Kentucky Law Journal

Volume 106 | Issue 3 Article 6

2018

How to Instruct the Jury on Stipulations of Fact in Federal Criminal Cases

Linsey K. Hogg
University of Kentucky

How to Instruct the Jury on Stipulations of Fact in Federal Criminal Cases

Linsey K. Hogg[1]

ABSTRACT

While courts agree on how to instruct juries on stipulations of fact in the federal civil context, there is no consensus in the federal criminal context.[2] *The only Supreme Court case addressing fact stipulations in the federal criminal context is* Old Chief v. United States.[3] *It holds that, in felon-in-possession cases, a court abuses its discretion when it admits the full record of prior conviction when the name or nature of the prior offense unfairly prejudices the defendant and outweighs its probative value.*[4] Old Chief *is a narrow holding, limited only to cases involving proof of felon status, and fails to address or provide guidance as to how a federal judge should instruct the jury after admitting a fact stipulation.*[5]

[1] J.D. Candidate 2018, University of Kentucky College of Law. The author would like to thank Professor Sarah N. Welling for her words of encouragement, advice, constructive criticism, mentorship, and, generally, everything. The author would also like to thank the Sixth Circuit Committee on Pattern Criminal Jury Instructions for expanding my knowledge of federal criminal law and for allowing me to converse with the committee regarding stipulations of fact.

[2] *See infra* Part I.

[3] Old Chief v. United States, 519 U.S. 172 (1997).

[4] *Id.* at 190–92; FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice."); *see also* 18 U.S.C. § 922(g)(1), (9) (2012) ("It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

[5] *See infra* Part II.

TABLE OF CONTENTS

INTRODUCTION

Stipulations of fact are routinely used in federal criminal cases and range from undisputed immaterial facts that are easily proven to facts establishing an element of the offense.[6] Stipulations of fact promote judicial efficiency, save adversarial parties time and money, and simplify the trial process by allowing parties to focus only on contested issues.[7] Although stipulations of fact are frequently used in federal criminal proceedings, surprisingly little discussion of stipulations of fact exist in either the common law or in secondary literature.[8]

Courts generally agree that stipulations of fact are binding on the parties, court, and on appeal.[9] Nevertheless, due to the routine use of stipulations of fact, judges often face the task of determining how to instruct and properly convey the binding effect of a stipulation of fact to juries.[10] Federal judges must determine whether the binding nature of the stipulation of fact extends to the jury such that it necessitates a mandatory or permissive jury instruction. If a judge finds that a mandatory instruction is necessitated, then the judge will instruct the jury that they *must* accept the stipulated fact conclusively proved. Alternatively, if a judge finds that a permissive instruction is necessitated, then the judge will instruct the jury they *should* or *may* accept the stipulated fact as conclusively proved..[11] Despite agreement over the binding effect of stipulations of fact, presently, federal courts of appeals disagree over the proper way to instruct jurors, with some circuits using a mandatory instruction and others using a permissive instruction.[12]

This lack of consensus is problematic because a federal judge's determination of how to instruct a jury as to stipulations of fact arguably plays a crucial role during jury deliberation.[13] Jurors' duties include determining the facts from the evidence and applying the law to those facts.[14] The jurors' application of the law to the adduced

---

[6] *See infra* Part I.

[7] *See infra* Part I.

[8] *See, e.g.*, United States v. Muse, 83 F.3d 672, 680 (4th Cir. 1996) ("We have been unable to find much guidance in the case law; indeed, no appellate case seems to have set forth proper language for a jury instruction [in instances where a stipulation encompasses an element of the crime].") (footnote omitted).

[9] *See, e.g.*, United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986) ("Stipulations freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into civil actions." (citing United States v. Campbell, 453 F.2d 447, 451 (10th Cir. 1972))); United States v. Griffith, No. 92-6106, 1993 WL 492299, at *2 (6th Cir. Nov. 29, 1993) ("The law in the Sixth Circuit on the effect of a stipulation of fact is clear: 'Stipulations voluntarily entered by the parties are binding, both on the district court and on [the appeals court].'" (quoting FDIC v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991))).

[10] *See infra* Part II.

[11] *See generally* KEVIN F. O'MALLEY ET AL., 1A FEDERAL JURY PRACTICE AND INSTRUCTIONS § 12.03 (6th ed. 2015) (listing each circuit court of appeals' jury instruction on stipulations of fact).

[12] *See infra* Part II; *see generally* O'MALLEY ET AL., *supra* note 11, § 12.03.

[13] *See infra* Part II.

[14] United States v. Gaudin, 515 U.S. 506, 514 (1995) (holding that a criminal jury's constitutional responsibility is not merely to act as a fact finder but also to apply the law to those facts in making its determination of guilt or innocence); *see also* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (holding

facts depends not only on the federal judge's interpretation of the law as set forth and explained in the jury instructions, but also on the judge's determination of whether a mandatory or permissive jury instruction on stipulations of fact is required.[15] If a judge finds that a mandatory instruction is necessitated, then it is highly likely, if not presumed, that a jury will abide by the instruction and accept the stipulation of fact as conclusively proved.[16] If, however, the jury instruction is permissive, then the jury will consider the stipulation of fact during deliberation and will determine, based on the stipulation of fact and possibly other evidence, whether the stipulation proves to be dispositive of the issue.[17] Thus, a federal judge's instruction on stipulations of fact plays a crucial role in jury deliberation.

The driving force behind variation in instruction on stipulations of fact among the courts of appeals stems from constitutional considerations. Specifically, when stipulations of fact comprise elements of the offense, the courts of appeals are concerned about possible violations of the Fifth and Sixth Amendments.[18] For example, one concern is whether a stipulation of fact that is an element of the offense constitutes a waiver of the Sixth Amendment right to a trial by jury on that element.[19] Another related issue is the effect a mandatory instruction has on the Sixth Amendment and a jury's power to nullify.[20] These constitutional considerations are

---

that the Due Process Clause of the Fourteenth Amendment requires states to provide a right to trial by impartial jury in criminal cases). The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

[15] *See infra* Parts II–III.

[16] *See* City of Los Angeles v. Heller, 475 U.S. 796, 798 (1986) ("[T]he theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given [to] them, . . . and that they do not consider and base their decisions on legal questions with respect to which they are not charged.") (citation omitted).

[17] Additionally, permissive instructions may vary in degrees of strength as well. Purely from a linguistic perspective, the word "should" carries with it a prescriptive action to be performed or that is expected to be performed, whereas the word "may" indicates that the jury has the ability to perform, but that the action connotes discretion.

[18] *See Gaudin*, 515 U.S. at 509–10 ("The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without 'due process of law'; and the Sixth, that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (footnote omitted) (citing Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993))). Additionally, some courts of appeals explicitly refuse to address the issue of whether a stipulation of fact that is an element of the offense violates the U.S. Constitution. *See, e.g.*, United States. v. Meade, 175 F.3d 215, 223 n.2 (1st Cir. 1999) ("[W]e express no opinion on whether the government's duty to prove each element of a crime beyond a reasonable doubt is diluted impermissibly if the jury instructions do not submit the stipulation for the jury's consideration. This thorny question has divided the courts of appeals . . . .").

[19] *Compare* United States v. Mason, 85 F.3d 471, 472–73 (10th Cir. 1996) (holding that the right to a trial by jury on each element is waived when the defendant voluntarily enters into a stipulation with the government), *with* United States v. Muse, 83 F.3d 672, 680–81 (4th Cir. 1996) (holding that a court may not remove a stipulated element from the jury's consideration).

