ORIGINAL

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 09-1198

STATE OF OHIO

Appellee

v.

JERMAINE C. BAKER

Appellant

On Appeal from the Summit County Court of Appeals Ninth Appellate District Court of Appeals No. 23713

MERIT BRIEF OF APPELLEE STATE OF OHIO

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF AUTHORITIES	III
STATEMENT OF FACTS	1
ARGUMENT:	
State's Proposition of Law:	
In A Prosecution Under R.C. 2923.13(A)(2) And (A)(3) The Defendant May Request To Have The Jury Instructed That The Defendant Has A Prior Conviction For An Offense Of Violence And A Prior Conviction For Illegal Possession Of A Drug Of Abuse. If The Court Allows The Instruction The Jurors Must Also Be Instructed That They May Find The Essential Elements Of The Prior Convictions Proved Beyond A Reasonable Doubt. The Defendant Must Personally Agree On The Record In Open Court To Such An Instruction	3
CONCLUSION	24
PROOF OF SERVICE	24

APPENDIX	**Appx. Page**
CONSTITUTIONAL PROVISIONS, STATUTES:	
Ohio Revised Code	
R.C. 2903.08	A-1
R.C. 2907.04	A-5
R.C. 2913.51	A-6
R.C. 2919.22	A-7
R.C. 2919.25	A-15
R.C. 2921.05	A-18
R.C. 2923.13	A-19
R.C. 2925.11	A-20
R.C. 2945.75	A-27
Ohio Rules of Evidence	
Evid.R. 403	A-28
Federal Rules of Evidence	
Rule of Evidence 403	A-29

TABLE OF AUTHORITIES

CASES: **PAGE(S)**

Allen v. State (Ga. 2008), 663 S.E.2d 370 19

Anderson v. Commonwealth (Ky. 2009), 281 S.W.3d 761 21

Blakemore v. Blakemore (1983), 5 Ohio St.3d 217 7

Brown v. State (Fla. 1998), 719 So.2d 882 ..... 18, 19

Cox v. State (Fla. 2002), 819 So.2d 705 18

Curry v. State (Ga. 2008), 657 S.E.2d 218 19

Ferguson v. State (Ark. 2005), 210 S.W.3d 53 19

Louisiana v. Ball (La. 1999), 756 So.2d 275 4

Old Chief v. United States (1997), 519 U.S. 172 ..... Passim

People v. Walker (Ill. 2004), 812 N.E.2d 339 18

Peraita v. State (Ala. 2004), 897 So.2d 1227 20

Ross v. State (Ga. 2005), 614 S.E.2d 31 ..... 19, 22

Sams v. Indiana (Ind. App. 1997), 688 N.E.2d 1323 20

Sawyer v. State (Miss. 2008), 2008 WL 2582530 19

State v. Allen (1987), 29 Ohio St.2d 53 7

State v. Allison (Ct. App. Wash.), 142 Wash. App. 1048, 2008 WL 257337.. 19

State v. Alvarez (N.J. Super 1999), 723 A.2d 91 20

State v. Baker, 9th Dist. App. No. 23713, 2009-Ohio-2340 ..... 2, 3, 13

State v. Baker, 123 Ohio St.3d 1516, 2009-Ohio-6486 1

State v. Chandler
(Sept. 1, 1999), 5th Dist. App. No. 98CA15, 1999 WL 770229 ..... 9, 23

State v. Carr
(Dec. 10, 1999), 12th Dist. App. No. 98-L-131, 1999 WL 1314672 15

TABLE OF AUTHORITIES - continued

CASES: **PAGE(S)**

State v. Fogle, 11th Dist. App. No. 2008-P-0009, 2009-Ohio-1005 17

State v. Free (Feb. 13, 1998), 2nd Dist. App. No. 15901, 1998 WL 57373.. 8

State v. Godbolt
(Apr. 19, 1999), 5th Dist. App. No. 98CA00101, 1999 WL 254370. 9, 23

State v. Hatfield, 11th Dist. App. No. 06-A-0033, 2007-Ohio-7130..... 1, 16, 17, 18

State v. Henton (1997), 121 Ohio App.3d 501..... 14, 15

State v. Hilliard, 9th Dist. App. No. 22808, 2006-Ohio-3918 13

State v. Jackson, 10th Dist. App. No. 02AP-468, 2003-Ohio-1653..... 14, 22

State v. James (Tenn. 2002), 81 S.W.3d 751..... 19

State v. Johnson, 8th Dist. App. No. 91900, 2009-Ohio-4367..... 11

State v. Johnson, 9th Dist. App. No. 22688, 2006-Ohio-1313 13

State v. Jordan (Apr. 29, 1999), 8th Dist. App. No. 73453..... 10

State v. Kisseberth 2nd Dist. App. No. 20500, 2005-Ohio-3059 8

State v. Kole
(June 28, 2000), 9th Dist. App. No. 98CA007116, 2000 WL 840503,
rev'd on other grounds, (2001) 92 Ohio St.3d 303 ..... 12, 13, 23

State v. Little (N.C. App. 2008), 664 SW.E.2d 432 19

State v. Long (1978), 53 Ohio St.2d 91 ..... 3, 7

State v. McGrath
(Sept. 6, 2001), 8th Dist. App. No. 77896, 2001 WL 1167152..... 10

State v. Melton, 11th Dist. App. No. 2009-L-078, 2010-Ohio-1278 ..... 18, 23

State v. Mewbourn (Tx. App. 1999), 993 S.W.2d 771 20

State v. Mundt, 115 Ohio St.3d 22, 2007-Ohio-4836..... 4

State v. Munz, 8th Dist. App. No. 79576, 2002-Ohio-675..... 11

TABLE OF AUTHORITIES - continued

CASES: **PAGE(S)**

State v. Nadock, 11th Dist. App. No. 2009-L-042, 2010-Ohio-1161 ..... 17, 22

State v. Parks, 8th Dist. App. No. 90368, 2008-Ohio-4245 21

State v. Payne
(Mar. 31, 1999), 12th Dist. App. No. 97-L-284, 1999 WL 262177 ... 15, 23

State v. Payne, 114 Ohio St.3d 502, 2007-Ohio-4642 4

State v. Perry, 101 Ohio St.3d 118, 2004-Ohio-297 3

State v. Renner (1998), 125 Ohio App.3d 383 8

State v. Riffle, 5th Dist. App. No. 2007-0013, 2007-Ohio-5299 9

State v. Rodgers, 11th Dist. App. No. 2007-T-0003, 2007-Ohio-2757 ..... 16, 23

State v. Roswell (Wash. 2008), 2008 WL 5088497 19

State v. Russell
(Nov. 9, 1998), 12th Dist. App. No. CA98-02-018, 1998 WL 778312 18, 23

