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Meet the New Chief, Same as the *Old Chief*: A Coherent Solution to the Problem of Prior Conviction Proof Procedures

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MEET THE NEW CHIEF, SAME AS THE *OLD CHIEF*:
A COHERENT SOLUTION TO THE PROBLEM OF PRIOR CONVICTION PROOF PROCEDURES

ROBERT BARNHART*

ABSTRACT

Conventional wisdom tells attorneys they can avoid having the jury learn about criminal defendants’ prior convictions if the client exercises their right to not testify at trial. Conventional wisdom is wrong. Myriad status crimes, sentence enhancing specifications, and substantive offenses make prior convictions an element of the offense, ensuring the prosecution can introduce them as a matter of course during the prosecution’s case-in-chief.

The seminal Supreme Court Case, Old Chief v. United States, provided some relief to criminal defendants by allowing them to stipulate to their status as a felon prohibited from possessing weapons to avoid having the jury learn about the name and nature of their prior offenses during prosecution for being a felon in possession of a firearm. Current state law circumvents the protections offered by Old Chief by making the fact of prior convictions an element of a crime in charges ranging from domestic violence to driving under the influence to non-support of dependents. Even more broadly, repeat offender statutes allow for the introduction of a wide range of prior convictions against those deemed by the government to be potential repeat violent offenders, violent career criminals, or sexually violent predators, among other classifications.

In certain cases, defendants can take advantage of procedural protections by bifurcating the trial such that the judge makes the determination of the fact of a prior conviction. In other cases, defendants can have the jury determine the prior conviction after determining guilt to the substantive crime. In another category of cases, defendants can either stipulate to the judge alone the fact of a prior conviction or have the jury learn about and determine the fact of a prior conviction while determining guilt on the substantive offense. There are also a wide variety of cases where defendants have no choice at all and can only hope the jury does not hold their prior conviction against them.

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This unprincipled mess cannot stand. It is offensive to reason, morality, and the Constitution. This Article proposes a universal statutory solution that blends the best procedures from various states and applies that procedure every time a prior conviction is an element of the crime. The right to a trial before an impartial jury is fundamental and having that impartiality rest on the happenstance of which procedural scheme covers a particular crime is offensive to notions of due process and equal protection.

This Article describes the chaotic scheme Ohio uses and compares it to other states. It then proposes a universal solution and explains its advantages. Finally, it argues the current mess may be unconstitutional and that the proposed universal solution protects constitutional values. This Article is a path forward that protects defendants while still allowing the states to prosecute repeat offenders more severely.

I. INTRODUCTION

II. PRIOR CONVICTIONS AS ELEMENTS/ENHANCEMENTS IN OHIO...
   A. Introduction
   B. Substantive Crimes
      1. Having a Weapon Under Disability (WUD)
      2. Domestic Violence
      3. Operating a Vehicle While Intoxicated (OVI)
      4. Non-Support of Dependents
      5. Use of a Firearm by a Violent Career Criminal
   C. Specifications
      1. Violent Career Criminal
      2. Repeat Violent Offender
      3. Sexually Violent Predator
   D. Conclusion

III. THE “NEW CHIEF” - A UNIFORM STATUTORY SOLUTION
    A. Introduction
    B. Solution
    C. Advantages
    D. Conclusion

IV. CONSTITUTIONAL CONCERNS AMELIORATED
    A. Introduction
    B. Due Process
    C. Trial by Jury
    D. Equal Protection

V. CONCLUSION
I. INTRODUCTION

Nearly every modern law student in America who has studied evidence is familiar with the case classically chosen to introduce the topic, Old Chief v. United States. Old Chief starkly presents a classic criminal trial dilemma of how to handle a criminal defendant’s prior criminal convictions in cases where those convictions make up an essential element of the offense. The defendant, Old Chief, had been charged with being a felon in possession of a firearm and his prior felony was assault causing serious bodily injury. Understandably, Old Chief’s counsel sought to prevent the jury from learning the particulars of his prior conviction by offering to stipulate that Old Chief “had been convicted of a crime punishable by imprisonment exceeding one (1) year.” The prosecution refused and the district court permitted it to introduce the judgment entry naming the crime that made Old Chief a felon.

The United States Supreme Court held that Old Chief should have been permitted to make his stipulation because the unfair prejudice of introducing the nature of the conviction outweighed the probative value when the defendant had offered a conclusive stipulation. This conclusion makes sense. After all, Federal Rule of Evidence 403 requires the exclusion of relevant evidence when its “probative value is substantially outweighed by [the] danger of . . . unfair prejudice, confusing the issues, misleading the jury, [considerations of] undue delay, wasting time, or needlessly presenting cumulative evidence.” The rule itself makes sense as well. In fact, it makes so much sense that it has been adopted either approximately or exactly in all 50 states.

But all is not well and good in the world of prior convictions being introduced as a matter of course in criminal proceedings. Sometimes stipulating is not so simple. Ohio provides myriad ways that jurors can learn about a defendant’s prior convictions and their exact nature as a matter of course during the State’s case in chief, making it an excellent case study. This article details seven such situations where prosecutors can introduce prior convictions as a matter of course: (1) providing the basis for a having weapons while under disability charge; (2) proving an offender is a “Repeat Violent Offender,” which

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1 519 U.S. 172 (1997).
2 Id. at 174.
3 Id. at 174–75.
4 Id. at 175 (citation to the record omitted).
5 Id. at 177.
6 Id. at 191–92.
7 FED. R. EVID. 403.
8 Kenneth Klein, Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters, 47 U. RICH. L. REV. 1077, 1078 n.8 (2013) (listing the evidentiary rules and case law enacting some version of Rule 403).
either permits or requires a judge to sentence the offender to additional prison terms for certain offenses;\(^\text{10}\) (3) proving an offender is a “Sexually Violent Predator,” which provides additional penalties for certain sex offenses;\(^\text{11}\) (4) proving an offender is a “Violent Career Criminal,” which opens offenders up to additional penalties and additional charges;\(^\text{12}\) (5) enhancing a domestic violence charge from a misdemeanor to a felony or increasing the degree of a felony charge;\(^\text{13}\) (6) enhancing an operating a vehicle while intoxicated charge from a misdemeanor to a felony or increasing the degree of a felony charge;\(^\text{14}\) and (7) making non-support of dependents easier to charge and enhancing the degree of felony.\(^\text{15}\)

The Rules of Evidence do not impede this panoply of prosecutorial opportunities. Federal Rule of Evidence 404 and its analogues offer no protection. While it prohibits the introduction of prior convictions to prove characters, when a prior conviction is an element of the crime itself it is no longer “offered to prove character in order to show that on a particular occasion the person acted in accordance with the character.”\(^\text{16}\) Thus, 404 recognizes the problem of prior convictions but offers an easy opportunity to circumvent its protections.

In some cases, Ohio defendants can waive their right to a jury trial on particular aspects of a case rather than take an “all or nothing” approach. For example, Ohio’s Repeat Violent Offender specification explicitly requires the court, not the jury, to determine whether the offender is a repeat violent offender.\(^\text{17}\) Oddly, the Violent Career Criminal specification does not.\(^\text{18}\) Even

\(^{10}\) Id. § 2929.01(CC) (defining the term); id. §§ 2929.14(B)(2)(a)–(b) (permitting and/or requiring additional mandatory prison terms).

\(^{11}\) Ohio Rev. Code Ann. § 29271.01(H) (West 2023) (defining the term); id. § 2971.03 (listing enhanced penalties).

\(^{12}\) Ohio Rev. Code Ann. § 2923.132(B) (West 2023) (defining the term and allowing a first-degree felony charge for “knowingly us[ing] any firearm or dangerous ordinance”); id. § 2929.14(K)(1) (providing additional penalties for certain offenses committed by “violent career criminals”).

\(^{13}\) Ohio Rev. Code Ann. § 2919.25(D) (West 2023) (initially defining domestic violence as a misdemeanor but then providing that prior convictions for certain charges permit the State to enhance the charge to a felony).