[20] *See, e.g.*, D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force"– Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 407 n.14

the reasons why circuit courts adopt specific language in their jury instructions on stipulations of fact.[21]

This Note first explores and explicates the split of authority concerning instructing a jury on stipulations of fact entered into knowingly and voluntarily by the defendant and government during federal criminal proceedings. Second, this Note suggests that that the correct jury instruction on stipulations is mandatory, instructing juries that they *must* accept stipulated facts as conclusively proved, and that other circuits should adopt a similar mandatory instruction. Part I provides background on stipulations, describing what a stipulation is and how it functions in a federal criminal proceeding. Part II describes the different approaches of the courts of appeals and the constitutional considerations underlying the varying constructions of jury instructions on stipulations of fact. Lastly, Part III outlines and argues that the best approach to constructing a jury instruction on stipulations of fact is the Sixth Circuit's recently published jury instruction on stipulations of fact, read in conjunction with the Use Note.[22]

I. TYPES OF STIPULATIONS AND THEIR ROLE DURING LITIGATION

Adversarial parties and courts regard a stipulation as an agreement.[23] Stipulations occur both in the civil and criminal context and represent agreements either by the parties and/or their attorneys.[24] The purpose and effect of a stipulation is to conserve judicial resources, save money and time for all parties involved, and save public money.[25] Entering into stipulations allows parties to focus only on disputed issues by allowing them to stipulate to those easily proven and agreed facts that are relevant and necessary to the outcome of the case but would otherwise need to be proved.[26] Additionally, Judicial resources and public money are saved by the shortening of trials, and thereby, the clearing of space on the docket. [27] Lastly, stipulations saves both judges and juries time by enabling them to hear evidence only on those disputed issues.[28]

(1998) (discussing the issue of jury nullification with a mandatory instruction on stipulations of fact and issues of intelligibility and rationality for permissive instructions).

[21] *See infra* Part II.

[22] See *infra* note 144, for a description of Use Notes.

[23] *See generally* KENNETH W. GRAHAM, JR., 22A FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5194 (2d ed. 2016) (defining a stipulation as an agreement made in court).

O'MALLEY ET AL., *supra* note 11, § 12.03.

[24] *See generally* GRAHAM, *supra* note 23.

[25] FDIC v. St. Paul Fire & Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991); *see also* United States v. Mason, 85 F.3d 471, 475 (10th Cir. 1996) (McKay, J., dissenting) ("Stipulations will still save prosecutors time and money in the presentation of their cases.").

[26] *See St. Paul Fire & Marine Ins. Co.*, 942 F.2d at 1038.

[27] *Id.*

[28] *Id.*

Stipulations range from agreements relating to matters of evidence to agreements on specific facts.[29] Stipulations concerning matters of evidence, for example, typically include parties entering into an agreement about the admissibility or authenticity of documents, records, or other exhibits presented in court,[30] or an evidentiary stipulation may represent what a specific witness would testify if called.[31] Stipulations relating to evidentiary matters are generally not binding on juries.[32] This is true both in the criminal and civil context.[33] Stipulations relating to evidentiary matters are not considered as conclusive proof of the particular issue for which the evidence is presented.[34] Rather, these types of evidentiary stipulations are weighed against all other evidence in determining whether the government, in a criminal context, or a plaintiff, in a civil context, has met his or her burden of proof or burden of persuasion on the issue.[35]

Stipulations of fact, in contrast, are agreements between the parties that a particular fact or proposition is true for the purposes of trial.[36] Stipulations of fact can range from easily proven facts to material facts comprising an element of the offense.[37] Stipulations of fact are binding on the parties, court, and on appeal, but, in

---

[29] *See* GRAHAM, *supra* note 23, § 5194.

[30] *See id.*

[31] *See id.*

[32] *See* United States v. Mason, 85 F.3d 471, 472 (10th Cir. 1996) (distinguishing stipulating to facts from stipulating to evidence and holding that "when . . . parties stipulate to evidence tending to establish an elemental fact, the jury must still resolve the existence or nonexistence of the fact sought to be proved"); United States v. Benally, 756 F.2d 773, 778 (10th Cir. 1985) (holding that it was reversible error for the district court to instruct the jury that it must accept stipulated testimony as true, reasoning that "a stipulation as to the testimony a witness would give if called, although it may constitute evidence of the facts covered, is not an admission of the truth of such testimony and does not prevent a party from attacking it as he might attack the testimony itself, had it been given." (quoting United States v. Spann, 515 F.2d 579, 582 (10th Cir. 1975))); United States v. Lawson, 682 F.2d 1012, 1015 (D.C. Cir. 1982) (stating that a stipulation entered into agreeing to the testimony a witness would have given if called is a matter of evidence for the jury's consideration).

[33] *See, e.g.*, *Benally*, 756 F.2d at 778 (holding that it is reversible error when a trial court instructs a jury in a criminal case that an element of the offense has been proved when the stipulation was an evidentiary stipulation to testimony a witness would have given if called); *See generally* KEVIN F. O'MALLEY ET AL., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 101:47 (6th ed. 2018) (noting that there is a difference between stipulating that a witness would give certain testimony—i.e. evidentiary stipulation— and stipulating that certain facts are established and that stipulations of facts are deemed to have been conclusively proved and the jury may be instructed accordingly) (citing United States v. Hellman, 560 F.2d 1235, 1236 (5th Cir. 1977))). It is important to note that the O'Malley complied circuit instructions tend to cite federal criminal cases for their authority regarding differentiating and submitting stipulations of fact from evidentiary stipulations. *Id.*

[34] *See supra* note 32 and accompanying text.

[35] *See supra* note 32 and accompanying text.

[36] *See* O'MALLEY ET AL., *supra* note 11, § 12.03.

[37] It is important to note that there are boundaries on facts to which parties may stipulate. For example, it is likely that a judge would reject fact stipulations that are not reasonable or relevant, or are untrue. *See* FDIC v. St. Paul Fire & Marine Ins. Co., 942 F.2d 1032, 1038 n.3 (6th Cir. 1991) ("This is not to say that the parties could stipulate patently untrue 'facts.' A trial judge may have some authority to reject stipulations. . . . [I]f the trial court wishes to reject a stipulation, the court must . . . give the parties notice of its intent, so that the parties will be able to demonstrate the reasonableness of the stipulation.").

contrast to evidentiary stipulations, courts vary as to how to instruct juries on the binding nature of stipulations of fact.[38] In the civil context, the circuit courts agree that stipulations of fact are binding and provide a mandatory instruction stating that the jury *must* accept the stipulated fact as proved for purposes of the case.[39]

The answer as to how to instruct juries on the binding nature of stipulations of fact is not so clear in the federal criminal context. Stipulations of fact are commonly used in federal criminal cases. Most frequently, the government and defendant stipulate to the jurisdictional and prior felony conviction elements in cases involving felon-in-possession-of-a-firearm, which prohibits any person previously convicted of a felony from possessing, transporting, or receiving any firearm or ammunition in interstate commerce.[40] Though regarded as binding, the circuit courts of appeals disagree as to how to properly convey the precise legal effect of a stipulation of fact to the jury, especially when the stipulated fact comprises an element of the offense.[41] Some circuits hold that a proper instruction is a permissive instruction stating that a jury *may* or *should* accept a stipulated fact as proved,[42] while other circuits hold that

---

[38] *See infra* Part II.

[39] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 677–78 (2010) (stating that "factual stipulations are 'formal concessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of that fact[,] [and] [t]hus, a judicial admission . . . is conclusive in the case." (quoting K. BROUN, 2 MCCORMICK ON EVIDENCE § 254 (6th ed. 2006))). *See, e.g.*, THIRD CIR. COMM. ON MODEL CIVIL JURY INSTRUCTIONS, MODERN CIVIL JURY INSTRUCTIONS § 2.4 (2017) ("The [parties] have agreed that [set forth stipulated fact or facts] [is/are] true. . . . You must therefore treat [this fact] [these facts] as having been proved for the purposes of this case."); COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N FIFTH CIR., PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 2.3 (2016) ("A 'stipulation' is an agreement. When there is no dispute about certain facts, the attorneys may agree or 'stipulate' to those facts. You must accept a stipulated fact as evidence and treat that fact as having been proven here in court."); COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIR., FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 2.05 (2017) ("The parties have stipulated, or agreed, that [*stipulated fact*]. You must now treat this fact as having been proved for the purpose of this case."); NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS: FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 2.2 (2017) (stating that, when parties agree to certain facts, the jury should treat these facts as having been proved but also stating in the Comment section that "[w]hen parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed"); *see also* KEVIN F. O'MALLEY ET AL., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS – CIVIL § 102:11 (6th ed. 2016) (providing a general model instruction: "The parties have stipulated, or agreed that _____ is a fact. You must treat this fact as having been proven for the purpose of this case.").

