University of Richmond Law Review

Volume 32 | Issue 1 Article 6

1998

Pretending to Upset the Balance: Old Chief v. United States and Exclusion of Prior Felony Conviction Evidence Under Federal Rule of Evidence 403

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CASENOTES

PRETENDING TO UPSET THE BALANCE: *OLD CHIEF V. UNITED STATES* AND EXCLUSION OF PRIOR FELONY CONVICTION EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 403

I. INTRODUCTION

The story of an event is often more interesting and informative than the mere fact that the event occurred. Aesop's morals would not be as captivating without the fables that accompany them. The fables tell the reader a story embodying a moral truth. On election night, the ballot tally proves which candidate won, but the voter is interested more in the story of the campaign trail that put the candidate in office rather than a naked statistic comparing voting percentages. The story gives not only the bare idea or fact; it mixes this bare idea or fact with the supporting factual information, making it easier to understand.

The context of a trial provides another example when reliance on the "story" is useful for understanding. Experienced counsel will not present his evidence to the jury through a laundry list of abstract legal principles, but will provide the jury with a story of the events that combines both principle and fact, which allows the jury to follow along. The details of the events that led to the issue in question assist the jury in understanding and assessing the evidence presented. A finding that a defendant stole corporate funds or murdered a victim with requisite intent may be very difficult for the jury to determine without the facts underlying the charge. Under these circumstances, the jury benefits from a story about the employ-

ee who took, allegedly, five thousand dollars from the cash register of the department store at the end of a shift and then mysteriously quit, or a story concerning a botched drug deal that ended when one of the dealers was shot in cold blood with a pistol. In the trial context, the story of events pieces the puzzle together so that the jury may assess the evidence and understand how the evidentiary pieces fit.

In criminal proceedings, the prosecution is allowed generally to satisfy its burden against the defendant and fulfill its evidentiary requirements by choosing its own method of proof or version of the "story."[1] This prosecutorial element of choice is expansive and has few restrictions.[2] One such restriction, however, prohibits the prosecution from introducing past or "other" acts[3] that bear only on the defendant's character and, though relevant, are not related directly to the case in question.[4]

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1. "A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact." 32 C.J.S. *Evidence* § 397 (1996). *See* Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958) (stating that "the rule is to permit a party 'to present to the jury a picture of the events [because a] substitute "naked admission might . . . rob the evidence of much of its . . . weight"'") (quoting Dunning v. Maine Central Railroad Co., 39 A. 352, 356 (Me. 1897)); *see also* Old Chief v. United States, 117 S. Ct. 644, 653 (1997) (stating that the standard rule is to entitle the prosecution to prove its case by evidence of its own choice); United States v. Gilman, 684 F.2d 616, 622 (9th Cir. 1982) (holding that prosecution was entitled to prove conspiracy by its own probative evidence regardless of defendant's willingness to stipulate to the existence of a conspiracy); United States v. Brickey, 426 F.2d 680, 686 (8th Cir. 1970) (stating that the government in a criminal proceeding is not required to accept a judicial admission by the defendant but has a right to offer proof).

2. *See* FED. R. EVID. 402 (requiring that admissible evidence be relevant); FED. R. EVID. 403 (stating that where relevant evidence is more unfairly prejudicial than probative, then it may be excluded); FED. R. EVID. 404 (stating that character evidence is not admissible to prove conduct); FED. R. EVID. 802 (restricting admissibility of hearsay evidence); *see also* Michelson v. United States, 335 U.S. 469, 475-76 n.8 (1948) (holding that prosecution may not provide evidence of prior criminal acts except where the past criminal conviction is an element of the crime).

3. "Other" is defined as "different or distinct from that already mentioned; additional, or further," such that an "other act" as evidence is a presentation of conduct outside, and in addition to, any evidence going to prove the case in chief. BLACK'S LAW DICTIONARY 1101 (6th ed. 1990).

4. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant . . . [but because] it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a general bad record and deny him a fair opportunity to defend against a particular

Evidence of a prior conviction demonstrates a particular type of past act[5] and is inadmissible as character evidence due to its unduly prejudicial influence on the jury.[6] Yet, Rule 404(b) of the Federal Rules of Evidence permits the prosecution to introduce prior convictions in a limited number of cases where the past act offered is indicative of more than character evidence, relates directly to the case in chief, and is not unduly prejudicial.[7] In determining whether the evidence of a prior conviction is admissible as part of the prosecutorial story, the trial court judge, pursuant to Federal Rule of Evidence 403,[8] must balance the probative value[9] of the evidence against its unfair prejudi-

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> charge. [T]he practical experience [is] that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson, 335 U.S. at 475-76 (footnotes omitted). *See also* Spencer v. Texas, 385 U.S. 554, 560 (1967) (holding that prior conviction evidence is "generally recognized to have potentiality for prejudice [and] it is usually excluded"); United States v. Jones, 67 F.3d 320, 322 (D.C. Cir. 1995) (stating that evidence of other crimes is always prejudicial and diverts the jury's attention to the defendant's bad character) (citing United States v. James, 555 F.2d 992, 1000 (D.C. Cir. 1977)).

In these instances, character or past acts evidence would add elements to the prosecution's "story" of the events that would be extraneous to the issues in question and color the story with prejudicial overtones to the overwhelming detriment of the defendant.

5. *See* FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove . . . character").

6. *See supra* note 4. Unfair prejudice in a criminal context refers to the "capacity of . . . relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 117 S. Ct. at 650. Additionally, "evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant." *Id.* at 652.

7. Prior acts or convictions may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." FED. R. EVID. 404(b). *See Michelson*, 335 U.S. at 475 n.8 (stating a qualification to the general inadmissibility of past convictions where the conviction is an element of the offense). Admissibility of other acts requires a two part analysis which first requires the evidence to be relevant for more than proof of character and, second, that the prejudicial value is not substantially greater than the probative value. *See* United States v. Figueroa, 976 F.2d 1446, 1453 (1st Cir. 1992); *see also* United States v. Garcia, 983 F.2d 1160, 1172 (1st Cir. 1993) (stating a similar two-part analysis under Rules 404(b) and 403 of the Federal Rules of Evidence).

8. "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." FED. R. EVID. 403.

9. Probative evidence is that "having the effect of proof; tending to prove, or actually proving." BLACK'S LAW DICTIONARY, 1203 (6th ed. 1990). Note that "probative" and "relevant" are distinguishable, such that evidence of a prior conviction may be relevant to proving an element, while having very little if any probative value

cial effect.[10] If, in its discretion, the court finds the evidence to be unduly prejudicial, then the prior conviction may be inadmissible, even though relevant.[11]

In *Old Chief v. United States*,[12] the Supreme Court inquired whether an abuse of discretion occurred when a trial court judge permitted, under Rule 403, prosecutorial evidence of not only the existence of a prior conviction, but also its name and nature, after the defendant offered to stipulate to the existence of the prior offense.[13] Although evidence of a prior conviction was necessary to convict Old Chief of felon-in-possession charges,[14] the Court questioned whether that evidence could include the nature of the past felony or, in the alternative, whether Rule 403 excluded categorically such a presentation as unfairly prejudicial.[15] The majority ruled that when the defendant agrees to stipulate[16] a prior conviction element, and the prior conviction element requires merely proof of status,[17] which ne-

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because it may not actually have the effect of proof. *See Old Chief*, 117 S. Ct. at 652 (discussing the difference between Rule 401 "relevance" and Rule 403 "probative value").

10. *See supra* note 6.

11. *See* FED. R. EVID. 403. The trial judge has wide discretion to balance probative value against unfair prejudicial value in deciding admissibility. *See* United States v. Abel, 469 U.S. 45, 54 (1984); *see also Garcia*, 983 F.2d at 1173 (stating that a judge has leeway in determining Rule 403 admissibility). On appeal, admission of evidence under Rule 403 is adjudged by the abuse of discretion standard. *See Abel*, 469 U.S. at 55.

12. 117 S. Ct. 644 (1997).

13. *See id.* at 647.

14. Felon-in-possession charges are described under 18 U.S.C. § 922(g)(1), which reads as follows: "It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm." 18 U.S.C. § 922(g)(1). This section replaced the repealed 18 U.S.C. § 1202(a)(1). Note that prior felony convictions do not include "antitrust violations, unfair trade practices, restraints of trade, or other . . . regulation of business practices [felonies]" or any State misdemeanor punishable by two or fewer years incarceration. *See Old Chief*, 17 S. Ct. at 647.

15. While evidence of prior conviction satisfies Rule 404(b) when it tends to prove a criminal element, the second prong of the test under Rule 403 may not be met if the prior conviction's unfairly prejudicial value substantially outweighs its probative value. *See supra* note 7.

16. For admission into evidence, a stipulation must "express a clear and unequivocal intention to remove the issues such that . . . it constitutes an offer to stipulate" and the "concession must cover the necessary substantive ground to remove the issues from the case." *Garcia*, 983 F.2d at 1174.

17. A status element is a "discrete and independent component of the crime" that shows class membership and is independent of the facts leading to membership.

gates the jury's need to know of the conviction's nature, the court abuses its discretion under Rule 403 if it allows the prosecution to present evidence showing the name and nature of the past offense.[18]

The questions that *Old Chief*'s majority opinion raise are peculiar. First, as the dissent remarked, either the majority failed to properly apply Rule 403 or, alternately, Rule 403 may not have force when the prior conviction is an element of the offense.[19] Second, the majority appears to have introduced a "less prejudicial alternative" test under Rule 403 that examines holistically evidentiary possibilities in order to exclude evidence that carries a "greater risk" of being unfairly prejudicial.[20] This test, however, finds no explicit reference in the history or text of Rule 403 and, possibly, no implicit support. Further, the holding violates the general rule permitting the prosecution to present evidence to prove its own story,[21] while making a judge's discretionary ruling under Rule 403 a mechanical process for "status" elements.[22]

Greater questions remain unanswered in determining the broader ramifications of *Old Chief*'s analysis of the Rule 403 balancing test when a defendant's stipulation is a factor. While issues of what constitutes a "status" element[23] and the general power of the defense to force both the court and opposing counsel to accept stipulations under Rule 403 could extend possibly to other offenses, *Old Chief* provides a narrow, circumscribed

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United States v. Jones, 67 F.3d 320, 323 (D.C. Cir. 1995) (citing United States v. Tavares, 21 F.3d 1, 4 (1st Cir. 1994)). The felon-in-possession prior conviction element is a status element showing membership in the class of convicted felons under 18 U.S.C. § 922(g)(1) and does not require a demonstration of the criminal acts that led to membership. *See Old Chief*, 117 S. Ct. at 653.

18. *See Old Chief*, 117 S. Ct. at 655.

19. *See id.* at 656 (O'Connor, J., dissenting).

20. The majority suggested that the proper Rule 403 balancing test will weigh probative value and unfair prejudice by comparing evidentiary items with available substitutes, such that the "probative value of an item of evidence [may decrease] when faced with less risky alternative proof going to the same point." *Id.* at 659.

21. *See id.* at 658 (O'Connor, J., dissenting).

22. *See* 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5250 (1978) (stating that Rule 403 "discretion" means that "no hard and fast rules are laid down" and that "no mechanical solution is offered") (citing United States v. Fierson, 419 F.2d 1020, 1022 (7th Cir. 1969)).

23. *See supra* note 17.

rule that should have little effect outside felon-in-possession cases.[24] While seemingly expansive, the majority holding is tailored narrowly to the specific offense[25] and fails to mandate a categorical exclusion of the nature of prior convictions in all cases during which such evidence may find admission.[26] Instead, the opinion shows truly that Rule 403 is discretionary and presents a mere tautology for future decisions.

This note examines those issues in order to determine the scope of the *Old Chief* decision. After a brief explanation of the history of Rule 403 balancing, this note provides a foundation for understanding modern cases dealing with defendant stipulations by exploring the early cases addressing the prosecution's right to tell its evidentiary story over the defendant's proffered stipulations. Court decisions from the 1970s to the present, particularly cases concerning felon-in-possession charges, comprise the next section. The note then provides an analysis of both the majority and minority opinions in *Old Chief* concerning the effect of a stipulation on the prosecution's proof and how Rule 403 should be applied to stipulations of status elements. Finally, the note concludes that *Old Chief* provides a limited holding that has not defeated the prosecution's ability to tell its story, because the Rule 403 balancing test favoring defendant stipulations is applicable only in specific instances.

