medical purpose. If a practitioner's order, purporting to be a prescription, is not issued for the legitimate medical purpose, it is not a prescription." Tr. 1905.

At first blush, the instruction may sound like it makes sense. But it doesn't bear up under much scrutiny.

This jury instruction has got nothing at all to do with the underlying offense, that is, whether or not a physician was "knowingly" trafficking in drugs.

By the express terms of this instruction, in the context of this prosecution, if the patient misleads his (or her) physician to write a script, and the patient's purpose is not "legitimate", no matter what the physician's knowledge or honest intent, then the script is arguably not for a "legitimate medical purpose."

Raymona Swyers convinced five doctors in this case including Dr. Nucklos to write her prescriptions that, after the fact, she insisted she didn't require medically.

Were those five doctors who wrote her those prescriptions "knowingly" trafficking in drugs because Ms. Swyers "purpose" was not legitimate?

Detective Kerri Frasco didn't think so, he thought guilt was individual, and that's presumably why he obtained statements from four of those doctors to confirm that they had no "knowledge" of her illicit "purpose." Appendix 74.

There is also no case or statutory authority for this instruction, and it appears tailored by its language to the facts of the case, in order to prompt a conviction.

There was no need to confound the jury's deliberations by giving the instruction in the first place.

This was plain error and the harm was significant -- as this instruction was the equivalent of directing a verdict to convict.

4. Affirmative Defense instruction and the Definition of Preponderance.

The Court instructed the jury that "if you find that the State proved beyond a reasonable doubt all of the essential elements of trafficking in OxyContin, you will 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 courts of the bona fide treatment of the patients." Tr. 1901-1902, 1906.

The Court also instructed the jury that "Preponderance of the evidence is the greater weight of the evidence. It is evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value." Tr. 1909

In other words, the Accused must, by a preponderance of the evidence outweigh the State's evidence that is presumably beyond a reasonable doubt.

But more importantly, the objection here is that, despite the presumption of innocence, the State shifted the burden of proof impermissibly to the defense.

5. The prior act instructions as to character.

Rule 404 states: "Evidence of other crimes, wrongs, or acts is <u>not</u> admissible to prove the character of a person". Rule 404 <u>only</u> permits such bad prior act evidence "for <u>other</u> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (emphasis supplied).

The judge, however, gave the jury two absolutely irreconcilable instructions at law:

First, the jury was told to consider the prior bad acts when "determining whether the defendant's character and reputation witness was accurate", Tr. 1912, and,

Second, the jury was told "not [to] consider the evidence to prove the character of the defendant" (emphasis supplied). Tr. 1912.

The jurors were told both that they may and that they may not use the prior bad acts when considering the question of Dr. Nucklos' "character".

While trial counsel did object to the last instruction, he did not as to the others.

Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For a reviewing court to find plain error, the following three conditions must exist: (1) an error in the proceedings; (2) the error must be plain, i.e., the error must be an "obvious" defect in the trial proceedings; and (3) the error must have affected "substantial rights," i.e., the trial court's error must have affected the outcome of the trial. See, e.g., *State v. Noling*, 98 Ohio St.3d 44, 56, 781 N.E.2d 88, 2002-Ohio-7044; *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. The errors relating to these instructions satisfy this standard in every respect.

G. THE GOVERNMENT WITHHELD CRITICAL EVIDENCE FROM THE DEFENSE AT TRIAL IN VIOLATION OF GIGLIO.

Raymona Swyers, a critical witness for the State, testified at the trial that she was getting prescriptions from four to five doctors including Dr. Nucklos, although the doctors were individually unaware of this.

The State unfortunately did not disclose this information to court or to counsel during the trial. *See* Law Enforcement Arrest Report, Detective Ken Frasco, at Appendix 74.

This information was pertinent to the trial in at least three major respects:

First. This information was not available to question Ms. Swyer herself;

Second, Dr. David Romano testified at the trial and was quite critical of Dr. Nucklos' medical practices although Dr. Romano was one of the physicians who had himself been taken in by Ms. Swyers, was identified in Detective Frasco's report, and cross-examining Dr. Romano at trial using the Frasco Report would have been quite helpful to the defense; the State knew this at the trial but did not provide the information.

Third, when State was cross-examining Dr. Nucklos who responded, in words or substance, that these other four doctors had not been prosecuted for what he'd done, the State berated him for not appreciating that they might be prosecuted in other jurisdictions. When State said that to Dr. Nucklos, State knew or should have known that that question by State did not have a good faith basis, that its content was not true, as these doctors were not being prosecuted at all. The impression the State left with the jury was that the other doctors were or would get more of the same – just like Dr. Nucklos was "getting" in this case.