[40] *See* 18 U.S.C. § 922(g)(1) (2012); *see, e.g.*, United States v. Ray, 803 F.3d 244, 255–56 (6th Cir. 2015) (prior felony elements); United States v. Higdon, 638 F.3d 233, 235 (3d Cir. 2011) (prior felony conviction and jurisdictional element); United States v. Broadnax, 601 F.3d 336, 339–41 (5th Cir. 2010) (prior felony element); United States v. Chevere, 378 F.3d 120 (2d Cir. 2004) (per curiam) (prior felony element); United States v. Hardin, 139 F.3d 813, 814 (11th Cir. 1998) (prior felony element); United States v. Mason, 85 F.3d 471, 471 (10th Cir. 1996) (prior felony and jurisdictional elements).

[41] *See infra* notes 42–44 and accompanying text.

[42] *See, e.g.*, United States v. Muse, 83 F.3d 672, 677–81 (4th Cir. 1996) (holding that a district court's instruction that the jury must consider all elements of an offense, even those encompassed in stipulations, was not erroneous, but that the jury *should* find that the government had proven those stipulated elements) (emphasis added).

a proper instruction is one that is mandatory and states that jurors *must* accept stipulated facts as true.[43] Furthermore, some circuits have failed to address the issue or have explicitly refused to address the issue when stipulations of fact comprise an element of the offense.[44]

II. JUDICIAL DETERMINATIONS ON INSTRUCTING JURIES AS TO THE LEGAL EFFECT OF STIPULATED FACTS

Despite frequent use of stipulations in federal criminal cases and *Old Chief*'s holding that it will generally be reversible error to refuse a defendant's stipulation of fact conceding the prior felony conviction element in felon-in-possession cases,[45] there is still uncertainty among the judiciary and little case law dictating how federal judges should instruct juries to the existence and legal effect of fact stipulations, especially when the stipulated fact is an element of the crime. Thus, circuit courts of appeals disagree as to what type of jury instruction is proper—whether it is appropriate to adopt a mandatory or permissive instruction. Some courts argue that only a permissive instruction instructing the jury that it *may* or *should* accept stipulated facts as proved can avoid violations of the Fifth and Sixth Amendments,[46] whereas some seem to indicate that, when a defendant stipulates to a fact comprising an element of the offense, the defendant waives his/her Sixth Amendment right to a trial jury on that element,[47] arguably lending the view that, if juries are instructed on that element, a mandatory instruction stating that they *must* accept stipulated facts as proved would be most proper.

The three circuit courts recurrently cited for their views on instructing juries as to the existence and legal effect of stipulated facts are the Tenth, Fourth, and Sixth Circuits. An examination of these three circuits provides a good representation of the continuum of possibilities and the underlying constitutional considerations driving the conflicting jury instruction determinations among the circuit courts of appeals.

---

[43] *See, e.g.*, United States v. Mason, 85 F.3d 471, 472–74 (10th Cir. 1996) (holding that defendant's stipulation as to certain elemental facts of an offense completely removed those elements from the jury's consideration).

[44] *See, e.g.*, United States v. Meade, 175 F.3d 215, 223 n.2 (1st Cir. 1999) ("[W]e express no opinion on whether the government's duty to prove each element of a crime beyond a reasonable doubt is diluted impermissibly if the jury instructions do not submit the stipulation for the jury's consideration."); United States v. Jones, 108 F.3d 668, 676 (6th Cir. 1997) (en banc) (Ryan, J., concurring) ("We express no opinion on the question of whether the government and defendant may agree to the removal of an element from the jury's consideration.").

[45] Old Chief v. United States, 519 U.S. 172, 190–92 (1997); *see* also 18 U.S.C. § 922(g)(1) (2012).

[46] *See, e.g.*, *Muse*, 83 F.3d at 677–81; *see also supra* note 19 and accompanying text.

[47] United States v. Mason, 85 F.3d 471 (10th Cir. 1996).

A. The Tenth Circuit's Take on Stipulations of Fact

In *United States v. Mason*, the Tenth Circuit held that the trial court's jury instruction removing an element of the offense from the jury's consideration was not reversible error where the defendant stipulated to that "elemental fact" of the offense.[48] In *Mason*, a jury convicted the defendant of being a felon-in-possession-of-a-firearm.[49] During the trial, the defendant stipulated to the jurisdictional and prior felony conviction elements of the felon-in-possession charge.[50] The stipulation of facts the defendant entered into admitted that he was previously convicted of a crime punishable by imprisonment for a term exceeding one year and that the possession of the firearm was in or affecting interstate or foreign commerce.[51] These "elemental" stipulations left the government with the burden of establishing beyond a reasonable doubt only the element that the defendant knowingly possessed the firearm described the indictment.[52] The trial court's instruction to the jury stated: "The parties stipulate that the first and third elements have been met . . . . Therefore, the government need not offer proof as to these elements, and you *should* consider them proven by the government."[53] The defendant did not object to these instructions.[54] Thus, the court of appeals reviewed the jury instructions under a plain error standard.[55]

The Tenth Circuit held that, when a defendant "stipulat[es] to elemental facts, . . . [he] waives his right to a jury trial on that element."[56] The court reasoned that, when a defendant stipulates to the facts that establish an element of the offense, the defendant voluntarily waives his/her Sixth Amendment right to a jury trial on that element.[57] The Tenth Circuit stated that to instruct the jury on the effect of the stipulations establishing elements of the offense as a waiver of the defendant's Sixth Amendment rights did not constitute a directed verdict on those elements because "the judge has not removed the consideration of an issue from the jury; the parties have."[58]

Additionally, the Tenth Circuit noted that there was no qualitative difference between this sort of "partial waiver" and instances where defendants enter into guilty

---

[48] *Id.* at 472–74.
[49] *Id.* at 471.
[50] *Id.*
[51] *See id.*
[52] *Id.* at 471–72.
[53] *Id.* at 472 (emphasis added).
[54] *Id.*
[55] *Id.*
[56] *Id.* at 472–73.
[57] *Id.*
[58] *Id.* The Tenth Circuit also seems to reject the notion of jury nullification by stating, "While we recognize that a jury in a criminal case has the practical power to render a verdict at odds with the evidence or the law, a jury does not have the lawful power to reject stipulated facts . . . . [This] would conflict with the jurors' sworn duty to apply the law to the facts, regardless of outcome." *Id.* at 473 (citing United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983)).

pleas and other sorts of "wholesale waivers" that do not violate the Sixth Amendment.[59] Thus, the court held that the jury instructions removing stipulated elements from the jury's consideration did not constitute plain error because the defendant waived his constitutional rights to a jury determination of those elements through fact stipulations.[60]

The majority opinion in *Mason* did not specifically address constitutional issues arising when a trial court fails to ensure that a defendant voluntarily and knowingly enters into a stipulation of fact. The majority never directly addressed the issue even though it held that a defendant could waive his Sixth Amendment rights to a trial by jury and even compared stipulations constituting a waiver to other "wholesale waivers," like bench trials and guilty pleas,[61] where the court does ensure that the defendant knowingly and voluntarily waives his Sixth Amendment Rights.[62] The closest the majority comes to addressing the issue is in a footnote directed toward the dissenting opinion.[63] The footnote cites the proposition in *Johnson v. Cowley* that "a trial court is not required to engage in an independent inquiry to ensure that a stipulation to an element is knowing and voluntary."[64] *Johnson*, however, states that a stipulation of fact of a prior conviction in an enhancement proceeding is not the functional equivalent of a guilty plea and that the court was not "prepared to hold *in all cases* a court receiving such a stipulation must make an independent inquiry to determine whether the stipulation is voluntarily made with full knowledge of its consequences."[65]

---

[59] *Id.* at 472–73. The Tenth Circuit also distinguished between fact stipulations establishing an element of the offense and evidentiary stipulations that tend to establish an element of the offense, stating: "When the only evidence tends to establish an elemental fact, or when the parties stipulate to evidence tending to establish an elemental fact, the jury must still resolve the existence or nonexistence of the fact sought to be proved." *Id.* at 472. Whereas, there is no need to resolve the existence of an element when parties stipulate to elemental facts. *Id.*; *see also* United States v. Benally, 746 F.2d 773, 778 (10th Cir. 1985) (holding that instructing a jury to find an elemental fact was "reversible error" when the stipulation was only to evidentiary facts).