\(^{14}\) Id. §§ 4511.19(G)(1)(d)–(e) (providing that when a person has sufficient prior OVI convictions future offenses are considered felonies); see also id. § 2941.1413(A) (additional penalties when offender has five or more OVI convictions within the last 20 years).

\(^{15}\) Ohio Rev. Code Ann. § 2919.21(G)(1) (West 2023) (stating that while generally the charge is a first-degree misdemeanor if an offender has been previously convicted it is a felony of the fifth degree if missed payments exceed 26 out of 104 consecutive weeks and a felony of the fourth degree if the offender has a prior felony conviction for the same charge).

\(^{16}\) Fed. R. Evid. 404(b)(1).

\(^{17}\) Ohio Rev. Code Ann. § 2941.149(B) (West 2023) (“The court shall determine the issue of whether an offender is a repeat violent offender.”).

\(^{18}\) Id. § 2941.1424.
more surprising, the Sexually Violent Predator specification gives defendants multiple options: they can elect to have the judge determine whether they are a sexually violent predator or have the jury decide the underlying charge first, and then have a second trial where that jury determines whether the defendant is a sexually violent predator.\footnote{Id. § 2971.02.} Further complicating the matter, Ohio law permits defendants to waive jury trial on individual counts in an indictment.\footnote{See, e.g., State v. Banks, 151 N.E.3d 198, 201 (Ohio Ct. App. 2019) (“[T]he record shows that the parties agreed that Ohio law permitted appellant to waive a jury trial with regard to the WUD charge.”).} However, Ohio courts generally do not permit defendants to waive jury trial only on certain elements of an offense or specification.\footnote{See, e.g., State v. Hill, 145 N.E.3d 1128, 1156 (Ohio Ct. App. 2019) (“A defendant is not entitled to bifurcated proceedings, nor may he waive jury trial on the prior-conviction element alone.”) (quoting State v. Sweeney, 723 N.E.2d 655, 772–73 (Ohio Ct. App. 1999)).}

In summary, Ohio courts provide protections to certain defendants who wish to avoid juries hearing about their prior convictions. As outlined above, repeat violent offenders are safe; defendants possessing a weapon under disability and violent career criminals are also safe if they are willing to have the judge determine not only their prior convictions but whether the State has proven the underlying offense itself beyond a reasonable doubt. Defendants who want a jury to determine all the facts in those firearm related matters are not safe. Defendants who have prior enhancing convictions in domestic violence, operating a vehicle while intoxicated, and non-support of dependents trials cannot help but have the jury learn about their prior record.

Over half a century ago, the United States Supreme Court recognized that jurors hearing about prior convictions is dangerous but permissible.\footnote{Spencer v. Texas, 385 U.S. 554 (1967).} In \textit{Spencer v. Texas},\footnote{Id.} the majority held that Texas’ recidivist statute permitting the inclusion of prior convictions in the indictment and presentation to the jury during trial to enhance the penalties for certain sentences was constitutional.\footnote{Id. at 567–68.} What started as a simple question about recidivist or habitual offender statutes has turned into a patchwork catastrophe of partial jury waivers, judicial determinations, and impossible choices for offenders seeking to be tried on the merits of the case and not their criminal pasts.

With this background in mind, Ohio and other states should adopt a uniform system to use when prior convictions are elements of the offense or specification. This would give defendants the option to not only stipulate to the prior offenses, the “Old Chief,” but allow them to either waive jury determination of that element of any offense or specification, or have the jury make that determination after deciding guilt on the underlying charge, the “New Chief.”
Statutes, laws, and codes should not give the State an exception to the general prohibition on character evidence that swallows the rule. This procedure would have the benefits of uniformity, clarity, and predictability. It also supports the values underlying the constitutional rights to due process, trial by jury, and equal protection. It does all of this without diminishing the States’ power to punish repeat offenders more severely.

As such, Section I outlines each of the listed seven areas under Ohio law. Section II provides a proposed statutory solution synthesizing Ohio’s procedure and New York law. That Section also argues the proposal’s advantages and advocates its universal adoption. Section III explains that while this solution may be constitutionally required, even if it is not, it protects the constitutional values enshrined in the rights to due process, trial by jury, and equal protection. Section IV concludes.

II. PRIOR CONVICTIONS AS ELEMENTS/ENHANCEMENTS IN OHIO

A. Introduction

In line with the federal courts and other state courts, Ohio generally forbids the introduction of a defendant’s prior convictions in the State’s case-in-chief.\(^\text{25}\) Generally, “[e]vidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”\(^\text{26}\) Ohio’s evidence rule also contains the usual exceptions concerning “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”\(^\text{27}\) This almost precisely mirrors the federal rule.\(^\text{28}\)

Generally, defendants surrender this protection if they choose to testify in their own defense. Ohio Rule 609 allows certain prior convictions (those punishable by greater than 12 months incarceration or involving dishonesty or false statements) to be introduced as evidence impeaching the accused if that person testifies at trial.\(^\text{29}\) That admission is still limited by Rule 403(B)’s prohibition on relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.\(^\text{30}\) Thus, defendants who are not charged with certain crimes or specifications are masters of their own fate. Choose not to testify and, in most cases, the jury will never hear about their prior convictions. But, as we will see, many defendants are not given this choice at all.

\(^{25}\) \textit{Ohio R. Evid.} 404(B).

\(^{26}\) \textit{Ohio R. Evid.} 404(B)(1).

\(^{27}\) \textit{Ohio R. Evid.} 404(B)(2).

\(^{28}\) \textit{Fed. R. Evid.} 404(b)(1)–(3).

\(^{29}\) \textit{Ohio R. Evid.} 609(A)(2)–(3).

\(^{30}\) \textit{Id.}
First, I will discuss the substantive crimes that either prohibit conduct based on prior convictions or enhance the degree of an already illegal act on that basis. Second, I will list the “specifications” that provide for greater penalties to substantive offenses if a person has certain prior convictions. By means of introduction, specifications are outlined in chapter 2941.141 of the Ohio Revised Code and list various additional facts the State can prove to enhance the penalty of an underlying criminal offense. For example, a common specification involves the use of a firearm during an offense and is charged in the indictment as follows:

The Grand Jurors False further find and specify that . . . the offender had a firearm on or about the offender’s person or under the offender’s control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.  

If a jury finds a defendant guilty of that specification, the court must impose an additional three-year prison term consecutive to the underlying offense. Some specifications, as listed below, include the defendant’s prior convictions as additional facts that increase the available penalties for certain offenses. Therefore, specifications can be considered “enhancements” to underlying substantive crimes that increase the severity of the penalty.

B. Substantive Crimes
1. Having a Weapon Under Disability (WUD)

Like nearly every state and the federal government, Ohio prohibits certain offenders from possessing firearms. Ohio’s crime is titled “Having Weapons While Under Disability,” and prohibits certain individuals from “knowingly acquiring, having, carrying, or using any firearm or dangerous ordnance[.]” Individuals under disability for purposes of possessing a weapon in Ohio include: (1) fugitives from justice, (2) those under indictment or having been convicted of a felony offense of violence or (3) drug offense (including juvenile convictions), (4) those considered drug dependents or chronic alcoholics, and (5) those considered mentally incompetent. A violation of this section is a felony of the third degree. If a person falls into subcategories (2) or

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32. Id. § 2941.145(B).
33. Id. § 2923.13(A).
34. Id. §§ 2923.13 (A)(1)–(5).
35. Id. § 2923.13(B).
(3), the State will be permitted to introduce evidence of their prior conviction in its case-in-chief because those are elements of the offense.

Previously, Ohio courts were not consistent as to whether courts and prosecutors must accept a defendant’s offer to stipulate to prior convictions. One line of cases held “Ohio law does not require either the state or the trial court to accept a defendant’s stipulation to a prior conviction.” 36 The Ohio Supreme Court stepped in in 2016 to clarify that, because Ohio’s substantive offense and evidence rules were sufficiently similar to the federal crime and evidentiary rules, Ohio courts must follow Old Chief’s holding that defendants willing to so stipulate must be allowed. 37

Ohio also offers defendants the opportunity to waive jury determination of whether they are guilty of having a weapon under disability. 38 Ohio courts permit defendants with multiple counts to waive jury determination of certain counts in an indictment while the jury decides the other charges. 39 This, however, is not always the panacea that it seems.

