

ORIGINAL

Case No. 2009-1198  
**IN THE SUPREME COURT OF OHIO**

State of Ohio,

*Plaintiff-Appellee,*

v.

Jermaine Baker,

*Defendant-Appellant.*

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Review of Certified Conflict From the Court of Appeals  
For The Ninth Appellate District No. CA 237113

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**BRIEF OF *AMICUS CURIAE* TIMOTHY REID  
IN SUPPORT OF APPELLANT**

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## INTEREST OF AMICUS, TIMOTHY REID

Amicus is a defendant-appellant in the Second District Court of Appeals having been convicted of murder. His case presents a straight forward proposition that no criminal defendant being tried for murder could receive a fair trial when the trial court allows the state to introduce, argue, and admit, a prior conviction for murder in the first degree. The admission of such evidence in Timothy Reid's jury trial unfairly and irreparably prejudiced the jury against him, violating the principles of a fair jury trial described in *Old Chief v. United States* (1997), 521 U.S. 172. The use of that one piece of evidence determined the course of events and only proof of the death of the victim and Reid's proximity was necessary for the conviction.

Perhaps even more than in this case, the evidence in Mr. Reid's trial emphasizes the importance of the principles espoused in *Old Chief* to a fair trial in prosecutions under Ohio law. There is no reasonable potential that the jury could fairly consider whether Timothy Reid was guilty of murder in the case against him with such intrinsically prejudicial evidence demonstrating that he was a "bad man" with the character of a murderer, a killer, already charged, tried, found guilty, and sentenced. No reasonable jury could be expected to put that evidence aside and render a verdict solely on the evidence in this case. A single line in the jury instructions that the prior conviction for murder in the first degree should not be considered as reflecting on his character to do very bad things, cannot possibly be thought to avoid the inherent prejudice and unfairness in his case.

Timothy Reid was convicted for murder, in substantial part, because he was a convicted murderer. That is what the rules of evidence, Rules 401, 402, 403, 404, Ohio R. Evid., were designed to prevent, in the honored and rudimentary principle that such evidence

would lead the jurors to wander from the evidence before them and decide guilt or innocence in this case based on what happened in a prior case.<sup>1</sup> Evidence that Timothy Reid had been convicted for murder in the first degree previously, improperly removed all doubts in the minds of the jury as to whether he was of very, very bad character, and was probably guilty of murder again.

Thus, Mr. Reid is interested as an amicus curiae in this case of *State of Ohio v. Jermaine Baker* in which the Ninth District Court of Appeals followed its prior decisions that the United States Supreme Court decision in *Old Chief* is not applicable to state prosecutions under Ohio law, in conflict with the holding of the Eleventh District decision in *State v. Hatfield*, Ashtabula App. No. 2006-A-0033, 2007-Ohio-7130. Effectively, the Ninth District, without analysis, has rejected the sound principles of a fair trial sought to be assured by proper application of the rules of evidence, common sense, the common law, and Ohio precedent. As pointed out below, it conflicts with the rulings by the high courts in other states where these principles have been adopted as the basis of a fair trial of a person with a prior conviction.

Amicus presents this brief in support of Mr. Baker for consideration in this case.

#### Course of Proceedings and Statement of Facts

Amicus adopts the statement of the case and facts set forth in the Brief of Appellant, Baker. Argument is offered in favor of the propositions of law submitted by Mr. Baker.

#### **CERTIFIED ISSUE TO BE BRIEFED:**

***“DOES THE HOLDING IN OLD CHIEF V. UNITED STATES (1997), 519 U.S. 172, GRANTING A RIGHT TO A DEFENDANT TO STIPULATE TO PRIOR CRIMINAL CONVICTIONS, APPLY TO STATE LAW PROSECUTIONS OR IS IT LIMITED SOLELY TO PROSECUTIONS UNDER FEDERAL LAW?”***

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<sup>1</sup> McCormick on Evidence, 2d ed. 1972, Sec. 190, p. 447, states the common law rule that such evidence is not admissible unless the defendant places his character in issue. “This danger [of prejudice] is at its highest when character is shown by other criminal acts . . . .”

## ARGUMENT OF AMICUS

### *Proposed Proposition of Law:*

THE TRIAL COURT ERRS AND VIOLATES EVIDENCE RULES 403 AND 404(B), AND DENIES A FAIR TRIAL GUARANTEED AS DUE PROCESS OF LAW, BY ALLOWING THE STATE TO INTRODUCE AND ARGUE, THE NAME AND NATURE OF A PRIOR CONVICTION, WHICH IS UNFAIRLY PREJUDICIAL TO THE DEFENDANT, AND FAR OUTWEIGHS ANY PROBATIVE VALUE. (*Old Chief v. United States* (1997), 519 U.S. 172, *followed and applied*).

