

**IN THE SUPREME COURT OF OHIO**  
**Supreme Court Case Numbers 08-1094 & 08-1304**

**STATE OF OHIO**

**Appellee**

**v.**

**JERMAINE C. BAKER**

**Appellant**

**On Appeal from the Summit  
County Court of Appeals  
Ninth Appellate District  
Court of Appeals No. 23840**

**MERIT BRIEF OF APPELLEE  
STATE OF OHIO**

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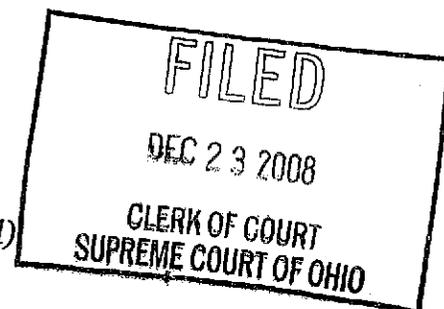
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## STATEMENT OF FACTS

This is a certified conflict case and one in which a discretionary appeal was accepted. The cases are consolidated. The certified issues are 1) Does *Old Chief v. United States* (1997), 519 U.S. 172, apply to Ohio, state law, criminal prosecutions; 2) are parties required to object to avoid waiver of criminal sentencing issues on appeal; 3) is the issue of merger waived if a trial court imposes concurrent sentences?

The State contends that the answers to the certified issues are 1) *Old Chief* applies as persuasive but not controlling authority; 2) normally parties are required to object to avoid forfeiture of criminal sentencing issues on appeal, in the case on appeal the appellant was required to object; 3) if there is no objection in the trial court, a reviewing court has discretion whether to find plain error concurrent sentences are imposed for multiple specifications, in the case on appeal the Ninth District did not abuse its discretion by failing to find plain error analysis since there was no showing that the outcome of the trial clearly would have been different.

The decision on appeal, *State v. Baker*, 9<sup>th</sup> Dist. App. No. 23840, 2008-Ohio-1909 is referred to in this Brief as Decision and Journal Entry.

Appellant Jermaine Baker was convicted after jury trial of four counts of kidnapping, R.C. 2905.01(A)(2)/(3) felonies of the first degree. He was sentenced to consecutive terms of three years on each count. Baker was also convicted of firearm specifications pursuant to R.C. 2941.141 on each of the kidnapping counts and sentenced to consecutive terms of three years and consecutive with the twelve year sentence on the principal kidnapping counts. Baker was also convicted of body armor specifications pursuant to R.C. 2941.1411 on each of the kidnapping counts and sentenced to consecutive terms of two years and consecutive with the twenty-four year sentence

described above, for a total sentence of thirty-two years in prison. That is the total sentence since the other sentences described below are concurrent with this thirty-two year sentence.

Baker was also convicted of one count of aggravated burglary, R.C. 2911.11(A)(1)/(2) a felony of the first degree, plus a firearm specification and a body armor specification. The sentence for this group is a total of eight years in prison.

Baker was also convicted of four counts of aggravated robbery, R.C. 2911.01(A)(1)/(3) felonies of the first degree, plus a firearm specifications and body armor specifications on each count. The sentence for this group is a total of thirty-two years in prison.

Baker was also convicted of two counts of felonious assault, R.C. 2903.11(A)(1)/(2) felonies of the second degree. The sentence was three years on each count consecutive. There were firearm and body armor specifications on each count. The sentence on the firearm specifications was three years on each, consecutive. The sentence on the body armor specifications was two years on each, consecutive. The sentence for this group is sixteen years in prison.

Baker was also convicted of robbery, R.C. 2911.02(A)(2) a felony of the second degree and sentenced to four years in prison. He was also convicted of having weapons under disability, a felony of the third degree and sentenced to four years in prison. The weapons under disability charge was brought pursuant to R.C. 2923.13 (A) (2) and (A) (3) and the jury was so instructed. T. 436-437.

Baker was found guilty by the jury of repeat violent offender specifications to the kidnapping, aggravated burglary, aggravated robbery, and felonious assault counts. The trial court did not sentence Baker on any of those specifications because of the nature of

the other sentences. There were no objections by either the State or Baker at sentencing. T. Sentencing.

Jermaine Baker accompanied by two accomplices, Edrick Mayfield and Anthony Meddley burst into the home of Toni Watkins and Larry Dampier. The home invasion had been planned by the trio on their belief that the home contained one hundred pounds of marijuana. Baker was the leader of the group. Baker and the accomplices each had a firearm. They had duct tape as well. The trio began shooting as they came into the home.

Also in the home were a granddaughter, Ashley Marsh, her cousin Walter Reed, and family member Kenny Sharpe. Dampier ran at the intruders. Baker shot him in the arm. Marsh's right leg was struck by a bullet. At Baker's direction tape was put on Marsh's mouth and Watkins' mouth and feet. Dampier's arms were taped together. Sharpe was taken to the basement. The home was searched upstairs and downstairs. Cell phones were taken from Marsh, Watkins, Dampier and Sharpe. Dampier's rings were pulled off his fingers. Dampier had about \$24,000.00 in a safe. That money was taken. Dampier's collection of rare coins was taken. The incident took some time and, apparently hungry, Baker helped himself to ribs that had been cooked before the invasion.

Police arrived and eventually arrested the trio. Three bullet proof vests were discovered in the home. Watkins felt something like armor on Baker when Baker grabbed her at one point. T. 41-45, 47-48, 50, 78, 80-81, 87-88, 122, 124-125, 141-142, 221, 248-249, 256.

## PROPOSITION OF LAW I

### **OHIO CHIEF V. UNITED STATES APPLIES TO OHIO, STATE LAW, PROSECUTIONS.**

#### LAW AND ARGUMENT

Even if the Ninth District erred in its interpretation of *Old Chief v. United States* (1997), 519 U.S. 172, Baker's convictions must stand. In the court of appeals Baker argued that trial counsel was ineffective and that plain error occurred when trial counsel failed to stipulate to Baker's prior convictions. The Ninth District found that trial counsel had indeed stipulated to at least the prior conviction for robbery and perhaps all three prior convictions. Decision and Journal Entry, ¶8-¶9, ¶13. The certified copies of the prior convictions, one document for robbery and one for possession of cocaine and tampering with evidence, was received into evidence without objection. *Id.* ¶10. The admission of those exhibits is the basis of Baker's argument in this Court. Brief, 5.

The trial court instructed the jury that evidence that Baker was a repeat violent offender was not received for and the jury could not consider it in order to prove character that Baker acted in conformity with that character. T. 435. Baker was not sentenced on the repeat violent offender specifications.

The prior convictions for robbery and possession of cocaine were not used to prove propensity. They were elements of the weapon under disability charge. R.C. 2923.13(A)(2) includes as a disability a prior conviction for a felony of violence. *State v. Allen* (1987) 29 Ohio St.3d 53, syllabus. Robbery is an offense of violence. R.C. 2901.01(A)(9). For that reason the prior conviction of robbery was admissible to prove an element of the offense. Likewise, the prior conviction for possession of cocaine was

admissible. R.C. 2923.13(A)(3); *State v. Hilliard*, 9<sup>th</sup> Dist. App. No. 22808, 2006-Ohio-3918, ¶26; See *State v. Twyford*, 94 Ohio St.3d 340, \*359, 2002-Ohio-894.

Baker made no effort in the court of appeals and makes no effort here other than conclusory allegations to show that admission of the prior offenses was outcome determinative or constituted a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91. Nor is there a showing of prejudice, a reasonable probability that he would not have been convicted of some offense(s) had the prior convictions not been received into evidence. *Strickland v. Washington* (1984), 466 U.S. 668, \*687.

The evidence of guilt on all the offenses is overwhelming. Baker armed himself when he was under disability for the prior offenses of robbery and possession of cocaine, Marsh and Dampier were shot, one by Baker and maybe one by Baker's accomplice, all of the victims were kidnapped and all were robbed. T. 41-45, 47-48, 50, 78, 80-81, 87-88, 122, 124-125, 141-142; T. 2, 221, 248-249, 256. For that reason Baker cannot show either ineffective assistance or plain error. The Ninth District found that Baker had not demonstrated prejudice. Decision and Journal Entry, ¶14.

The only convictions Baker challenged on an evidentiary basis in the court of appeals were the two felonious assault convictions arising from the shooting of Dampier and Marsh. That argument was easily disposed of by the court of appeals. Decision and Journal Entry, ¶22-¶26.

The prior convictions were not emphasized by the State and mentioned briefly only in reference to the having a weapon under disability charge. T. 446.

#### **OLD CHIEF**

*Old Chief* involves neither plain error nor ineffective assistance of counsel. The decision is not based on constitutional principles. *Louisiana v. Ball* (La. 1999), 756

So.2d 275, \*278. In *Old Chief* the defendant was convicted of a federal offense that prohibited a person with a prior conviction of any felony (subject to certain exclusions) to possess a firearm. Defendant offered to stipulate that he had been convicted of a qualifying felony and that the jury could be so instructed. The government refused to stipulate and the trial court ruled that the government did not have to stipulate. A document reciting that the defendant had a prior conviction for assault in that defendant “knowingly and unlawfully assault Rory Dean Fenner, said assault causing serious bodily injury” resulting in a prison term of five years was admitted into evidence.

