

NO. 2009-1469

ORIGINAL

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 91701

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STATE OF OHIO

Plaintiff-Appellant

-vs-

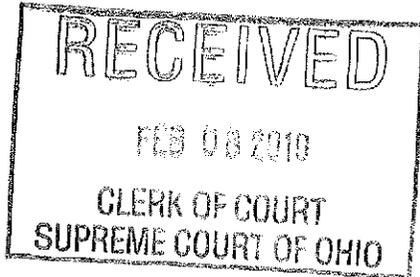
STEVEN JOHNSON

Defendant-Appellee

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**MERIT BRIEF**

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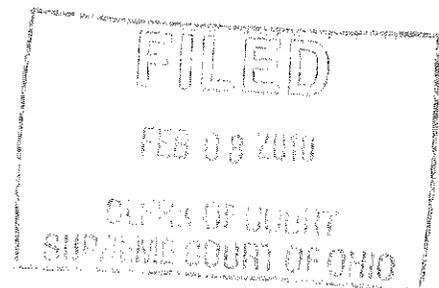
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## **Introduction and Summary of Argument**

A person may not knowingly possess a firearm or dangerous ordnance, if he has a prior conviction involving a drug of abuse. Despite having a prior conviction for an offense involving a drug of abuse, Steven Johnson possessed a firearm that was concealed in a bag. The Eighth District inserted a mental element and held that the State is required to prove that Johnson was aware that his conviction created a bar to his possession of a firearm.

The Eighth District's new rule of law is incorrect for two reasons:

- the legislature did not intend that the State prove a mental element when a disability is based on a prior conviction and;
- assuming the State is required to prove a mental element, the Eighth District went too far and created a mistake of law defense based on inserting a judicially interpreted mental element.

The Eighth District's opinion has overruled the longstanding principal that ignorance of the law is no excuse. The rule of law from this case is that Courts should not presume the legislature intended, by omission of a mental element, that ignorance of the law is an excuse for criminal conduct. The Eighth District's decision should be reversed and remanded for consideration of the remaining assignments of error.

### **Statement of the case**

Steven Johnson brought a concealed firearm into an apartment despite having prior convictions for possessing a drug of abuse and trafficking in a counterfeit controlled substance. He was indicted, tried, convicted, and sentenced for having a weapon under a legal disability.<sup>1</sup>

On appeal, he argued that the indictment was defective because a judicially interpreted mental element was omitted. Despite stipulating to the prior convictions, the Eighth District found structural error and reversed the conviction.<sup>2</sup>

### **Statement of the facts**

Natasha Fentress was hanging out with Nicole Arnold/May, other men, and Steven Johnson.<sup>3</sup> The group proceeded to “Bud’s” apartment to continue the party.<sup>4</sup> Johnson brought a bag into this house, which contained a firearm.<sup>5</sup>

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<sup>1</sup> R.C. 2923.13(A)(3).

<sup>2</sup> *State v. Johnson*, Cuyahoga App. No. 91701, 2009-Ohio-3101.

<sup>3</sup> Tr. 174.

<sup>4</sup> Tr. 175.

<sup>5</sup> Tr. 182.

Fentress went into a bedroom to lie down.<sup>6</sup> After some time, Fentress heard Johnson say, “Bitch, you keep trying to play me.”<sup>7</sup>

Fentress went to the living room and saw Johnson strike Nicole Arnold.<sup>8</sup> Fentress then jumped in the fight and the women told the men they had to leave.<sup>9</sup> The women threatened to call the police but Johnson refused to leave because he claimed that Nicole had his chain.<sup>10</sup>

After another fight ensued and Nicole Arnold grabbed a knife, *Johnson retrieved his gun from his bag.<sup>11</sup> Johnson brought the bag in the house earlier in the day with his gun.<sup>12</sup>*

Officer Egglemeyer and Officer Petranek received a radio dispatch of a male threatening with a gun at 2804 Cedar Avenue.<sup>13</sup> As the officers approached the residence, they heard a female scream “he’s got a gun, he’s

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<sup>6</sup> Tr. 176.

<sup>7</sup> Tr. 177.

<sup>8</sup> Tr. 177.

<sup>9</sup> Tr. 178.

<sup>10</sup> Tr. 179-180.

<sup>11</sup> Tr. 181.

<sup>12</sup> Tr. 182.

<sup>13</sup> Tr. 120-121, 141.

got a gun.”<sup>14</sup> Egglemeyer entered the residence and saw Johnson kneeling on the ground with a revolver in his right hand.<sup>15</sup> There were three females fighting with Johnson.<sup>16</sup>

The three females were hysterical and Johnson was bleeding and appeared dazed.<sup>17</sup> There was a holster on the floor in front of Johnson.<sup>18</sup> Johnson was arrested and charged.

## **LAW AND ARGUMENT**

### **Proposition of Law I:**

**When a disability is based on a prior conviction, the State is not required to prove that a defendant is reckless in his knowledge that a prior conviction creates a disability that criminalizes knowing possession of a firearm or dangerous ordnance.**

#### **I. Question presented**

In drafting R.C. 2923.13, the legislature placed no mental elements in any subdivision. The Eight District has now held that the mental state of reckless applies to a defendant’s knowledge that his prior conviction creates a disability. Did the legislature intend to require the State prove that a

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<sup>14</sup> Tr. 122, 143.

<sup>15</sup> Tr. 124.

<sup>16</sup> Tr. 125.

<sup>17</sup> Tr. 125, 129.

<sup>18</sup> Tr. 126.

defendant is aware that his conviction creates a legal bar to possessing a weapon by omitting a mental element in R.C. 2923.13(A)(3)?

## II. *State v. Clay* and R.C. 2923.13.

In *State v. Clay*, this Court examined the weapon under disability statute and R.C. §2901.21(B) and held that the State is required to prove the mental state of recklessness when a disability is based on a pending indictment. Johnson argues that the “State of Ohio seeks to revisit a decision of this Court—*State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325—that was decided by a clear majority of the Court.”<sup>19</sup> *Clay* deals with the unique situation of creating criminal liability when a defendant may have no knowledge about a certain fact—a pending indictment. The State is not asking that this Court change *Clay*. The State’s proposition is that the legislature did not intend that the State prove a mental element in relation to a *prior conviction* or that there cannot be structural error when the defendant stipulates to the prior conviction.

*Johnson* concerns whether there are “other indications outside” the language of R.C. §2923.13(A)(3) that plainly indicate an intent to impose strict liability” when a disability is based on a prior conviction. It is this factor that distinguishes this case from *Clay*.

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<sup>19</sup> Johnson Memorandum in Opposition pg. 1.

*Clay* starts the framework within which R.C. §2923.13(A)(3) must be construed. The statute prevents knowing possession of a firearm or dangerous ordnance when a person has been convicted of any drug abuse offense.<sup>20</sup> The word knowingly modifies the verbs that are within the discrete clause where the word knowingly resides.<sup>21</sup> The question then turns to the legislative intent in creating criminal liability for possessing a firearm or dangerous ordnance when a person has a prior conviction for any offense involving a drug of abuse.<sup>22</sup> There is no language contained within the statute's subdivision that indicates a purpose to impose strict liability.<sup>23</sup> The examination then centers on consideration of factors outside the statute's language that indicate an intent to impose strict liability when a disability is based on a *prior conviction*.

- a. **Indications outside and within the Ohio Revised Code that the legislature did not intend the State prove a mental element in regards to a disability based on a prior conviction.**
  - i. **Automatic revocation of a relief from disability when a defendant commits a crime of violence**

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<sup>20</sup> R.C. §2923.13(A)(3).

<sup>21</sup> *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325, at ¶14.

<sup>22</sup> *Id.* at ¶ 15.

<sup>23</sup> *Id.* at ¶ 19.

**or crime involving a drug of abuse.  
R.C. §2923.14(F)(5).**

The legislature has established a procedure for a person to petition a trial court to have a legal disability removed.<sup>24</sup> But a person's disability is *automatically* reinstated if that person commits a crime of violence or a crime involving a drug of abuse.<sup>25</sup> This revocation does not require probable cause to support an indictment or charge. Commission of the offense is all that is required. This is a strong stance taken by the legislature to impose criminal liability on an individual for possessing a firearm or dangerous ordnance under a disability.

For example, a person may have had the legal disability removed. That person may then smoke a marijuana cigarette. If that person is in possession of a firearm or dangerous ordnance, that person now possesses a weapon under disability because of the commission of an offense involving a drug of abuse.

A defendant cannot argue that he believed he had his disability legally removed. His knowledge in relation to the disabling conviction is irrelevant because the disability is *automatically* reinstated upon commission of the drug abuse offense. This automatic reinstatement of the disability is a

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<sup>24</sup> R.C. §2923.14.

<sup>25</sup> R.C. §2923.14(F)(5).

legislative indication that the state need not prove a mental element when a disability is based on a prior conviction.

**ii. Concealed carry requirements to show legislative intent.**

Carrying a firearm is a constitutionally protected right.<sup>26</sup> But to carry a concealed weapon a person must take the necessary legal steps to be a responsible concealed carry firearm owner. In this case, Johnson entered this apartment with his firearm concealed in a bag. Had Johnson gone through the proper legal procedures to carry the concealed firearm he would have known that he had a legal disability.

Johnson would legally have to read *Ohio's Carry Concealed Law*, which states that to have a carry concealed permit a person cannot have a conviction for any crime involving a drug of abuse.<sup>27</sup> In filling out the application prescribed under R.C. §2923.1210, Johnson would have had to affirmatively answer that he was previously convicted of committing a crime involving a drug of abuse.<sup>28</sup>

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<sup>26</sup> *Clay*, 2008-Ohio-6325, at ¶ 26 (citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35).

<sup>27</sup> A person seeking to obtain a license to carry a concealed weapon must aver that he or she read the pamphlet explaining Ohio firearms law. (see R.C. 2923.1210, Section VI). The sheriff must provide this pamphlet to any person seeking to obtain a license. R.C. 2923.125. See also R.C. 109.731 (provides that the Ohio peace officer training commission in consultation with the Ohio Attorney General prepare the pamphlet explaining firearms in “everyday language”). Ex. A.

<sup>28</sup> R.C. §2923.1210, Section III, question 5.

In fact, Johnson is not even permitted to take the class that certifies he is able to safely possess a concealed firearm. There is a publication by the Ohio Attorney General for individuals that wish to teach a concealed carry class. A person certified to teach the concealed carry class is prohibited from teaching the class to a person that has a legal disability:

“suppose a student’s criminal background check reveals a prior conviction for *misdemeanor drug possession under R.C. §2925.11* in the Franklin County Municipal Court \* \* \*. \* \* \* the student must resolve [the disability] prior to participating in any portion of firearms training in any OPOTC-approved training program.”<sup>29</sup>

When a person has the same disability as Johnson, there is such a strong stance against that person possessing a concealed firearm that the person cannot even participate in an approved class that teaches firearms safety. This strong stance is evidence that the State is not required to prove a mental element when a person’s disability is based on a prior conviction.

**iii. An emergency license to carry a concealed weapon.**

Suppose Johnson needed an emergency concealed carry license because he had a reasonable belief that he was in imminent fear of a criminal attack.<sup>30</sup> That emergency license would be denied because he was

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<sup>29</sup> Ex. B. (emphasis added).