As a hypothetical, imagine a defendant charged with aggravated robbery 40 and WUD. Understandably, this defendant would want the jury to avoid learning they have a prior drug-related offense or offense of violence conviction. Further, imagine this defendant intends to present a defense that he or she was not the person who committed the aggravated robbery. In this case, if the defendant waives his right to a jury trial on the WUD, the jury would determine guilt on the aggravated robbery charge, and the judge would determine guilt on the WUD. There is one problem with this plan. The jury could believe the State failed to prove the identity of the robber and acquit the defendant of aggravated robbery while the judge could find the opposite and convict him of having a weapon while under disability. Ohio law permits the judge and the jury to render inconsistent verdicts. 41 So, the defendant who waives his right to a jury trial on the having a weapon while under disability charge prevents the jury from


37 State v. Creech, 84 N.E.3d 981, 991 (Ohio 2016) (“[A] trial court abuses its discretion when it refuses a defendant’s offer to stipulate to the fact of the prior conviction or indictment and instead admits into evidence the full record of the prior judgment or indictment when the sole purpose of the evidence is to prove the element of the defendant’s prior conviction or indictment.”).

38 OHIO REV. CODE ANN. § 2945.05 (West 2023).


40 OHIO REV. CODE ANN. § 2911.01(A)(1) (West 2023) (making it a felony of the first degree to display, brandish, threaten with, or use a firearm during the commission of a theft offense).

hearing about the prior convictions but risks a single judge may see things different than 12 jurors drawn from the community.

Defendants cannot have it both ways and submit a partial jury waiver, allowing the jury to determine whether they had the weapon but leaving the determination of whether they had a prior conviction to the judge. In summation, Ohio law allows for stipulation to a prior conviction pursuant to Old Chief, does allow for partial jury waiver but only to the entire charge, and permits the judge to reach a verdict completely inconsistent with the determination of the jury.

2. Domestic Violence

Ohio’s domestic violence law provides enhanced penalties for those with prior convictions. Without any prior convictions, a domestic violence charge is a misdemeanor of the first degree, punishable by a maximum of 180 days in jail. Defendants with one prior conviction for domestic violence or a selection of other crimes (with a family or household member as victim) face a felony of the fourth degree, punishable by a maximum of 18 months in prison. Defendants with two or more of those same offenses can be charged with a felony of the third degree punishable by a maximum of 36 months in prison.

Similar to charges of having a weapon under disability, courts have permitted stipulation to prior convictions but not allowed for bifurcated trials: “It is well-settled that where a prior conviction elevates the degree of a subsequent offense, the prior conviction is an essential element of the subsequent offense and may not be bifurcated from the remaining elements of the subsequent offense.”

Defendants retain the same opportunity they have with a possession of a weapon under disability charge to have the judge decide a domestic violence charge with the jury deciding any remaining charges, but common-sense would indicate those situations are less common. Domestic violence is often the primary charge litigated rather than an additional charge to a more substantive offense.

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43 Id. § 2919.25(D)(3).
44 Id. § 2919.25(D)(4).
3. Operating a Vehicle While Intoxicated (OVI)

Ohio’s operating a vehicle while intoxicated law contains multiple degrees of offense depending on the quantity and timing of prior convictions.\textsuperscript{46} A first-time OVI offender faces a first degree misdemeanor with a maximum penalty of up to 180 days in jail and a one-to-three year driver’s license suspension, among other penalties.\textsuperscript{47} A second offense within ten years is also a first-degree misdemeanor but carries a harsher minimum sentence (ten or 20 days in jail, depending on the concentration of alcohol or controlled substance in the defendant’s bodily fluids or if defendant had previously refused a breath test), and the license suspension is for one to seven years.\textsuperscript{48} An individual with two prior convictions within ten years faces an unclassified misdemeanor carrying a minimum penalty of 30 or 60 days in jail (depending on the same conditions outlined above), a maximum penalty of up to one year in jail, and a license suspension of two to 12 years.\textsuperscript{49} Defendants with three or four prior convictions within ten years or five priors within 20 years face a felony of the fourth degree with a minimum penalty of 60–120 days jail, a maximum penalty of 30 months in prison, and driving rights suspension of anywhere from three years to life.\textsuperscript{50} Defendants with a prior felony OVI face a third-degree felony with a minimum of 60–120 days in prison, a maximum penalty of 36 months in prison, and a three-years to-lifetime driving rights suspension.\textsuperscript{51} Finally, the State can charge a defendant with a felony OVI with a specification that adds one to five years in prison consecutive to any penalties for the underlying felony charge, making the functional maximum eight years in prison.\textsuperscript{52}

 Defendants in OVI cases have no choice but to stipulate to prior convictions or to have the State prove them beyond a reasonable doubt.\textsuperscript{53} This is a particularly pernicious problem in OVI cases that do not rely on chemical test results, either because they were not obtainable or defendants refused to provide them. In those cases, the State proceeds under the theory that the defendant is guilty because the defendant operated the vehicle “under the influence of alcohol, a drug of abuse, or a combination of them.”\textsuperscript{54} Using that theory, the State has the high burden of proving to a jury that a defendant was under said influence by

\begin{itemize}
\item \textsuperscript{46} \textit{Ohio Rev. Code Ann.} § 4511.19 (West 2023).
\item \textsuperscript{47} Id. § 4511.19(G)(1)(a).
\item \textsuperscript{48} Id. § 4511.19(G)(1)(b).
\item \textsuperscript{49} Id. § 4511.19(G)(1)(c).
\item \textsuperscript{50} Id. § 4511.19(G)(1)(d).
\item \textsuperscript{51} Id. § 4511.19(G)(1)(e).
\item \textsuperscript{52} Id. § 2941.1413.
\item \textsuperscript{53} State v. Martin, No. 04CA2946, 2005 WL 1869677, at *4 (Ohio Ct. App. Aug. 3, 2005) (“By introducing into evidence those convictions, the prosecution simply complied with its burden of proof.”).
\item \textsuperscript{54} \textit{Ohio Rev. Code Ann.} § 4511.19(A)(1)(a) (West 2023).
\end{itemize}
relying on evidence outside of scientific testing.\textsuperscript{55} A defendant arguing that a law enforcement officer or witness is mistaken has a much higher hill to climb if a jury knows that the defendant has multiple prior convictions for OVI.

Thus, defendants in OVI cases have no choice but to waive their right to a jury trial or have jurors hear about their prior convictions when they challenge their charges.

4. Non-Support of Dependents

In Ohio, defendants who fail to provide court-ordered support are generally charged with a misdemeanor of the first degree.\textsuperscript{56} However, they can be charged with a felony of the fifth degree if they fail to make 26 weekly payments during a period of 104 consecutive weeks, or if they have a prior conviction for non-support of dependents.\textsuperscript{57} Additionally, the State can charge a defendant with a felony of the fourth degree if the defendant has a prior felony conviction for non-support of dependents.\textsuperscript{58}

Defendants charged with this crime will have their juries hear about prior convictions. While one could argue this seems less concerning than in instances involving drug offenses, violent crimes, and sex offenses, there is an affirmative defense available to defendants for this offense that makes the admission of prior convictions more dangerous. Defendants can argue “that the accused was unable to provide adequate support or the established support but did provide the support that was within the accused’s ability and means.”\textsuperscript{59} It is clear a jury would be less sympathetic to a defendant presenting this defense when the jurors know the defendant has a prior conviction for failing to provide support to a dependent. Thus, defendants charged with non-support of dependents will always have a jury hear about their prior convictions for that same offense.