The Supreme Court found that the document was relevant and framed the issue as one concerning the discretion of the trial court under FRE 403. An excerpt from the opinion follows.

The principal issue is the scope of a trial judge's discretion under Rule 403, which authorizes exclusion of relevant evidence when its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. Rule Evid. 403. *Old Chief* relies on the danger of unfair prejudice.

The term “unfair prejudice,” as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. See generally 1 J. Weinstein, M. Berger, & J. McLaughlin, *Weinstein's Evidence* ¶ 403[03] (1996) (discussing the meaning of “unfair prejudice” under Rule 403). So, the Committee Notes to Rule 403 explain, “‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

Such improper grounds certainly include the one that *Old Chief* points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds

that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, "Although ... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged-or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment-creates a prejudicial effect that outweighs ordinary relevance." *United States v. Moccia*, 681 F.2d 61, 63 (C.A.1 1982).

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FN7. While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status. On appellate review of a Rule 403 decision, a defendant must establish abuse of discretion, a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon.

\*\*\*

In dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious, and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charge against him.

\*\*\*

The District Court was also presented with alternative, relevant, admissible evidence of the prior conviction by Old Chief's offer to stipulate, evidence necessarily subject to the District Court's consideration on the motion to exclude the record offered by the Government. Although Old Chief's formal offer to stipulate was, strictly, to enter a formal agreement with the Government to be given to the jury, even without the Government's acceptance his proposal amounted to an offer to admit that the prior-conviction element was satisfied, and a defendant's admission is, of course, good evidence. See Fed. Rule Evid. 801(d)(2)(A).

Old Chief's proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element. The statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies, and Old Chief clearly meant to admit that his felony did qualify, by stipulating "that the Government has proven one of the essential elements of the offense." App. 7. As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission. Logic, then, seems to side with Old Chief.

There is, however, one more question to be considered before deciding whether Old Chief's offer was to supply evidentiary value at least equivalent to what the Government's own evidence carried. In arguing that the stipulation or admission would not have carried equivalent value, the Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it. The authority usually cited for this rule is *Parr v. United States*, 255 F.2d 86 (CA5), cert. denied, 358 U.S. 824, 79 S.Ct. 40, 3 L.Ed.2d 64 (1958), in which the Fifth Circuit explained that the "reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.' " 255 F.2d, at 88 (quoting *Dunning v. Maine Central R. Co.*, 91 Me. 87, 39 A. 352, 356 (1897)).

This is unquestionably true as a general matter. The "fair and legitimate weight" of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. \*\*\* Thus,

the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault. Cf. *United States v. Gilliam*, 994 F.2d 97, 100-102 (CA2), cert. denied, 510 U.S. 927, 114 S.Ct. 335, 126 L.Ed.2d 280 (1993).

But there is something even more to the prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. "If [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Calif. L.Rev. 1011, 1019 (1978) (footnotes omitted).

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In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later

criminal behavior charged against him. As in this case, the choice of evidence for such an element is usually not between eventful narrative and abstract proposition, but between propositions of slightly varying abstraction, either a record saying that conviction for some crime occurred at a certain time or a statement admitting the same thing without naming the particular offense. The issue of substituting one statement for the other normally arises only when the record of conviction would not be admissible for any purpose beyond proving status, so that excluding it would not deprive the prosecution of evidence with multiple utility; if, indeed, there were a justification for receiving evidence of the nature of prior acts on some issue other than status ( *i.e.*, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," Fed. Rule Evid. 404(b)), Rule 404(b) guarantees the opportunity to seek its admission. Nor can it be argued that the events behind the prior conviction are proper nourishment for the jurors' sense of obligation to vindicate the public interest. The issue is not whether concrete details of the prior crime should come to the jurors' attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute. "A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, *see* 16 U.S.C. § 3372, to the most aggravated murder." *Tavares*, 21 F.3d, at 4. The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions. Finally, the most obvious reason that the general presumption that the prosecution may choose its evidence is so remote from application here is that proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense. Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.

Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available. What we have said shows why this will be the general rule when proof of convict status is at issue, just as the prosecutor's choice will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.

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FN11. In remanding, we imply no opinion on the possibility of harmless error, an issue not passed upon below.

Id. \*180- \*192 (footnotes omitted.)

## **OLD CHIEF IN THE OHIO COURTS OF APPEALS**

No court of appeals has found either plain error or ineffective assistance of counsel based on *Old Chief*.

### First District

In *State v. Simms*, 1<sup>st</sup> Dist. App. Nos. C 030138, C 030211, 2004-Ohio-652 the defendant's prior rape conviction and actions at a prior proceeding were admitted as elements of an intimidation charge under R.C. 2921.05(B). The court distinguished *Old Chief* since the evidence also showed that the defendant acted purposely because of the prior charges; further, there was a stipulation to the conviction and the full judgment

record was not admitted, only testimony about some details and consequences of the rape. Id. ¶7-¶10.

### Second District

In *State v. Renner* (1998), 125 Ohio App.3d 383 the court reversed a conviction where inadmissible character evidence was introduced. *Old Chief* was cited to support the general rule against propensity evidence. Id. \*388-\*393.

In *State v. Free* (Feb. 13, 1998), 2<sup>nd</sup> Dist. App. No. 15901, 1998 WL 57373 the court held that the defendant had no right to stipulate that a victim of a felonious assault suffered physical harm. The court cited *Old Chief* in support. Id. \*3-\*4.

In *State v. Sinkfield* (Oct. 2, 1998), 2<sup>nd</sup> Dist. App. No. 16277, 1998 WL 677413 the defendant was convicted of having weapons under disability and asserted plain error where the trial court admitted a termination entry. Counsel failed to object to admission of the complete copy of the termination entry. The court distinguished *Old Chief* since the defendant testified; for that reason the prior conviction was admissible during cross-examination. Id. \*11-\*12.

In *State v. Kisseberth* 2<sup>nd</sup> Dist. App. No. 20500, 2005-Ohio-3059 the defendant filed a motion in limine to be allowed to stipulate to a prior conviction. The motion was denied and the defendant did not preserve the issue. The court stated that a trial court had discretion whether to allow a defendant to stipulate to a prior conviction constituting an element of an offense. The court found no plain error since only minimal evidence of the prior conviction was introduced, a limiting instruction was given, and there was competent credible evidence of guilt. Id. ¶18-¶29.

## Fifth District

In *State v. Godbolt* (Apr. 19, 1999), 5<sup>th</sup> Dist. App. No. 98CA00101, 1999 WL 254370 the defendant was convicted of having weapons under disability. The defendant offered to stipulate to prior convictions but only that he was under disability under either section of the code; the trial court did read a stipulation to the jury that defendant had previous convictions for a crime of violence and a drug related offense. There was no objection to the court's rendition of the stipulation. The court of appeals found no conflict with *Old Chief* since the stipulation mirrored the Ohio statute. *Id.* \*4-\*5. The denial of this defendant's later untimely petition for post-conviction was affirmed in *State v. Godbolt*, 5<sup>th</sup> Dist. App. No. 02CA39, 2002-Ohio-6547.

In *State v. Chandler* (Sept. 1, 1999), 5<sup>th</sup> Dist. App. No. 98CA15, 1999 WL 770229 the defendant filed a motion to dismiss the indictment or to preclude use of a prior DUI conviction on the basis that it had been obtained without counsel. Defendant also by motion offered to stipulate to the prior convictions and did not want the jury to know about the prior convictions. The motions were denied and the defendant pled no contest. The court of appeals distinguished *Old Chief* since the State was required to prove that the defendant had three prior DUI convictions in the past six years; if the jury did not know of the prior convictions defendant could not have been found guilty. *Id.* \*2-\*3.

In *State v. Riffle*, 5<sup>th</sup> Dist. App. No. 2007-0013, 2007-Ohio-5299 the defendant was convicted of having a weapon under disability. There was a stipulation that defendant had two prior robbery convictions but the defendant did not object to admission of the sentencing entry on those offenses. On appeal the defendant claimed that counsel was ineffective for not objecting and for not stipulating that defendant had

previously been convicted of an offense of violence. The court of appeals found that defendant had not been prejudiced due to the evidence of guilt. Id. ¶26-¶41.

#### Eighth District

In *State v. Jordan* (Apr. 29, 1999), 8<sup>th</sup> Dist. App. No. 73453 the defendant was convicted of having weapons under disability. The trial court denied a motion to hold a separate hearing on a prior conviction and re-opened the case to allow evidence of the conviction. The case was re-opened because the trial court and the State believed that the defendant had stipulated to the prior conviction. On appeal the defendant argued that he had offered to stipulate after the court decided to re-open the case but that the stipulation was off the record. The court of appeals held that the defendant never presented the trial court with an adequate evidentiary alternative to proving the prior conviction. Id. \*11-\*12.

