



# Judicial Impact Statement

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## AFFIRMATIVE DEFENSES AND *NUCKLOS*

### Looking for sponsor

#### PROPOSED TITLE INFORMATION

To amend Ohio Revised Code R.C. 2901.05(D) to clarify what constitutes an affirmative defense (burden on defense) and what constitutes an element of the crime (burden on the prosecution).

#### BACKGROUND

In *State v. Nucklos*, 121 Ohio St.3d 332, 2009-Ohio-792, the Ohio Supreme Court held that the language “this section does not apply” in the drug trafficking offense is a statutory exception to criminal liability with the burden on the state to show the exception does not apply. Prior appellate court decisions characterized the “does not apply” language as an affirmative defense<sup>1</sup>. The decision in *Nucklos* was based in part upon an analysis of the statutory definition of an affirmative defense.

Case law has extended the *Nucklos* rationale so that arguably unintended consequences emerge – *Nucklos* permits different statutory provisions that fall within the same “does not apply” section to be construed independently, with some sections constituting an affirmative defense and other subsections not. The application of *Nucklos* and its progeny<sup>2</sup> risks applying *Nucklos* beyond its intended scope and risks misconstruing the intent of the General Assembly in regard to various statutory exemptions.

#### RECOMMENDATION

R.C. 2901.05(D) should be changed as follows:

(D) As used in this section:

(1) An “affirmative defense” is ~~either~~ any of the following:

- (a) A defense expressly designated as affirmative;
- (b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.; or
- (c) A defense that is expressed as an exception to a statutory prohibition or that is not part of the definition of the offense.

What is a Judicial Impact Statement?

A Judicial Impact Statement describes as objectively and accurately as possible the probable, practical effects on Ohio’s court system of the adoption of the particular bill. The court system includes people who use the courts (parties to suits, witnesses, attorneys and other deputies, probation officials, judges and others). The Ohio Judicial Conference prepares these statements pursuant to R.C. 105.911.

<sup>1</sup> *State v. Hassell* (Case No. C-920530, Ct. App., 1st Dist., decided May 5, 1993), *State v. Carras* (Case No. 61260, Ct. App., 8<sup>th</sup>. Dist., decided August 27, 1992), *State v. Little* (Case No. 57033, Ct. App., 8<sup>th</sup>. Dist., decided March 14, 1991).

<sup>2</sup> For *Nucklos* progeny, see *State v. Durbin*, No. 10CA136-M, 9th Dist. 2012 Ohio 301 and *City of Brook Park v. Basham*, No. 97428, 8th Dist. 2012 Ohio 2067.