Whereas the State had knowledge of this error when and as it occurred, in each of these critical instances, the State failed to correct the false impression left with the jury.

If the State knew this fact during the testimony of Ms. Syres, Dr. Romano and Dr. Nucklos, it violated *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959).

In *Napue*, a critical prosecution witness stated, in response to a defense question, that he had not received any promise of lenient treatment from the prosecutor in return for his testimony. Although the prosecutor had, in fact, made such a promise, he did not correct the witness' testimony.

In holding that due process had been violated, the Court noted that "the principle that a State may not knowingly use false evidence ... does not cease to apply merely because the false testimony goes only to the credibility of the witness."

The "jury's estimate of the truthfulness and reliability of a given witness," it noted, "may well be determinative of guilt or innocence."

But, even if the prosecutor sitting there at trial, didn't know, it has the same effect. *See Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763 (1972).

In Giglio, the government's trial attorney was unaware that the witness was lying, but the Supreme Court nevertheless found *Napue* controlling, treating the prosecutor as a spokesman for the government, and binding each by the acts of every other agent of the government.

This evidence was so critical, its absence was outcome-determinative, requiring a new trial.

H. DR. NUCKLOS' SENTENCING WAS UNCONSTITUTIONAL AND ILLEGAL

The Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) concluded that it is "the defendant's right [in state sentencing schema] to have the jury find the existence of 'any particular fact" that the law makes essential in his punishment". *Blakely*, 124 S.Ct., at 2536.

But that's not what happened in this case. The prosecution and the Court below disregarded the offenses for which Dr. Nucklos had actually been convicted and instead sentenced him for the bad acts that had been uncharged.

As indicated above, in a case involving only three witnesses, the State acted as if this was a case involving organized crime, and made makeshift arguments to this effect. Tr., 2/22/06, at 29. No matter that the predicate had no legs.

Although the charges themselves did not involve "organized activity", the Court did itself also conclude that Dr. Nucklos had "committed the offenses as part of an organized criminal activity." Tr., 2/22/06, at 39. And concluded that "the defendant set up a major felony drug

trafficking operation in our community." *Compare* Section 2929.12 (B)(7) of the Ohio Code Revised Ann.;Tr., 2/22/06, at 39.

None of this was based on the limited findings that the jury made.

This error had dramatic and unfortunate consequences because it affected the sentence the court imposed and the basis for running the sentences consecutively.

Section 2929.14(B) of the Ohio Code Revised Ann. makes it "mandatory" that the Court impose "the shortest prison term authorized for the offense," but the Court would not because of the bad act evidence.

The Court concluded that the higher sentences should be "consecutive", in accordance with Section 2929.14 (E)(4) of the Ohio Revised Code Ann., based on a similar court finding.

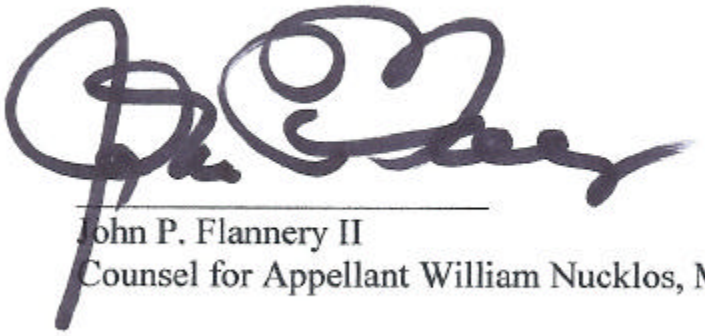
Accordingly, if there is no other relief, and we respectfully insist there should be, then Defendant requests that he be remanded to be re-sentenced in accordance with the offenses for which he was convicted.

VI. CONCLUSION

Dr. Nucklos cited seven errors, and discussed eight issues in this brief that we believe are worthy of this court's careful consideration. One issue argues that the evidence was insufficient as a matter of fact and law, and, if a panel of this Honorable Court agrees with that assertion, we respectfully request that the charges be dismissed. Several other issues, challenging the fairness of the trial, the jury, the bad act evidence introduced by the State, errors in the jury instructions and the withholding of evidence by the State, merit a reversal of the judgment and of the sentence, and a remand for a new trial before a different judicial officer. Another issue, challenging the sentence as unconstitutional and illegal, if granted by this

Honorable court, require vacating the sentence, and remanding the matter for re-sentencing before a different judicial officer. Appellant also requests such other relief as this Court deems fit and just. Counsel for Appellant will be submitting a motion for oral argument under separate cover.

RESPECTFULLY SUBMITTED,



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