State v. Sage (1987), 31 Ohio St.3d 173 7

State v. Simmons, 11th Dist. App. No. 2004-L-131, 2005-Ohio-6706..... 16

State v. Simms, 1st Dist. App. Nos. C 030138, C 030211, 2004-Ohio-652 8

State v. Sinkfield (Oct. 2, 1998), 2nd Dist. App. No. 16277, 1998 WL 677413 8

State v. Smith (1990), 68 Ohio App.3d 692 ..... 4, 11, 13

State v. Taniguchi (1995), 74 Ohio St.3d 154 22

State v. Tice (N.C. App. 2008), 664 S.E.2d 368 20

State v. Tisdel, 8th Dist. App. No. 87516, 2006-Ohio-6763 11

State v. Totarella, 11th Dist. App. No. 2002-L-147, 2004-Ohio-1175 15

State v. Twyford (2002), 94 Ohio St.3d 340 7

State v. Williams, 9th Dist. App. No. 22877, 2006-Ohio-4720 13

TABLE OF AUTHORITIES - continued

CASES: **PAGE(S)**

State v. Woods
(Aug. 30, 2001), 8th Dist. App. No. 78752, 2001 WL 1002233 10

CONSTITUTIONAL PROVISIONS, STATUTES:

Ohio Revised Code

R.C. 2903.08 23
R.C. 2907.04 23
R.C. 2913.51 1
R.C. 2919.22 23
R.C. 2919.25 23
R.C. 2921.05 8
R.C. 2923.13 ..... 1, 3, 11, 13, 14, 16, 21, 22, 23
R.C. 2925.11 1
R.C. 2945.75 ..... 3, 22

Ohio Rules of Evidence

Evid.R. 403 6

Federal Rules of Evidence

Rule of Evidence 403 ..... 5, 6

STATEMENT OF FACTS

This is a conflict case presenting the question whether *Old Chief v. United States* (1997), 519 U.S. 172 allowing a defendant to stipulate to prior criminal convictions applies to state law prosecutions. *State v. Baker*, 123 Ohio St.3d 1516, 2009-Ohio-6486. The conflict case is *State v. Hatfield*, 11th Dist. App. No. 06-A-0033, 2007-Ohio-7130. Since *Old Chief* is a case involving prejudice flowing from introduction of a prior conviction to prove an element of an offense where the name of and information about that offense was unnecessary to prove the offense *Old Chief* is relevant to Ohio prosecutions.

Appellant Baker was convicted after jury trial of having weapons under disability, R.C. 2923.13(A)(2)/(A)(3), a felony of the third degree, and misdemeanor obstruction of official business. He was acquitted of possession of cocaine, R.C. 2925.11(A), a felony of the fourth degree, and receiving stolen property, R.C. 2913.51(A), a felony of the fourth degree.

Prior to trial the parties stipulated that Baker had a prior crime of violence, robbery, and a prior possession of a drug abuse, possession of cocaine. Baker stipulated that there was no need for identification testimony. T. 1, 3-4. The State had two journal entries for the offenses of robbery and possession of cocaine. The parties agreed that the entries would be redacted to remove reference to any other offenses and that the redacted entries would go to the jury. Id. 4-5. One journal entry showing only the robbery conviction went to the jury unredacted. The other entry showing possession of cocaine and tampering with evidence was redacted to remove the tampering conviction. There was no objection to admission of the entries. Id. 119-121, 125; State Exhibits 14 and 15.

The Ninth District Court of Appeals analyzed the issue of the admission of the entries as plain error. The court found no error based on its prior precedent. *State v. Baker*, 9th Dist. App. No. 23713, 2009-Ohio-2340, ¶16-¶18.

STATE'S PROPOSITION OF LAW

IN A PROSECUTION UNDER R.C. 2923.13(A)(2) AND (A)(3) THE DEFENDANT MAY REQUEST TO HAVE THE JURY INSTRUCTED THAT THE DEFENDANT HAS A PRIOR CONVICTION FOR AN OFFENSE OF VIOLENCE AND A PRIOR CONVICTION FOR ILLEGAL POSSESSION OF A DRUG OF ABUSE. IF THE COURT ALLOWS THE INSTRUCTION THE JURORS MUST ALSO BE INSTRUCTED THAT THEY MAY FIND THE ESSENTIAL ELEMENTS OF THE PRIOR CONVICTIONS PROVED BEYOND A REASONABLE DOUBT. THE DEFENDANT MUST PERSONALLY AGREE ON THE RECORD IN OPEN COURT TO SUCH AN INSTRUCTION.

LAW AND ARGUMENT

Under R.C. 2923.13(A)(2) a prior conviction of a felony offense of violence is an essential element of the offense. Under R.C. 2923.13(A)(3) a prior conviction of possession of a drug of abuse is an essential element of the offense. The State had to prove the prior convictions beyond a reasonable doubt. *State v. Baker*, supra ¶17. Prior convictions are normally proved by evidence of identification and a certified journal entry, or by a certified copy of a record of the registrar of motor vehicles. R.C. 2945.75(B).

Since Baker did not object to the journal entries going to the jury at a minimum he forfeited any error and must show plain error. Plain error correction is a discretionary act and requires the defendant to show that his substantial rights were affected, that the outcome clearly would have been otherwise and that a manifest miscarriage of justice would occur absent the error. *State v. Long* (1978), 53 Ohio St.2d 91, paragraphs two and three of the syllabus; *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, ¶14.

Even if admission of the journal entries is determined to be error Baker cannot demonstrate any prejudice. That is because he was acquitted of possession of cocaine (which was one of the prior offenses) and receiving stolen property. It is impossible that

the jury went beyond use of the entries as proof of essential elements of the offense of having weapons under disability and convicted Baker due to misuse of the entries. See *State v. Smith* (1990), 68 Ohio App.3d 692, *695. Any argument otherwise is utter speculation. See *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶115, ¶132 where this Court held that speculation cannot prove the prejudice prong of ineffective assistance of counsel.

Indeed it should be said that this is more than a forfeiture case and that Baker waived any error by expressly agreeing that the journal entries could go to the jury after any redaction. T. 3, 4-5. Waiver is the "intentional relinquishment or abandonment of a right" and cannot form the basis of a plain error analysis. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶23.

Whatever this Court determines the impact of *Old Chief* to be on Ohio prosecutions Baker's convictions must be affirmed.

Old Chief

Old Chief does not involve plain error or waiver. The decision is not based on constitutional principles. *Louisiana v. Ball* (La. 1999), 756 So.2d 275, *278. In *Old Chief* the defendant was convicted of a federal offense that prohibited a person with a prior conviction of any felony (subject to certain exclusions) to possess a firearm. Defendant offered to stipulate that he had been convicted of a qualifying felony and that the jury could be so instructed. The government refused to stipulate and the trial court ruled that the government did not have to stipulate. A document reciting that the defendant had a prior conviction for assault in that defendant "did knowingly and unlawfully assault [the victim], said assault causing serious bodily injury" resulting in a prison term of five years was admitted into evidence.

