IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,764

District Court of Appeal,
Third District Case No.: 96-02587

TERRY KENNETH BROWN,

Petitioner

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

After the State introduced two judgments of conviction and its trial exhibit referenced an additional three and the State's improper closing argument, Defendant sought and was denied a new trial. From the Third District Court of Appeal's affirmance of the judgment of conviction, denial of new trial and certification as a matter of great public importance the question of whether Old Chief v. United States overruled Parker v. State, Defendant timely invokes discretionary jurisdiction, on which this Court has deferred ruling.

STATEMENT OF THE CASE AND FACTS[1]

Terry Kenneth Brown ("Brown") was convicted of unlawfully possessing a firearm as a previously convicted felon, pursuant to § 790.23, Fla. Stat. (1995), and sentenced to seven years as an habitual felony offender. (R. 8-10, 53).[2] The police never found and the State never produced a gun. Brown did not testify.

Prior to trial, the lower court ruled on the State's Halberton Motion that neither side could argue the failure to call certain witnesses. (T. 176-78). The lower court ruled that the defense could argue, however, the State's failure to recover and the convenience store's failure to preserve a convenience store videotape that would have documented Brown while allegedly wielding a firearm

---

[1] All references are to the Record on Appeal (R.) and the Trial Transcript (T.). The parties will be referred to as they appeared in the proceedings below.

[2] The State nolle prossed Brown's other two charges -- battery (Count II) and aggravated assault (Count I) on a person at least sixty-five years of age, pursuant to §§ 775.087, 784.08(2)(b) & (c), Fla. Stat. (1995). (R. 9, 10, 17, 18, 39; T2 52, 54).

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in the convenience store. (T. 178-79). The lower court allowed a non-prosecution form signed by Mr. Robert Stewart ("Stewart"), the alleged victim here, because it evidenced "intent". (T. 181).

Brown also offered from the beginning and throughout trial to stipulate to the Information referencing his prior felonies and his legal status as a convicted felon, which the State refused. (T. 6-12, 182-83). The lower court voiced its inclination to exclude the prior felonies and require the alternative proof by stipulation:

> THE COURT: When we get to that point, we need to discuss it. ***My gut impression is that if we can agree the way the stipulation is written*** and if they or --
>
> MS. MORALES: There is not going to be a stipulation.
>
> THE COURT: All right. If the Defense -- I can't force you to stipulate, ***but if the Defense admits to something and agrees that this is the state of facts, I have to figure out what I am going to do about it.***
>
> MS. MORALES: You are not going to allow me to admit the certified convictions?
>
> THE COURT: ***Five*** of them?
>
> * * *
>
> MS. MORALES: Now we have just the issue of numbers. How many can I use?
>
> THE COURT: Might we agree that you get to introduce one, and then you and the Defendant agree to stipulate that there are four other ones?
>
> Could we do that? But that they don't get introduced, that they don't know the names of the crimes? . . . . (T. 183-84; emphasis added).

With that, the lower court deferred ruling until the issue actually arose during trial (T. 183); but continued to recognize the risk of

prejudice:

THE COURT: . . . . So, pick the one you want after that. ***My feeling is that you have the right to let them know that he's got the felony priors, but I'd rather not have you proving them up*** and stipulate to the other four. You can say that I can't order you to stipulate, and that's true.

MS. MORALES: ***My concern*** is that, for some reason, ***they look up one prior and they decide, for whatever reasons,*** that ***we don't know enough about it or whatever***, if there is any issue about this prior raised by the Defense, ***that I don't have other ones to rely on.***

THE COURT: Pick two of them then. But what I want you to do is stipulate to the other three.

MR. JEPEWAY: I will do that.

THE COURT: I'm preserving your right to say that one should be enough and you shouldn't have --

MR. JEPEWAY: Admitting the prior convictions and -- well, ***I object to the introduction of any of them***, because ***we are willing to stipulate*** that he's been convicted of one. Number two, I will stipulate as far as we can stipulate, but it's ***under protest***. (T. 285-86; emphasis added).

The lower court denied the Defendant's repeated requests for a proposed limiting instruction, to have been modified from a "Williams Rule" § 90.404, Fla. Stat., instruction (standard 3.07), prior to presentation of the State's fingerprint technician.[3] (T. 286-89; 361-65).

To prove Brown's convicted-felon status, the State presented, over defense objections and protest, testimony of Metro Dade Police

[3] The proposed curative instruction was to caution the jury that the testimony and evidence of prior convictions was presented only to prove Brown's legal status as a previously convicted felon and for no other purpose. (T. 286-88).

Department latent fingerprint technician, George Hertel ("Hertel"), and certified criminal judgments and sentences against Brown for two prior felony convictions of burglary and robbery. (R. 10, 40; T. 285-86, 287-89, 316-17, 320-23). The lower court instructed the jury that Brown had been convicted of three additional felonies. (T. 323-24).

In violation of the lower court's ruling, however, that the jury would learn the names of only two prior felony convictions, the State's Composite Exhibit "3" permitted the jury to learn (i) the names of the remaining three convictions for robbery, cocaine possession and sale, and another cocaine possession and sale, (ii) each conviction's number of counts and degrees of seriousness and (iii) the number of points assessed against Brown for these three additional convictions. (State's Exh. 3 at 6).

The testimony surrounding Brown's alleged possession of a firearm was, at best, highly inconsistent. According to Stewart, Brown approached him on June 14, 1995 at around 10:00 a.m., on "tree way" -- the forested corner on 57th Street and 7th Avenue of Miami where "old timers hang out" across from the Key Food Store (the "Store"). (T. 218, 229). According to Stewart, Brown, with whom he had "always gotten along", was in a "violent mood"; repeatedly demanded money from Stewart; and Stewart responded he had none. (T. 210-11, 212, 218, 220, 229, 242, 245). Brown then supposedly threw a bag of money on the ground before Stewart, telling Stewart and a companion, who did not testify at trial, not to touch that bag. (T. 214-15). Brown allegedly patted his abdominal area; lifted his

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shirt; and revealed the butt of a gun. (T. 216-17). Stewart arose and yelled "get this man off me". (T. 217). This entire crime crescendoed when Brown supposedly knocked Stewart's cap from his head. (T. 217).

Mr. Nizer Mohamaad ("Mohamaad") was managing the Store that day. (T. 253-54). Mohamaad testified, contrary to Stewart, that he heard the argument between Brown and Stewart around 8:30 a.m., not Stewart's estimated 10:00 a.m.; Mohamaad saw Brown knock Stewart's hat from the top of his head; and ***saw no gun***. (T. 254-55, 273). Mohamaad returned to his customers. (T. 254-55, 273). Stewart returned home; telephoned the police; and watched them arrive at the Store from his apartment window, less than five minutes later. (T. 218-20).

Stewart testified that he was not using drugs nor under the influence of drugs that morning; but did not recall whether he had been under "the tree" the night before or in early morning. (T. 234-36). After being impeached, Mohamaad admitted that Stewart would buy two beers from the Store, contrary to Stewart's testimony, every thirty to forty-five minutes. (T. 244, 265-70).

Stewart admitted filing a non-prosecution form regarding this alleged crime. (T. 222-28, 246-47, 251-52). Stewart testified, over defense objection, that the person ***whom he did not know*** that presented this form to him may have been a friend of Brown's mother. (T. 222-28, 246-47, 249-52). Stewart admitting reading, understanding and signing the form; the form "was truthful"; but denied swearing to its truthfulness, on the ostensible basis that no

notary was present when he signed it.[4] (T. 222-28, 250-51). As to his reason for signing the non-prosecution form, Stewart never testified that he was coerced or harassed. He signed the non-prosecution form because he "felt badly", though he did not know Brown's mother or his family. (T. 247-48, 249-50).

Stewart never testified that Brown was intoxicated, but Mohamaad testified that Brown walked to the Store's counter, angry and drunk, immediately after leaving Stewart. (T. 255-56). According to Mohamaad, Brown pointed a gun at Mohamaad's face, and threatened to kill him and everyone in the Store; Mohamaad then allegedly responded -- while supposedly thinking of his four kids and fearing for his life -- "Go ahead, do it. What are you waiting for?" (T. 256-58, 273-74). The defense moved to strike Mohamaad's testimony regarding his children, and the lower court gave a curative instruction. (T. 258). Mohamaad testified that he threatened to call the police, and did call the police after Brown left. (T. 256-58).

In further contradiction to Mohamaad's version at trial, fifteen-year, veteran police officer Jane Vandersand ("Officer Vandersand"), the arresting officer, testified that Mohamaad described the incident as an argument over a beer; Brown made no death threats; he lifted his shirt; he displayed, not wielded, his gun; and left. (T. 261-62, 314-15).