In *State v. Woods* (Aug. 30, 2001), 8<sup>th</sup> Dist. App. No. 78752, 2001 WL 1002233 the defendant was convicted of having weapons under disability. The defendant filed a motion in limine seeking to exclude the name and nature of the prior conviction. The motion was denied and the issue not preserved for appeal. The court of appeals did not discount the applicability of *Old Chief* but did find plain error since the record did not support the conclusion that the outcome of the trial would have been different. Id. \*2-\*5.

In *State v. McGrath* (Sept. 6, 2001), 8<sup>th</sup> Dist. App. No. 77896, 2001 WL 1167152 the court distinguished *Old Chief* since the defendant's argument concerned admission of other act evidence. The defendant had been convicted of retaliation and menacing by stalking and the other act evidence including prior convictions was relevant to show the defendant's intent and the fear caused in the victim. Id. \*4-\*5.

In *State v. Munz*, 8<sup>th</sup> Dist. App. No. 79576, 2002-Ohio-675 the defendant was convicted of intimidation. The defendant offered to stipulate that the victim was a “victim of a crime.” The court of appeals distinguished *Old Chief* on the basis that that case involved proof of felon status while the prior offense in defendant’s case was not only relevant evidence of an element, “victim of a crime” but also to the method and manner by which the defendant used force and the threat of force to intimidate the victim. Id. \*2-\*3.

In *State v. Tisdell*, 8<sup>th</sup> Dist. App. No. 87516, 2006-Ohio-6763 the defendant was convicted of having weapons under disability. The defendant offered to stipulate a prior conviction or alternatively requested that the issue be bifurcated. On appeal the defendant conceded that neither the trial court nor the State was required to accept the stipulation. The court of appeals held that a defendant could not waive a jury on the one element. Id. ¶40-¶41.

#### Ninth District

Pre-*Old Chief* in *State v. Smith* (1990), 68 Ohio App.3d 692 the defendant was charged but acquitted of having a weapon under disability. On appeal the defendant argued that it was unduly prejudicial to use a prior conviction for armed robbery when the State could have used a prior conviction for CCW. The court of appeals held that neither the State nor the trial court is required to accept a stipulation to a prior offense element of an offense. Id. \*695.

In *State v. Kole* (June 28, 2000), 9<sup>th</sup> Dist. App. No. 98CA007116, 2000 WL 840503, rev’d on other grounds, (2001) 92 Ohio St.3d 303 the defendant was convicted of having weapons under disability. The defendant offered to stipulate to a prior conviction for armed robbery. The trial court allowed a probation officer to testify to the

prior conviction and the defendant did not object. The court of appeals did not find plain error. The court distinguished *Old Chief* as follows:

Kole's reliance on *Old Chief* is misplaced for three reasons. First, *Old Chief* construed a federal statute and, therefore, is not binding upon this Court's interpretation of an Ohio statute. Second, unlike Kole, the defendant in *Old Chief* timely objected to the prosecution's introduction of his prior conviction into evidence. Third, the federal statute construed in *Old Chief* is facially dissimilar to the Ohio statute in the case at bar. In *Old Chief* the charge was assault with a dangerous weapon in violation of 18 U.S.C. 922(g)(1) which makes it unlawful for any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year [to] possess \* \* \* any firearm." *Old Chief*, 519 U.S. at 518. In the instant case, an essential element of the indicted offense of having a weapon while under disability is whether the individual possessing the weapon was previously convicted of a felony offense of violence. R.C. 2923.13(A)(2). Unlike the federal statute in *Old Chief*, evidence concerning the name or nature of Kole's prior conviction was necessary in order for the jury to find Kole guilty of the charged offense. In order to prove the offense of having a weapon while under a disability the state was required to prove the prior conviction beyond a reasonable doubt.  
(citations omitted.)

*Kole*, \*4.

In *State v. Johnson*, 9<sup>th</sup> Dist. App. No. 22688, 2006-Ohio-1313 the defendant offered to stipulate to prior convictions but did not object to admission of evidence of the convictions. The court of appeals acknowledged that there are instances when refusing to permit a stipulation would be an abuse of discretion, citing *Old Chief*, but did not consider plain error since the defendant did not assert plain error on appeal. *Id.* ¶18-¶19.

In *State v. Hilliard*, 9<sup>th</sup> Dist. App. No. 22808, 2006-Ohio-3918 the defendant was convicted of having weapons under disability. On appeal the defendant argued

ineffective assistance due to counsel's failure to stipulate to prior convictions. Citing *State v. Kole*, supra and *State v. Smith*, supra the court of appeals did not find ineffective assistance; further, the court indicated whether to seek a stipulation was a trial tactic. Id. ¶26.

In *State v. Williams*, 9<sup>th</sup> Dist. App. No. 22877, 2006-Ohio-4720 the defendant was convicted of domestic violence. The defendant offered to stipulate to three prior convictions and the court accepted the stipulation and instructed the jury without any mention of the facts or the victim. Then the trial court admitted exhibits showing the convictions into evidence without objection. The court of appeals found that the issue had been not been preserved. In addition, citing *Kole*, supra the court of appeals held that *Old Chief* was not binding on the court's interpretation of an Ohio statute. Id. ¶19-¶21.

#### Tenth District

In *State v. Jackson*, 10<sup>th</sup> Dist. App. No. 02AP-468, 2003-Ohio-1653 the defendant was convicted of having weapons under disability. The defendant would have conceded that he had a prior qualifying conviction. The court of appeals distinguished *Old Chief* on the basis that the defendant's prior conviction was for drug possession and the statute, R.C. 2923.13(A)(3) made a prior drug possession an element of the offense. Moreover, the defendant did not want the jury to know that he had a prior drug possession conviction; the only issue before the jury would be whether he had a firearm. In effect, the defendant wanted to waive a jury trial on one element of the offense. Id. ¶18-¶26.

## Eleventh District

Only in the Eleventh District are cases, two, found where convictions were reversed under *Old Chief*. Neither of those cases involved plain error or ineffective assistance of counsel.

One is *State v. Henton* (1997), 121 Ohio App.3d 501 where the defendant was convicted of aggravated trafficking. The trial court admitted certified copies of two judgment entries indicating that defendant had two prior convictions for aggravated trafficking. Defendant stipulated that the documents were authentic and that he was the person named in the documents. The defendant argued in the trial court that only one prior conviction should have been admitted. On appeal the defendant raised *Old Chief* that had been decided after the trial concluded. The court of appeals held that the trial court abused its discretion in permitting evidence of two prior convictions when the defendant had agreed to stipulate to admission of one. The error was not harmless because the evidence of guilt was not overwhelming. Id. \*505-\*508.

In *State v. Payne* (Mar. 31, 1999), 12<sup>th</sup> Dist. App. No. 97-L-284, 1999 WL 262177 the defendant was convicted of DUI. The defendant offered to stipulate to prior convictions for DUI but not to the name and nature of the offenses. The court of appeals distinguished *Old Chief* since the Ohio statute required the jury to find that the defendant had prior DUI convictions whereas in *Old Chief* a generic felony was sufficient. *Henton* was distinguished since in that case the defendant merely asked that evidence of two prior convictions not be admitted. *Payne*, \*3-\*4.

In *State v. Carr* (Dec. 10, 1999), 12<sup>th</sup> Dist. App. No. 98-L-131, 1999 WL 1314672 the defendant was convicted of DUI. The defendant had offered to stipulate to the prior

convictions element. The defendant did not preserve the issue by objection. The court of appeals did not find plain error, relying on its decision in *State v. Payne*, supra.

In *State v. Totarella*, 11th Dist. App. No. 2002-L-147, 2004-Ohio-1175 the defendant was convicted of CCW. Defendant moved in limine to accept a stipulation to the prior conviction element that would not identify the nature of the conviction or any details about it. When the trial court indicated it would allow testimony on the element, the defendant stipulated before the jury that he had previously been convicted of felonious assault, an offense of violence and robbery, an offense of violence. The court of appeals held that the trial court erred in admitting evidence of both prior offenses and in admitting the name and nature of the offenses since any offense of violence was sufficient. The court of appeals held there was no plain error since the defendant had invited the error by agreeing to the stipulation. Id. ¶31-¶38.

In *State v. Simmons*, 11<sup>th</sup> Dist. App. No. 2004-L-131, 2005-Ohio-6706 the defendant was convicted of DUI. Defendant's prior conviction for DUI was proved through witness testimony and an exhibit; the defendant objected when the exhibit was put into evidence. The defendant did not offer any stipulation. The court of appeals distinguished *Old Chief* since the DUI statute required proof of the name and nature of the prior conviction. Id. ¶47-¶54.

In *State v. Hatfield*, 11th Dist. App. No. 2006-A-0033, 2007-Ohio-7130, the second case in the Eleventh District in which a conviction was reversed under *Old Chief* the defendant was convicted of driving with a suspended license and aggravated vehicular homicide. The defendant's driving record was admitted over objection. The driving record showed two current suspensions and five prior suspensions. The defendant also offered to stipulate that his license was suspended at the time of an

accident. The court of appeals found that evidence of an active suspension was necessary to prove an element of the charge. The court of appeals found that it was error to not approve the stipulation since defendant would have stipulated to his status as an unlicensed driver. Moreover, admission of evidence showing seven suspensions (five of them irrelevant to prove an element) constituted prohibited propensity or character evidence. *Id.* ¶133-¶148.