5. Use of a Firearm by a Violent Career Criminal

The final substantive crime under consideration is use of a firearm by a violent career criminal.\textsuperscript{60} The statute first defines a violent career criminal as

\textsuperscript{55} See Brooklyn Hts. v. Yee, No. 92038, 2009 WL 2841224, at *5 (Ohio Ct. App. Sept. 3, 2009) (“Here, we find that a rational trier of fact could conclude that Yee’s conduct as described by the two veteran law enforcement officers was consistent with operating a vehicle while under the influence of alcohol.”).
\textsuperscript{56} OHIO REV. CODE ANN. § 2919.21(G)(1) (West 2023).
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. § 2919.21(D).
\textsuperscript{60} Id. § 2923.132.
a person who within the preceding eight years, subject to extension as provided in division (A)(1)(b) of this section, has been convicted of or pleaded guilty to two or more violent felony offenses that are separated by intervening sentences and are not so closely related to each other and connected in time and place that they constitute a course of criminal conduct.\textsuperscript{61}

The referenced subsection expands the eight-year window of time by tolling the time period when defendants are incarcerated or in violation of probation, parole, or supervised release.\textsuperscript{62}

The act prohibited by the statute reads simply “[n]o violent career criminal shall knowingly use any firearm or dangerous ordnance.”\textsuperscript{63} The crime is a first-degree felony that carries a mandatory prison term of two to 11 years.\textsuperscript{64}

 Defendants charged under this statute face a similar dilemma as those charged with having a weapon under disability. Either they waive jury determination on the entire charge and open themselves up to inconsistent verdicts if the case is being charged in connection with another crime or they have a jury learn the state considers them categorically a “violent career criminal.”

\section*{C. Specifications}

1. Violent Career Criminal

As outlined above, “violent career criminal” is a statutorily defined term in Ohio. In addition to facing a first-degree felony for using a firearm, violent career criminals face additional penalties when they commit new crimes. This is known as the “violent career criminal specification.”\textsuperscript{65}

To file a violent career criminal specification, the State must allege the defendant meets the statutory definition of a violent career criminal, is currently charged with a violent felony offense, and had or used a firearm during the commission of that offense.\textsuperscript{66} Violent career criminal is defined as outlined in

\begin{itemize}
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} Id. § 2923.132(A)(1)(b) (“Except as provided in division (A)(1)(c) of this section, the eight-year period described in division (A)(1)(a) of this section shall be extended by a period of time equal to any period of time during which the person, within that eight-year period, was confined as a result of having been accused of an offense, having been convicted of or pleaded guilty to an offense, or having been accused of violating or found to have violated any community control sanction, post-release control sanction, or term or condition of supervised release.”).
  \item \textsuperscript{63} Id. § 2923.132(B).
  \item \textsuperscript{64} Id. § 2923.132(C).
  \item \textsuperscript{65} Id. §2929.14(K).
  \item \textsuperscript{66} Id. § 2941.1424(A) (“The Grand Jurors . . . further find and specify that (set forth that the offender is a violent career criminal and did have a firearm on or about the offender’s person or
the previous section—a defendant who has two or more violent felony offense convictions within the previous eight years. Defendants found guilty of this specification face an additional penalty of two to eleven years in prison consecutive to the sentence to the underlying offense.\[^{67}\]

Notably, this specification does not contain any language like that in the Repeat Violent Offender specification detailed below that requires the court to make this finding rather than having the allegation submitted to the jury. Thus, “violent career criminals” have no choice but to have the jury learn about their prior convictions through stipulation or proof by the prosecution.

2. Repeat Violent Offender

“Repeat violent offenders” are a different statutory creation than “violent career criminals” in Ohio law. Repeat violent offenders are statutorily defined by a two-step process. First, they must be currently being sentenced for committing or complicit in committing “[a]ggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree.”\[^{68}\] Second, they must have a prior conviction for any of those offenses listed.\[^{69}\]

A defendant found guilty of being a repeat violent offender can either be optionally sentenced to one to 11 additional years in prison consecutive to the underlying offense (if the current conviction is not their third overall conviction for an offense of violence) or must be mandatorily sentenced to one to 11 additional years consecutive to the maximum sentence for the underlying offense (if the current is their third overall conviction for an offense of violence).\[^{70}\]

The starkest difference between the repeat violent offender specification and other charges and specifications involving prior convictions is this subsection: “The court shall determine the issue of whether an offender is a repeat violent offender.”\[^{71}\] This unique subsection demands further discussion.

Initially, Ohio’s repeat violent offender sentencing scheme ran afoul of the law. Prior to 2006, Ohio judges were required to make certain factual findings before giving additional prison time to repeat violent offenders when the law indicated such sentences were optional. Specifically, they had to make five

\[^{67}\] Id. § 2929.14(K)(1).
\[^{68}\] Id. § 2929.01(CC)(1).
\[^{69}\] Id.
\[^{70}\] Id. § 2929.14(B)(2).
\[^{71}\] Id. § 2941.149(B).
findings:72 (1) the offender was convicted of or plead guilty to being a “repeat violent offender;” (2) the offense for which the offender plead or was convicted was an aggravated murder, murder, felony of the first degree that is an offense of violence or a felony of the second degree “that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person;”73 (3) the court imposed the maximum sentence for the underlying felony; (4) the prison term for just the underlying felony would be “inadequate to punish the offender and protect the public from future crime;”74 and (5) that prison term would also “demean the seriousness of the offense.”75

For individuals with more than one prior conviction, judges had to find that “[t]he offender within the preceding twenty years ha[d] been convicted of or pleaded guilty to three or more offenses [listed in the definition of a repeat violent offender].”76 If the judge made that finding, the judge did not have to find the fourth and fifth factor above and was required, by law, to impose the maximum sentence for the underlying felony and an additional one to 11 years imprisonment.77

This scheme was challenged after the United States Supreme Court decided Blakely v. Washington.78 Blakely examined Apprendi v. New Jersey’s79 holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”80 Blakely concluded that “the ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”81

The Ohio Supreme Court reconciled Ohio’s repeat violent offender specification and sentencing scheme with these cases in State v. Foster.82 There, the court simply severed the requirement that the trial court make factual findings regarding whether the underlying prison sentence is inadequate to punish the offender and demean the seriousness of the conduct.83 Thus, sentencing judges

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72 Id. §§ 2929.14(B)(2)(a)(i)–(v).
73 Id. § 2929.14(B)(2)(a)(ii).
74 Id. § 2929.14(B)(2)(a)(iv).
75 Id. § 2929.14(B)(2)(a)(v).
76 Id. § 2929.14(B)(2)(b).
77 Id. § 2929.14(B)(2)(b).
79 530 U.S. 466 (2000).
80 Id. at 490.
81 Blakely, 542 U.S. at 303.
82 845 N.E.2d 470 (Ohio 2006).
83 Id. at 29.
are able to determine whether someone is a repeat violent offender by simply looking to their prior and current convictions.

There is, however, another problem with this scheme. When sentencing a defendant who only has one prior conviction and is charged presently with a felony of the second degree, a judge cannot sentence them to the optional additional term for a repeat violent offender “unless the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.”84 Notably, this provision was added just months after Foster.85 Ohio courts have interpreted the “trierror of fact” language in that subsection to require the “serious physical harm” element either be proven to the jury or be obvious from the statutory nature of the underlying felony itself. In State v. Davis,86 Ohio’s Seventh District Court of Appeals reversed a repeat violent offender specification sentencing.87 There, the defendant was convicted of robbery, a felony of the second degree that is an offense of violence.88 The elements of robbery are attempting or committing a theft offense or in fleeing immediately after the attempt or offense, the offender recklessly inflicted, attempted to inflict, or threatened to inflict physical harm on another.89 Thus, the very nature of robbery does not necessarily require causing, attempting to cause, or threatening to cause “serious physical harm.” The Davis court reversed the additional sentence for being a repeat violent offender because “[a]lthough appellant may have in fact threatened to cause serious physical harm to the robbery victims, the jury, who was the “trierror of fact” referred to by the legislature in R.C. 2929.14(D)(2)(a)(ii), was not instructed to and did not make such a finding.”90

The Twelfth District’s State v. Weaver91 stands in contrast. In Weaver, the defendant attempted a similar challenge to his repeat violent offender sentencing enhancement but was rebuffed. There, the State submitted an additional factual question to the jury asking it to find beyond a reasonable doubt “that appellant inflicted, attempted to inflict, or threatened to inflict serious physical harm,” even though that was not a necessary element of the charged offense.92 Because the trier of fact made the necessary finding, the additional sentence was upheld.93

86 Id.
87 Id.
88 Id.
89 Ohio Rev. Code Ann. § 2911.02 (West 2023).
90 Davis, 2009 WL 3068762, at *5.
92 Id. at *2.
93 Id. at *4.
In summation, Ohio defendants have their prior convictions determined by a judge for the purpose of being found guilty of being a repeat violent offender. If additional factual findings relating to second-degree felonies are required, then jurors may make those findings separately. Thus, Ohio defendants charged with being repeat violent offenders are free to try the underlying crime and the facts of that crime to a jury and the jury will not be informed about their prior convictions. The State may not introduce them as a matter of course.

