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Old Chief v. United States: Radical Change or Minor Departure? How Much Further Will Courts Go in Limiting the Prosecution's Ability to Try Its Case?

In *Old Chief v. United States*,¹ the United States Supreme Court held that a district court abused its discretion under rule 403 of the Federal Rules of Evidence ("Rule 403") when it refused a defendant's offer to stipulate to a prior assault conviction, and instead admitted the full record of the conviction, when the sole purpose of the evidence was to prove the prior conviction element of a felon in possession of a firearm charge.² The holding marks the first time the Supreme Court has limited the time-honored principal of allowing the prosecution the freedom to refuse offers to stipulate and to try its case as it sees fit.

I. FACTUAL BACKGROUND

Petitioner Old Chief was arrested in 1993 after an altercation involving the discharge of a firearm. Old Chief was charged with the crimes of assault with a dangerous weapon, using a firearm in relation to a crime of violence, and violating 18 U.S.C. § 922(g)(1).³ The violation of 18 U.S.C. § 922(g)(1) was the focus of the litigation. The statute makes it a crime for anyone who has been convicted of a felony punishable by more than a year in prison to possess any firearm.⁴ Old Chief had previously been convicted of this type of a felony—assault causing serious bodily injury.⁵

Before trial Old Chief moved for an order requiring the government to refrain from mentioning or offering any evidence of the prior conviction except to say he had been convicted of a crime that was punishable by imprisonment exceeding one year. The Assistant United States Attorney refused to accept Old Chief's stipulation, arguing that the Government

1. 117 S. Ct. 644 (1997).

2. *Id.* at 647.

3. *Id.*

4. 18 U.S.C. § 922(g)(1) (1996).

5. 117 S. Ct. at 647.

had a right to prove its case in its own way. The United States District Court for the District of Montana agreed and allowed the Government to introduce the order of judgment and commitment for Old Chief's prior conviction. The order revealed that Old Chief knowingly and unlawfully assaulted Rory Dean Fenner, causing serious bodily harm, and that Old Chief was sentenced to five years imprisonment. Old Chief was convicted on all counts, and he appealed.⁶ The Ninth Circuit, in a rather cursory decision, stated that the Government had the right to prove a prior felony conviction by introducing probative evidence regardless of whether the defense offered to stipulate to the conviction.⁷ Furthermore, the Ninth Circuit stated that offers to stipulate have "no place in the Rule 403 balancing process," and therefore the district court did not abuse its discretion by allowing evidence of Old Chief's prior conviction to be introduced to "prove that element of the unlawful possession charge."⁸

The Supreme Court granted certiorari to resolve a sharp division among the courts of appeals in the treatment of a defendant's efforts to exclude the introduction into evidence of the name and nature of prior convictions in situations similar to the case at bar.⁹ The Supreme Court resolved the conflict, reversed the judgment, and remanded the case to the Ninth Circuit.¹⁰ The Court held that in cases in which the prior conviction is likely to support a jury verdict based on improper considerations, the risk of unfair prejudice substantially outweighs the probative value of the evidence of the name and nature of the offense.¹¹ It was therefore an abuse of discretion to admit the record of the prior conviction when the defendant offered to stipulate.¹²

II. LEGAL BACKGROUND

The courts of appeals of the various circuits have been divided on the issue of whether and under what circumstances a defendant may stipulate to an element of the offense charged in an attempt to prevent the name and nature of a prior conviction from being introduced into evidence.¹³ The Supreme Court decision to grant certiorari was a direct consequence of this sharp division.¹⁴

6. *Id.* at 647-48.

7. *Id.* at 649.

8. *Id.*

9. *Id.*

10. *Id.* at 656.

11. *Id.* at 655.

12. *Id.*

13. *Id.* at 649.

