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# “Stipulate? We Don't Need No Stinking Stipulation!”: Can the Prosecution be Forced to Stipulate to Facts That It Would Rather Prove?

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# Case at a Glance

Most people hate doing unnecessary work, particularly prosecutors who bear the heavy burden of proving every element of a charged crime beyond a reasonable doubt. If a defendant offered to concede an element, i.e., stipulate to its existence, one would think the prosecutor would quickly (if not graciously) accept. The defendant in this case wanted to do just that but the United States resisted. Now the Supreme Court decides if a defendant can force a prosecutor to accept a stipulation regarding an element of the crime charged.

## “Stipulate? We Don’t Need No Stinking Stipulation!”: Can the Prosecution Be Forced to Stipulate to Facts That It Would Rather Prove?

by Daniel D. Blinka

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Modern criminal law assigns liability based on what the defendant did, not who he or she is or what he or she represents. Thus, the elements of most crimes eschew any mention of the defendant’s status, focusing with surgical detail on the nature of the defendant’s acts and his or her accompanying state of mind.

The law of evidence is in accord. In theory, the prosecution cannot introduce evidence of the defendant’s “bad” character to show that the defendant committed the crime in question.

A narrow band of crimes is different. In some instances, Congress has made the defendant’s status as a convicted felon an element of the crime. In these cases, the nature of the crime requires the prosecution to prove that the defendant is a felon, although the evidence that establishes the defendant’s prior criminal status cannot be used, again in theory, to show that the defendant committed the crime now being charged.

Juries are, of course, tempted to draw the forbidden inference from bad character to other criminal conduct, including the crime charged,

regardless of what the trial judge says to the contrary. To minimize the damage, some defendants offer to stipulate to their status as felons in order to preclude prosecutors from spilling the unsavory details of their past misdeeds before the jury.

Defendants hope, perhaps naively, that jurors will not infer the worst. Prosecutors, however, often spurn the favor because proving the defendant’s felony status is usually a “no brainer” and has the added benefit of exposing the jury to details of the defendant’s criminal past, thus inevitably coloring its attitude toward the defendant.

### ISSUE

The question before the Supreme Court in this case involves both the way we define crimes and the rules governing the evidence that juries hear about those crimes. In cases in which the defendant is charged under federal law with being a felon in possession of a firearm (“felon in possession”) and the defendant

*JOHNNY LYNN OLD CHIEF V.  
UNITED STATES  
DOCKET NO. 95-6556*

ARGUMENT DATE:  
OCTOBER 16, 1996  
FROM: THE NINTH CIRCUIT

offers to stipulate to his status as a felon, should the trial court require the Government to accept the stipulation, thereby precluding the Government from offering any evidence concerning the factual nature of the prior felony conviction?

## FACTS

The charges against petitioner Johnny Lynn Old Chief arose from an evening of drinking on the Blackfeet Indian Reservation in Browning, Montana. In the course of the evening, Old Chief got into a fistfight with Anthony Calf Looking outside a liquor store. During the fracas, a handgun was fired. One witness, Ms. Everybody Talks About, identified Old Chief as the shooter. Police later found the gun in a pick-up truck in which Old Chief had been riding. In Old Chief's pockets, police found bullets and a spent shell casing that matched the caliber of the gun.

Federal prosecutors filed three charges against Old Chief. Count I charged that Old Chief was a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (1994). Old Chief's status as felon, i.e., having been convicted of a crime carrying a punishment of more than one year imprisonment, was tied to a 1989 conviction for assault resulting in serious bodily injury.

Count II alleged that Old Chief used or carried the firearm during, or in relation to, a crime of violence — the fight with Calf Looking — in violation of 18 U.S.C. § 924(c). Count III charged assault with a deadly weapon, again involving the fight with Calf Looking, in violation of 18 U.S.C. §§ 1153 and 113(c).

Old Chief filed a pretrial motion in which he offered to stipulate that he had been convicted of a felony, an essential element of the felon-in-possession charge, and proposed

that the jury be instructed that he "has been convicted of a crime punishable by imprisonment for a term exceeding one year." In support of the motion, Old Chief argued that he would be unfairly prejudiced on the assault charges (Counts II and III) if the jury learned that he had been previously convicted of assault resulting in serious bodily injury — the basis for the felon-in-possession charge alleged in Count I. In short, Old Chief argued that only his status as a felon was at issue, not the nature of the underlying felony conviction, and that his willingness to concede his status should end the matter.

The Government opposed the motion, arguing that it had a right to prove its case. Conceding that unfair prejudice could arise if the Government piled on the prior convictions, the prosecutor pointed out that Old Chief had other serious prior convictions, including one for robbery, that were not alleged in the indictment and would not be raised before the jury.

The trial judge sided with the Government. He ruled that if the prosecutor "doesn't want to stipulate, he doesn't have to."