II. RULE 403, PRIOR CONVICTION EVIDENCE AND STIPULATIONS

A. *Rule 403*

Prior to ratification of the Federal Rules of Evidence in 1975, exclusion of evidence based on unfair prejudice to a party was not so much a rule as an amalgam of judicial responses to various scenarios.[27] While judges excluded relevant evidence

24. The majority stated that in most cases a "Rule 403 objection . . . generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." *Old Chief*, 117 S. Ct. at 651.

25. "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." *Id.* at 651 n.7.

26. "[I]f . . . there were a justification for receiving evidence of the nature of the prior acts on some issue other than status . . . Rule 404(b) guarantees the opportunity to seek its admission." *Id.* at 655.

27. *See* FED. R. EVID. 403 advisory committee's note. The Committee noted that

that produced unfair prejudice against the defendant, confused the issues, misled the jury, or wasted time,[28] no specific standards existed to guide the judiciary in a determination of unfair prejudice beyond balancing the probative value and need for evidence against the probable harm of admitting the evidence. Thus, courts excluded evidence that was relevant if other circumstances existed which created greater harm than benefit, though the circumstances were not provided in a set of objective rules.

When the Federal Rules of Evidence were promulgated, the Supreme Court drafted Rule 403, which read as follows: "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."[29] The new rule noted the traditional concerns of the Court, but it left the admission of unfair prejudicial evidence to judicial discretion.[30] The new rule, like the common law tradition, failed to provide an objective set of circumstances under which evidence was to be excluded. Instead, Rule 403 stated explicitly broad categories under which relevant evidence may be excluded and mandated an analysis that requires a balancing of probative and prejudicial value.[31]

In addition, the Federal Rules of Evidence contained Rule 404(b), which permitted evidence of other crimes under limited circumstances. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

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Rule 403 was designed "as a guide for the handling of situations for which no specific rules have been formulated." *Id.*

28. *See id.* The Committee defined "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.*

29. FED. R. EVID. 403.

30. Based on the advisory committee's note, Rule 403 mandates a court balancing test to determine the admissibility of evidence as to probative value and unfair prejudicial effect, though the decision of admissibility under Rule 403 remains discretionary. *See id.*; *see also supra* note 27 (stating that Rule 403 was meant to be a guide).

31. *See* FED. R. EVID. 403.

> preparation, plan, knowledge, identity, or absence of mistake or accident.[32]

Although evidence of other crimes was regarded as highly prejudicial to the party against whom it was offered, the rule provided a narrow exception when such evidence was also probative of a matter at issue other than character.[33] Admission of evidence indicating other crimes was premised upon compliance with not only Rule 404(b), but also passing the Rule 403 balancing test.[34] The Rule 403 balancing test was intended to be conducted with a wary eye towards the availability of alternative means of proof and "other factors appropriate for making decisions of this kind under Rule 403."[35]

B. *Early History of Prior Conviction Evidence and Stipulations*

In a number of instances, the prosecution in a criminal case may find an opportunity to introduce evidence of the defendant's prior conviction record.[36] A prior conviction falls within Rule 404(b) restrictions, which exclude evidence of other

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32. FED. R. EVID. 404(b).

33. *See id.*, advisory committee's note.

34. *See id.*

35. *Id.* These decisions are based on discretion in view of a number of factors including, but not limited to the following: probative worth, evidentiary need, sufficiency of other evidence, alternative proof, strength of proof, prejudice, time required to prove, nature of the proof, and motivation of offeror. *See* WRIGHT & GRAHAM, *supra* note 22. Courts are to eschew any mechanical application of Rule 404(b) in place of a more subjective assessment of the evidence to ensure that relevant evidence is admitted while lessening prejudicial impact that necessarily accompanies other crimes evidence. *See id.*

Note that admission of other crimes evidence is a three step process that involves: (1) meeting one of the nine categories in Rule 404(b); (2) a relevancy determination under Rules 401 and 402; and (3) a balancing under Rule 403 to determine that the probative value is greater than any unfair prejudicial value. *See Emerging Problems under the Federal Rules of Evidence*, 1991 A.B.A. SEC. LITIG. 48 (David A. Schlueter ed., 2d. ed.) (discussing the Supreme Court's holding in *Huddleston v. United States*, 485 U.S. 681 (1988)). Thus, admission under Rule 404(b) often will hinge upon the mandatory Rule 403 balancing test and a determination of whether the admission of evidence of other crimes is unfairly prejudicial.

36. While not admissible to show a "criminal" character under Rule 404(b), prior convictions could be used to demonstrate that the events underlying the conviction were part of a common and continuing course of action, motivation, status as a career criminal, or even represent an element of the offense itself. *See* FED. R. EVID. 404.

crimes. Thus, evidence of a prior conviction must fall within Rule 404(b)'s exceptions, constitute relevant evidence, and pass Rule 403 balancing in order to gain admission.[37] Once admitted, the prosecution may tell its story concerning the prior conviction and include the details, type, and nature of the offense underlying the conviction.

In an effort to block efforts by the prosecution to introduce the details of a prior conviction, a criminal defendant may attempt to stipulate that a prior conviction exists. The stipulation then acts as an admission to the prior conviction, while preventing the jury from hearing the nature of the conviction and possibly making improper considerations based on such evidence. In effect, the stipulation removes the prosecution's ability to tell a story about the prior conviction by providing an assertion that such a conviction exists. The question that remains, however, is whether an offer to stipulate constitutes a factor under Rule 403 when conducting a Rule 404(b) admissibility test and prevents the prosecution from telling its story.[38]

Before the Federal Rules of Evidence were enacted in 1975, and for some time thereafter, a defendant's stipulation was taken by the trial court with some levity and usually without success. Generally, a court rejected a defendant's stipulation in favor of the prosecution's need to tell a continuous evidentiary story. The balance of prejudice and probativeness often fell to the side of the latter based on need and the alleged inadequacy of a stipulation to fully meet the prosecution's burden of proof. In the 1958 case of *Parr v. United States*,[39] the Fifth Circuit upheld the right of the prosecution to refuse the defendant's stipulation to an element of criminal interstate transport of ob-

37. *See supra* note 35.

38. Both the prosecution's story and a stipulation constitute alternative proofs of the prior conviction. When applying Rule 404(b), the court will examine the availability of alternative proofs. *See supra* note 35. Since the story contains more detail than the bare stipulation, the court will consider issues surrounding this extra information, including waste of time, prejudicial value, need, and strength of the evidence for proving the factual proposition that the prior conviction goes to prove. *See id.* The defendant's hope is that the extra information will prove unfairly prejudicial under the Rule 403 balancing test, denying the prosecution the ability to tell its story, and leaving only the naked stipulation before the jury untainted with knowledge of the conviction's nature.

39. 255 F.2d 86 (5th Cir. 1958).

scene films.[40] The court held that a party is not required to accept the admission by his adversary, but may insist on proving the facts in his own manner.[41] Otherwise, the party may lose the weight and effect of the evidence by permitting the adversary to remove the surrounding facts, leaving only the naked admission.[42]

Eight years later, in *Spencer v. Texas*,[43] the Supreme Court held that while evidence of a prior conviction is potentially prejudicial and, usually, must be excluded, the evidence is admissible when it is probative.[44] When the prior conviction is a criminal element that the prosecution must prove, evidence of the past act is both probative and admissible.[45] The decision upheld the prior ruling of *Michelson v. United States*,[46] in which the Court stated that while prior convictions, generally, were inadmissible as character evidence, the rule did not apply when the prior conviction constituted an element of the offense and was not introduced merely to show character.[47]

1. Prior conviction stipulations in the 1970s

In the 1970s, a line of felon-in-possession cases followed the *United States v. Brickey*[48] decision that the prosecution is entitled to prove its own case regardless of any offer by the defendant to stipulate the existence of the conviction element.[49] Ad-

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40. The court ruled that the prosecution was not required to accept the defendant's stipulation that the films were lewd and obscene, and instead, allowed evidence showing the film's content since a party is allowed "'to present to the jury a picture of the events relied upon.'" *Id.* at 88 (citations omitted).

41. *See id.*

42. *See id.* (quoting Dunning v. Maine Central Railroad Co., 39 A. 352, 356 (Me. 1897)).

43. 385 U.S. 554 (1967).

44. *See id.* at 560.

45. *See id.*

46. 335 U.S. 469 (1948).

47. *See id.* at 475-76.

48. 426 F.2d 680 (8th Cir. 1970) (holding that the prosecution could present evidence, over the defense's objections, showing personal expenditures of money taken in a fraudulent scheme in order to show a scheme to defraud).

49. *See id.* at 685-86; United States v. Williams, 612 F.2d 735 (3rd Cir. 1979) (holding that the prosecution was not required to accept defendant's stipulated offer of prior felony conviction as proof); United States v. Blackburn, 592 F.2d 300 (6th Cir. 1979) (holding that the government was not required to accept the defendant's

ditionally, through the middle of the decade, several cases also allowed the prosecution to present multiple past convictions to show the prior felony element.[50] In general, a defendant could not require the prosecution to accept either stipulation of admission to a prior conviction[51] or stipulation of the existence of the element.[52] While some cases recognized the possible preju-

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stipulation of prior felony conviction in a felon-in-possession case); United States v. Brinklow, 560 F.2d 1003 (10th Cir. 1977) (holding that while the prosecution does not have an unequivocal right to refuse all stipulations, the government, generally, is not required to accept such offers); United States v. Burkhart, 545 F.2d 14 (6th Cir. 1976) (holding that the government was not required to accept defendant's stipulation to a lesser prior felony conviction in a felon-in-possession case); United States v. Smith, 520 F.2d 544 (8th Cir. 1975) (holding that the prosecution was not required to accept the defendant's stipulations in lieu of its own proof in a felon-in-possession case). *But see* United States v. Poore, 594 F.2d 39 (4th Cir. 1979) (finding that once the prosecution has accepted a stipulation, the court cannot admit prosecutorial evidence excluded by the stipulation); United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976) (holding that Rule 403 prohibits the government's refusal of a stipulation where the government's own evidence has little prosecutorial need and the evidence is not probative).

50. *See Burkhart*, 545 F.2d at 15 (allowing the government to present evidence of two prior convictions to satisfy the prior felony element of felon-in-possession offense); *Smith*, 520 F.2d at 548 (finding that the prosecution was not limited to presenting only one prior felony conviction to prove the conviction element in a felon-in-possession case).

51. A defendant is not allowed to "stipulate" out of the element, which means the defendant cannot offer to concede the element so that the jury is never appraised that the element even exists. At a minimum, the jury must be informed by a stipulation that the defendant does have a prior felony record, although not necessarily the type of felony conviction. *See Williams*, 612 F.2d at 740 (holding that a defendant's stipulation cannot modify a prior conviction element so as to remove it entirely from the jury's consideration); *Brinklow*, 560 F.2d at 1006 (deciding that the prosecution is not required to accept a stipulation that will remove completely the issue of a past conviction from the jury); *Burkhart*, 545 F.2d at 15 (stating that a defendant could not stipulate the lesser of two past felony convictions in order to altogether remove evidence of a past conviction from the jury).

52. Such a stipulation does not remove the element from the jury's consideration, but does restrict the type of evidence that the prosecution can provide the jury in proving the prior conviction element. Most notably, the stipulation removes the ability of the government to present evidence of the name and nature of the prior felony and instead requires the jury to accept an admission that the defendant has been convicted of a prior felony without any knowledge of the facts underlying that offense. This issue is the principal problem in stipulations to a prior conviction element. *See supra* note 49; *see also Poore*, 594 F.2d at 42 (discussing the effect of an accepted stipulation in limiting prosecutorial evidence).

dicial effect of the evidence under Rule 403,[53] most courts held that probative value outweighed any unfair prejudice.[54]

Five years before the Federal Rules of Evidence were enacted, the Eighth Circuit decided *Brickey*, a case that later would serve as the cornerstone for a line of cases rejecting defendant stipulations in favor of the prosecution's need to tell a continuous story.[55] Charged with mail fraud, Brickey objected to the prosecution's presentation of evidence demonstrating personal expenditures made by Brickey with diverted funds. The expenditures included a diamond ring, a pool, and money paid on Brickey's home. After Brickey argued that the evidence was irrelevant and conceded a diversion of funds, the trial court nonetheless permitted the government to present evidence of the expenses to show that funds were diverted through a scheme to defraud.[56] The basis for the decision was that a party is not required to accept an opponent's admission, but may demand his own right to offer proof.[57]

The Eighth Circuit relied upon the *Brickey* decision a few years later in *United States v. Smith*.[58] Smith was charged with being a felon-in-possession[59] and the prosecution introduced the trial records of Smith's prior convictions for armed robbery and felon-in-possession. Although Smith offered to stipulate that the "jury might take it as established that [he] had a felony record" or that the armed robbery offense was the basis for the prior felon-in-possession conviction, the trial court ad-

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53. *See Spletzer*, 535 F.2d at 956 (finding that Rule 403 may restrict the prosecution's presentation of evidence).