<sup>30</sup> R.C. §2923.1213.

convicted of a crime involving a drug of abuse.<sup>31</sup> The fact that the legislature has decided that an individual that fears an imminent criminal attack may not carry a concealed weapon because that person was convicted of a crime involving a drug of abuse means that the legislature does not want individuals convicted of certain crime to possess firearms or dangerous ordnances *for any reason*. This is a strong indication that the State need not prove a mental element in relation to a prior conviction.

**iv. Possession of a dangerous ordnance is already a crime and the *fact* of a prior conviction enhances the punishment.**

In drafting R.C.§2923.13, the legislature also criminalizes possession of dangerous ordnances. A dangerous ordnance includes items such as sawed off firearms, rocket launchers, grenades, and torpedoes. These are items that can be more easily regulated under a State's police power. *Possession of a dangerous ordnance is not innocent conduct*. Under R.C.§2923.17, it is illegal to knowingly posses a dangerous ordnance. This statute is a flat prohibition against possessing these type items.<sup>32</sup> Stated differently, the legislature has taken a strong stance against possession of a dangerous ordnance.

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<sup>31</sup> R.C.§2923.1213(B)(1)(b).

<sup>32</sup> *State v. Jordan*, 89 Ohio St.3d 488, 494, 2000-Ohio-225.

R.C. § 2923.13(A)(3) increases the punishment if the person has a disabling conviction. Thus, to increase punishment, the State must simply prove the additional fact. The disability simply enhances the range of punishment available.

The legislature did not add an additional mental element in drafting the disability statute. Because no mental element was added to the disability statute and possession of a dangerous ordnance *is not innocent conduct*, there is an indication that the Legislature did not intend the State prove an additional mental element when a person's disability is based on a *prior conviction*.

When the other statutes concerning firearms and weapons control are examined, the legislature strictly limits who is entitled to legally possess these weapons. This is an indication outside of the weapons under disability statute that the legislature is attempting to prohibit individuals convicted of certain crimes from possessing firearms regardless of their mental state in relation to a prior conviction.

### **III. Application of R.C. 2901.21(B).**

The reason that this case is before this Court is so that this Court can continue to provide rules to determine when a statute imposes strict liability

or requires proof of an additional mental element.<sup>33</sup> This Court can answer the specific question presented in the appeal concerning the weapons under disability statute. But the heart of this case is creation of tools—rules of law—for a prosecutor to use to determine how to properly indict when this Court has not addressed a particular statute. For this reason, a review of this Court’s jurisprudence in applying R.C. §2901.21(B) is necessary. R.C. §2901.21(B) dictates that when a statute does not have a mental element and there is not an intent to impose strict liability, recklessness will suffice as the mental element. Above and beyond the plain language of a statute, three major themes can be taken from this Court’s decisions in applying R.C. §2901.21(B). This Court looks to the structure of the statute, whether the offense creates a real present danger, and the object sought to be criminalized to determine legislative intent.

**i. Structure as indicative of intent**

In *State v. Wac*, this Court first addressed how the structure of a statute can help to determine legislative intent. The defendant committed book making and operating a gambling house. He argued that the State was required to prove the mental state of reckless. This Court examined the structure of both statutes and found that because the General Assembly

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<sup>33</sup> R.C. §2901.21(B).

included a mental element in other parts of the statutes, the exclusion of a mental element in relation to other elements “plainly indicates a purpose to impose strict liability.”<sup>34</sup>

In *State v. Maxwell*, this Court examined a statute that is similar to the structure of the weapons under disability statute. This Court held that the General Assembly’s strong stance against sex acts involving minors makes “it is reasonable to presume that the inclusion of a knowledge requirement regarding the character of the material and the absence of a mental element elsewhere in R.C. §2907.321 reflect legislative intent to impose strict liability for the act of bringing child pornography into the state of Ohio.”<sup>35</sup>

In *State v. Fairbanks*, this Court examined the offense of failure to comply with the order or signal of a police officer. This Court noted that the inclusion of a mental element in part (B) of the statute and omission of a mental element in the statute’s penalty enhancement provision “plainly indicates a purpose to impose strict liability.”<sup>36</sup>

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<sup>34</sup> *State v. Wac*, 68 Ohio St.2d 84, 86-87.

<sup>35</sup> 95 Ohio St.3d 254, 2002-Ohio-2121, at ¶ 29-30.

<sup>36</sup> 117 Ohio St.3d 543, 2008-Ohio-1470, at ¶ 14.

The weapon under disability statute has already been found to be structurally similar to the statute imposing strict liability in *State v. Maxwell*.<sup>37</sup> Thus, the statute's structure indicates a purpose to impose strict liability. But *Clay* tells us that while the structure is important that is not the only concern. In *State v. Clay*, this Court held that structure of a statute in and of itself is not enough to impose strict liability. This Court reasoned that because possession of a firearm is constitutionally protected, the mental state of reckless applied to prove a *pending indictment*. Because it was not an issue, this Court did not address the real and present danger that possession of a firearm or dangerous ordnance presents when a defendant's disability is based on a *prior conviction*.

**ii. Real and present danger as legislative intent**

This Court first adopted the “real and present danger” line of cases in determining legislative intent in *State v. Cleary*. In *Cleary*, the defendant operated a vehicle under the influence of alcohol. In finding that the statute imposed strict liability, this Court adopted the logic of the First District and found that the General Assembly intended to impose strict liability because:

We find in the language chosen by the legislature a plainly indicated purpose to do so, because the overall design of

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<sup>37</sup> *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325, at ¶ 26.

the statute is to protect against the hazards to life, limb and property created by drivers who have consumed so much alcohol that their faculties are impaired.<sup>38</sup>

When a statute looks to criminalize behavior that presents a real and present danger to society, this Court presumes that the omission of a mental element is an indication that the legislature intends to impose strict liability.

The issue of real and present danger was discussed again in *State v. Wharf*. In *Wharf*, this Court examined a subsection of the robbery statute to determine whether the General Assembly intended the State prove an additional mental state in regards to possessing a deadly weapon while committing a theft offense. This Court determined that the statute imposed strict liability because 1) mere possession elevated the offense and 2) that merely having the weapon creates the “potentially dangerous factual condition.”<sup>39</sup> By making the statute strict liability this Court found that the legislature was attempting to achieve the laudable goal of protecting law enforcement and the public from increased risks of harm that possessing a deadly weapon creates during a theft offense.

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<sup>38</sup> *State v. Cleary* (1986), 22 Ohio St.3d 198, 199.

<sup>39</sup> *State v. Wharf*, 86 Ohio St.3d 375, 378-379 1999-Ohio-112 (quoting *State v. Edwards* (1976), 50 Ohio App.2d 63, 66-67).

In *State v. Loizer*, this Court also advanced the real and present danger rationale. This Court found that the legislature intended, by the words of the statute, to impose strict liability for trafficking drugs in the vicinity of a juvenile.<sup>40</sup> The legislative policy in creating strict liability for trafficking drugs in the vicinity of a juvenile was the real and present danger that is presented by drug transactions because children “could become part of the collateral damage of a failed drug transaction.”<sup>41</sup> So, beyond the words of the statute there was a real and present danger to children that were in the presence of a drug transaction and the presumption is that the legislature intends to impose strict liability for this additional element.

In *State v. Lester*, this Court recently construed a statute as imposing strict liability because, in part, the risk of harm increases when a person brandishes or displays a deadly weapon during a theft offense.<sup>42</sup>

A firearm or dangerous ordnance in the hands of a person that has prior convictions for committing crimes of violence and being involved with drugs of abuse presents a greater potential harm to society than individual that is only facing a pending indictment for these crimes. Just because a

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<sup>40</sup> *State v. Loizer*, 101 Ohio St.3d 161, 2004-Ohio-732, at ¶s 40-41.

<sup>41</sup> *Id.* at ¶ 42.

<sup>42</sup> 123 Ohio St.3d 396, 2009-Ohio-4225, at ¶ 28.

person has a pending indictment does not mean that the individual is a danger to society. There are any numbers of reasons that a person may have been indicted for a crime they did not commit. But when a person has been *convicted* of a felony of violence or violating drug laws, a firearm or dangerous ordnance in that person's possession presents a qualitatively different concern to the legislature. The conviction shows either a propensity to violence or that an individual may have impaired judgment due to drugs so that this particular individual should never have possession of a firearm or a dangerous ordnance. Because of the person's prior convictions and the increased risk to society if these individuals possess a firearm or dangerous ordnance, the legislature intends to impose strict liability concerning proof of the prior conviction.

This Court recognized that the legislature's goal in passing the weapons under disability statute was to eliminate the real and present danger that certain weapons have in the hands of people convicted of drug abuse offenses:

If the purpose of the statute is to keep weapons out of the hands of those involved with drugs, then it is likewise important to keep weapons away from a person who attempts to commit an illegal drug abuse offense yet fails. Omission of the offense of attempted drug abuse from the meaning of subsection (A)(3) would thwart the intent and purpose of the statute by granting leniency to an individual who intended and attempted to commit a drug abuse offense but was unable to complete it. One

who cannot even successfully complete an offense involving drugs may be even more dangerous with a weapon in his or her hands.<sup>43</sup>

It is also a fourth degree felony to recklessly sell or furnish a firearm or dangerous ordnance to a person who is prohibited by section §2923.13 of the Revised Code from possessing a firearm.<sup>44</sup> Criminalizing the act of selling, lending, giving or furnishing a firearm or dangerous ordnance to a person who has been convicted of a violent felony or drug of abuse offense further shows that the General Assembly intended to keep firearms or dangerous ordnance out of the hands of individuals who pose a clear and present danger to society.

The State also submits that the language “recklessly sell \*\*\* to any person prohibited by section 2923.13\*\*\*” demonstrates that it is the conviction for the violent felony or drug of abuse offense that creates the disability.

Based on this Court’s own precedent, the weapons under disability statute is an attempt to eliminate a real and present danger to society when certain people possess firearms or dangerous ordnances. And when a statute is an attempt to eliminate a real and present danger there should be a presumption that favors a strict liability interpretation.

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<sup>43</sup> State v. Moaning, 76 Ohio St.3d 126, 129, 1996-Ohio-413.

<sup>44</sup> R.C. §2923.20(A)(1), R.C. §2923.20(B).

**iii. Object sought to be criminalized as indicative of legislative intent.**

In addition to the statute's structure and the real and present danger line of cases, this Court also examines the object that is being criminalized to determine legislative intent. In *Maxwell*, this Court reasoned that the legislature's strong stance against sex acts involving minors indicated that the legislature intended the pandering statute to impose strict liability in the statute's subsections. But in *Clay*, this Court held that possessing a firearm is an innocent act and the legislature probably intended to require an additional mental element in relation to a defendant's awareness of a pending indictment.

In *Lester*, this Court indicated that when an additional fact makes innocent conduct criminal, the legislature likely intends to require the State to prove a mental element in relation to the additional fact.

Possession of a dangerous ordnance is not innocent conduct.<sup>45</sup> And the legislature has determined that with certain groups of people the danger to society is the same whether these individuals possess a firearm or a hand grenade. When a person has a prior conviction, the legislature has established many ways to prevent lawful possession of weapons. Because the statute is not wholly limited to conduct that is innocent, the legislature

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<sup>45</sup> R.C. §2923.17.

did not intend that the State prove an additional mental element when a disability is based on a prior conviction.

