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I. INTRODUCTION

Since its enactment by Congress in 1975, Rule 403 of the Federal Rules of Evidence has been one of the most important discretionary tools a trial judge has when ruling on evidentiary issues. It is a trial judges' rule: trial judges make frequent 403 rulings, and are rarely reversed on appeal. In 1997, the Supreme Court, in United States v. Old Chief, reminded trial judges that there are limits to their exercise of discretion when deciding on the admissibility of evidence under Rule 403. Additionally, the Court attempted to provide an analytical framework for federal courts to follow when applying this rule.

This Note discusses and analyzes the Old Chief decision and its implications for the future use of Rule 403. Part II of this Note sets forth the facts and procedural background of the Old Chief opinion. Part III briefly summarizes the split in how the circuit courts of appeal, prior to Old Chief, had applied Rule 403 to determine the admissibility of prior felony convictions in the context of present felon-in-possession charges. Part IV then presents and analyzes the Supreme Court’s majority and dissenting opinions in Old Chief. Part V next discusses Old Chief’s significance at some length; in addition to assessing the Rule 403 balancing framework the majority proposes, this part also considers the issues of fairness and accountability that are inherent in such balancing and, indeed, underlie the opinion.

The Note turns in Part VI to Old Chief’s legacy, starting with a brief summary of how the federal courts are applying Old Chief, and concluding with an analysis of New Mexico courts’ approach to Rule 403 balancing in the context of New Mexico’s felon-in-possession statute.

II. FACTUAL AND PROCEDURAL BACKGROUND TO OLD CHIEF

The events leading to Johnny Lynn Old Chief’s (Old Chief) arrest occurred on October 23, 1993, on the Blackfoot Indian Reservation in Browning, Montana. As the prosecution stated in its closing argument, the events occurred in a context
where “[e]verybody seemed to be drinking, and drinking heavily.”

Old Chief and two witnesses, Stacey Everybody Talks About (Everybody Talks About) and Stephanie Spotted Eagle (Spotted Eagle), parked a pickup in front of Ick’s Bar after an afternoon of drinking beer and driving around the reservation.

A short time later, witnesses Anthony Calf Looking (Calf Looking) and Louis Reevis (Reevis), who had also been drinking heavily all afternoon, pulled up to the bar. Calf Looking initiated a fight with Old Chief, and knocked him to the ground. Calf Looking started running away and heard a gunshot in his direction; however, Calf Looking did not see Old Chief fire a gun and no one was injured in the fight.

Old Chief and the two women drove to an abandoned Exxon station nearby where they met two other men, both of whom had also been drinking. At least one shot was fired into the air at the gas station. Police officers arrived and arrested Old Chief. The officers found a nine-millimeter pistol in the truck, several rounds of nine-millimeter ammunition, and a spent nine-millimeter casing in Old Chief’s pocket.

Old Chief was indicted for using or carrying a firearm during commission of a violent crime, assault with a dangerous weapon, and felon in possession of a firearm. The felon-in-possession statute, 18 U.S.C. § 922(g)(1), makes it a crime for almost any convicted felon to be in possession of a firearm. Old Chief had a
prior felony conviction for assault,\(^{22}\) and thus met the statutory definition of felon in possession under Section 922(g)(1).

Old Chief, charged with assault, did not want the jurors to know about his previous conviction for virtually the same crime.\(^{23}\) Old Chief was understandably worried that jurors would improperly use his prior conviction for its propensity inference.\(^{24}\) Therefore, he made a pretrial motion\(^{25}\) under Rule 403 to exclude the name and nature of his previous conviction, arguing that such specific information was unduly prejudicial.\(^{26}\) He offered instead to stipulate to the fact of his convicted felon status, thereby admitting the essential element of the government's felon in possession charge.\(^{27}\) The government refused Old Chief's offer to stipulate, and the trial judge denied Old Chief's motion to exclude and overruled his subsequent objections at trial.\(^{28}\) A jury found Old Chief guilty on all three charges.\(^{29}\)

Old Chief appealed his conviction to the Ninth Circuit,\(^{30}\) claiming that the trial court abused its discretion under Rule 403 when it refused his offer to stipulate as to his felon status.\(^{31}\) The Ninth Circuit affirmed the conviction,\(^{32}\) holding that "the district court did not abuse its discretion by allowing the prosecution to introduce
evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge.\textsuperscript{33}

The United States Supreme Court granted Old Chief's petition for certiorari and reversed the Ninth Circuit.\textsuperscript{34} The Court held that in criminal cases, where the defendant has a prior conviction for a felony, which conviction is an element of the present offense, a district court abuses its discretion under the Federal Rules of Evidence Rule 403 when it refuses a defendant's offer to concede a prior judgment and admits the full record of the prior conviction.\textsuperscript{35} The Court found that such admission risks a verdict which is tainted by "improper considerations,"\textsuperscript{36} especially when the evidence is used solely to prove an element of the present conviction.

III. BACKGROUND: RULE 403 IN THE CIRCUIT COURTS OF APPEAL BEFORE OLD CHIEF

The United States Supreme Court granted Old Chief's petition for certiorari "because the Courts of Appeal have divided sharply in their treatment of defendants' efforts to exclude evidence of the names and natures of prior offenses in cases like this."\textsuperscript{37} Prior to Old Chief, the federal circuit courts were split in their decisions on how to treat a defendant's attempts to exclude specific evidence of their previous felony convictions when faced with a felon-in-possession charge under 18 U.S.C. § 922(g)(1).\textsuperscript{38} In such cases, the government generally had sought to establish the prior conviction element by introducing, as in Old Chief, a copy of a prior judgement of conviction. This conviction record revealed the specific offense for which the defendant previously had been convicted.\textsuperscript{39} Defendants, in turn, sought to exclude the specific offense evidence, including prior conviction records, arguing that simple acknowledgment of felon status satisfied the felon status element of a Section 922(g)(1) charge, and that anything else should be excluded under Rule 403 because it was unnecessary and unfairly prejudicial.\textsuperscript{40} Defendants attempts have included not only pre-trial offers to stipulate as to their felon status, but also requests for trial severance, bifurcation, and special limiting instructions.

The circuit courts of appeal review of trial courts' use of Rule 403 has divided into three main groups.\textsuperscript{41} One group has ruled that the name and nature of a defendant's prior felony conviction should be excluded because such details are

\begin{itemize}
\item \textsuperscript{33} United States v. Old Chief, 121 F.3d at 449.
\item \textsuperscript{34} Id. v. United States, 117 S. Ct. at 645.
\item \textsuperscript{35} Id. at 644-45.
\item \textsuperscript{36} Id. at 647.
\item \textsuperscript{37} Old Chief, 117 S. Ct. at 649.
\item \textsuperscript{38} See id.
\item \textsuperscript{39} See, e.g., United States v. Jacobs, 44 F.3d 1219, 1221 (3d Cir. 1995) (In response to the defendant's pre-trial request to prevent the jury from learning of his prior conviction, the court stated "I am going to permit the admission of the prior...conviction. [T]he government will offer...the state court papers reflecting the judgement in that court and that sentence, and I believe again that is appropriate . . . .").
\item \textsuperscript{40} See id. and supra notes 41, 43.
\item \textsuperscript{41} See Old Chief's Petition for Cert. at 13. See also United States v. Tavares, 21 F.3d 1, 5(1st Cir. 1994) (discussing the circuits' different holdings); Old Chief v. United States, 117 S. Ct. at 649.
\end{itemize}
simply not relevant to the charge of felon-in-possession. This view was held by the First and Fourth Circuits, joined in dictum by the Second.\footnote{42}

In comparison, a group comprised of the Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits has similarly tended to exclude specific details of a defendant's qualifying crime. However, this group's reasoning relied not on a Rule 401 relevancy/irrelevancy analysis but on Rule 403. These courts found such evidence relevant, but unfairly prejudicial under Rule 403,\footnote{43} and thus tended to accept evidentiary alternatives, such as a defendant's stipulation as to his felon status, that kept the jury from knowing exactly what the defendant had previously been convicted of.\footnote{44}

The third group has held that government cannot be compelled to accept a defendant's offer to stipulate to the fact of his prior conviction, and has generally refused defendant's efforts to exclude such evidence.\footnote{45} Although these circuits do not explain their reasoning,\footnote{46} it seems to be based in the general principle that "the criminal accused cannot 'plead out' an element of the charged offense by offering to stipulate to that element."\footnote{47}

The Ninth Circuit has split between allowing and refusing defendant's efforts to exclude name and nature evidence of their prior convictions. In United States v. Barker, the Ninth Circuit used a relevancy approach to exclude the prior name and nature evidence, holding that "[t]he underlying facts of a prior conviction are completely irrelevant under § 922(g)(1); the existence of the conviction itself is not."\footnote{48} However in more recent decisions the Court held that the government is not required to accept a defendant's stipulation to the fact of his prior conviction.\footnote{49}

\footnote{42} See Tavares, 21 F.3d at 1 (holding that the nature of prior felony was irrelevant to instant charge); United States v. Poore, 594 F.2d 39, 41 (4th Cir. 1979) ("In light of his stipulation to the prior felony conviction, the nature of that conviction was not a necessary element of the statutory offense charged."); United States v. Gilliam, 994 F.2d 97, 103 (2d Cir. 1993) ("The underlying facts of the prior conviction, however, are completely irrelevant to § 922(g)(1)").