The case proceeded to trial before a jury. Over objection by Old Chief's counsel, the prosecutor introduced into the record a certified copy of the 1989 criminal judgment against Old Chief, which stated that Old Chief had knowingly and unlawfully assaulted the victim who sustained serious bodily injury. The judgment also reflected Old Chief's 60-month sentence for the 1989 crime.

The prosecutor referred to the 1989 conviction during both the opening statement and closing arguments. The judge also addressed the prior conviction in jury instructions, explaining that Old Chief could be found guilty of the felon-in-posses-

sion count only if he had been convicted previously of an offense punishable by more than one year in prison and that the 1989 assault conviction was such an offense. Finally, the jury was given the certified copy of the 1989 judgment to examine during its deliberations.

The jury convicted Old Chief on all three counts. Old Chief appealed to the Ninth Circuit which, in an unpublished opinion, vacated Old Chief's sentence (on other grounds) but rejected his argument that given his offer to stipulate, the admission of the 1989 conviction contravened Rule 403 of the Federal Rules of Evidence ("Rule 403"). (Rule 403 provides that "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." to the party seeking exclusion.)

The Ninth Circuit ruled that regardless of Old Chief's offer to stipulate, the Government was "entitled to prove a prior felony offense through introduction of probative evidence." Thus, the Ninth Circuit concluded that the trial judge had not abused his discretion in refusing to require that the Government accept Old Chief's offer to stipulate to his status as a felon. It is this decision that the Supreme Court reviews, having granted Old Chief's petition for a writ of certiorari. 116 S. Ct. 907 (1996).

## CASE ANALYSIS

There are two different but closely related issues in this case. The first issue involves how a crime is defined and the second relates to how it can be proved.

Old Chief argues that the plain language of Section 922(g)(1), the felon-in-possession criminal statute, requires proof only that

*(Continued on Page 3)*

the defendant who possessed the firearm had been convicted of a crime punishable by imprisonment exceeding one year. Thus, Old Chief insists the nature and description of the prior felony are not essential elements of the felon-in-possession crime; nor does the prior felony element require any consideration of the defendant's conduct that merited the earlier felony conviction. In short, Old Chief argues that Congress did not intend that the jury learn anything more than the bare fact of a prior conviction and that it was punishable by more than one year of imprisonment.

The Government responds by pointing out that Section 922(g)(1) does not apply to all prior convictions. Specifically, Congress excluded various business crimes and some state law misdemeanors punishable by less than two years in prison. Thus, the Government maintains that it must be allowed to prove the nature of the earlier conviction to establish that it is not among the excluded list of crimes. In the Government's view, both the structure and legislative history of the felon-in-possession statute reflect congressional intent that specific evidence of the prior felony conviction is ordinarily admissible.

The second issue brings to the fore the nature of the adversary system and the Federal Rules of Evidence that govern how the parties in federal court are permitted to prove their respective cases. Although the Rules of Evidence mostly preclude the Government from proving the defendant's bad character, Old Chief acknowledges that the defendant's status as a convicted felon is an essential element of the felon-in-possession crime. It is altogether unavoidable, then, that the jury will learn, at the very least, about the defendant's past felony conviction; but, argues Old Chief, the prosecu-

tion goes too far by proving details about the nature of the prior felony or the conduct that gave rise to the earlier conviction.

Rule 403 gives federal district judges the authority to exclude even relevant evidence if its probative value is substantially outweighed by other considerations, such as unfair prejudice. And the unfair prejudice is amplified in cases such as this one because the felon-in-possession charge is joined with other charges that closely resemble the prior felony conviction. In other words, the unfair prejudice is dangerously higher when the defendant faces trial for the same kind of violent conduct that gave rise to the prior felony conviction. In such circumstances, the jury could be irresistibly tempted to draw the forbidden inference of bad character and propensity to commit crimes.

For these reasons, Old Chief contends that a defendant's offer to stipulate to his status as a felon must be accepted. The judge should instruct the jury that "the defendant has been convicted of a crime punishable by imprisonment for a term exceeding one year, thus satisfying the prior felony conviction element of Section 922(g)(1)."

The stipulation obviates the need for any additional proof on this element. If the prosecution wants to inject evidence of the defendant's criminal past, it must comply with the exceptions to the rules of evidence that generally ban evidence of bad character.

Old Chief maintains that the trial judge abused his discretion by spurning Old Chief's offer to stipulate and allowing the prosecutor to dredge up superfluous details about the earlier conviction for assault causing bodily injury.

The Government responds by arguing that it must come forward with some details about the prior felony conviction in order to show that it qualifies under the nonexhaustive list of predicate felonies. See 18 U.S.C. § 921(a)(20). An offer to stipulate in no way affects the relevancy of such evidence.