In *State v. Rodgers*, 11<sup>th</sup> Dist. App. No. 2007-T-0003, 2007-Ohio-2757 the defendant was convicted of having a weapon under disability under R.C. 2923.13(A)(2) and (A)(3). On appeal the defendant argued ineffective assistance of counsel because counsel did not have the weapons charge tried to the bench and because counsel stipulated to two prior convictions to prove one count of having weapons under disability. The court of appeals disposed of the waiver of jury trial issue by holding that the right to waive a jury trial belongs to the defendant and not to counsel and there was no evidence that the defendant pre-trial wanted to waive a jury trial.

With regard to the remaining claim, that counsel erred in stipulating to both prior convictions, the court stated:

{¶ 71} With regard to Rodgers' first argument, we noted in our discussion of his third assignment of error, that the grand jury indictment for Having Weapons while Under Disability charged him under R.C. 2923.13(A)(2) and (A)(3), which requires proof that Rodgers "knowingly \* \* \* ha[d], carr[ied], or use[d] any firearm \* \* \* ha[ving] been convicted of any felony offense of violence \* \* \* [or] \* \* \* any offense involving the illegal possession, use, \* \* \* or trafficking in any drug of abuse."

{¶ 72} As is clear from the language of the aforementioned statute, the offense of Having Weapons while Under Disability may be proven by means of evidence showing that Rodgers had "used any firearm," after having been

previously convicted of *either* of the aforementioned offenses.

{¶ 73} “The material and essential facts constituting an offense are found by the presentment of the grand jury.” *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624, at ¶ 17 (citation omitted).

{¶ 74} “The state must provide sufficient proof necessary to convince a trier of fact beyond a reasonable doubt of the existence of *every element of an offense*.” *State v. Smith* (1990), 68 Ohio App.3d 692, 695, 589 N.E.2d 454, citing *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (emphasis added). In cases where a prior conviction “is an element of an offense, the state must prove the prior offense beyond a reasonable doubt.” *Id.*, citing *State v. Weible* (Mar. 15, 1989), 9th Dist. No. 13754, 1989 Ohio App. LEXIS 869, at \*3-\*4, 1989 WL 24227.

{¶ 75} In the instant case, the grand jury indictment, by charging Rodgers of Having Weapons while Under Disability on the basis of a prior conviction of either an offense of violence *or* a drug offense, gave the prosecution the option to pursue conviction under either subsection. We are not aware of any authority, nor has Rodgers presented us with any, requiring the prosecution to choose between two valid alternate means of proving an offense. Even if such an action by the grand jury *were* improper, “Crim.R. 12(C)(2) states that defects in an indictment are waived if not raised before trial.” *Colon*, 2008-Ohio-1624, at ¶ 5, 118 Ohio St.3d 26, 885 N.E.2d 917.

{¶ 76} Rodgers nevertheless argues that trial counsel’s decision to stipulate to both prior convictions was tantamount to ineffective assistance of counsel. We disagree.

{¶ 77} “Neither the state nor the trial court is required to accept a defendant’s stipulation as to the existence of [a] conviction.” *Smith*, 68 Ohio App.3d at 695, 589 N.E.2d 454 (citation omitted). That said, trial counsel’s “tactical decision to stipulate to [a defendant’s] prior conviction \* \* \* [is] not unreasonable, and certainly not the kind of incompetence necessary to support a claim for ineffective assistance of counsel.” *State v. Reynolds*, 148 Ohio App.3d 578, 774 N.E.2d 347, 2002-Ohio-3811, at ¶ 76; accord *State v. Gray* (Aug. 19, 1988), 6th Dist. No. L-87-393, 1988 Ohio App. LEXIS 3372, at \*11-\*12, 1988 WL 86921 (“[T]rial counsel

could stipulate to the fact of a prior conviction in order to reduce the prejudicial effect of a prior criminal record. The decision is purely one of trial strategy. Thus, the decision of appellant's counsel to stipulate \* \* \* cannot be characterized as ineffective assistance of counsel.”) (citation omitted); *State v. Copley*, 9th Dist. No. 03CA0028-M, 2003-Ohio-7172, at ¶ 20 (“By limiting the state's evidence on those crimes, trial counsel was able to keep out evidence that would likely be harmful to [his] defense, particularly evidence about his prior conviction.”).

### Twelfth District

In *State v. Russell* (Nov. 9, 1998), 12<sup>th</sup> Dist. App. No. CA98-02-018, 1998 WL 778312 the defendant was convicted of domestic violence. He had offered to stipulate to a prior conviction and moved to preclude the jury from hearing “any and all” evidence of the prior conviction. The proposed stipulation and motion was denied. The court of appeals distinguished *Old Chief* on the basis that under the Ohio statute the name and nature of the prior offense was necessary for the jury to convict. In addition, the stipulation proposed by the defendant was deficient as an evidentiary alternative. Id. \*3-\*5.

### **OLD CHIEF IN THE STATE COURTS**

There are courts that accept *Old Chief* as implementing a rule of decision in their jurisdictions. That occurred in *Brown v. State* (Fla. 1998), 719 So.2d 882, where there was a timely objection in the trial court and no harmless error. *Brown* was a status case. Later the Florida court distinguished *Old Chief* when other act evidence was at issue. *Cox v. State* (Fla. 2002), 819 So.2d 705, \*716. *Old Chief* was followed in another status case, *People v. Walker* (Ill. 2004), 812 N.E.2d 339; there the error was not harmless. Another status case where *Old Chief* was followed is *Ferguson v. State* (Ark. 2005), 210 S.W.3d 53 (adopting the reasoning of *Brown*, supra). Another status case is *Sawyer v.*

*State* (Miss. 2008), 2008 WL 2582530 where the court emphasized that the prior offenses were armed robbery and the defendant was charged with armed robbery. *Id.* ¶28. The Mississippi court distinguished *Old Chief* in *Esco v. State* (Miss. 2008), 2008 WL 4401428 where the defendant did not make a proper stipulation or any stipulation at all. *Id.* ¶36-¶37.

The Supreme Court of Georgia in *Ross v. State* (Ga. 2005), 614 S.E.2d 31 adopted *Old Chief* in status cases and set out a condition before acceptance of a stipulation is required that the “prior conviction is of the nature likely to inflame the passions of the jury and raise the risk of a conviction based on improper considerations.” *Id.* \*\*34. The rule in Georgia is subject to harmless error and is not applicable where the evidence is offered for other purposes as well as to prove status, such as to prove an element apart from status. *Curry v. State* (Ga. 2008), 657 S.E.2d 218; *Allen v. State* (Ga. 2008), 663 S.E.2d 370, \*373. Another status case following *Old Chief* is *State v. James* (Tenn. 2002), 81 S.W.3d 751 where the error was not harmless. *Id.* \*762.

In *State v. Allison* (Ct. App. Wash.), 142 Wash. App. 1048, 2008 WL 257337 there was no ineffective assistance where counsel stipulated to a prior offense of possession of cocaine where the defendant was charged with unlawful possession of a firearm. The Supreme Court of Washington held in *State v. Roswell* (Wash. 2008), 2008 WL 5088497 that the defendant could not bifurcate the trial to eliminate any consideration of a prior conviction by the jury. *Id.* ¶19.

In *State v. Little* (N.C. App. 2008), 664 SW.E.2d 432 there was no abuse of discretion in refusing to accept a stipulation to a prior conviction of involuntary manslaughter where the defendant was charged with attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury among other

offenses. The court emphasized that the involuntary manslaughter statute did not require malice, premeditation, deliberation or intent to kill or inflict serious bodily injury. Id. \*436-\*437. Prejudice constituting ineffective assistance was not found in *State v. Tice* (N.C. App. 2008), 664 S.E.2d 368, a status case, where counsel did not attempt to stipulate to a prior conviction for possession of cocaine where the defendant was charged with assault with a deadly weapon. The court noted that “Proof that a defendant has been guilty of another crime *equally heinous* prompts to a ready acceptance of and belief in the prosecution’s theory that he is guilty of the crime charged.” Id. \*372 citing *State v. McClain* (N.C. 1954), 81 S.E.2d 364, \*366.

*Old Chief* was not applied in *State v. Mewbourn* (Tx. App. 1999), 993 S.W.2d 771 where the defendant was charged with OUI and the statute made prior OUI offenses jurisdictional. In *Sams v. Indiana* (Ind. App. 1997), 688 N.E.2d 1323 there was error in admitting the defendant’s entire driving record in a OUI prosecution but the error was harmless. In *State v. Alvarez* (N.J. Super 1999), 723 A.2d 91 there were a series of errors including a failure to allow the defendant to stipulate to a prior conviction that led to reversal. Id. \*\*98-\*\*100.

Last, the Supreme Court of Alabama refused reverse based on *Old Chief* in *Peraita v. State* (Ala. 2004), 897 So.2d 1227 where the trial court limited the State to introducing evidence of the court of conviction, the sentence imposed, the date of conviction, and in prior murder convictions evidence that there was a murder. The Supreme Court of Alabama distinguished *Old Chief* since the statute in that case was concerned with generic convictions whereas the defendant in the present case was charged with capital murder and the statute required proof that the defendant was

under a sentence of life imprisonment. The court was also concerned with limiting the State in the presentation of its case. Id. \*1229, \*1233-\*1235.