\footnote{43} See United States v. Wacker, 72 F.3d 1453, 1473 (10th Cir. 1995): [w]here a defendant offers to stipulate as to the existence of a prior felony conviction, the trial judge should permit that stipulation to go to the jury as proof of the status element of section 922(g)(1), or provide an alternate procedure whereby the jury is advised of the fact of the former felony, but not its nature or substance.

See also United States v. Palmer, 37 F.3d.1080, 1084 (5th Cir. 1994); United States v. Dockery, 955 F.2d 50, 54 (D.C. Cir. 1992); United States v. Pirovolos, 844 F.2d 415, 420 (7th Cir. 1988); United States v. O'Shea, 724 F.2d 1514, 1516-17 (11th Cir. 1984).

\footnote{44} See cases cited supra note 43.

\footnote{45} See United States v. Burkhart, 545 F.2d 14 (6th Cir. 1975) ("the government was not required to accept in lieu of proof the defendant's stipulation [to his prior felony conviction]"); see also United States v. Bruton, 647 F.2d 818, 825 (8th Cir. 1981) ("the government is not required to accept a defendant's stipulation to a prior felony conviction in lieu of proof of that element of its case"). The Third Circuit had not yet decided this issue, see United States v. Jacobs, 44 F.3d 1219,1224 (3d Cir. 1995), but seemed to be leaning in the direction of not requiring the Government to accept a defendant's stipulation, see id.

\footnote{46} See supra note 28.

\footnote{47} Edward J. Imwinkelried, The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection, 40 EMORY L. J. 341, 357-58 (1991). A defendant's tactical decision not to contest an element of the crime charged does not alleviate the government's burden of proving that element, see infra note 49.

\footnote{48} United States v. Barker, 1 F.3d. 957, 959 n.3 (9th Cir. 1993) (emphasis added).

\footnote{49} See United States v. Breitkreutz, 8 F.3d 688, 691(9th Cir. 1993; see also United States v. Blackstone, 56 F.3d 1143, 1146 (9th Cir. 1995). In Breitkreutz, the Court further held that a party's proferred stipulation had no place in a Rule 403 balancing inquiry because "[a] stipulation is not proof . . . . [I]t's a partial amendment to
Thus prior to *Old Chief* there was great confusion in the circuits not only on whether or not to include details of a defendant’s prior conviction in a present felon-in-possession charge, but also on the proper method of analysis and which of the Federal Rules of Evidence to use in making such decisions.

IV. THE COURT’S REASONING IN OLD CHIEF ANALYZED

In *Old Chief*, the United States Supreme Court considered the scope of a trial judge’s authority to include evidence under Rule 403 and found abuse of discretion. Justice Souter, joined by Justices Stevens, Kennedy, Ginsburg, and Breyer, authored the five-justice majority opinion. The majority first found that the name and nature of Old Chief’s prior conviction was relevant, under Rule 401, to Old Chief’s present felon-in-possession charge. Turning to the Rule 403 issue, the majority ruled that the trial court did abuse its discretion in rejecting Old Chief’s stipulation. The Court found that the purpose of the name and nature evidence the trial judge allowed the government to introduce in *Old Chief* was “solely to prove the element of prior conviction,” and that “the name or nature of the prior offense raise[ed] the risk of a verdict tainted by improper considerations.” In addition, the majority stated that in cases where proof of convict status is at issue, accepting a defendant’s stipulation to his felon status in lieu of admitting specific name and nature evidence of the prior crime “will [now] be the general rule.”

Justice O’Connor wrote a strong dissent, in which she was joined by the conservative wing of the Court. Justice O’Connor implicitly agreed that the name and nature evidence of a prior conviction is relevant to prove the status element of a felon-in-possession charge. However, she criticized the majority’s characterization of unfair prejudice, and pointedly disagreed with the majority’s “newly minted rule” requiring the government to accept a defendant’s stipulation in cases like *Old Chief*.

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50. *See Breitkreutz*, 8 F.3d at 691.
51. *See id.* at 647.
52. *See id.* at 649.
53. *Id.*
54. *Id.*
55. *See id.* at 656. Having crafted a virtually per se rule, the majority explicitly limits its holding to cases involving proof of felon status. *See id.* at 651 n.7 (“While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status.”).
56. Chief Justice Rehnquist and Justices Scalia and Thomas.
57. Justice O’Connor presumably assumes that the details of the prior conviction are relevant to the present charge by not addressing this point at all. *See Old Chief*, 117 S. Ct. at 656-60 (O’Connor, J., dissenting).
58. *See id.* at 656.
59. *See id.*
A. Relevance of Prior Convictions Under Rule 401

"The principal issue," according to Justice Souter, "is the scope of a trial judge's discretion under Rule 403." First, however, there is the threshold matter of whether the name and nature of Old Chief's prior offense as introduced at trial are even relevant, under Rule 401 of the Federal Rules of Evidence, to his present felon-in-possession charge. Because "[e]vidence which is not relevant is not admissible," a trial judge can exclude matters that are irrelevant to the present charge by using Rule 401. Old Chief's 1989 conviction for assault is relevant to his present charge if it made "the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence."

The majority disposed of the relevancy hurdle in two short paragraphs. It found that because it is not necessary to prove, specifically, assault with injury to satisfy the status element of Section 922(g)(1), Old Chief's prior assault conviction is not itself an ultimate fact. However, the name of Old Chief's prior offense—assault resulting in serious bodily injury—was relevant because it was "a step on one evidentiary route to the ultimate fact, since it served to place Old Chief within a particular sub-class of offenders for whom firearms possession is outlawed by § 922(g)(1)." The record of the previous conviction, as introduced at trial, was relevant because it made "Old Chief's § 922(g)(1) status more probable than it would have been without the evidence."

The majority's efficient treatment of the relevancy issue is significant in two respects. First, in so ruling the Court reaffirms the fact that Rule 401's relevancy standard is very easy to meet. Even slight relevance is sufficient. As the Advisory Committee's note to Rule 401 states, "[t]he standard of probability under the rule is 'more...probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic." Appeals for exclusion of evidence on the grounds of irrelevancy are likely to fail. Second, these two paragraphs overturn the reasoning, if not the result, of a number of the circuit courts of appeal rulings.

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60. Id. at 650.
61. The order offered into evidence by the prosecution stated, in relevant part: And the defendant having been convicted on his plea of guilty of the offense charged ... that on or about the 18th day of December 1988, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury in violation of Title 18 U.S.C. §§ 1153 and 113(f).
62. See supra note 39 and accompanying text.
63. See FED. R. EVID. 401.
64. Id.
65. See Old Chief, 117 S. Ct. at 649.
66. By "sub-class," Justice Souter refers to the fact that not all felonies fulfill the status element of § 922(g)(1). See supra note 21 and accompanying text.
68. Id.
69. Rule 401 of the Federal Rules of Evidence by its wording does not distinguish among types of evidence; that is, whether the evidence is circumstantial or direct, or whether it is directed at preliminary or ultimate facts. Rule 401 also does not allow the trial judge to weigh the evidence's believability.
70. FED. R. EVID. 401 advisory committee's note.
in cases involving Section 922(g)(1) charges. Old Chief sends a message to the federal courts that they must use Rule 403’s balancing analysis when ruling on the admissibility of prior conviction evidence.

B. Rule 403 Balancing Should Consider the “Full Evidentiary Context” and Include Evidentiary Alternatives

Since the name and nature of Old Chief’s prior felony conviction were relevant to his present charge, the Court then considered his argument for exclusion of this information under Rule 403 of the Federal Rules of Evidence. Rule 403 gives a trial judge discretion to exclude otherwise relevant evidence when its “probative value is substantially outweighed by,” among other things, “the danger of unfair prejudice.” The words “substantially outweighed” indicate that Rule 403 favors admissibility. Furthermore, the burden is on the party opposing admission to convince the judge that not only prejudice, but unfair prejudice, “raises the risk of a verdict tainted by improper considerations.”