54. *See supra* note 49.

55. *See* United States v. Brickey, 426 F.2d 680 (8th Cir. 1970). The Eighth Circuit relied upon the *Brickey* decision in deciding *Smith*, 520 F.2d at 548, and *United States v. Bruton*, 647 F.2d 818, 825 (8th Cir. 1981). The First Circuit referred to *Bruton* in *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989), in upholding the prosecution's right to refuse a defendant's stipulation. Later, the First Circuit attacked *Brickey* and its line of cases, including its own decision in *Collamore*, in *United States v. Tavares*, 21 F.3d 1 (1st Cir. 1994), in which a prosecutorial duty to accept stipulations was formulated.

56. *See Brickey*, 426 F.2d at 685-86.

57. *See id.* (citing Parr v. United States, 255 F.2d 86 (5th Cir. 1958)).

58. 520 F.2d 544 (8th Cir. 1975).

59. The charge was "having unlawfully received a firearm that had moved in interstate commerce" under 18 U.S.C. app. § 1202(a)(1) (1994), the precursor to the modern felon-in-possession statue. *See supra* note 14.

mitted the felony record.[60] Relying on *Brickey*, the court of appeals upheld the admission, stating that the prosecution was not to be limited by defendant's stipulations.[61] Further, the court held that the lack of a jury instruction on the limited use of the evidence was not reversible error since no affirmative duty existed for the trial court to include such an instruction without a request from the defendant.[62]

Several other circuits in the 1970s followed the Eighth Circuit's holding that a defendant's stipulation did not restrict the prosecution's presentation of evidence concerning prior convictions. In 1976, the Sixth Circuit relied upon *United States v. Smith* when it ruled in *United States v. Burkhart*[63] that a defendant's stipulation could not limit the prosecution's choice of prior convictions to prove the prior felony element in a felon-in-possession case.[64] In *Burkhart*, the defendant attempted to stipulate that he had been convicted of the lesser of two prior offenses. The court, however, refused summarily to require the government to accept the offer.[65]

In turn, *Burkhart* provided the foundation in *United States v. Blackburn*.[66] In *Blackburn*, the Sixth Circuit held that an offer to stipulate would not prevent the government from introducing the nature of a prior offense. While the concurring opinion in *Blackburn* disagreed that the *Burkhart* rule should apply,[67] the opinion noted that the admission was harmless because such admission was necessary to rebut the defense of innocent pos-

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60. *See Smith*, 520 F.2d at 547.

61. *See id.* at 548. Additionally, the court held that the stipulation would not act to restrict the government's choice of prior convictions to prove the element, such that the prosecution was allowed to rely on either the armed robbery or felon-in-possession records to prove its case. *See id.*

62. *See id.* at 549.

63. 545 F.2d 14 (6th Cir. 1976).

64. *See id.* at 15.

65. If the stipulation had required acceptance by the prosecution, then the defendant strategically would have blocked proof of either conviction from going to the jury. *See id.* Instead, the court ruled that the government was not only not bound by the stipulation, but was not limited to proof of only one prior conviction. *See id.*

66. 592 F.2d 300 (6th Cir. 1979) (refusing to overturn *Burkhart*).

67. "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. . . . Therefore, I cannot agree that the court should adhere to the Burkhart rule." *Id.* at 301 (DeMascio, J., concurring).

session and, therefore, would be admissible under the Federal Rules of Evidence.[68]

The Third and Tenth Circuits also joined the Eighth Circuit concerning defendant stipulations to prior conviction evidence. Relying in part on *Brickey*, the Third Circuit held in *United States v. Williams*[69] that the defendant could not require the prosecution to accept his stipulation regarding a prior conviction such that felony status would not be admitted in argument or jury instructions. The court cited to the prosecution's right to offer its own proof and refused to recognize a duty to accept the proffered stipulation.[70] Similarly, the Tenth Circuit, while not citing to the Eighth Circuit opinions, held in *United States v. Brinklow*[71] that a defendant's stipulation to remove prior conviction evidence from the jury could not bind the prosecution when the conviction was an element of the offense.[72] Thus, a defendant charged with interstate possession of explosives by a convicted felon could not stipulate away the prior offenses and remove the elements from prosecutorial proof.[73]

Several circuits in the 1970s, however, imposed limits on *Brickey*'s rule permitting the prosecution to choose its own evidence. In *United States v. Spletzer*,[74] the Fifth Circuit held that the trial court erred in admitting evidence of a conviction and confinement for bank robbery to demonstrate that the accused was a prior felon who had escaped from prison.[75] After the defendant provided a sworn admission of the conviction, the government nonetheless was permitted to introduce the full record of the bank robbery conviction. While noting *Brickey*'s

68. *See id.* (relying upon FED. R. EVID. 609(a) and 404(b)).

69. 612 F.2d 735 (3d Cir. 1979).

70. The stipulation in question would have prevented the jury from hearing any evidence concerning the prior conviction and also would have permitted the defendant to modify the elements of the felon-in-possession statute by removing them from jury consideration. *See id.* at 740.

71. 560 F.2d 1003 (10th Cir. 1977).

72. *See id.* at 1006; *see also supra* note 51.

73. The *Brinklow* court was hesitant to grant a wholesale refusal to the prosecution concerning stipulations. It stated that the government did not have an "unequivocal right" to refuse all stipulations and sided with the general rule of prosecutorial choice of evidence based on the essential need for the prior conviction element. *Brinklow*, 560 F.2d at 1006.

74. 535 F.2d 950 (5th Cir. 1976).

75. *See id.* at 955-56.

general rule permitting a party to refuse an adversary's stipulations, the court held that the full record of the prior conviction was not needed given the sworn admission.[76] Since there was no prosecutorial need for the evidence and the full record was irrelevant,[77] a balancing test should have demonstrated that the prejudicial value of the full record substantially outweighed its probative value.[78]

Analogously, the Fourth Circuit in *United States v. Poore*[79] held that the admission of evidence concerning a prior conviction for handgun possession was admitted erroneously to prove the prior conviction element of the felon-in-possession statute.[80] After the defendant stipulated to the prior offense and asked the court to strike the nature of the crime from the indictment, the court refused and the defendant alleged an abuse of discretion.[81] Refusing to consider *Smith* as persuasive authority for the prosecution's right to prove its own case, the court held that the stipulation satisfied the conviction element, and that the prejudice contained in the conviction's nature should have led the lower court to strike the language upon stipulation.[82] While recognizing that the prosecution could use the nature of the offense without a stipulation or where the evidence demonstrated more than the element in question, the court found that the evidence demonstrated only the prior conviction element and that the stipulation prevented the court from admitting the nature of the past offense.[83]

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76. *See id.*

77. In actuality, the full record would be relevant to prove prior conviction status, though the probative weight may be low. Note that the relevancy and probativeness tests under prior conviction evidence are separate determinations. *See supra* notes 9 and 35.

78. *See Spletzer*, 535 F.2d at 955-56.

79. 594 F.2d 39 (4th Cir. 1979).

80. *See id.* at 40-41.

81. *See id.*

82. In this case, the prior conviction for possession of a handgun was substantially similar to the offense charged such that it would have been difficult for the jury not to consider the nature of the past offense as relevant to deciding a similar offense. *See id.* at 41-42. Additionally, the court held that a limiting instruction was inadequate to alleviate the prejudice of the nature of the conviction. *See id.*

83. *See id.* at 42-43.

2. Prior Conviction Stipulations in the 1980s

In the 1980s, stipulations for felon-in-possession cases were considered more fully, but the rules remained much the same. While a stipulation to prior conviction was regarded as sufficient to satisfy the element[84] and presented a factor in Rule 403 balancing,[85] the trial court still maintained wide discretion under Rule 403 and, usually, held in favor of the general rule allowing the prosecution to prove its own case.[86] Evidence of multiple past convictions was allowed[87] and, at most, stipulations created a non-binding "less restrictive alternative" factor if the court limited the prosecution's presentation of evidence.[88] Additionally, the First Circuit ruled that a defendant could not seek bifurcation of felon-in-possession elements to exclude evidence of prior conviction.[89]

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84. "[P]roffered stipulation that [defendant] has been convicted of a prior felony was sufficient" for 18 U.S.C. § 922(g)(1) prior conviction element. United States v. Pirovolos, 844 F.2d 415, 420 (7th Cir. 1988).

85. *See* United States v. O'Shea, 724 F.2d 1514, 1517 (11th Cir. 1984) (holding that a stipulation diminishes the probative value of a full conviction record offered by the prosecution to prove a prior conviction element and that a stipulation is one factor in Rule 403 balancing).

86. *See* United States v. Abel, 469 U.S. 464, 470 (1984) (holding that district courts were given wide latitude in determining admissibility under Rule 403); United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989) (stating that "even in the face of an offer to stipulate [a prior conviction for felon-in-possession charges], the government may choose to present evidence on the one felony necessary to prove the crime charged"); United States v. Gilman, 684 F.2d 616, 622 (9th Cir. 1982) (holding that the prosecution had the right to refuse stipulations of past conduct tending to prove elements for conspiracy charges); United States v. Bruton, 647 F.2d 818, 825 (8th Cir. 1981) (holding that, for felon-in-possession cases, the government is not required to accept defendant stipulations on prior felony conviction).

87. *See Collamore*, 868 F.2d at 29 (stating that while the prosecution did not have an absolute right to introduce multiple prior felony convictions to prove a conviction element, it may introduce cumulative evidence subject to the trial court's discretion); *Bruton*, 647 F.2d at 825 (holding that jury knowledge of a defendant's prior two-count indictment, where a stipulation was offered to admit to a one-count indictment, was not in error since the government's proof generally is not limited to showing only one prior felony).

88. A "proffered stipulation . . . [is] one factor to be considered in the Rule 403 balancing process." *O'Shea*, 724 F.2d at 1517 (holding that a stipulation may decrease the probative value of other evidence that carries a greater risk of prejudice, though circumstances may decrease the value of a stipulation itself).

89. A bifurcation occurs where the defendant attempts to have the jury decide solely on the possession element of a felon-in-possession indictment before the prosecution can present evidence on the prior conviction element. The action excludes evi-

Several decisions in the early years of the 1980s revealed the courts' willingness to perpetuate the prosecution's right to refuse a defendant's stipulation. In 1981, the Eighth Circuit held fast to its decisions in *Brickey* and *Smith* when it decided that the defendant in *United States v. Bruton*[90] was not entitled to have his stipulation to a prior conviction accepted.[91] On four separate occasions, the prosecution exposed the jury to the prior conviction evidence, including multiple charges for being a felon-in-possession of firearms and explosives, despite the defendant's offer to stipulate the convictions. The court ruled that the prosecution could refuse to accept the stipulation in lieu of its own proof, and also that the government was entitled to prove multiple prior convictions even though the statute required only proof of one.[92] The basis for the decision was that no prejudice was found in the jury's knowledge of the prior convictions stemming from a two-count indictment when the statute required proof of prior conviction as an element.[93]

In the *United States v. O'Shea*[94] and *United States v. Pirovolos*,[95] the Eleventh and Seventh Circuits, respectively, addressed defendant stipulations to the prior conviction element of felon-in-possession charges. In *O'Shea*, the Eleventh Circuit held that the defendant's offer to stipulate prior convictions for illegal possession of firearms and interstate auto theft diminished the probativeness of the prosecution's conviction evidence, but that a stipulation is only one factor in Rule 403 balancing.[96] The *O'Shea* court held that the trial court did not abuse its discretion in admitting the evidence since circumstances demonstrated that the evidence would have been introduced for other aspects of the case and because the court was not bound to require the prosecution to accept the least prejudicial alternative.[97] Similarly, in *Pirovolos*, the Seventh Circuit held that

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dence of prior conviction during the possession phase of the trial and such evidence is disallowed generally. *See Collamore*, 868 F.2d at 26.

90. 647 F.2d 818 (8th Cir. 1981).

91. *See id.* at 825.

