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

REPLY BRIEF OF PETITIONER ON THE MERITS

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SUMMARY OF THE ARGUMENT

An accused is not entitled to a perfect trial, but is entitled to presumed innocence and an impartial trial. The Respondent deprived the Petitioner of a fair trial. The Respondent was allowed to reject Brown's offer to stipulate to his convicted-felon status and present, over vigorous defense objection, records of his prior felony convictions likely to support conviction on an improper basis, and reveal an additional three, in violation of the lower court's ruling. Under § 90.403, Fla. Stat. (1995), this evidence carried the risk of improperly drawing the jury's attention away from the State's substantive burden to prove this crime to Brown's *de facto* burden to disprove his propensity for bad acts. Brown was also improperly denied a Williams Rule modified curative instruction and jury instruction to otherwise mitigate the unfair prejudice from this evidence. Given the other trial errors, the Respondent cannot carry its burden to show that these errors were harmless beyond and to the exclusion of reasonable doubt.

ARGUMENT

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 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.

The Brief of Respondent on the Merits ("Respondent's Brief") misses the issue raised in this petition: the need for this Highest Court's pronouncement on the proper application of § 90.403, Fla. Stat., (1995), to this felon-in-possession statute, § 790.23, Fla. Stat. (1995), because of the U.S. Supreme Court's recent decision Old Chief v. United States, 519 U.S. ___, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), analyzing a virtually identical federal felon-in-possession statute, 18 U.S.C. § 922(g)(1),

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and rule of evidence, Rule 403, Fed. R. Evid.[1] Brown's posits that the lower court abused its discretion under § 90.403 when (i) it allowed the Respondent to reject Brown's offer to stipulate to his five prior felony convictions and, instead pick two judgments of conviction and reference another three, (ii) it refused to give a Williams Rule limiting instruction *at the time* those judgments were introduced, and (iii) it refused to give a Williams Rule jury instruction before deliberations. Brown also posits that the attachment, in violation of the lower court's ruling, to one of the Respondent's trial exhibits -- part of the record now before this Court -- of a sheet naming all of Brown's prior convictions, their relative degrees, and their resulting points violated the lower court's ruling and was cumulatively prejudicial.

The Respondent's justification for rejecting Brown's unequivocal offer to stipulate and, instead, admit his prior conviction judgment(s) demonstrates the procedural quagmire of prior felony evidence that Old Chief addressed. First, the Respondent incorrectly analyzes the multiple prior conviction judgments not under § 90.403, Fla. Stat. (1995), comparing the convictions' evidentiary alternative -- Brown's offer to stipulate to convicted felon legal status -- but under § 90.402, Fla. Stat. (1995), relevancy. The argument goes, prior felony conviction evidence is relevant because it is an element of this crime of unlawful possession of a firearm. Under Arrington v. State, 233 So. 2d 634 (Fla. 1970),

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[1] Brown disagrees with Respondent's suggestion that this State's Highest Court is not interested in the pronouncement from this Nation's Highest Court on the procedure for analyzing prior conviction evidence under a virtually identical felon-in-possession statute and a rule of evidence. 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); see, e.g., generally Morton v. State, 689 So. 2d 259, 262-64 (Fla. 1997) (recently amended § 90.608); 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).

Brown does not dispute that state courts can decide for themselves all questions on the construction of state constitutions and statutes. (Respondent's Brief at 7 (citing State v. Barquet, 262 So. 2d 431, 436 (Fla. 1972) (quoting 21 C.J.S. s205 at 362-64))).

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and Parker v. State, 408 So. 2d 1037 (Fla. 1982), so the argument goes, the Respondent can reject a stipulation and prove each and every element of a crime. The prior conviction, therefore, is admissible unless and until the Respondent decides to accept the stipulation of its own volition.