The problem for a trial judge is how to balance an item of evidence’s probative value against its unfair prejudicial risk. The majority suggested that there are two alternate ways in which a court can approach a Rule 403 issue. The first, which it rejected, is the “island” option. In this approach, an item of evidence is considered in isolation, with “estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded.”

The majority discarded this approach as being inconsistent with the purpose of the Rules of Evidence, which is to ensure fairness in the search for truth and justice. Rule 403 recognizes that evidence relevant to the issues at trial may nevertheless unfairly prejudice a party’s case. However, if the party offering evidence were allowed to do so in a contextual vacuum, without reference to any available evidentiary alternatives, it would be easy to structure the trial to include extremely prejudicial evidence on the basis of relevance: “This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation and the Rules of Evidence are not so odd.”

71. A number of the circuits had previously excluded prior felony name and nature evidence in felon-in-possession charges on the grounds that this information was irrelevant. See supra Part III.
73. See MAUET & WOLFSON, supra note 3, at 84 (“FRE 403 favors admissibility by providing that relevant evidence is inadmissible only if its probative value is substantially outweighed by the countervailing danger of [among other things] creating unfair prejudice.”).
74. Old Chief, 117 S. Ct. at 646.
75. See id. at 651.
76. Id.
77. See id. at 652; see also Fed. R. Evid. 102. (“These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”).
78. Such an alternative could be a defendant’s offer to stipulate to his felon status.
79. Old Chief, 117 S. Ct. at 652.
Instead, the majority endorsed a "full evidentiary context" approach in conducting Rule 403 balancing. As presented in Old Chief, this is a three step process. First, the trial judge must ask if a particular item of evidence raises a danger of unfair prejudice. If it does, the judge must next evaluate "the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well." Lastly, "if an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

The Court emphasized that this last "discount" calculation must be done within the context of "the offering party’s need for evidentiary richness and narrative integrity in presenting a case.

C. Rule 403 Analysis Applied to Old Chief

The Court balanced the issues in Old Chief using its proposed analytical scheme. First, because one of Old Chief’s present charges (for assault) was the same as his 1989 conviction, the Court concluded that introduction of the full record of Old Chief’s prior felony conviction to establish his felon status for the felon-in-possession charge raised the possibility of unfair prejudice. The Court explained that unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." In Old Chief, the danger was that jurors might decide to convict Old Chief based on improperly inferring propensity, believing that his previous bad acts made it more probable that he did the later ones. Propensity is generally an improper basis for conviction, a fact reflected in Federal Rules of Evidence Rule 404(b)’s specific bar against using character to "show action in conformity therewith." Thus, according to the majority, "evidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence."

80. Id. at 651. The majority opinion does not make clear if this “full evidentiary context” 403 analysis is to be applied only to attempts to exclude evidence based on unfair prejudice, or also to the other situations to which Rule 403 can be applied, namely "confusion of the issues, misleading the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.
81. See id.
82. Id. (emphasis added).
83. Id.
84. Louis Jacobs, Evidence Rule 403 after United States v. Old Chief, 20 AM. J. TRIAL ADVOC. 563, 569 (1997) (calling this the ‘‘Wal-Mart’ approach of a value discount.’’).
85. Old Chief, 117 S. Ct. at 651.
86. See id. at 652.
87. Id. at 650.
88. But see FED. R. EVID. 413-415 (allowing propensity evidence in the context of sexual offenses).
89. FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” The circumstantial character evidence may be admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”).
90. Old Chief, 117 S. Ct. at 651.
Next, the Court evaluated the probative and unfairly prejudicial value of Old Chief's record of prior judgement, the evidence the government sought to introduce to prove Old Chief's felon status. The majority's Rule 403 balancing method also demanded that the Court do this evaluation for "actually available [evidentiary] substitute[s]," in this case Old Chief's offer to stipulate to his felon status.

The Court unambiguously found that introducing details of a prior offense, such as those found in a conviction record, is not only prejudicial but unfairly so:

[T]here can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant...[t]hat risk...will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning. Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious.93

Looking at Old Chief's proferred stipulation, the Court found it "alternative, relevant [and] admissible." Moreover, by stipulating to his felon status Old Chief admitted he satisfied the prior-felon element of the 18 U.S.C. § 922(g)(1)'s felon-in-possession charge, and "a defendant's admission is, of course, good evidence."96

In addition, the Court viewed 18 U.S.C. § 922(g)(1)'s wording as broad. The majority interpreted Congress' intent in drafting the statute with such inclusive wording to mean that Congress wanted virtually all convicted felons, regardless of specific crimes, to be barred from possessing and transporting firearms. Since, the Court reasoned, the fact of prior felon status was all that Congress had thought necessary to meet the requirements of a felon-in-possession charge, the name and nature of Old Chief's prior offense "addressed no detail in the definition of the prior conviction element that would not have been covered by the stipulation or admission."99

The Court found Old Chief's stipulation was less prejudicial than the record of his prior conviction. In addition, it found the stipulation as relevant and probative on the element of his felon status. The majority recognized that the government

91. See id. at 653.
92. Id. at 651.
93. Id. at 652 (emphasis added).
94. Id. at 653.
95. See id.
96. See also Fed. R. Evid. 801(d)(2)(A): ("A statement is not hearsay if [t]he statement is offered against a party and is the party's own statement, in either an individual or a representative capacity."). However, the Government pointed out in its Brief for the United States, that [t]his Court has never addressed the issue of whether a defendant's offer to stipulate to an element of an offense may justify precluding the admission of actual evidence to establish that element." Brief for the United States at 21. This remains an open question after Old Chief. Justice O'Connor, joined by Justices Rehnquist, Scalia, and Thomas, sided with the Government in her dissent, stating that the prosecution's burden in a criminal case is required to prove each element of a case beyond a reasonable doubt. Old Chief, 117 S. Ct. at 659 (O'Connor, J., dissenting). Therefore "a defendant's stipulation to an element of an offense does not remove that element from the jury's consideration." Id.
97. See supra note 21.
98. See Old Chief, 117 S. Ct. at 655.
99. Id. at 653.
100. See id. at 655.
101. The alternative must have "substantially the same or greater probative value but a lower danger of unfair
is generally entitled to prove its case by evidence of its own choice, and a criminal
defendant is normally not allowed to admit or stipulate his way out of the full
evidentiary force of the government’s case. Evidence tells a story, and the
“persuasive power of . . . concrete and particular [facts are] often essential to the
capacity of jurors to satisfy the obligations that the law places on them.” If jurors
are given a story with large narrative gaps created by stipulation or admission, they
may well try to fill in that gap with their own speculation, however misdirected or
wrong.

But the majority concludes that the principle that the prosecution is entitled to
prove its case free from defendants’ offers to stipulate to facts does not apply
where “the point at issue is a defendant’s legal status, dependent on some judgment
rendered wholly independently of the concrete events of later criminal behavior
charged against him.” Here, the choice is not between a colorful, descriptive story
and a colorless admission, but between two almost equally abstract statements.
All Congress thought necessary to qualify for being a felon-in-possession was the
simple fact of felon status. The Court concludes:

Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other.

Because Old Chief’s stipulation was equally probative and less prejudicial than the government’s evidentiary choice, the trial judge should have discounted the probative value of the government’s offer and excluded it.

prejudice.” Old Chief, 117 S. Ct. at 651. Of course, this begs the question: probative value relative to what? In Old Chief, the majority and the dissent differ in opinion over statutory interpretation. The majority determined that Congress was not interested in the name and nature of the felony that qualifies felons for the § 922(g)(1) crime. See id. Therefore, according to the majority, the name and nature are not more probative than a defendant’s stipulation. See id. at 653. The dissent in Old Chief argued, however, that this misread Congress’ intent, and that when Congress enacted the statute it “envision[ed] jurors’ learning the name and basic nature of the defendant’s prior offense.” See id. at 656.

This rule was developed in Parr v. United States, 255 F.2d 86 (5th Cir.) cert. denied, 358 U.S. 824 (1958) The Parr court stated:

It is a general rule that a party is not required to accept a judicial admission of his adversary, but may insist on proving the fact. The reason for this rule is to permit a party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.

Id. at 88 (internal quotes and citations omitted). But see United States v. Grassi, 602 F.2d 1192, 1196 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980) (stating that the Parr rule "is not a blanket prohibition against compelling the government to accept a defendant's stipulation").

102. See Old Chief, 117 S. Ct. at 653. This rule was developed in Parr v. United States, 255 F.2d 86 (5th Cir.) cert. denied, 358 U.S. 824 (1958) The Parr court stated:

Id. at 88 (internal quotes and citations omitted). But see United States v. Grassi, 602 F.2d 1192, 1196 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980) (stating that the Parr rule "is not a blanket prohibition against compelling the government to accept a defendant's stipulation").