92. *See id.* (citing United States v. Brickey, 426 F.2d 680, 686 (8th Cir. 1970); United States v. Smith, 520 F.2d 544, 548 (8th Cir. 1975)).

93. *See id.*

94. 724 F.2d 1514 (11th Cir. 1984).

95. 844 F.2d 415 (7th Cir. 1988).

96. *See O'Shea*, 724 F.2d at 1517.

97. *See id.*

while the prosecution's prior conviction evidence should have been excluded based on the defendant's stipulation to the prior offense element, the admission was harmless since the evidence would have tended to prove other matters in the case.[98] The *Pirovolos* court affirmed the defendant's conviction since the error in admission was not prejudicial, as it pertained to proof beyond prior conviction status.[99]

Relying on the rich history of precedent concerning defendant stipulations, the decision in *United States v. Collamore*[100] analyzed offers to stipulate where no such offer existed. Collamore had eight prior convictions for burglary and robbery. He attempted to bifurcate the trial into hearings regarding the possession and prior conviction elements upon notice that the government sought to introduce at least three of his prior convictions.[101] While the court rejected the defendant's motion to bifurcate the trial since it would prevent the prosecution from proving its case, the court also stated that the mere absence of a stipulation did not afford the government free reign to introduce cumulative evidence concerning prior convictions.[102] The holding provided explicitly that the prior conviction evidence may be unfairly prejudicial under Rule 403 even when the convictions went to prove the prior felony element and were in the absence of the defendant's stipulation.[103]

3. Prior Conviction Stipulations in the 1990s

During the early 1990s, courts began to take divergent views on stipulations to prior convictions and Rule 403. While cases continued to support prosecutorial refusal of stipulations,[104]

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98. *See Pirovolos*, 844 F.2d at 420.

99. *See id.*

100. 868 F.2d 24 (1st Cir. 1989).

101. *See id.* at 25-26.

102. *See id.* at 28 (citing *United States v. Bruton*, 647 F.2d 818 (8th Cir. 1981), *United States v. Blackburn*, 592 F.2d 300 (6th Cir. 1979), and *United States v. Burkhart*, 545 F.2d 14 (6th Cir. 1976), in support of its contention that the prosecution reserved the right to present its own evidence over a stipulation).

103. *See id.* at 29-30. Note that the multiple prior convictions were not relevant merely to prove the element, but were intended to enable the prosecution to seek an enhanced sentence. *See id.* at 26.

104. *See* United States v. Breitkreutz, 8 F.3d 688, 690 (9th Cir. 1993) (holding, in a felon-in-possession case, that the prosecution's burden of proof is not relieved by a

they also began to recognize the possible risk of prejudice and Rule 403 implications.[105] In *United States v. Breitkreutz*,[106] the court held that a stipulation had no place in Rule 403 balancing.[107] The court, however, held that the rule limits the prosecution to evidence of only one prior conviction because cumulative evidence of multiple past offenses would be unduly prejudicial.[108] While a defendant could not stipulate out of the element,[109] his offer now had some weight as a factor under Rule 403 in limiting portions of the prosecution's arguments.

In *Breitkreutz*, the Ninth Circuit followed the First Circuit's analysis in *Collamore*. The trial court allowed the prosecution, over the defense's objections and offer to stipulate, to prove Breitkreutz had been convicted of three separate offenses prior to the felon-in-possession charge.[110] On appeal, Breitkreutz challenged both the admission of any of the convictions over his stipulation and the admission of multiple convictions. On the first challenge, the court stated that an offer to stipulate does not remove the issue from the jury's consideration and that the prosecution should be permitted to prove its own case in light of this burden.[111] The court denied vehemently that a stipula-

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stipulation of prior conviction and the government is not precluded from charging and proving the element regardless of stipulation); United States v. Donlon, 909 F.2d 650, 656 (1st Cir. 1990) (relying on *Collamore* in ruling that the government's proof of prior conviction is not restricted by a stipulation).

105. *See* United States v. Williams, 985 F.2d 634, 638 (1st Cir. 1993) (stating that prior conviction evidence is generally unfairly prejudicial to show only felon status, though it may be admissible as proof of other elements); United States v. Dockery, 955 F.2d 50, 54 (D.C. Cir. 1992) (holding that the prosecution's right to present evidence is always subject to Rule 403 discretion). Additionally, courts began to emphasize the use of the two step procedure in admission of prior conviction evidence. *See* United States v. Garcia, 983 F.2d 1160, 1172 (1st Cir. 1993) (discussing the two-step application of Rules 404 and 403 to prior conviction evidence); United States v. Figueroa, 976 F.2d 1446, 1453 (1st Cir. 1992) (discussing "other acts" and prior conviction evidence admissibility test).

106. 8 F.3d 688 (9th Cir. 1993).

107. "A stipulation is not proof. . . . [I]t's a partial amendment to the defendant's plea, a means of precluding any and all proof on a particular issue . . . [and] thus has no place in the Rule 403 balancing process." *Id.* at 691-92.

108. "[T]he balance between probative value and unfair prejudice [under Rule 403] shifts dramatically against the introduction of the subsequent felonies once the government proves up [sic] one . . . . [P]roof of . . . other[s] . . . [is] cumulative and . . . likely to fail . . . [under] Rule 403 . . . [since they] add [ ] little of probative value." *Id.* at 692.

109. *See supra* note 51.

110. *See Breitkreutz*, 8 F.3d at 689-90.

111. *See id.* at 690-91 (citing *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991), in

tion is an alternative means of proof weighed in Rule 403 balancing and succinctly stated that a stipulation is not proof at all.[112] In contrast, the court held that presentation of cumulative prior convictions, as in *Collamore*, increased the risk of prejudice without a concomitant increase in probative value such that the multiple convictions failed to pass Rule 403.[113] In turn, this finding led to reversal.[114]

In *United States v. Donlon*,[115] the First Circuit relied on its prior holding in *Collamore* to reject the defendant's contention that his stipulation restricted the prosecution's proof of prior conviction status.[116] After police found a pistol in Donlon's home while responding to a domestic dispute call, enforcement officials discovered that Donlon had a prior felony record and charged him with being a felon-in-possession. At trial, Donlon offered to stipulate his previous conviction, but was rejected by the prosecution which proceeded to provide evidence of the conviction's nature.[117] On appeal, Donlon's contention that the prosecution should have been barred from introducing its evidence was rejected when the court of appeals relied on *Collamore* in holding that the government is entitled to prove the elements in its own fashion.[118]

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support of and distinguishing *United States v. Poore*, 594 F.2d 39 (4th Cir. 1979), as inapposite under the facts).

112. *See id.* at 691-92 ("[T]he Rule 403 balance would tip against the prosecution's evidence because it inevitably would have little if any probative value beyond that of the stipulation.").

113. *See id.* at 692-93.

114. *See id.*

115. 909 F.2d 650 (1st Cir. 1990).

116. *See id.* at 656.

117. *See id.*

118. *See id.* at 656 (citing United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989)).

Note that in 1993, the First Circuit warned prosecutors against continuing to engage in introducing cumulative evidence that proved highly prejudicial to the defendants. *See* United States v. Williams, 985 F.2d 634 (1st Cir. 1993). In *Williams*, the prosecution insisted on using statements of the accused pertaining to his prior murder convictions in order to prove past felony convictions, rather than relying on other available evidence already in court concerning convictions for drug conspiracy in conjunction with the use of a firearm. While the "murderer" statement was held not to be prejudicial since it would have been admissible for other reasons beyond proving prior felony status, the court cautioned the use of bad acts evidence that served to inflame the jury and was only marginally related to the events in issue. *See id.* at 638 ("It comes with ill grace to introduce marginally justifiable evidence and then to defend its use by arguing that there was so much evidence of guilt that any error

C. *Recent Cases*

In recent years, courts of appeal have taken differing views on trial court admission of prior conviction evidence in felon-in-possession cases. In *United States v. Gilliam*,[119] the Second Circuit held that evidence of a prior conviction cannot be unduly prejudicial under Rule 403 if it is an element.[120] Further, allowing a stipulation to remove evidence from the case is harmful to the jury's function of assessing the facts before it.[121] While a stipulation excludes some evidence from the jury, the stipulation does not remove the uncontested element itself from jury consideration.[122] Yet, the court also remarked that the underlying nature of the past conviction was irrelevant to demonstrate that a prior conviction existed.[123] The court appeared to be locked in the horns of a dilemma, unable to decide where, or even if, to draw a line between total exclusion of evidence by stipulation or total admissibility of all facts pertaining to the prior conviction.[124]

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would be harmless.").

119. 994 F.2d 97 (2d Cir. 1993). The defendant in *Gilliam* argued that the trial court erred in not requiring the prosecution to accept his stipulation to prior felony convictions in a felon-in-possession charge; however, the defendant was attempting to stipulate the entire element, and not just his admission to his felony record, in an attempt to prevent the jury from learning of his conviction. *See id.* at 100.

120. *See id.* (stating that evidence of prior conviction is not prejudicial where the conviction is an element and tends to prove the fact that justifies its admission).

121. A stipulation creates "harm to the judicial process and the role of the jury in determining the guilt or innocence of the accused as charged . . . and removes from the jury's consideration an element of the crime." *Id.* at 101. Indeed, a stipulation "concede[s] and strip[s] away" jury consideration even though the jury still needs to know "why it is convicting or acquitting." *Id.*

122. *See id.* at 102. The court cited *United States v. Williams*, 612 F.2d 735, 740 (3d Cir. 1979), *United States v. Bruton*, 647 F.2d 818, 825 (8th Cir. 1981), *United States v. Blackburn*, 592 F.2d 300, 301 (6th Cir. 1979), and *United States v. Brinklow*, 560 F.2d 1003, 1006 (10th Cir. 1977), in support of the proposition in other circuits that the prosecution may refuse a defendant's stipulation. *See Gilliam*, 994 F.2d at 102.

123. *See Gilliam*, 994 F.2d at 103. Relying in part upon *United States v. Pirovolos*, 844 F.2d 415, 420 (7th Cir. 1988), and *United States v. Mohel*, 604 F.2d 748, 754 (2d Cir. 1979), the court stated that the underlying facts of a prior conviction are "completely irrelevant" to a felon-in-possession charge under 18 U.S.C. § 922(g)(1). *Gilliam*, 994 F.2d at 103.

124. The *Gilliam* court appeared to be addressing whether a defendant could stipulate the existence of a prior felony conviction in order to prevent the jury from considering it. *See supra* note 51. The greater problem is analyzing the dicta that

In *United States v. Jones*,[125] the D.C. Circuit ruled that evidence of the nature of a prior conviction violated Rule 403 once a defendant offered a stipulation.[126] In *Jones*, the nature of the prior conviction, which involved illegal possession of a firearm, was presented to the jury on five occasions, which the government conceded was in error, but harmless.[127] The court of appeals disagreed and reversed the conviction. The rationale was that a prior conviction element is based on "status."[128] Status does not require a full showing of the offense's factual details to meet the prosecution's burden of proof on the element. Further, under Rule 403, the facts themselves are prejudicial and inadmissible if not tending to prove an element other than status.[129]

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states that the factual underpinnings of the conviction are irrelevant and non-probative, since this appears to argue that the jury is entitled only to knowledge of the existence of a prior conviction, not the nature of that conviction. *See Gilliam*, 994 F.2d at 103.

125. 67 F.3d 320 (D.C. Cir. 1995). In *Jones*, the defendant, charged with being a felon-in-possession, argued that the trial court abused its discretion by allowing the prosecution to present the name and nature of his past conviction when he offered to stipulate to the prior conviction. *See id.* at 322.

126. *See id.* at 324.

127. *See id.* at 322. The government contended that the admission was harmless because the prosecution did not overemphasize the prior conviction, the court issued limiting instructions concerning the evidence, the defense failed to move for a severance, and overwhelming evidence of guilt on other grounds robbed the conviction evidence of any overwhelming prejudicial effect. *See id.*

128. *See id.* at 323. Status is a "discrete and independent component . . . , a requirement reflecting Congressional policy [under § 922(g)(1)] that possession of a firearm is categorically prohibited" for felons classified under the statute, such that the "predicate crime is significant only to demonstrate status, and a full picture of that offense is . . . beside the point." *Id.* (quoting United States v. Tavares, 21 F.3d 1 (1st Cir. 1994)).