The Respondent's rule fails in application. While each of these general principles is accurate *in isolation*, they breakdown when combined and applied to this unique, two-element, felon-in-possession statute, one element of which is only here to establish statutory eligibility, like the ubiquitous "cutting butter with a chainsaw".[2] The Respondent's § 90.402 relevancy justification, without ever reaching a § 90.403 weighing of evidentiary alternatives, has entrenched a trial practice of *de facto* admissibility of prior conviction evidence focused not on that conviction's now discounted probative value and far greater unfair prejudice, but on the proponent's, the Respondent's, power to reject the far more conclusive, far less prejudicial evidentiary alternative -- the stipulation. Meaning, the Respondent gets this prejudicial evidence in under Parker v. State and Arrington v. State not through judicial fiat, but through the Respondent's power to trump. That is what happened here.

In contrast to the Respondent's rule, Brown's rule is reasoned and makes good evidentiary sense. Brown's rule (i) allows a stipulation that the defendant qualifies under the felon-in-possession statute and combines with (ii) curative and jury instructions that the only remaining element the jury needs to decide is whether the defendant had a weapon, avoiding *entirely* the otherwise looming risk[3] of a jury's

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[2] Establishing prior felony conviction status through a certified judgment of conviction is in all material respects a question easily addressed by way of stipulation.

[3] The Advisory Committee Notes recognize that certain circumstances call for "the exclusion of relevant evidence which is of unquestioned relevance", including ***the 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

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pro-active conviction within an unreasonable degree of certainty for a defendant's prior wrongs. Brown respectfully submits that this is what Parker v. State was originally intended to do, but its analysis stopped before getting to the procedure for doing it.[4]

Second, the Respondent's generalized rule ignores entirely the definitional problems that these unique statutes create, like the unlawful possession of a firearm statute at issue here, § 790.23, Fla. Stat. (1995), containing prior adjudged felony guilt as one of their substantive elements. It would be disingenuous to suggest that these statutes do not carry the inescapable risk of criminalization based on status, rather than conduct.[5] They do. Under these unique prior conviction statutes, the competing constitutional safeguards requiring the State to prove and jury deliberation of each element of a crime, ***all*** drafted for and intended to inure to the direct benefit of the accused, directly benefit the Respondent.

Respondent's Brief overlooks Old Chief's sensible evidentiary solution. The issue in Old Chief and here, is not the unfair prejudice arising from the naked similarity between the prior felony conviction and the current charge for which the defendant is on trial.[6] The Old Chief decision, itself,[7] the transcript

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

[4] 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).

[5] See United States v. Gaudin, 515 U.S. 506, 522-23, 115 S. Ct. 2310, 2320, 132 L. Ed. 2d 444 (1995); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642 (1977).

[6] Rule 404(b), Fed. R. Evid., addresses the situation that the State implies:
[e]vidence of ***other crimes***, wrongs, or acts is not admissible to prove the character of a person in order ***to show action in conformity therewith***.

of the Old Chief oral argument,[8] and the federal and Florida rules of evidence[9] prove this position to be overly simplistic.

What troubled the U.S. Supreme Court in Old Chief was the way to remedy the otherwise intractable problem under a virtually identical felon-in-possession statute of unfairly, and *wholly unnecessarily*, prejudicing a defendant's right to presumed innocence because of the government's certain rebuff of a defendant's offer to stipulate and vaunting of the prior felony judgment solely to

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Rule 404(b), Fed. R. Evid. (emphasis added).

Even under Rule 404, where a defendant offers to unequivocally concede an element of a crime, such as intent, the otherwise prior "bad act" evidence is precluded.

[7] 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).

[8] See Old Chief v. United States, 1996 WL 605007 (U.S. Oral. Arg.). In fact, Rule 404 is *nowhere* argued during the Old Chief oral argument.

[9] 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) allows only "[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 limiting instruction when one is requested. Second, § 90.403 requires the trial court to assess the effects of the evidence, even though admissible under § 90.404, and determine whether the probative value of the evidence, nevertheless, substantially outweighs its potential for unfair prejudice. Third, § 90.402 only allows evidence which is relevant, as enforced through § 90.104.