### **WHETHER OLD CHIEF APPLIES OR NOT BAKER WAS NOT PREJUDICED**

The State has not found and Baker has certainly not cited any case finding that a decision of a trial court admitting evidence of prior convictions in a felon status case constituted either plain error or ineffective assistance of counsel. As detailed above the evidence of Baker's guilt was simply overwhelming and the State did not emphasize the prior convictions at all.

The prior offenses were possession of cocaine, robbery and tampering with evidence. The State concedes that the tampering with evidence was not relevant to proving the offense of having a weapon under disability but evidence of that offense could not have been prejudicial.

Baker was charged with four counts of kidnapping and four counts of aggravated robbery in which he possessed and used a firearm. The prior convictions could not have prejudiced him. In *State v. Henton*, supra where there was an objection the prior convictions were for aggravated trafficking and the defendant was charged with aggravated trafficking. In *State v. Hatfield*, supra where there was an objection and five old license suspensions were admitted into evidence. In *State v. Allison*, supra no prejudice was found where the prior offense was possession of cocaine and the charged offense was unlawful possession of a firearm. To the same effect are *State v. Tice*, supra and *State v. Little*, supra. Accordingly, Baker's convictions must stand under any view this Court may take of *Old Chief*.

## **THERE ARE REASONS TO DISTINGUISH OLD CHIEF**

As noted by several courts the statute in *Old Chief* required proof of a generic felony and R.C. 2923.13(A)(2) and (A)(3) require specifically proof of either a prior felony offense of violence or a drug offense. *State v. Kole*, supra; *State v. Williams* supra; *State v. Jackson*, supra; *State v. Rodgers*, supra; See *State v. Payne*, supra (OUI); *State v. Simmons*, supra (OUI); *State v. Mewbourn*, supra.

## **ADOPTION OF OLD CHIEF MUST BE LIMITED SO AS NOT TO DICTATE TO THE TRIAL COURT'S HOW DISCRETION MUST BE EXERCISED AND HOW THE STATE CHOSE TO PROVE ITS CASE**

If this Court adopts the reasoning of *Old Chief*, the State believes the test announced by the Supreme Court of Georgia in *Ross v. State* is fair to all concerned. Specifically, *Old Chief* must be limited to felon status cases and in order to prevent the jury from receiving evidence of prior conviction(s) it must be shown and found by the trial court that the prior conviction(s) "is of the nature likely to inflame the passions of the jury and raise the risk of a conviction based on improper considerations." Id. 614 S.E.2d at \*\*34. Further, in prosecutions under R.C. 2923.13 the defendant must agree to stipulate in writing that he has either been convicted of a felony offense of violence or a drug related offense or both and that the jury may find that element(s) proved beyond a reasonable doubt. A stipulation for other charged offenses should be crafted in similar fashion. The stipulation should be read to the jury and admitted as an exhibit. Further, the defendant must agree to the stipulation personally and on the record in open court. Any violation of the guidelines must be subject to harmless error analysis.

None of the above is in conflict with *State v. Allen* (1987), 29 Ohio St.3d 53 where a conviction was reversed on the basis that evidence of prior convictions was admitted in a case where the prior convictions did not constitute an element of the offense.

## **PROPOSITIONS OF LAW II AND III**

### **PROPOSITION OF LAW II**

**CRIMINAL SENTENCING ISSUES ARE NOT WAIVED ON APPEAL, EVEN IF A PARTY FAILS TO OBJECT AT THE END OF THE SENTENCING HEARING.**

### **PROPOSITION OF LAW III**

**THE ISSUE OF MERGER IS REVIEWABLE ON APPEAL EVEN IF THE TRIAL COURT IMPOSED CONCURRENT SENTENCES.**

### **LAW AND ARGUMENT**

These Propositions concern Baker's third Assignment of Error in the court of appeals. In that assignment Baker referenced counts 11-14 of the indictment. Those counts were the aggravated robbery charges, one for each victim. There was a firearm specification on each of those counts as well as a body armor specification. The trial court sentenced Baker to consecutive terms of three years on the four firearm specifications and to consecutive two year terms on the four body armor specifications, concurrent to the sentences imposed for the four counts of kidnapping which also carried four firearm specifications and four body armor specifications.

Each group, of aggravated robbery counts and kidnapping counts, carried a sentence of thirty-two years including twenty years on the eight specifications. In the court of appeals Baker argued that there should have been only one three year sentence for the four firearm specifications and one two year sentence for the four body armor specifications based on merger. In other words even if Baker were correct his sentence would still be thirty-two years because of the sentence for the kidnapping group.

Baker acknowledged that there had been no objection at sentencing and argued that the issue could nevertheless be addressed directly, in other words, that no objection

was necessary; that there was plain error; and that there was ineffective assistance of counsel.

Multiple firearm specification sentences may not be imposed “for felonies committed as part of the same act or transaction.” R.C. 2929.14(D)(1)(b). The same prohibition applies to sentences for body armor specifications. R.C. 2929.14(D)(1)(d). The latter statute allows multiple sentences for firearm and body armor specifications. There is no merger of sentences on those specifications if the firearm were used and armor worn during one transaction.

This Court defined a transaction as “a series of continuous acts bound together by time, space and purpose, and directed toward a single objective.” *State v. Wills*, 69 Ohio St.3d 690, 1994-Ohio-417, \*691.

The State did not and does not concede that any of the sentences on the firearm specifications or the body armor specifications merge. There could be no prejudice under *Strickland v. Washington* (1984), 466 U.S. 668. Nor could there be plain error. *State v. Long* (1978), 53 Ohio St.2d 91. The State also argued in the court of appeals that a plain error analysis was foreclosed under Ninth District precedent because of the concurrent sentences, specifically, *State v. Martin* (Feb. 9, 1999), 9<sup>th</sup> Dist. App. No. 18715, 1999 WL 66211.

The Ninth District held that since Baker had not objected in the trial court he forfeited the issue and was left with plain error. Decision and Journal Entry, ¶30. Then the Ninth District held that there could be no plain error since the sentences on counts 11-14 (the aggravated robbery counts) for the specifications was concurrent with the remainder of the sentence. *Id.* ¶31. The Ninth District did not reach the issue whether any of the specifications merge.

The second Proposition concerns whether Baker was required to object at sentencing. Baker invites this Court to hold that “an illegal sentence is void as a matter of law” thus no objection was required. Appellant’s Brief, 7. This assertion is overbroad and does not take into account that this case concerns specifications rather than offenses. Moreover, deciding whether specifications merge is not a matter of following a clear statutory command but involves close consideration of the specific facts of the case.

The third Proposition continues the argument in the second Proposition: if an objection was necessary and plain error applies, can there be plain error where the sentences are concurrent? The State contends that there can but need not be plain error in those circumstances. Precedent from this Court supports that result.

The categorical statement that criminal sentencing issues are not forfeited on appeal even absent an objection is completely defeated by *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642 where this Court held that failure to object to a sentencing error under *Blakely v. Washington* (2004), 542 U.S. 296, an error of constitutional magnitude, forfeited the issue and the issue could only be considered under a plain error analysis. *Payne*, supra ¶21, ¶24. *Payne* exempts from a requirement of an objection sentences that are void or that constitute structural error. *Id.* ¶18, ¶27. To the same effect is *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197 where this Court stated that sentencing errors are not jurisdictional and do not render a judgment void, subject to exceptions such as a sentence that does not contain a statutorily mandated term (there post-release control). *Id.* ¶13-¶19. The general rule is that even errors of constitutional magnitude must be presented to the trial court in order to avoid forfeiture. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus.

Baker asserts that the sentences on the specifications are void. That is certainly wrong. A void sentence is one imposed by a court “lacking subject matter jurisdiction or the authority to act.” *Payne*, supra ¶27 citing *State v. Wilson* (1995), 73 Ohio St.40. A recent case from the Ninth District involving a void sentence is *State v. Douglas*, 9<sup>th</sup> Dist. App. No. 24069, 2008-Ohio-5568 where the defendant was sentenced to an eighteen month term for a felony of the fifth degree. *Id.* ¶17; See also *State v. MacNellis*, 9<sup>th</sup> Dist. App. No. 07CA0103-M, 2008-Ohio-3207, ¶22 (defendant sentenced to ninety days for a misdemeanor of the fourth degree). A void sentence would also be one where the trial court failed to include a statutorily mandated term. *Simpkins*, supra. Otherwise, sentencing errors involve the erroneous exercise of jurisdiction and are voidable, not void. *Simpkins*, supra ¶12.

There is no case to the State’s knowledge holding that error in failing to merge specifications for sentencing results in a void sentence. There are cases applying a plain error analysis where a firearm specification merger issue was not raised in the trial court. *State v. Brown* (Feb. 9, 2001), 6<sup>th</sup> Dist. App. No. WD-00-033, 2001 WL 108743, \*2; *State v. Kirk* (July 14, 1998), 10<sup>th</sup> Dist. App. No. 97APA09-1247, 1998 WL 400657, \*1-\*2; *State v. Conrad* (July 19, 1993), 1993 WL 289858, \*3. In none of those cases was plain error found and in one, *Conrad*, concurrent sentences imposed (on two out of seven specification convictions). *Conrad*, \*3. This Court reached a similar result in *State v. Long* (1978), 53 Ohio St.2d 91 (imposition of five consecutive firearm specification sentences did not constitute plain error.)