The court in *Jones* followed the First Circuit decision in *Tavares*, which distinguished cases in which defendants offered to stipulate to prior conviction evidence relevant on grounds other than merely proving prior conviction from those cases in which prior conviction stipulations were made where the evidence tended only to prove conviction status. *See id.* at 323 (citing United States v. Blackburn, 592 F.2d 300 (6th Cir. 1979); United States v. Brickey, 426 F.2d 680 (8th Cir. 1970)).

129. *See Jones*, 67 F.3d at 324. "[T]he government did not need to establish the nature of Jones' prior felony to meet its burden of proof" under the prior conviction element. *Id.* at 324. Since the underlying facts were not necessary for the burden of proof and only tended to increase the risk of unfair prejudice, there was an error in allowing evidence tending to show the nature of the offense. *See id.*

In *United States v. Tavares*,[130] the First Circuit distinguished *Brickey*[131] and held that a stipulation is a less prejudicial alternative for demonstrating the prior conviction element.[132] Daniel Tavares, who had a prior conviction for larceny of a firearm, was arrested after a series of incidents which ended with the defendant firing a weapon into a residence. During the trial, the prosecution refused Tavares' offer to stipulate the prior conviction and proceeded to present evidence of the nature of the conviction to prove his status as a convicted felon.[133] The court held that evidence of the nature of the past conviction was inadmissible unless the trial court could find another compelling reason for admission under Rule 403.[134] The court distinguished its prior holdings in *United States v. Collamore* and *United States v. Donlon* by stating that those

130. 21 F.3d 1 (1st Cir. 1994). Charged with being a felon-in-possession, Tavares attempted to stipulate to the prior felony conviction element, which the prosecution refused to accept and proceeded to prove the conviction element by revealing the name and nature of the past offense. *See id.* at 2.

131. *See id.* at 3. The majority pointed out that *Brickey*, which provided precedent for the government to prove its own case in the event of stipulation, involved stipulation to an element tending to require a factual narrative (proof of fraudulent intent) that could not be shown by a concrete record of events, as a prior conviction trial transcript can. *See id.* (citing *Brickey*, 426 F.2d at 680). The court distinguished *Tavares* by stating that *Brickey*'s stipulation "concerned facts directly relevant to the instant crime, [while *Tavares*] involves a stipulation to facts establishing only the defendant's status." *Id.*

132. *See id.* at 4. The court in *Tavares* noted that the prior conviction element is a status element, such that the predicate crime is only necessary to show membership in the class of felons, not to show character or reveal the nature of the prior convictions. *See id.* The court stated that a "redacted record, testimony by a clerk, stipulation, a defendant's affidavit, or even . . . judicial notice of the prior conviction" are all substitutes for admission of the full record, which, unlike the other alternatives, contain a risk of unfair prejudice by revealing the name and nature of the offense to the jury, which may lead to improper considerations. *See id.*; *see generally* Katherine Conboy, *Probative or Prejudicial? Defendant Charged as Felon-in-possession of a Firearm May Stipulate to Status as a Felon*, 29 SUFFOLK U. L. REV. 941 (1995) (discussing the history of stipulations in the First Circuit and *Tavares*' impact on altering the ability of the government to refuse stipulations). *But see supra* notes 106-07 and 112 (suggesting that stipulations are not to be considered as less prejudicial alternatives for Rule 403 balancing).

133. *See Tavares*, 21 F.3d at 2.

134. *See id.* at 5. Additionally, the court claimed that the prior conviction element is intended to be a neutral element, such that the nature of the predicate felony is wholly unrelated to the crime. *See id.* at 4. The prosecution contended that the conviction evidence indeed was presented to prove more than status and went to demonstrate the culpability of Tavares as a serious offender, though the court rejected this proposal. *See id.*

decisions required admission of evidence for purposes other than merely establishing prior felon status.[135] While admitting that prior conviction evidence may be admitted over stipulation when the evidence proves more in issue than prior felon status, the court held that stipulations to felon status generally will prevent the prosecution from introducing the nature of the underlying offense.[136]

After *Tavares*, the federal circuits were split in their treatment of defendant stipulations to prior conviction evidence. While the majority of circuits had ruled or suggested that a stipulation would bar the prosecution from presenting evidence concerning the nature of the predicate offense, three circuits held that the government had no obligation to accept stipulations.[137] Additionally, the Seventh Circuit addressed stipulations on a case-by-case basis and the Third Circuit had found no need for resolution.[138] With the courts in confusion over how to treat stipulations, *Old Chief* arrived.

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135. The reexamination of *Collamore* also led the *Tavares* court into a discussion of the authority which *Collamore* rested upon, including: *United States v. Blackburn*, 592 F.2d 300 (6th Cir. 1979), *United States v. Burkhart*, 545 F.2d 14 (6th Cir. 1976), *United States v. Bruton*, 647 F.2d 818 (8th Cir. 1981), and *Brickey*, 426 F.2d at 680. *See Tavares*, 21 F.3d at 3.

136. *See Tavares*, 21 F.3d at 6. The court was clear in its message that stipulations as to prior conviction status were different from other types of evidence and receive paramount consideration in Rule 403 balancing.

> In the first place, a stipulation to a defendant's status as a felon is easily and obviously distinguishable from those relating to his actions or state of mind in committing the crime. In the second place, the evidence we exclude has no legitimate claim to relevance. In the third place, the unnecessary risk of unfair prejudice looms as clear and likely in this context. Finally, our holding allows the trial court to recognize and articulate any special circumstances justifying admission of evidence of the nature of the predicate offense.

Id.

137. The First, Second, Fourth, Fifth, Tenth, Eleventh and D.C. Circuits comprised the majority of federal circuits that recognized that the defendants' stipulations impose prosecutorial obligations, while the Sixth, Eighth, and Ninth Circuits continued to permit the government to refuse stipulations. *See* Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 939-40 n.3 (1997); *see also Tavares*, 21 F.3d at 5 (discussing the circuit split on stipulations).

138. *See* Richman, *supra* note 137, at 939-40 n.3.

III. *OLD CHIEF V. UNITED STATES*[139]

Before 1993, Johnny Lynn Old Chief was convicted of a felony assault. In 1993, after a disturbance involving at least one gunshot, Old Chief was arrested and charged with assault with a deadly weapon, using a firearm in relation to a crime of violence, and being a felon-in-possession.[140] In a pre-trial motion before a district court in the Ninth Circuit, Old Chief moved for an order prohibiting the prosecution from mentioning or offering into evidence anything regarding the prior assault conviction except Old Chief's admission, under stipulation, that he had been convicted of a prior felony within 18 U.S.C. § 922(g)(1)'s elements.[141] Old Chief argued that presentation of the name and nature of the past offense would tax his ability to receive a fair jury trial and that his subsequent stipulation would render such evidence inadmissible under Rule 403.[142] The prosecution refused to accept his stipulation and the district court judge permitted the government to present the name and nature of the past offense at trial.[143] After Old Chief's conviction, the Ninth Circuit refused to reverse the trial court's decision and relied upon *United States v. Breitkreutz* in holding that the admission of the evidence was an extension of the prosecution's right to prove its own case.[144]

The Supreme Court issued a writ of certiorari based on the circuit split over treatment of defendant stipulations[145] and

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139. 117 S. Ct. 644 (1997).

140. *See id.* at 647.

141. *See id.* at 647-48. Further, Old Chief proposed a subsequently refused jury instruction which would have attempted to explain that Old Chief fell within the class of convicted felons while not betraying the nature of the prior assault conviction. Since the Court dismissed Old Chief's contention that the instruction was adequate, this note will not address that portion of the case. *See id.*

142. *See id.* at 648.

143. *See id.*

144. *See id.* at 649 (holding that the evidence of the nature of the prior conviction was probative). Under *Breitkreutz*, the court held that the Ninth Circuit did not recognize a stipulation as proof or a factor in Rule 403 balancing. *See id.*; *see also supra* note 107.

145. The court noted the sharp division in treatment among the Sixth, Eighth, and Ninth Circuits' refusing to hold prosecutors to stipulations and the First, Fourth, Tenth and D.C. Circuits which had limited government evidence based on stipulations. Among the cases that the Supreme Court cited in its comparison of circuits were *United States v. Burkhart*, 545 F.2d 14 (6th Cir. 1976), *United States v. Smith*,

reversed the conviction.[146] First, the Court held that the name and nature of the offense were relevant to proving prior felon status and that such relevancy was not diminished by alternative proofs such as stipulations.[147]

Next, the majority held that a trial court abuses its Rule 403 discretion if it spurns a prior conviction stipulation under section 922(g)(1) and admits the full record of the past conviction over the defendant's objection.[148] This conclusion was based on several steps. First, the name and nature of the offense increase the risk of improper consideration by the jury and should not be admitted when their only purpose is to prove the element of prior offense.[149] Next, the Court considered two analytical methods for Rule 403 application: the island[150] and the holistic[151] approaches. The Court rejected the island view

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520 F.2d 544 (8th Cir. 1975), *United States v. Tavares*, 21 F.3d 1 (1st Cir. 1994), and *United States v. Poore*, 594 F.2d 39 (4th Cir. 1979). *See Old Chief*, 117 S. Ct. at 649.

146. *See id.*

147. *See id. But see supra* notes 123 and 136 (finding that prior conviction records presenting the underlying details were irrelevant).

Having conceded relevancy, the Court then held that any exclusion of prior conviction evidence must arise during Rule 403 balancing, such that the issue becomes one of probative value rather than relevancy under Rules 401 and 402. *See Old Chief*, 117 S. Ct. at 650.

148. *See Old Chief*, 117 S. Ct. at 650-51.

149. *See id.* (citing the inherent bias considerations in Rule 404(b)'s limitation on the use of past bad acts evidence to prove character alone).

150. "An item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded." *Id.* at 651.

151. [T]he question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case. . . . This second approach would start out like the [island approach] but be ready to go further. On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the first item offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

Id. (considering the analysis of *United States v. O'Shea*, 724 F.2d 1514, 1517 (11th Cir. 1984), in which the appellate court adopted the lower court's perspective in analyzing admissibility of evidence). Additionally, the considerations would be conducted in light of evidentiary need for detail and smooth narration. *See id.* The Court did limit its holding to felon-in-possession cases. *See id.* at 650 n.7.

as a method that would allow parties to structure evidentiary requests to maximize prejudicial effect and instead adopted the holistic approach.[152] Relying on the determination that, in general, evidence of prior bad acts evidence is highly prejudicial, the court examined the felon-in-possession prior conviction element and found that Old Chief's stipulation was alternative proof, under the Rule 403 balancing test, that should have been considered when assessing the admissibility of the prosecution's evidence.[153] Since both alternatives were relevant, the difference needed to be assessed in probative weight.

While the Court recognized the general power of the prosecution to prove its own case,[154] the Court held that a story is not needed to prove an abstract "status" element such as prior conviction, especially where the details of a conviction story are remotely relevant to the issues in question.[155] Thus, a holistic approach to Rule 403 concerning prior convictions should bar evidence of the name and nature of the offense since less prejudicial alternatives exist which reduce the probative value of the prior convictions.

A synopsis of the majority's holding runs as follows. While the nature of the prior conviction is relevant to lay the foundation of proof for the prior conviction element,[156] it also carries a risk of undue prejudice.[157] Since either a stipulation or ad-

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152. *See id.* at 651-52. In choosing the holistic approach, the court delineated Rule 401 "relevance" from Rule 403 "probativeness" by stating that the latter was determined by comparing evidentiary alternatives. *See id.* (citing FED. R. EVID. 403 advisory committee's note).

153. *See id.* at 652-53.

154. *See id.* at 653 (citing Parr v. United States, 255 F.2d 86 (5th Cir. 1958)). While the court agreed that the general rule protects the prosecution's need to tell a story and inform the jury, the court refused to recognize the validity of the rule when the prosecution did not need to tell a story to meet its burden and its story would only introduce prejudice. *See id.* at 655.

155. *See id.* (citing United States v. Tavares, 21 F.3d 1 (1st Cir. 1994)).

156. Showing the nature of the prior conviction "was a step on one evidentiary route to the ultimate fact [of predicate felon status], since it served to place Old Chief within a particular sub-class of offenders" and the "documentary record of the conviction for that named offense was thus relevant evidence in making . . . status more probable." *Id.* at 649.