14. *Id.*

On one side of the line were the Sixth,¹⁵ Eighth,¹⁶ and Ninth¹⁷ Circuits, which recognized the right of the prosecution to refuse a defense stipulation and to present evidence of prior offenses as they saw fit.¹⁸ Indicative of the reasoning in these circuits were the decisions in *United States v. Smith*¹⁹ and *United States v. Breitzkreutz*.²⁰ In *Smith* the Eighth Circuit held that the Government was not required to accept any of the defendant's stipulations, nor was it limited to establishing only one of two prior felony convictions.²¹ Defendant Robert Smith was convicted in the District Court of Minnesota of unlawfully receiving a firearm pursuant to 18 U.S.C. app. § 1202(a)(1).²² Under section 1202(a)(1), the Government had to establish that defendant had been convicted of at least one prior felony.²³ Having been convicted of two prior felonies, defendant offered to stipulate, in lieu of the introduction into evidence of a 1970 conviction for felony possession, that the jury may accept as fact that he had been convicted of a prior felony. Alternatively, defendant offered to stipulate to a 1961 felony conviction in an effort to prevent introduction of the 1970 conviction. The Government refused to accept either stipulation, and defendant appealed, arguing that the district court erred in admitting evidence of the 1970 conviction without giving the jury a limiting instruction about how the evidence should be treated.²⁴ The majority pointed out that no limiting instruction was requested and that had the request been made, it would have been up to the discretion of the district court in deciding whether to give an instruction.²⁵ Furthermore, the majority held that the Government was not required to accept either of the defendant's stipulations, and the Government was not "necessarily" limited to establishing only one of the two prior felony convictions.²⁶ Though there may be an occasion when it might be prejudicial to allow the Government to prove multiple prior convictions, the majority stated that

15. *United States v. Burkhardt*, 545 F.2d 14 (6th Cir. 1976).

16. *United States v. Smith*, 520 F.2d 544 (8th Cir. 1975).

17. *United States v. Breitzkreutz*, 8 F.3d 688 (9th Cir. 1993).

18. 117 S. Ct. at 649.

19. 520 F.2d 544 (8th Cir. 1975).

20. 8 F.3d 688 (9th Cir. 1993).

21. 520 F.2d at 548.

22. *Id.* at 546. Note that 18 U.S.C. app. § 1202(a)(1) is now codified at 18 U.S.C. § 922(g)(1).

23. 520 F.2d at 548.

24. *Id.*

25. *Id.* at 549.

26. *Id.* at 548.

this was not one of those cases and that defendant was not substantially prejudiced by proof of the 1961 and 1970 convictions.²⁷

Eighteen years later, in *United States v. Breitreutz*,²⁸ the Court of Appeals for the Ninth Circuit held fast to the notion that the Government, regardless of defendant's offer to stipulate to the existence of a prior offense, was not precluded from offering evidence of the prior offense.²⁹ Defendant Douglas Breitreutz was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).³⁰ On appeal Breitreutz raised two separate arguments based on Rule 403.³¹ First, he contended that the Government should not have been allowed to introduce evidence of any prior convictions because he had offered to stipulate that he was a convicted felon. Second, like the defendant in *Smith*, Breitreutz argued that even if the Government could introduce evidence to prove the existence of prior felony convictions, it should have been limited to proving only one and not all three of Breitreutz's felony convictions in order to satisfy its section 922(g) burden.³²

Regarding Breitreutz's first argument, the majority held that it is a long-standing rule that the prosecution cannot be forced to accept a defendant's stipulation because doing so would allow the accused to "plead out" an element of the charged offense.³³ Furthermore, the majority stated that a stipulation was not an alternative means of proof and therefore had no place in the Rule 403 balancing process.³⁴ However, unlike the court in *Smith*, the majority agreed with defendant's second Rule 403 argument and held that once the Government had proved one prior conviction, proof of the other convictions would add very little probative value and thus would likely fail the Rule 403 balancing of probative value and unfair prejudice.³⁵

On the other side of the division between the circuits were the First,³⁶ Fourth,³⁷ Tenth,³⁸ and D.C.³⁹ Circuits. These circuits main-

27. *Id.*

28. 8 F.3d 688 (9th Cir. 1993).

29. *Id.* at 690.

30. *Id.* at 689.

31. *Id.* at 690. "Rule 403 states: 'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Id.* at n.1 (quoting FED. R. EVID. 403).

32. *Id.* at 690.

33. *Id.* at 691 (citing 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 (1991)).

34. *Id.* at 691-92.

35. *Id.* at 692.