Sherri Stephens ("Stephens"), Brown's girlfriend, further contradicted Stewart's version of the incident. Stephens testified

[4] According to Stewart, the notary page of the form was not attached at the time he signed it. (T. 246-49).

that Brown remained at "tree way" the night of June 13, 1995; Brown telephoned her the following morning at approximately 9:00 a.m., told her that he was on his way home, and Stephens heard yelling and threats in the background:

> No good nigger, I will call the police and tell him [sic] that you have a gun. (T. 344, 356-58).

Stephens testified that she recognized that background voice as Stewart's when he approached her some five months later in December of 1995 near the Store. (T. 347-51, 358). Stephens had no expertise in voice recognition and only spoke with Stewart on that December day. (T. 352). During that conversation, Stephens testified that Stewart told her that (i) he filed "a paper" for Brown to be dismissed; (ii) he told the police that Brown knocked his hat from his head; and (iii) Brown did not have a gun. (T. 349-51). When questioned about that meeting with Stephens, Stewart was evasive, but firmly denied ever telling anyone that Brown did not have a gun. (T. 237-38).

As to Stewart's reputation for veracity in the community, Karen Hadley ("Hadley"), Brown's sister, former corrections department employee, and current courthouse employee, specifically testified, per the lower court's prior ruling, that Stewart was considered a liar. (T. 327-33, 338-39). Hadley based this testimony on information from her husband and from community members, whom she did not know, who approached her and volunteered it. (T. 334-39).

Mohamaad's and Stewart's testimony about the gun itself was also not believable. Stewart saw only the gun's butt, testifying that it

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was black. (T. 221-22). Stewart admitted having no familiarity with guns, and did not know if Brown's alleged gun was real, fake or even loaded. (T. 221-22).

Yet, Mohamaad also admittedly inexperienced with guns, (i) "thought" the gun was a .380, as he had seen his boss' gun before; (ii) "knew" it was a real gun capable of firing bullets; and (iii) was "positive" that Brown's .380 gun allegedly wielded was ***white with a red handle***. (T. 256-57, 274-75, 277, 278-79).

Mohamaad did not waver on this critical description:

Q. Now the gun was red and white, correct?

A. Ah huh.

Q. You have to say yes.

A. Yes.

Q. And you are positive about it?

A. Not red. I said the top was red and the whole gun was white.

Q. Part of the gun was red and the rest was white, correct?

A. Yeah.

Q. Are you positive about that?

A. Yeah, ***positive***.

Q. ***Are you as positive about that as you are about the gun being real?***

A. ***Yeah***. (T. 278-79; emphasis added).

These State witnesses equally could not observe and describe Brown. Stewart could identify Brown in court, but could not describe the color of his shirt. (T. 211). After the State's third prod,

Stewart stated that Brown was wearing a striped, not a solid, shirt in court that day. (T. 211). Mohamaad initially described Brown as six feet-seven inches in height, though Brown was well below that, admitting at trial that he was unsure. (T. 270-72). Mohamaad on the State's redirect could not identify Brown at all by what he was wearing in court that day. (T. 280).

As to any direct, physical evidence of Brown's possession of a gun, Mohamaad failed to recover or tell the police to recover a videotape running his Store's video camera, pointed squarely in the direction of the counter and cash register where Mohamaad and Brown had their alleged dispute that day.[5] (T. 260-64). Stephens herself never saw Brown with a gun during the fairly regular time that Brown had been staying with her. (T. 340).

Despite an admittedly "thorough search" of Stephens' one bedroom apartment, where Brown was arrested, without a search warrant, the police never found the gun or, more accurately, the alleged black and/or red and/or white gun that may have been real and/or fake and/or loaded. (T. 311-13, 345). While Officer Vandersand testified that the search was consensual (T. 311-13), Stephens testified that she did not consent, the police "came in anyway", and at least three officers searched "everything" in her one-bedroom apartment. (T. 345).

Q. Was there any part of the apartment that they did not search?

[5] Because the video camera used the same tape every day, Mohamaad testified that it taped over and erased this alleged incident. (T. 260, 264).

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A. No.

* * *

A. ***Everything***. (T. 346; emphasis added).

Officer Vandersand testified that she arrived at the scene several minutes after being dispatched and observed some six elderly Black males sitting on the north side of 59th Street, West of 7th Avenue -- on tree way, before speaking to Mohamaad. (T. 292-95). The State, over defense hearsay objections, adduced hearsay testimony about an alleged relative -- a ***non***-testifying witness -- who supposedly saw the incident:

Q. Did you come in contact with anyone else at the scene pursuant to your investigation?

A. Yes, I did.

Q. ***Did the complaining people tell you they knew the person that was involved with this situation?***

MR. JEPAWAY: Objection. Hearsay.

THE COURT: Overruled.

MS. MORALES:

Q. Did they tell you that?

A. Yes, ma'am.

Q. ***How did they know this person?***

A. It was a relative.

Q. Who was a relative?

A. ***One of the witnesses was a relative to the Defendant***. (T. 297-98; emphasis added).

The lower court ordered the State into side-bar because the arresting officer had just "testified that someone who [was] not in

court [had] identified [Brown]":

THE COURT: I mean, the fact of the matter is that [defense counsel] warned us three minutes ago about it, and you say no, no -- (T. 298).

The State apologized; and the defense moved for mistrial, which the lower court denied. (T. 303-04).

Officer Vandersand's testimony resumed. From the time Officer Vandersand was dispatched and the time that she and other officers arrested Brown, thirty minutes elapsed. (T. 310). During that time, Officer Vandersand questioned the six men, Mohamaad and Stewart; went to Ms. Stephens' apartment to arrest Brown; returned to the Store; and returned to Ms. Stephens' apartment when Brown was entering it. (T. 306-10). They ordered Brown to stop; Brown ran inside; and Ms. Stephens brought him outside for a peaceful arrest. (T. 308-09).

The defense moved for judgment of acquittal at the close of the State's case and then at the close of his case on the basis that the State failed to prove that Brown had a fully operable firearm in his possession, which motion and renewed motion the trial court denied. (T. 324-27).

During the charge conference, the defense again requested a limiting instruction -- that the jury should consider the evidence of prior felonies only to prove the convicted-felon element of this particular crime, not as proof that he actually possessed a firearm. (T. 371). The State opposed the requested instruction because this case was "no different from any other". (T. 369-70). The defense rebutted that, in this case, the potential prejudice was greater than in a "Williams Rule" case because, here, adjudged guilt from a

different proceeding was being admitted to prove an element of guilt in this proceeding. (T. 369-71). The lower court denied the requested instruction, because it would closely monitor closing arguments. (T. 371).

The State told the jury during closing argument to dismiss the defense argument, supposedly to be made, that this case was an exaggeration of a simple dispute involving no actual gun. (T. 372-74). The State told the jury that "[Stewart] said [the gun] looked like a real gun" (T. 375), when, in fact, Stewart testified that all he saw was the butt of a gun (T. 216-17), he was unfamiliar with guns (T. 216-17, 221), and he could not tell if it was real, fake or loaded. (T. 221-22).

The State emphasized that Mohamaad knew Brown well (T. 376), was afraid (T. 376), and had children (T. 376). The State twisted ***it's*** inability to carry its burden of proving that there was any gun as proof of ***Brown's*** guilt, and suggested a conspiracy in Brown's neighborhood never intimated in any testimony at trial (T. 376-77):

> . . . .The police come and, of course, do not find the evidence. The Defendant knows the police are going to be called. He has been warned by the witness, Mr. Mohamaad. I am calling the police.
>
> Now, ***use your common sense. If someone is in possession of a firearm who shouldn't be***, hears that the police are going to be called, what happens next? They go. They leave. They are not going to hang around for the police. ***They leave and they get rid of the firearm.*** Of course. And, ***in this case, that's exactly what happened. . . .***
>
> The Defendant immediately leaves. ***He is not apprehended for half an hour in the neighborhood where he is very familiar with the area where he hangs out, his girlfriend, many people he knows*** live in the area. And the gun is ***mysteriously*** not recovered. ***. . .Where ever he was,***

> ***he was able to secret away the unlawful firearm***. (T. 376-77; emphasis added).

The State then switched to Brown's status as a convicted felon, explaining that (i) Brown had been convicted of "felony crimes"; (ii) "the State needed to prove that these are two crimes"; and the "Defense stipulated that [Brown] was convicted of three other felony crimes." (T. 378).

