IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	
vs.	:	**Case No. 19 CR 2735**
WILLIAM S. HUSEL,	:	**JUDGE HOLBROOK**
Defendant.	:	

DEFENDANT'S SUPPLEMENT TO MOTION IN LIMINE AND REQUEST FOR PROPOSED JURY INSTRUCITON

Now comes the Defendant, William S. Husel ("Dr. Husel") by and through the undersigned counsel, and hereby submits supplements Defendant's previous Motion in Limine filed on January 18, 2022 in which he moved this Court to 1) rule that he immune from prosecution of lesser included offenses related murder that do not include an element of intentional murder, as related to these facts, and 2) preclude the State of Ohio from introducing or offering evidence in support of any lesser included offenses of murder as he has immunity.

I. Supplement to Motion in Limine Regarding Request that This Court Find the Defendant Immune from the Prosecution of Murder

The immunity statute at issue gives Dr. Husel immunity for any offense that does not include purposeful death, or, intentional murder. R.C. § 2133.11(A)(6) provides in relevant part, "an attending physician [is] not subject to criminal prosecution…[for] prescribing, dispensing, administering, or causing to be administered any particular medical procedure, treatment, intervention, or other measure to a qualified patient including, but not limited to, prescribing, personally furnishing, administering, or causing to be administered by judicious titration or in another manner any form of medication, for the *purpose* of diminishing the qualified patient's or other patient's pain or discomfort and not for the *purpose* of postponing or causing…death even though the medical procedure, treatment, intervention, or other measure may appear to hasten or

increase the risk of the patient's death, if the attending physician so prescribing, dispensing, administering, or causing to be administered or the health care personnel acting under the direction of the attending physician so dispensing, administering, or causing to be administered are carrying out in good faith the *responsibility* to provide comfort care described in division (E)(1) of section 2133.12 of the Revised Code."

Under the plain reading of this statute, so long as the physician acted in good faith to prevent suffering and provide comfort care for which physicians have a statutory "responsibility" to provide under R.C. § 2133.11 and 2133.12, they cannot be prosecuted for anything less than purposeful murder, even if the care was allegedly reckless. This is because certain medical circumstances, where death is imminent and family consent to withdrawal of care, warrant the prioritization of pain prevention over appearances of potentially hastening death. Under these circumstances, where the mechanisms and machines keeping someone alive are being terminated and pulled at the behest of family wishes, death is certain. When the family's decision to terminate life support is made, patient comfort trumps all other medical concerns. Doctors and the medical profession must be protected from criminal prosecution when their actions must necessarily shift from treating symptoms to providing comfort. To practice such medicine with the fear of criminal prosecution that your efforts, absent murderous intent, to avoid suffering can result in criminal liability will result in the needless suffering of the terminally ill.

This important distinction was discussed at length by the Supreme Court of the United States in its seminal decision *Vacco v. Quill*, 521 U.S. 793 (1997). There the Court stated:

> We think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational. . . .**The distinction comports with fundamental legal principles of causation and intent**. . . . a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." Assisted Suicide in the United

States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 368 (1996) (testimony of Dr. Leon R. Kass). **The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead."** *Id.*, at 367. Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. See, *e.g.*, *Matter of Conroy, supra*, at 351, 486 A. 2d, at 1224 (patients who refuse life-sustaining treatment "may not harbor a specific intent to die" and may instead "fervently wish to live, but to do so free of unwanted medical technology, surgery, or drugs"); *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 743, n.11, 370 N. E. 2d 417, 426, n.11 (1977) ("In refusing treatment the patient may not have the specific intent to die").

The law has long used actors' intent or purpose to distinguish between two acts that may have the same result. See, *e.g.*, *United States* v. *Bailey*, 444 U.S. 394, 403-406 (1980) ("The . . . common law of homicide often distinguishes . . . between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life"); *Morissette* v. *United States*, 342 U.S. 246, 250 (1952) (distinctions based on intent are "universal and persistent in mature systems of law"); M. Hale, 1 Pleas of the Crown 412 (1847) ("If A., with an intent to prevent gangrene beginning in his hand doth without any advice cut off his hand, by which he dies, he is not thereby *felo de se* for tho it was a voluntary act, yet it was not with an intent to kill himself"). Put differently, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences. *Feeney*, 442 U.S. at 279; *Compassion in Dying* v. *Washington*, 79 F.3d 790, 858 (CA9 1996) (Kleinfeld, J., dissenting) ("When General Eisenhower ordered American soldiers onto the beaches of Normandy, he knew that he was sending many American soldiers to certain death . . . . His purpose, though, was to . . . liberate Europe from the Nazis").

. . .

Thus, even as the States move to protect and promote patients' dignity at the end of life, they remain opposed to physician-assisted suicide.

Vacco, 521 U.S. at 800-806 (emphasis added).