36. *United States v. Tavares*, 21 F.3d 1 (1st Cir. 1994).

tained that a defendant's offer to stipulate to or admit to prior convictions places a duty upon the trial court to exclude from the case the name and nature of the prior offense.⁴⁰ In *United States v. Tavares*,⁴¹ the First Circuit held that the district court abused its discretion by allowing the Government to reject the defendant's stipulation.⁴² Once again, as in the cases cited before, defendant was tried and convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and raised a Rule 403 objection.⁴³ The majority admitted that there is a well-established right of the Government to present its case as it sees fit.⁴⁴ A caveat to this rule was warranted, however, with felon in possession cases because the stipulated facts strictly showed defendant's legal status as a felon and did not prove the crime currently charged.⁴⁵ The Government's ability to try the case as it sees fit was in no way weakened by requiring it to accept a stipulation to establish defendant's status as a felon because the status element was a "discrete and independent component of the crime . . . reflecting a Congressional policy that possession of a firearm is categorically prohibited for those individuals who have been convicted of a wide assortment of crimes calling for a punishment of over a year's imprisonment."⁴⁶ A defendant fits the requirement of section 922(g)(1) simply by having a prior felony conviction that called for over one year's imprisonment regardless of whether the conviction was for assault or for "the most aggravated murder."⁴⁷ The majority concluded that the existence of a prior conviction was only relevant to show defendant's status and that disclosing the full nature of the prior offense, even if not prejudicial, was "beside the point."⁴⁸

A little over a year after the decision in *Tavares*, the D.C. Circuit, in *United States v. Jones*,⁴⁹ adopted the language and reasoning in *Tavares* and held that the district court abused its discretion by denying defendant's motion to exclude evidence of the nature of his prior

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37. *United States v. Poore*, 594 F.2d 39 (4th Cir. 1979).
 38. *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995).
 39. *United States v. Jones*, 67 F.3d 320 (D.C. Cir. 1995).
 40. 117 S. Ct. at 649.
 41. 21 F.3d 1 (1st Cir. 1994).
 42. *Id.* at 2.
 43. *Id.*
 44. *Id.* at 4.
 45. *Id.* at 3.
 46. *Id.* at 4.
 47. *Id.*
 48. *Id.*
 49. 67 F.3d 320 (D.C. Cir. 1995).

conviction.⁵⁰ The majority decision was particularly influenced by what it regarded as the manifest danger of undue prejudice in allowing the nature of the prior convictions to be presented to the jury because the current charges were virtually identical to the prior felony convictions.⁵¹

Taking cues from *Tavares*⁵² and other cases from the various circuits,⁵³ the Supreme Court in *Old Chief* attempted to carve out a rule that would settle the dispute between the circuits regarding how to treat stipulations in the context of the admission of evidence of prior convictions.

III. THE SUPREME COURT RATIONALE

The Supreme Court holding centers on the notion that admitting evidence of the name and nature of Old Chief's prior conviction was unnecessary to prove his legal status as a felon.⁵⁴ Though the name of his prior offense may have been technically relevant, it did not address any "detail in the definition of the prior-conviction element that would not have been covered by [his] stipulation or admission."⁵⁵ Indeed, Justice Souter, writing for the majority, stated that the statutory language of 18 U.S.C. § 922(g)(1), in which the prior conviction requirement is contained, evidences no congressional concern with the name of the prior crime other than what is necessary to place it among the general class of felonies that satisfy the prior conviction requirement.⁵⁶ Logic, according to Justice Souter, was on Old Chief's side.⁵⁷

The Government argued it had the right to present and prove its case by evidence of its own choosing, free from any offers or attempts by defendant to stipulate "his way out of the full evidentiary force of the case" as presented by the government.⁵⁸ The majority acknowledged that though the general rule that the Government is entitled to prove its case free from any defense stipulations or admissions rests on good

50. *Id.* at 324. Mr. Jones was charged with six counts including possession with intent to distribute cocaine and being a felon in possession of a firearm. *Id.* at 320. The prior felony was for possession with intent to distribute. *Id.* at 321. Jones's attorney offered to stipulate that Jones had a prior felony conviction and asked that evidence of the name and nature of the prior conviction be excluded pursuant to Rule 403. *Id.*

51. *Id.* at 321.

52. 117 S. Ct. at 655 (citing *Tavares*, 21 F.3d. at 4).

53. *Id.*

54. *Id.*

55. *Id.* at 653.