103. Old Chief, 117 S. Ct. at 653.
104. See id. at 654.
105. Id.
106. Id.
107. See id. at 655.
108. See id.
109. Id. at 655.
D. Justice O'Connor Dissented on Unfair Prejudice and on Forcing Acceptance of a Defendant’s Stipulation

Justice O’Connor’s dissent did not address at all the majority opinion’s central point, the analytical framework for applying Rule 403. Instead, the dissent faulted the majority’s finding of unfair prejudice, and its “retreat from the fundamental principle that in a criminal prosecution the Government may prove its case as it sees fit” by forcing the Government to accept a defendant’s stipulation in Old Chief-like cases.

Justice O’Connor did not agree with the majority’s finding that the Government’s introduction of the name and nature of the defendant’s prior qualifying offense in a current 18 U.S.C. § 922(g)(1) charge is “unfair prejudice” within the meaning of Rule 403. She conceded that such specific name and nature information prejudices the defendant. However, “[v]irtually all evidence is prejudicial or it isn’t material,” and in order to invoke Rule 403 the prejudice must also be unfair. The dissent believed it is not unfairly prejudicial for the Government to use a prior judgement record, which is indisputable proof of the conviction, to establish an essential element of its case. After all, the dissent reasoned, not all felonies qualify under 18 U.S.C. § 922(g)(1), which excludes certain business crimes such as antitrust violations or unfair trade practices. Therefore, Congress envisioned jurors’ learning the name and nature of the qualifying offense—so the information cannot be unduly prejudicial, but merely an element of the crime which the Government is required to prove.

Within the meaning of § 922(g)(1), then, “a crime” is not an abstract or metaphysical concept. Rather, the Government must prove that the defendant committed a particular crime. In short, under § 922(g)(1), a defendant’s prior felony conviction connotes not only that he is a prior felon, but also that he has engaged in specific past criminal conduct.

In addition, the dissent believed the majority never explained precisely why it is “unfairly prejudicial” for the Government to introduce the name and nature of the prior conviction to prove the status element of the offense. “Why, precisely, does

110. See id. at 656.
111. Id. at 658.
112. See id.
113. See id.
114. Id.
115. “In a popular lay sense, “prejudicial” means damaging or harmful. However, that is not the sense in which Rule 403 uses the term “prejudice.” If it were, virtually all evidence would be inadmissible under 403; whenever a proponent offers relevant evidence at trial, its admission will tend to damage or harm the opponent’s case.”
117. See supra note 21.
118. See Old Chief, 117 S. Ct. at 656.
119. See id. at 657.
120. Id.
121. See id.
the Court think that this item of evidence raises the risk of a verdict "tainted by improper considerations"?"

Finally, the dissent criticized the majority's "retreat from the fundamental principle that in a criminal prosecution the Government may prove its case as it sees fit." Justice O'Connor disputed the majority's argument that in this kind of case, a stipulation does not take away from the government's need to present a continuous story with evidentiary depth. The dissent pointed out that jurors are likely to wonder what both parties are trying to conceal by the stipulation, especially given the wide legality of gun ownership in the United States, and hinted that the jurors' own gap-filling may be more prejudicial to the defendant's case than the actual information. Furthermore, forcing the Government to accept a defendant's stipulation impermissibly infringes on its constitutional obligation to prove all elements of the charged crime beyond a reasonable doubt. The Government's burden is not taken away by "a defendant's tactical decision not to contest an essential element of the crime."  

E. The Dissent's Reasoning Critiqued

Justice O'Connor believed that it is not unfairly prejudicial to the defendant for jurors to find out about the name and nature of a defendant's prior felony conviction in a felon-in-possession case. Her dissent, however, is open to critique on at least three points. Justice O'Connor reasoned that Congress did not consider specific name and nature evidence to be unfairly prejudicial because a proper reading of 18 U.S.C. § 922(g)(1) leads to the conclusion that Congress envisioned jurors' learning the name and nature of the qualifying offense. However, Justice O'Connor's statutory argument is open to two interpretations. The felon-in-possession statute is couched in the negative and includes every crime not specifically excluded: the list of excluded crimes is short and consists of trade and business practice violations. Justice Souter specifically pointed out, in the majority opinion, that because the statutory language of 18 U.S.C. § 922(g)(1) is so broad and inclusive, the language shows "no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies." On the basis of 18 U.S.C. § 922(g)(1)'s text, the majority's view of Congress' intent is as plausible, and arguably more so, than the dissent's.

Additionally, the dissent found the name and nature evidence prejudicial, but not unfairly so "[U]nfair prejudice as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial

122. Id. at 658.
123. Id.
124. See id.
125. See id. at 659.
126. See id.
127. Id. (quoting Mathews v. United States, 485 U.S. 58, 64 (1988)).
128. See Old Chief, 117 S. Ct. at 656.
129. 18 U.S.C. § 921(a)(20) defines the type of prior felony that qualifies for § 922(g)(1). See also supra note 21.
130. Old Chief, 117 S. Ct. at 653.
131. See id. at 656.
or it isn’t material.”132 However, this does not address the majority opinion that unfair prejudice includes the danger that a jury will convict based on “improper grounds,” including “generalizing a defendant’s earlier bad act into bad character and taking that as raising the odds that he did the later act now charged.”133 Old Chief’s prior qualifying conviction for the felon-in-possession charge was for assault, and Count I of his current indictment was for assault. The propensity danger is obvious, and it is disingenuous for Justice O’Connor to suggest otherwise: “Or perhaps the Court finds that introducing the order risks a verdict ‘tainted by improper considerations’ simply because the § 922(g)(1) charge was joined with counts charging petitioner with using a firearm . . . and with committing an assault with a dangerous weapon.”134

The dissent suggested any danger of unfair prejudice to the defendant can be solved through the vehicle of limiting instructions.135 The majority’s reluctance to rely on jury instructions, however, adds to the current debate about jury instructions’ effectiveness in actually limiting prejudice.136 In Old Chief, the majority discusses, in a footnote, the instructions actually proposed and used at the district court trial, instructions the Court held defective.137 The majority, notably, does not mention jury instructions at any other point in its opinion, not even when discussing evidentiary alternatives other than a defendant’s stipulation that a court might be required to consider in light of its ruling in Old Chief.138

Finally, the dissent stated that the majority, by forcing the government to accept a defendant’s stipulation in cases like Old Chief “upsets, without explanation, longstanding precedent regarding criminal prosecutions.”139 The dissent seemed to ignore, or rather minimized, the many paragraphs the majority devotes to describing how very important evidentiary richness is, and how facts have persuasive force and character that goes beyond mere logical relevance.140 Furthermore, the dissent did not fairly present the fact that the majority goes to great lengths to describe why, in

132. Id. (quoting Dollar v. Long Mfg., N.C., Inc. 561 F.2d 613, 618 (5th Cir. 1977)).
133. Old Chief, 117 S. Ct. at 650.
134. Id. at 658 (emphasis added). The Government contended in its brief that presenting evidence of Old Chief’s prior felony was minimally prejudicial because its offer was not “inflammatory.” Brief for the United States, at 30-31. This suggests, and Justice O’Connor seems to believe, that evidence can only be unfairly prejudicial if it is inflammatory—whatever that means—or if the crime is a “heinous or infamous crime” likely to provoke an emotional response from the jury. Id. at 31. But as Old Chief makes clear, the appropriate inquiry for unfair prejudice is what is “likely to support a conviction on improper grounds,” which includes but is not limited to a making a decision based on an emotional response. See Old Chief, 117 S. Ct. at 650 (emphasis added). See also FED. R. EVID. 403 advisory committee’s note.
135. “Any incremental harm resulting from proving the name or basic nature of the prior felony can be properly mitigated by limiting jury instructions.” Old Chief, 117 S. Ct. at 658.
136. The paradigmatic case often cited for the Court’s recognition that limiting instructions are not always effective is Bruton v. United States, 88 S. Ct. 1620 (1968). See also Jacobs, supra note 84, at 586 (“[j]oining the debate over the efficacy of jury instructions is as ambitious as it is futile.”).
137. See Old Chief, 117 S. Ct. at 648 n.2 (“Proposals for instructing the jury in this case proved to be perilous. We will not discuss Old Chief’s proposed instructions beyond saying that, even on his own legal theory, revision would have been required to dispel ambiguity . . . . While Old Chief’s proposed instruction was defective even under the law as he viewed it, the instruction actually given was erroneous even on the Government’s view of the law.”).
138. See id. at 653.
139. Id. at 656.
140. See id. at 653-55.
this narrow context, there is no significant difference between Old Chief’s concession and the Government’s proof. In this case, the majority made clear, the choice is between two abstract propositions, and not between a rich, full story and a simple, soul-less description.\textsuperscript{141}