It is the duty of the trial judge to apply Evid. R. 404(B) correctly so that the accused may have a fair trial. The United States Supreme Court has clarified that “unfair prejudice” for a criminal defendant refers 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.” *Old Chief*, 519 U.S. at 180. The improper grounds include “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).” *Id.*, 180-181.

This basic principle was further explained by the United States Court of Appeals for the Sixth Circuit in *United States v. Johnson* (6<sup>th</sup> Cir. 1994), 27 F.3d 1186, 1193:

When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. That, of course, is why the prosecution uses such evidence whenever it can. When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered; to suggest that the defendant is a bad person, a convicted criminal, and that if he ‘did it before he probably did it again.’ That is why the trial court’s duty is to apply Rule 404(b) correctly and, before admitting such evidence, to decide carefully whether it will be more substantially prejudicial than probative.

Amicus submits that it is difficult to conceive of a case in which this unfair prejudice is clearer than his case of a trial for murder where evidence of a prior conviction for murder in the first degree is presented and argued to the jurors.

However, the unfair prejudice from such evidence varies only in degree based on the severity of the charges involved. Certainly, in a jury trial, the more severe the nature of the crime charged, the greater the prejudicial impact of a prior conviction of the same or similar offense in luring the jury to decide the case before them based on the criminal record.

In Mr. Reid's case, as in the case of *Old Chief* itself, the prior conviction was offered on another charge. The charge was of Having Weapons While Under Disability (prior offense of violence), ("HWWD"), contrary to R.C. 2923.13(A)(2), a felony of the third degree. Even though the statute merely refers to a "felony offense of violence" the prosecution wants to use the prior conviction and not accept a stipulation as in *Old Chief*. In Mr. Reid's case, the trial court and counsel labored to redact the circumstances and the sentence while leaving the *identity* and *nature* of the offense, MURDER IN THE FIRST DEGREE, in the exhibit for jury view and for argument by the prosecution. It is more than a bit ironic that Mr. Reid's social security number was redacted from jury view, but his conviction for murder in the first degree was not. "The most the jury would need to know is that [Reid] had stipulated to a conviction for a crime defined under the Revised Code as an 'offense of violence.'" *State v. Totarella*, Lake App. No. 2002-L-147, 2002-Ohio-1175, ¶36. All the state needs is to show the defendant's *status* as a person previously convicted of a crime of violence. Allowing the admission of evidence of the *name* and *nature* of the crime was an abuse of discretion. See *State v. Hatfield*, Ashland App. No. 2006-A-0033, 2007-Ohio-7130, ¶148. The prior conviction, especially of a heinous crime, contains so much taint that there is little or no possibility that it will not sway the jury to find guilt.

In *United States v. Bell* (6<sup>th</sup> Cir. 2008), 516 F.3d 432, the Court discussed the unfair prejudice from admitting into evidence a prior state court drug conviction for the purpose of proving intent. The Sixth Circuit held,

“We find this Rule 404(b) claim to have merit and hold that the district court erred by permitting the government to introduce evidence of Bell’s prior drug convictions. Because we also find that the admission of this evidence violated Bell’s right to receive a fair trial, we reverse Bell’s conviction and remand the case for a new trial.” 516 F.3d at 440.

The Sixth Circuit rejected a “harmless error” argument since the “evidence was highly prejudicial” finding it contributed to the improper “propensity reasoning during its deliberations” and that the trial court’s limiting instruction “in all likelihood probably increased them.” 516 F.3d at 448. Evidence of the name or nature of the prior conviction carries a substantially high risk of unfair prejudice:

“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 . . . .” 519 U.S. at 185.

The design of the rules of evidence, specifically Rules 401-404, is to provide a fair trial. The United States Supreme Court has long endorsed the basic principle that the Due Process Clause of the Fourteenth Amendment guarantees the fundamental elements of fairness in a criminal trial. See e.g., *Tumey v. Ohio* (1927), 273 U.S. 510; *Betts v. Brady* (1932), 316 U.S. 455. The Supreme Court in *Old Chief*, stated, “there can be no question that evidence of the name and nature of the prior offense generally carries a risk of unfair prejudice.” 519 U.S. at 185.

The high courts of other states have followed this reasoning and adopted and applied *Old Chief*. In *People v. Walker*, (Ill. 2004), 812 N.E.2d 339, 348, the Illinois Supreme Court adopted the principles of *Old Chief*, and noted that,

“Old Chief has been followed by the overwhelming majority of courts and every state court of last resort to have considered the matter.” 812 N.E.2d at 348, (emphasis added.). The Supreme Court of Illinois explained,

“In other words, the Supreme Court found that when felon status is all that the government needs to prove, evidence of the name and nature of the prior conviction is needless surplusage which has no probative value, yet presents a high risk of unfair prejudice. Thus, the Court found it logical to conclude that the name and nature evidence should generally be excluded in favor of the admission or stipulation.” *Id.*