[60] *Mason*, 85 F.3d at 474.

[61] *Id.* at 472–73.

[62] *See, e.g.*, Cox v. Hutto, 589 F.2d 394, 396 (8th Cir. 1979).

[63] *Id.* (citing Johnson v. Cowley, 40 F.3d 341, 346 (10th Cir. 1994)).

[64] *Id.*

[65] *Johnson*, 40 F.3d at 346 (emphasis added). *But see Cox*, 589 F.2d at 395–96 (holding that, in a habitual offender action, the trial court violated the defendant's due process rights by accepting a stipulation to the defendant's prior conviction without determining whether the defendant understood and voluntarily consented to the stipulation); United States v. Strother, 578 F.2d 397, 404–05 (D.C. Cir. 1978) (holding that when stipulations are tantamount to a guilty plea, Federal Rules of Criminal Procedure 11–type procedures should apply).

B. The Fourth Circuit's Take on Stipulations of Fact

In *United States v. Muse*, the Fourth Circuit held that a jury instruction instructing the jury that it *should* consider an element proved was not plain error.[66] In *Muse*, the government charged the defendant with violation of 18 U.S.C. 922(g)(1), felon-in-possession-of-a-firearm.[67] The defendant and the government stipulated to the jurisdictional and prior felony conviction elements of the offense.[68] The jury found the defendant guilty of being a felon-in-possession-of-a-firearm.[69] The defendant appealed, arguing that the judge improperly instructed the jury as to the effect of stipulations of fact and, thus, functionally directed a verdict for the prosecution on the jurisdictional and prior felony conviction elements of the felon-in-possession offense.[70] Alternatively, the defendant argued that if the trial judge properly instructed the jury on the legal effect of stipulated facts, then the trial judge erred in failing to ensure that the defendant knowingly and voluntarily waived his Sixth Amendment right to a trial by jury on those elements.[71]

The trial court's instructions read:

> [T]he Government must prove each of the following elements beyond a reasonable doubt . . . . First, that the defendant was previously convicted of a felony. . . . This has been stipulated to; and . . . a stipulation is an agreement among the parties that this element has been proved or is proved, and the Government does not have to go any further to prove that. So, you should not have to concern yourself with that, because the stipulation establishes that element . . . . You should go right past that. You have to consider it, certainly, as one of the elements, but the stipulation makes it very clear that you don't have to look into the evidence to see if it has been proven by the government. The stipulation does that. . . .
>
> Third, that the possession charged was in or affecting interstate commerce. The third element is again stipulated to between the parties. So, you don't have to worry yourself about whether or not the gun was in or affecting interstate commerce.[72]

Because the defendant failed to object to the jury instruction at trial, the court of appeals reviewed the instruction under a plain-error standard.[73] The Fourth Circuit held that the jury instruction was not erroneous by noting its similarities with Eighth

---

[66] United States v. Muse, 83 F.3d 672, 681 (4th Cir. 1996) (emphasis added).
[67] *Id.* at 674.
[68] *Id.* at 677–78.
[69] *Id.* at 674.
[70] *Id.* at 677–78.
[71] *Id.* at 677.
[72] *Id.* at 678 (punctuation in original).
[73] *Id.*

and Ninth Circuit model instructions which strike an "appropriate balance" between the strong "evidentiary force of a stipulation" and the trial court's inability "to remove even a stipulated fact from the jury's consideration or to mandate that the jury return findings as the court directs . . . ."[74] The Fourth Circuit began its reasoning by noting that stipulations of fact are "special" in nature and are "more potent than simply an admission," such that, when a defendant stipulates to a fact, the defendant waives his or her right to require the government to produce evidence beyond the stipulation itself to meet its burden of proof of establishing the fact beyond a reasonable doubt.[75] This, the court maintained, is the effect of a stipulation of fact.[76]

Although a stipulation of fact has strong evidentiary force, the court stated that the prosecution was neither entitled to a directed verdict on the facts comprising those elements, nor does the defendant effectively plead guilty with respect to any element of the offense established by the stipulated facts.[77] Thus, stipulating to a fact only relieves the government "of the burden of producing . . . evidence" in addition to the stipulated fact, "it does not relieve the prosecution from . . . 'proving every element of the crime' beyond a reasonable doubt."[78] Consequently, the trial court could not remove the stipulated facts comprising an element of the offense from the jury's consideration by "enter[ing] its own finding that the element [had] been established."[79] Doing so, the court added, would "violate the 'very foundation of the jury system.'"[80]

The Fourth Circuit based its rationale on the Sixth Amendment. When a defendant enters a plea of not guilty, the Sixth Amendment requires the jury to reach the "requisite finding of 'guilty.'"[81] Accordingly, the Fourth Circuit stated that, for a guilty verdict to be valid under the Constitution, a jury must consider the stipulation of fact as evidence of the existence of the element during its deliberation and render a decision finding that the government has met its burden of proof on every element of the offense, including those established by stipulations of fact.[82] Not only does a defendant have a constitutional right to trial by an impartial jury, but a jury also has

---

[74] *Id.* at 680.

[75] *Id.* at 678.

[76] *Id.*

[77] *Id.* at 679.

[78] *Id.* Here, the Court points the reader to *Estelle v. McGuire*, 502 U.S. 62 (1991), in support of the proposition that the prosecution is not relieved of its burden when a defendant stipulates to facts comprising an element of the crime. *Id.* This Supreme Court case states that the prosecution's burden of proof, to prove the elements of the offense beyond a reasonable doubt, "is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle*, 502 U.S. at 69.

[79] *Muse*, 83 F.3d at 679–80.

[80] *Id.* at 679 (quoting United States v. Gilliam, 994 F.2d 97, 100 (2d Cir. 1993), *cert. denied*, 510 U.S. 927 (1993)).

[81] *Id.* (quoting Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (citation omitted)); *see also* United States v. Gaudin, 515 U.S. 506, 522–23 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.").

[82] *Muse*, 83 F.3d at 679–80.

an "'undisputed power' to nullify guilty verdicts."[83] Thus, limiting the extent to which the jury's province can be invaded is also partially based on this "undisputed [nullification] power," which permits a jury to "bring in a verdict in the teeth of both law and facts."[84] Ultimately, the Fourth Circuit held that the trial court's jury instruction "was not erroneous" and did not amount to a directed verdict on elements of the offense because the trial court explicitly "instruct[ed] . . . the jury that it *must* 'consider'" each element of the offense and that it *should* accept stipulated facts as proved.[85]

Because the instructions were not erroneous, the Fourth Circuit declined to address the defendant's alternative argument that the trial court erred in not ensuring that the defendant knowingly and voluntarily entered into stipulations of fact comprising elements of the offense.[86] But, in dictum, the court indicated that constitutional issues would likely arise in instances where a defendant stipulated to all elements of an offense.[87] The Fourth Circuit explained that, in those instances, "the knowing and voluntary nature of [the defendant]'s entry into stipulations (amounting effectively to a de facto guilty plea) would raise more significant concerns."[88] The Fourth Circuit dodged the issue of the potential need for Rule 11

---

[83] *Id.* at 680 (citing United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969)).

[84] *Id.* (quoting Horning v. District of Columbia, 254 U.S. 135, 138 (1920)).

[85] *Id.* at 681.