This case does not involve a failure to merge sentences for offenses under R.C. 2941.25. A specification does not constitute a separate offense. Whether to merge sentences on specifications does not implicate R.C. 2941.25. *State v. Briscoe*, 8<sup>th</sup> Dist.

App. No. 89979, 2008-Ohio-6276, ¶32 FN5; *State v. Cook*, 9<sup>th</sup> Dist. App. No. 24058, 2008-Ohio-4841, ¶8; *State v. Steward*, 4<sup>th</sup> Dist. App. No. 06CA38, 2007-Ohio-5523, ¶11; *State v. Adams*, 7<sup>th</sup> Dist. App. No. 00CA211, 2006-Ohio-1761, ¶51-¶58; *State v. Williams*, 8<sup>th</sup> Dist. App. No. 81949, 2003-Ohio-3950, ¶20. The State does not see any difference in this regard between firearm specifications and body armor specifications.

The decision whether to merge sentences on specifications involves an analysis different from whether to merge sentences for offenses under R.C. 2941.25. This is explained in *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311:

{¶ 35} Appellant contends that it is irrelevant whether the firearm specifications refer to acts that were committed with separate animus and that the trial court failed to consider which counts were part of the same criminal act or transaction.

¶ 36} The issue that appellant raises is a mixed issue of law and fact. Appellant argues that the trial court used the wrong legal standard, but also argues that the court erred in finding that there was enough evidence to support the imposition of 11 consecutive firearm-specification penalties. When the record presents a mixed issue of law and fact, a reviewing court should uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Gillard* (1997), 78 Ohio St.3d 548, 552, 679 N.E.2d 276. Any purely legal issues, and the trial court's application of the law to the facts, are subject to de novo review. *Id.*

{¶ 37} "Transaction," as used in the firearm specification statutes, has been defined as "a series of continuous acts bound together by time, space and purpose, and directed toward a single objective." *State v. Wills* (1994), 69 Ohio St.3d 690, 691, 635 N.E.2d 370 (reviewing former R.C. 2929.71(B), containing substantially similar language to R.C. 2929.14(D)(1)(b)). Other courts have stated that a "transaction" is a "single criminal adventure." *State v. Stilson* (Dec. 13, 1996), 4<sup>th</sup> Dist. No. 95CA28, 1996 WL 735246. The First District Court of Appeals has adopted the following definition: " 'a series of criminal offenses which develop from a single criminal adventure, bearing a logical relationship to one another, and bound together by time,

space, and purpose directed toward a single objective.’ ” *State v. Godfrey* (Aug. 14, 1998), 1st Dist. Nos. C-970531 and C-970577, 1998 WL 472021, quoting *State v. Crawford* (Feb. 6, 1986), 10th Dist. No. 85AP-324, 1986 WL 1715.

{¶ 38} “Animus,” in contrast, has been described as “purpose, intent, or motive.” *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, 84, 549 N.E.2d 520. It has also been defined as “immediate motive.” *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 14 O.O.3d 373, 397 N.E.2d 1345.

{¶ 39} Whether crimes were committed with separate animus most often arises when a court is considering an allied offense of similar import as set forth in R.C. 2941.25:

{¶ 40} “(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 41} “(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a *separate animus* as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.” (Emphasis added.)

{¶ 42} Most appellate courts have held that the test for merging firearm specifications found in R.C. 2929.14(D)(1)(b) is distinct from the “separate animus” test for determining allied offenses of similar import as found in R.C. 2941.25(B). For example, the Eleventh District Court of Appeals held that the Ohio Supreme Court, in *Wills*, 69 Ohio St.3d 690, 635 N.E.2d 370, impliedly rejected the “separate animus” test in reference to merging firearm specifications. *State v. Salinas* (1997), 124 Ohio App.3d 379, 388, 706 N.E.2d 381. The Second and Fourth District Courts of Appeals have held that the test for merging firearm specifications is a broader concept than the “separate animus” test found in R.C. 2941.25(B). *State v. Walker* (June 30, 2000), 2nd Dist. No. 17678, 2000 WL 873222; *State v. White* (1991), 71 Ohio App.3d 550, 554, 594 N.E.2d 1087. The Ninth and Tenth District Courts of Appeals have also concluded that the “separate animus” test does not apply when determining whether firearm specifications should

merge. *State v. Brown* (Aug. 19, 1998), 9th Dist. No. 18591, 1998 WL 487039; *State v. Jones* (Mar. 18, 1999), 10th Dist. No. 98AP-639, 1999 WL 155703.

{¶ 43} The only appellate court that has consistently used the “separate animus” test with respect to firearm specifications is the Twelfth District. See *State v. Kehoe* (1999), 133 Ohio App.3d 591, 617, 729 N.E.2d 431; *State v. Throckmorton* (May 15, 2000), 12th Dist. No. CA99-08-081, 2000 WL 628210.

{¶ 44} This court has not explicitly ruled on this issue. Furthermore, we have not found a case in which we applied the separate-animus test when reviewing the merger of firearm specifications.

{¶ 45} In one fairly recent case, we held that firearm specifications for aggravated murder and aggravated robbery should have merged because the defendant had one overall common objective, which was to commit suicide by inducing the police to shoot him. *State v. Burch* (Mar. 15, 2000), 7th Dist. No. 97-JE-57, 2000 WL 288607. On the other hand, in *State v. Mahone* (Aug. 8, 1996), 7th Dist. No. 92 CA 27, 1996 WL 451373, we held that an aggravated murder and an aggravated robbery had no common objective, and affirmed the imposition of two separate firearm specifications. In both cases, though, our focus was on the defendant’s overall criminal objectives, not on the specific animus for each crime.

{¶ 46} The caselaw on this subject indicates that it would be much too simple to merely impose separate penalties for firearm specifications because the defendant had separate animus for each corresponding criminal act. Whether or not a defendant had a common purpose or objective in committing multiple crimes is broader than the concept of animus and is also highly dependent on the factual circumstances of each case. Therefore, appellant is correct that the trial court relied on the wrong legal standard when imposing separate penalties for every gun specification.

Since the decision whether to merge sentences on specifications involves a mixed question of law and fact and is “highly dependent on the factual circumstances of each case” it is impossible that an error in failing to merge sentences on specifications results

in a void sentence. Any error is one involving the erroneous exercise of jurisdiction and such an error can be forfeited. The second Proposition of Law must be overruled.

The State does not disagree with the third Proposition of Law as written; certainly a reviewing court may review a merger issue even if the sentences are concurrent. Certainly a reviewing court can apply a plain error analysis when the sentences are concurrent. But a reviewing court like the Ninth District in this case is not *obligated* to review a merger issue under plain error where sentences on specifications are concurrent.

Plain error correction is a discretionary act and requires the defendant to show that his substantial rights were affected, that the outcome clearly would have been otherwise and that a manifest miscarriage of justice would occur absent the error. *State v. Long* (1978), 53 Ohio St.2d 91, paragraphs two and three of the syllabus; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶14. As explained in *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, \*27:

Even if a forfeited error satisfies these three prongs, however, *Crim.R. 52(B)* does not demand that an appellate court correct it. *Crim.R. 52(B)* states only that a reviewing court “may” notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of *Crim.R. 52(B)* by admonishing courts to notice plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*, 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus; see, also, *Olano*, 507 U.S. at 736, 113 S.Ct. at 1779, 123 L.Ed.2d at 521 (suggesting that appellate courts correct a plain error “if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,’ ” quoting *United States v. Atkinson* [1936], 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555, 557). (emphasis added.)

Since plain error correction is discretionary it should not be surprising that different courts have reached different results on whether to find plain error in similar circumstances. Consequently, the issue is whether the Ninth District abused its discretion in failing to address the issue of merger. An abuse of discretion is more than an error of law and “implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, \*219.

Precedent in the Ninth District indicates that that court will not find plain error where concurrent sentences are imposed for offenses that are allied offenses of similar import. *State v. Wharton*, 9<sup>th</sup> Dist. App. No. 23300, 2007-Ohio-1817, ¶7 (citations omitted.) The Ninth District applied that precedent to concurrent sentences on specifications in the case under review. The reason was that Baker could not demonstrate prejudice since his sentence would remain the same. Decision and Journal Entry, ¶31. Where consecutive sentences are imposed the Ninth District uses plain error where no objection was made. See, e.g. *State v. Hadi* (Mar. 20, 1996), 9<sup>th</sup> Dist. App. No. 17294, 1996 WL 122006.