The Supreme Court found that the document was relevant and framed the issue as one concerning the discretion of the trial court under Federal Rule of Evidence 403:

> The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. ***
> Such improper grounds certainly include the one that Old Chief points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily).***
>
> In dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, for the reasons already given, *but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning.* ***
>
> The District Court was also presented with alternative, relevant, admissible evidence of the prior conviction by Old Chief's offer to stipulate, evidence necessarily subject to the District Court's consideration on the motion to exclude the record offered by the Government. ***
>
> In arguing that the stipulation or admission would not have carried equivalent value, the Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it. ***
>
> This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him. ***

> *The issue is not whether concrete details of the prior crime should come to the jurors' attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute.* "A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, *see* 16 U.S.C. § 3372, to the most aggravated murder." *** The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instructions. ***
>
> In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available. ***
> FN11. In remanding, we imply no opinion on the possibility of harmless error, an issue not passed upon below.

Old Chief, supra *180- *192 (footnotes omitted.) (Emphasis added.)

The pertinent evidence rules are similar.

Federal Rule of Evidence 403 provides in part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice***

Ohio Evid.R. 403 provides in part:

> (A) Exclusion Mandatory
> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice***

It is well established that evidentiary rulings are reviewed under an abuse of discretion standard. A defendant must show material prejudice to warrant a reversal.

State v. Sage (1987), 31 Ohio St.3d 173, paragraph two of the syllabus; *State v. Long* (1978), 53 Ohio St.2d 91, *98. An abuse of discretion is more than an error of law and "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, *219.

Old Chief holds that where the indicted offense does not require any specific prior conviction and the prior conviction is likely to support a conviction on the charged offense by the jury generalizing a prior bad act into present bad character and convicting on that bad character it is an abuse of discretion as a matter of law to refuse a defense offer to stipulate to the prior conviction.

This Court has determined that:

> "The existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule."

State v. Allen (1987), 29 Ohio St.2d 53, *55.

Allen points the way to how *Old Chief* should be analyzed in cases where the statute makes the prior conviction an element of the offense; the primary issue is what the pertinent statute requires as an element.

OLD CHIEF IN THE OHIO COURTS

No Ohio court has found plain error based on *Old Chief.*

In *State v. Twyford* (2002), 94 Ohio St.3d 340 the defendant in a capital case who was also charged with having weapons under disability complained that the court erred in receiving evidence of a prior conviction of burglary to prove the prior conviction of an offense of violence. The issue was waived except for plain error. This Court stated that the prior conviction was a direct element of the offense and the state was entitled to prove the element as it did. Id. *359-*360.

First District

In *State v. Simms*, 1st Dist. App. Nos. C 030138, C 030211, 2004-Ohio-652 the defendant's prior rape conviction and actions at a prior proceeding were admitted as elements of an intimidation charge under R.C. 2921.05(B). The court distinguished *Old Chief* since the evidence also showed that the defendant acted purposely because of the prior charges; further, there was a stipulation to the conviction and the full judgment record was not admitted, only testimony about some details and consequences of the rape. Id. ¶7-¶10.

Second District

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

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

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

In *State v. Kisseberth* 2nd Dist. App. No. 20500, 2005-Ohio-3059 the defendant filed a motion in limine to be allowed to stipulate to a prior conviction. The motion was denied and the defendant did not preserve the issue. The court stated that a trial court

had discretion whether to allow a defendant to stipulate to a prior conviction constituting an element of an offense. The court found no plain error since only minimal evidence of the prior conviction was introduced, a limiting instruction was given, and there was competent credible evidence of guilt. Id. ¶18-¶29.

Fifth District

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

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

In *State v. Riffle*, 5th Dist. App. No. 2007-0013, 2007-Ohio-5299 the defendant was convicted of having a weapon under disability. There was a stipulation that defendant had two prior robbery convictions but the defendant did not object to

admission of the sentencing entry on those offenses. On appeal the defendant claimed that counsel was ineffective for not objecting and for not stipulating that defendant had previously been convicted of an offense of violence. The court of appeals found that defendant had not been prejudiced due to the evidence of guilt. Id. ¶26-¶41.

Eighth District

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

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

In *State v. McGrath* (Sept. 6, 2001), 8th Dist. App. No. 77896, 2001 WL 1167152 the court distinguished *Old Chief* since the defendant's argument concerned admission of other act evidence. The defendant had been convicted of retaliation and menacing by

stalking and the other act evidence including prior convictions was relevant to show the defendant's intent and the fear caused in the victim. Id. *4-*5.

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

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

In *State v. Johnson*, 8th Dist. App. No. 91900, 2009-Ohio-4367 the defendant was convicted of having weapons under disability. R.C. 2923.13(A)(2). The court adhered to its precedents and held that *Old Chief* applied to federal law. The court did hold that the trial court should not have admitted evidence of two prior convictions (where only one was required) but that the error was harmless. Id. ¶22, ¶26-¶27.

Ninth District

Pre-*Old Chief* in *State v. Smith* (1990), 68 Ohio App.3d 692 the defendant was charged but acquitted of having a weapon under disability. On appeal the defendant argued that it was unduly prejudicial to use a prior conviction for armed robbery when

the State could have used a prior conviction for CCW. The court of appeals held that neither the State nor the trial court is required to accept a stipulation to a prior offense element of an offense. Id. *695.

In *State v. Kole* (June 28, 2000), 9th Dist. App. No. 98CA007116, 2000 WL 840503, rev'd on other grounds, (2001) 92 Ohio St.3d 303 the defendant was convicted of having weapons under disability. The defendant offered to stipulate to a prior conviction for armed robbery. The trial court allowed a probation officer to testify to the prior conviction and the defendant did not object. The court of appeals did not find plain error. The court distinguished *Old Chief* as follows:

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

Kole, *4.

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

In *State v. Hilliard*, 9th Dist. App. No. 22808, 2006-Ohio-3918 the defendant was convicted of having weapons under disability. On appeal the defendant argued ineffective assistance due to counsel's failure to stipulate to prior convictions. Citing *State v. Kole*, supra and *State v. Smith*, supra the court of appeals did not find ineffective assistance; further, the court indicated whether to seek a stipulation was a trial tactic. Id. ¶26.

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

In *State v. Baker*, 9th Dist. App. No. 23713, 2009-Ohio-2340 (a prior *Old Chief* certified conflict case ultimately dismissed as improvidently accepted) the defendant was convicted of having weapons under disability under R.C. 2923.13(A)(2)/(A)(3). On appeal defendant asserted plain error. The court of appeals adhered to its precedents

and found no error in admitting journal entries of prior convictions to prove the elements of the offense. Id. ¶18.