Rule 403 is the umbrella controlling Rule 404, in that evidence excluded under Rule 404 precludes a Rule 403 analysis altogether. If and only if the evidence is admissible under Rule 404, does that evidence become subject to a Rule 403 analysis. The Old Chief opinion turned on a Rule 403 analysis, not because Old Chief's prior assault felony introduced in his current trial for assault and unlawful possession was excluded under Rule 404, but because it satisfied Rule 404. Had Old Chief turned on the naked similarities between the prior and the current charges, the Supreme Court could have stopped at Rule 404, without ever reaching a Rule 403 analysis.

satisfy a singular, statutory eligibility requirement. In comparing these evidentiary alternatives in Old Chief within the "peculiarities of the element of felony-convict status and of admissions and the like when used to prove it," the Supreme Court reasoned that 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]

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

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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 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.

[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).

Blindly applying Arrington v. State, 233 So. 2d at 634, and Parker v. State, 408 So. 2d 1037, therefore, to this unique felon-in-possession statute to always allow proof of an accused's prior adjudged guilt, on the basis that it is a substantive element of this crime, prejudices the defendant's presumed innocence before a jury of his peers in contrast to stipulations rejected under murder statutes to the cause of death which take away a forceful chapter to an otherwise rich narrative that a jury must hear.

The U.S. Supreme Court found that the evidence of the prior conviction of assault likely supported that Old Chief jury's current unlawful possession of a firearm conviction on an improper basis and, therefore, an abuse of the trial court's discretion, not under Rule 402, but Rule 403. See Old Chief, 117 S. Ct. at 655.[12] While 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, allowing multiple prior convictions

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

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logically multiply those risks and logically constitute this lower court's greater abuse of discretion. That interpretation of Rule 403 and § 90.403 is consistent with both Old Chief and Parker.

Williams v. State, 492 So. 2d 1051 (Fla. 1986), on which the Respondent relies, where multiple convictions were introduced in that felon-in-possession case, does not guide this Court's decision on this issue. This Court reaffirmed Parker's holding and § 90.403, Fla. Stat. (1985), limitations in Williams. Williams, however, did not involve the issue here or in Old Chief of a defendant's offer to stipulate to the element of that crime, convicted felon status.

The Respondent also ignores the proof of the risk of unfair prejudice here -- that Mr. Brown is currently serving a seven-year conviction, pursuant to § 790.23, Fla. Stat. (1995), for unlawful possession of a gun that the police never found, despite an admittedly thorough search of his girlfriend's one-bedroom apartment where he was arrested, and that was allegedly documented on a convenience store videotape that the police failed to recover. More specifically, the Respondent's circumstantial evidence showed that Brown *may* have (i) knocked a hat off a senior citizen one morning during an argument, (ii) allegedly revealed, according to that senior citizen, the ***black*** butt of a gun that was either "fake" or "real" (T. 221-22), (iii) immediately thereafter entered a convenience store to argue with an employee over a beer, (iv) and wielded this same gun that was suddenly no longer black, but now ***red and white***. The senior citizen, the alleged victim here, even signed a non-prosecution form.

The Respondent inaccurately suggests that the Third District Court of Appeal in its opinion and during oral argument dismissed this appeal as largely shallow and ruled against Brown's supposed position that Old Chief was absolutely binding precedent. (Respondent's Brief at 2-3, 8) More correctly, Brown argued and the Third District recognized that, because Old Chief was decided on a rule of evidence, not on constitutional grounds, Parker v. State was binding precedent unless and until this State's Highest Court chose to re-examine Parker v. State, in light of Old Chief. Also contrary to the