The principle that concurrent sentences defeat a claim of prejudice has been applied in other contexts. In *State v. Brandenburg* (Mar. 2, 1988), Auglaize App. Nos. 2-86-25 to 27, 1988 WL 29244 there was no error in the trial court’s failure to allow the defendant allocution before imposing sentence on a misdemeanor conviction where the defendant was also sentenced to a concurrent prison term on a felony conviction. *Id.* \*3 -\*4. In *State v. Blade*, 8<sup>th</sup> Dist. App. No. 83796, 2004-Ohio-4486 there was harmless error where the trial court did not make findings necessary to impose more than a minimum felony sentence where that sentence was concurrent to a longer felony sentence. *Id.* ¶13 (citations omitted).

Recently the Ninth District has taken a different tack and found that where the defendant was sentenced to concurrent sentences for offenses that should have merged counsel was ineffective for not objecting in the trial court. The court acknowledged its precedent concerning plain error but held that ineffective assistance presented a lower threshold than plain error. *State v. Mathis*, 9<sup>th</sup> Dist. App. No. 23507, 2008-Ohio-4077, ¶4-¶8.

There are cases in which the court found plain error when the defendant was convicted of allied offenses of similar import even though there were concurrent sentences. *State v. Coffey*, 2<sup>nd</sup> Dist. App. No. 2006 CA 6, 2007-Ohio-21, ¶9, ¶14. The court stated that the substantial rights of the defendant were violated when he was convicted and sentenced for two felonies instead of one. *Id.* ¶14; See also *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, ¶26. The Second District had earlier reached the opposite result in *State v. Burch* (Sept. 29, 1995), 2<sup>nd</sup> Dist. App. No. 14488 where plain error was not found because the sentences were concurrent.

The First District found plain error in *State v. Fischer* (1977), 52 Ohio App.2d 53 where the defendant was convicted of allied offenses of similar import and given concurrent sentences. The court stated that R.C. 2941.25 represented a “fundamental precept of the constitutional requirements of fair trial: there shall be no ‘shotgun’ convictions.” *Id.* \*55.

In *State v. Taylor*, 4<sup>th</sup> Dist. App. No. 07CA29, 2008-Ohio-484, an alleged conflict case, the defendant did object to imposition of concurrent sentences for kidnapping and gross sexual imposition. No plain error analysis was employed. *Id.* ¶21-¶25.

This Court has declined to apply a plain error analysis where the defendant was sentenced to concurrent sentences for offenses that were alleged to merge under R.C.

2941.25. In *State v. Comen* (1990), 50 Ohio St.3d 206 the defendant was convicted of aggravated burglary and receiving stolen property and given concurrent sentences. Id. \*208. The defendant did not object in the trial court but raised a merger issue in the court of appeals. This Court held that it “need not address this proposition of law” since there was no objection in the trial court and that the defendant had thus waived the issue. Id. \*211. *Comen* is authority for the proposition that a reviewing court need not but may address a merger issue under R.C. 2941.25 where there are concurrent sentences and no objection at trial.

This Court did address an offense merger issue under plain error where the sentences were concurrent. In *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006 the defendant was convicted of multiple counts of rape and gross sexual imposition. The sentences were concurrent. This Court applied a plain error analysis since the issue had not been raised in the trial court and addressed the issue. Plain error was not found. Id. ¶24, ¶139, ¶144-¶145.

The State has found one case in which the court found plain error where concurrent sentences were imposed on firearm specifications and the offenses were committed as part of the same transaction. *State v. Jones* (June 19, 1998), 1<sup>st</sup> Dist. App. No. C-970618, C-970619, 1998 WL 321122, \*2.

The State does not believe it is possible to impose a bright line rule, that a reviewing court must always apply or find plain error analysis when faced with an argument that the trial court erred in imposing concurrent sentences on specifications. Plain error requires that there be a manifest miscarriage of justice and an analysis of the evidence in order to determine if any error was outcome determinative.

A defendant does not suffer a manifest miscarriage of justice where sentences on specifications are concurrent and where as in this case the specification sentences although consecutive to each other are concurrent with other specification sentences that Baker did not challenge in the court of appeals. Put another way, a reviewing court does not abuse its discretion where it determines that a defendant described above does not suffer a manifest miscarriage of justice.

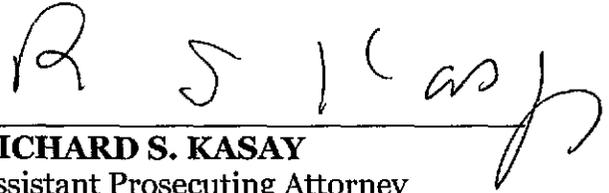
The State contends that the Decision and Journal Entry must be affirmed.

**CONCLUSION**

Pursuant to the argument offered, the State respectfully contends that the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Brief was sent by regular U.S. Mail to Attorney Donald Gallick, 190 North Union Street, #201, Akron, Ohio 44304 , on the 22nd day of December, 2008.

A handwritten signature in black ink, appearing to read "R S Kasay", written over a horizontal line.

**RICHARD S. KASAY**  
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APPENDIX

**R.C. § 2901.01**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

^■Chapter 2901. General Provisions

^■General Provisions

**→2901.01 Definitions**

(A) As used in the Revised Code:

(1) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

(2) "Deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person.

(3) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

(4) "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

(5) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

(6) "Serious physical harm to property" means any physical harm to property that does either of the following:

(a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;

(b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.

(7) "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

(8) "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

(9) "Offense of violence" means any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A)(9)(a) of this section;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

(10)(a) "Property" means any property, real or personal, tangible or intangible, and any interest or license in that property. "Property" includes, but is not limited to, cable television service, other telecommunications service, telecommunications devices, information service, computers, data, computer software, financial instruments associated with computers, other documents associated with computers, or copies of the documents, whether in machine or human readable form, trade secrets, trademarks, copyrights, patents, and property protected by a trademark, copyright, or patent. "Financial instruments associated with computers" include, but are not limited to, checks, drafts, warrants, money orders, notes of indebtedness, certificates of deposit, letters of credit, bills of credit or debit cards, financial transaction authorization mechanisms, marketable securities, or any computer system representations of any of them.

(b) As used in division (A)(10) of this section, "trade secret" has the same meaning as in section 1333.61 of the Revised Code, and "telecommunications service" and "information service" have the same meanings as in section 2913.01 of the Revised Code.

(c) As used in divisions (A)(10) and (13) of this section, "cable television service," "computer," "computer software," "computer system," "computer network," "data," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(11) "Law enforcement officer" means any of the following:

(a) A sheriff, deputy sheriff, constable, police officer of a township or joint township police district, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, or state highway patrol trooper;

(b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority;

(c) A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation;

(d) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission;

(e) A person lawfully called pursuant to section 311.07 of the Revised Code to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called;

(f) A person appointed by a mayor pursuant to section 737.01 of the Revised Code as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed;

(g) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;

(h) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor;

(i) A veterans' home police officer appointed under section 5907.02 of the Revised Code;

(j) A member of a police force employed by a regional transit authority under division (Y) of section 306.35 of the Revised Code;

(k) A special police officer employed by a port authority under section 4582.04 or 4582.28 of the Revised Code;

(l) The house of representatives sergeant at arms if the house of representatives sergeant at arms has arrest authority pursuant to division (E)(1) of section 101.311 of the Revised Code and an assistant house of representatives sergeant at arms;

(m) A special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in section 119.3 of Title 14 of the Code of Federal Regulations, 14 C.F.R. 119.3, as amended, and that is required to be under a security program and is governed by aviation security rules of the transportation security administration of the United States department of transportation as provided in Parts 1542. and 1544. of Title 49 of the Code of Federal Regulations, as amended.

(12) "Privilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.

(13) "Contraband" means any property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense. "Contraband" includes, but is not limited to, all of the following:

(a) Any controlled substance, as defined in section 3719.01 of the Revised Code, or any device or paraphernalia;

(b) Any unlawful gambling device or paraphernalia;

(c) Any dangerous ordnance or obscene material.

(14) A person is "not guilty by reason of insanity" relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.

(B)(1)(a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, "person" includes all of the following:

(i) An individual, corporation, business trust, estate, trust, partnership, and association;

(ii) An unborn human who is viable.

(b) As used in any section contained in Title XXIX of the Revised Code that does not set forth a criminal offense, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association.

(c) As used in division (B)(1)(a) of this section:

(i) "Unborn human" means an individual organism of the species *Homo sapiens* from fertilization until live birth.

(ii) "Viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.

(2) Notwithstanding division (B)(1)(a) of this section, in no case shall the portion of the definition of the term "person" that is set forth in division (B)(1)(a)(ii) of this section be applied or construed in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense in any of the following manners:

(a) Except as otherwise provided in division (B)(2)(a) of this section, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman. An abortion that violates the conditions described in the immediately preceding sentence may be punished as a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, 2903.14, 2903.21, or 2903.22 of the Revised Code, as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence, but that does violate section 2919.12, division (B) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code, may be punished as a violation of section 2919.12, division (B) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code, as applicable. Consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with section 2919.12 of the Revised Code.

(b) In a manner so that the offense is applied or is construed as applying to a woman based on an act or omission of the woman that occurs while she is or was pregnant and that results in any of the following:

(i) Her delivery of a stillborn baby;

(ii) Her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying;

(iii) Her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human;

(iv) Her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human;

(v) Her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity, or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn

human that she is carrying.