[86] *Id.*

[87] *See id.*

[88] *Id.*; *cf.* United States v. Wellington, 417 F.3d 284, 291 (2d Cir. 2005) (cautioning district judges that "where a court accepts a defendant's stipulation to the elements of the charged offense, the district judge must ensure (1) that the stipulation is voluntarily made and (2) that the defendant understands the consequences of his stipulation"); United States v. Lyons, 898 F.2d 210, 214–15 (1st Cir. 1990) (holding that the panoply of procedures required in Federal Rule of Criminal Procedure 11 are not required when stipulating to facts that establish the crime, but that trial judge should inquire as to whether stipulations were entered into voluntarily and with knowledge (citing United States v. Strother, 578 F.2d 397, 404 (D.C. Cir. 1978))); United States v. Stalder, 696 F.2d 59, 62 (8th Cir. 1982) (holding that although "an inquiry as thorough as that prescribed by [Federal Rule of Criminal Procedure 11] is not required before the district court accepts a stipulation of facts establishing guilt from a criminal defendant," (quoting United States v. Lawriw, 568 F.2d 98, 105 n.13 (8th Cir. 1977)) the court should ensure the defendant understood the rights being surrendered as a result of signing the stipulations); Witherspoon v. United States, 633 F.2d 1247, 1251–52 (6th Cir. 1980) (holding that Federal Rule of Criminal Procedure 11 is not required in instances when a defendant stipulates to most or all of the factual elements of an offense but "suggest[ing] to the District Courts that they consider the possible applicability of the terms of Rule 11 in any instance where a stipulation as to most or all of the factual elements necessary to proof of guilt of a crime is tendered [, and] [i]f applicable, the strictures of the rule should be followed"); United States v. Strother, 578 F.2d 397, 404 (D.C. Cir. 1978) (holding that although Federal Rule of Criminal Procedure 11 is inapplicable to stipulations to elemental facts, "the trial judge should arguably be at some special pains to satisfy himself that the defendant is fully informed about precisely what it is that he is giving up;" and parts of Rule 11 are helpful in ensuring the defendant understands the significance of stipulations to elements of the offense); United States v. Brown, 428 F.2d 1100, 1102–04 (D.C. Cir. 1970) (holding that despite the inapplicability of Federal Rule of Criminal Procedure 11 to situations where a defendant stipulates to all elements of an offense but reserves the defense of insanity, courts should follow its procedure of addressing the defendant personally to assure stipulations are made voluntarily and knowingly).

type procedures, stating that, because the defendant in this case stipulated only to two elements and not all three elements of the offense, they need not address the issue.[89]

C. The Sixth Circuit's Take on Stipulations of Fact

The Sixth Circuit has changed its stance on how to instruct juries on the binding nature of stipulations of fact. The Sixth Circuit case on stipulations of fact recurrently cited in other circuits is *United States v. Jones*.[90] In *Jones*, a jury convicted the defendant for being a felon-in-possession-of-a-firearm.[91] The defendant and government entered into a stipulation of fact that the defendant was "a prior convicted felon for the purposes of [the] trial."[92] Before deliberation, the judge instructed the jury as to the legal effect of the stipulation of fact. The instruction read:

> The first element you must find beyond a reasonable doubt before you can convict the defendant is that the defendant had been convicted of a felony . . . . To satisfy the first element, you need only find that the defendant was, in fact, convicted of a felony and the conviction was prior to the receipt or possession of the firearm charged in this case. Defendant admits that he was convicted of a felony prior to the date alleged in the indictment, so this element of the offense has been proven. Since defendant admits that he was previously convicted of a felony, *you will find that the government has established this element of the offense*. . . .[93]

The defendant did not object to the instruction, and the Sixth Circuit reviewed the decision for plain error.[94] The majority of eight judges sitting en banc declined to decide whether the challenged jury instruction was error and decided the case on

---

[89] *Muse*, 83 F.3d at 681. After the ruling in *Old Chief v. United States*, 519 U.S. 172 (1997), the Fourth Circuit stated, "[W]e question the validity of our holding in *United States v. Muse*, 83 F.3d 672 (4th Cir. 1996) that a stipulation does not constitute a waiver of the government's burden of proof in the limited circumstances of a defendant's felon status for purposes of a 18 U.S.C.A § 922(g)(1) charge. . . . [But, in this case,] we need not address whether the necessary result of the holding of *Old Chief* is the elimination of the Government's burden of proof of a defendant's felon status in a § 922(g)(1) charge when the defendant has entered into a stipulation to that effect." United States v. Jackson, 124 F.3d 607, 617 n.8 (4th Cir. 1997). This seems to indicate that the Fourth Circuit has not definitively ruled out whether it is constitutional to provide a mandatory instruction to the jury concerning stipulations of fact that comprise an element of the crime.

[90] United States v. Jones, 108 F.3d 668 (6th Cir. 1997) (en banc). *See* United States v. Cornish, 103 F.3d 302, 305–06 (3d Cir. 1997); U.S. v. Gonzalez, 110 F.3d 936, 948 (2d Cir. 1997) United States v. Mason, 85 F.3d 471, 472–74 (10th Cir. 1996).

[91] *Jones*, 108 F.3d at 670.

[92] *Id.*

[93] *Id.* (alteration in original).

[94] *Id.*

narrower grounds.[95] The majority assumed error and concluded that, if any error did exist in the district court's instruction, it was not plain error, reasoning that because "[t]here is only sparse case law . . . and what little case law exists is divergent and conflicting[,]" any error resulting from the district court's instruction on stipulations of fact was not plain.[96]

Although the majority of judges sitting *en banc* declined to address whether the instructions to jury were error, a minority of six concurring judges addressed the question.[97] The Sixth Circuit's concurring judges stated that, in their view, the jury instruction constituted "constitutional plain error."[98] The concurring judges found that instructing jurors that "you will find that the government has established one of the elements of the offense" constituted plain error.[99] In making the determination of constitutional plain error, the court differentiated the following statements: (1) "[d]efendant admits that he was convicted of a felony prior to the date alleged . . . so this element of the offense has been *proven*"[100] and (2) "[s]ince defendant admits that he was previously convicted of a felony, *you will find*"[101] that the element of the offense has been proven. The concurring six judge minority seemed to adopt the view that instructing the jury that an element of the offense has been proven is proper where the defendant has affirmatively stipulated to the fact comprising the element because the government's burden of proving that fact is relieved.[102] But, according to the concurring judges, when a district court judge instructs the jury as to what they "will find," the judge essentially directs a verdict against the defendant on that element of the offense.[103] This is so because the judge not only relieves the government of its burden of offering evidence on the stipulated fact but makes a finding that "the stipulation has effectively proved the stipulated fact beyond a reasonable doubt," instructing "the jurors [that they] 'will' so find."[104] Such an action by the trial court then arguably violates a defendant's Fifth Amendment right to due process and Sixth Amendment right to a jury trial.[105]

---

[95] *Id.* at 671 ("We decline to decide at this time whether the instruction challenged here was error. Rather we choose to decide the case on narrower grounds and will assume error . . . .") (citation omitted).

[96] *Id.* at 671–73.

[97] *See id.* at 673–77 (Ryan, J., concurring).

[98] *Id.* at 673.

[99] *Id.*

[100] *Id.* at 674–75 (alteration in original).

[101] *Id.* at 673 (alteration in original).

[102] *Id.* at 674–75.

[103] *Id.* at 675–76.

[104] *Id.* at 675.

[105] *Id.* at 675–676; *see also* United States v. Gaudin, 515 U.S. 506, 509–10 (1995) ("The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without 'due process of law'; and the Sixth, that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (citing Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993))).