The State inaccurately told the jury that Stewart's non-prosecution form was not evidence, and suggested, with no evidence in the record, Stewart was pressured into signing it:

> ***He was asked to sign this form*** not by the State but ***by a friend of the Defendant's*** and he works and lives in that neighborhood. And ***he doesn't want any trouble*** so he signs this form. (T. 382; emphasis added).

The State couched Mohamaad's inconsistent and contradictory testimony about (i) whether Brown revealed (T. 314-15) or wielded (T. 256-58, 273-74) a gun, if at all; (ii) the gun's incredulous red and white color (T. 278-79); (iii) Brown's originally incorrect estimated height of six feet-seven inches (T. 270-72, 278-79); and (iv) inaccuracies about Stewart's hefty beer consumption (T. 244, 265-70) as a simple "English-as-a-second-language" issue (T. 161-66):

> This is Miami, Florida, 1996, where everyone speaks a different amount of English with a different accent and different ability to convey what they mean in English. Does that mean that they are not victims or witnesses in a case? Does that mean that they are incapable of recognizing a gun which was seen before in the Defendant's hands? Absolutely not. People in Miami speak all different levels of English, and people in Miami have a different ability to discuss things. (T. 384).

As to Brown's telephone call to Stephens, the State inaccurately told the jury that the witnesses testified that Brown left the area

and never stopped. (T. 386-87). In fact, Stewart, allegedly in his apartment at that time (T. 218-20), never testified to anything of the sort. (T. 214-17); and Mohamaad testified ***only*** that Brown left the Store. (T. 256-58).

The defense never argued that this was an elaborate scheme to frame Brown. It argued that (i) the State's star witnesses -- Stewart and Mohamaad -- were liars; (ii) their testimony about the gun's color, the gun's authenticity, and the incident itself was highly inconsistent and not believable; and (iii) the police were grossly negligent in failing to recover the video tape. (T. 388-400). The defense stated that Mohamaad's failure to tell the police about a videotape that would have documented this entire incident was "incomprehensible" and "rubbish". (T. 388-89). Finally, the defense argued that the video tape was the "best evidence" and neither Mohamaad nor the State had it. (T. 392, 397).

The defense accurately argued that Mohamaad was not as certain about Brown's height of six feet-seven inches as he was that the gun was real. (T. 390-91; 270-72). The State objected, on the inaccurate basis that this was "not the evidence" (T. 391). The lower court cautioned the jury. (T. 391). The defense accurately told the jury (i) that Ms. Stephens testified that Mr. Stewart told her Brown did not have a gun (T. 349-51), and (ii) that Mohamaad did not tell Officer Vandersand about Brown's newly alleged threat to use a gun. (T. 398, 314-15). The State objected on the inaccurate basis of facts not in evidence. (T. 399). The court, again, instructed the jury. (T. 399).

The State rebutted defense closing, over repeated defense objection, by interjecting an "elaborate scheme" theory -- that defense counsel just told them that "this was a very elaborate scheme to frame the Defendant". (T. 400-04). The State further shifted its inability to recover the videotape -- for which it carried the burden -- as circumstantial proof of Brown's guilt:

> ***if this was the elaborate scheme that Mr. Jepeway has just provided you with*** (defense objection). . .let me suggest to you a few things. ***Number one would -- be a video***. The State and the police officers and the witnesses ***would have made sure to get one.*** Someone who talked about Terry Brown's height, weight, get like a grainy video going --

MR. JEPEWAY: I object. This is improper argument.

THE COURT: Go ahead. (T. 400-01; emphasis added).

The State further expanded its "elaborate scheme" rebuttal -- never suggested by the defense -- to a scheme allegedly involving the police itself, suggesting for a second time, the State's failure to find a gun as circumstantial proof of Brown's guilt:

MS. MORALES: But this was a ***big scheme*** to frame him. ***If it was, don't you think they'd have the gun, they'd throw it on him when [] they arrested him they'd smack his hands on it and bring you some fingerprint*** - -

MR. JEPEWAY: It is improper. No evidence outside the record. There is no evidence, no charge of any such activity. I object and move to strike. Move for mistrial. Move to strike.

THE COURT: Motion is denied. Go ahead.

MS. MORALES: Thank you. So, what I am telling you is, ***this was not a case that's put together in Hollywood*** with a producer and director in a casting --

MR. JEPEWAY: Your Honor, I object. It's improper.

THE COURT: Continue. Go ahead.

MS. MORALES: -- casting director where they go out and pick the perfect witnesses, witnesses that preserved the evidence, the witnesses that speak the King's English, the witnesses who perfectly recall all the things that happened. (T. 401-02, 404; emphasis added).

The State's argument outside the evidence, over defense objection, continued. "I submit to you that the gun is very real. That's why it was hidden. It was hidden because it was a real gun." (T. 403). The State further argued outside the record and implicated Brown's failure to testify:

> The ***one person*** who came to Court to tell you that the State's witness, Mr. Stewart, is a liar is the Defendant's sister. She wouldn't know Mr. Stewart if he stomped on her toe. (T. 379; emphasis added).
>
> * * *
>
> There is no evidence that this man is not anything but truthful ***except for this -- this witness*** who is this elderly sister of the Defendant who doesn't want you all to find him guilty. (T. 380).
>
> * * *
>
> And Sherry Stephens, again, it's the Defendant's girlfriend. (T. 380).
>
> * * *
>
> So, it is another way for you to see that the phone witnesses are here only for one reason, and that's because they are so personally related to the Defendant that they will say and do anything to make sure that you all don't listen to the evidence in this case, the people who are there and the people who saw and know what happened. (T. 387).
>
> * * *
>
> Mr. Mohamaad is not a liar, and I am going to ask you to use your comment [sic] sense, and just look at the evidence.
>
> There is no evidence to suggest that, ***except for Defense counsel's statement***, and we all agree what Defense

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counsel's says is not evidence. (T. 401; emphasis added).

Defense counsel objected, moved to strike and moved for mistrial, which the lower court denied. (T. 402).

The State's allusions to Brown's failure to testify continued:

> We know that ***the only witness*** that could tell you these are inconsistent statements by the witness, Mr. Stewart, are the Defendant's girlfriend -- and ***isn't it interesting*** that everyone is now friends with someone who saw the crime after the crime occurs. (T. 404-05; emphasis added).

The State continued to shift the burden of proof and twist the evidence:

> [A]ny nolle pros forms, ***it is just not evidence.*** It's evidence of the fact that Mr. Stewart's a nice guy who lives in the neighborhood who doesn't want any trouble. (T.405).

* * *

> This case is about ***judging the acts*** of the Defendant. That's what this case is all about. . . .

MR. JEPEWAY: Your Honor, I object.

THE COURT: Overruled.

MS. MORALES: . . .And the State is not required to prove this case with any special evidence.

* * *

> ***The best evidence is the evidence that's here in court.*** Did the State prove the case beyond a reasonable doubt, ***and is that doubt reasonable?*** You can attack --

MR. JEPEWAY: I object. I object.

THE COURT: Sustained. You need to rephrase your comment.

MR. JEPEWAY: Move to strike. Request a curative instruction.

THE COURT: ***I am going to read the jury instructions in a couple of minutes***.

MR. JEPEWAY: Excuse me? (T. 406; emphasis added).

The lower court reasoned in side-bar that the State's definition of reasonable doubt was a "harsher standard, but the fact of the matter is that a doubt that you can attach a reason to is not Florida law", and told the State to rephrase it. (T. 407). The defense moved for mistrial again, which the lower court denied. (T. 407).

The State resumed its argument outside the record telling the jury, over continuing objection from the defense, that (i) "the ***fact*** is, we couldn't provide you with the gun because [Brown] hid it", and "***I am confident*** that once you evaluate the evidence and you understand ***all the realities*** of the case (objection omitted) you will come back with a verdict that rings true of guilty. . . ." (T. 407-09; emphasis added).

The trial court instructed the jury; defense counsel renewed, yet again, his request for a modified "Williams Rule" limiting instruction (T. 409-19), which the trial court denied, again, on the basis of the closing arguments and the lack of any relationship of these prior convictions for robbery and burglary to firearms. (T. 418). The jury deliberated and returned a verdict of guilty as charged. (T. 425-26).

The defense moved for new trial on various bases, of which the introduction of five prior convictions and the risk of an unfairly prejudicial effect on the jury and refusal to give curative instructions regarding these prior convictions are critical to this petition for discretionary review. (R. 48-49).

SUMMARY OF THE ARGUMENT

It would be disingenuous to argue the law requires that an accused enjoy a perfect trial. It is accurate to state that an accused is entitled to presumed innocence and a fair, impartial trial. These legal precepts, though lofty, possess an historical pedigree dating back to our Bill of Rights that, to date, remain good law. The State deprived him of these rights. On that basis, he is entitled to a new trial.