**iv. Inserting the word reckless when a disability is based on a prior conviction means a defendant is permitted to argue ignorance of the law.**

The Eighth District has used this Court's decision in *Clay* to create a mistake of law defense. The Eighth District held that Johnson is entitled to a jury instruction that requires the State to prove that Johnson was aware that his prior conviction prevented him from possessing a firearm:

the jury was never instructed that it must determine whether Johnson “acted recklessly with regard to being aware” that he had been convicted of *an offense that prohibited him from having a weapon*.<sup>46</sup>

Although Johnson stipulated to his prior convictions and took those facts out of the jury's review, he now argues that his disabilities are “such that a reasonable person would not have known of the disabling condition.” He then argues that this is not an ignorance of the law defense.

Johnson does not argue ignorance of a fact—no knowledge of his prior conviction. He argues that a reasonable person would not know that the conviction creates a disability. But does the legislature intend that the State prove that a defendant is reckless for not being aware that a prior

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<sup>46</sup> *State v. Johnson*, Cuyahoga App. No. 91701, 2009-Ohio-3101, at ¶ 32 (emphasis in original and emphasis added with the underline).

conviction for trafficking in 10 pounds of cocaine prevents possession of a hand grenade?

The legislature intended that the State prove that the person has a conviction—a fact. The fact that the conviction creates a disability is the law. The legislature determined that a hand grenade or firearm in the hands of a person that has been convicted of marijuana possession or trafficking in 10 pounds of cocaine presents the same danger to society and created criminal liability. There is no evidence that the legislature intended to create a mistake of law defense.

Contrary to the new rule of law established by the Eighth District, *Clay* only requires the State prove that a defendant is aware of an indictment. The State is not required to prove that a defendant is aware that the indictment *is a disabling condition*. Neither *Clay* nor any other rule of law stands for the proposition that ignorance of the law is a valid defense.

Without a clear indication from the legislature, a mental state should not be inserted into a statute if the mental element creates a mistake of law defense.

A prior conviction that creates a weapons disability fits within the requirements—structure, real and present danger, and object sought to be

criminalized—for finding that the legislature intends to impose strict liability concerning a defendant’s knowledge of a prior conviction. Additionally, as a rule of law, courts should not presume that the legislature intends to create a mistake of law defense by omission of a mental element in a statute’s subdivision.

### **CONCLUSION**

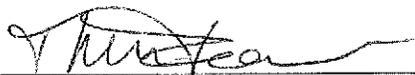
The Eighth District’s decision indicating that the legislature intends the State to prove a mental element in relation to a prior conviction is incorrect because:

- indications within the Ohio Revised Code support a finding that the legislature intend to impose strict liability when a person is prohibited from possessing a weapon because of a prior conviction;
- prior precedent from this Court supports a finding that, because of this statute’s structure and the real and present danger that possession of a firearm creates in the hands of a person convicted of any offense involving a drug of abuse, the legislature intended to impose strict liability in relation to proof of the prior conviction and;
- Courts should not presume the legislature intended to create a mistake of law defense by omitting a mental element from a statute.

The Eighth District's decision should be reversed and remanded for consideration of the additional assignments of error.

Respectfully submitted,

WILLIAM D. MASON  
Cuyahoga County Prosecuting Attorney



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 5<sup>th</sup> day of February, 2010, to John Martin and Cullen Sweeney at 310 Lakeside Ave. Suite 200 Cleveland Ohio 44113.



Thorin Freeman (0079999)  
Assistant Prosecuting Attorney

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO )  
 )  
 Plaintiff-Appellant )  
 )  
 v. )  
 )  
 STEVEN JOHNSON )  
 )  
 Defendant-Appellee )

CASE NO: 09-1469  
 On Appeal from the Cuyahoga  
 County Court of Appeals  
 Eighth Appellate District  
 Court of Appeals  
 Case No. CA-91701

**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

**WILLIAM D. MASON (0037540)**

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**RECEIVED**  
 AUG 13 2009  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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**FILED**  
 AUG 13 2009  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Johnson* Appeals Case No. 91701, Cuyahoga Common Pleas Case number CR-509170, on July 6, 2009.

This appeal raises a substantial constitutional question, involves a felony, or a question of public or great general interest and invokes this Court's discretionary authority under Art. IV, § 2(B)(2)(e) and S.Ct. R. II Section 1 (A)(2) and (3).

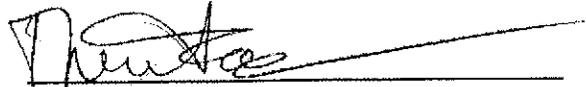
Respectfully submitted,  
WILLIAM D. MASON (0037540)



By: Thorin Freeman (0079999)  
Counsel of Record  
COUNSEL FOR APPELLANT  
STATE OF OHIO

**CERTIFICATE OF SERVICE**

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail, postage prepaid, to counsel for Appellee John Martin and Cullen Sweeney 310 Lakeside Ave. Cleveland Ohio 44113 and the Ohio Public Defender 8 East Long Street 11<sup>th</sup> Floor Columbus Ohio 43215 on this 11 day of August, 2009.



Thorin Freeman (0079999)  
Assistant Prosecuting Attorney  
COUNSEL FOR APPELLANT,  
STATE OF OHIO

JUL 6 - 2009

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 91701

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**STEVEN JOHNSON**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
REVERSED AND REMANDED**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-509170

**BEFORE:** Rocco, J., Gallagher, P.J., and Blackmon, J.

**RELEASED:** June 25, 2009

**JOURNALIZED:** JUL 6 - 2009

CA08091701

58371099



VOL 685 PG 0345 1 3



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**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

JUL 6 - 2009

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP.



**ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED**

JUN 25 2009

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

Defendant-appellant Steven Johnson appeals from his conviction after a jury found him guilty of having a weapon while under disability ("HWD").

Johnson presents four assignments of error. He takes issue with certain instructions the trial court provided to the jury, the admission of certain statements into evidence, and, in his fourth assignment of error, the wording of the indictment against him.

Upon a review of the record, this court finds that Johnson's fourth assignment of error falls under the supreme court's decision in *State v. Clay*, Slip Opinion No. 2008-Ohio-6325; 900 N.E.2d 1000. Due to the lack of the element of mens rea in the indictment for HWD, the entire proceeding against Johnson was structurally flawed. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624; *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749.

Johnson's fourth assignment of error is dispositive of his appeal. Since it must be sustained, Johnson's remaining assignments of error are rendered moot pursuant to App.R. 12(A)(1)(c), his conviction is reversed, and this case is remanded for further proceedings consistent with this opinion.

Johnson's indictment resulted from an incident that occurred in the early morning of April 3, 2008. Cleveland police officers Elbert Egglemeyer and Patrick Petranek received a broadcast indicating a man was "threatening with

a gun"<sup>1</sup> at an address on Cedar Avenue.

Upon the officers' arrival at the address, they heard a woman screaming. The officers ran up the stairs to the apartment with their service revolvers drawn, pushed open the partially-ajar door, and entered a room to see Johnson crouching in a defensive position on the floor with a gun in his right hand. Johnson appeared "dazed" and bloody; one woman "was basically on top of him" and two others were directly behind him. A "metal pipe" lay on the floor near Johnson.

Petranek pushed Johnson completely to the floor and stepped on the gun before securing him. The officers summoned an ambulance for Johnson. They then interviewed each of the women.

According to Natasha Fentress's testimony, Johnson accused one of the three women, viz., Nicole Arnold, of "playing" him. Both he and Arnold became angry and began physically striking each other. The two other women attempted to break up the fight, and when Arnold obtained a knife from the kitchen, Johnson "pulled the gun on her." Lorrie Lockhart, the apartment's leaseholder, then hit Johnson in the head with a metal bat.

Johnson subsequently provided a written statement to the detective who

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<sup>1</sup>Quotes indicate testimony presented at Johnson's trial.

had been assigned to the case. Johnson claimed that Arnold was giving oral sex to him in the apartment when he "felt her going through [his] pockets." He accused her of taking some of his money.

According to Johnson, during the argument that ensued, Lockhart "came in the room with a gun." Johnson stated that he wrested the gun away from her, and "was hit on the back of the head"; the gun fell to the floor and remained there when the police arrived.

Approximately a week after the incident, the Cuyahoga County Grand Jury returned an indictment against Johnson. Count one charged him with a violation of R.C. 2923.13(A)(3), HWD.<sup>2</sup>

In pertinent part, the indictment charged that Johnson "knowingly acquired, had, carried, or used a firearm \*\*\* having been convicted of an offense involving the illegal possession \*\*\* [of] any drug of abuse, to-wit: the said Steven Johnson, with counsel, on or about the 10<sup>th</sup> day of August 1994, \*\*\* having been convicted of the crime of Drug Possession, in violation of [R.C.] 2925.11 \*\*\* and/or on or about the 4<sup>th</sup> day of September 2003, \*\*\* having been convicted of the crime of Possession of Counterfeit Controlled Substance, in violation of [R.C.] 2925.37 \*\*\*." The charge additionally contained a forfeiture specification.

---

<sup>2</sup>The trial court granted Johnson's motion for acquittal on count two, receiving stolen property, after the state presented its case-in-chief.

Johnson's case proceeded to a jury trial. In instructing the jury, the court stated in pertinent part as follows:

"So before you can find the defendant guilty of having a weapon while under disability \*\*\* you must find beyond a reasonable doubt \*\*\* the defendant knowingly acquired, had, carried, or used a firearm \*\*\* having been convicted of an offense involving the illegal possession \*\*\* of any drug of abuse. That is, and this is a disability claimed by the State, that [defendant] with counsel on or about the 9<sup>th</sup> day of August 1994, \*\*\* ha[d] been convicted of the crime of drug possession, in violation of 2925.11 \*\*\*, and/or that on September 4<sup>th</sup>, 2003, \*\*\*ha[d] been convicted of the crime of possession of counterfeit controlled substance in violation of 2925.37 \*\*\*."

The trial court defined the element of "knowingly." As to the statutory word "disability," the trial court instructed the jury that it meant "a person who has previously been convicted of an offense involving the illegal possession, use, sale, distribution or trafficking in any drug of abuse." The court further instructed the jury that "there has been a stipulation" that Johnson had been convicted of the two offenses listed in count one of the indictment.

The jury found Johnson guilty of the offense. After the trial court imposed a prison term of one year for his conviction, Johnson filed a timely appeal.

Although he presents four assignments of error, only his fourth will be

addressed, since it is dispositive of this appeal, and the disposition renders his others moot.

Johnson's fourth assignment of error states:

**"IV. The trial was structurally flawed because the indictment failed to allege, and the jury failed to consider, whether the defendant was aware that he had been convicted of a crime that prevented him from possessing a firearm."**

Johnson argues in this assignment of error that an essential element was missing from the indictment, and the jury was not informed of the missing element. He contends the indictment was therefore defective, and that, pursuant to the supreme court's decisions in the *Colon* cases and *Clay*, the defect constituted structural error that permeated the entire proceeding.

In deciding this issue, the supreme court stated in *Clay* in relevant part as follows:

"Clay was convicted of having a weapon while under a disability. Therefore, we first examine R.C. 2923.13, which provides:

'(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:

" \* \* \*

(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 \*\*\*.