In support of this opinion, the concurrence discussed *United States v. Mentz*.[106] In *Mentz*, the government submitted uncontested evidence in support of an element of the offense, and the district judge instructed the jury that the government had proven the element.[107] The Sixth Circuit held that the judge invaded the jury's province by "improperly cast[ing] himself in the role of trier of fact" and applying the law to the facts he had determined.[108] This amounted to a directed verdict on an essential element of the crime and, thus, violated the defendant's Fifth[109] and Sixth Amendment rights.[110]

The concurring minority in *Jones*, taking into account the constitutional considerations outlined in *Mentz* and other Supreme Court precedent,[111] reasoned that, in order to prevent a directed verdict against the defendant, and consequently, violations of the Fifth and Sixth Amendments, a jury instruction on stipulations of fact should state that "those facts *may* be considered proved by the government."[112] According to the concurring judges, this type of permissive instruction holds the government accountable to its duty of proving every element of the offense beyond a reasonable doubt and permits the jury to make the requisite finding of guilty on each element of the crime.[113] This, the concurring judges noted, also serves the function of preserving the jury's power to nullify a verdict.[114] Thus, the Sixth Circuit judges who addressed the issue of how to properly instruct juries on stipulations of fact in *Jones* arguably concluded that a permissive instruction is appropriate to assure constitutionality.[115]

---

[106] *See Jones*, 108 F.3d at 674–75; United States v. Mentz, 840 F.2d 315 (6th Cir. 1988)).

[107] *See Mentz*, 840 F.2d at 318–19.

[108] *Id.* at 320.

[109] *See id.* at 319 n.4.

[110] *Id.* at 323.

[111] *See generally Jones*, 108 F.3d at 673–77; *see* Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (stating that it is a defendant's constitutional "right to have [a] jury, rather than [a] judge, reach the requisite finding of 'guilty[,]'" and, thus, a district court judge "may not direct a verdict for the State, no matter how overwhelming the evidence"); Estelle v. McGuire, 502 U.S. 62, 69 (1991) ("[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense."); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (stating that the right to trial by jury in criminal cases is "fundamental to the American scheme of justice"); United States v. Martin Linen Supply Co., 430 U.S. 564, 572–73 (1977) (holding that a verdict for the prosecution may never be directed no matter how strong the evidence is against the defendant).

[112] *See Jones*, 108 F.3d at 674 (original emphasis altered).

[113] *See id.* at 674–75.

[114] *Id.* at 676. In response to the majority opinion in *United States v. Mason*, 85 F.3d 471 (10th Cir. 1996), the six concurring judges in *Jones* stated, "We . . . are disturbed by the discomforting reality of jury nullification. . . . However, even if a jury does not have the lawful *authority* 'to bring in a verdict in the teeth of both law and facts,' it unquestionably has the *power* to do so." *Jones*, 108 F.3d at 676 (alteration in original) (quoting Horning v. District of Columbia, 254 U.S. 135, 138 (1920)). Thus, an underlying constitutional consideration for the Sixth Circuit concurrence on instructing juries on stipulations of fact is undoubtedly jury nullification.

[115] *Id.* at 674–76. The six minority concurring judges in *Jones* also "express[ed] no opinion on the question of whether the government and defendant may agree to the removal of an element from the jury's consideration," but stated it was "indisputably clear that there was no such agreement in this case[,]"

Both the majority and concurring opinions in *Jones*, however, failed to acknowledge previous Sixth Circuit precedent directly addressing the issue of whether a defendant may enter into stipulations of fact that comprise an element of the offense. In *Witherspoon v. United States*, a trial court convicted the defendant of being a felon-in-possession-of-a firearm.[116] The defendant stipulated to the facts comprising each element of the crime but asserted the unconstitutionality of the statute, as applied to the stipulated facts.[117] The district court judge concluded that the statutes were "constitutionally valid" as applied to the stipulated facts and that "since the defendant . . . stipulated to all of the elements of the offense, and the stipulation of all of the elements to the offense constitutes what I would consider to be a person's guilt, I find the defendant guilty of the charge . . . ."[118]

The defendant appealed, asserting that, by stipulating to facts comprising each element of the crime, Rule 11 procedures were required to ensure that he knowingly and voluntarily waived a trial by jury on all elements of the crime.[119] The Sixth Circuit did not hold that a defendant could not stipulate to any or all facts comprising elements of the crime. But, the Sixth Circuit did observe that while Rule 11 did not by its terms apply to the case at hand because the defendant did not offer a plea of guilt, a district court judge should consider the possible applicability of the terms of Rule 11 when a defendant stipulates to most or all of the facts comprising an element of the offense in order to ensure that the defendant understands the legal effect of stipulations of fact—a waiver of a jury trial on those elements of the offense.[120] Thus, Sixth Circuit precedent does seem to indicate that a defendant may enter stipulations of fact comprising elements of the crime and that, in some instances, it is advisable to implement Rule 11 procedures to ensure the defendant understands any constitutional rights he or she may be waiving.[121]

By comparison, in *United States v. Griffith*, the Sixth Circuit reversed a conviction due to an erroneous jury instruction on stipulations of fact.[122] In *Griffith*, the government charged the defendant with transmitting threatening

---

noting that such an agreement would likely require the defendant to "give up much more than he wittingly bargained for if [the court found] that his stipulation to the fact of a prior conviction constituted a waiver of his rights to a jury trial and to due process." *Id.* at 676.

[116] Witherspoon v. United States, 633 F.2d 1247, 1248 (6th Cir. 1980).

[117] *Id.*

[118] *Id.* at 1250.

[119] *Id.* at 1251; *see also* FED. R. CRIM. P. 11 (detailing procedural requirements for pleas).

[120] *Witherspoon*, 633 F.2d at 1251–52. In citing another circuit court's opinion, the Sixth Circuit also seemed to indicate that not all Rule 11 procedures would be necessary or appropriate in all cases but that, in some cases, it would be helpful in impressing upon the defendant the significance of his choice to enter stipulations of fact. *See id.* (quoting United States v. Strother, 578 F.2d 397, 404–05 (D.C. Cir. 1978)).

[121] *See* United States v. Hicks, 495 F. App'x 633, 643–44 (6th Cir. 2012) (comparing Sixth Circuit precedent and suggesting that Rule 11 procedures may be required in instances where a defendant stipulates to all of the elements of an offense or otherwise reduces the government's burden of proof such that the stipulation amounts to a de facto guilty plea).

[122] United States v. Griffith, No. 92-6106, 1993 WL 492299, at *3 (6th Cir. Nov. 29, 1993).

communications.[123] During the trial, the defendant and government entered into a stipulation of fact regarding the defendant's mental capacity.[124] Specifically, the stipulation stated that the defendant "did suffer from a severe mental disease or defect which rendered her unable to appreciate the nature, quality, or wrongfulness of her acts."[125] The jury instruction as to the fact stipulation admitted read:

> A stipulation is an agreement between the parties that there is no factual dispute as to the matter. Both parties agree that this fact is true; . . . .
>
> [A]s with any other fact in evidence in this case, you *may* give this such weight as you believe it deserves in arriving at your verdicts in this case. However, you *should* consider this fact as a matter of evidence in the case as if it had been proved by a witness presented by both parties. . . .
>
> There is no factual dispute with respect to that item, and it is an item of evidence that you *may* consider in reaching your verdicts in this case; but the weight you give it is, as with all matters of evidence in this case, is [sic] up to you.[126]

The defendant did not object to the jury instructions.[127] The appeals court, reviewing the district court's instruction for plain error, explained that "[t]he law in the Sixth Circuit on the effect of a stipulation of fact is clear: 'Stipulations voluntarily entered by the parties are binding, both on the district court and on the appeals court.'"[128] The Sixth Circuit held that "once the district court accepted the binding stipulation of fact that proved the [necessary] elements of the insanity defense, that defense had been made out as a matter of law."[129] As such, the Sixth Circuit stated that the jury had nothing to resolve about the defense.[130]

Because the insanity defense was proven as a matter of law, the district court erred in telling "the jury it could weigh the evidence as to the defendant's insanity."[131] The Sixth Circuit specified that district court should have instructed the jury that if it determined the defendant had satisfied the elements of the crime, then the jury was "required to return a verdict of 'not guilty by reason of insanity.'"[132] The Sixth Circuit explained that the stipulation of facts proving the elements of the insanity defense prevented the jury from returning a verdict of "guilty."[133] Thus, in