Respondent's suggestion, the Third District never affirmatively "declined the defendant's invitation to apply [Old Chief] and thus [did not] decline[] to find an abuse of discretion in the trial court's admission of the convictions." (Respondent's Brief at 2-3). More accurately, oral argument focused on Old Chief and its now overwhelming progeny, precisely because Old Chief articulated a logical procedure for applying Rule 403, Fed. R. Evid., virtually identical to § 90.403, Fla. Stat. (1995), to a defendant's unequivocal offer to stipulate like the unequivocal offer here and the virtually identical felon-in-possession statute, 18 U.S.C. §922(g)(1). There was no Florida decision on the procedure for analyzing prior conviction evidence under felon-in-possession statutes. Accordingly, Brown urged certification as the proper procedural vehicle to examine that procedure in Old Chief and its progeny in the context of Parker v. State as a matter of great public importance, an the Third District agreed.[13]

Irrespective of the stated rule, the Parker v. State rule in practice is that the Respondent is absolutely entitled to reject an offer to stipulate and prove the element of prior felony conviction in the lower courts without ever reaching "403 balancing". Lest there be any doubt about the *de facto* per se admissibility of prior felony conviction evidence under the Respondent's current use of Parker v. State, this trial transcript speaks for itself.[14]

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[13] The precise question certified was:
Should the decision in Parker v. State, 408 So. 2d 1037 (Fla. 1982), be overruled in favor of the analysis of the evidentiary requirements for proof of convicted felon status in firearm violation cases established for federal courts in Old Chief v. United States, 519 U.S. ___, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)?

[14] The trial transcript has been exhaustively cited in the Petitioner's Brief on the Merits, but the following exchange in Brown's trial exemplifies Parker's unintended application over time and contradicts the Respondent's suggestion that the lower court weighed the unfair prejudice of arising from these convictions, let alone each specific conviction:

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.

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The Petitioner is constrained to dedicate the remainder of his Reply to pointing out to this Court the Respondent's palpable errors and misstatements in its Brief, also made previously before the Third District Court of Appeal, which Petitioner also pointed out before the Third District by quoting the record and relies on Petitioner's Brief on the Merits for the legal arguments showing error. Contrary to the Respondent's suggestion, the trial judge -- the only objective force in the courtroom qualified to balance the unfair prejudice of evidence of each conviction against its probative value -- never got to § 90.403 balancing of the prior conviction against Brown's unequivocal offer to stipulate. (T. 6-12, 182-84, 285-86, 286-89, 361-65). In fact, the lower court ultimately gave the proponent of this evidence, the Respondent, the discretion to select which two of the five judgments of convictions it desired. (T. 285-86). Notably, the Respondent chose the two "hardest" crimes, most often associated with firearms and most similar to the alleged underlying facts here -- robbery and burglary. (R. 10, 40; T. 320-23). The Respondent's suggestion to the contrary (Respondent's Brief at 12-14) is painfully inaccurate.

The Respondent's statement before this Court, the same also made before the Third District, that the admission of Brown's prior felony conviction judgments was "not even preserved. . .for appellate review" (Respondent's Brief at 17) strains credulity and is directly contrary to ***the record***. Even before trial, defense counsel had moved to sever the Counts against Brown precisely in anticipation of his stipulation to his prior convictions (R. 17-18, T. 6-8) and the Respondent had already agreed to proceed

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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).

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first on the unlawful possession of a firearm (Count III). (R. 18). Even at the beginning of trial, Brown detailed his standing objections to the introduction of prior convictions.[15]

Throughout trial, these objections, already detailed in the Petitioner's Brief on the Merits ("Petitioner's Brief"), were vigorous. (Petitioner's Brief at 2-4). When the lower court resumed argument on the issue, it explicitly rejected Brown's position, relying on Parker v. State, 408 So. 2d at 1038. (T. 8-9). Notably, when defense counsel continued arguments to exclude the introduction of Brown's prior felony convictions, the Respondent argued against the stipulation on the basis that the offered stipulation was not really an issue of proof of the evidence, but now one of impermissible amendment of the Information, as it had already listed Brown's five prior convictions. (T. 9-10, 11-12). To that, the defense even offered to stipulate to the Information. (T. 9-10, 11-12).