56. *Id.*

57. *Id.*

58. *Id.*

sense, it had no application when the issue at hand rested on defendant's legal status.⁵⁹ The only thing the jury needed to know was that defendant's prior conviction fell within the class of crimes that Congress intended the statute to cover.⁶⁰ Defendant's admission to this point coupled with the court's jury instructions were sufficient to satisfy the statutory requirement.⁶¹

Indeed, the majority concluded that the general rule that the prosecution may choose its evidence freely had no application in this case because proof of defendant's status was entirely unrelated to what defendant was thinking or intending when he committed the current offense.⁶² Defendant's offer to stipulate or admit to his status as a felon took nothing away from the prosecution's presentation of evidence to satisfy its burden of proving the crimes alleged.⁶³ In the Rule 403 balancing of probative value and unfair prejudice, the risk of unfair prejudice in admitting the full record of the prior conviction, despite defendant's offer to stipulate to his status as a felon, substantially outweighed the probative value of that evidence.⁶⁴

Justice O'Connor, joined by Justices Rehnquist, Scalia, and Thomas,⁶⁵ stated in her dissent that the majority misapplied Rule 403 and thus upset "longstanding precedent regarding criminal prosecutions."⁶⁶ The dissent disagreed that admitting the name and nature of the prior conviction unfairly prejudiced Old Chief within the meaning of Rule 403.⁶⁷ Rather, the dissent concluded that the name and nature of the offense was an essential element in satisfying the section 922(g)(1) prior conviction requirement. In fact, the dissent reasoned that the structure of section 922(g)(1) indicates that Congress intended jurors to learn of the name and nature of the defendant's prior crime.⁶⁸ Because section 922(g)(1) excludes certain crimes from inclusion,⁶⁹ the dissent reasoned that it necessarily follows that the term "crime" as used in the language of section 922(g)(1) is not an "abstract or metaphysical concept" and that

59. *Id.* at 654.

60. *Id.* at 655.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 656.

66. *Id.*

67. *Id.*

68. *Id.*

69. Certain business crimes and state misdemeanors punishable by imprisonment of two years or less are excluded from the prior felony conviction requirement of section 922(g)(1). 18 U.S.C. § 921(a)(20) (1996 & Supp. 1997).

the Government must prove that defendant committed a specific crime.⁷⁰ Furthermore, Justice O'Connor asserted that evidence of the name and nature of the offense was direct proof of a necessary element of the offense charged.⁷¹ Therefore, to say, as the majority does, that it "'unfairly' prejudice[d] the defendant for the government to establish its [section] 922(g)(1) case with evidence showing that, in fact, the defendant did commit a prior offense misreads the Rules of Evidence and defies common sense."⁷² The dissent concluded that "like it or not, Congress chose to make a defendant's prior criminal conviction one of the two elements of the [section] 922(g)(1) offense."⁷³ Therefore, defendant was not convicted of some "unspecified crime;" he was convicted of a named crime, and therefore it was not unfairly prejudicial for the Government to prove the prior conviction with evidence of the name and nature of the prior offense.⁷⁴

IV. IMPLICATIONS

The Supreme Court decision in *Old Chief* marked the first time the Court has limited how the prosecution may present and prove its case by forcing it to accept a defense stipulation. Therefore, *Old Chief* represented a "remarkable drawing of a line in the sand" by "corralling" the previously unbridled discretion of district courts under Rule 403.⁷⁵ However, it is possible that the holding in *Old Chief* will be limited to its facts. Indeed, as one commentator has stated, "Rule 403 after *Old Chief* may well closely resemble Rule 403 before *Old Chief*."⁷⁶ In fact, the majority in *Old Chief* recognized that the general rule that the prosecution should be free to prove its case free from any defense offers to stipulate "rests on good sense."⁷⁷ However, the Court cautioned that though a "naked proposition" in the form of a stipulation was "no match for the robust evidence that could be used to prove it," the prosecution's right to offer that evidence has "virtually no application when the point at issue is a defendant's *legal status*."⁷⁸

70. 117 S. Ct. at 656-57.

71. *Id.* at 656.

72. *Id.* at 657-58.

73. *Id.* at 660.