3. Sexually Violent Predator

Sexually violent predators receive the maximum procedural protection under Ohio law. The sexually violent predator definition and specification are complex. Sexually violent predators are subject to penalties beyond those for their underlying sex offense and can be sentenced to indefinite terms, serving up to their natural life in prison for their offenses. For this severe sentencing to be imposed, a few things must happen. First, the defendant must plead or be found guilty of a statutorily defined “violent sex offense.” Second, they must plead or be found guilty of a “sexually violent predator” specification.

The sexually violent predator specification must be included in the indictment. A sexually violent predator is defined as someone who “commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses.” The statute allows the fact-finder to consider the following in determining whether a person is likely to engage in the future in one or more sexually violent offenses: (1) “the person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense,” (2) has a documented history from childhood that exhibits sexually deviant behavior, (3) evidence exists suggesting the person chronically commits sexually motivated offenses, (4) the person has committed one or more offenses involving torture or ritualistic acts, (5) the person has committed offenses where one or more victims has been physically

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95 Id. § 2971.03(A).
96 Id.
97 Id.
98 Id. § 2971.01(H)(1).
99 Id. § 2971.01(H)(2)(a).
100 Id. § 2971.01(H)(2)(b).
101 Id. § 2971.01(H)(2)(c).
102 Id. § 2971.01(H)(2)(d).
harmed such that they were close to death\textsuperscript{103}, and (6) any other relevant evidence.\textsuperscript{104}

Given the vast array of evidence that can be considered, Ohio law gives these defendants the most procedural options to avoid having the jury learn about prior convictions before determining guilt of the substantive offense. Unlike the repeat violent offender law, defendants have the option to have the court or jury decide whether they are sexually violent predators: “the defendant may elect to have the court instead of the jury determine the sexually violent predator specification.”\textsuperscript{105} If the defendant elects to have the jury determine the specification, that trial does not take place until after he or she is found guilty of the underlying offense: “[f]ollowing a verdict of guilty on the charge of the offense and, if the offense is a designated homicide, assault, or kidnapping offense, on the related sexual motivation specification, the defendant shall be tried before the jury on the sexually violent predator specification.”\textsuperscript{106}

Thus, if a sexually violent predator does not want a jury to hear about his or her prior convictions, Ohio provides them with that ability. In fact, defendants can take advantage of that ability while still allowing the jury to make the ultimate determination about those prior convictions and their impact upon their sentence.

\textbf{D. Conclusion}

Ohio law is not coherent or uniform on the issue of the State informing the jury about a defendant’s prior convictions as a matter of course in their case-in-chief. If we conceive of these laws on a spectrum ranging from least to most friendly to defendants, the situations least friendly to defendants are cases involving domestic violence, operating a vehicle while intoxicated, non-support of dependents, using a firearm while being a violent career criminal, and the violent career criminal specification. In those cases, unless the defendant wants to waive their right to a jury trial and try the substantive crime to the bench, the prosecution will always inform the jury about the defendant’s prior convictions. They retain the power under \textit{Old Chief} to stipulate to those convictions, but unlike Old Chief himself, in the case of domestic violence, operating a vehicle while intoxicated, and non-support of dependents, even with a stipulation jurors will nevertheless be told that a defendant has been convicted of the same or a similar crime.

In the middle of the spectrum lies the charge of having a weapon under disability. There, assuming the existence of charges relating to the use of the weapon beyond simple possession, a defendant can partially waive his right to a

\begin{flushleft}
\textsuperscript{103} \textit{Id.} § 2971.01(1)(2)(e).
\textsuperscript{104} \textit{Id.} § 2971.01(1)(2)(f).
\textsuperscript{105} \textit{Id.} § 2971.02.
\textsuperscript{106} \textit{Id.}
\end{flushleft}
trial by jury on that charge and still have the jury determine his guilt on other offenses without learning of his prior convictions.

Anchoring the “friendly” end of the spectrum are the procedures for determination of whether a defendant is a repeat violent offender or a sexually violent predator. Repeat violent offenders are required to have the trial court determine whether they have the necessary prior convictions, while a jury must only make specific factual findings regarding second-degree felonies. Sexually violent predators are the most protected because they get a choice. If they choose to have their specification determined by a jury, that determination waits until after the jury has determined their guilt on the underlying offense. The next section uses this procedure as a starting point to craft a uniform statutory solution.

III. THE “NEW CHIEF” - A UNIFORM STATUTORY SOLUTION

A. Introduction

The chaos and confusion for defendants, counsel, courts, prosecutors, and juries described above is illogical, incoherent, and unfair. Defendants charged with substantive crimes that have enhanced penalties and degrees-of-offense based on prior convictions for the same or similar crimes will always have their convictions told to the jury during the prosecution’s case-in-chief. Their only protection is the one outlined in Old Chief—that they may avoid the details of their prior conviction coming in by stipulating to them. The jury still gets to hear about those convictions—it is just a bit more abstract and general than revealing the details of the crime. While Old Chief has been widely followed, it is not a constitutional rule. Furthermore, Old Chief’s protection in cases where the prior conviction must be of a specific nature or a specific crime only allows defendants to stipulate to those convictions, the jury still knows that they exist.

As outlined above, a few categories of Ohio defendants have a safe harbor. Repeat violent offenders and sexually violent predators can avoid the State telling the jury about their prior convictions while still having that same jury determine whether they are guilty of the underlying offense. Their protection extends beyond that of simply being able to stipulate to a conviction or even felon-status prohibiting the possession of a weapon (like Old Chief). The jury simply finds out nothing at all about the defendant’s prior convictions until after the jury has determined guilt or innocence. This problem isn’t limited to Ohio. For example, Illinois has a general rule that:

107 People v. Walker, 812 N.E.2d 339, 348 (Ill. 2004) (“Old Chief has been followed by the overwhelming majority of courts and every state court of last resort to have considered the matter.”).
[w]hen the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State’s intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.\(^\text{108}\)

That rule only applies, however, when the State is seeking an “enhanced sentence;” it does not apply if a prior conviction is an element of the offense, as in felon in possession of a weapon charges.\(^\text{109}\)

Defendants in Texas face a similar conundrum. In *Tamez v. State*,\(^\text{110}\) the defendant faced an OVI charge enhanced to a third-degree felony because the defendant had more than two prior convictions.\(^\text{111}\) The indictment stated that he had six prior convictions and the State took full advantage:

Before trial, appellant stated to the court that he would stipulate to two previous DWI convictions if the State would be foreclosed from mentioning his prior convictions in any way to the jury. The trial court refused. At the commencement of trial and over appellant’s objection, the prosecutor read the indictment—including all six aforementioned convictions—to the jury. The State also introduced the six judgments against appellant into evidence during its case-in-chief, again over his objection.\(^\text{112}\)

The Court of Criminal Appeals of Texas held that the defendant should have been permitted to stipulate to two of the offenses, as that was all that was required for the third-degree felony:

In cases where the defendant agrees to stipulate to the two previous DWI convictions, we find that the proper balance is struck when the State reads the indictment at the beginning of trial, mentioning only the two jurisdictional prior convictions,

\(^\text{108}\) 725 ILL. COMP. STAT. ANN. 5/111-3 (West 2023).