Tenth District

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

Eleventh District

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

One is *State v. Henton* (1997), 121 Ohio App.3d 501 where the defendant was convicted of aggravated trafficking. The trial court admitted certified copies of two judgment entries indicating that defendant had two prior convictions for aggravated trafficking. Defendant stipulated that the documents were authentic and that he was the person named in the documents. The defendant argued in the trial court that only one prior conviction should have been admitted. On appeal the defendant raised *Old Chief* that had been decided after the trial concluded. The court of appeals held that the trial court abused its discretion in permitting evidence of two prior convictions when the

defendant had agreed to stipulate to admission of one. The error was not harmless because the evidence of guilt was not overwhelming. Id. *505-*508.

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

In *State v. Carr* (Dec. 10, 1999), 12th Dist. App. No. 98-L-131, 1999 WL 1314672 the defendant was convicted of DUI. The defendant had offered to stipulate to the prior convictions element. The defendant did not preserve the issue by objection. The court of appeals did not find plain error, relying on its decision in *State v. Payne*, supra.

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

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

In *State v. Hatfield*, 11th Dist. App. No. 06-A-0033, 2007-Ohio-7130, the second case in the Eleventh District in which a conviction was reversed under *Old Chief* the defendant was convicted of driving with a suspended license and aggravated vehicular homicide. The defendant's driving record was admitted over objection. The driving record showed two current suspensions and five prior suspensions. The defendant also offered to stipulate that his license was suspended at the time of an accident. The court of appeals found that evidence of an active suspension was necessary to prove an element of the charge. The court of appeals found that it was error to not approve the stipulation since defendant would have stipulated to his status as an unlicensed driver. Moreover, admission of evidence showing seven suspensions (five of them irrelevant to prove an element) constituted prohibited propensity or character evidence. Id. ¶133-¶148.

In *State v. Rodgers*, 11th Dist. App. No. 2007-T-0003, 2007-Ohio-2757 the defendant was convicted of having a weapon under disability under R.C. 2923.13(A)(2) and (A)(3). On appeal the defendant argued ineffective assistance of counsel because counsel stipulated to two prior convictions to prove one count of having weapons under disability. The court of appeals stated:

> {¶ 72} As is clear from the language of the aforementioned statute, the offense of Having Weapons while Under Disability may be proven by means of evidence showing that Rodgers had "used any firearm," after having been previously convicted of *either* of the aforementioned offenses.
> ***
> {¶ 75} In the instant case, the grand jury indictment, by charging Rodgers of Having Weapons while Under Disability on the basis of a prior conviction of either an offense of violence *or* a drug offense, gave the prosecution the option to pursue conviction under either subsection. ***

In *State v. Fogle,* 11th Dist. App. No. 2008-P-0009, 2009-Ohio-1005 the defendant was convicted of assembly or possession of chemicals to manufacture a controlled substance. The defendant wanted to stipulate that there was a meth laboratory. There was no objection to the testimony concerning the lab. The court of appeals found no plain error. The testimony concerning the lab described for the jurors what went into the manufacturing process and did not deal with a prior conviction. Id. ¶45, ¶49-¶52.

In *State v. Nadock,* 11th Dist. App. No. 2009-L-042, 2010-Ohio-1161 the defendant was convicted of domestic violence, a third degree felony because of two prior convictions of domestic violence. The court found that the defendant wanted to stipulate so as to prevent the State from mentioning in any manner the two prior convictions. *Old Chief* did not support that argument because the jury had to be aware of the fact that is a necessary element of the offense. Id. ¶31-¶32. Nor was *Hatfield* any support because there the defendant offered to stipulate the element that he was driving with a suspended license. Id. ¶35. The court found that the defendant could not bifurcate the trial or waive a jury trial on one element of the offense. Id. ¶38. The

defendant could have complied with *Old Chief* by stipulating that he had two prior domestic violence convictions. Id. ¶41.

In *State v. Melton,* 11th Dist. App. No. 2009-L-078, 2010-Ohio-1278 the defendant was charged with having weapons under disability and the parties agreed to a stipulation to a prior drug trafficking conviction with a limiting instruction. The stipulation was to "illegal drug trafficking in a drug of abuse." Id. ¶60. The court found the stipulation not barred by either *Old Chief* or *Hatfield* since the stipulation strictly followed the language of the statute. ¶71-¶72.

Twelfth District

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

OLD CHIEF IN THE STATE COURTS

There are courts that accept *Old Chief* as implementing a rule of decision in their jurisdictions. That occurred in *Brown v. State* (Fla. 1998), 719 So.2d 882, where there was a timely objection in the trial court and no harmless error. *Brown* was a status case. Later the Florida court distinguished *Old Chief* when other act evidence was at issue. *Cox v. State* (Fla. 2002), 819 So.2d 705, *716. *Old Chief* was followed in another status case, *People v. Walker* (Ill. 2004), 812 N.E.2d 339. Another status case where *Old Chief*

was followed is *Ferguson v. State* (Ark. 2005), 210 S.W.3d 53 (adopting the reasoning of *Brown*, supra).

Another status case is *Sawyer v. State* (Miss. 2008), 2008 WL 2582530 where the court emphasized that the prior offenses were armed robbery and the defendant was charged with armed robbery. Id. ¶28.

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

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

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

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

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

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

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

The Supreme Court of Kentucky adopted *Old Chief* so that a defendant charged with being a felon in possession of a firearm can make an admission to a prior felony conviction without the consent of the Commonwealth. The court found that the trial court's refusal to accept the admission and receive evidence of prior convictions for escape and receiving stolen property was harmless error. The court noted that had the jury not known the specific prior offenses it might speculate that the defendant had been convicted of far more serious offenses. *Anderson v. Commonwealth* (Ky. 2009), 281 S.W.3d 761.

ADOPTION OF OLD CHIEF MUST NOT DICTATE TO THE TRIAL COURT HOW DISCRETION IS TO BE EXCERCISED; MUST NOT UNFAIRLY HINDER THE STATE'S ABILITY TO PROVE ITS CASE; AND OLD CHIEF MUST BE READ IN CONFORMANCE WITH THE LANGUAGE OF OHIO STATUTES.

Certainly a defendant might be prejudiced in a R.C. 2923.13(A)(2) prosecution where proof of a prior conviction for rape or multiple convictions of aggravated robbery, say are put before the jury. There are guidelines which will protect both the interest of the defendant and of the State, without doing violence to the words of the pertinent criminal statutes. Guidelines will foster uniform application in the courts and should cut down on the number of appeals urging error under *Old Chief*.

If a defendant agrees to stipulate according to these guidelines the trial court would have the authority to accept the offer as an admission if the State did not agree to stipulate. Otherwise, a stipulation of fact is a voluntary agreement that is accepted by the court and which binds the parties. *State v. Parks*, 8th Dist. App. No. 90368, 2008-Ohio-4245, ¶11.