157. *See id.* at 651. Note that the majority cites *Michelson v. United States*, 335 U.S. 469, 475 (1948), in defining the effect of unfair prejudice; yet, *Michelson* held that prior conviction evidence was admissible if it went towards proof of an element, a seemingly disparate treatment of unfairly prejudicial material than what is found

mission of the full record[158] can satisfy the status element of prior conviction, the only difference in the two is their degree of prejudice.[159] Though usually given its choice of argument, the prosecution's evidence is always subject to Rule 403 balancing.[160] Where the difference in evidence is merely in its prejudicial effect, as here, then Rule 403 requires the court to exclude the full record for the less risky alternative, the defendant's stipulation.[161] The court abuses its discretion if it fails to exclude the full record when it is unnecessary, does not damage the prosecution's burden of proof on the status element, and will lead to improper jury considerations.[162]

In response, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, argued that the majority misapplied Rule 403 and upset precedent.[163] First, Rule 403 acts to exclude unfairly prejudicial evidence, which does not include evidence tending to prove an element.[164] The

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in *Old Chief*. *Compare Michelson*, 335 U.S. at 483 (allowing the prosecution to introduce evidence of the nature of arrest, not conviction, records) *with Old Chief*, 117 S. Ct. at 650 (generalizing that the nature of prior convictions will almost always be grounds for improper considerations).

158. *See* United States v. Pirovolos, 844 F.2d 415, 420 (7th Cir. 1988).

159. "[T]here is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record . . . [T]he functions of the competing evidence are distinguishable only by the risk [of unfair prejudice] inherent in the one [record] and wholly absent from the other. *Old Chief*, 117 S. Ct. at 655.

160. *See id.* at 653-54.

161. The prosecution needs no "evidentiary depth" to prove the status element and the full record has "no application when the point at issue is a defendant's legal status . . . rendered . . . independently of the concrete events of later criminal behavior." *Id.* at 654-55. A stipulation is an "alternative, relevant, admissible . . . [and] seemingly conclusive" piece of evidence tending to prove status without the prejudice of the full record. *Id.* at 653. From this, the question of admissibility under Rule 403 "might be seen as inviting further comparisons to take account of the full evidentiary context of the case . . . to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well." *Id.* at 651. Once the "calculations" were finished, a judge "applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative[s]." *Id.*

162. *See id.* at 647.

163. *See id.* at 656 (O'Connor, J., dissenting).

164. *See id.*; *see also* United States v. Breitkreutz, 8 F.3d 688, 690 (9th Cir. 1993) (stating that where a prior conviction is an element of the offense, a stipulation has no place in Rule 403 balancing). *But see* United State v. Collamore, 868 F.2d 24, 29-30 (1st Cir. 1989) (stating that although Rule 404(b) would not keep out evidence that proved an element, Rule 403 may act to rule out cumulative and highly prejudi-

minority noted that virtually all government evidence will be prejudicial to the defendant in that it aims to incriminate him or her; therefore, the question under Rule 403 is whether the evidence is unfairly prejudicial. The minority found that since prior conviction status was an element and Congress intended juries to learn of the name and nature of the offense, the evidence pertaining to the proof of such element could not be unfairly prejudicial.[165] Additionally, the minority disagreed with the majority's contention that the prosecution's argument was not damaged by the defendant's stipulation[166] and argued that the majority failed to explain exactly why admission of the record was unfair prejudice.[167] Second, the minority argued that the decision upset the generally recognized rule allowing a party to prove its case.[168] Further, giving a stipulation conclusive power is analogous to permitting partial guilty verdicts without the consent of the court,[169] contradicting the power of the court to refuse similar strategies.[170]

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cial evidence).

165. *See Old Chief*, 117 S. Ct. at 656-57 (O'Connor, J., dissenting). While the majority considers all prior bad acts to be highly prejudicial and prior conviction status to signify a "class membership" provable by abstract evidentiary items, the minority focuses on the need for the prosecution to prove that status by demonstrating the concrete actions that granted class membership. *See id.*

166. *See id.* at 659. The minority stated that "[b]ecause the Government bears the burden of proof on every element of a charged offense, it must be accorded substantial leeway to submit evidence of its choosing to prove its case." *Id.* at 659-60.

167. *See id.* at 657-58 (stating that the majority has failed to state exactly why the revelation of the nature of a prior conviction will lead to improper considerations). The majority opinion stated that prior conviction evidence would increase the propensity for improper considerations, but did not cite to any general authority stating that past convictions were always unfairly prejudicial. *See id.* at 651.

168. *See id.* at 659.

169. "[I]n 'conceding' . . . [a] prior felony conviction, a defendant may be trying to take the issue from the jury altogether by effectively entering a partial plea of guilty, something we have never before endorsed . . . . A defendant who concedes . . . may be . . . trying to waive his right to a jury trial on that element." *Id.* at 660.

170. *See* Singer v. United States, 380 U.S. 24, 36 (1965) (holding that the only constitutional right to trial is one by jury and a waiver of this right may be conditioned on acceptance by both the court and the prosecution).

IV. ANALYSIS OF *OLD CHIEF*: APPLICATION OF RULE 403 AND EVIDENCE EXCLUSION

Turning to the reasoning of the case, the principal argument in *Old Chief* pertains to Rule 403's application to evidence of the prior conviction element of 18 U.S.C. § 922(g)(1).[171] Both the majority and minority agreed that evidence showing the nature of prior convictions is relevant because the facts proving Old Chief's prior assault was one step in showing that he was a member of the class of prior felons.[172] The issue, however, is not relevance, but probative value.[173] The majority argued that the evidence's probative value is not sufficient to overcome its unfair prejudicial value under Rule 403.[174] The Court recognized that evidence of prior acts generally is inadmissible under Rule 404 because of prejudicial effects on jury considerations; however, in felon-in-possession cases, prior convictions

171. *See Old Chief*, 117 S. Ct. at 650 (stating that "[t]he principle issue is the scope of a trial judge's discretion under Rule 403 . . . .").

172. *See id.* at 649 (stating also that relevance was unaffected by the availability of alternative proofs). While the majority recognized that the nature of the assault is not relevant in showing that the conviction was for a particular type of crime, such as theft rather than assault, the nature of the past offense was relevant to place Old Chief in the necessary category of prior felons. Therefore, the complete record would show that felon status was more probable than not—the threshold test of relevance under Rule 401. Additionally, the minority asserted that the name and nature of the offense are inseparable from the existence of an earlier conviction, which insinuates that no proof of a prior conviction adequately could exclude the name and nature without removing adequate proof of the past offense. *See id.* at 657 (O'Connor, J., dissenting).

173. *See supra* note 152.

174. Revealing the nature of prior convictions causes unfair prejudice by introducing the risk of improper grounds for consideration. *See Old Chief*, 117 S. Ct. at 650. Additionally, the specific name and nature of the offense is beyond what is necessary to prove the prior conviction element. *See id.* at 653. If the evidence is not necessary, then its probative value is likely to be minimal. *See* United States v. Spletzer, 535 F.2d 950, 956 (5th Cir. 1976) (stating that "an important consideration relating to probative value is the prosecutorial need for such evidence); WRIGHT & GRAHAM, *supra* note 22 (stating that the extent to which the prosecution needs the evidence is a principal issue in determining probative value). Thus, the name and nature will have little probative value, because it is unnecessary, while having high unfair prejudicial value, making it a prime target for exclusion under Rule 403. While the majority appears to say that the probative value is also decreased by the presence of other, less prejudicial alternative proofs, this alone seems less important in excluding the prior conviction evidence than its unnecessary nature. *See Old Chief*, 117 S. Ct. at 652.

are allowed as an exception, under Rule 404(b), because they constitute an element of the offense.[175] Once Rule 404(b) applies, then the court must balance probative value against prejudice using Rule 403.[176]

In its Rule 403 balancing, the majority opinion introduced a less restrictive alternatives test.[177] This test is a formulation of the holistic approach to Rule 403 in which the probative value of an evidentiary item is assessed by comparing it with other alternatives.[178] The Court adopted *Jones'* view that membership in § 922(g)(1)'s prior conviction class is a status element.[179] Thus, the underlying facts are unimportant so long as there is some evidence tending to show that the defendant is indeed a member of the statute's broad class of convicted felons. This makes a stipulation of class membership equivalent to presenting the entire record because the underlying facts are unnecessary to prove membership; either will be sufficient.[180] The only difference is that the full record carries a risk of unfair prejudice that a stipulation does not;[181] yet, the risk is entirely contained in the facts of the prior conviction, which facts are not necessary to prove status.[182] From this, both a

175. *See Old Chief*, 117 S. Ct. at 653-54.

176. *See* United States v. Garcia, 983 F.2d 1160, 1172 (1st Cir. 1993) (stating that once Rule 404(b) exemption occurs, the next step is to apply Rule 403); WRIGHT & GRAHAM, *supra* note 22 (stating that once evidence passes Rule 404(b), then the court still must assess the evidence under Rule 403 and that this decision is not discretionary); *see also supra* note 35.

177. *See Old Chief*, 117 S. Ct. at 652; *see also supra* notes 150-51 (discussing the majority formulations for application of Rule 403).

178. *See supra* note 151. This adoption also relies on the majority's consensus that the distinguishing factor between relevance and probativeness lies in the latter's consideration of alternative proofs rather than whether the item merely makes a factual proposition more or less probable. *See supra* note 152.

179. While the court does not cite *Jones v. United States*, 67 F.3d 320 (D.C. Cir. 1995), the majority does say that status is "wholly independent of the concrete events of later criminal behavior . . . ." *Old Chief*, 117 S. Ct. at 654. This is analogous to the language in *Jones* which states that prior conviction status is "discrete and independent." *Jones*, 67 F.3d at 323 (citing United States v. Tavares, 21 F.3d 1, 5 (1st Cir. 1994)).

180. *See Old Chief*, 117 S. Ct. at 655 (stating that the evidentiary significance of a stipulation is equivalent to the evidentiary significance of the full record in proving prior conviction status).

181. *See id.*

182. The only difference between using a stipulation and using the record to show status is that the latter carries the risk of unfair prejudice. *See id.* The prejudice comes from the name and nature of the offense. *See id.* at 650. Proof of status, how-

stipulation and the full record have equal probative value. Yet, when the holistic Rule 403 is applied, the full record becomes unfairly prejudicial as alternative proof of equal value, but with less prejudicial value, exists to lower the full conviction's probative weight.[183] Under Rule 403 balancing, the risk of prejudice will make the full record less appropriate than a proffered stipulation because the record's probative value is diminished by its unnecessary prejudicial content.[184] The court must then chose the less prejudicial alternative, the stipulation or analogous evidence,[185] to satisfy Rule 403 without an abuse of discretion.

The problem is that Rule 403 does not necessarily require a less prejudicial alternatives test.[186] Rule 403 requires exclu-

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ever, does not require a showing of the name and nature of the prior offense. *See id.* at 653. Thus, deductively, the risk must come from what is extraneous and irrelevant to the proof.

183. Both a stipulation and full record go toward proving a prior conviction exists, but the latter also supports improper considerations concerning Old Chief's propensity to be a violent felon. Application of the holistic approach to Rule 403 requires a comparison of both methods of proof. Proof by the full record already contains both probative value and a degree of prejudicial value, but, on comparison with the stipulation alternative, the prejudicial value increases since an alternative exists that does not contain the same prejudice. Additionally, because the prosecution does not need the evidence to prove the conviction, the prejudicial effect is high in comparison to the probative aspect. All of these factors demonstrates that the prejudicial value substantially outweighs the probative value. *See id.*

184. *See id.* at 655 (stating that risk of unfair prejudice did substantially outweigh the discounted probative value of the record); *Jones*, 67 F.3d at 324 (holding that the nature of the prior conviction was irrelevant and unfairly prejudicial, such that an abuse of discretion occurred to allow the evidence under Rule 403 when other evidence was available); *Tavares*, 21 F.3d at 4 (holding that additional facts of prior conviction are irrelevant and not sufficiently probative under Rule 403 to prove prior conviction status alone when the evidence is overwhelmingly prejudicial); United States v. Gilliam, 994 F.2d 97, 103 (2d Cir. 1993) (holding that additional facts of prior conviction are irrelevant and prejudicial).

185. The majority contended that a record redacted of the name and nature of the prior conviction offers the same proof as a stipulation or full record in proving prior conviction status. *See Old Chief*, 117 S. Ct. at 656. The full record would be categorically excluded only when a felon-in-possession prior conviction element requires proof, because in such a situation the evidence will always have minimal probative value and high prejudicial value. *See supra* notes 182 and 184. Additionally, the facts will not go towards proof of another element if no other charges are present, so there will not be grounds for admission of the prior conviction's facts on another basis. *See Old Chief*, 117 S. Ct. at 655.