“\*\*\* In examining the structure of R.C. 2923.13, we find that the General Assembly intended the word ‘knowingly’ within R.C. 2923.13(A) to modify only the phrase ‘acquire, have, carry or use any firearm or dangerous ordnance.’ \*\*\* See generally *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, P 29, 767 N.E.2d 242 (in examining a statute structured similarly to the one herein, the court determined that ‘knowledge is a requirement only for the discrete clause within which it resides’).

“\*\*\* The General Assembly knows how to define a strict liability offense when it so desires, as evidenced in *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770. \*\*\*

“We stated that ‘R.C. 2925.01(BB) makes it abundantly clear that the offender’s mental state is irrelevant in determining whether an offender has committed an offense ‘in the vicinity of a juvenile,’ and therefore it imposes strict liability. *Id.* at P 36. In the instant case, we find no similar language in R.C. 2913.13(A)(3), or elsewhere in the Revised Code, that the General Assembly plainly intended to impose strict liability for this offense. Thus, we find that R.C. 2923.13(A)(3) has no culpable mental state, nor does it contain any

language that plainly indicates an intent to impose strict liability. \*\*\*

“Where a statute lacks a mental state and the General Assembly did not intend strict liability, the mental state of recklessness applies under R.C. 2901.21(B). Accordingly, for purposes of proving the offense of having a weapon while under a disability pursuant to R.C. 2923.13(A)(3), the mental state of recklessness applies in determining whether the defendant is aware that he or she is ‘under indictment.’”

“Because the trial court never determined whether Clay acted recklessly with regard to being aware that he was ‘under indictment,’ we remand the cause to the trial court to determine that issue. Accordingly, we reverse the judgment of the court of appeals and remand the cause to the trial court.”

(Emphasis added.)

In *Clay*, the supreme court focused on the disability of being “under indictment” as contained in the initial portion of R.C. 2923.13(A)(3). In this case, Johnson was accused of having a weapon while under the second type of disability, viz., that he had been “convicted of” an offense that prohibited him from having a weapon. The applicability of *Clay*, however, is the same.

The record of this case demonstrates that, throughout, the offense was treated as a strict liability offense. Thus, the jury was never instructed that it must determine whether Johnson “acted recklessly with regard to being aware”

that he had been convicted of an offense that prohibited him from having a weapon. Rather, the trial court merely repeated the indictment as it was worded. Under these circumstances, the error in the indictment permeated the entire proceeding. *State v. Summers*, Cuyahoga App. No. 91676, 2009-Ohio-1883.

The state argues that since the court in *Clay* considered only the phrase "under indictment," the opinion should be limited to apply only to that phrase, and, thus, this case is distinguishable. However, the supreme court used broad language in determining that R.C. 2923.13(A)(3) lacks a culpable mental state and is not a strict liability offense.

As does the legislature, the Ohio Supreme Court "knows how to define" a determination when it so desires. The court nevertheless held the culpable mental state of "recklessness" applies to R.C. 2923.13(A)(3). Until the supreme court determines otherwise, the language the supreme court used applies equally to the other type of "disability" set forth in that section, and this court is constrained to follow the decision in *Clay*.

Consequently, Johnson's fourth assignment of error is sustained.

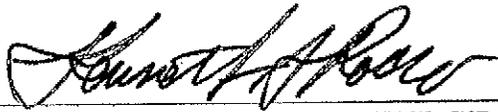
Johnson's conviction is reversed. This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and  
PATRICIA ANN BLACKMON, J., CONCUR

# EXHIBIT A

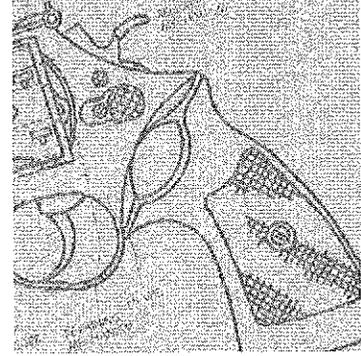
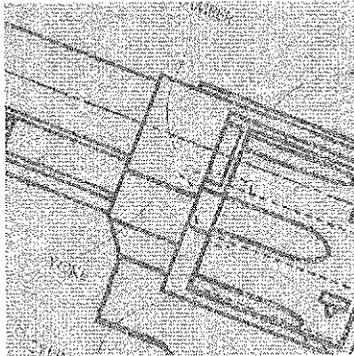
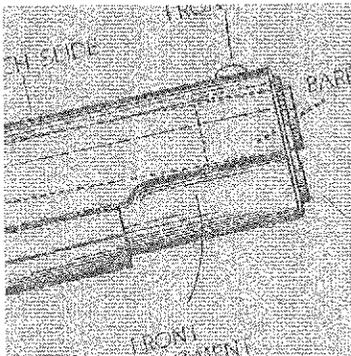


# RICHARD CORDRAY

OHIO ATTORNEY GENERAL



## OHIO'S CONCEALED CARRY LAW



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## **Laws Change**

**For the most current and up-to-date information on carrying a  
concealed handgun, visit the Attorney General's web site at  
[www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov)**

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## Introduction

As required by Ohio law, this publication broadly discusses several different areas of firearms law. This is neither a formal nor informal opinion of the Attorney General; rather, it is a summary of prevailing firearms and self-defense laws and may be updated without notice. It is not intended to be a substitute for the advice of a lawyer or for common sense. This publication is informational in nature and cannot cover all possible scenarios regarding carrying of concealed handguns. For the most recent edition covering the most current law, consult the Attorney General's Web site at: **[www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov)**.

There are many areas of Ohio law that impact your decision to be a concealed carry licensee and you should consult an attorney for specific information. The Ohio Attorney General cannot provide legal advice to anyone other than state agencies, officers, and employees. In this publication, sections of the Ohio Revised Code — the laws passed by the General Assembly — are referenced with the abbreviation "R.C." followed by the relevant code number. The Revised Code is available online and may also be found at law libraries and some public libraries. Citizens are encouraged to read the law for themselves using this book as a guide.

## **Training and Educational Requirements**

### **Training and Competency Certification**

Before you obtain a license to carry a concealed handgun, you will need proof of your competency certification. Competency can be established by providing one of the following:

- A certificate of completion of a firearms safety course that was offered by or under the auspices of the National Rifle Association (NRA) containing certain minimum educational requirements (See the section of this publication titled, "Minimum Educational Requirements" for additional information about the specific areas that must be covered in training.); or
- A certificate of completion of a class that was open to the public that used instructors approved by the National Rifle Association or Ohio Peace Officer Training Commission (OPOTC), or approved instructors of another state and was offered under the authority of a law enforcement agency of Ohio or another state, a college, or a firearms training school that contains the minimum educational requirements; or
- A certificate of completion of a state, county, municipal, or Ohio Department of Natural Resources (ODNR) peace officer training school that is approved by the executive director of OPOTC which complies with the law's training requirements and contains the minimum educational requirements; or
- A document that shows the applicant is an active or reserve member of the armed forces, or was honorably discharged within the past six years, or is a retired highway patrol trooper, or is a retired peace officer or federal law enforcement officer and who, through the position, acquired experience with handguns or other firearms that was equivalent to the minimum educational requirements; or
- A certificate of completion of a class not otherwise described in this publication that was conducted by an instructor who was certified by an official or entity of Ohio, another state, the United States government, or the NRA that complies with the minimum educational requirements; or

- An affidavit from a qualified instructor that attests to the applicant's completion of a course that satisfied the minimum educational requirements.

*Statutory Reference(s): The types of competency certifications are described in R.C. 2923.125(B)(3)(a) - (f).*

### **Temporary Emergency License**

The law allows for the issuance of an emergency license under extraordinary circumstances. The law states that upon receipt of evidence of imminent danger; a sworn affidavit; an application fee of not more than \$30; and a set of applicant fingerprints, a license will be issued.

The sheriff must immediately conduct a criminal records check on the applicant. The sheriff must determine if the applicant is not prohibited from having a license, and then immediately issue the license.

1. Evidence of imminent danger must take two forms:

- a. A sworn statement by the applicant that states the person has reasonable cause to fear a criminal attack upon himself or a member of his family such as would justify a prudent person in going armed; or
- b. A written document from a government entity or public official describing facts that give the person reasonable cause to fear such a criminal attack. Such documents may include, but are not limited to, temporary protection orders, civil protection orders, a protection order of another state, a court order and any report filed with or made by a law enforcement agency or prosecutor.

2. The sworn affidavit must attest that the applicant is a legal resident of the United States, at least 21 years of age, not a fugitive from justice, is not under indictment or charged with a crime, and has not been convicted of disqualifying crimes listed in R.C. 2923.125(D)(1) and discussed under the "Application Process" section.

If the applicant has been convicted or pleaded guilty to a disqualifying offense and the court has ordered the sealing of the records of that

offense, that offense(s) shall not be relevant for purposes of the sworn affidavit.

The temporary emergency license lasts for 90 days and may be renewed only once every four years. If you wish to have your license last longer, you must apply for the license through the normal process within the 90 days.

*Statutory References: R.C. 2923.1213 allows sheriffs to issue emergency licenses when there is evidence of imminent danger to the applicant. R.C. 2923.1213 (B) (3) does not allow sheriffs to consider court ordered sealed records for purposes of the sworn affidavit.*

### **Minimum Educational Requirements**

The Attorney General does not endorse any particular form of training or instructor. However, a list of Ohio Peace Officer Training Commission-certified instructors who wish to teach classes to the general public is available from the Attorney General's Web site at [www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov). County sheriffs may also have a list of certified instructors who have provided contact information to the sheriff.

The law sets out minimum educational requirements that are a component of the various forms of competency certification as set forth on page 2. The total time required for training is 12 hours: 10 hours of instruction and another two hours of experience shooting a handgun.

The law requires at least 10 hours of certified training in the following matters:

- The ability to name, explain, and demonstrate the rules for safe handling of a handgun and proper storage practices for handguns and ammunition;
- The ability to demonstrate and explain how to handle ammunition in a safe manner;
- The ability to demonstrate the knowledge, skills and attitude necessary to shoot a handgun in a safe manner;
- Gun-handling training.

Additionally, you must have two hours of practical training including range time and live-fire experience. The applicant must also complete an examination that tests his or her competency. The test must include a written section on the ability to name and explain the rules for the safe handling of a handgun and proper storage practices for handguns and ammunition. Additionally, the exam must include a physical demonstration of competency on handgun usage and rules for safe handling and storage of a handgun, and an examination requiring the physical demonstration of the attitude necessary to shoot a handgun in a safe manner.

As part of the training, applicants must also receive and certify that they have reviewed a copy of this publication.

As an advisory to consumers, the Attorney General recommends anyone contemplating private handgun training take the following minimum steps before paying for any form of training:

- Verify the person teaching the class is qualified to teach.
- Confirm the instructor knows the requirements of the law.
- Be certain the instructor will provide you with this publication.
- Verify whether a refund or additional training may be available if a county sheriff determines the course was incomplete when you apply.

*Statutory Reference(s): R.C. 2923.125(G)(1) requires that all applicants be given a copy of this publication by their trainer.*

*R.C. 2923.125(G)(1)(a) sets out the minimum educational requirements necessary to receive competency certification.*

*R.C. 2923.125(G)(1)(b) describes the minimum amount of range and live-fire experience required to receive competency certification.*

*R.C. 2923.125(G)(2) requires that applicants take and pass a written examination.*

## The Application Process

To begin the application process, you must apply to the sheriff in the county where you reside or an adjoining county. Before you apply with your local sheriff, call ahead to determine the times applications are accepted and confirm what documentation may be necessary.