The State believes the test announced by the Supreme Court of Georgia in *Ross v. State* is fair to both parties. Specifically, *Old Chief* must be limited to felon status cases, where an element of the offense is a prior conviction of some sort. Under *Old Chief* a defendant cannot seek a stipulation to any other element and the defendant cannot preclude the jury from hearing any information about the prior conviction. See also *State v. Nadock*, supra 2010-Ohio-1161, ¶35, ¶38.

In order to prevent the jury from receiving full evidence of prior conviction(s) under R.C. 2945.75(B) it must be shown by the defendant and found by the trial court in the exercise of sound discretion that the prior conviction(s) "is of the nature likely to inflame the passions of the jury and raise the risk of a conviction based on improper considerations." *Ross*, supra 614 S.E.2d at **34; *Old Chief*, supra 519 U.S. at *192.

The defendant must agree to the stipulation personally on the record in open court to preclude later claims of ineffective assistance. The point is that if a defendant stipulates that he has a prior conviction for a felony of violence, and the offense is robbery say, the jury might speculate that the prior conviction is murder or child rape and defendant wants to hide it. A limiting instruction should be given. Any violation of the guidelines must be subject to harmless or plain error analysis.

Most importantly where the statute makes specific reference to the name or type of prior conviction required to prove the offense the stipulation must reference the required name or type of offense specified in the statute. In those situations the type of offense is jurisdictional and must be proved to the trier of fact. In Ohio a court cannot delete or insert words into a statute. *State v. Taniguchi* (1995), 74 Ohio St.3d 154, *156. That means that a defendant charged under R.C. 2923.13(A)(2) can't have the jury simply told that he is under a disability. *State v. Jackson*, supra.

For example, in prosecutions under R.C. 2919.25(A) charged as felonies of the third degree the defendant must agree to stipulate that he has either been convicted of two or more offenses of domestic violence or offenses listed in R.C. 2919.25(D)(3) and that the jury may find that element proved beyond a reasonable doubt. *State v. Russell,* supra.

In prosecutions under R.C. 2923.13(A)(2) or (A)(3) the stipulation must be for example, that there is a prior conviction for a felony of violence; or illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse and that the jury may find that element proved beyond a reasonable doubt. *State v. Godbolt,* supra; *State v. Rodgers,* supra; *State v. Kole,* supra; *State v. Melton,* supra.

In DUI prosecutions the stipulation must be that the defendant has the specified number of prior DUI convictions and that the jury may find that element proved beyond a reasonable doubt. *State v. Payne,* supra; *State v. Chandler,* supra.

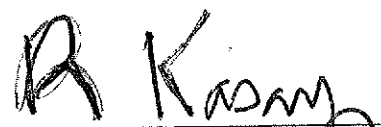
Some other statutes that make specific prior convictions or a certain status elements of the offense because they elevate the degree of the offense are 2903.06(B)(3), (C) and (D), aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter; R.C. 2903.08(B)(1), (C), aggravated vehicular assault, and vehicular assault; R.C. 2907.04(B)(4), unlawful sexual conduct with a minor; and R.C. 2919.22(E)(3) and (E)(5), endangering children. In *Old Chief* the statute was satisfied with generic felony convictions – possession of short lobsters to aggravated murder. There was no need to identity the name or nature of the prior offense. The State is unaware of any such criminal statute in Ohio.

CONCLUSION

Baker's convictions must be affirmed because he either waived the issue concerning *Old Chief* or cannot show plain error. Otherwise, the State requests that this Court adopt the State's Proposition of Law.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney



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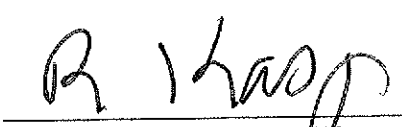
PROOF OF SERVICE

I hereby certify that a copy of the foregoing Brief was sent by regular U.S. Mail to Attorney Donald Gallick, 190 North Union Street, #201, Akron, Ohio 44304, on the 7th day of April, 2010.



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APPENDIX

2903.08 Aggravated vehicular assault; vehicular assault.

(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:

(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;

(b) As the proximate result of committing a violation of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance;

(c) As the proximate result of committing a violation of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance.

(2) In one of the following ways:

(a) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a reckless operation offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the reckless operation offense in the construction zone and does not apply as described in division (E) of this section;

(b) Recklessly.

(3) As the proximate result of committing, while operating or participating in the operation of a motor vehicle or motorcycle in a construction zone, a speeding offense, provided that this division applies only if the person to whom the serious physical harm is caused or to whose unborn the serious physical harm is caused is in the construction zone at the time of the offender's commission of the speeding offense in the construction zone and does not apply as described in division (E) of this section.

(B)(1) Whoever violates division (A)(1) of this section is guilty of aggravated vehicular assault. Except as otherwise provided in this division, aggravated vehicular assault is a felony of the third degree. Aggravated vehicular assault is a felony of the second degree if any of the following apply:

(a) At the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code.

(b) The offender previously has been convicted of or pleaded guilty to a violation of this section.

(c) The offender previously has been convicted of or pleaded guilty to any traffic-related homicide, manslaughter, or assault offense.

(d) The offender previously has been convicted of or pleaded guilty to three or more prior violations of section 4511.19 of the Revised Code or a substantially equivalent municipal ordinance within the previous six years.

(e) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A) of section 1547.11 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(f) The offender previously has been convicted of or pleaded guilty to three or more prior violations of division (A)(3) of section 4561.15 of the Revised Code or of a substantially equivalent municipal ordinance within the previous six years.

(g) The offender previously has been convicted of or pleaded guilty to three or more prior violations of any combination of the offenses listed in division (B)(1)(d), (e), or (f) of this section.

(h) The offender previously has been convicted of or pleaded guilty to a second or subsequent felony violation of division (A) of section 4511.19 of the Revised Code.

(2) In addition to any other sanctions imposed pursuant to division (B)(1) of this section, except as otherwise provided in this division, the court shall impose upon the offender a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of section 4510.02 of the Revised Code . If the offender previously has been convicted of or pleaded guilty to a violation of this section , any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, the court shall impose either a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of that section or a class one suspension as specified in division (A)(1) of that section.

(C)(1) Whoever violates division (A)(2) or (3) of this section is guilty of vehicular assault and shall be punished as provided in divisions (C)(2) and (3) of this section.

(2) Except as otherwise provided in this division, vehicular assault committed in violation of division (A)(2) of this section is a felony of the fourth degree. Vehicular assault committed in violation of division (A)(2) of this section is a felony of the third degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code, if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense, or if, in the same course of conduct that resulted in the violation of division (A)(2) of this section, the offender also violated section 4549.02, 4549.021, or 4549.03 of the Revised Code.

In addition to any other sanctions imposed, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section , any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of that section.