186. *See* United States v. O'Shea, 724 F.2d 1514, 1517 (11th Cir. 1984) (stating that a court is not required to choose the least prejudicial alternative available for proof). *But see* WRIGHT & GRAHAM, *supra* note 22 ("[P]robative worth [under Rule

sion of evidence if its probative value is less than its prejudicial value, not exclusion because there are less restrictive alternatives. While the advisory committee's note to Rule 403 states that "the availability of other means of proof may also be an appropriate factor,"[187] the passage of the Rule does not mandate a holistic approach. Thus, even though evidence may have a greater risk of unfair prejudice than an alternative, if the evidence is more probative than prejudicial, then the court should be able to admit that evidence over less prejudicial alternatives.[188] The majority recognized this and crafted its argument to fit the rule as it stands. While the opinion seemed to argue that evidence of the nature of prior convictions is excluded categorically in the presence of alternatives,[189] the basis for the argument would appear to contain two premises. First, evidence of the nature of prior convictions, is generally, unfairly prejudicial.[190] Second, if evidence is extraneous to proof of the element, then it has a low probative value.[191] From these premises, the majority reached its conclusion that the nature of prior convictions under felon-in-possession cases is almost always excluded.

The first portion of the argument lies in the assertion that prior conviction evidence relating the name and nature are, generally, unfairly prejudicial. The majority stated that such evidence increases the risk of improper considerations and raises the specter of prejudice.[192] While correct in that analysis,

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403] . . . is . . . affected by the scarcity or abundance of other [alternative] evidence on the same point.").

187. *See* FED. R. EVID. 403 advisory committee's note.

188. Rule 403 is not a mechanical rule, but a rule of discretion. WRIGHT & GRAHAM, *supra* note 22. As such, the question is not whether the evidence is less prejudicial than other evidence, but whether the evidence's probative value is still greater than any prejudicial value it may have. *See id.*

189. *See Old Chief*, 117 S. Ct. at 652.

190. *See id.* ("[E]vidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant.").

191. This is a synthesis of two minor premises. First, the specific name and nature are beyond what is necessary to prove status. *See id.* at 653. Second, both a stipulation and the full record carry equal evidentiary or probative weight in showing status. *See id.* at 655. If the full record has no more probative weight than a stripped down stipulation, then one must conclude that the specific facts add little or no probative value to the record and are truly extraneous.

192. The Court's determination relies upon the inherent limitations of such evidence in Rule 404's limiting provisions for conviction evidence. *See id.* at 651.

the majority cannot then say that such evidence is always unfairly prejudicial, because that premise is distinct from improper considerations. As the minority asserted that all evidence against the defendant will be "prejudicial" in that it will go to prove guilt,[193] the majority required a mechanism to jump from the possibility of improper considerations to unfair prejudice. Thus, the second prong of the test, application of Rule 403's evidentiary alternatives test, is needed to demonstrate why prior conviction records generally will not be merely prejudicial, but *unfairly* prejudicial.

The brunt of the issue lies in a synthesis of the premises and the need to prove a prior conviction element. To prove felon-in-possession, the prosecution must show prior conviction as an element.[194] Yet, if it introduces the full record, it will introduce a risk of unfair prejudice by submission of the factual underpinnings of the conviction, material that is extraneous to merely proving status as a felon. In isolation, Rule 404(b) would allow the evidence to prove the element,[195] while Rule 403 would show that the probative value was less than its prejudicial effect.[196] Yet, Rule 404(b) and Rule 403 should work together,[197] not in isolation, so that it would lead to a

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193. Note that while the majority believes that presentation of the name and nature of the offense will increase the risk of prejudice against the defendant, the minority assumes an opposite position. The minority finds that exclusion of the evidence actually results in greater detriment to the defendant because it requires the jury to consider prior conviction evidence without the full narrative and leads them to speculate about the underlying offense when ruling on guilt. *See id.* at 658 (O'Connor, J., dissenting). Under the minority view, presentation of the evidence may be prejudicial in that it proves guilt, but is not fodder for improper consideration since it provides a flowing narrative that prevents the very juror speculation concerning prior convictions that is the strongest basis for improper considerations. *See id.*

194. *See* 18 U.S.C. § 922(g)(1) (1994).

195. *See* FED. R. EVID. 404(b) (stating that evidence of prior acts or crimes, including convictions for past offenses, is admissible where the evidence goes towards proof of an element of the offense).

196. *See* FED. R. EVID. 404 (stating that evidence whose unfair prejudice substantially outweighs its probative value is generally inadmissible, even if tending to prove an essential element). As shown above, where only the prior conviction status needs proof, the risk of unfair prejudice will, generally, outweigh any probative value. *See supra* notes 190-91.

197. *See* WRIGHT & GRAHAM, *supra* note 22 (stating that Rule 404(b) provides a mechanism to allow proof into proceedings that is otherwise generally inadmissible, and that Rule 403 acts to reduce the prejudicial impact that may arise from abuse of Rule 404(b)'s window of opportunity); *see also* United States v. Garcia, 983 F.2d 1160, 1172 (1st Cir. 1993) (stating that Rules 404(b) and 403 are each part of a dual test

seemingly incongruous result to exempt generally prejudicial evidence under Rule 404(b), only to find it overwhelmingly prejudicial under Rule 403.[198]

The solution appears to lie in the majority's finding of a subset of alternative evidentiary methods that satisfy both Rule 404(b) and Rule 403.[199] In addition, the majority reasons that evidence of the nature of prior convictions, while satisfying Rule 404(b), fails Rule 403 and, therefore, must be excluded.[200] No mechanical alternatives test really exists,[201] but only a categorical test of whether something meets the rules or not.[202] The nature of prior convictions is not excluded because there are less restrictive alternatives, but because it alone fails to

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for the admission of generally prejudicial evidence, and that Rule 403 will work to exclude highly prejudicial information even if it is found relevant under Rule 404).

198. Rule 403 is a check on evidence admitted under Rule 404(b) to insure that the probative value of evidence introduced is not overwhelmed by unfair prejudicial value. *See Garcia*, 983 F.2d at 1172. If this is so, then Rule 403 appears to restrain Rule 404(b); yet, if Rule 403 allows extremely prejudicial material to enter via Rule 404, then it serves virtually no purpose as applied to Rule 404(b).

199. The alternatives that show prior conviction status (including stipulations, redacted records, and similar methods, such as sworn affidavits) are allowed under Rule 404(b). They also pass Rule 403 because their probative value (proof of status) outweighs the prejudicial value associated with the jury's knowledge of a prior conviction. *See Old Chief*, 117 S. Ct. at 655-56.

200. While a full record, relevant in showing status, generally is admissible under Rule 404(b), Rule 403 should find that the unfair prejudicial value outweighs the probative value of the name and nature of the prior conviction. *See id.*; *see also supra* notes 190-91.

201. The alternatives test that provides categorical exclusion of prior conviction status is flawed for two reasons. First, the majority asserts a mechanical analysis of Rule 403 that should always prevent presentation of the full conviction record as unfairly prejudicial. Yet, this test requires an analysis of the evidence presented and the stipulation, which may vary in the context, such that some type of discretionary ruling will be required. Second, the rule applies narrowly to felon-in-possession cases, and prior conviction evidence may be introduced in support of other factual propositions. When the prosecution asserts these bases for admission, the court will have to conduct a Rule 403 test without the proposed "mechanical" application and the admission will again depend on judicial scrutiny.

202. Alternative evidentiary standards may have an effect on the probative value of other, more prejudicial standards. *See Old Chief*, 117 S. Ct. at 652; WRIGHT & GRAHAM, *supra* note 22 (asserting that probative value will be affected by alternative evidence tending to prove the same thing). The alternatives, however, do not necessarily exclude the full record of the name and nature merely because they are less prejudicial, but do have some effect on the record's probative value. The test under Rule 403 is whether evidence is unfairly prejudicial. Since the full record is overwhelmingly prejudicial without adding anything to the probative value, it fails under Rule 403. *See Old Chief*, 117 S. Ct. at 655.

meet Rule 403 when there is only a question of status. The existence of other methods of proof that do satisfy Rule 403 shows merely that the prosecution can meet its burden of proof without risk of improper considerations.

The majority categorically excludes evidence of the nature of prior convictions when its purpose is to prove solely the status element, because the evidence is not necessary to prove the element.[203] If it is not necessary, then its probative value is minimal;[204] in contrast, its prejudicial value will be high.[205] Thus, under Rule 403, even though the nature is relevant, the facts must be excluded because the risk of unfair prejudice outweighs probative value. The simple fact that the evidence would tend to prove the element under Rule 404(b) does not give the prosecution unlimited reign to use any and all evidence to prove that element.[206]

Turning to the dissent, the argument that the majority misapplies Rule 403 is flawed. O'Connor argues that once evidence meets Rule 404(b), it cannot be unfairly prejudicial since it goes toward proof of that element.[207] Yet, lower courts have conceded that evidence that meets Rule 404(b) can still be excluded under Rule 403, as in the case of presenting multiple prior convictions to prove a prior conviction element.[208] Allowing a Rule 404(b) exemption to pass automatically Rule 403 would not be a proper conclusion.

While the minority would appear to respond that Rule 403 allows the evidence because it is not unfairly prejudicial, they fail to make a delineation as to what qualifies as unfair prejudice, just as the majority failed to do so.[209] Just as the majori-

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203. *See Old Chief*, 117 S. Ct. at 655.

204. *See supra* note 191.

205. *See Old Chief*, 117 S. Ct. at 652.

206. *See, e.g.*, United States v. Breitkreutz, 8 F.3d 688, 692 (9th Cir. 1993) (holding that while evidence of multiple convictions is relevant under Rule 404(b) to show felon status, Rule 403 generally renders multiple conviction evidence inadmissible due to the evidence's lack of probative value and cumulative unfair prejudice).

207. *See Old Chief*, 117 S. Ct. at 657 (O'Connor, J., dissenting).

208. *See Breitkreutz*, 8 F.3d at 692; United States v. Collamore, 868 F.2d 24, 29-30 (1st Cir. 1989) ("Although Rule 404(b) would not keep out evidence designed to show an element . . . Rule 403 would keep out evidence of *several* prior convictions, where most evidence is cumulative and highly prejudicial.").

209. "The court never explains precisely why it constitutes 'unfair' prejudice . . . to

ty cannot provide a consistent argument that prior conviction evidence always is excluded because it is unfairly prejudicial, the minority cannot prove that the same evidence is never unfairly prejudicial.

Further, the dissent argued that a stipulation cannot relieve the government of its burden of proof[210] and that a stipulation itself raises serious questions about the ability of the defendant to direct the prosecution's method of proof and constitutional questions regarding the jury's role.[211] This argument is not entirely complete, because it fails to recognize that a stipulation does not require an obligation of acceptance or force the government to abandon evidence regarding the nature of the prior offense.[212] A stipulation is only one of several methods by which the prosecution can prove felon status and it can choose from among these methods rather than accept a stipulation.[213] If the majority is correct that the prior conviction's nature will be excluded in most instances, then the government will have its choice among a variety of methods, all tending to the same proof, and always will be restricted from giving the facts under Rule 403, whether there is a stipulation or not.[214] A stipula-

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directly prove an essential element." *Old Chief*, 117, S. Ct. at 657 (O'Connor, J., dissenting). Yet, the dissent does not respond to the overwhelmingly general consensus that the name and nature of a prior offense is highly prejudicial. *See id.* at 652. While the dissent argues that the evidence goes to proof of an element under Rule 404(b), the analysis, as shown above, does not stop there since the court must also examine the evidence under Rule 403. *See* United States v. Garcia, 983 F.2d 1160, 1172 (1st Cir. 1993). There is no indication that the dissent examines any Rule 403 balancing except to say that the evidence is not unfairly prejudicial.

210. *See Old Chief*, 117 S. Ct. at 659 (O'Connor, J., dissenting).

211. *See supra* note 169.

212. The government may choose to pursue its own proof through a redacted record or affidavit. *See supra* note 199.

213. "The Government might, indeed, propose such [alternatives] for the trial court to weigh against a defendant's offer to admit, as indeed the government might do even if the defendant's admission had been received into evidence." *Old Chief*, 117 S. Ct. at 655 n.10.