The sheriff must accept applications and supporting documents for temporary emergency licenses during normal business hours. The sheriff must provide application forms and accept license applications and supporting documents for regular licenses at least 15 hours each week. The sheriff shall post a notice of the hours during which the sheriff is available to accept applications or to provide information about the licensing process.

The sheriff must provide you with an application form and make this publication available at no charge. You must pay a fee which will vary depending on the background check the sheriff must conduct. The minimum fee, however, for a background check and license is \$55. You must provide evidence of your competency certification as described above, and certify that you have read this publication. Applicants must also submit their fingerprints necessary to conduct the background check.

The applicant must state whether he or she has a concealed handgun license that is currently suspended and whether or not he or she has previously applied for a concealed handgun license. If the applicant has previously applied for a license, the applicant must provide the name of the county in which the application was made.

Licenses issued on or after March 14, 2007, expire 5 years after the issue date. Licenses issued before March 14, 2007, expire 4 years after the issue date. All regular licenses renewed on or after March 14, 2007, expire 5 years after the renewed license was issued.

*Statutory Reference(s): Under R.C. 2923.125(A), the sheriff must provide you with an application and make this publication available at no charge. R.C. 2923.125(B)(4) requires that applicants certify that they have read this publication.*

*R.C. 2923.125(B)(1) states applicants must pay an application fee that will vary based on the type of background check required and sets the*

*minimum fee at \$55.*

*R.C. 2923.125(B)(2) requires applicants to provide a color photograph taken within 30 days of the application date. However, some sheriffs' offices may take these photographs themselves.*

*R.C. 2923.125(B)(3) requires that applicants submit proof of competency at the time of the application. R.C. 2923.125(B)(5) requires applicants submit to fingerprinting necessary to conduct a background check.*

## **Sheriff's Criteria for Issuing the License**

### **Residency**

You must be a legal resident of the United States and an Ohio resident for 45 days before you apply for your license. You must be a resident of the county (or adjoining county) where you apply for at least 30 days. You must also be at least 21 years of age and not a fugitive from justice.

### **Residency for members of the armed forces.**

You are considered an Ohio resident for purposes of obtaining and renewing a license to carry a concealed handgun if you are absent from the country, Ohio or an Ohio county while complying with military or naval orders as an active or reserve member of the armed forces of the United States and, if prior to leaving this state in compliance with those orders, you were legally living in the United States and were a resident of this state, you, solely by reason of that absence, shall not be considered to have lost your status as living in the United States or your residence in this state or in the county in which you were a resident prior to leaving this state in compliance with those orders, without regard to whether or not you intend to return to this state or to that county, shall not be considered to have acquired a residence in any other state, and shall not be considered to have become a resident of any other state.

If you are present in this state in compliance with military or naval orders as an active or reserve member of the armed forces of the United States for at least forty-five days, you are considered to have been a resident of this state for that period of at least forty-five days, and, if you are present in a county of this state in compliance with military or naval orders as an active or reserve member of the armed forces of the United States for at least thirty days, you shall be considered to have been a resident of that county for that period of at least thirty days.

*Statutory Reference: 2923.125(D)(1)(i)-(ii) allows persons deployed in the military to obtain Ohio concealed carry licenses under certain conditions.*

### **Criminal Record**

Prior to obtaining your license, you must provide the sheriff with complete information about your background. There are many

criminal offenses that bar you from obtaining your license. There are many laws and conditions that prohibit you from owning a handgun. If you have questions about specifics you should consult an attorney.

The law states that you must not be under indictment, charged or convicted of a felony, a felony that involves the trafficking in drugs or similarly charged with a misdemeanor offense of violence or negligent assault. You may not obtain your license if you have been charged with falsification of a concealed handgun license.

In addition, you must not have been convicted, pleaded guilty, or been adjudicated as delinquent in connection with a crime that involves the illegal use, sale, possession, administration, distribution, or trafficking of a drug of abuse. You cannot have been convicted, pleaded guilty or been adjudicated delinquent for assaulting a peace officer. You must not, within three years of your application, have been convicted, pleaded guilty or been adjudicated delinquent in connection with a misdemeanor offense of violence against a peace officer.

You must not have been convicted, pleaded guilty or been adjudicated delinquent in connection with two or more assaults or negligent assaults within five years of your application. You must not have been convicted, pleaded guilty or adjudicated as delinquent in connection with resisting arrest within 10 years of your application. If you are charged with an offense during the application process, the sheriff can suspend your application until your case is resolved.

The sheriff shall not consider the conviction, guilty plea, or adjudication of an applicant's sealed records even if those sealed offenses would otherwise disqualify an applicant. If you have questions about sealed criminal records, consult an attorney.

### **Mental Competency**

The law states that you must not have been adjudicated as a mental defective, been committed to any mental institution, be under a current adjudication of incompetence, have been found by a court to be mentally ill subject to hospitalization by court order, and not be an involuntary patient other than one who is a patient only for purposes of observation.

### **Protection Orders**

You must not be subject to a civil protection order or a temporary protection order of an Ohio court or a similar protection order issued by another state. For additional information on civil and temporary protection orders, consult an attorney.

As long as you meet the law's requirements, the sheriff must issue a concealed handgun license within 45 days of receiving your properly completed application. The license lasts for five years.

*Statutory Reference(s): The criminal offenses that bar a citizen from receiving a concealed carry license are listed in R.C. 2923.125 (D) (1) (a) – (h).*

*R.C. 2923.125 (D) (3) allows a sheriff to suspend the processing of an application if a pending criminal case is outstanding against an applicant.*

*R.C. 2923.125 (D) (5) prohibits sheriffs from considering the conviction, guilty plea, or adjudication of an applicant's sealed records.*

*R.C. 2923.125 (D) (1) (i) – (j) lists the mental competency and protection order issues that can cause the denial of an application.*

*R.C. 2923.13 lists the disabilities that prohibit you from having a firearm.*

### **License Denials and Appeals**

If the sheriff denies your license, he must inform you of the grounds for denial in writing. If the denial was the result of a criminal records check and you wish to appeal the decision, you may appeal the denial through an in-house procedure with the sheriff or through the Ohio Bureau of Criminal Identification and Investigation to resolve the problem. The sheriff's denial of a temporary emergency license must also be in writing and can be appealed.

*Statutory Reference(s): If your application is denied, the sheriff must inform you of the grounds for denial in writing under R.C. 2923.125(D)(2) (b).*

*R.C. 2923.127 requires sheriffs to set up an appeals process for applicants who wish to contest the denial.*

### **License Renewals and Competency Recertification**

Concealed carry licenses issued before March 14, 2007 expire four years after issuance. Licenses issued or renewed after that date expire five years after the date of issuance or renewal.

After October 17, 2009, if you wish to renew your license, you may do so 90 days before the license expires. You should renew as early as possible. You must file a renewal application with the sheriff's office, certify that you have read this booklet and pay a nonrefundable fee. A printed copy is not needed; you may read the online version at **[www.OhioAttorneyGeneral.gov/CCWManual](http://www.OhioAttorneyGeneral.gov/CCWManual)**.

In order to renew your license for the first time, you must submit proof of competency certification. Proof of certification may take either of the following forms:

1. A previously issued Ohio concealed carry license. The license may be either expired or currently valid.
2. A competency certificate from your instructor. There is no longer a time limit from the day you completed your class to the time of your first renewal. Any certificate will

If you have previously renewed your license and are renewing for a second time, you need to present proof of renewed competency certification. The renewed competency certification must attest that you are range competent. To obtain a renewed competency certification, you do not need to attend the entire course, class or program that you initially took to obtain your license. The renewed competency certification must be dated and signed by an instructor. It must attest that you are range competent.

*Statutory Reference: 2923.125(F) and (G) describe the procedure and necessary materials to renew a concealed carry license.*

## **Duties that Accompany Holding a Concealed Handgun License**

### **Do not Take Your Handgun With You When You Apply For Your License At Your Local Sheriff's Office.**

The ability to have a firearm carries with it certain restrictions and responsibilities, many of which are regulated by state and federal laws.

The explanation of laws regulating carrying a handgun found within this publication is not an exhaustive list. If you have questions, consult an attorney.

### **Identification Required**

You must carry another piece of valid government identification in addition to the handgun license.

### **Forbidden Carry Zones**

The law sets forth several places where your license does not allow you to carry a handgun. Under the law, you may not carry a concealed handgun into the following places:

- Police stations
- Sheriffs' offices
- Highway Patrol posts.
- Premises controlled by the Ohio Bureau of Criminal Identification and Investigation.
- Correctional institutions or other detention facilities
- Airport terminals or commercial airplanes.
- Institutions for the care of mentally ill persons.
- Courthouses or buildings in which a courtroom is located.
- Universities, unless locked in a motor vehicle or in the process of being locked in a motor vehicle.
- Places of worship, unless the place of worship permits otherwise.
- Child day-care centers.
- Licensed D-Liquor Permit premises in which any person is consuming liquor.

Concealed firearms are banned in premises for which a D permit has been issued or in an open air arena for which a permit of that nature has been issued. There are some exceptions to this prohibition. The prohibition does not apply to principal holder of D permit as long as principal holder is not consuming liquor.

The prohibition does not apply to an agent or employee of the principal holder who is also a peace officer who is also off duty. Possession of a concealed firearm is allowed in a retail store with a D-6 or D-8 permit as long as concealed carry license holder is not consuming liquor. Class D permits are generally issued to an establishment that sells alcohol for consumption on the premises. In any event, be certain of the type of permit and whether liquor is being consumed before you enter with a concealed handgun.

- Government facilities that are not used primarily as a shelter, restroom, parking facility for motor vehicles, or rest facility and is not a courthouse or a building or structure in which a courtroom is located.

- School safety zones.

A "school safety zone" includes a school, school building, school premises, school activity, and school bus. For purposes of this statute, a school includes everything up to the property boundary.

The law generally forbids the carrying of a handgun in a school safety zone unless all of the following apply:

- You do not enter a school building, premises or activity; and
- You have a concealed carry license or temporary emergency license; and
- You are not otherwise in one of the forbidden places listed above and detailed in R.C. 2923.126 (B); or
- You are a driver or passenger in a motor vehicle immediately in the process of picking up or dropping off a child, and you are not otherwise in violation of the laws governing transportation of firearms in motor vehicles.

### **Transporting in Motor Vehicles**

The transportation of loaded, concealed handguns in motor vehicles is permitted, but strict obligations are imposed by the law to protect you and law enforcement. These obligations apply to drivers and occupants. These obligations do not apply if you are storing a firearm for any lawful purpose and it is not on your person or you are lawfully storing or possessing a firearm in your home.

You may not have a loaded handgun in the vehicle if you are under the influence of drugs or alcohol. If you have a concealed carry permit, you may not transport a loaded, concealed handgun in a vehicle unless it is carried in one of the following ways:

- The loaded handgun is in a holster secured on the person. Ohio law previously required carrying firearms in a holster in plain sight. **The “plain sight” provision has been removed from the law.**
- The loaded handgun is in a closed case, bag, box, or other container that is in plain sight and that has a lid, a cover, or a closing mechanism with a zipper, snap, or buckle, which lid, cover or closing mechanism must be opened for a person to gain access to the handgun, or
- The loaded handgun is securely encased by being stored in a closed, glove compartment or console, or in a case that is locked.