(3) Except as otherwise provided in this division, vehicular assault committed in violation of division (A)(3) of this section is a misdemeanor of the first degree. Vehicular assault committed in violation of division (A)(3) of this section is a felony of the fourth degree if, at the time of the offense, the offender was driving under a suspension imposed under Chapter 4510. or any other provision of the Revised Code or if the offender previously has been convicted of or pleaded guilty to a violation of this section or any traffic-related homicide, manslaughter, or assault offense.

In addition to any other sanctions imposed, the court shall impose upon the offender a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code or, if the offender previously has been convicted of or pleaded guilty to a violation of this section , any traffic-related homicide, manslaughter, or assault offense, or any traffic-related murder, felonious assault, or attempted murder offense, a class three suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of section 4510.02 of the Revised Code.

(D)(1) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(1) of this section.

(2) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(2) of this section or a felony violation of division (A)(3) of this section if either of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.06 of the Revised Code.

(b) At the time of the offense, the offender was driving under suspension under Chapter 4510. or any other provision of the Revised Code.

(3) The court shall impose a mandatory jail term of at least seven days on an offender who is convicted of or pleads guilty to a misdemeanor violation of division (A)(3) of this section and may impose upon the offender a longer jail term as authorized pursuant to section 2929.24 of the Revised Code.

(E) Divisions (A)(2)(a) and (3) of this section do not apply in a particular construction zone unless signs of the type described in section 2903.081 of the Revised Code are erected in that construction zone in accordance with the guidelines and design specifications established by the director of transportation under section 5501.27 of the Revised Code. The failure to erect signs of the type described in section 2903.081 of the Revised Code in a particular construction zone in accordance with those guidelines and design specifications does not limit or affect the application of division (A)(1) or (2)(b) of this section in that construction zone or the prosecution of any person who violates either of those divisions in that construction zone.

(F) As used in this section:

(1) "Mandatory prison term" and "mandatory jail term" have the same meanings as in section 2929.01 of the Revised Code.

(2) "Traffic-related homicide, manslaughter, or assault offense" and "traffic-related murder, felonious assault, or attempted murder offense" have the same meanings as in section 2903.06 of the Revised Code.

(3) "Construction zone" has the same meaning as in section 5501.27 of the Revised Code.

(4) "Reckless operation offense" and "speeding offense" have the same meanings as in section 2903.06 of the Revised Code.

(G) For the purposes of this section, when a penalty or suspension is enhanced because of a prior or current violation of a specified law or a prior or current specified offense, the reference to the violation of the specified law or the specified offense includes any violation of any substantially equivalent municipal ordinance, former law of this state, or current or former law of another state or the United States.

Effective Date: 01-01-2004; 06-01-2004; 09-23-2004; 04-04-2007

2907.04 Unlawful sexual conduct with minor.

(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

(B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.

(1) Except as otherwise provided in divisions (B)(2), (3), and (4) of this section, unlawful sexual conduct with a minor is a felony of the fourth degree.

(2) Except as otherwise provided in division (B)(4) of this section, if the offender is less than four years older than the other person, unlawful sexual conduct with a minor is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (B)(4) of this section, if the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree.

(4) If the offender previously has been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code, unlawful sexual conduct with a minor is a felony of the second degree.

Effective Date: 10-17-2000

2913.51 Receiving stolen property.

(A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

(B) It is not a defense to a charge of receiving stolen property in violation of this section that the property was obtained by means other than through the commission of a theft offense if the property was explicitly represented to the accused person as being obtained through the commission of a theft offense.

(C) Whoever violates this section is guilty of receiving stolen property. Except as otherwise provided in this division, receiving stolen property is a misdemeanor of the first degree. If the value of the property involved is five hundred dollars or more and is less than five thousand dollars, if the property involved is any of the property listed in section 2913.71 of the Revised Code, receiving stolen property is a felony of the fifth degree. If the property involved is a motor vehicle, as defined in section 4501.01 of the Revised Code, if the property involved is a dangerous drug, as defined in section 4729.01 of the Revised Code, if the value of the property involved is five thousand dollars or more and is less than one hundred thousand dollars, or if the property involved is a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code, receiving stolen property is a felony of the fourth degree. If the value of the property involved is one hundred thousand dollars or more, receiving stolen property is a felony of the third degree.

Effective Date: 10-29-1999

2919.22 Endangering children.

(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

(1) Abuse the child;

(2) Torture or cruelly abuse the child;

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

(4) Repeatedly administer unwarranted disciplinary measures to the child, when there is a substantial risk that such conduct, if continued, will seriously impair or retard the child's mental health or development;

(5) Entice, coerce, permit, encourage, compel, hire, employ, use, or allow the child to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of any material or performance that the offender knows or reasonably should know is obscene, is sexually oriented matter, or is nudity-oriented matter;

(6) Allow the child to be on the same parcel of real property and within one hundred feet of, or, in the case of more than one housing unit on the same parcel of real property, in the same housing unit and within one hundred feet of, any act in violation of section 2925.04 or 2925.041 of the Revised Code when the person knows that the act is occurring, whether or not any person is prosecuted for or convicted of the violation of section 2925.04 or 2925.041 of the Revised Code that is the basis of the violation of this division.

(C)(1) No person shall operate a vehicle, streetcar, or trackless trolley within this state in violation of division (A) of section 4511.19 of the Revised Code when one or more children under eighteen years of age are in the vehicle, streetcar, or trackless trolley. Notwithstanding any other provision of law, a person may be convicted at the same trial or proceeding of a violation of this division and a violation of division (A) of section 4511.19 of the Revised Code that constitutes the basis of the charge of the violation of

this division. For purposes of sections 4511.191 to 4511.197 of the Revised Code and all related provisions of law, a person arrested for a violation of this division shall be considered to be under arrest for operating a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them or for operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine.

(2) As used in division (C)(1) of this section:

(a) "Controlled substance" has the same meaning as in section 3719.01 of the Revised Code.

(b) "Vehicle," "streetcar," and "trackless trolley" have the same meanings as in section 4511.01 of the Revised Code.

(D)(1) Division (B)(5) of this section does not apply to any material or performance that is produced, presented, or disseminated for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under division (B)(5) of this section.

(3) In a prosecution under division (B)(5) of this section, the trier of fact may infer that an actor, model, or participant in the material or performance involved is a juvenile if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the actor, model, or participant as a juvenile.

(4) As used in this division and division (B)(5) of this section:

(a) "Material," "performance," "obscene," and "sexual activity" have the same meanings as in section 2907.01 of the Revised Code.

(b) "Nudity-oriented matter" means any material or performance that shows a minor in a state of nudity and that, taken as a whole by the average person applying contemporary community standards, appeals to prurient interest.

(c) "Sexually oriented matter" means any material or performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.

(E)(1) Whoever violates this section is guilty of endangering children.