V. SIGNIFICANCE OF OLD CHIEF

The \textit{Old Chief} decision is most obviously significant because it sets concrete limits to trial courts’ exercise of discretion in using Rule 403. The opinion does, however, provide other insights into the function and use of evidence at trial, as in, for example, its mandate to trial courts to include consideration of evidentiary alternatives in their Rule 403 balancing analysis.\textsuperscript{142}

More importantly, however, the Court’s reasoning in \textit{Old Chief} says something about fairness. The Court arguably reached the correct result, the fair result, in this case. Apart from the legal issues as briefed and presented by the opposing parties, the transcripts of the oral arguments presented before the Supreme Court support the Court’s finding that the trial judge abused his discretion when he refused Old Chief’s offer to stipulate.\textsuperscript{143} But the Court could have dealt with this unfairness by simply issuing a per curiam decision reversing the trial court and Ninth Circuit decisions. Instead, the Court issued an opinion that “serves as an important reminder that principles of fairness lie at the heart of the American criminal justice system.”\textsuperscript{144}

A. Old Chief and Evidence Law

The Court used \textit{Old Chief} as a forum to emphasize that decisions on the admissibility of evidence are almost never based on Rule 401, because its standards for relevance are so low that almost anything is technically relevant. In effect, the district courts’ mandate when considering proof of felon status is, to paraphrase the popular board game \textit{MONOPOLY},\textsuperscript{145} “Go directly to Rule 403 balancing, do not stop to consider Rule 401 relevance, do not collect two-hundred dollars.” Federal courts, both trial and appellate, that have avoided the delicate business of Rule 403

\begin{footnotes}
\item[141] See id. at 655. See also infra notes 184-88 and accompanying text.
\item[142] See id. at 651.
\item[143] The transcript of the oral argument hints at bias on the part of the trial judge, as the following excerpt suggests:

\begin{quote}
[Question]: When the Government said . . . we won’t stipulate, did you ever say to the judge . . . all right, we will sign an admission or make an admission in open court . . . that in fact he was convicted and he has this status. Did you ever offer to do that?

[Counsel for Old Chief, reply]: No, but . . . not only did I offer to stipulate [in writing], but I moved in limine to exclude the evidence, and I offered this jury instruction, and the judge’s motion denied the whole motion in limine, so—\textemdash I’ve been dealing with the judge for 15 years. You state your objection, you get overruled, and that’s it, you know . . . (Laughter). [A]nd another thing that happened here is the judge read the jury instructions to the jury before we had a settlement conference, so I didn’t have an opportunity to object or resubmit or have any discussions with the court until after the instructions were read . . . I was kind of boxed in.
\end{quote}

\begin{center}
\end{center}

\item[145] Registered by Hasbro, Inc.
\end{footnotes}
balancing by dismissing the name and nature of the prior felony conviction as irrelevant,\textsuperscript{146} will no longer be able to do so.

More significantly, \textit{Old Chief} sets limits, for the first time, on federal district trial courts’ discretion in using Rule 403 of the Federal Rules of Evidence to exclude or include evidence.\textsuperscript{147} \textit{Old Chief} establishes, as a general rule, that the prosecution will not be able to introduce the name and nature of the qualifying felony conviction in felon-in-possession cases and that doing so is abuse of discretion.\textsuperscript{148} The Court emphasized that its holding is very narrow and “limited to cases involving proof of felon status.”\textsuperscript{149} Nevertheless, the fact that the Court has articulated a clear boundary, where none existed before, is an important change from previous Rule 403 jurisprudence.\textsuperscript{150}

Besides setting limits, \textit{Old Chief} gives some structure\textsuperscript{151} to the task of balancing the probative value of evidence against other factors that could lead a jury to decide a case for the wrong reasons. First, the Court explicitly states that the probative value of evidence “may be calculated by comparing evidentiary alternatives.”\textsuperscript{152} This is not a new idea. The Advisory Committee’s Note to Rule 403, for example, had previously suggested that “the availability of other means of proof may also be an appropriate factor...[i]n reaching a decision on whether to exclude on grounds of unfair prejudice.”\textsuperscript{153} However, \textit{Old Chief} reinforces the Advisory Committee’s note and also gave courts more guidance in Rule 403 decision-making.

Professor Louis Jacobs of the Ohio State University School of Law argues that \textit{Old Chief} provides general standards that trial judges may use when applying Rule 403, and also provides standards for appellate judges when reviewing lower courts’ decisions.\textsuperscript{154} \textit{Old Chief}’s finding of an abuse of discretion “can be mined for four general standards: (1) need, (2) probative value, (3) harm, and (4) mitigation.”\textsuperscript{155} These standards can help guide the trial judge as she attempts to weigh an item of evidence’s “probative value” and “unfair prejudice.” Whereas the majority opinion in \textit{Old Chief} proposes a step-by-step process for balancing, Professor Jacob’s approach is useful in that it groups and labels the values the Court uses when weighing probative value and prejudice under Rule 403.

\begin{footnotes}
\footnotetext[146]{See \textit{supra} note 42.}
\footnotetext[147]{See \textit{Mauet}, \textit{supra} note 3, at 84.}
\footnotetext[148]{\textit{Old Chief}, 117 S. Ct. at 656. Of course, specific evidence of prior crimes or bad acts has always been admissible for other purposes, such as impeachment, see \textit{Fed. R. Evid.} 609 & 608(b), or to prove such things as motive and opportunity, see \textit{Fed. R. Evid.} 404(b).}
\footnotetext[149]{\textit{Old Chief}, 117 S. Ct. at 651 n.7.}
\footnotetext[150]{See \textit{Rule 403—Unfair Prejudice, supra} note 144, at 366 (“Prior to Old Chief, commentators noted that appellate courts have often wrongly interpreted Rule 403 to confer an unreviewable grant of discretion to trial courts.”).}
\footnotetext[151]{The drafters of the Federal Rules of Evidence did not provide much guidance as to the standards a trial judge is supposed to use when applying Rule 403’s balancing test, other than to say that it is designed as "a guide for the handling of situations for which no specific rules have been formulated." \textit{Fed. R. Evid.} 403 advisory committee’s note. Rule 403 can be thought of as a “catch-all” rule to prevent unfairness not already foreseen by other, more concrete relevance rules.}
\footnotetext[152]{\textit{Old Chief}, 117 S. Ct. at 652.}
\footnotetext[153]{\textit{Fed. R. Evid.} 403 advisory committee’s note. See also \textit{Rule 403—Unfair Prejudice, supra} note 144, at 365 ("[P]rior to Old Chief lower courts had at times failed even to conduct the Rule 403 balancing test, much less to compare evidentiary alternatives.").}
\footnotetext[154]{See Jacobs, \textit{supra} note 84, at 568.}
\footnotetext[155]{\textit{Id.}}
\end{footnotes}
According to Professor Jacobs, one factor courts should assess is both sides’ need, whether stated or implied, for the challenged evidence. For example, in Old Chief the Court decided that the name and nature of Old Chief’s prior conviction was both relevant under Rule 401’s liberal admissibility standards, yet possibly excludable under Rule 403. Given the fact that the Court also found that Old Chief’s prior conviction record for assault carried a substantial risk of unfair prejudice, Old Chief arguably “needed” to have it excluded. The Court then looked to the Government’s “need” for introducing the evidence and concluded that, given the particular nature of the felon-in-possession statute, the name and nature “addressed no detail in the definition of the prior conviction element that would not have been covered [by the stipulation].” On the scale of need, the Government’s was less.

However, “[j]udicial sensitivity to the source of the need should help distinguish the truly needy from the evidence-challenged.” A relatively “weak” case by either side—that is, a case in which an item of evidence plays a critical role, rather than simply providing background information—might need an item of evidence more than a “strong” case. If a party has a strong case overall, it might be well advised not to risk using evidence that poses a risk of unfair prejudice:

The need factor could, however, favor admissibility when the proffered evidence plays a critical role, rather than serves as... background information in the proponent’s case or strides through a door opened by the opponent. [T]his should not encourage flimsy charges or claims, or save defenses by questionable evidence. A strong case would not be worth the risk of using questionable evidence. The easiest case to handle is when the need is satisfied by alternative evidence, as in Old Chief.