The State was allowed to reject Brown's offer to stipulate to his convicted-felon, legal status and present, over defense objection, records of two prior felony convictions likely to support a conviction on an improper basis, and reveal an additional three, in violation of the lower court's prior ruling. Under § 90.403, this evidence was unfairly prejudicial because it had the effect, unnecessarily, of improperly drawing the jurors' attention away from the State's substantive burden to prove this crime to the Defendant's de facto burden to disprove his propensity for bad acts. Brown was also erroneously denied the right to a limiting instruction to mitigate that prejudice. In light of the recent decision in Old Chief v. United States, 519 U.S. ___, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), applying a rule of evidence to a felon-in-possession statute virtually identical to this State's, the controlling precedent of Parker v. State, 408 So. 2d 1037 (Fla. 1982), should be re-examined, clarified and, to the extent necessary, overruled.

Allowing the jury to learn of Brown's five prior felonies was also prejudicial considering the State's weak circumstantial evidence, the State's improper closing argument outside the record

and argument violating this accused's right to remain silent and his presumption of innocence. The State implicitly twisted non-evidence that the State carried the burden of getting in the first place -- a gun and a videotape -- into proof of the Defendant's guilt. The State brought to the jury's attention the Defendant's failure to testify, represented speculation as fact, misstated the evidence adduced at trial, exceeded fair reply, and misled the jury as to its burden of proof, all of which aggravated the prejudicial error already resulting from the revelation of five prior felony convictions to Brown's detriment.

ARGUMENT

I.

WHERE THIS DEFENDANT OFFERED TO STIPULATE TO THE "CLASSIFICATION" ELEMENT OF THIS CRIME -- LEGAL STATUS AS A CONVICTED FELON -- THE ADMISSION OF TWO PRIOR CONVICTIONS INTO EVIDENCE AND REFERENCE TO AN ADDITIONAL THREE WAS PREJUDICIAL AND CONSTITUTED AN ABUSE OF THE LOWER COURT'S DISCRETION UNDER § 90.403. THE STATE'S EXHIBIT ATTACHING THE ACTUAL NAMES OF THE OTHER THREE, IN VIOLATION OF THE LOWER COURT'S RULING, WAS ALSO PREJUDICIAL.

A. Prior Convictions Solely to Satisfy a Felon-in-Possession Statutory Eligibility Requirement Are Unfairly Prejudicial Under Rule 403, Fed. R. Evid., and § 90.403, Fla. Stat. (1997).

> More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with a crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of the evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.

See Irvin v. Dowd, 366 U.S. 717, 729, 81 S. Ct. 1639, 1646, 6 L. Ed. 2d 751 (1961) (Frankfurter, J., concurring). The most basic objective behind this State's formulation of its own criminal process, therefore, is that this Defendant's conviction not be the product of procedures that undermine conviction reliability or the people's confidence in the procedures used to arrive at that conviction. That necessarily means that this prosecution and this defense must not merely have had their respective fair opportunities to present relevant, competent evidence.

It also means that the resulting verdict must have been an honest one. That means a verdict that gave rise to a conviction

based on this jury's ***dis***passionate evaluation of the quality of the State's evidence presented against this Defendant, Mr. Terry Kenneth Brown, to prove beyond and to the exclusion of every reasonable doubt his criminalized act of possessing a firearm; rather than some pro-active conviction based on this jury's generalized assessments of Mr. Brown's moral deserts within an ***un***reasonable degree of certainty. See Shannon v. United States, 512 U.S. 573, 579, 114 S. Ct. 2419, 2424, 129 L. Ed. 2d 459 (1994) ("The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged."); Zafiro v. United States, 506 U.S. 534, 540, 113 S. Ct. 933, 938, 122 L. Ed. 2d 317 (1993) ("An important element of a fair trial is that a jury considers only relevant and competent evidence bearing on the issue of guilt or innocence.") (quoting Bruton v. United States, 391 U.S. 123, 131 n.6, 88 S. Ct. 1620, 1625, 20 L. Ed. 2d 476 (1968)); see also, e.g., Montana v. Egelhoff, __ U.S. __, 116 S. Ct. 2013, 2016-17, 135 L. Ed. 2d 361 (1996); United States v. Lancaster, 96 F.3d 734, 744 (4th Cir. 1996), cert. den., __ U.S. __, 117 S. Ct. 967, 136 L. Ed. 2d 852 (1997); United States v. Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993).

Statutes like the unlawful possession of a firearm statute at issue here, § 790.23, Fla. Stat. (1995), that contain the element of prior conviction status as a substantive criminal element are definitionally problematic. This is so because they carry the inescapable risk of criminalization based on status, not conduct.[6]

[6] See, e.g., State v. Emmund, 698 So. 2d 1318, 1320 (denying State's petition for certiorari review of lower court order granting

Under these statutes, what procedure is "fair" becomes obscure because the competing constitutional safeguards, ***all*** drafted for and intended to inure to the direct benefit of the accused, work a direct benefit to the State under these unique prior conviction statutes. More particularly, the Fifth Amendment of the United States Constitution's requirement that the government prove a defendant's guilt beyond a reasonable doubt and the Sixth Amendment's mandate that a conviction be had by jury determination of the State's proof of each and every element of the alleged crime are supposed to safeguard the rights of the accused. See United States v. Gaudin, 515 U.S. 506, 522-23, 115 S. Ct. 2310, 2320, 132 L. Ed. 2d 444 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642 (1977) ("a trial judge is prohibited from entering a judgment of conviction or directing a jury to come forward with such a verdict"). Yet, as part of that "package of rights", always requiring proof of an accused's prior adjudged guilt, on the basis that it is a substantive element of a crime, erodes these principals when balanced against another fundamental safeguard constitutionally guaranteed an accused before a jury of his peers -- his presumed

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motion in limine, excluding solely "violent career criminal" terminology of § 790.235, Fla. Stat. (1995), because focus of case should remain on facts actually in dispute: defendant's possession of firearm on date charged); Lowder v. State, 589 So. 2d 933, 935 (Fla. 3d DCA 1991) ("every defendant has the right to be tried based on the evidence against him, not on the characteristics or conduct of certain classes of criminals in general").

innocence.

Managing that risk, not certainty, of conviction based on improper assessments and unfair inferences from prior convictions evidence is the purpose underlying Rule 403, Fed. R. Evid.,[7] and this State's own virtually identical construct, § 90.403, Fla. Stat. (1995). This petition turns on the need for this Court's pronouncement of what is the proper procedural application of § 90.403, Fla. Stat., (1995), to this felon-in-possession statute, in light of the United States Supreme Court's recent pronouncement in Old Chief v. United States, analyzing the federal felon in possession statute, 18 U.S.C. § 922(g)(1), and Rule 403, virtually identical to § 790.23, Fla. Stat. (1995), and § 90.403, Fla. Stat. (1995), respectively.

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[7] The Advisory Committee Notes recognize that certain circumstances call for "the exclusion of relevant evidence which is of unquestioned relevance", including risk of unfair prejudice and misleading the jury:

> 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.
>
> * * *
>
> In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. . . .The availability of other means of proof may also be an appropriate factor.

Fed. R. Evid. 403, advisory committee notes.

B. *Parker v. State*'s Affirmation of the Lower Court's Ultimate Discretion to Exclude Relevant, But Unfairly Prejudicial, Evidence Has Gotten Lost in Translation.

This is so because some fifteen years ago, this Court ruled in Parker v. State, 408 So. 2d at 1038, that the State was entitled to reject an offer to stipulate and, instead, prove a defendant's prior conviction as an essential element of unlawful possession of a firearm under § 790.23, Fla. Stat. (1977). Parker, 408 So. 2d at 1038, cited this Court's earlier decision in Arrington v. State, 233 So. 2d 634 (Fla. 1970), which held that the State was not obligated to stipulate to an essential element of a crime.

In Arrington v. State, 233 So. 2d at 635, that defendant offered to stipulate to the identity of the corpse and the cause of death to prevent the State from presenting evidence on these issues to the jury. The State did not accept the defendant's offer to stipulate and the defendant insisted that the lower court's acceptance of her offer precluded, nevertheless, the State's presentation of the evidence on these particular stipulated issues. Arrington v. State, 233 So. 2d at 637. The defendant argued that the lower court's later admission of the State's evidence on the cause of death, against that stipulation, was error. This Court reasoned that, until the State voluntarily accepted a defendant's offer to stipulate, the offer remained just that, distilling the issue of stipulations to:

> [t]he question [being] not whether a stipulation should be accepted, but rather whether or not the presentation of evidence would violate standards of relevancy and materiality and the like and whether it would be merely cumulative or inflammatory.