(2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following, and, in the circumstances described in division (E)(2)(e) of this section, that division applies:

(a) Except as otherwise provided in division (E)(2)(b), (c), or (d) of this section, a misdemeanor of the first degree;

(b) If the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(2)(c) or (d) of this section, a felony of the fourth degree;

(c) If the violation is a violation of division (A) of this section and results in serious physical harm to the child involved, a felony of the third degree;

(d) If the violation is a violation of division (B)(1) of this section and results in serious physical harm to the child involved, a felony of the second degree.

(e) If the violation is a felony violation of division (B)(1) of this section and the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory prison term as provided in division (D)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code.

(3) If the offender violates division (B)(2), (3), (4), or (6) of this section, except as otherwise provided in this division, endangering children is a felony of the third degree. If the violation results in serious physical harm to the child involved, or if the offender previously has been convicted of an offense under this section or of any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, endangering children is a felony of the second degree. If the offender violates division (B)(2), (3), or (4) of this section and the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory prison term as provided in division (D)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code. If the offender violates division (B)(6) of this section and the drug involved is methamphetamine, the court shall impose a mandatory prison term on the offender as follows:

(a) If the violation is a violation of division (B)(6) of this section that is a felony of the third degree under division (E)(3) of this section and the drug involved is methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than two years. If the violation is a violation of division (B)(6) of this section that is a felony of the third degree under division (E)(3) of this section, if the drug involved is methamphetamine, and if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(6) of this section, a violation of division (A) of section 2925.04 of the Revised Code, or a violation of division (A) of section

2925.041 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years.

(b) If the violation is a violation of division (B)(6) of this section that is a felony of the second degree under division (E)(3) of this section and the drug involved is methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree that is not less than three years. If the violation is a violation of division (B)(6) of this section that is a felony of the second degree under division (E)(3) of this section, if the drug involved is methamphetamine, and if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(6) of this section, a violation of division (A) of section 2925.04 of the Revised Code, or a violation of division (A) of section 2925.041 of the Revised Code, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree that is not less than five years.

(4) If the offender violates division (B)(5) of this section, endangering children is a felony of the second degree. If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory prison term as provided in division (D)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code.

(5) If the offender violates division (C) of this section, the offender shall be punished as follows:

(a) Except as otherwise provided in division (E)(5)(b) or (c) of this section, endangering children in violation of division (C) of this section is a misdemeanor of the first degree.

(b) If the violation results in serious physical harm to the child involved or the offender previously has been convicted of an offense under this section or any offense involving neglect, abandonment, contributing to the delinquency of, or physical abuse of a child, except as otherwise provided in division (E)(5)(c) of this section, endangering children in violation of division (C) of this section is a felony of the fifth degree.

(c) If the violation results in serious physical harm to the child involved and if the offender previously has been convicted of a violation of division (C) of this section, section 2903.06 or 2903.08 of the Revised Code, section 2903.07 of the Revised Code as it existed prior to March 23, 2000, or section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, endangering children in violation of division (C) of this section is a felony of the fourth degree.

(d) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction it imposes upon the offender pursuant to division (E)(5)(a), (b), or (c) of this

section or pursuant to any other provision of law and in addition to any suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege under Chapter 4506., 4509., 4510., or 4511. of the Revised Code or under any other provision of law, the court also may impose upon the offender a class seven suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code.

(e) In addition to any term of imprisonment, fine, or other sentence, penalty, or sanction imposed upon the offender pursuant to division (E)(5)(a), (b), (c), or (d) of this section or pursuant to any other provision of law for the violation of division (C) of this section, if as part of the same trial or proceeding the offender also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the offender also shall be sentenced in accordance with section 4511.19 of the Revised Code for that violation of division (A) of section 4511.19 of the Revised Code.

(F)(1)(a) A court may require an offender to perform not more than two hundred hours of supervised community service work under the authority of an agency, subdivision, or charitable organization. The requirement shall be part of the community control sanction or sentence of the offender, and the court shall impose the community service in accordance with and subject to divisions (F)(1)(a) and (b) of this section. The court may require an offender whom it requires to perform supervised community service work as part of the offender's community control sanction or sentence to pay the court a reasonable fee to cover the costs of the offender's participation in the work, including, but not limited to, the costs of procuring a policy or policies of liability insurance to cover the period during which the offender will perform the work. If the court requires the offender to perform supervised community service work as part of the offender's community control sanction or sentence, the court shall do so in accordance with the following limitations and criteria:

(i) The court shall require that the community service work be performed after completion of the term of imprisonment or jail term imposed upon the offender for the violation of division (C) of this section, if applicable.

(ii) The supervised community service work shall be subject to the limitations set forth in divisions (B)(1), (2), and (3) of section 2951.02 of the Revised Code.

(iii) The community service work shall be supervised in the manner described in division (B)(4) of section 2951.02 of the Revised Code by an official or person with the qualifications described in that division. The official or person periodically shall report in writing to the court concerning the conduct of the offender in performing the work.

(iv) The court shall inform the offender in writing that if the offender does not adequately perform, as determined by the court, all of the required community service work, the court may order that the offender be committed to a jail or workhouse for a period of time that does not exceed the term of imprisonment that the court could have

imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under the sentence or term that was imposed upon the offender for that violation and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code, and that, if the court orders that the offender be so committed, the court is authorized, but not required, to grant the offender credit upon the period of the commitment for the community service work that the offender adequately performed.

(b) If a court, pursuant to division (F)(1)(a) of this section, orders an offender to perform community service work as part of the offender's community control sanction or sentence and if the offender does not adequately perform all of the required community service work, as determined by the court, the court may order that the offender be committed to a jail or workhouse for a period of time that does not exceed the term of imprisonment that the court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under the sentence or term that was imposed upon the offender for that violation and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code. The court may order that a person committed pursuant to this division shall receive hour-for-hour credit upon the period of the commitment for the community service work that the offender adequately performed. No commitment pursuant to this division shall exceed the period of the term of imprisonment that the sentencing court could have imposed upon the offender for the violation of division (C) of this section, reduced by the total amount of time that the offender actually was imprisoned under that sentence or term and by the total amount of time that the offender was confined for any reason arising out of the offense for which the offender was convicted and sentenced as described in sections 2949.08 and 2967.191 of the Revised Code.

(2) Division (F)(1) of this section does not limit or affect the authority of the court to suspend the sentence imposed upon a misdemeanor offender and place the offender under a community control sanction pursuant to section 2929.25 of the Revised Code, to require a misdemeanor or felony offender to perform supervised community service work in accordance with division (B) of section 2951.02 of the Revised Code, or to place a felony offender under a community control sanction.

(G)(1) If a court suspends an offender's driver's or commercial driver's license or permit or nonresident operating privilege under division (E)(5)(d) of this section, the period of the suspension shall be consecutive to, and commence after, the period of suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege that is imposed under Chapter 4506., 4509., 4510., or 4511. of the Revised Code or under any other provision of law in relation to the violation of division (C) of this section that is the basis of the suspension under division (E)(5)(d) of this section or in relation to the violation of division (A) of section 4511.19 of the Revised Code that is the basis for that violation of division (C) of this section.