(C) As used in Title XXIX of the Revised Code:

(1) "School safety zone" consists of a school, school building, school premises, school activity, and school bus.

(2) "School," "school building," and "school premises" have the same meanings as in section 2925.01 of the Revised Code.

(3) "School activity" means any activity held under the auspices of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district; a governing authority of a community school established under Chapter 3314. of the Revised Code; a governing board of an educational service center; or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code.

(4) "School bus" has the same meaning as in section 4511.01 of the Revised Code.

CREDIT(S)

(2006 H 241, eff. 7-1-07; 2002 H 675, eff. 3-14-03; 2002 H 364, eff 4-8-03; 2002 H 545, eff. 3-19-03; 2002 S 184, eff. 5-15-02; 2000 S 317, eff. 3-22-01; 2000 H 351, eff. 8-18-00; 2000 S 137, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 H 162, eff. 8-25-99; 1999 S 1, eff. 8-6-99; 1998 H 565, eff. 3-30-99; 1996 S 277, eff. 3-31-97; 1996 S 269, eff. 7-1-96; 1996 S 239, eff. 9-6-96; 1996 H 445, eff. 9-3-96; 1995 S 2, eff. 7-1-96; 1991 S 144, eff. 8-8-91; 1991 H 77; 1990 S 24; 1988 H 708, § 1)

**R.C. § 2903.11**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2903. Homicide and Assault

Assault

**→2903.11 Felonious assault**

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

- (1) Cause serious physical harm to another or to another's unborn;
- (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

- (1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;
- (2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;
- (3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)(1) Whoever violates this section is guilty of felonious assault, a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license,

commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

CREDIT(S)

(2006 H 461, eff. 4-4-07; 2006 H 347, eff. 3-14-07; 2006 H 95, eff. 8-3-06; 1999 H 100, eff. 3-23-00; 1999 S 142, eff. 2-3-00; 1996 S 239, eff. 9-6-96; 1995 S 2, eff. 7-1-96; 1983 S 210, eff. 7-1-83; 1982 H 269, S 199; 1972 H 511)

**R.C. § 2905.01**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2905. Kidnapping and Extortion

Kidnapping and Related Offenses

**2905.01 Kidnapping**

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

- (1) To hold for ransom, or as a shield or hostage;
- (2) To facilitate the commission of any felony or flight thereafter;
- (3) To terrorize, or to inflict serious physical harm on the victim or another;
- (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;
- (5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

- (1) Remove another from the place where the other person is found;
- (2) Restrain another of the other person's liberty;
- (3) Hold another in a condition of involuntary servitude.

(C) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division, kidnapping is a felony of the first degree. Except as otherwise provided in this division, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree. If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in section 2929.14 of the Revised Code, the offender shall be sentenced pursuant to section

2971.03 of the Revised Code as follows:

(1) Except as otherwise provided in division (C)(2) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(2) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section, "sexual motivation specification" has the same meaning as in section 2971.01 of the Revised Code.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 1995 S 2, eff. 7-1-96; 1982 H 269, § 4, eff. 7-1-83; 1982 S 199; 1972 H 511)

**R.C. § 2911.01**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2911. Robbery, Burglary, and Trespass (Refs & Annos)

Robbery

**→2911.01 Aggravated robbery**

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;

(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

CREDIT(S)

(1997 H 151, eff. 9-16-97; 1995 S 2, eff. 7-1-96; 1983 S 210, eff. 7-1-83; 1982 H 269, § 4, S 199; 1972 H 511)

**R.C. § 2911.02**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣Chapter 2911. Robbery, Burglary, and Trespass (Refs & Annos)

▣Robbery

**→2911.02 Robbery**

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control;

(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

(3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

(1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

CREDIT(S)

(1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1982 H 269, § 4, eff. 7-1-83; 1982 S 199; 1972 H 511)

**R.C. § 2911.11**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2911. Robbery, Burglary, and Trespass (Refs & Annos)

Burglary

**→2911.11 Aggravated burglary**

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

- (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
- (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

- (1) "Occupied structure" has the same meaning as in section 2909.01 of the Revised Code.
- (2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

CREDIT(S)

(1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1983 S 210, eff. 7-1-83; 1982 H 269, § 4, S 199; 1972 H 511)

R.C. § 2921.05

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2921. Offenses Against Justice and Public Administration (Refs & Annos)

Bribery, Intimidation, and Retaliation

**2921.05 Retaliation**

(A) No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against a public servant, a party official, or an attorney or witness who was involved in a civil or criminal action or proceeding because the public servant, party official, attorney, or witness discharged the duties of the public servant, party official, attorney, or witness.

(B) No person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against the victim of a crime because the victim filed or prosecuted criminal charges.

(C) Whoever violates this section is guilty of retaliation, a felony of the third degree.

CREDIT(S)

(1996 H 88, eff. 9-3-96)

**R.C. § 2923.13**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2923. Conspiracy, Attempt, and Complicity; Weapons Control (Refs & Annos)

Weapons Control

**2923.13 Having weapons while under disability**

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) The person is a fugitive from justice.

(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

(4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.

(5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to hospitalization by court order" and "patient" have the same meanings as in section 5122.01 of the Revised Code.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.

CREDIT(S)

(2004 H 12, eff. 4-8-04; 1995 S 2, eff. 7-1-96; 1972 H 511, eff. 1-1-74)

R.C. § 2929.14

Baldwin's Ohio Revised Code Annotated Currentness  
Title XXIX. Crimes--Procedure  
Chapter 2929. Penalties and Sentencing  
Felony Sentencing

➔2929.14 Prison terms (later effective date)

<Note: See also preceding version of this section with earlier effective date.>

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (G), or (L) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), or (L) of this section, in section 2907.02 or 2907.05 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the

Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D)(1)(a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an

additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer, as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(f) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(2)(a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (DD)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is

convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3)(a) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in section 2941.1410 of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code,

the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced

pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(E)(1)(a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or

subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also

is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code.

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F)(1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) If a person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender is adjudicated a sexually violent predator, if a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code, or if a person is convicted of or pleads guilty to attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code, the

court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2929.142 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under section 5120.031 of the Revised Code or for placement in an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the

offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 or 5120.032 of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of section 2903.06 of the Revised Code and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to section 2929.142 of the Revised Code.

(2006 S 281, eff. 4-5-07; 2006 H 461, eff. 4-4-07; 2006 S 260, eff. 1-2-07; 2006 H 137, § 3, eff. 8-3-06; 2006 H 137, § 1, eff. 7-11-06; 2006 H 95, eff. 8-3-06; 2004 H 473, eff. 4-29-05; 2004 H 163, eff. 9-23-04; 2004 H 52, eff. 6-1-04; 2004 H 12, § 3, eff. 4-8-04; 2004 H 12, § 1, eff. 4-8-04; 2002 H 130, eff. 4-7-03; 2002 S 123, eff. 1-1-04; 2002 H 485, eff. 6-13-02; 2002 H 327, eff. 7-8-02; 2000 S 222, eff. 3-22-01; 1999 S 22, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 H 29, eff. 10-29-99; 1999 S 1, eff. 8-6-99; 1998 H 2, eff. 1-1-99; 1997 S 111, eff. 3-17-98; 1997 H 32, eff. 3-10-98; 1997 H 151, eff. 9-16-97; 1996 H 180, eff. 1-1-97; 1996 S 166, eff. 10-17-96; 1996 H 154, eff. 10-4-96; 1996 S 269, eff. 7-1-96; 1996 H 445, eff. 9-3-96; 1996 H 88, eff. 9-3-96; 1995 S 2, eff. 7-1-96)

**R.C. § 2941.141**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2941. Indictment

Pleading, Averments, and Allegations

**→2941.141 Specification concerning possession of firearm essential to affect sentence**

(A) Imposition of a one-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

“SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense.)”

(B) Imposition of a one-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded if a court imposes a three-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) As used in this section, “firearm” has the same meaning as in section 2923.11 of the Revised Code.

CREDIT(S)

(2000 S 179, § 3, eff. 1-1-02; 1999 S 107, eff. 3-23-00; 1995 S 2, eff. 7-1-96; 1990 H 669, eff. 1-10-91; 1990 S 258; 1982 H 269, § 4, S 199)

R.C. § 2941.1411

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2941. Indictment

Pleading, Averments, and Allegations

**2941.1411 Specification concerning use of body armor**

(A) Imposition of a two-year mandatory prison term upon an offender under division (D)(1)(d) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender wore or carried body armor while committing the offense and that the offense is an offense of violence that is a felony. The specification shall be stated at the end of the body of the indictment, count, or information and shall be stated in substantially the following form:

“SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender wore or carried body armor while committing the specified offense and that the specified offense is an offense of violence that is a felony).”

(B) As used in this section, “body armor” means any vest, helmet, shield, or similar item that is designed or specifically carried to diminish the impact of a bullet or projectile upon the offender's body.

CREDIT(S)

(2000 S 222, eff. 3-22-01)

**R.C. § 2941.25**

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

▣ Chapter 2941. Indictment

▣ Pleading, Averments, and Allegations

**→2941.25 Multiple counts**

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

CREDIT(S)

(1972 H 511, eff. 1-1-74)

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.