Motorcycles fall under the definition of motor vehicles. Thus, the same requirements apply to licensees who carry a handgun while on a motorcycle.

#### **Traffic Stops and Other Law Enforcement Encounters**

If a person is stopped for a law enforcement purpose and if the person is carrying a concealed handgun as a CCW licensee, whether in a motor vehicle or not, the person shall inform the law enforcement officer that the person is carrying a concealed handgun, keep his or her hands in plain sight at all times and not touch the concealed handgun, unless in accordance with directions given by any law enforcement officer.

Violating this section of law is a first degree misdemeanor, and in addition to any other penalty handed down by a court, shall result in the suspension of the person’s concealed handgun license for one year.

**NOTE:** So far, the Ohio Supreme Court has not defined the term “plain sight” precisely in the context of carrying a concealed handgun. However, in other contexts, courts have generally held that the term “plain sight” is a common sense term that means clearly visible or unobstructed. Plain sight applies to your hands and other objects.

If a person is stopped for a law enforcement purpose and if the person is carrying a concealed handgun as a CCW licensee, whether in a motor vehicle or not, the person shall not have or attempt to have any contact with the handgun, unless in accordance with directions given by a law enforcement officer. Violating this law is a felony.

If a person is stopped for a law enforcement purpose and if the person is carrying a concealed handgun as a CCW licensee, whether in a motor vehicle or not, the person shall not knowingly disregard or fail to comply with any lawful order given by any law enforcement officer.

Violating this law is a first degree misdemeanor and may result in the suspension of the person's concealed handgun license for two years. However, if at the time of the stop the law enforcement officer or an employee of a motor carrier enforcement unit who made the stop had actual knowledge that the licensee has had a CCW license, then the person's CCW license shall not be suspended for a violation of 2923.16 (E) (3). The CCW licensee's violation will be considered a minor misdemeanor.

If the CCW licensee surrenders the firearm, then the following applies:

- If the firearm is not returned at the completion of the stop, the law enforcement officer is required to return the firearm in "the condition it was in when it was seized."
- If a court orders the firearm's return and the firearm has not been returned to the licensee, the CCW licensee can claim reasonable costs and attorney fees for the loss and the cost of claiming the firearm.

**WARNING:**

If you are planning on carrying a concealed handgun while driving:

Have your concealed carry license and another piece of valid government identification in your possession.

Make sure the handgun is:

- In a holster secured on your person, or
- In a closed case, bag, box, or other container that is in plain sight and has a closing mechanism such as a zipper, snap or buckle, or
- Securely encased by being stored in a closed, glove compartment or vehicle console, or
- Locked in a case.

If you are pulled over and you are carrying a concealed handgun remember the following:

- Before the officer approaches, roll down your window and place your hands in plain view on the steering wheel.
- Calmly tell the officer that you have a license to carry a concealed handgun and that you have a handgun with you. Ask if the officer has particular instructions concerning the handgun.
- Do not touch or attempt to touch your handgun unless specifically told to by the officer.
- Do not exit your vehicle unless specifically told to by the officer.
- Comply with all lawful orders given by the officer.

If you are a licensee and are not carrying a concealed handgun, this section does not apply to you.

In addition to the concealed carry prohibitions detailed above, Ohio has strict laws concerning firearms in a vehicle. If you DO NOT have a concealed handgun license, you may not transport a loaded handgun in any manner where it is accessible to anyone inside the vehicle without leaving the vehicle. If you DO NOT have a license, you may not transport a firearm in a vehicle unless it is unloaded and carried in one of the following ways:

- In a closed package, box or case;
- In a compartment that can be reached only by leaving the vehicle;
- In plain sight and secured in a rack or holder made for that purpose;
- or
- If it is a firearm at least twenty four inches in overall length and if the barrel is at least eighteen inches in length in plain sight with the action open or the handgun stripped, or if the firearm is of a type in which the action will not stay open or cannot easily be stripped, in plain sight.

*Statutory Reference (s) R.C. 2923.16 (E) governs how licensees may transport loaded concealed handguns in motor vehicles.*

*R.C. 2923.16 (B) – (C) governs how firearms must be otherwise transported in a vehicle*

## Private Property and the Workplace

Under the law, private employers may, but are not required to, prohibit the presence of firearms on their property or motor vehicles owned by the employer. You should make yourself aware of your employer's policies before you go to work with a handgun. In addition, the owner or person in control of private land or premises or person leasing land or premises from the government may post a sign in a conspicuous location that prohibits persons from carrying firearms or concealed handguns.

Ohio law provides that a person who knowingly violates a posted prohibition of a parking lot or other parking facility is not guilty of criminal trespass but is liable for a civil cause of action for trespass. Furthermore, a landlord may not prohibit or restrict a tenant with a concealed carry license from lawfully carrying or possessing a handgun on residential premises.

### Signage

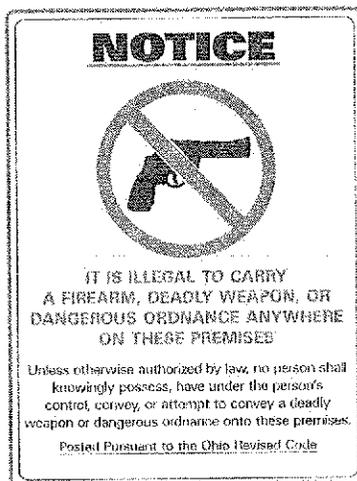
The law does not say precisely what language must be on the sign. At a minimum, signs must be conspicuous and inform people that firearms and/or concealed handguns are prohibited. However, the law suggests that the prohibited locations post a sign that substantially says the following:

*Unless otherwise authorized by law, pursuant to the Ohio Revised Code, no person shall knowingly possess, have under the person's control, convey, or attempt to convey a deadly handgun or dangerous ordnance onto these premises.*

An example of a standard warning sign approved for use on state buildings appears below. If you see this sign, it means that you cannot bring your concealed handgun inside. Businesses and persons wishing to post such signs are strongly advised to consult their legal counsel for language, style, format and placement.

The sign is available to download from the Attorney General's Web site at [www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov) at no charge.

## Example of a Standard Warning Sign



*Statutory Reference(s): R.C. 2923.126(C) allows private employers to prohibit the presence of firearms on their property or in motor vehicles owned by the employer.*

*R.C. 2923.126(C)(3) allows the owner or person in control of private land to post a sign in a conspicuous place that prohibits persons from carrying concealed firearms on that property.*

### **Concealed Carry by Law Enforcement**

Federal law (HR 218) permits active and retired law enforcement officers, under specific circumstances, to carry a concealed firearm. This publication does not address issues related to HR 218. If you are an active or retired law enforcement officer and have questions about HR 218, consult an attorney.

### **Reciprocity**

Ohio has agreements with other states to recognize one another's concealed handgun licenses. Consult the Attorney General's web site for the most recent list of agreements. Be aware the laws of the other state apply to you when you are in that state.

### **Open Carry**

Ohio's concealed carry laws do not regulate "open" carry of firearms. If you openly carry, use caution. The open carry of firearms is a legal activity in Ohio.

## **Deadly Force**

### **Introduction**

Ohio law specifically sets forth that a handgun is a deadly weapon capable of causing death. The license to carry a concealed handgun comes with the responsibility of being familiar with the law regarding use of deadly force. This publication is designed to provide general information only. It is not to be used as authority on legal issues, or as advice to address specific situations.

In Ohio, deadly force can be used only to prevent serious bodily harm or death. Deadly force can never be used to protect property only. Depending on the specific facts and circumstances of the situation, use of deadly force may lead to criminal charges and/or civil liability.

### **Criminal Issues**

If law enforcement and prosecutors determine that a person's use of deadly force is not justified, criminal charges may be pursued. In a situation where the victim is injured by the conduct of a person using a handgun, the licensee can be charged with assault crimes including, but not limited to, felonious assault, aggravated assault, or attempted murder. Where the victim is killed as a result of a person's use of a firearm, he or she can be charged with homicide crimes, such as reckless homicide, voluntary manslaughter, murder or aggravated murder. (This list does not include all crimes that may apply.)

If the accused person is convicted, he or she will be sentenced to a term of incarceration by a judge, according to the law.

*Statutory Reference(s): Title 29 of the Ohio Revised Code defines the crimes that could be charged when the use of deadly force is not justified.*

### **Civil Liability**

Even if the situation does not lead to criminal charges or result in a criminal conviction, the licensee may still face civil liability. The victim or his survivors could sue the licensee for the harm from the licensee's use of deadly force. A "wrongful death" lawsuit or "tort action" is a common legal action for money damages. A civil action does not involve a criminal penalty such as incarceration but both a criminal and civil case can be brought based on the same incident.

In any civil case, the victim or his survivors must prove it is more probable than not that the licensee's use of force was inappropriate or excessive and it caused the victim's injuries or death. If this is proven, the victim or his survivors may be entitled to recover money from the licensee as punishment and/or compensation.

The law requires the force used be reasonable and necessary to prevent the danger. So even if the victim was wrong and caused the situation, if the force was inappropriate or excessive for the particular situation, the defendant risks criminal and/or civil punishment.

Although self-defense is an affirmative defense a licensee may assert against civil liability, the licensee might still be required to compensate the victim if the force used was excessive and unnecessary.

### **Self-Defense**

Depending on the specific facts of the situation, an accused person may claim that use of deadly force was justified to excuse his or her actions, which would otherwise be a crime. Self-defense or the defense of another is an affirmative defense that an accused may assert against a criminal charge for an assault or homicide offense.

The term "affirmative defense" means the accused, not the prosecutor, must prove by a preponderance of the evidence that he acted in self-defense or in defense of another. In other words, the defendant must prove that it is more probable than not that his use of deadly force was necessary due to the circumstances of the situation.

Whether this affirmative defense applies to the situation or whether it will likely succeed against criminal charges depends heavily on the specific facts and circumstances of each situation. The Ohio Supreme Court has explained that a defendant must prove three conditions to establish that he acted in defense of himself or another.

#### **Condition 1: Defendant Is Not At Fault**

First, the defendant must prove that he was not at fault for creating the situation. The defendant cannot be the first aggressor or initiator. However, in proving the victim's fault, a defendant cannot point to other unrelated situations where the victim was the aggressor. Remember, the focus is on the specific facts of the situation at hand.

If you escalate a confrontation by throwing the first punch, attacking, or drawing your handgun, you are the aggressor. Most likely in this situation, you cannot legitimately claim self-defense nor would you likely succeed in proving your affirmative defense.

**Condition 2: Reasonable and Honest Belief of Danger**

Second, the defendant must prove that, at the time, he had a real belief that he was in immediate danger of death or great bodily harm and that his use of deadly force was the only way to escape that danger. Bear in mind that deadly force may only be used to protect against serious bodily harm or death. **The key word is serious.**

In deciding whether the bodily harm was serious, the judge or jury can consider how the victim attacked the defendant, any weapon the victim had, and how he used it against the defendant. Minor bruises or bumps from a scuffle probably do not meet the legal definition of "serious." In court cases, rape has been determined to be serious bodily harm, as has being attacked with scissors. Serious bodily harm may also result from being struck with an object that can cause damage, such as a baseball bat or a wooden club.