The Government also argues that Rule 403 does not bar such evidence despite the defendant's offer to stipulate. According to the Government, Congress definitively struck the Rule 403 balance on the side of admitting evidence of the facts surrounding a prior felony conviction. Moreover, Congress intended that ordinarily the jury would be apprised of the details of the prior felony.

The Government contends that its reading of Congress' intent also comports with the traditional presumption that a prosecutor does not have to accept a defendant's stipulation to an element of an offense when it might deprive the prosecutor of the moral force of the evidence. Put another way, a prosecutor can elect to accept or reject the defendant's stipulation depending on a tactical assessment of what works best. In the Government's view, forcing a prosecutor to accept the defendant's stipulation invites the "defendant to stipulate away all but the most hotly contested aspect of the charged offense" and reduces "the jury's role to resolving abstract, isolated factual questions."

In this case, argues the Government, the judge did not abuse his discretion in allowing the prosecutor to spurn the proffered stipulation. Old Chief's proposed stipulation fell short of a concession that the element was established. Not only did the prosecution have to offer some evidence on this element, but its proof was noninflammatory and avoided details about the prior felony assault conviction.

## SIGNIFICANCE

Old Chief's appeal raises issues that are somewhat technical yet have far-reaching repercussions for the adversary system. The more mundane issue involves the precise definition of the offense proscribed by the felon-in-possession statute. Is the prosecutor restricted to the naked fact that the offense was punishable by imprisonment in excess of one year? Or may the prosecutor prove the factual nature of the prior felony, perhaps with some background detail as well?

The federal circuit courts of appeals are split over this issue, so the Supreme Court's guidance will alleviate the reigning confusion. Compare *United States v. Tavares*, 21 F.3d 1 (1st Cir. 1994) (nature of prior felony irrelevant to a Section 922(g)(1) offense); *United States v. Gilliam*, 994 F.2d 97 (2d Cir. 1993) (same); *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976) (same); *United States v. Milton*, 52 F.3d 78 (7th Cir. 1995) (same); *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995) (same); and *United States v. Jones*, 67 F.3d 320 (D.C. Cir. 1995) (same) with *Old Chief v. United States*, 56 F.3d 75 (9th Cir. 1995) (unpublished opinion, judgment noted in table) (the Government has the right to introduce evidence concerning the facts surrounding the prior felony conviction supporting the felon-in-possession charge).

Lurking just below the surface are issues of much greater moment. Section 922(g)(1) showcases the defendant's status as a convicted felon as a matter of fact for the jury to consider. By making this status an element of a Section 922(g)(1) crime, Congress compels prosecutors to introduce some evidence that the defendant is a criminal despite mountains of precedent that normally forbids proof of the defen-

nant's bad character, unless the defendant first opens the door to the issue or the prosecutor can demonstrate admissibility under other rules, neither of which was applicable in this case.

Defense lawyers view such prior-offense elements as little more than a subterfuge for putting evidence of a defendant's criminal character before juries which are often less than sympathetic to people with criminal backgrounds. Indeed, Old Chief points out that a prosecutor's manual strongly recommends using criminal background information "in the manner most advantageous to the Government." And where the predicate felony closely resembles some of the underlying offenses, as the assault counts mirrored Old Chief's 1989 conviction, the jury will be sorely tempted to use the earlier crime as proof of the defendant's criminal propensity.

Prosecutors counter that narrowly drawn stipulations can gut their cases, leaving only abstract issues that resonate little with juries. Deprived of the whole story, juries might be more prone to nullify; that is, juries might acquit despite overwhelming evidence of guilt.

This concern could be a particularly pressing problem in cases involving firearms because some jurors might well question the fundamental validity of prosecuting people for possessing a firearm. The less the jury knows about the defendant's background or why it was illegal for the defendant to possess a firearm, the more likely it may be that the jury will strain to find a reason to acquit. The danger is exacerbated when the defendant's offer to stipulate falls short of an unequivocal concession that proves the prior felony-conviction element.

Finally, the adversary system traditionally allows the parties great latitude to try their cases as they see fit. Trial lawyers are justifiably wary of proffered stipulations because they are most often motivated by a desire to soften the blow of overwhelming, negative evidence.

In criminal cases, prosecutors must convince jurors beyond a reasonable doubt that the crime occurred, a subjective test defying precise calibration but demanding an extraordinarily compelling display of evidence. This stringent burden of proof leaves prosecutors unwilling to surrender any opportunity to show their strength (not to mention picking up the collateral, if illicit, advantage of bad character evidence). In short, forcing trial lawyers to accept stipulations runs counter to a fundamental feature of the adversary system — allowing the parties advance their most compelling case.

## ATTORNEYS OF THE PARTIES

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## AMICUS BRIEFS

**In support of Johnny Lynn Old Chief**

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