\(^\text{109}\) People v. Henderson, No. 5-14-0342, 2016 WL 4268796, at *5 (Ill. App. Ct. 5th Aug. 12, 2016) (“The jury had sufficient evidence before it to make its finding regarding the two essential elements of the offense—that the defendant was in possession of a weapon and that he had been previously [] convicted of a felony.”).


\(^\text{111}\) *Id.* at 199.

\(^\text{112}\) *Id.* at 199.
but is foreclosed from presenting evidence of the convictions during its case-in-chief.\textsuperscript{113}

Texas’ OVI defendants have a jury hear about some of their prior convictions while Texas’ repeat offenders avoid the jury hearing about the same due to Texas’ bifurcated trial system for felonies. In that system, repeat offenders have a second trial after the guilt phase trial to determine whether they have prior convictions such that the penalties contained in the Texas code apply.\textsuperscript{114}

New York’s law is closer to a more uniform approach. New York Rule of Criminal Procedure 200.60 contains a three-step process. First, “[w]hen the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment for such higher offense may not allege such previous conviction.”\textsuperscript{115} Second, because the information is not contained in the indictment:

\[\text{an indictment for such an offense must be accompanied by a special information, filed by the district attorney with the court, charging that the defendant was previously convicted of a specified offense. Except as provided in subdivision three, the people may not refer to such special information during the trial nor adduce any evidence concerning the previous conviction alleged therein.}\textsuperscript{116}

Finally, during the trial, “the court, in the absence of the jury, must arraign the defendant upon such special information, and must advise him that he may admit the previous conviction alleged, deny it or remain mute.”\textsuperscript{117} If the defendant admits the allegation:

that element of the offense charged in the indictment is deemed established, no evidence in support thereof may be adduced by the people, and the court must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense.\textsuperscript{118}

If the defendant denies the conviction or remains mute “the people may prove that element of the offense charged before the jury as a part of their

\begin{itemize}
\item \textsuperscript{113} Id.
\item \textsuperscript{115} N.Y. Crim. Proc. Law § 200.60(1) (McKinney 2023).
\item \textsuperscript{116} Id. § 200.60(2).
\item \textsuperscript{117} Id. § 200.60(3).
\item \textsuperscript{118} Id. § 200.60(3)(a).
\end{itemize}
There is a caveat to this rule. In the case of a defendant charged with murder in the first degree on the theory the defendant has a prior conviction for murder, the State presents its case on the previous conviction after a guilty verdict.

New York’s law is close to ideal, but I believe the solution outlined below, combining New York’s easily understood and consistent procedure with Ohio’s more generous procedure for sexually violent predators, is predictable, consistent, just, and supports constitutional values.

B. Solution

I propose the following uniform statutory solution for Ohio and all jurisdictions. It borrows the best features of New York and Ohio Law. It can be placed in a codification scheme or as part of Rules of Criminal Procedure.

Model Rule for Charges and Specifications Involving Prior Convictions

1. Whenever a prior conviction of an offense becomes an element of any indicted offense by raising an offense of lower grade to one of higher grade or increasing the maximum penalty, an indictment for such higher offense may not allege such previous conviction. If the State alleges a specification that includes prior convictions that increase the penalty for the indicted offense that specification may not appear in the indictment.

2. An indictment for such an offense must be accompanied by a special information, filed by prosecutor with the court, charging that the defendant was previously convicted of a specified offense and/or containing the specification that includes the prior conviction(s). The prosecution may not refer to such special information during the trial nor adduce any evidence concerning the previous conviction alleged therein absent another exception contained in the Rules of Evidence or charged crime.

3. At least seven days before trial, the defendant may elect, in writing, to have the court instead of the jury determine the previous conviction(s).

4. If the defendant elects to have the court determine the previous conviction(s) the court shall do so after the jury’s verdict and before sentencing.

5. If the defendant elects to have the jury determine the previous conviction(s) the defendant shall be tried before the jury on the charge of the offense.

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119 Id. § 200.60(3)(b).
120 Id.
Following a verdict of guilty on the charge of the offense, the defendant shall be tried by that jury on the prior conviction(s) element and/or specification.

6. Nothing contained in this section precludes the prosecution from proving a prior conviction(s) before a grand jury or relieves them from the obligation or necessity to do so.

7. In misdemeanor cases not charged by indictment any language concerning prior conviction(s) shall be omitted from the complaint provided to the jury. Those prior conviction(s) will then be determined by the procedure outlined in sections 3-5. This does not relieve the prosecution of its obligation to allege all necessary elements in the charging instrument for misdemeanors.

This system should be adopted as it provides the advantages discussed below and ameliorates a number of constitutional concerns about modern procedures concerning prior convictions outlined in the next section.

C. Advantages

The advantages of this system are bountiful. Primarily, it is uniform. In every case where the offense is enhanced by prior conviction(s) there is a standard procedure that everyone can follow.

The defense does not risk committing ineffective assistance of counsel by failing to have the court determine a repeat offender specification where applicable. For example, in State v. Banks,\textsuperscript{121} the defense counsel was found ineffective when their "decision not to have a bench trial on the repeat violent offender specifications was not based on any reasonable trial strategy."\textsuperscript{122} In the proposed system, counsel would not be considered ineffective, regardless of their decision, because the jury would have already determined guilt under subsection five above. The State would benefit from this uniformity as well. In Banks, the State had to retry three cases involving multiple charges.\textsuperscript{123}

The State would also know that, in every case, it cannot introduce prior convictions as elements of the offense, and would not risk reversal when the court, defendant, or defense counsel mistake which particular scheme applies to particular statutes and/or specifications.

\textsuperscript{121} 56 N.E.3d 289 (Ohio Ct. App. 2015).
\textsuperscript{122} Id. at 302.
\textsuperscript{123} Id. at 305.
This standardization also protects the State’s interest in punishing repeat offenders more seriously. It is understandable that states want to punish those who frequently commit violent crimes, operate a vehicle while intoxicated, fail to pay child support, and/or commit sexually motivated offenses more severely than first offenders. I am not proposing that states uniformly eliminate the role of prior convictions in determining the degree of offense and punishment. I propose they do so fairly. States can continue to punish repeat offenders more harshly while continuing to protect the rights and dignity of those offenders. By ensuring that convictions of repeat offenders are based only on the facts of a particular case, the State can wash its hands of concerns that juries are handing down guilty verdicts because of a defendant’s character rather than the evidence.

Though more fully developed in the section about equal protection below, another advantage of this system is that it is more coherent. There is no compelling reason to treat different prior convictions differently. Even if there was such a reason, it would be hard to imagine why it makes more sense that a jury can hear about a prior non-support of dependents but not a prior sex offense. This system is even more coherent than New York’s system. As outlined above, New York’s system offers defendants a choice, but it is a hard bargain. If a New York defendant chooses not to admit that he or she has a prior conviction, the prosecution gets to tell the jury about that conviction prior to the jury determining guilt. Thus, New York’s system pressures defendants to stipulate because it is the only way to avoid having the jury learn about their prior convictions. This system removes that undue pressure because the determination of a prior conviction is independent of determining guilt.

D. Conclusion

A uniform statutory solution is predictable and coherent while still preserving the states’ interests in making crimes and punishments more serious for repeat offenders. In addition to its logically apparent advantages, it should be adopted because it ameliorates the constitutional concerns about the introduction of prior convictions during the State’s case-in-chief and supports constitutional values, as outlined below.

IV. CONSTITUTIONAL CONCERNS AMELIORATED

A. Introduction

Permitting defendants to stipulate pursuant to Old Chief is not a constitutionally compelled result. The majority opinion does not even mention the constitution and explicitly further limits the holding of Old Chief to felon
status cases. Courts, however, have always been wary of evidence of prior bad acts and its prejudicial effects on juries. *Old Chief* itself recognizes such concerns: “there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice whenever the official record would be arresting enough to lure a juror into a sequence of bad character reasoning.” Writing earlier, Justice Holmes succinctly stated, “character is not an issue in the case unless the prisoner chooses to make it one.” In the 19th century the Supreme Court held, “[h]owever depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.”