“Potential harm” is another factor a court can consider when analyzing parties’ claims under Rule 403. In Old Chief, the harm was the threat of unfair prejudice to the defendant. The Government, in contrast, did not argue harm but rather the right to turn down Old Chief’s stipulation and prove its case as it saw fit. This potential harm standard is useful because it can focus the trial court’s attention on what is really at stake. If one side is arguing, as Old Chief was, real harm, a virtually quantifiable potential for jury misuse, and instead the other party’s argument is based on tradition or abstract premise, it can make the balancing endeavor easier for the trial judge by making the issue more concrete.

156. See id. at 573.
158. Old Chief, 117 S. Ct. at 653.
159. Jacobs, supra note 84, at 577.
160. Conversely a strong case is one where, for example, a party has multiple facts supporting a single issue. See, e.g., Jacobs, supra note 84, at nn.68-69 and accompanying text.
161. Id. at 576-77 (internal quotes and citations omitted).
162. Jacobs, supra note 84, at 583.
163. Old Chief, 117 S. Ct. at 650.
164. See id. at 653.
The concept of "mitigation" underlies Old Chief's discussion of how alternative evidence fits into a trial judge's Rule 403 balancing analysis.\(^{167}\) Old Chief tells the trial judge to evaluate probative value and unfair prejudice not just for the "item in question, but for any actually available substitutes as well."\(^{168}\) If harm is subject to mitigation, the trial judge can take such mitigation into consideration in her balancing. Besides a defendant's stipulation, the danger posed by unfair prejudice may be mitigated through a redacted record of the conviction.\(^{169}\) Limiting instructions may also mitigate this danger.\(^{170}\) Other methods that have been used by the circuit courts to mitigate potential harm have been severance,\(^{171}\) bifurcation,\(^{172}\) "or some other ameliorative procedure."\(^{173}\)

Judicial notice is another mitigation option, one never mentioned in Old Chief.\(^{174}\) Judicial notice, provided for by Rule 201 of the Federal Rules of Evidence, is appropriate where a fact is either so well known, or so easily verifiable, that formal proof is unnecessary.\(^{175}\) It is not easy to meet the requirements of judicial notice. The fact must be one "not subject to reasonable dispute" because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."\(^{176}\) A prior conviction, subject to verification by a judgment record, is precisely the kind of accurate and unquestionable fact identified by Rule 201.\(^{177}\) In addition, a trial judge is required to take judicial notice if requested, provided the facts meet the proper requirements.\(^{178}\) A trial judge may also take judicial notice of a fact, independent of a request from either party.\(^{179}\)

One advantage, at least from the defendant's perspective, in asking the court to take judicial notice of a defendant's prior conviction is that a trial judge must
comply with the request. In contrast, under Old Chief, a trial judge can still deny a defendant's request if phrased as a stipulation. Unless a defendant carefully words the stipulation to match the one in Old Chief, the trial judge is still free to reject it. Conversely, if a defendant's qualifying felony was for a non-violent crime, but the present charge is for a violent one, it is possible that the government might want, as a tactical ploy, to exclude the name and nature of the defendant's previous convictions. Under Old Chief's mandate to consider evidentiary alternatives, a defendant, or a trial judge, might choose to preempt any such arguments or speculation through the mechanism of judicial notice.

Finally, Old Chief is valuable in that it provides much-needed definition to the amorphous concept of "probative value." The majority expansively defines this term by the repeated use of phrases such as "evidentiary depth," "a colorful story with descriptive richness," and "the persuasive power of the concrete and particular." The Court formally recognized that probative value speaks to many things besides mere logical relevance and that the function of evidence is to persuade. Furthermore, Old Chief confirms that the cognitive and emotional qualities of evidence are linked: "evidence may legitimately have emotional force, and emotional evidence can be consistent with reasoned deliberation. Evidence that appeals to a juror's emotion differs from an appeal for that juror's vote which is fueled by emotion."

B. Old Chief and Fairness

Old Chief also implicates the line between prosecutorial zeal and prosecutorial misconduct. The Government's stated reason for denying Old Chief's stipulation was ostensibly its right to introduce evidence relevant to its case and a need and right to construct a seamless and persuasive narrative story. However, in Old Chief and cases like it, the prosecution's real motivation may have been an attempt to admit, through a statutory loophole, prior-conviction evidence to prove a defendant's bad character, a purpose clearly impermissible in these circumstances.
by Rule 404(b).\textsuperscript{191} Prior bad acts evidence is generally admissible to impeach a witness' character, or to establish motive or opportunity or other permissible goals, but not usually as circumstantial proof of bad character, or to suggest action in conformity therewith.\textsuperscript{192} The American criminal justice system revolves around the principle that a defendant must be charged with a specific offense, complete with distinguishable elements. To be must be convicted of that offense, a defendant must be found guilty based on the facts of that crime, not a past crime committed by him. The issue is not the government's traditional right "to prove its case by evidence of its own choice"\textsuperscript{193} but rather the government's motivation. If the government's motive is to prove to the jury the element of the offense, then the simple fact of felony conviction should be adequate.\textsuperscript{194}

In a footnote, the Court discussed the possibility that the prosecution's strategy in \textit{Old Chief} rose to the level of misconduct:

\begin{quote}
Petitioner also suggests that we might find a prosecutor's refusal to accept an adequate stipulation and jury instruction in this case to be prosecutorial misconduct. The argument is that, since a prosecutor is charged with the pursuit of just convictions, not victory by any fair means or foul, any ethical prosecutor must agree to stipulate in the situation here.\textsuperscript{195}
\end{quote}

The Court then adds: "But any ethical obligation will depend on the construction of Rule 403, and we have no reason to anticipate related ethical lapses once the meaning is settled."\textsuperscript{196} Prosecutorial misconduct was not an issue before the Court in \textit{Old Chief} and remains unresolved in this case. However, the Court's wording strongly suggests that, in the future, it would be unethical for the prosecution or a trial judge not to comply with a defendant's stipulation in \textit{Old Chief}-like cases.

\section*{VI. THE \textit{OLD CHIEF} LEGACY IN THE CIRCUIT COURTS AND NEW MEXICO}

\subsection*{A. \textit{Old Chief} and the Circuit Courts of Appeal}

Commentators have predicted that evidence law will remain much the same in spite of \textit{Old Chief}. Professor Jacobs opines: "[The majority] took great care to confine [their] discussion to the specific facts in \textit{Old Chief}. Rule 403 after \textit{Old Chief} may well closely resemble Rule 403 before \textit{Old Chief}."\textsuperscript{197} A former United States Attorney believes that "Old Chief is not going to have a lot of [practical] effect except in the felon-in-possession cases."\textsuperscript{198} Most emphatic is Professor Duane of Regent University in Virginia Beach, who states, "Between now and doomsday, no

\textsuperscript{191} See \textit{supra} notes 87 & 88 and accompanying text.
\textsuperscript{192} See discussion \textit{supra} Part IV.C.
\textsuperscript{193} \textit{Old Chief}, 117 S. Ct. at 653.
\textsuperscript{194} \textit{Id.} at 655.
\textsuperscript{195} \textit{Id.} at 651 n.5.
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} Jacobs, \textit{supra} note 84, at 590.
\textsuperscript{198} Phone conversation, Jan. 9, 1998, with Victor Ortega, United States Attorney for the District of New Mexico, 1969-1978.
more than a dozen convicted defendants will win reversal and retrial as a result of this holding."\textsuperscript{199}

These predictions seem to be upheld by the way the United States circuit courts have applied \textit{Old Chief} so far. First, only a handful of defendants outside of the prior felony conviction/felon-in-possession context have brought appeals based on \textit{Old Chief}, and these appeals have been unsuccessful. Even when the case on appeal involves the \textit{Old Chief} scenario of a defendant with a prior felony conviction and a present felon-in-possession charge, appellate review under \textit{Old Chief} has resulted in relatively few reversals and retrials. In all these instances, \textit{Old Chief} has been cited as frequently for what it said about evidentiary richness and narrative integrity as for its exclusionary rule.

Defendants relying on \textit{Old Chief} have not succeeded in obtaining reversal based on abuse of discretion in any case where the facts have departed from the narrow prior felony conviction/felon-in-possession context. For example, in \textit{United States v. Cottman},\textsuperscript{200} the defendant challenged his conviction for making a false statement in violation of 18 U.S.C. \textsection{}1001\textsuperscript{201} on the grounds that the district court abused its discretion under Rule 403 by allowing the government to introduce evidence over Cottman’s offer to stipulate.\textsuperscript{202} At trial, Cottman sought to prevent the Government from introducing “other bad acts”\textsuperscript{203} evidence about other false statements and failure to file claims he had allegedly made.\textsuperscript{204} Cottman offered to stipulate to all the elements of the charged offense other than materiality.\textsuperscript{205} The district court refused to require the government to accept his stipulation, and the Second Circuit upheld Cottman’s conviction.\textsuperscript{206} Citing \textit{Old Chief}, the Second Circuit found the government is entitled to present a full evidentiary picture, which is very important in a case involving technical financial disclosure laws.