Arrington v. State, 233 So. 2d at 637. The "check on the

prosecution's procession of evidence", this Court stated, would be not the forcing of stipulations, but "[t]he submission of evidence [still] subject to the safeguard of objections raised on traditional grounds." Arrington v. State, 233 So. 2d at 637.[8]

Parker v. State reaffirmed Arrington v. State's general principle against involuntary stipulations. It also reaffirmed the lower court's discretion to include or exclude relevant evidence on traditional grounds. Parker, 408 So. 2d at 1038. Parker imposed limits, however, on that lower court discretion -- to admit evidence only if it was far more relevant than prejudicial, referencing the then recently codified § 90.403, Fla. Stat. (1979). Consistent with both Rule 403 and § 90.403 principles, this Court explicitly stated that prior conviction evidence would ***not*** be admissible where that evidence's "probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless presentation of cumulative evidence". Parker, 408 So. 2d at 1038. Yet, this Court also ruled that:

> the State may refuse a defendant's offer to stipulate to a prior felony conviction and prove the conviction by the use of a certified copy of the judgment when the fact of the conviction [was] an essential element of the crime charged.

Parker v. State, 408 So. 2d at 1038.

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[8] The prosecution in Arrington acquiesced to the lower court's announcement that the defendant's offer to stipulate had been accepted, but this Court ultimately found that the lower court did not abuse its discretion in allowing this cause-of-death evidence where also presented to prove a different, non-stipulated issue: premediation. Arrington v. State, 233 So. 2d at 637.

While recognizing the State's right to refuse an offer to stipulate, therefore, this Court still explicitly recognized and preserved the lower court's ultimate "trump card" -- to exclude this evidence, nevertheless, after § 90.403 judicial balancing. This Court did not reach the question of the procedure for weighing the evidentiary alternative of the defendant's offer to stipulate to his prior felony conviction under § 90.403 against the judgment of conviction itself once the lower court sought to exclude this evidence pursuant to objections raised on traditional grounds.

This case demonstrates how Parker v. State's explicitly preserved § 90.403 balancing has gotten lost in translation. During this trial, the proponent of the evidence of a prior felony -- the State -- used Parker v. State to control, throughout the course of trial, whether there would be any stipulation and whether the lower court's discretion to engage in § 90.403 balancing to exclude this evidence on traditional grounds would even be triggered. (T. 6-12, 182-84, 285-86). The State also relied at trial on Parker v. State to present two judgments of convictions to the jury, educate the jury by way of instruction about another three convictions, and present as a trial exhibit, in violation of the lower court's ruling, the actual names of ***all five*** of the prior felonies, including their severity and the number of points added. (States Ex. 3 at 6).

Under the U.S. Supreme Court's latest construction of Rule 403, Fed. R. Evid., within the context of a felon-in-possession statute virtually identical to that of this State, and application of Parker v. State's exclusion on traditional grounds, allowing the State to

refuse an offer to stipulate and present two judgments of prior felony convictions, list in a trial exhibit the other three, and reveal to the jury that this Defendant had a total of five prior felonies, was an abuse of the lower court's discretion and highly prejudicial. That is at the heart of this petition.

C. The United States Supreme Court's Recent Pronouncement on the Procedural Application of Rule 403, Fed. R. Evid., to Prior Felony Convictions under a Felon-In-Possession Statute Virtually Identical to That of Florida Compels Re-Examination or Clarification of *Parker v. State*.

In January of 1997, the United States Supreme Court construed the federal analogs of § 90.403 and § 790.23, Fla. Stat. -- Rule 403 and 18 U.S.C. § 922(g)(1),[9] respectively -- to hold that, when the prior judgment record was offered "solely to prove the element of prior conviction", allowing the full record of the prior judgment and spurning a defendant's offer to admit its legal status as convicted felon constituted an abuse of discretion under Rule 403, Fed. R. Evid., "when the name or nature of the prior offense raises the ***risk*** of a verdict tainted by improper considerations." See Old Chief v. United States, 519 U.S. ___, 117 S. Ct. 644, 647, 650-51 nn.5-7, 136

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[9] Section 922(g)(1) makes it unlawful for anyone "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess in or affecting commerce, any firearm. . . ." 18 U.S.C. § 922(g)(1) (1997).

Section 921(a)(20) defines the requisite legal status of the defendant as a convicted felon as:

> a crime punishable by imprisonment for a term exceeding one year. . .exclude[s] any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices [and]. . .any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. 18 U.S.C. § 921(a)(20) (1997).

L. Ed. 2d 574 (1997) (emphasis added) (the decision is sprinkled with footnotes giving deference to the trial judges and parties and limiting its holding to "cases involving proof of felon status").

In that case, Petitioner Johnny Lynn Old Chief ("Petitioner Old Chief") was charged with, among other things, unlawful possession of a firearm by a convicted felon. Old Chief, 117 S. Ct. at 647. Petitioner Old Chief had been previously convicted of assault causing serious bodily injury. Old Chief, 117 S. Ct. at 647. He did not testify at trial.

Petitioner Old Chief offered to stipulate to § 922(g)(1)'s prior conviction element, and argued that his willingness to stipulate to this element of the offense rendered that evidence inadmissible under Rule 403, Fed. R. Evid. See Old Chief, 117 S. Ct. at 648. The Government refused to stipulate, insisting on its long established right to prove all elements of the charged offense. The trial court let the Government introduce the judgment of the prior conviction for assault, and gave Petitioner Old Chief's requested limiting instruction. See Old Chief, 117 S. Ct. at 646, 657. A jury found Petitioner Old Chief guilty.

The Supreme Court rejected the Ninth Circuit Court of Appeals' position that, irrespective of "the defendant's offer to stipulate, the government [was] entitled to prove a prior felony offense through the introduction of probative evidence." See Old Chief, 117 S. Ct. at 649. That Court also rejected Petitioner Old Chief's position that the prior conviction was inadmissible under Rule 401 and 402 relevancy analyses, because the name of the prior conviction was, in

fact, exceedingly relevant. See Old Chief, 117 S. Ct. at 649-50, n.4 650.

> If, then, relevant evidence is inadmissible in the presence of other evidence related to it, its exclusion must rest not on the ground that the other evidence has rendered it 'irrelevant,' but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding. See Old Chief, 117 S. Ct. at 650.

The Court concluded that under Rules 403 and 404(b), evidence of a prior conviction was inadmissible because it carried "the prejudicial risk of misuse as propensity evidence," triggering Rule 403 balancing "by comparing evidentiary alternatives." See Old Chief, 117 S. Ct. at 651-52. In comparing these evidentiary alternatives within the "peculiarities of the element of felony-convict status and of admissions and the like when used to prove it," the evidence of the conviction itself and the admission only differed in "the risk [of unfair prejudice that was] inherent in the [conviction] and wholly absent from the [admission]." Old Chief, 117 S. Ct. at 655 (emphasis added). Therefore, because:

> ***the fact of the qualifying conviction is alone what matters under the statute***. . . .[p]roving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and ***its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution,*** to confuse or offend or provoke reproach.[10]

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[10] Quoting United States v. Tavares, 21 F.3d 1, 4 (1st Cir. 1994) (en banc), that:

> [a] defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, see 16 U.S.C. § 3372, to the most aggravated murder[,]

the U.S. Supreme Court reasoned that:

> the most the jury needs to know is that the conviction

Old Chief, 117 S. Ct. at 655 (emphasis added).[11]

On that basis, the U.S. Supreme Court found that the evidence of the prior conviction of assault likely supported that Old Chief jury's current conviction on an improper basis. See Old Chief, 117 S. Ct. at 655. The admission of the prior conviction was, accordingly, an abuse of the trial court's discretion, not under Rules 402, but Rule 403. See Old Chief, 117 S. Ct. at 655.[12] While

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admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possession of a gun.

Old Chief, 117 S. Ct. at 655.

That Court echoed the First Circuit's original position in Tavares that:

[t]he [felony] status element is 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 punishment of over a year's imprisonment. . .[and the reality that] the predicate crime is significant only to demonstrate status, [such that] a full picture of that offense is -- even if not prejudicial -- beside the point.

Tavares, 21 F.3d at 4.

Justice Stewart's example in Scarborough v. United States, 431 U.S. 563, 580, 97 S. Ct. 1963, 1971, 52 L. Ed. 2d 582 (1977), of the bookkeeper who owns a hunting rifle, is convicted of embezzlement, and does not turn over his rifle, cuts to the evidentiary problem inherent to felon-in-possession statutes.