(2) An offender is not entitled to request, and the court shall not grant to the offender, limited driving privileges if the offender's license, permit, or privilege has been suspended under division (E)(5)(d) of this section and the offender, within the preceding six years, has been convicted of or pleaded guilty to three or more violations of one or more of the following:

(a) Division (C) of this section;

(b) Any equivalent offense, as defined in section 4511.181 of the Revised Code.

(H)(1) If a person violates division (C) of this section and if, at the time of the violation, there were two or more children under eighteen years of age in the motor vehicle involved in the violation, the offender may be convicted of a violation of division (C) of this section for each of the children, but the court may sentence the offender for only one of the violations.

(2)(a) If a person is convicted of or pleads guilty to a violation of division (C) of this section but the person is not also convicted of and does not also plead guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, both of the following apply:

(i) For purposes of the provisions of section 4511.19 of the Revised Code that set forth the penalties and sanctions for a violation of division (A) of section 4511.19 of the Revised Code, the conviction of or plea of guilty to the violation of division (C) of this section shall not constitute a violation of division (A) of section 4511.19 of the Revised Code;

(ii) For purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code and that is not described in division (H)(2)(a)(i) of this section, the conviction of or plea of guilty to the violation of division (C) of this section shall constitute a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(b) If a person is convicted of or pleads guilty to a violation of division (C) of this section and the person also is convicted of or pleads guilty to a separate charge charging the violation of division (A) of section 4511.19 of the Revised Code that was the basis of the charge of the violation of division (C) of this section, the conviction of or plea of guilty to the violation of division (C) of this section shall not constitute, for purposes of any provision of law that refers to a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code, a conviction of or plea of guilty to a violation of division (A) of section 4511.19 of the Revised Code.

(I) As used in this section:

(1) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code;

(2) "Limited driving privileges" has the same meaning as in section 4501.01 of the Revised Code;

(3) "Methamphetamine" has the same meaning as in section 2925.01 of the Revised Code.

Effective Date: 01-01-2004; 08-11-2004; 05-17-2006; 08-17-2006; 2008 HB280 04-07-2009

2919.25 Domestic violence.

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

(D)(1) Whoever violates this section is guilty of domestic violence, and the court shall sentence the offender as provided in divisions (D)(2) to (6) of this section.

(2) Except as otherwise provided in division (D)(3) to (5) of this section, a violation of division (C) of this section is a misdemeanor of the fourth degree, and a violation of division (A) or (B) of this section is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (D)(4) of this section, if the offender previously has pleaded guilty to or been convicted of domestic violence, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to domestic violence, a violation of section 2903.14, 2909.06, 2909.07, 2911.12, 2911.211, or 2919.22 of the Revised Code if the victim of the violation was a family or household member at the time of the violation, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to any of those sections if the victim of the violation was a family or household member at the time of the commission of the violation, or any offense of violence if the victim of the offense was a family or household member at the time of the commission of the offense, a violation of division (A) or (B) of this section is a felony of the fourth degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (A)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the second degree.

(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (A)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the first degree.

(5) Except as otherwise provided in division (D)(3) or (4) of this section, if the offender knew that the victim of the violation was pregnant at the time of the violation, a violation of division (A) or (B) of this section is a felony of the fifth degree, and the court

shall impose a mandatory prison term on the offender pursuant to division (A)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the third degree.

(6) If division (A)(3), (4), or (5) of this section requires the court that sentences an offender for a violation of division (A) or (B) of this section to impose a mandatory prison term on the offender pursuant to this division, the court shall impose the mandatory prison term as follows:

(a) If the violation of division (A) or (B) of this section is a felony of the fourth or fifth degree, except as otherwise provided in division (A)(6)(b) or (c) of this section, the court shall impose a mandatory prison on the offender of at least six months.

(b) If the violation of division (A) or (B) of this section is a felony of the fifth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of twelve months.

(c) If the violation of division (A) or (B) of this section is a felony of the fourth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of at least twelve months.

(d) If the violation of division (A) or (B) of this section is a felony of the third degree, except as otherwise provided in division (A)(6)(e) of this section and notwithstanding the range of prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of six months or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.

(e) If the violation of division (A) or (B) of this section is a felony of the third degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, notwithstanding the range of prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of one year or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the third degree.

(E) Notwithstanding any provision of law to the contrary, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of charges against a person alleging that the person violated this section or a municipal ordinance substantially similar to this section or in connection with the prosecution of any charges so filed.

(F) As used in this section and sections 2919.251 and 2919.26 of the Revised Code:

(1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a person living as a spouse, or a former spouse of the offender;

(ii) A parent or a child of the offender, or another person related by consanguinity or affinity to the offender;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

(3) "Pregnant woman's unborn" has the same meaning as "such other person's unborn," as set forth in section 2903.09 of the Revised Code, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

(4) "Termination of the pregnant woman's pregnancy" has the same meaning as "unlawful termination of another's pregnancy," as set forth in section 2903.09 of the Revised Code, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

Effective Date: 11-09-2003; 2008 HB280 04-07-2009

2921.05 Retaliation.

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

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

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

Effective Date: 09-03-1996

2923.13 Having weapons while under disability.

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

(1) The person is a fugitive from justice.

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

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

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

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

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

Effective Date: 04-08-2004

2925.11 Possession of controlled substances.

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), or (f) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty-five grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, possession of cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds

twenty-five grams but is less than one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, possession of heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code and in addition to any other sanction that is imposed for the offense under this section, sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a

violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1)(a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of section 2929.18 of the Revised Code in accordance with and subject to the requirements of division (F) of section 2925.03 of the Revised Code. The agency that receives the fine shall use the fine as specified in division (F) of section 2925.03 of the Revised Code.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with section 2925.38 of the Revised Code.

(F) It is an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge of a fourth degree felony violation under this section that the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use. Notwithstanding any contrary provision of this section, if, in accordance with section 2901.05 of the Revised Code, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of section 2925.03 of the Revised Code applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

Effective Date: 01-01-2004; 05-17-2006; 2008 HB195 09-30-2008

2945.75 Degree of offense - proof of prior convictions.

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

(B)(1) Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

(2) Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record. The accused may offer evidence to rebut the prima-facie evidence of the accused's identity and the evidence of prior convictions. Proof of a prior conviction of an offense for which the registrar maintains a record may also be proved as provided in division (B)(1) of this section.

(3) If the defendant claims a constitutional defect in any prior conviction, the defendant has the burden of proving the defect by a preponderance of the evidence.

Effective Date: 01-01-1974; 04-04-2007; 2008 SB17 09-30-2008

Ohio Rules Of Evidence

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.
[Effective: July 1, 1980; amended effective July 1, 1996.]

Federal Rule of Evidence 403

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