Important is the defendant's belief that he is in immediate serious danger. The defendant's belief must be reasonable, it cannot be purely speculative. In deciding if the belief was reasonable and honest, the judge or jury will envision themselves standing in the defendant's shoes and consider his physical characteristics, emotional state, mental status, knowledge, the victim's actions, words and all other facts regarding the encounter. The victim must have acted in a threatening manner. Words alone, regardless of how abusive or provoking, or threats of future harm ("I'm going to kill you tomorrow") do not justify the use of deadly force.

**Condition 3: Duty to Retreat**

A defendant must show that he did not have a duty to retreat or avoid the danger. A person must retreat or avoid danger by leaving or voicing his intention to leave and ending his participation in the confrontation. If the person retreats and the other continues to fight, the person who left the confrontation may be later justified in using deadly force when he can prove all three conditions of self-defense existed. You should always try to retreat from a confrontation before using deadly force if retreating does not endanger yourself or others.

If the person can escape danger by means such as leaving or using less than deadly force, he must use those means. If you have no means to escape the other person's attack and you reasonably, honestly believe that you are about to be killed or receive serious bodily harm, you may be able to use deadly force if that is the only way for you to escape that danger.

### **Castle Doctrine**

Under certain changes enacted in 2008, a person does not have a duty to retreat from the residence that they lawfully occupy before using force in self-defense or defense of another. Additionally, there is no duty to retreat if the person is lawfully in that person's vehicle or lawfully is an occupant in a vehicle owned by an immediate family member of that person. However, being a lawful occupant of a residence or vehicle is not a license to use deadly force against an attacker. The person who is attacked, without fault of his own, may use deadly force only if he reasonably and honestly believed that deadly force was necessary to prevent serious bodily harm or death. If the person does not have this belief, he should not use deadly force. Again, if it does not put your life or the life of others in danger, you should withdraw from the confrontation if it is safe for you to do so.

The law presumes you to have acted in self-defense or defense of another when using deadly force if the victim had unlawfully and without privilege entered or was in the process of entering the residence or vehicle you occupy. The presumption does not apply if the defendant was unlawfully in that residence or vehicle. The presumption does not apply if the victim had a right to be in, or was a lawful resident, of the residence or vehicle.

The presumption of self-defense is a rebuttable presumption. The term "rebuttable presumption" means the prosecutor, and not the defendant, carries the burden of producing evidence contrary to the facts that the law presumes. However, a rebuttable presumption does not relieve the defendant of the burden of proof. If the prosecutor provides sufficient evidence to prove that the defendant created the confrontation or that the use of deadly force was not reasonably necessary to prevent death or great bodily harm then the presumption of self-defense no longer exists.

*Statutory Reference(s): R.C. 2901.05 sets forth the rebuttable presumption R.C. 2901.09(B) establishes that there is no duty to retreat before using force if a person is a lawful occupant of that person's vehicle or a lawful occupant in a vehicle owned by an immediate family member.*

### **Defense of Others**

A person may defend another only if the protected person would have had the right to use deadly force in self-defense themselves. Under Ohio law, a person may defend family members, friends or strangers. However, just as if he were protecting himself, a person cannot use any more force than is reasonable and necessary to prevent the harm threatened.

A defendant, who claims he used deadly force to protect another, has to prove that he reasonably and honestly believed that the person he protected was in immediate danger of serious bodily harm or death and that deadly force was the only way to protect the person from that danger. Furthermore, the defendant must also show that the protected person was not at fault for creating the situation and did not have a duty to leave or avoid the situation.

**WARNING:** The law specifically discourages citizens from taking matters into their own hands and acting as law enforcement. This is true even if the person thinks he is performing a good deed by protecting someone or helping law enforcement. The Ohio Supreme Court has ruled that a person risks criminal charges if he interferes in a struggle and protects the person who was at fault, even if he mistakenly believed that person did not create the situation.

In other words, if you misinterpret a situation and interfere, you may face criminal charges because your use of deadly force is not justified. If you do not know all the facts and interfere, you will not be justified to use force. It does not matter that you mistakenly believed another was in danger and not at fault.

Of greater concern than risking criminal charges is the fact that you may be putting yourself and others in danger. If you use your handgun to interfere in a situation, and an officer arrives on the scene, the officer will not be able to tell if you are the criminal or if you are the Good Samaritan.

Ohio law does not encourage vigilantism. A license to carry a concealed handgun does not deputize you as a law enforcement agent. Officers are trained to protect members of the community, handle all types of situations, and enforce the law. Do not allow the license to carry a concealed handgun give you a false sense of security or empowerment. Let law enforcement officers do their job. If you want to be a Good Samaritan, call the police.

### **Conclusion: Self-Defense Issues**

If the defendant fails to prove any one of the three conditions for self defense or defense of another, he fails to justify his use of deadly force. If the presumptions of deadly force in the home or vehicle are removed and the defendant is unable to prove that he did not create the situation or that the use of deadly force was reasonably necessary, he fails to justify his use of deadly force. Under either condition, if convicted, an individual will be sentenced accordingly.

### **Defense of Property**

There must be immediate threat of serious bodily harm or death in order to use deadly force. Protecting property alone does not allow for the use of deadly force. A property owner may use reasonable, but never deadly force, when he honestly believes that the force will protect his property from harm.

If a person's property is being attacked or threatened, he may not use deadly force unless he reasonably believes it was the only way to protect himself or another from being killed or receiving serious bodily harm. Deadly force can never be used solely to protect property no matter where the threat to the property occurs.

### **Conclusion**

A license to carry a concealed handgun does not bring with it the automatic right to use deadly force. The appropriateness of using any force depends on the specific facts of each and every situation.

## **Dispute Resolution**

### **Introduction**

Because of the serious consequences inherent with the use of deadly force, it should always be a last option for resolving a problem. If you have a problem, you should consider other ways of resolving the problem first. Ohioans have many different options for settling disputes outside the traditional judicial arena in a quick, equitable, and most importantly, legal manner, that do not require force.

Broadly termed "alternative dispute resolution" (ADR), these methods recognize that for many people, the judicial process is time consuming and cumbersome, possibly expensive, and often confusing. Instead of giving citizens the choice of taking a matter to court or into their own hands for satisfaction, alternative dispute resolution offers a third way that has been overwhelmingly shown to be successful in ending disputes of all types. These choices include mediation, arbitration, conciliation and negotiation.

### **Basic Forms of Dispute Resolution**

Alternative dispute resolution spans a spectrum of methods, each more formalized and binding than the last.

The most obvious form of alternative dispute resolution is avoidance. This "like it or lump it" response to a dispute is often the hardest to accept as it means surrendering one's own choice in favor of someone else's. Depending on the issue, avoidance may not be possible.

If one cannot avoid a conflict, discussion is often the next best way to solve a dispute. Direct talks often result in an acceptable solution that ends in conciliation and defused tension. Sometimes, however, the best way to solve a conflict using discussion is to have negotiation through agents. In simple conflicts, these agents can be friends, relatives, a counselor or religious advisor. Other times, agents can include formal, recognized officials such as labor or management representatives, or attorneys.

Formal alternative dispute resolution often involves a neutral third party whose advice and decision may have binding effect on the participants. The least binding form of third-party intervention is

involvement of an ombudsman.

An ombudsman is most frequently found within a company or large organization and may be empowered to facilitate consumer complaints or employee disputes. While compensated by the organization, the ombudsman is normally answerable only to the most upper-level management or to the board of directors and is engaged to be as neutral and fair as possible. An ombudsman is generally empowered to talk to anyone, uncover facts, and make a recommendation to senior management within an organization. Some large American companies who employ ombudsmen for employee disputes include FedEx, IBM and McDonald's Corporation.

Another, more involved, form of negotiated settlement is mediation. This method of ADR is appropriate when the various sides wish to preserve a relationship or terminate it with the least amount of ill will. Mediation involves negotiation, where a neutral mediator guides the process. Mediation does not force compromise, and parties are expected to reach an agreement only if they are convinced such an agreement is reasonable.

When negotiations fail, the parties can opt to try arbitration, where a neutral arbitrator is given authority by the parties to impose a settlement after each side presents its "case." The arbitrator renders a decision which can be binding or non-binding upon the parties. Non-binding decisions may provide a guide for the parties to reach a settlement or to give insight into the possible outcome of more traditional litigation. Many contracts require signers to choose arbitration as a prerequisite to a lawsuit.

Should arbitration not be an option, or if the non-binding result does not lead to a settlement, the parties can still engage in alternatives to the traditional courtroom trial. These alternatives almost always require legal counsel and are more complex than the extra-judicial remedies listed here.

#### **Advantages of Alternative Dispute Resolution**

Besides the faster timeline and usually lower cost, alternative dispute resolution has a number of strengths that may make it a better choice in some disagreements. ADR allows for a much broader range of equitable solutions, provides for more direct participation by the parties in the settlement of their disputes, increases the likelihood of uncovering the underlying problems that led to the disagreement,

and has a greater chance of creating agreements that both sides will adhere to. By reaching a settlement through consensus rather than by judicial decision, participants in ADR have told researchers that they feel more empowered, their emotional concerns as well as their legal or financial positions had been acknowledged and, their belief in the legal system had improved.

### **The Ohio Commission on Dispute Resolution and Conflict Management**

The state of Ohio, recognizing ADR has an important role in conflict resolution, created the Ohio Commission on Dispute Resolution and Conflict Management to promote and strengthen the state's ADR policy. Established in 1989, the Commission provides Ohioans with forums, processes, and techniques for resolving disputes. The Commission provides dispute resolution and conflict management training, consultation and technical assistance in designing dispute resolution programs, and facilitation and mediation services.

The information contained in this section should not be construed as legal advice. It is not an endorsement of alternative dispute resolution over traditional forms of legal remedies, and readers are cautioned that any questions about their rights should be discussed with an attorney prior to engaging in legal action of any type.

For more information on Alternative Dispute Resolution, contact:

Ohio Commission on Dispute Resolution  
and Conflict Management  
Riffe Center  
77 S. High Street, 24th Floor  
Columbus, OH 43215-6108  
Phone: (614) 752-9595  
Fax: (614) 752-9682  
<http://www.disputeresolution.ohio.gov/>

### **Conclusion**

This pamphlet is intended to provide you with information regarding Ohio's concealed carry law. The Office of the Attorney General will continue to work closely with the legislature and law enforcement with a common goal of helping to ensure a safe, efficient licensing process for Ohioans.

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Revised 09/03/09

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# EXHIBIT B



RICHARD CORDRAY  
OHIO ATTORNEY GENERAL

# OHIO PEACE OFFICER TRAINING COMMISSION



*Guidance for OPOTC-Certified Commanders*

## Weapons Disabilities

## Introduction

The purpose of this document is to clarify the Ohio Peace Officer Training Commission's ("OPOTC" or the "Commission") position with respect to weapons disabilities, OPOTC-approved firearms training, and the issuance of certificates evidencing successful completion of such training. In short, OPOTC-certified school commanders are prohibited from providing firearms training to, and the Commission will not generate a certificate of successful completion for, a student who is under a weapons disability, and is thus prohibited by law from acquiring, having, carrying, or using a firearm. When determining a student's eligibility to participate in firearms training, we must look to relevant statutes, both state and federal, for guidance.