---

[123] *Id.* at *1.
[124] *Id.*
[125] *Id.*
[126] *Id.* at *1–*2 (emphasis added).
[127] *Id.* at *2.
[128] *Id.* (quoting FDIC v. St. Paul Fire & Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991)).
[129] *Id.* at *3.
[130] *Id.*
[131] *Griffith*, 1993 WL 492299, at *2.
[132] *Id.* at *3.
[133] *Id.*

comparison to the concurrence in *United States v. Jones*, which seems to arguably support the use of a permissive jury instruction with regard to stipulated facts, in *Griffith*,[134] the Sixth Circuit appears to arguably adopt a mandatory instruction.[135]

III. MANDATORY JURY INSTRUCTIONS ON STIPULATIONS OF FACT ARE THE BEST APPROACH FOR INSTRUCTING JURIES

With no definitive precedent from the Supreme Court and no consensus among the circuit courts of appeals, the question remains as to how federal district courts should properly instruct juries on the binding nature of stipulations of fact. The previously discussed Tenth, Fourth, and Sixth Circuits' views provide a good representation of the continuum of possibilities on instructing juries on stipulated facts.[136] Each circuit's view is based on the constitutional considerations of the Fifth Amendment's guarantee of due process of law and the Sixth Amendment's guarantee

---

[134] *Id.*; United States v. Jones, 108 F.3d 668, 674–75 (6th Cir. 1997) (en banc) (Ryan, J., concurring). Although not necessarily proffered as a view here, one way of approaching this concurring opinion in *Jones* is the to view the concurring opinion as seeming to arguably adopt a permissive instruction because it states that a judge may instruct a jury that stipulated facts may be considered proved by the government, consequently relieving the government's burden of proof on that stipulated fact. *Id.* This means that the government is not required to offer any additional proof other than the stipulated fact itself. *Id.* Thus, although a fact stipulation may have the effect of providing proof beyond a reasonable doubt in virtue of the existence of the stipulated facts that compose an element, the jury is still ultimately determines whether the element itself is proved beyond a reasonable doubt. *Id.* (citing United States v. Muse, 83 F.3d 672, 679–80 (4th Cir. 1996)). In this case, it just so happens that the stipulated fact is an elemental fact in that the stipulated fact is that the defendant had a prior felony conviction. *Id.* at 673. Thus, arguably, from this point of view, it is not inconsistent when the concurring opinion then goes on to say that it is not an error to state that "this element of the offense has been *proven*" because the government's burden of proof has been relieved as to the prior felony conviction element. In comparing this instruction with United States v. Mentz, 840 F.2d 15, (6th Cir. 1988), the difference is that the burden of proof is relieved in *Jones* because the stipulation is a stipulation of fact, whereas the burden of proof in *Mentz* was not relieved because it was uncontested evidence that the trial judge used to support a jury instruction that the element was proven. *Jones*, 109 F.3d, at 674–75. Ultimately in *Jones*, then, although a stipulation relieves the government of its obligation to produce additional evidence to establish the stipulated facts beyond a reasonable doubt, and may have the effect of providing proof beyond a reasonable doubt, the jury itself will consider the stipulation of fact and determine whether the government proved the each element of the offense beyond a reasonable doubt. It is unclear as to whether this alternative reading is correct because the concurring opinion seems difficult to apprehend the exact meaning of the opinion being offered. However, arguably either of these views are defensible in light of the language of the opinion.

[135] *See also* United States v. Vaughn, 12 F. App'x 188, 191–92 (6th Cir. 2000) (comparing present facts and jury instructions to those in *Jones* and holding no plain error where district court judge stated during voir dire that "the government need not offer proof on these two elements, and you should consider them proven by the government[,] and at close of the trial that 'you may consider two of the elements proven by the government'").

[136] *See supra* Part II. Although the Tenth and Fourth Circuits are frequently cited for their opinions on stipulations of fact, neither circuit has adopted federal criminal pattern jury instructions. In contrast, the Sixth Circuit adopted an instruction on stipulations of fact in August 2016. *See* SIXTH CIR. COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS § 7.21 (2017) [hereinafter SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS].

in criminal cases of a trial by impartial jury.[137] Given that stipulations of facts in federal criminal trials are voluntary, affirmative, and binding agreements between the government and the defendant that a certain fact is true,[138] arguably a mandatory instruction on stipulations of fact is not only most appropriate but is also constitutional.

A mandatory instruction is constitutional because the underlying premise behind the Fifth and Sixth Amendments is to protect the defendant in a criminal trial from oppression by the government through "corrupt or overzealous prosecutor[s]" or the "complaint, biased, or eccentric judge."[139] If a defendant and the government enter into an agreement over a specific fact in the case, not only is the fact undisputed, but the truth of the proposition has been voluntarily and affirmatively made by both litigating parties.[140] In some instances, the defendant expressly requests a mandatory instruction on the stipulations of fact.[141] Because the purposes of the Fifth and Sixth Amendments are to protect the defendant from an "oppressive government,"[142] it is difficult to perceive how a mandatory instruction on a stipulation of fact, voluntarily, knowingly, and affirmatively entered into by the defendant with the government, constitutes a violation of the defendant's constitutional guarantees. Given these constitutional considerations, not only is there arguably no constitutional violation in providing a mandatory instruction, but a mandatory instruction also preserves the binding nature of the stipulations of fact and the reasons litigating parties stipulate certain facts.[143] As such, a mandatory instruction is the best approach to instructing juries to stipulated facts.

---

[137] *See supra* Part II.

[138] *See supra* Part I.

[139] *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[140] There is arguably a fundamental difference in affirmatively stipulating to facts and the failure to contest an element of the offense. In instances involving a "defendant's tactical decision not to contest an essential element of the offense," the government is not relieved of its burden of proof to prove every element of the offense charged. Estelle v. McGuire, 502 U.S. 62, 69–70 (1991). In *Old Chief v. United States*, Justice O'Connor stated that when a defendant pleads "not guilty" to an offense, the prosecution still has the burden of proving every element beyond a reasonable doubt and that a defendant's decision not to contest an element of the offense does not remove the prosecution's burden on that element. 519 U.S. 172, 199–200 (1997) (O'Connor, J., dissenting). Further, she noted that, following these principles, "a defendant's stipulation to an element of an offense does not remove that element from the jury's consideration." *Id.* at 200. But, as demonstrated above, the constitutional considerations underlying *Estelle v. McGuire* and other Supreme Court precedents is to safeguard the defendant against an oppressive government. In instances where a defendant stipulates to facts (or even an element), the defendant is not simply failing to contest (omitting to act) but, rather, the defendant is affirmatively agreeing that a stipulated fact is true. Arguably, this affirmative act of stipulating to the truth of propositions is fundamentally different than omitting to act at all. *See also* Risinger, *supra* note 20, at 451–53 (discussing Justice O'Connor's dissenting opinion in *Old Chief* and discussing the appropriateness of a permissive versus mandatory jury instruction on stipulations of fact).

[141] *See, e.g.*, *Old Chief*, 519 U.S. at 174–77 (explaining procedural posture of how the defendant requested that the Court instruct the jury that he had previously been convicted of a crime punishable by imprisonment exceeding one year).

[142] *See Duncan*, 391 U.S. at 155.

[143] *See supra* Part I.

Specifically, the Sixth Circuit's recently adopted mandatory instruction, read in conjunction with the Use Note,[144] is the best approach to instructing juries on the legal effect of stipulations of fact. The Sixth Circuit's criminal jury instruction on stipulations of fact reads: "The government and the defendant have agreed, or stipulated, to certain facts. Therefore, you *must* accept the following stipulated facts as proved: [*insert facts stipulated*]."[145] The Use Note to the Sixth Circuit's stipulations instruction reads: "When the stipulated facts establish an element of the crime, the best practice is for the stipulation to be in writing and signed by the defendant and counsel."[146]

The Sixth Circuit's jury instruction on stipulations is currently the best approach on instructing juries as to the binding nature of stipulations of fact because it is a mandatory instruction in that it dictates that a jury *must* accept a stipulated fact as proved. This mandatory instruction expresses how stipulations are binding on the parties, court, and on appeal, while also allowing parties to dispose of necessary but undisputed facts, which, in turn, saves judicial resources, public money, and time.[147] The Sixth Circuit's Use Note addresses the possible constitutional issues arising when stipulations of fact comprise an element of the crime by suggesting that the "best practice" is to have a "stipulation [of fact] . . . in writing and signed by [both] the defendant and counsel."[148]

Because stipulations are agreements as to the truth of proposed facts for purposes of trial, additional language inserted into the Sixth Circuit's criminal pattern jury instruction indicating that the facts are true would reinforce the binding nature of stipulations. It is the truth of stipulated facts that arguably necessitates a mandatory instruction.[149] An instruction including the suggested language would state something like: "The government and defendant have stipulated that [fact] is true. Therefore, you must accept [stipulated fact] as proved."[150]

---

[144] Use Notes typically follow jury instructions and briefly explain issues relating to the instructions. *See, e.g.*, SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 136, Introduction ("Use Notes following the instructions briefly explain when bracketed language should be used and other issues relating to the instructions.").