While a change in procedures regarding prior convictions as elements of the offense may not be constitutionally required, the concerns that courts have about its admission would be obviated by adopting procedures that keep the information from juries while still preserving the States’ rights to punish repeat offenders more seriously.

### B. Due Process

The United States Supreme Court confronted and expressly left open the question of whether the introduction of prior crimes to show propensity to commit future offenses would violate the due process clause in *Estelle v. McGuire*. In that case, the defendant brought his six month old daughter who was not breathing to the hospital and claimed she had sustained injuries from falling off of a couch. She died 45 minutes after being brought to the hospital and:

> [a]n autopsy revealed 17 contusions on the baby’s chest, 29 contusions in her abdominal area, a split liver, a split pancreas, a lacerated large intestine, and damage to her heart and one of her lungs. The autopsy also uncovered evidence of rectal tearing, which was at least six weeks old, and evidence of partially healed rib fractures, which were approximately seven weeks old.

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124 Old Chief v. United States, 519 U.S. 172, 183 n.7 (1997) (“While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status.”).

125 *Id.* at 173.


127 Boyd v. United States, 142 U.S. 450, 458 (1892).


129 *Id.* at 64–65.

130 *Id.* at 65.
The defendant objected to the introduction of evidence of the prior injuries to prove that the victim suffered from “battered child syndrome.”\(^{131}\) California law permitted introduction of the “evidence demonstrating battered child syndrome [to] help[] to prove that the child died at the hands of another and not by falling off a couch.”\(^{132}\) The defendant at trial claimed someone else must have injured the child, not that the child accidentally fell from the couch. The Ninth Circuit reversed the conviction on the grounds that evidence was inadmissible “on the theory that, because no claim was made at trial that [the victim] died accidentally, the battered child syndrome evidence was irrelevant and violative of due process.”\(^{133}\)

Reversing, the Supreme Court held that the evidence was not introduced as propensity evidence and that the California trial court had specifically instructed the jury not to consider the evidence as proof the defendant had injured the child on the day in question:

> It seems far more likely that the jury understood the instruction, . . . to mean that if it found a “clear connection” between the prior injuries and the instant injuries, and if it found that McGuire had committed the prior injuries, then it could use that fact in determining that McGuire committed the crime charged. The use of the evidence of prior offenses permitted by this instruction was therefore parallel to the familiar use of evidence of prior acts for the purpose of showing intent, identity, motive, or plan.\(^{134}\)

The Supreme Court also found the court’s limiting instruction ensured the jury did not consider the prior injuries improperly:

> Furthermore, the trial court guarded against possible misuse of the evidence by specifically advising the jury that the “[prior injury] evidence, if believed, was not received, and may not be considered by you[,] to prove that [McGuire] is a person of bad character or that he has a disposition to commit crimes.”\(^{135}\)

After finding that prior bad acts were not used as character evidence in this case, the Court left open the question of whether a state explicitly allowing the use of prior bad acts to prove propensity would violate the Constitution: “Because we need not reach the issue, we express no opinion on whether a state

\(^{131}\) Id.

\(^{132}\) Id. at 68.

\(^{133}\) Id. at 69 (citing McGuire v. Estelle, 902 F.3d 749, 754 (9th Cir. 1990)).

\(^{134}\) Id. at 75.

\(^{135}\) Id.
law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime.\textsuperscript{136}

While this case is not primarily about evidence of prior convictions, the concerns animating the due process discussion apply equally in prior conviction cases. Limiting instructions about prior convictions, like the following offered in Ohio, try to offer assurances that jurors will not make improper inferences:

Evidence was received that the defendant was convicted of (describe prior conviction). That evidence was received because a prior conviction is an element of the offense charged. It was not received, and you may not consider it, to prove the character of the defendant in order to show that he/she acted in (conformity) (accordance) with that character.\textsuperscript{137}

Courts have suggested these instructions help assuage due process concerns.\textsuperscript{138}

Just because something is constitutionally permissible does not mean it is the best practice. Concerns about prior convictions being introduced against defendants have existed in modern jurisprudence for centuries. This proposal is not about the classic exceptions to the character evidence rule such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident as outlined in Federal Rule of Evidence 404 and its state analogues. The proposed rule addresses due process concerns about character evidence by ensuring juries don’t need to consider and limit the inferences drawn from prior convictions when those prior convictions only serve to enhance the degree of offense or increase the maximum penalty of an offense.

\textbf{C. Trial by Jury}

The right to a trial by jury is protected by the Sixth Amendment to the United States Constitution: “[T]he accused shall enjoy the right to... trial, by an impartial jury.”\textsuperscript{139} This right also applies to defendants in state court per \textit{Duncan v. Louisiana},\textsuperscript{140} as it is “fundamental to the American scheme of justice.”\textsuperscript{141} Defendants’ rights to be tried by a jury in a criminal case extend

\textsuperscript{136} \textit{Id.} at 75 n.5.
\textsuperscript{137} \textit{Ohio Jury Instructions}, CR Section 401.25 (2022).
\textsuperscript{138} Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991) (“Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court’s instructions. Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process.”).
\textsuperscript{139} U.S. \textsc{const.} amend. VI.
\textsuperscript{140} 391 U.S. 145 (1968).
\textsuperscript{141} \textit{Id.} at 149.
beyond American jurisprudence and can be traced back to the Magna Carta.\textsuperscript{142} Duncan’s language about the history and power of the right to a jury trial is striking:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored, but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.\textsuperscript{143}

There is no parallel right to waive the right to a trial by jury. In Singer v. United States,\textsuperscript{144} the defendant challenged Federal Rule of Criminal Procedure 23(A), which allowed jury waiver only upon consent of the court and prosecutor “on the ground that the Constitution gives a defendant in a federal criminal case the right to waive a jury trial whenever he believes such action to be in his best interest, regardless of whether the prosecution and the court are willing to acquiesce in the waiver.”\textsuperscript{145} While the Court recognized that States may choose to allow defendants to unilaterally waive the right to a trial by jury:

[j]n light of the Constitution’s emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald

\textsuperscript{142} Id.
\textsuperscript{143} Id. at 156.
\textsuperscript{144} 380 U.S. 24, 25 (1965).
\textsuperscript{145} Id. at 25.
proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant’s only constitutional right concerning the method of trial is to an impartial trial by jury.\textsuperscript{146}

The right to a trial by jury is violated when a defendant is compelled to give up that right through coercion. While a judge promising a defendant a more favorable outcome or sentence for waiving his right to a jury trial is clearly problematic, “[c]oercion in either form has been rejected, whether its source is executive, legislative, or judicial in nature.”\textsuperscript{147} A clear example of this principle is illustrated in \textit{United States v. Jackson}.\textsuperscript{148} There, the defendant challenged the provision of the Federal Kidnapping Act that allowed for the death penalty only if recommended by a jury.\textsuperscript{149} The Court struck down that portion of the act, reasoning that it discouraged defendants from asserting their right to a trial by jury because waiving that right would ensure that defendants would not receive the death penalty: “Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.”\textsuperscript{150}

It is clear that treating defendants who assert their constitutional right to a trial by jury differently raises concerns about the very fundamental right they are enforcing. The rule proposed in this article addresses that concern. When a defendant with prior convictions that are elements of the crime chooses a trial by jury, that decision is not fraught with concerns about whether a jury will learn of the defendant’s prior convictions as a part of the State’s case-in-chief. Under rules like Ohio’s, defendants in most cases are compelled to choose between having a jury learn about their prior convictions or not having a jury at all. Even New York’s more liberal rule exerts undue pressure. Recall that under New York law, defendants are given a choice: if they admit the prior conviction to the judge, then the jury will never learn about it, but if they refuse to admit the prior conviction the State gets to tell the jury about the prior conviction before the jury

\textsuperscript{146} Id. at 36.
\textsuperscript{147} People v. Collins, 27 P.3d 726, 732 (Cal. 2001).
\textsuperscript{148} 390 U.S. 570 (1968).
\textsuperscript{149} Id. at 570–71 (“The Federal Kidnapping Act, 18 U.S.C. § 1201(a), provides: ‘Whoever knowingly transports in interstate commerce, any person who has been unlawfully [kidnapped] and held for ransom [or] otherwise [has been] shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.’ This statute thus creates an offense punishable by death ‘if the verdict of the jury shall so recommend.’ The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty.”).
\textsuperscript{150} Id. at 583.
determines the guilt of the underlying offense. Thus, defendants are pressured to waive their right to have a jury determine all the elements of the charged offense. If they choose to challenge their prior convictions, the jury will learn of the convictions. Under the proposed rule, if a defendant chooses to assert their constitutionally protected right to a trial by a jury, that jury will still decide all the elements, but the jury’s ruling on the prior conviction elements will come after its determination of guilt. This assures the jury makes all factual decisions in the case while preventing it from making impermissible inferences about the defendant’s character.