[11] A precursor to 18 U.S.C. § 922(g)(1) was enacted in the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as 18 U.S.C. § 1202 (a)).

The statutory language [of § 1202(1)] is sweeping, and its plain meaning is that ***the fact of a felony conviction*** imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action. . . .

Lewis v. United States, 445 U.S. 55, 60-61, 100 S. Ct. 915, 918, 63 L. Ed. 2d 198 (1980) (emphasis added).

The current version of § 922(g) was a part of the Firearm Owners Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (1986).

[12] While Old Chief was a 5:4 decision, the United States Supreme Court's resolution of the procedural framework under Rule 403 for

Old Chief did not address the issue of multiple convictions present in this case, it follows that where evidence of one prior conviction carries the risk of unfair and unnecessary prejudice within the peculiarities of this convicted-felon statute, multiple prior convictions logically multiply those risks. And that interpretation of Rule 403 and § 90.403 is consistent with both the explicit limitations on unfairly prejudicial[13] evidence in both Old Chief and

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analyzing a defendant's offered stipulation or admission of a prior felony under this felon-in-possession statute was not unusual or earth-shattering. Even before the U.S. Supreme Court decided Old Chief, none of the circuits allowed the Government to present proof of the conduct underlying the prior felony. A majority of federal courts had already barred the Government from proving the nature of a defendant's prior felony where the defendant offered to stipulate or suggested that the admission of the prior felony against the offered stipulation constituted an abuse of the lower court's discretion. See United States v. Tavares, 21 F. 3d at 5; United States v. Gilliam, 99 F. 2d 97, 102-03 (2d Cir.), cert. den., 510 U.S. 927, 114 S. Ct. 335, 126 L. Ed. 2d 280 (1993); United States v. Rhode, 32 F.3d 867, 870-71 (4th Cir. 1994), cert. den., 513 U.S. 1164, 115 S. Ct. 1130, 130 L. Ed. 2d 1092 (1995); United States v. Poore, 594 F.2d 39, 40-43 (4th Cir. 1979); United States v. Palmer, 37 F.3d 1080, 1084-85 (5th Cir. 1994), cert. den., 514 U.S. 1087, 115 S. Ct. 1804, 131 L. Ed. 2d 729 (1995); United States v. Wacker, 72 F.3d 1453, 1472-73 (10th Cir. 1995); United States v. O'Shea, 724 F.2d 1514, 1517 (11th Cir. 1984); United States v. Jones, 67 F.3d 320, 322-24 (D.C. Cir. 1995). Three circuits found that the Government was not obligated to accept such a stipulation. See United States v. Hudson, 53 F.3d 744, 747 (6th Cir. 1995); United States v. Burkhart, 545 F.2d 14 (6th Cir. 1976); United States v. Flenoid, 718 F.2d 867, 868 (8th Cir. 1983); United States v. Breitkreutz, 8 F.3d 688, 690-92 (9th Cir. 1993). The Seventh Circuit took the position that this issue was to be resolved on a case-by-case basis. See United States v. Lomeli, 76 F.3d 146, 150-51 (7th Cir. 1996). The Third Circuit had found no need to resolve this issue. See United States v. Jacobs, 44 F.3d 1219, 1224 (3d Cir.), cert. den., 514 U.S. 1101, 115 S. Ct. 1835, 131 L. Ed. 2d 754 (1995).

[13] Old Chief, 117 S. Ct. at 651, cited 1 J. Strong, MCCORMICK ON EVIDENCE 780 (4th ed. 1992) for guidance on the kind of prior felony evidence that would constitute a conviction on an improper basis:

> Rule 403 prejudice may occur, for example, when 'evidence of convictions for prior, ***unrelated crimes*** may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case'. (Emphasis added).

Parker.[14]

Like the district court in Old Chief, this trial court abused its discretion by allowing the State to introduce two judgments of Mr. Brown's prior convictions, reference the remaining three, under a virtually identical felon-in-possession statute, § 790.23, Fla. Stat., and evidentiary standards, and to refuse to even give a limiting instruction otherwise guiding the jury on the narrow purpose for which the evidence was to be presented. § 90.403, Fla. Stat. See Laws 1971, c. 71-318, § 1 (showing intent of Florida Legislature to make § 790.23, Fla. Stat., prior felony a generic element by deleting from subsection (2) provision that section not apply "to a person convicted of a felony for antitrust violation, unfair trade practice, restraints of trade, nonsupport of dependents, bigamy, or other similar offense"); see generally, Laws 1993, c. 93-416 (substantially rewording § 790.23, yet still evincing legislative intent that mere fact of prior felony, rather than felony name or conduct underlying it, remains operative).

The lower court denied Brown's offer to stipulate to the Information and to his prior felonies; it denied his repeated

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[14] Old Chief and Parker do not address whether the jury, when a defendant stipulates to a prior felony, should be instructed that this element of the crime has been proven. Compare United States v. Mason, 85 F.3d 471 (10th Cir. 1996) (no trial court error to instruct jury that prior felony and interstate commerce elements of federal felon-in-possession statute been satisfied where defendant stipulates to facts establishing those elements) with United States v. Jones, 65 F.3d 520, 522 (6th Cir.) (such instruction erroneous because trial judge may not "override or interfere with juror's independent judgment") (citation omitted), vacated, 73 F.3d 616 (6th Cir. 1995), conviction aff'd, 108 F.3d 668 (6th Cir. 1997) (finding no need to decide whether such instruction erroneous because defendant did not object, suffered no prejudice and error not plain).

requests for a modified "Williams Rule" limiting instruction at the time the evidence was presented and at the time of instructing the jury before their deliberations; it allowed the State to present two judgments of prior convictions of robbery and burglary, reveal to the jury an additional three, and present the conviction names and their additional points in one of its trial exhibits.

This reference to five prior felony convictions, against a rejected offer to stipulate, carried the singular "prejudicial risk of misuse as propensity evidence", and the additional failure to give any limiting instruction on the narrow purpose behind this evidence only aggravated that risk. Lest there be any doubt concerning the momentum behind these convictions as propensity evidence, the State's selection of the two judgments that the lower court would allow it to present to the jury was telling.[15]

Every federal court deciding this issue since Old Chief, under this unique felon-in-possession statute clarifying the application of Rule 403's "unfair prejudice" analysis to the federal felon-in-possession by a convicted felon, has construed Old Chief to mean that a defendant's offer to stipulate renders the judgment of the felony conviction, when offered solely to prove the element of felon status,

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[15] It is noteworthy that, out of the five convictions, the State selected the convictions for robbery and burglary, which, depending upon the surrounding circumstances, are associated with force against a person and weapons, and stipulated to those for possession and sale of cocaine. Those robbery and burglary convictions also most closely resembled Mr. Stewart's and Mr. Mohamaad's versions, albeit inconsistent and conflicting, of the facts surrounding Mr. Brown's alleged possession of a firearm in the first place.

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of discounted probative value and excessive unfair prejudice. See United States v. Gonzalez, 110 F.3d 936, 944-45, 947 n.1 (2nd Cir. 1997) ("...in the wake of [Old Chief] the government must accept a defendant's offer to stipulate to the [prior felony]", also discussing the issues raised by the jury instructions in the context of that stipulation); United States v. Jackson, 124 F.3d 607, 617 & n.8 (4th Cir. 1997) (citing Old Chief, "[b]y stipulating to his [prior unrelated] felon status, Jackson effectively prevented the Government from presenting any additional evidence of his prior conviction"); United States v. Taylor, 122 F.3d 685, 688 (8th Cir. 1997) (district court's denial of defendant's motion in limine and, instead, exposing jury to name and nature of earlier manslaughter offense was abuse of discretion in light of Old Chief, but error harmless where Government retrieved the gun and defendant admitted possession); United States v. Horsman, 114 F.3d 822, 824, 827-28 (8th Cir. 1997) (same); United States v. Blake, 107 F.3d 651, 652-53 (8th Cir. 1997) (reversing lower court's judgment and remanding for further proceedings because "[Old Chief] reverses prior well-established Eighth Circuit law, and lends support to [that defendant's] argument that it is an abuse of discretion to admit the record of convictions [for felonies of burglary, stealing, driving while intoxicated, and stealing a motor vehicle] when an admission is available"); United States v. Hernandez, 109 F.3d 1540, 1541-42 (9th Cir. 1997) (citing Old Chief, Ninth Circuit ruled that "district court abused its discretion in admitting [judgment of conviction for burglary] despite the offer to

stipulate to a felony conviction."); United States v. Wilson, 107 F.3d 774 (10th Cir. 1997) ("[Old Chief] held that because the prior conviction was relevant only to prove an element of § 922(g)(1), and because the defendant had offered to stipulate to the prior conviction, 'the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.'"); see, e.g., generally United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir. 1997) (case where prejudicial evidence of letter written by defendant while in prison far more probative to legitimate issue of witness intimidation).[16]