The Court then also went on to elaborate upon the above distinction and described palliative comfort care statutes such as the ones at issue in this case. "Just as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, **it may permit palliative care related to that refusal, which may have the foreseen but unintended "double effect" of hastening the patient's death.** See New York Task Force, When Death is Sought, *supra*, n.6, at 163 ("It is widely recognized that the provision of pain medication is ethically and professionally

acceptable even when the treatment may hasten the patient's death, if the medication is intended to alleviate pain and severe discomfort, not to cause death"). *Vacco*, 521 U.S. 793, 807 (1997), fn. 11 (emphasis added).

This understanding of the statutory immunity provided by § 2133.11 is made even clearer by the Legislature of Ohio's references in § 2133.11 to both physicians' duties to give effect to consent under circumstances described in § 2133.08[1] as well as physicians' duties to provide comfort care under § 2133.12. There is no irony or ambiguity to § 2133.12 (D), which immediately precedes § 2133.12 (E)(1)'s definition of comfort care referenced in conjunction with immunity in § 2133.11 (A)(6), stating "Nothing in sections 2133.01 to 2133.15 of the Revised Code condones, authorizes, or approves of mercy killing, assisted suicide, or euthanasia." These statutes speak directly to immunity not applying in circumstances of purposeful ending of life and clearly applying in situations where the intent is to prevent suffering despite the actions taken potentially appearing to hasten death or the risk of it. As such, this immunity statute provides a minimal *mens rea* threshold of intentional murder for which physicians providing comfort care at the time of ending life support can be prosecuted.

In this case, all the original and subsequent remaining counts Dr. Husel is charged with regard comfort care on qualified patients administered at the time of palliative vent withdrawals with family consent to do so. In other words, every allegation in this case regards Dr. Husel's actions taken in the honoring of family members' wishes that their loved one not suffer once the machines that were keeping them alive were removed. Specifically, what drugs were given and in what amounts to prevent suffering at those times of inevitable death. The sole question to be decided is whether the State can meet its burden in proving that in each and every one of those circumstances where they allege murder that Dr. Husel's intent was to end life and not to prevent suffering as he

[1] § 2133.08 describes the circumstances in which consent to physician withdrawal of life sustaining treatment occurs or can occur.

has a statutory and ethical duty to do. The result: all offenses that do not include purposeful death have no relation to this case. It is for these reasons that Dr. Husel reiterates that he is in fact immune from prosecution for any offense less than intentional murder and further reiterates his contention that the proposed jury instruction at issue is an appropriate and necessary instruction for the proper adjudication of this matter.

II. Defendant's Motion in Limine Should be Granted

Defendant's Motion in Limine filed on January 18, 2022 seeking to prevent evidence of lesser-included offenses of murder was necessitated by the State's last-minute notification, three years into this litigation, that they would seek a reckless murder charge. In attempting to dissuade this Court from granting Defendant's timely and appropriate motion, the State has served merely to muddy the waters of what is at issue with this Motion.

A. State's distinction between "Lesser Included Offenses" and "Offenses of Inferior degree" is Irrelevant in this case.

In its brief opposing Defendant's Motion in Limine filed on January 26, 2022, the State spends a significant amount of time with an argument that distinguishes between "lesser-included offenses" and "offenses of inferior degree." Unfortunately, the State misses the mark with its distinction. Most crucially, at no point does the State's elaborate discussion relate its distinction between the two legal concepts to the immunity statute at issue. Omitting any mention of the immunity statute, the State irrelevantly states that "[a]ll evidence that the State intends to present to prove purposeful murder also support conviction for the lesser-included offenses." State's Br. P.4. This demonstrates State's misunderstanding of the immunity statute because, as demonstrated above, any offense that does not include purposeful death should be excluded from this litigation.

Not only is the State incorrect when they attempt to characterize this as a "nonexistent issue," but they actually inadvertently "hit the nail on the head" as to what is at issue when they stated that "[t]he only difference between reckless homicide and purposeful murder is the offender's intent."

State' Br. p.3. This is precisely what is at issue, as Defendant's have repeatedly made clear.

Furthermore, the substantial differences between reckless murder and intentional murder from a practical, trial standpoint also weigh heavily in favor of granting Defendant's Motion. Aside from the legally substantive differences of the two offenses' elements, as this Court well knows, the difference between the offenses has major trial implications, impacting the kinds of evidence brought, presentation of the case, experts to be used, how the case is to be argued and received by a jury, along with myriad other considerations differ between a trial for intention murder and reckless murder.

Ohio courts have recognized that, where "delay in bringing the new charges was unreasonable and that the delay resulted in actual prejudice" a due process violation is established. *State v. Stahl*, 2005-Ohio-2239, at ¶ 15 (2nd Dist.). In *Stahl,* the Court of Appeals found that the State's delay in bringing new charges was not unreasonable on account of new evidence discovered. *Id.* Here, however, the State's delay in bringing new charges of reckless homicide rests on no new evidence. In fact, despite this case being in its third year, the State has never indicated they would pursue reckless murder. This includes three years of court hearings, emails, calls, and public media appearances, all without a hint of any intention to bring reckless murder charges. Therefore, the delay here is not reasonable and, as described above, would result in actual prejudice to Defendant.