214. "There may be yet other means of proof besides a formal admission on the record that, with a proper objection, will obligate a district court to exclude evidence of the name of the offense." *Id.* Additionally, "the general rule when proof of convict status is at issue" is to rule the facts of the predicate conviction inadmissible. *Id.* at 655-656.

tion would merely offer another method of proof, but would not constrict proof or choice.[215] Even if stipulations were contrary to constitutional requirements, the government could still be restrained from presenting the factual background of prior convictions under Rule 403.[216] Stipulations are not catalysts in triggering Rule 403 exclusion. Unfair prejudice is what leads to the inadmissibility of the nature of past acts.[217]

V. CONCLUSION

Several key points should appear from an analysis of *Old Chief*. First, the holding is limited to the prior conviction element of section 922(g)(1).[218] Second, the holding applies categorically only when a felon-in-possession charge is present, but not necessarily when other charges are present.[219] Third, both the majority and the minority cannot agree on the nature of "unfair prejudice"[220] and this appears to be the source of the

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215. If proof of the nature of the prior conviction always was inadmissible, whether there was a stipulation or not, then the government would not lose any ground if it could not introduce the evidence in any case.

216. If a stipulation is not integral in defeating prior conviction evidence under Rule 403, but the evidence itself falls under the weight of its own unfair prejudice, then the dissent's concerns over stipulations are unfounded since the government will be restrained in its proof regardless. *See supra* note 214.

217. *See supra* note 202 (Rule 403 test hinges on unfair prejudice, not alternatives).

218. *See Old Chief*, 117 S. Ct. at 651 n.7.

219. *See id.* at 651 (where the nature of the prior conviction will goes towards proof of some other element, the Rule 403 will generally admit the evidence).

220. While neither the majority nor the minority opinions grasp the unfair prejudice issue with triumph, the two sides do appear to engage in fairness of method. The majority argues that evidence of prior convictions generally raises the risk of improper considerations, but that the government will win admission of the evidence in most Rule 403 balancing tests. Thus, the majority is carving a narrow exception to limit the government's ability to prejudice the defendant in the extreme situation where the evidence is almost always irrelevant and only prejudicial. *See id.* Alternatively, the dissent concentrates on the ability of the prosecution to meet its burden of proof, but also on the ability of the defendant to receive a fair and constitutional trial. *See id.* at 658-59 (O'Connor, J., dissenting) (discussing the importance of the jury being informed for purposes of consideration). Both sides disagree on what is fair for the defendant and which general rule prejudices him less: a categorical exclusion or the general rule allowing the prosecution to present its own evidence and thus inform the jury, thereby allowing it to produce a knowledgeable conviction or acquittal. *See id.; see also* United States v. Gilliam, 994 F.2d 97, 102 (2d Cir. 1993) (stating that the jury needs to be apprised of the facts to enter a proper verdict for a felon-in-possession case).

divergent opinions and what makes *Old Chief* a unique and limited decision.

When a section 922(g)(1) offense occurs among other offenses, the prosecution may not be limited in presenting the facts of the prior conviction if they meet Rule 403 balancing.[221] In these cases, the evidence could show more than status and have greater probative weight, thereby outweighing the prejudicial effects.

Additionally, in formulating a categorical rule of exclusion, *Old Chief* emphasizes that Rule 403 is not mechanical, but discretionary, and must be resolved on a case by case basis.[222] While evidence of the nature of prior acts, generally, will be inadmissible under Rule 403 due to the status element,[223] there may be exceptions when the evidence would be admissible for other purposes.[224] A determination of "unfair prejudice" will depend on the quality of the case and an assessment of both the probative value and the prejudice, the very source of contention between *Old Chief*'s majority and minority opinions. So long as the evidence tends to prove an element other than felon status or fails to increase the risk of improper consider-

221. *See Old Chief*, 117 S. Ct. at 651; United States v. Tavares, 21 F.3d 1, 5 (1st Cir. 1994) ("[E]vidence beyond the fact of the prior conviction is inadmissible absent adequate trial court findings that its noncumulative relevance is sufficiently compelling to survive the balancing test of Rule 403.").

222. "[E]vidence of the name or nature of the prior offense generally carries a risk of unfair prejudice. . . . That risk will vary from case to case . . . but will be substantial whenever the official record offered . . . would be arresting enough to lure a juror into a sequence of bad character reasoning." *Old Chief*, 117 S. Ct. at 652. Discretion under Rule 403 will assess whether there is a risk of unfair prejudice and also whether the record is arresting enough to lead to improper considerations. *See* WRIGHT & GRAHAM, *supra* note 22 (stating that a court will assess both probative value and prejudicial value in balancing the evidence under Rule 403).

223. *See Old Chief*, 117 S. Ct. at 652; United States v. Jones, 67 F.3d 320, 322 (D.C. Cir. 1995) (stating that other crimes evidence is always prejudicial); United States v. Tavares, 21 F.3d at 6 (saying that the "unnecessary risk of unfair prejudice looms" in the context of prior conviction evidence).

224. *See* FED. R. EVID. 404(b) (evidence is admissible to show motive, intent, preparation, knowledge, plan, identity, or mistake).

ations, the evidence may be admissible.[225] Trial judges still must conduct Rule 403 balancing as before,[226] even though the Supreme Court has provided a rule that evidence of the nature of prior convictions, generally, is inadmissible. At the most, the decision has placed a judicial thumb on the Rule 403 scales against evidence concerning the nature of prior convictions in the limited context of a single statute. At minimum, the decision has stated a previously known tautology: where the evidence violates Rule 403 by having greater unfair prejudicial weight than probative value, then the evidence is inadmissible under Rule 403.

Old Chief's holding should not have a substantial effect on the prosecution's right to carry its burden of proof. The holding's limitations on the method of proof are consistent with Rule 403.[227] Where the prosecution introduces evidence of the nature of prior acts, the government can expect the trial court to allow the admission unless there is a clear abuse of discretion under *Old Chief*.[228] Yet, the discretionary standard is

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225. The holding of *Old Chief* requires that evidence be inadmissible when it both increases the risk of improper considerations and the purpose of the evidence is solely to prove the element of prior conviction. *See Old Chief*, 117 S. Ct. at 647. This should mean that only when the conjunction is met does the rule of *Old Chief* apply. *See* United States v. Wilson, 107 F.3d 774, 786 (10th Cir. 1997) (citing *Old Chief* and holding that while evidence of the nature of a predicate offense failed to prove any element but the prior felony conviction, admission was harmless because other convicting evidence rendered the risk of improper considerations minimal); Redding v. United States, 105 F.3d 1254, 1255 (8th Cir. 1997) (citing *Old Chief* and holding that, while evidence of the nature of a prior conviction went solely to show the conviction element, no error occurred from an increased risk of unfair prejudice because of other overwhelming evidence displaying guilt). *But see* United States v. Blake, 107 F.3d 651, 652 (8th Cir. 1997) (citing *Old Chief* and finding an abuse of discretion where evidence of the nature of a prior conviction went only to prove the conviction element and the evidence raised the risk of improper considerations).

226. A judge has no discretion as to whether to perform a Rule 403 balancing test and he maintains a duty to weigh the factors. *See* WRIGHT & GRAHAM, *supra* note 22, § 5214, at 263. If the *Old Chief* test requires a trial judge to assess the evidence and determine if there are any improper considerations, then nothing has changed procedurally since judges have had to perform this test prior to *Old Chief*. *See id.*

227. The majority opinion has not altered Rule 403, but has shown that the nature of prior felony convictions is generally inadmissible under the test where the proof is offered only to show status, because it increases the risk of improper considerations. *See Old Chief*, 117 S. Ct. 647. If the use of prior conviction evidence is lost under the original test, then nothing has been taken from the government that it should have had prior to the ruling.

228. *See id.* at 651.

vague enough that this probably will happen only where the evidence alone can be shown to lead the jury to engage in an improper sequence of bad character reasoning or where the admission is not cognizably different from a stipulation except for its prejudicial value.[229] In all other cases, if the evidence tends either directly to prove anything other than felon status or overwhelmingly shows guilt, such evidence will be admitted as either satisfying Rule 404(b) and 403 or as constituting harmless error.[230]

This result is supported by the case law subsequent to *Old Chief*. In most instances, the circuits have ruled that overwhelming evidence of guilt or support of other factual propositions rendered admission of the nature of prior convictions harmless error.[231] This finding has been true even for cases in which *Old Chief* was supposed to have the greatest influence over—cases in which only a 922(g)(1) offense was presented.[232] The minority view has been to reverse the lower court's decision based on abuse of discretion in admitting the prior conviction evidence. The cases have circumvented *Old Chief*'s holding

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229. *See supra* note 225 (cases following *Old Chief* that have found harmless error where both elements are not met).

230. *See id.*

231. *See* United States v. Taylor, 122 F.3d 685 (8th Cir. 1997) (holding that the government could refuse stipulation to prior conviction evidence of involuntary manslaughter and that *Old Chief* did not require exclusion of evidence that would prejudice jury consideration of defendant's self defense claim); LaForce v. United States, 976 F. Supp. 402 (W.D. Va. 1997) (holding that the admission of the defendant's two murder convictions over the defendant's stipulation was collateral and harmless given the defendant's own statements concerning the prior convictions which were needed to provide evidentiary depth to the prosecution's story); *see also supra* note 225.

A growing use of the *Old Chief* holding in non-felon-in-possession cases has been in support of the prosecution's right to prove its own case. *See* Gonzalez v. DeTella, 127 F.3d 619 (7th Cir. 1997) (holding that the right of the prosecution to prove its own case stated in *Old Chief* rendered the government's introduction of gruesome murder photographs harmless); United States v. Ortiz, 125 F.3d 630 (8th Cir. 1997) (holding that the government was permitted, under *Old Chief*, to introduce photos of the defendants using gang signals to show conspiracy rather than rely on defendants' stipulation to their relation).

232. *See* United States v. Anaya, 117 F.3d 447 (10th Cir. 1997) (finding the court did not substantially prejudice felon-in-possession defendant by refusing to accept his stipulation and requiring the government to prove the conviction at trial for purposes of enhanced sentence); United States v. Horsman, 114 F.3d 822 (8th Cir. 1997) (holding that refusal to accept defendant's prior felony stipulation and the presentation at trial of four prior convictions was not abuse of discretion under *Old Chief* where evidence of overwhelming guilt rendered such introduction harmless).

by finding, in most cases, that presentation of the evidence did not affect the substantial rights of the parties, a finding premised on Rule 403 balancing of prejudice and probative value.

One question, yet unanswered, is whether *Old Chief*'s exclusion of prior conviction evidence excludes symmetrically or asymmetrically.[233] If the rule applies symmetrically, then neither the defense nor the prosecution may introduce the nature of a prior conviction. When the prior conviction consists of an old offense or a crime which would lead the jury to sympathize with the accused, detriment, rather than prejudice, to the defendant results since he would be barred from presenting evidence in support of the case.[234] If the rule is asymmetrical, then the defendant could introduce prior conviction evidence to assist the defense, but the prosecution would remain barred from introducing the nature of the past felony. This rule effectively would provide the defendant with the best of both worlds at the expense of the prosecution. Based on *Old Chief's* motivation to reduce improper considerations, whether to prevent unsympathetic or sympathetic juries, the symmetric application likely applies, but no case law has determined that principle.

Additionally, *Old Chief* has not required the prosecution to accept stipulations, but has shown that the government has a number of options available to prove felon status, a stipulation only being one.[235] The true result is that whether there is a stipulation or not, evidence of the nature of a prior conviction to prove status alone, generally, is unfairly prejudicial under Rule 403 in a § 922(g)(1) case. The rule, based on Rule 403 discretion, however, cannot be adamant and still requires assessment of the specific nature of the case, probative value, and prejudicial effect.[236] Even if there is an error, other factors may render the admission harmless.[237] *Old Chief*, in effect,

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233. For a discussion of the asymmetrical and symmetrical possibilities of the *Old Chief* holding, and a treatment of anticipated ramifications, see generally Richman, *supra* note 137.

234. Symmetrical application is more likely since the use most beneficial to the defendant in using prior conviction evidence would be for jury sympathy, leading to an improper consideration of character based on emotional reaction to collateral aspects of the presented evidence.

235. *See Old Chief*, 117 S. Ct. at 655.

236. *See supra* note 222.

237. Generally, the admission will be harmless if it tends to prove another element

merely has made explicit the obvious prejudice in permitting the nature of prior convictions where the facts have little probative value in proving the element.

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or if the remaining evidence overwhelmingly shows guilt so that no increase in the risk of unfair prejudice can be attributed to a subsequent conviction. *See supra* notes 223 and 231.