D. Equal Protection

The final constitutional concern this procedure ameliorates is that of Equal Protection:

The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.\textsuperscript{151}

Classifications that are not based on suspect characteristics like race and gender are generally subject only to rational basis review unless they “jeopardize[] exercise of a fundamental right.”\textsuperscript{152}

As an initial matter, schemes like the one in Ohio do treat offenders differently in terms of their ability to prevent a jury from learning about prior convictions. Those charged with substantive crimes like domestic violence, OVI, non-support of dependents, having a weapon under disability, and using a firearm as a violent career criminal have no procedural method to stop the State from introducing their convictions to a jury other than completely waiving the right to a jury trial. Repeat violent offenders and sexually violent offenders, by law, have their prior convictions heard by the court. Violent career criminals charged with that specification have their prior convictions heard by a jury.

Thus, the first question in an equal protection analysis is whether this distinction jeopardizes a fundamental right. The right to a trial by jury is undoubtedly fundamental, but the question of whether these disparate schemes jeopardize that right is more difficult. Defendants seeking to challenge these laws on equal protection grounds will run firmly into the challenge posed by \textit{Apprendi} that judicial determination of prior convictions is permissible and does not

\textsuperscript{151} F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

\textsuperscript{152} Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).
threaten the right to a trial by jury: “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”153

But those defendants should seek solace in an older case, Skinner v. Oklahoma ex rel. Williamson.154 Famously, the Skinner case dealt with an Equal Protection challenge to Oklahoma’s scheme for mandatory sterilization.155 At the time, Oklahoma allowed the Attorney General to seek an order requiring sterilization of an individual who had been previously convicted of two or more crimes “amounting to felonies involving moral turpitude” upon their next conviction of such a crime for which they were sentenced to prison in Oklahoma.156 The plaintiff in that case, Williamson, was one such person. He had been convicted previously of stealing chickens in 1926, armed robbery in 1929, and armed robbery again in 1934. The third conviction is what motivated the sterilization proceedings against him. Williamson challenged his sterilization order on a number of grounds, including procedural due process, substantive due process, and cruel and unusual punishment.157 It was the equal protection challenge that carried the day.158

The Court started by noting its skepticism of equal protection challenges: “the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is ‘the usual last resort of constitutional arguments.’”159 The Court recited prior precedent emphasizing the states’ power to make criminal law and classify criminals accordingly.160 States are certainly allowed, in our federal system, the flexibility necessary to meet their changing and perceived needs.161

However, that flexibility only extends so far. Oklahoma reached the breaking part of that flexibility when it passed “legislation which involves one of the basic civil rights of man.”162 Importantly, Skinner’s decision was not based on a suspect class like race or nationality. Rather, Oklahoma’s law demanded strict scrutiny review because “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected

155 Id.
156 Id. at 536.
157 Id. at 537–38.
158 Id. at 538.
159 Id. at 539.
160 Id. at 539–40.
161 Id. (“Thus, if we had here only a question as to a State’s classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised.”).
162 Id. at 541.
a particular race or nationality for oppressive treatment."163 Once the Court decided to strictly review Oklahoma’s disparate application of sterilization between those who committed embezzlement (who could not be sterilized) versus those who stole in other ways (who could be), the law quickly failed to meet constitutional scrutiny.164

The differences in procedures regarding the admission of prior convictions are strikingly similar. Sexually violent predators are treated differently than violent career criminals, who are treated differently than repeat violent offenders, who are treated differently than repeat OVI offenders, and so on and so on. Here, one might object that the harm suffered in Skinner is the crux of the constitutional problem and that sterilization and juries learning about prior convictions are of a different character altogether. There is no compelling reason to believe, however, that the right to an impartial jury is not “one of the basic civil right of man.”165

Even prior to the right to a jury trial being incorporated against the states, the Supreme Court recognized “the impartiality of any jury empaneled to try a cause.”166 “[D]ue process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.”167 Jurists have previously expressed concern that the introduction of the nature of prior felony convictions makes it more difficult for defendants to receive a trial from a fair and impartial jury.168

The current system of disparate procedures depending on the nature of the offense or specification makes as little, if not less, sense than Oklahoma’s classification scheme challenged in Skinner. The right to an impartial jury is just as fundamental as any other right protected by the constitution. Unlike the right to “marriage and procreation” protected in Skinner, the right to an impartial jury is explicitly protected by the Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”169 Given this explicit protection, courts should find, and practitioners should argue, that granting different procedural protections to different types of crimes and

163 Id.
164 Id. at 542.
165 Id. at 541.
167 Id. at 727.
168 United States v. Blackburn, 592 F.2d 300, 301 (6th Cir. 1979) (“Disclosure of the nature of prior felony convictions makes it difficult to assure an accused a fair and impartial jury. Without doubt, it places an unnecessary burden upon the presumption of innocence.”).
169 U.S. CONST. amend. VI.
specifications is just as constitutionally impermissible as distinguishing between
embezzlers and other types of thieves in Oklahoma.

If the right to an impartial jury is not fundamental or not implicated by
these schemes, then defendants can still make a case based on rational basis
review. In that case, the “the Equal Protection Clause requires only that the
classification rationally further a legitimate state interest.” I believe there is a
valid argument that, in Ohio’s scheme, the fact that each discussed specification,
violent career criminal, repeat violent offender, sexually violent predator, is
treated differently does not rationally further a legitimate state interest. It is hard
to imagine why sexually violent predators receive the most procedural protection
(being permitted to choose trial by jury on the specification and have that
determination reserved for after the trial on the underlying charge), repeat violent
offenders receive some protection (mandatory court determination) and violent
career criminals receive none (must waive entire charge to jury to prevent
introduction of prior convictions).

Concerns about equal protection highlight that treating certain
defendants differently in this context simply does not make sense. Adopting the
uniform procedure that I propose for all defendants supports the values of the
equal protection clause just as it supports the values of due process and trial by
jury. These are values worth protecting.

V. CONCLUSION

The issue of prior convictions as elements of an offense does not have to
be a chaotic and confusing universe that depends on the underlying offense,
specification, and jurisdiction. Prosecutors, defense attorneys, judges, jurors, and
defendants should not have to worry about what inferences will be drawn based
on prior convictions. The prosecution should not be able to skirt the prohibitions
on character evidence by simply making prior convictions an element of the
crime or specification and hiding behind a jury instruction that asks the jury not
to infer the obvious. It is hard to imagine a jury believing a convicted domestic
abuser is not guilty this time after hearing he or she has been convicted multiple
times before. The same goes for drunk drivers, deadbeat parents, repeat violent
offenders, sexually violent predators, and violent career criminals. These labels
are not conducive to rational decision making based on evidence. They may be
appropriate for sentencing determinations. Only by adopting a uniform system
that allows defendants to have prior convictions heard independent of the
determination of the underlying offense can we avoid “the risk that a jury will
convict for crimes other than those charged—or that, uncertain of guilt, it will

convict anyway because a bad person deserves punishment." While *Old Chief* was rightly decided, a New Chief should lead the way forward.

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