\textit{[O]ffenses that might lack weight or significance when considered by lay jurors, unless the government was afforded an opportunity to provide appropriate background... The effect of Cottman’s ...motion, if granted would have been to drain the trial of all evidence of human events, and to force the government to}

\textsuperscript{199} Duane, supra note 174, at 4.
\textsuperscript{201} 18 U.S.C. \textsection{}1001 (1994) provides:

\begin{quote}
Whoever, in any matter within the jurisdiction any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than 5 years, or both.
\end{quote}

\textsuperscript{202} See Cottman, 1997 WL 340344, at *2.
\textsuperscript{203} See id.
\textsuperscript{204} Cottman was an inspector of the United States Customs Service, and an officer of Chapter 154 of the National Treasury Employees Union. See id. at *1. He was charged with falsely stating information on two consecutive years, 1989 and 1990, on financial reports (known as LM-3s) he was required to file with the Department of Labor (DOL) for Chapter 154. See id. At trial, the “other bad acts” evidence the Government wanted to introduce included evidence that he had failed to file LM-3s on time for 1991 and 1992, and that he had lied to DOL investigators that Chapter 154 financial records were unavailable. See id. at *2.
\textsuperscript{205} See id. at *2.
\textsuperscript{206} See id. at *1.
present a disembodied, bloodless account of what would likely be seen as a
minor breach of one of the myriad requirements of government bureaucracy.207

The "evidentiary richness" portion of Justice Souter's opinion in Old Chief is
similarly relied upon by the Seventh,208 Ninth,209 and Tenth210 Circuits to reject
defendants' Rule 403 appeals. Those cases were too dissimilar from Old Chief and
the Ninth Circuit clearly rejects Old Chief's application outside its narrow
context.211

True to Professor Duane's prediction, even defendants who fall within the Old
Chief pattern have been for the most part unsuccessful. Despite the fact that the
Court found abuse of discretion in Old Chief, the opinion has not noticeably
reduced the numerous hurdles a defendant must leap to get reversal on appeal.212
For example, in order to benefit from Old Chief, a defendant with a prior felony
conviction first must remember to offer to stipulate to the fact of his prior
conviction at trial.213 If the district court rejects the defendant's stipulation, despite
Old Chief, the appellate court is unlikely to reverse if the rejected stipulation is
artlessly worded or too broad.214 In United States v. Mallet,215 the district court
allowed a defendant to stipulate to his prior conviction.216 Relying on Old Chief, the
defendant claimed error because the stipulation included the fact that his prior
conviction was for drug trafficking, which could have supported a jury verdict on
an improper ground.217 The Sixth Circuit recognized that the stipulation as written
was potentially prejudicial, but said that there was no error because the defendant
agreed to the wording.218

Even when an appellate court has found under Old Chief that a district court
erred in admitting a defendant's prior conviction, it frequently finds that error

207. Id. at *3.
208. Gonzales v. DeTella, 127 F.3d 619, 621 (7th Cir. 1997). In Gonzales, the defendant was convicted of
murder. See id. at 620. He objected on appeal to the admission, at trial, of photographs of the victim's body,
arguing they were unfairly prejudicial. See id. at 621. In rejecting his 403 argument, the Seventh Circuit stated,
"The Court recognized in Old Chief that limiting the proofs to clinically abstract propositions may prevent the
juries from acquiring an accurate picture of events." Id.
disposition).
(unpublished disposition). Reviewing the district court's admission of evidence for abuse of discretion, the Tenth
Circuit cites Old Chief as generally approving the "use of witnesses to describe a train of events naturally related."
Id.
211. See Reynolds, 1997 WL 75533, at *2 ("Old Chief's holding pertains to the admission of the name and
nature of the previous crime which is not at issue here because the admission of this information is not challenged
by [defendant]. Additionally, Old Chief explicitly limits its holding to proof of felon status cases."). Id.
212. See Duane, supra note 174, at 21.
213. The Tenth Circuit recently reviewed a case whose facts closely track those of Old Chief, including the
defendant's claim on appeal that the district court erred by allowing evidence of his prior felony conviction. See
(unpublished disposition). However, in this case the defendant never offered to stipulate to his prior felony
convictions, and defendant's counsel even mentioned them in his opening statement as part of his trial strategy.
See id. at *4. The Court never mentioned Old Chief in ruling that the defendant had effectively waived the issue.
214. See Duane, supra note 174, at 21.
216. See id.
217. See id.
218. See id.
harmless. In remanding Old Chief's case to the district court, the Supreme Court noted that it "impl[ies] no opinion on the possibility of harmless error, an issue not passed upon below." The Eighth Circuit has been particularly vigorous in this regard, confirming convictions in at least six cases on the grounds that the Old Chief error was harmless. The Sixth and Tenth Circuits have also found trial courts' abuse of discretion under Old Chief harmless.

As of January 1998, two defendants have won reversals based on Old Chief. The Sixth Circuit reversed a defendant's conviction for felon in possession of a firearm, stating, "there can be no question that the trial court, ruling upon essentially identical facts as were involved in Old Chief, erred." The Ninth Circuit also ruled that the trial court abused its discretion in refusing a defendant's offer to stipulate, finding the error was not harmless because the evidence of guilt "while strong, was not overwhelming." The fact remains that of the many appeals under Old Chief, so far only two have been successful, and the opinion appears cabined to situations involving prior felony convictions and felon-in-possession cases. Because most Rule 403 decisions are made at the trial court level, with few published opinions, it is difficult to determine whether federal trial judges are actively using the balancing framework Old Chief proposes.

B. Old Chief and Evidence Law in New Mexico

Although the federal courts are bound by Old Chief, the decision is unlikely to affect New Mexico evidence law. In a 1996 case that closely tracks the facts in Old Chief, the New Mexico Court of Appeals addressed the question of whether it was error for the trial court to admit, over defendant's objection and offer to stipulate, the specific name and nature of a defendant's predicate felony in a felon-in-possession case. The court of appeals in State v. Tave found abuse of discretion, reasoning the evidence should have been excluded as irrelevant under New Mexico Rule of Evidence 11-401, rather than under the Rule 403 analysis the Supreme Court applied in Old Chief. New Mexico may prefer the Tave court's Rule 401 approach when deciding the narrow Old Chief question. Apart from the felon-
in-possession context, however, New Mexico trial judges and attorneys may want to follow *Old Chief* for its guidance on how to conduct a Rule 403 balancing analysis.

In 1994 William Tave was assaulted and stabbed in his home in Alamogordo, New Mexico. His brother, Julio Tave, went to see William at the hospital, and while he was there the police arrived to question him regarding the assault. The police arrested Julio Tave for disturbing the peace, and found some shotgun shells in his pants pocket.

Tave was charged with disturbing the peace and with being a felon-in-possession of a firearm, in violation of Section 30-7-16 of the New Mexico Statutes. His prior felony conviction was for aggravated assault with a deadly weapon. Like *Old Chief*, Tave was worried that a jury would be more likely to believe that a person who had previously been convicted of assault with a firearm would be more likely to carry a gun. Like *Old Chief*, he moved pre-trial to prevent the State from introducing the specific name and nature of his previous offense. Like *Old Chief*, Tave offered to stipulate to his felon status on the grounds that that specific information about his prior conviction would be unfairly prejudicial to his present charge under New Mexico’s Rule 403.

The State objected to the stipulation, claiming that the jury had a right to know Tave’s violent history. The trial court refused Tave’s stipulation, stating that the State was entitled to prove a prior felony at trial when it is an element of the offense. Julio Tave was convicted on both counts, and appealed his felon-in-possession conviction on the grounds that the trial court committed reversible error in admitting evidence of his prior conviction at trial.