In fact, the Florida Supreme Court noted that the name and identity of the prior felony has discounted probative value. *Brown v. State* (Fla. 1998), 719 So.2d 882, 888-89. The Kansas Supreme Court has stated, “Unless there is a dispute over the status of the prior conviction (for example, was it or was it not a felony), the admission of the type and nature of the prior crime can only prejudice the jury.” *State v. Lee* (Kan. 1999), 977 P.2d 263, 269-70. It further noted,

“We acknowledge that the State has the right and, in fact the duty, to establish the elements of the crime charged. The State also has an interest in presenting its case in its own way, by telling the story as the State wishes. But, Lee should be judged only on the crimes charged and, as *Brown* observed, ‘not being convicted on an improper ground due to the admission of evidence that carries unfairly prejudicial baggage.’” *Id.*

Despite the clear connection between admitting such highly unfair evidence into a criminal trial and the due process right to a fair trial, the Ninth Appellate District has taken a minority position, avoiding the strong reasoning in *Old Chief* as applying only to the federal statute involved in that case. See *State v. Baker*, Summit App. No. 23840, 2008-Ohio-1909 and *State v. Simmons*, Summit App. No. 24218, 2009-Ohio-1495. Frankly, these decisions ignore the essence of *Old Chief* and the analysis of basic unfairness, and that the unfairly prejudicial evidence was admitted under a federal statute very similar to the Ohio HWWD statute. There is no other

analysis. Also, the Ohio rules of evidence at issue are similar to the federal rules, and designed to produce a fair trial. This Court should not follow the reasoning of the Ninth District in restricting the *Old Chief* principles to the Federal Rules of Evidence and to the federal criminal statute at issue. See *State v. Simmons*, Summit App. No. 24218, 2009-Ohio-1495, ¶18.

As noted in *State of Washington v. Young* (App. Wash. 2005), 119 P.3d 870, ¶20, “No one can seriously dispute that disclosure that an accused has been previously convicted of second degree assault is not a serious irregularity that is inherently prejudicial.” The state's right to control its evidence, as argued in *Old Chief*, is not controlling where the defendant's status is the issue. As recognized by the Maryland Supreme Court in *Carter v. State* (Md. 2003), 824 A.2d 123, 138,

“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.”

Thus, the Wisconsin Supreme Court has stated, “The State can be compelled to limit its proof of the element to a sanitized stipulation to the prior conviction.” *State v. Warbelton* (Wis. 2008), 759 N.W.2d 557, 569, 2009 WI 6.

Criminal defendants in Ohio are entitled to a fair trial as a matter of guaranteed due process. The propensity reasoning that inserts character into the trial distorts a fair assessment of the evidence in the case being decided. “[W]hile [the defendant] was not clothed with a presumption of good character, he was nonetheless entitled to a trial free of assaults on his character.” *State v. Renner* (1998), 125 Ohio App.3d 383, 393.

This Court should not ignore the compelling reasoning of *Old Chief*. As

stated in *State v. Henton*, (Ash. App. 1997), 121 Ohio App.3d 501, 507,

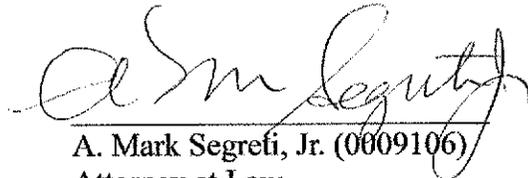
“This case sub judice is nearly identical to *Old Chief*. While we recognize that the United States Supreme Court’s interpretation of the Federal Rule of Evidence has no mandatory authority over our interpretation of the Ohio Rules of Evidence, we are not prepared to state that Ohio Evid. R. 403, nearly identical to its federal counterpart, would allow the risk of a verdict tainted by improper considerations.”

Manifest injustice is the likely result when the jury is informed of a prior conviction that is similar to the charged offense. *United States v. Coleman* (D.C. Cir. 2009), 552 F.3d 853, referencing *United States v. Jones* (D.C. Cir. 1995), 67 F.3d 320, 324.

### CONCLUSION

Accordingly, the Court should adopt the ruling in *Old Chief* as the essence of a fair trial required by the due process clause of the Fourteenth Amendment in a criminal trial, find the trial court violated rules of evidence 404, 401-403, find the admission plain error, reverse the conviction, and remand for a new trial.

Respectfully submitted,

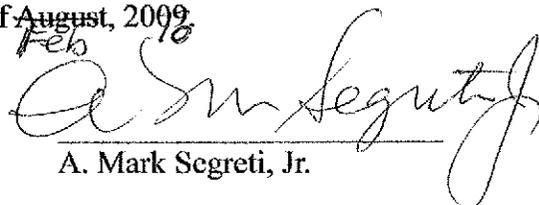


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### CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served on the parties addressed to counsel of record on this 2 day of ~~August~~ <sup>Feb</sup>, 2009.



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