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[16] Old Chief explicitly limited its holding to proof of felon status cases. Old Chief, 117 S. Ct. at 655. Four States have explicitly considered Old Chief. Michigan has considered this issue specifically in the context of the felon-in-possession statute, but that defendant, as a practical matter, did not properly preserve the issue. People v. Mayfield, 562 N.W.2d 272, 275 (Mich. Ct. App. 1997) (citing Old Chief, court ruled that, had defendant convicted under Michigan felon-in-possession weapon statute "offered to concede the fact of prior conviction, admission of evidence beyond such a stipulation may have constituted prejudicial error", implicitly under their respective analog of Rule 403). Three have considered this issue in contexts other than this felon-in-possession statute. See State v. Hamilton, 486 S.E.2d 512, 513, 515 (S.C. Ct. App. 1997) (declining to apply Old Chief to first degree burglary statute where statute specifically required prior record of two or more convictions for burglary or housebreaking, rather than "generic prior felony conviction" contained in the statute in Old Chief, but reaffirming that a limiting instruction should accompany the introduction of such evidence); People v. Atkinson, 679 N.E.2d 1266, 1268-70 (Ill. App. 1997) (in analyzing Old Chief, court held that trial court abused its discretion in allowing "State to give the name of the prior offenses when impeaching defendant" convicted under burglary statute, implicitly under their respective analog of Rule 403, and that error not harmless even where defendant shown to be present at scene of crime); State v. Jackson, 567 N.W.2d 920 (Wis. App. Ct. 1997) (trial court abused discretion in allowing State to introduce letters from defendant, ultimately convicted under Wisconsin's statutes for first-degree sexual assault, kidnapping while armed, robbery and threats to

Old Chief's and its progeny's construction of Rule 403, virtually identical to § 90.403, in the context of a virtually identical felon-in-possession statute is compelling precedent in Florida that has logical application to this case where, notwithstanding an offer to stipulate, the jury learned that this accused was a five-time convicted felon. See State ex rel. Packard v. Cook, 108 Fla. 157, 146 So. 223 (1933) (well settled that state statute patterned after language of its federal counterpart will take same construction in Florida courts as its prototype so long as such construction comports with spirit and policy of Florida law concerning same subject); Pasco Co. Sch. Bd. v. Florida Pub. Employees Relations Comm'n, 353 So. 2d 108, 116 (Fla. 1st DCA 1977) (same); compare generally James v. Illinois, 493 U.S. 307, 110 S. Ct. 648, 107 L. Ed. 2d 676 (1990) (construing exclusionary rules of evidence in context of Fourth Amendment constitutional values at risk); Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991) (construing § 90.403 where its application "otherwise precludes a defendant from presenting a full and fair defense, the rule must give way to the defendant's constitutional rights"); Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980) (though district court of appeal lacks authority to overrule or modify either conclusions of fact or interpretation of law reached by Florida supreme court, it does have the power to pass

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injure as repeater, written to girlfriend while he was in jail to impeach girlfriend's sister, because even assuming those letters were remotely relevant, they were unfairly prejudicial explicitly under their respective analog of Rule 403, § 904.03, Wis. Stat. (1995)), rev. granted, 569 N.W.2d 589 (Wis. Sept. 2, 1997)).

on issues raised in subsequent proceedings that were not necessarily previously resolved); Teemer v. State, 615 So. 2d 234 (Fla. 3rd DCA 1993) (same as Lewis v. State); Washington Fed. Savings & Loan Ass'n of Florida v. del Portillo, 419 So. 2d 805, 806 (Fla. 3rd DCA 1982) (recognizing United States Supreme Court case of Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982) overruled state case law on same issue); Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984) (Fourteenth Amendment's due process guarantee includes right to fair trial); Brown v. Wainwright, 459 F. Supp. 244 (M.D. Fla. 1978) (same as Boykins v. Wainwright); with Maness v. Wainwright, 512 F.2d 88 (5th Cir. 1975) (state evidentiary rules need not mirror federal evidentiary rules to pass constitutional due process muster).

Old Chief's construction of Rule 403 is also persuasive authority where, as here, this State's courts regularly look to the construction of Federal Rules of Evidence to construe Florida's Evidence Code analogously. See, e.g., generally Morton v. State, 689 So. 2d 259, 262-64 (Fla. 1997) (recently amended § 90.608, Fla. Stat. (1991), with Rules 403 and 607, Fed. R. Evid.); Hitchcock v. State, 413 So. 2d 741, 744 (Fla.), cert. den., 459 U.S. 960, 103 S. Ct. 274, 74 L. Ed. 2d 213 (1982) (analyzing § 90.403); Roby By and Through Roby v. Kingsley, 492 So. 2d 789 (Fla. 1st DCA 1986) (same).

Additionally, under the plain language of §§ 90.403 and 90.404(2)(a), Fla. Stat. (1997), and Rule 404, Fed. R. Evid., a defendant's offer to stipulate to a prior conviction that the State seeks to prove, though relevant, should render the prior conviction

judgment inadmissible unless and until it is directed to a valid purpose ***other than*** proof of a prior conviction.[17] See, e.g., generally United States v. Taylor, 17 F.3d 333 (11th Cir. 1994), cert. den., 513 U.S. 950, 115 S. Ct. 364, 130 L. Ed. 2d 317 (1994) (evidence of prior convictions inadmissible to prove the issue to which the defendant offers to stipulate and which the government seeks to prove); Gore v. State, 599 So. 2d 978 (Fla.), cert. den., 506 U.S. 1003, 113 S. Ct. 610, 121 L. Ed. 2d 545 (1992); Sumpter v. State, 612 So. 2d 635 (Fla. 4th DCA 1993); see, e.g., generally Williams v. State, 662 So. 2d 419, 420 (Fla. 3rd DCA 1995); State v. Richardson, 621 So. 2d 752 (Fla. 5th DCA 1993). A stipulation makes that "material fact" no longer one "at issue."

Under Old Chief and its progeny, it is illogical, unfair and an abuse of discretion to (i) reject an offer to stipulate to a categorical element of convicted-felon status and (ii) narrowly apply the § 90.403 balancing test to a § 790.23 case to the State's direct benefit, (iii) merely because the State seeks to introduce a prior offense for the stated purpose of establishing legal status and the

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[17] Three sources in the Florida Evidence Code protect against unfairly prejudicial evidence of a prior conviction where a criminal defendant offers to stipulate to that conviction. First, § 90.404(2) that only allows "[s]imilar fact evidence of other crimes, wrongs, or acts. . .when relevant to prove ***a material fact in issue***. . .but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." If this evidence is admitted under § 90.404, the court absolutely must give a limited instruction when one is requested. Second, § 90.402 only allows evidence which is relevant, as enforced through § 90.104. Third, § 90.403 requires the trial court to assess the effects of the evidence and determine whether the probative value of the evidence substantially outweighs its potential for unfair prejudice.

improper result of "hooking" the jury with propensity evidence. When Brown offers to stipulate, his stipulation is not merely exceedingly relevant to prove the specific element of convicted-felon status, but conclusive on the issue entirely.[18] Under those circumstances, Brown's stipulation "does one better" than the State's evidence of multiple, prior convictions, and does so while simultaneously preserving the § 90.403 balance against the improper externalities of unfair prejudice. Brown is entitled, therefore, to a new trial because the lower court's admission of these prior convictions, rejection of Brown's offer to stipulate, and refusal to give a limiting instruction constituted an abuse of discretion.

D. Admitting Mr. Brown's Prior Convictions, Presenting the Names of All Five Convictions to the Jury, and the Lower Court's Refusal to Give a Limiting Instruction Were Prejudicial Given the State's Weak, Circumstantial Evidence and Other Trial Errors.

Even more prejudicial than Old Chief, the jury evaluating Mr. Brown's case ultimately learned the names of all five convictions and never received guidance from a limiting instruction. It is far likelier here than in Old Chief that these five convictions supported Brown's current conviction on an improper, rather than proper, basis. The evidence supporting Brown's guilt for unlawful possession of a firearm was weak and suspect, under the most favorable of interpretations. The alleged victim signed a non-prosecution form;

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[18] It may also be said that it is because of this indubitable relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciably probative value, but because it has too much.
1 Wigmore, Evidence, § 194 at 646 (3d ed. 1940).

the State never found a gun; never produced witnesses that could agree on the gun's description in color or in ***any other*** material respect; never produced witnesses that could consistently state under oath whether Brown even had a real gun and, if so, the manner in which he supposedly did or did not wield it; and never recovered the video that would have documented this crime, had it actually occurred. Additionally, three of the State's four witnesses, including Officer Vandersand, were impeached.