The New Mexico Court of Appeals found abuse of discretion and reversed the trial court’s ruling. First, the appellate court found that the New Mexico felon-in-possession statute, “only requires that the accused person have been convicted of a crime with a sentence of one year or more imprisonment... in other words, the State is required to prove Defendant’s status as a felon, not the underlying

230. See *id.* The facts are taken, except where noted, from *State v. Tave* 122 N.M. 29, 919 P.2d 1094.
231. See *id.* at 30, 919 P.2d at 1095.
232. N.M. STAT. ANN. § 30-7-16 (1986), is New Mexico’s felon-in-possession statute. Section 30-7-16(A) states “[i]t is unlawful for a felon to receive, transport, or possess any firearm or destructive device in this state.” A “felon” is defined as any person who has been convicted in the preceding ten years by a court of the United States. ... to a sentence of death or one or more years imprisonment and has not been pardoned.” § 30-7-16(C). Cf. 18 U.S.C. §§ 922(g)(1), 921(a)(20), *supra* note 21.
233. See *Tave*, 122 N.M. at 33, 919 P.2d at 1096.
234. See *id.* at 30, 919 P.2d at 1095.
235. See *id.* New Mexico’s Rule 403 is codified at N.M. R. EVID. 11-403. Its text is identical to *FED. R. EVID.* 403. *See supra note 1.*
236. See *Tave*, 122 N.M. at 30, 919 P.2d at 1095. The State countered the “unfair prejudice claim” by stating that the prior and present crimes were not similar, and therefore there was little danger of prejudice from introducing the name and nature of the past crime. *See id.*
237. See *id.* On the issue of unfair prejudice, the trial court said that it could only find unfair prejudice in cases where the present conviction was for a violent crime, but the prior qualifying felony was non-violent. *See id.* This situation might lead the jury to disregard the seriousness of the felon-in-possession charge and engage in jury nullification. *See id.* For further discussion of the potential problem of jury nullification in the context of a felon-in-possession charge, see Richman, *supra* note 184, at 953-54.
238. See *Tave*, 122 N.M. at 31, 919 P.2d at 1096.
239. See *id.* at 29, 919 P.2d 1094.
felony." 240 Writing in 1996, before the benefit of Old Chief, the court looked for support to the federal courts of appeal. 241 The court quotes the First Circuit in United States v. Tavares, 242 which found the federal felon-in-possession statute, "[d]id not embrace additional facts such as a particular kind of felony. Congress required no gradation for seriousness, numerosity or recency." 243

Continuing to follow Tavares's lead, the court of appeals found that the name and nature of the prior felony was not relevant to the crime of felon-in-possession. 244 Since this evidence was irrelevant, it should have been excluded under Rule 402 of the New Mexico Rules of Evidence, which states that "[e]vidence which is not relevant is not admissible." 245 Therefore, the trial court erred in refusing to grant Tave's pre-trial stipulation.

However, the court acknowledged that the State is entitled to prove a defendant's felon status, and that only the details of the prior crime are irrelevant. 246 The court noted that the State has many ways of proving felon status, and again quotes Tavares: "Other ways include a redacted record, testimony by a clerk, a defendant's affidavit, or even, in the absence of controversy, judicial notice of the prior conviction." 247

Like the Supreme Court in Old Chief, the New Mexico Court of Appeals found the trial court abused its discretion when it refused to grant the defendant's offer to stipulate to the name and nature of his prior felony conviction in a felon-in-possession case. 248 However, its analysis differs from that Court's in that the court of appeals found the basis for exclusion in a Rule 401-402 relevancy argument, rather than in Rule 403's mandate to weigh an item of evidence's unfairly prejudicial value against its probative value. 249 In this respect the court of appeals follows the lead, not of the Tenth Circuit, 250 but of the First, Second, and Fourth Circuits. 251

Thus, when the court of appeals discusses "evidentiary alternatives," it does so outside a Rule 403 balancing context. The Tave court merely lists the evidentiary alternatives as options the State has available to prove felon status, but does not weigh or balance their probative or unfairly prejudicial values against each other.

Federal courts will be bound by the rule in Old Chief, which means they will now uniformly use Rule 403 when deciding whether to accept a defendant's offer to

240. Id. at 31, 919 P.2d at 1096.
241. See id.
242. 21 F.3d 1, 4 (1st Cir. 1994).
243. Id. at 4, quoted in Tave, 122 NM. at 31, 919 P.2d at 1096.
244. Judge Alari also cites United States v. Gilliam, 994 F.2d 97 (2d Cir. 1994), and United States v. Jones, 67 F.3d 320 (D.C. Cir. 1995), for the irrelevancy proposition.
245. N.M.R.EvD. 11-402.
246. See Tave, 122 N.M at 32, 919 P.2d at 1097.
247. Tave, 122 N.M. at 31, 919 P.2d at 1096 (quoting Tavares, 21 F.3d at 4). The Supreme Court's failure to mention judicial notice contrasts with the First Circuit's mention of this mechanism in Tavares.
248. See Tave, 112 N.M. at 33, 919 P.2d at 1098.
249. Despite the fact that the New Mexico Court of Appeals repeatedly states that name and nature evidence should be excluded because it is irrelevant, its analysis is confusing because it concludes by saying that the prior conviction evidence "should have been excluded under Rule 403." See Tave, 122 N.M. at 33, 919 P.2d at 1098.
250. See supra note 43.
251. See supra note 42.
stipulate to his felon status, when that is an element of the present offense.\textsuperscript{252} The State of New Mexico, however, is not bound by the Old Chief, and can continue to use a Rule 401-402 relevant/irrelevant distinction when deciding cases that involve status crimes like felon-in-possession. One advantage of continuing this approach is that it may simplify decision-making at the trial level. At least for felon-in-possession cases, under Tave, New Mexico trial judges will not have to determine if an item of evidence raises a risk of unfair prejudice, then carefully “evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well.”\textsuperscript{253} This is not an easy mandate, given a general lack of standards to use in making such an evaluation. Moreover, “[b]ecause evidentiary issues must be decided frequently and quickly at trial, evidence law must also be relatively simple to understand and administer.”\textsuperscript{254} Excluding the name and nature of a prior qualifying felony, in a felon-in-possession case, because it is irrelevant to the present charge, has the advantages of simplicity and consistency.

Furthermore, basing a decision to exclude an item of evidence on the grounds that it is “irrelevant” to the present issue could facilitate review at the appellate level. If the only issue at the trial level becomes whether or not the evidence is relevant, then it could well be easier for the trial court to articulate the reason for its decision, leaving a clear and straight-forward record for appellate review. In contrast, weighing factors under Rule 403 involves more questions and more variables, such as determining whether there is a danger of unfair prejudice; how much danger; and relative to how much probative value. Is there the danger of unfair prejudice? How much? Relative to how much probative value? Trial courts, given their wide discretion to apply Rule 403, frequently leave inadequate records of how they reached these decisions, to the frustration of the judges that must review them.\textsuperscript{255} However, it is important to emphasize that any question about the relevancy of an item to a particular inquiry must be tightly focused, and approached with a strong presumption that the evidence is, indeed, relevant. Any other interpretation would violate the spirit of Rule 401.\textsuperscript{256}

Outside of the narrow felon-in-possession context, New Mexico trial judges and attorneys might find Old Chief’s attempt to articulate an analytical framework for Rule 403 balancing decisions helpful. Old Chief’s holding may be narrowly “limited to cases involving proof of felon status,” but its “full evidentiary context” approach to 403 balancing is widely applicable and bears repeating:\textsuperscript{257}

\begin{itemize}
\item \textsuperscript{252} See Old Chief, 117 S. Ct. at 656. See also discussion supra Part IV.
\item \textsuperscript{253} Old Chief, 117 S. Ct. at 651.
\item \textsuperscript{254} Victor Gold, Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence, 58 WASH. L. REV. 497, 500 (1983), quoted in Jacobs, supra note 84, at 572 n.46.
\item \textsuperscript{255} “We take this occasion, once again, to remind the district courts of their obligation to perform this weighing on the record.” United States v. Sriyuth, 98 F.3d 739, 744 n.8 (3d Cir. 1996), quoted in Jacobs, supra note 84 at 573, n. 49.
\item \textsuperscript{256} “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401 (emphasis added).
\item \textsuperscript{257} See Old Chief, 117 S. Ct. at 651.
\end{itemize}
On objection the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question, but for any actually available substitutes as well.  

This last phrase in particular should encourage New Mexico attorneys to develop valid evidentiary substitutes for evidence they feel could unfairly prejudice their clients' cases and should similarly encourage trial judges to take such attempts seriously. Creative use of such alternatives could help avoid the pervasive problems of "undue delay, waste of time, [and] needless presentation of cumulative evidence."

VII. CONCLUSION

In Old Chief, the United States Supreme Court set an outer limit on the exercise of a trial judge's discretion under Rule 403 of the Federal Rules of Evidence. The fact that the holding is quite narrow does not diminish its importance in this regard. Apart from the prior felony conviction/felon-in-possession context, courts could try to use the balancing framework for Rule 403 decision-making in Old Chief to help define more uniform standards for Rule 403 decisions at trial and on review. However, unless they take this mandate seriously, Old Chief is likely to become another decision that, while perhaps full of sound and fury, ultimately signifies little.

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