[145] *Id.* § 7.21 (first emphasis added).

[146] *Id.*

[147] *See supra* notes 25–29 and accompanying text.

[148] SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 136, § 7.21.

[149] Some may disagree and argue that this is simply "splitting hairs," but precise language and the import of that language is important from a linguistic standpoint because sometimes words have two meanings. For example, if instead a fact were viewed as undisputed or uncontested, that would connote that there was no disagreement about the fact but would not necessarily indicate that the fact was true. To avoid any confusion and to properly convey the binding nature of stipulations of fact, it is arguably necessary to include that the fact is considered true for purposes of the trial.

[150] *See* SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 136, § 7.21.

As a comparison, the First Circuit's jury instruction on evidence and inferences is a mandatory instruction that includes a statement indicating the truth value of the stipulated fact. Specifically, the First Circuit's criminal pattern jury instruction states:

> The evidence from which you are to decide what the facts are consists of . . . any facts to which the lawyers have agreed or stipulated. A stipulation means simply that the government and defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact to be given whatever weight you choose.[151]

The strength of the First Circuit's jury instruction is the imported language indicating that the litigating parties accept as true a particular proposition or fact. The weakness is that the instruction goes on to state that the stipulation of fact is "to be given whatever weight you choose," arguably undermining the binding nature of a stipulation of fact. Additionally, the First Circuit includes no Use Notes or committee commentary[152] for guidance. Thus, because the Sixth Circuit adopts a mandatory instruction and provides Use Notes to protect a defendant's constitutional rights, their jury instruction is superior. Furthermore, importing language establishing the truth of the stipulations of fact would further strengthen the Sixth Circuit's instruction.

Additionally, the Sixth Circuit jury instruction would arguably be strengthened by including, in the committee commentary, Sixth Circuit precedent explicitly addressing constitutional guarantees with respect to instances wherein a defendant stipulates to facts comprising the elements of the offense. For example, the Eighth Circuit's mandatory instruction on stipulations of fact incorporates references to and excerpts from case law that thoroughly explicate the constitutional issues surrounding stipulations of fact.[153] Specifically, the Eight Circuit committee commentary on stipulations indicates that "[w]hen facts which tend to establish guilt are submitted on stipulation, the court must determine whether the consequences of the admissions are understood by the defendant and whether he consented to them"[154] and that "when a stipulation is entered that leaves no fact to be tried, the court should

---

[151] PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 3.04 (2017) [hereinafter FIRST CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS].

[152] Committee Commentaries typically "cite the authority for the instruction and explain the Committee's rationale." SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 136, Introduction.

[153] The Eight Circuit's instruction on stipulations of fact states: "The [government] [prosecution] and the defendant[s] have stipulated—that is, they have agreed—that certain facts are as counsel have just stated. You must therefore treat those facts as having been proved." JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIR., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 2.03 (2014) [hereinafter EIGHTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS]. Unlike the Sixth Circuit, the Eighth Circuit instruction does not include a Use Note explaining and advising the judge on issues relating to stipulations of fact.

[154] *Id.* (citing Cox v. Hutto, 589 F.2d 394, 396 (8th Cir. 1979)).

determine that the stipulation was voluntarily and intelligently entered into, and that the defendant knew and understood the consequences of the stipulation."[155] Thus, by including references and explicit excerpts of Eight Circuit case law, the committee commentary provides explicit assurance that district courts will knowingly safeguard defendants' constitutional rights.

One example of Sixth Circuit precedent that could be inserted in the Sixth Circuit's Criminal Pattern Jury Instructions is *Witherspoon v. United States*.[156] As explained in Part II above, in *Witherspoon*, the Sixth Circuit suggested to district courts that "they consider the possible applicability of the terms of Rule 11 in any instance where a stipulation as to most or all of the factual elements necessary to proof of guilt of a crime is tendered."[157] Further, the Sixth Circuit noted that incorporating applicable Rule 11 procedures would ensure that a defendant understands the legal effect of stipulations of fact—that a stipulation of fact comprising elements of the offense constitutes a waiver of the defendant's Sixth Amendment right to a trial by jury on those elements.[158] Incorporating *Witherspoon* into the committee commentary would strengthen the Sixth Circuit's jury instruction on stipulations of fact because it would explicate the reason for the Use Note's suggestion that the best practice for stipulations of fact is that they be in writing and signed by the defendant and counsel—protecting a defendant's constitutional rights.

CONCLUSION

Stipulations of fact are frequently utilized in federal criminal cases and range from undisputed, immaterial facts that are easily proven to elements of the offense. In spite of their routine use, there is no Supreme Court guidance or consensus among the circuit courts of appeals as to how to accurately and effectively instruct juries on the legal effect of stipulations of fact voluntarily and knowingly entered into by a defendant and the government during a trial proceeding. Interpretations of the requirements of the Fifth and Sixth Amendments are the driving force behind variations in instructions, resulting primarily in three different possibilities on how to instruct juries. The Tenth Circuit case law adopts the view that a stipulation of fact comprising an element of the offense amounts to a waiver of trial by jury on the stipulated element.[159] The Fourth Circuit adopts the position that the Fifth and Sixth Amendments require the government to prove beyond a reasonable doubt every element of the offense when a defendant pleads "not guilty," and, therefore, that a permissive instruction is proper to ensure submission of every element of the offense to the jury for its consideration.[160] The Sixth Circuit case law has been vagarious over

---

[155] *Id.* (citing United States v. Stalder, 696 F.2d 59, 62 (8th Cir. 1982)).
[156] Witherspoon v. United States, 633 F.2d 1247 (6th Cir. 1980).
[157] *Id.* at 1252.
[158] *Id.* at 1251–52.
[159] *See* discussion *supra* Section II.A.
[160] *See* discussion *supra* Section II.B.

the years, but the case law and Sixth Circuit Criminal Pattern Jury Instructions indicate that the prevailing view is that a mandatory instruction is proper.[161]

When a defendant voluntarily, knowingly, and affirmatively enters into an agreement with the government as to the truth of a proposition or fact, a mandatory instruction on that stipulated fact is proper to ensure preservation of the binding nature of the stipulation. Additionally, as explicated and argued above, when a defendant voluntarily and knowingly enters into a stipulation of fact, there is no violation of the defendant's Fifth and Sixth Amendment rights because the voluntariness and knowledge of the defendant guards against oppression by the government through "corrupt or overzealous prosecutor[s]" or the "complaint, biased, or eccentric judge."[162]

Thus, the Sixth Circuit's jury instruction on stipulations of fact is an effective option for providing clarity to other circuits because it is mandatory, ensuring that the binding nature of stipulations is maintained, and because the Use Note provides guidance and guarantees that safeguard a defendant's constitutional rights.[163] Furthermore, the suggestions discussed in Part III would arguably strengthen the Sixth Circuit's jury instructions by explicitly indicating that the facts agreed to are true for purposes of the trial and by elucidating constitutional concerns through inclusion of Sixth Circuit precedent directly addressing cases involving stipulations of fact comprising most or all elements of the offense.

---

[161] *See* discussion *supra* Section II.C.

[162] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[163] SIXTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS, *supra* note 136, § 7.21.