The failure to exclude this prior conviction evidence adversely affected Brown's presumption of innocence of the only criminal conduct in ***this*** case -- possession of a firearm. The State cannot carry its burden of showing that this error was harmless beyond and to the exclusion of every reasonable doubt -- that these errors did ***not*** contribute to the verdict. See Heuss v. State, 687 So. 2d 823 (Fla. 1996); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The prosecutor's improper, inflammatory argument, cited extensively in the Statement of the Case and Facts, aggravated the unfair prejudice already arising from allowing the jury to learn of all of Brown's prior convictions and refusal to give a limiting instruction. More particularly, the following comments made by the prosecutor at this trial further constituted egregious argument outside the record, improperly shifting of the burden of proof, exceeding the boundaries of fair reply, and "fairly susceptible" to interpretation as comment on Brown's failure to testify and call certain witnesses, in violation of the lower court's explicit ruling:

"If it was [a big scheme as Mr. Jepeway allegedly suggested], don't you think they'd have the gun, they'd throw it on him when [] they arrested him they'd smack his hands on [the gun] and bring you some fingerprint". (T. 401-02, 404). "I submit to you that the gun is very real. That's why it was hidden. It was hidden because it was a real gun." (T. 403). "The one person who came to Court to tell you that the State's witness, Mr. Stewart, is a liar is the Defendant's sister. (T. 379). "There is no evidence that [Mr. Stewart] is not anything but truthful except for this -- this witness who is this elderly sister of the Defendant who doesn't want you all to find him guilty." (T. 380). "There is no evidence to suggest that [Mr. Mohamaad is a liar], except for Defense counsel's statement, and we all agree what Defense counsel says is not evidence. (T. 401). "We know that the only witness that could tell you these are inconsistent statements by. . .Mr. Stewart[] are the Defendant's girlfriend. . . ." (T. 404-05). "This case is about judging the acts of the Defendant. That's what this case is all about." (T. 406). "The best evidence is the evidence that's here in court. Did the State prove the case beyond a reasonable doubt, and is that doubt reasonable?" (T. 406). "[T]he fact is, we couldn't provide you with the gun because [Brown] hid it". (T. 407-08). "I am confident that once you evaluate the evidence and you understand all the realities of the case. . .you will come back with a verdict that rings true of guilty. . . ." (T. 408-09).

These errors deprived Brown of a fair and impartial trial, and they were preserved when defense counsel objected and moved for

mistrial, either concurrently with, directly after or in close proximity to the time that the improper remarks were made. See State v. Smith, 573 So. 2d 306, 317 (Fla. 1990); Simpson v. State, 418 So. 2d 984 (Fla. 1982); Clark v. State, 363 So. 2d 331, 335 (Fla. 1978), receded from in part on other grounds, State v. DiGuilio, 491 So. 2d at 1129; Sgroi v. State, 634 So. 2d 280 (Fla. 4th DCA 1994); Spry v. State, 664 So. 2d 41 (Fla. 4th DCA 1995) (citing State v. DiGuilio, 491 So. 2d at 1135); Dixon v. State, 430 So. 2d 949 (Fla. 3d DCA 1983) (and cases cited therein); see also Griffen v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (comment about criminal defendant's failure to testify violates Fifth and Fourteenth Amendment's right against self-incrimination).

This prosecutor's false statements as fact and argument outside the record in closing argument was equally egregious and aggravated the errors already committed. See Garcia v. State, 564 So. 2d 124 (Fla. 1990); Tillman v. State, 647 So. 2d 1015 (Fla. 4th DCA 1994); see also Dean v. State, 690 So. 2d 720 (Fla. 4th DCA 1997) (same); Rigsby v. State, 639 So. 2d 132 (Fla. 2nd DCA 1994) (prosecutor's statements that only defense counsel's version of facts was heard and that no testimony was heard from stand to support defense counsel's version were improper comments on defendant's exercise of right to remain silent).

The same aggravation of error arose from the prosecutor's comments about the allegedly hidden gun, allegedly non-functioning, unrecovered video, better witnesses, and the reasonable doubt standard because they likely led the jury to believe that Brown had

the burden of proving his innocence and disproving these allegations. Tillman v. State, 647 So. 2d at 1015 (prosecutor must confine closing argument to evidence in record and inferences reasonably made from the evidence). This prosecutor's comments misstating the reasonable doubt standard and twisting its inability to produce the gun and videotape as proof that this was not an elaborate scheme to frame Brown shifted the jury's proper focus on the strengths and weaknesses of the State's case to, as the prosecutor termed it, "judging the acts of the defendant", both current and prior. See generally Fryer v. State, 693 So. 2d 1046 (Fla. 3d DCA 1997).

At trial, the State also engaged in a line of questioning, over defense objection, from Officer Vandersand directed toward hearsay about an alleged relative -- a ***non***-testifying witness -- who supposedly saw the incident. (T. 297-98; emphasis added). There is no doubt that this was impermissible hearsay. When a statement, or belief, or assertion can be implied from the conduct or statement of a person, the implied assertion is within the definition of hearsay. See Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 801.7 (3d ed. 1991).

Here, the lower court recognized the harm resulting from this hearsay, after the defense had already warned the trial court that it was coming and attempted to preclude it:

> THE COURT: I mean, the fact of the matter is that [defense counsel] warned us three minutes ago about it, and you say no, no -- (T. 298).

The lower court cited and distinguished an officer's prejudicial

testimony in Postell v. State, 398 So. 2d 851 (Fla. 3rd DCA 1981), rev. den., 411 So. 2d 384 (Fla. 1981), from Officer Vandersand's testimony on the basis that Postell involved an identification issue and here, identification was not an issue. (T. 300-02).

The problem here is that, while identification of Brown himself was not at issue, evidence connecting Brown with possession of any firearm was very much at issue. This Officer's testimony "did one better" than identify Brown through a non-testifying witness. Through Officer Vandersand, the State was able to communicate to the jury that (i) a relative of Brown (ii) may have witnessed the crime or, as the State called it, the "situation", (iii) told the police about it, and (iv) the police found it credible enough to now tell the jury -- without that witness ever having to appear, be cross-examined, and judged by the jury for believability, demeanor, memory, intelligence, candor, bias, interest, opportunity and ability to observe the "situation" and was, in ***every*** respect, fully concealed, fully protected by the armor of police authority, and fully unimpeachable. See Wilding v. State, 674 So. 2d 114 (Fla. 1996).

> When the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police ***evidence of the accused's guilt***, the testimony should be disallowed as hearsay.

Trotman v. State, 652 So. 2d 506, 507 (Fla. 3d DCA 1995) (citations omitted).

Prior to Officer Vandersand's testimony, the only other evidence of the alleged incident was Stewart's and Mohamaad's testimony, whose believability were impeached. Like this Court's holding in Trotman,

therefore, "the error may not be regarded as harmless." See Trotman, 652 So. 2d at 507 (citing Bell v. State, 595 So. 2d 232, 234 (Fla. 3d DCA 1992), rev. den., 604 So. 2d 488 (Fla. 1992)); Davis v. State, 493 So. 2d 11, 13 (Fla. 3d DCA 1986); Molina v. State, 406 So. 2d 57, 58 (Fla. 3d DCA 1981)); see also State v. DiGuilio, 491 So. 2d at 1129; Barnes v. State, 576 So. 2d 439 (Fla. 4th DCA 1991).

Given the State's weak case and trial errors, the admission of the prior convictions cannot, therefore, be said to have been harmless because the five prior felonies likely created the risk of conviction on an improper basis and cumulatively lured the jury into pro-active conviction based on general assessments of Mr. Brown's moral character. See generally Hazelwood v. State, 658 So. 2d 1241, 1242-43 (Fla. 4th DCA 1995) (citing Thompson v. State, 318 So. 2d 549, 551 (Fla. 4th DCA 1975), cert. den., 333 So. 2d 465 (Fla. 1976)).

CONCLUSION

For all the reasons stated, the reasoning of Old Chief v. United States should be applied to this virtually identical felon-in-possession statute under this State's virtually identical evidentiary standard, § 90.403, Fla. Stat. (1995), Parker v. State should be clarified or overruled, to the extent necessary, in light of Old Chief, and Terry Brown should receive a new, fair trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was **mailed**/faxed/hand-delivered on 8th day of December, 1997 to:

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