Thus, the State's contention that Defendant's Motion in Limine seeks to address "nonexistent" issues is incorrect and the Court should grant the Motion. Should the Court grant the State's request for reckless homicide or any other lesser-included offense to be included at trial, Defendant respectfully asks this Court to grant a continuance of trial, given the myriad implications and complications cited above that will impact the Defendant's theory of defense, mere days before trial.

III. Defendant's Proposed Jury Instruction Regarding Immunity Should be Granted

A. State Has Failed to Actually Address Applicability of 2133.11(A)(6) Immunity

The State attempts to argue that Dr. Husel is not "automatically presumed" to receive statutory immunity. State's Br. pp. 4-5. The State appears intent on denying Dr. Husel this statutorily entitled immunity by simply arguing its application is not "automatic," without then suggesting or discussing under what circumstances a Defendant is entitled to this statutory immunity. In fact, the State does not appear to make any actual argument that Dr. Husel is not entitled to the protections of the immunity statute, rather, just repeating that it is not "automatic."

This entitlement, however, is exactly the case, as Defendant has argued. In fact, "Dr. Husel is entitled to statutory immunity from prosecution for the lesser-included offenses of murder." Defendant's Mtn. p. 1. As such has been reiterated and made clear herein as well. Again, as has been explained, the plain language of the immunity statute applies and Dr. Husel is in fact entitled to immunity for anything less than intentional murder.

B. The State of Ohio Misapplies *Gelesh*

In attempting to deny Defendant his statutorily entitled immunity, the State leans heavily on *Gelesh v. State Med. Bd. of Ohio*. 2010-Ohio-4378 (10th Dist.). However, *Gelesh* was a civil case involving "professional disciplinary action" rather than charges of murder. *Id.* at ¶ 51. As such, its applicability to the case at hand is severally limited. Indeed, the State acknowledged themselves that, under *Gelesh,* applicability of the immunity statutes diverges between criminal cases and civil, or professional disciplinary, cases. State's Br. p. 8. Relying on this civil and inapplicable precedent, the State returns to its cursory conclusion that "Defendant is not automatically" immune under the statute and, again, apparently seeks to deny Dr. Husel of his statutory right based merely on this civil determination. *Id.* at 10. As such, the State's arguments should be disregarded and Defendant

should be granted the statutory immunity.

C. Defendant has Not Waived R.C. 2133.11(A)(6) Immunity

The State appears to make its first direct argument that Defendant is not entitled to the relevant statutory immunity based on an incorrect theory of waiver. Again, the State returns to its method of citing largely civil precedent as to why Defendant must have raised his statutory immunity or else waive it. *Id.* at 10-13. Again, at no point does the State cite any criminal authority relating to the statute at issue and why it should be considered waived. *Id.*

Furthermore, while Defendant and council are aware of Ohio Crim. R. 12 as it applies to pretrial motions, Defense council never anticipated this immunity statute was at issue until 1/18/22, when the State indicated its intent to seek instructions regarding reckless homicide for the first time. Our motion was filed the *same* day. As has been detailed above, this was three years into this case. Thus, Defendant was not on notice that this statutory immunity was implicated until one week ago and promptly raised the statutory immunity. Thus, Defendant has not waived his entitlement to the statutory immunity and the State's arguments to the contrary should be disregarded.

D. Defendant's Proposed Jury Instruction Regarding Immunity is Proper

As has been demonstrated, Dr. Husel is entitled to the statutory immunity. Issues regarding comfort care and palliative care are not of such common understanding that jurors would not benefit from being instructed regarding them. As such, it is proper to instruct the jury of this type of medicinal practice and why immunity applies under particular circumstances, where intent is not murderous, so that they are not confused by irrelevant issues and facts such as allegations of failures to conform to civil or administrative standards of care. Again, the State attempts to deprive Defendant of his statutorily entitled immunity simply because the statute is "confusing." State's. Br. p. 13. Additionally, the State attempts to categorize the issue as one akin to an affirmative defense. If that was the case, then there is no issue regarding the appropriateness of the instruction but rather

as to whose burden applies. The type of medicine at issue in this case is not one of common understanding, immunity is applicable, and jurors' understanding as to the all of the above is highly relevant. Thus, the jury must be properly instructed as to which offenses Dr. Husel is and is not on trial for.

For the foregoing reasons, Dr. Husel respectfully requests that this Court enter an Order 1) granting his request that he be found immune from prosecution of lesser included offenses related murder that do not include an element of intentional murder, as related to these facts, and 2) granting Defendant's Motion in Limine with respect to precluding the State of Ohio from introducing or offering evidence in support of any lesser included offenses of murder as he has immunity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplement to Defendant's Motion in Limine was sent electronically on January 31, 2022 to the following:

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