The court "defer[red] ruling". (T. 12). Only *after* the lower court had ruled that the Respondent would be allowed to introduce two judgments of Brown's prior felony convictions, did defense counsel state that he would stipulate "***under protest***" to the three remaining convictions -- two judgments of convictions, still yet to be selected, having been already ruled as admissible -- because he objected, as he had already multiple times, to the introduction of any of the prior convictions, and the defense standing objections were fully noted by the lower court *and* the Respondent.[16] (T. 285-86, 287-89, 316-

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[15]

MR. JEPEWAY: . . . .First as to the convictions, ***we'll stipulate that he's been convicted***. There is no need for them to introduce certified copies of the convictions, and we'll stipulate it's the same person. That avoids the difficulty of the State parading the convictions before the jury and saying look, see, he has been convicted of this, he has been convicted of that. ***Which is the purpose of the motion to sever***.

MS. MORALES: Your Honor, I am sorry, I am just not agreeing to a sti[p]ulation in this case, and I can provide case law. (T. 6-8; emphasis added).

[16] Notwithstanding the Respondent's argument now that this issue is not preserved for review (Respondent's Brief at 12-13), the Respondent explicitly acknowledged on the record that "it's been ***preserved***". (T. 285-86, 287-89, 316-17) (emphasis added).

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17) (emphasis added). It is illogical, contrary to the record, and inconsistent with appellate principles that the very issue the Respondent has already recognized as preserved at trial would somehow become waived and made *un*preserved through higher court scrutiny.

The Respondents' statement that "[d]efense counsel did not object and only later asked about a curative instruction" to which the lower court deferred ruling (Respondent's Brief at 13) is equally belied by the record:

THE COURT: I am not giving the instruction, over the Defense's objection. (T. 288).

Defense counsel argued for a Williams Rule type of instruction well before the fingerprint technician's testimony, to be modified from a standard Williams Rule instruction.[17] (T. 286-89). That curative instruction, given in Old Chief, should have been given here.

The Respondent's suggestion -- also unsuccessfully urged before the Third District -- that ***the lower court***, not defense counsel, triggered any defense objections to prior convictions evidence and requests for a modified Williams Rule curative instruction (Respondent's Brief at 12-13) is squarely contradicted throughout the trial transcript, cited already. (Petitioner's Brief at 2-4, 11-12).

Additionally, the Respondent incorrectly states, as it had before the Third District, that "the court [did not say that it] would actually spell out the [prior] felony", to which defense counsel stated

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[17] Moreover, the Respondent's suggestion that the lower court denied this curative instruction, requested because of the unfair prejudice arising from the upcoming "prior convictions" testimony, on that ostensible basis that the lower court was planning to "cure" the unfair prejudice in the finger print technician's testimony and evidence of prior convictions by closely monitoring closing arguments -- at the end of trial -- makes no sense. (Respondent's Brief at 13). Williams Rule curative instructions are given not because of what the Respondent ultimately characterizes the evidence to be in closing argument. They are given because of the independent, impermissible inferences that the jury may unguidedly take from the evidence ***at the time*** that unfairly prejudicial evidence is presented. This same point was argued before the Third District.

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"THAT'S FINE" (Respondent's Brief at 13).[18] After defense counsel had already argued -- yet, again -- for a modified Williams Rule limiting instruction, which the lower court had, again, denied, the lower court moved to the wording of the actual jury instruction on the elements of ***this particular*** crime. (T. 361-65).[19] The lower court stated, then, that it would closely monitor closing arguments to decide whether to give a modified Williams Rule *jury* instruction. (T. 371).