## State Weapons Disabilities

Ohio Revised Code ("R.C.") Section 2923.13 creates a state weapons disability for anyone who (1) is a fugitive from justice; (2) is under indictment for or has been convicted of any felony offense of violence;<sup>1</sup> (3) 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; (4) 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; (5) 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; (6) is drug dependent, in danger of drug dependence, or a chronic alcoholic; or (7) 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,<sup>2</sup> or is an involuntary patient other than one who is a patient only for purposes of observation.<sup>3</sup> State weapons disabilities can be relieved in one of two ways: by court order or by an unconditional pardon from the Governor. The procedures and effect are quite different, and are summarized as follows:

Court Order: In cases where a state weapons disability stems from indictment, conviction, or adjudication of a felony offense of violence or drug offense under R.C. 2923.13(A)(2) or (3), relief from the disability may be sought pursuant to R.C. 2923.14. This statutory procedure is the exclusive remedy by which a court can remove a state weapons disability.<sup>4</sup> In other words, a court order sealing the record of conviction pursuant to R.C. 2953.32 (oftentimes referred to as an "expungement") is not sufficient to relieve a defendant of a weapons disability imposed by R.C. 2923.13. To seek relief of a disability pursuant to R.C. 2923.14, a person must apply to the court of common pleas in the county in which he or she resides at the time of application. This is true even if the weapons disability resulted from adjudication as a delinquent child in juvenile court.<sup>5</sup> The court will then conduct a hearing and determine whether the disability shall be lifted.

<sup>1</sup> R.C. 2901.01(A)(9)

<sup>2</sup> R.C. 5122.01(B)

<sup>3</sup> R.C. 2923.13(A)

<sup>4</sup> *State v. Hendren*, 9<sup>th</sup> Dist. No. 22464, 2005-Ohio-2814

<sup>5</sup> R.C. 2923.13(A)(2) and (3) (imposing the weapons disability specifically on juveniles adjudicated as delinquent children on violent felony or drug charges) and R.C. 2923.14(A) (providing that "any person" subject to an R.C. 2923.13(A)(2) or (3) weapons disability may petition the common pleas court in that person's county of residence).

<sup>6</sup> R.C. 2953.32(D)

<sup>7</sup> *In re Forster*, 161 Ohio App.3d 627, 2005-Ohio-3094 (holding that where an agency is specifically authorized by R.C. 2953.32(D) to inspect a sealed conviction, the agency may consider the conviction in performing its lawful functions).

<sup>8</sup> R.C. 2967.04(B)

<sup>9</sup> 18 U.S.C. 921(a)(33)(B)(ii)

<sup>10</sup> 18 U.S.C. 921(a)(20)

<sup>11</sup> R.C. 2151.358(H)

As an example, suppose a student's criminal background check reveals a prior conviction for misdemeanor drug possession under R.C. 2925.11 in the Franklin County Municipal Court, but the student now resides in Hamilton County. The student is prohibited from acquiring, having, carrying or using a firearm as provided in R.C. 2923.13(A)(3). The OPOTC will notify the student and the school commander that an apparent weapons disability exists, which the student must resolve prior to participating in any portion of firearms training in any OPOTC-approved training program. The student would have to apply to the common pleas court in his or her county of residence, in this case Hamilton County, and request a court order to remove the disability pursuant to R.C. 2923.14. After the hearing, if the court granted the student's request, the student would forward a copy of the court's journal entry to the OPOTC. The Commission would then issue a letter to the student and school commander indicating that the apparent weapons disability had been resolved, permitting the student to participate in firearms training.

The removal of a weapons disability pursuant to R.C. 2923.14 will have no effect on the underlying conviction or adjudication. A student may, at his or her option, seek to have the record of conviction sealed pursuant to R.C. 2953.32 (R.C. 2151.358 if it was a juvenile court adjudication). In such a case, the student would petition the court that presided over the case resulting in the conviction or adjudication (e.g. the Franklin County Municipal Court in the example cited above), which may be different than the court that can remove the weapons disability. The sealing of the record does not remove the student's conviction or adjudication; it merely prohibits the general public from being able to view it. Accordingly, both the OPOTC and law enforcement agencies acting as prospective employers will still have access to the record of conviction.<sup>6</sup> It should be noted that if the student desires to enroll in peace officer basic training and has a felony conviction, R.C. 109.77(E)(3) prohibits the student from being awarded a peace officer basic training certificate. This is true even if the record of conviction has been sealed.<sup>7</sup> In such case, the student's only recourse is to seek an unconditional pardon from the Governor, as discussed below.

Governor's Pardon: Section 11, Article III of the Ohio Constitution gives the Governor of Ohio the authority to grant pardons. "An unconditional pardon relieves the person to whom it is granted of all disabilities arising out of the conviction or convictions from which it is granted."<sup>8</sup> Thus, an unconditional pardon will not only relieve a state weapons disability, it removes all consequences of the underlying conviction. As indicated above, R.C. 109.77(E)(3) disqualifies a student who has a felony conviction from becoming a peace officer; an unconditional pardon is necessary to remove this disqualification.

As an example, suppose the criminal background check of a student intending to enroll in peace officer basic training reveals a prior conviction for Felonious Assault under R.C. 2903.11, a felony offense of violence as defined in R.C. 2901.01(A)(9). Such a conviction creates both a state and a federal weapons disability (see Federal Weapons Disabilities below). The student could apply to the

common pleas court in his or her county of residence to remove the state weapons disability pursuant to R.C. 2923.14. However, R.C. 109.77(E)(3) would still disqualify the student, as a convicted felon, from obtaining a peace officer basic training certificate. Thus, to be eligible for training, the student would have to obtain an unconditional pardon from the Governor, which would also resolve the state weapons disability. Upon receiving a copy of the Governor's warrant, the Commission would notify the student and school commander that the state weapons disability and/or disqualifying felony conviction had been resolved, permitting the student to enroll and/or participate in basic training.

### **Federal Weapons Disabilities**

Section 922(g), Title 18, of the United States Code ("U.S.C.") creates a federal weapons disability for anyone who (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) is a fugitive from justice; (3) is an unlawful user of or addicted to any controlled substance; (4) has been adjudicated as a mental defective or has been committed to any mental institution; (5) being an alien, is illegally or unlawfully in the United States; (6) has been discharged from the Armed Forces under dishonorable conditions; (7) having been a citizen of the United States, has renounced his citizenship; (8) is subject to a court order restraining such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; or (9) has been convicted in any court of a misdemeanor crime of domestic violence.

It should be noted that in many respects, federal weapons disabilities are very similar to Ohio's. Perhaps the most significant difference is that federal law imposes a weapons disability for misdemeanor domestic violence convictions, which are defined at 18 U.S.C. 921(a)(33). This section defines a misdemeanor domestic violence conviction as a conviction for an offense that is (1) "a misdemeanor under federal or state law" and (2) "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." As a general rule, relief from federal weapons disabilities can be sought from the United States Attorney General pursuant to 18 U.S.C. 925(c). However, in cases of a state misdemeanor domestic violence conviction, the federal statutory definition of "misdemeanor crime of domestic violence" excludes any conviction that "has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored."<sup>9</sup> In other words, an order from an Ohio court sealing the record of conviction pursuant to R.C. 2953.32, while it does not technically "relieve" the federal disability [which only the United States Attorney General can do pursuant to 18 U.S.C. 925(c)], it does exclude the domestic violence conviction from being considered as a "conviction" that would trigger a federal weapons disability. Similarly, conviction of a "crime punishable by imprisonment for a term exceeding one year" (i.e. a felony conviction in Ohio) does not count as a "conviction" if it has been "expunged, or set aside or [if the] person has been pardoned or has had civil rights restored."<sup>10</sup> Thus, in effect, an expungement from an Ohio state court does remove the federal domestic violence and felony conviction weapons disabilities. Alternatively, an unconditional pardon yields the same result.

As an example of a federal weapons disability, suppose a student's criminal background check reveals a prior conviction for misdemeanor Domestic Violence under R.C. 2919.25. Such a conviction does not create a state weapons disability under R.C. 2923.13. However, a federal weapons disability is imposed by 18 U.S.C. 922(g)(9). The student would need to petition the court in which he or she was convicted of the domestic violence offense for an order sealing the record of conviction pursuant to R.C. 2953.32. Such an order would exclude the conviction from the federal statutory definition of a misdemeanor crime of

domestic violence, and hence the federal weapons disability would no longer apply. The student would need to forward a copy of the court's order sealing the record of conviction to the OPOTC. The Commission would then notify the student and school commander that the disability had been resolved. As an alternative to the expungement under R.C. 2953.32, the student could petition the Governor for an unconditional pardon. As previously mentioned, since Ohio law does not recognize a misdemeanor domestic violence conviction as an offense that would trigger a state weapons disability under R.C. 2923.13, an application to the common pleas court pursuant to R.C. 2923.14 is not necessary.

### **Juvenile Adjudications**

It should be noted that, under Ohio law, an adjudication in juvenile court as a delinquent child is not considered to be a "conviction" of a criminal offense.<sup>11</sup> In cases where juvenile adjudications are to be treated the same as criminal convictions, the General Assembly has specified that the particular statute applies to both persons who have been convicted of a particular criminal offense, and to persons who have been adjudicated as a delinquent child for the commission of acts that would constitute that particular offense. For instance, the state "felony offense of violence" weapons disability imposed by R.C. 2923.13(A)(2) is specifically made applicable to persons who have 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.

As an example of how juvenile adjudications can sometimes apply, suppose a student intending to enroll in peace officer basic training has a prior juvenile court adjudication as a delinquent child for committing an act that would constitute Felonious Assault under R.C. 2903.13. R.C. 2923.13(A)(2) imposes a state weapons disability since that subsection specifically applies to juvenile adjudications, and Felonious Assault is a felony offense of violence under R.C. 2901.01(A)(9). However, in this case there is no federal weapons disability imposed by virtue of a conviction of a "crime punishable by imprisonment for a term exceeding one year." Rather, 18 U.S.C. 921(a)(20) states that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." In other words, since under Ohio law a juvenile adjudication is not considered a criminal conviction, the federal weapons disability does not apply. Similarly, R.C. 109.77(E)(3) does not disqualify the student for having a felony adjudication, since that statute is not expressly made applicable to juvenile court adjudications. Thus, the OPOTC would notify the student and school commander of the apparent state weapons disability. The student would need to petition the common pleas court in his or her county of residence pursuant to R.C. 2923.14 to remove the weapons disability. Once obtained, a copy of the court's journal entry would be forwarded to the OPOTC, and the Commission would in turn notify the student and school commander that the disability had been resolved.

As another example, suppose the student's prior juvenile adjudication was for a misdemeanor domestic violence violation. In this case, there would be no state weapons disability, since Ohio law does not impose a disability for a domestic violence conviction, even if committed by an adult. Moreover, there would be no federal weapons disability, since under Ohio law the juvenile adjudication is not a criminal conviction. Thus, the student would be permitted to participate in firearms training.

### **Disclaimer**

This document is not intended to cover every conceivable circumstance that students and/or school commanders may face, nor is it intended to provide specific legal advice for students who are subject to weapons disabilities and/or disqualifying offenses. Rather, the examples given are intended to illustrate typical scenarios that the Commission frequently encounters, and to clarify the types of proof the Commission will require to approve a prospective student for training when an issue results from his or her

criminal background check. As always, the Commission urges students and commanders to seek the advice of competent legal counsel to determine what steps are appropriate to their specific situation.