74. *Id.*

75. David Rudolf & Gordon Widenhouse, *Reeling in Otherwise Relevant Evidence Due to Unfair Prejudice*, 21 MAR CHAMPION 46 (Mar. 1997).

76. Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL ADVOC. 563, 590 (Spring 1997).

77. 117 S. Ct. at 654.

78. *Id.* (emphasis added).

However, it is also possible that *Old Chief* will be the first step in a radical change in how criminal cases are tried. Courts now have a choice of limiting the rationale of *Old Chief* to felony-possession cases, or courts may choose to apply the decision in *Old Chief* to any and all instances when the defendant offers to stipulate to some element or aspect of the crime charged. An indication of which route the courts will take may soon be answered. As of the writing of this Note, a case in the D.C. Circuit, *United States v. Crowder*,⁷⁹ has been remanded in light of the decision in *Old Chief*. The decision in *Crowder* will likely indicate just how far courts are going to be willing to extend the holding in *Old Chief* outside the realm of proof of status.

The defendant in *Crowder*, charged with possession with intent to distribute crack and heroin, offered to concede all elements of the offense except possession.⁸⁰ Crowder admitted that the substances seized were indeed crack and heroin and that "anybody who possessed those drugs possessed them with the intent to distribute."⁸¹ Crowder contended that because he was willing to concede that whoever possessed the drugs had the intent to distribute them, no evidence of his prior act of selling drugs to an undercover policeman could be introduced to show intent.⁸² The court of appeals remanded the case, ruling that the district court erred in admitting evidence of Crowder's prior drug sale to establish intent.⁸³ What the court of appeals holds on remand from the Supreme Court in light of *Old Chief* may help shed some light on whether the defendant's right to stipulate will be extended to situations in which the evidence goes to the proof of an element of the charged crime and not just to the existence of a prior conviction.⁸⁴

79. 87 F.3d 1405 (D.C. Cir. 1996), cert. granted, 117 S. Ct. 760 (1997).

80. 87 F.3d at 1409.

81. *Id.* at 1412.

82. *Id.* at 1412-13.

83. *Id.*

84. The D.C. Circuit's recent decision in *United States v. Rezaq* may indicate which direction the circuit court will choose in *Crowder*. No. 96-3127, 1998 WL 44439, at *1 (D.C. Cir. Feb. 6, 1998). In *Rezaq* defendant was convicted in the district court of one count of aircraft piracy under 49 U.S.C. app. § 1427(n) (1994) arising out of a 1985 hijacking of an Air Egypt jet. *Id.* at *1. Defendant had previously pleaded guilty in Malta to the murder of two of the passengers and offered to stipulate in the district court that the passengers had died. On appeal defendant contended that his trial had been "fatally tainted" by the introduction of evidence of the murders. *Id.* The court of appeals held that *Old Chief* had established an exception to the rule that the prosecution was free to prove its case without having to accept defense stipulations. *Id.* at *15. However, the court ruled that the exception created by *Old Chief* only applied when "the evidentiary issue is one of 'status'" and that the exception did not apply in the case at bar. *Id.* (quoting *Old Chief*, 117 S. Ct. at 655).

Until the courts rule on how expansive the holding in *Old Chief* is, defense attorneys have a tremendous window of opportunity to push for an expansive reading of *Old Chief* and to offer to stipulate to any prejudicial or detrimental elements of the crime in order to preclude the jury from being influenced by the introduction of evidence of those crimes. Consider for example how this might have worked in practice in the Oklahoma City bombing prosecution. If an expanded version of the rule in *Old Chief* had been applied, the defense could have offered to stipulate to the fact that over 168 people died, thereby precluding the prosecution from producing any evidence of how those deaths occurred. The defense could have thereby prevented the prejudice caused by the introduction of gory and heart-wrenching evidence of how people were crushed to death and how others lost loved ones. Keeping this emotionally charged evidence from the jury would likely have had a profound effect on how the jury reached its verdict. It would also have constituted a dramatic departure from the way criminal cases are tried.

If the courts decide to expand the holding of *Old Chief* outside the realm of proof of prior convictions in felony-possession cases, defendants will have a new, very powerful weapon at their disposal. By offering to stipulate, the defense could force the hand of the prosecution, thereby cutting into the prosecution's ability to present its case as it sees fit.

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