The Respondent incorrectly states that the trial exhibit referencing the names of all five prior felony convictions was "not included in the record on appeal". (Respondent's Brief at 13 n.1). That document was part of the record below, was included in the record on appeal prior to the Third District's decision, and was specifically included in the record sent up to this Court.[20] (R. 137-49). Any suggestion or intimation that this prejudicial error arising from slipping in this sheet of paper referencing the names of ***all*** five prior felonies, their respective degrees and the additional points assessed -- one of the Respondent's own trial exhibits in direct violation of the lower court's ruling and unbeknownst to the court or the defense at trial -- was somehow waived for this Court's exacting scrutiny

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[18] The Respondent made this exact argument in its Answer Brief before the Third District Court of Appeal.

[19]

THE COURT:	There is only one substantive, but I was going to spell it out as unlawful possession of a firearm by a convicted felon.
MR. JEPEWAY:	That's fine.
MS. MORALES:	Your Honor --
THE COURT:	I would just put, for felony. That Terry Brown had been convicted of a felony. One or more felonies. How is that?
MS. MORALES:	***You don't want to say what they are***? (T. 365; emphasis added).

[20] Out of an overabundance of caution, undersigned counsel went to the evidence locker where the file was stored, and perused the trial exhibits. Included among the trial exhibits was a page -- not correctly part of either court-authorized judgment of conviction -- listing the names of each of all five prior felonies, their degrees, and the additional points assessed against Mr. Brown for each of those five felonies. (State's Exh. 3 at 6). That page was included in the timely motion to supplement the record and notice of filing trial exhibits, dated September 27, 1997 (R. 137-49) and became part of the record by Order dated September 29, 1997. (R. 149).

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(Respondent's Brief at 13 n.1) precisely because it got past the lower court, is an extraordinary and disturbing argument. It also justifies no further response.

The issue remains that, if Parker v. State is to be overruled or, at a minimum, clarified, it must be because this Court agrees with the analysis of Old Chief. Brown urges this Court's re-examination of Parker v. State, not because Old Chief advances a rule of *per se* exclusion of prior felony convictions. But because Old Chief preserves Rule 403 balancing by establishing a procedure for requiring the State to agree to a stipulation where the prior felony conviction has no legitimate purpose other than establishing legal status. Under Old Chief's logic, prior conviction judgments should be *in*admissible unless and until they are directed to a valid purpose ***other than*** proof of prior conviction.[21] As detailed already in the Petitioner's Brief on the Merits (Petitioner's Brief at 4-18), this error in spurning Brown's offer to stipulate and admitting his prior convictions was not harmless. Moreover, the other trial errors were preserved, and would not have been cited had they not been preserved. The Respondent's rebuttal was replete with defense objections already cited. (Petitioner's Brief at 15-18). The Respondent's suggestion that its comments referencing the lack of evidence was also fair reply is painfully inaccurate, as such a stated reason violated the lower court's explicit ruling on the State's Halberton Motion that neither side could comment on the failure to call certain witnesses unless uniquely available to only one side. (T. 176-78).[22] The State's suggestion that its comments about its imagined defense allegation of

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[21] 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); 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).

[22] See State v. Smith, 573 So. 2d 306, 317 (Fla. 1990); 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 1129, 1135 (Fla. 1986)); see also Griffen v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (comment on criminal defendant's silence violates Fifth and Fourteenth Amendment's right against self-incrimination).

a scheme to fabricate evidence was somehow fair reply to defense counsel's use of the term liar is inaccurate, as the lower court specifically ruled that its defense witness could use the term, "liar", and defense counsel stayed within the four corners of that ruling. (Petitioner's Brief at 7-8; T. 327-33, 338-39). The State's suggestion that defense counsel did not preserve the Postell error, when the Respondent elicited, over defense objection hearsay from the testifying officer also strains and is contradicted by the record. (Petitioner's Brief at 10-11; T. 297-304). The Petitioners relies on his initial Brief on the Merits for the remaining legal arguments showing prejudicial error below.

CONCLUSION

For all the reasons stated, Parker v. State should be re-examined, the procedure set forth in Old Chief should be applied to analyze evidence under this virtually identical felon-in-possession statute and rule of evidence, and Terry Kenneth 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 9th day of February, 1998 to:

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