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IN THE
SUPREME COURT OF FLORIDA

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CASE NO. 92,558

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District Court of Appeal,
Third District Case. No.: 96-3004

DYRON TUCKER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is an appeal from the Third District Court of Appeal's affirmance of the petitioner's judgment of conviction, and certification as a matter of great public importance the question of whether *Parker v. State* should be overruled on the basis of *Old Chief v. United States*. The petitioner timely invokes discretionary jurisdiction, on which this Court has deferred ruling. In this brief, the symbol "R" will be used to designate the record on appeal, the symbol "TR" will be used to designate the transcripts

of the July 15-16, 1996 proceedings, and the symbol "TRII" will be used to designate the transcripts of the September 13, 1996 proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Dyron Tucker was charged with possession of a firearm by a convicted felon (R. 6). A jury trial on this charge commenced on July 15, 1996 (TR. 1).

To establish Mr. Tucker's status as a convicted felon, the state sought to introduce certified copies of the defendant's three prior convictions for robbery, burglary, and carrying a concealed firearm (TR. 135, 142). Defense counsel objected to the evidence of a conviction for carrying a concealed firearm on the grounds that evidence of this particular offense would unfairly prejudice the defense (TR. 136). The trial court overruled the objection (TR. 136). The state then attempted to show that Mr. Tucker's conviction in case #95-31865-- which was later shown to be the conviction for carrying a concealed firearm-- was entered under an alias (TR. 138). At this point, defense counsel again objected to the evidence and offered to stipulate to the fact that Mr. Tucker was a convicted felon, stating:

I am not challenging the fact that he has a prior conviction, and those three convictions are his. I never questioned it to the court. It is not an issue. I have conceded that. The mere fact that you have prejudiced information not relevant to the court. [sic] The court also has the obligation to make sure the defendant receives a fair trial. I am stipulating those were his convictions. What

is the relevancy of trying to further bias this jury by putting in a different name?

(TR. 141). The trial judge reserved ruling on the issue of whether the certified conviction for carrying a concealed firearm should be shown to the jury (TR. 141). However, the state's fingerprint technician witness ultimately revealed to the jury the nature of each of Mr. Tucker's prior convictions, including the conviction for carrying a concealed firearm (TR. 142). Moreover, the judge also allowed the state to introduce *all* of the proposed certified convictions into evidence, over previously made objections (TR. 142). In his closing argument, the prosecutor urged the jury to look at Mr. Tucker's certified convictions, and to look specifically "at the particular felonies for which he was convicted." (TR. 237).

The state presented the following evidence at trial: On February 15, 1996, at approximately 11:30 p.m., Mr. Joe Bellume was conversing with a group of people in the vicinity of Northwest 41st Street and 11th Avenue (TR. 149, 184). At one point gunshots were fired, causing everyone in the area to run (TR. 152, 187, 191). After the incident, Officer Pam Braga interviewed Mr. Bellume (TR. 158). During this interview, Mr. Bellume told the officer that Dyron Tucker, an acquaintance of Bellume's from school, was the

person who fired the shots (TR. 159, 186). At the trial, however, Mr. Bellume recanted this statement and testified to several different versions of what happened that night (TR. 184-207).

Mr. Bellume first stated that he heard gunshots and immediately ran away without seeing who fired the shots (TR. 187-189, 191, 195). Mr. Bellume also testified that while he told the police that Mr. Tucker possessed a gun that night, he was in fact uncertain about this identification (TR. 189, 194, 197).

At one point, the trial judge stopped the proceedings to advise Mr. Bellume that if he didn't testify truthfully he could be subject to perjury charges (TR. 198). Following this judicial warning, Bellume testified that he was robbed on the night in question by someone with a firearm, but that he was honestly unsure of the identity of the robber (TR. 201-202). However, Bellume then changed his testimony and alleged that Dyron Tucker robbed him with a firearm (TR. 203-206)

Dyron Tucker was found guilty of possession of a firearm by a convicted felon (R. 14-15; 250-251). He was sentenced to 30 years in state prison (R. 18-19; TRII. 11).

SUMMARY OF ARGUMENT

It is well established that in a criminal case, evidence of the defendant's *unconnected* past offenses destroys the constitutional presumption of innocence, and is therefore presumed to be harmful error. This is so because such evidence of past offenses causes the jury to conclude that the defendant has a propensity to crime, or has "bad character," and therefore must be guilty of the charged offense. Even where the defendant's past conviction is a substantive element of the offense which the state must prove, this Court has held that special procedures are necessary to prevent the jury from learning of the defendant's past convictions, and to thereby protect the constitutional presumption of innocence.

The present case involves the offense of possession of a firearm by a convicted felon. In *Parker v. State*, this Court held that the prosecution may reject a defense offer to stipulate to the convicted-felon status element, in favor of introducing copies of the defendant's prior convictions, *so long as* the probative value of the state's evidence is not substantially outweighed by the danger of unfair prejudice under section 90.403 of the Florida Statutes. However, this Court did not determine *when* the balancing

test of section 90.403 would preclude prior conviction evidence in prosecutions for possession of a firearm by a felon.

Very recently, in *Old Chief v. United States*, the Supreme Court of the United States answered the latter question by applying the virtually identical federal counterpart to Florida's section 90.403, in the context of a prosecution for the virtually identical federal offense of possession of a firearm by a felon. The Court in *Old Chief* held that the probative value of the state's prior conviction evidence is substantially outweighed by the danger of unfair prejudice where nature of the conviction that the state seeks to introduce is likely to result in an improper verdict based upon bad character or propensity reasoning, and where alternative evidence, such as a defense stipulation, is available to conclusively establish the convicted-felon status element. Specifically, the Supreme Court found that this balancing test undoubtedly weighs in favor of accepting a defense stipulation where the prior conviction that the state seeks to introduce is for another "gun crime," or for a crime that is similar to another pending offense. The sound reasoning of the United States Supreme Court should be adopted in Florida, and *Parker v. State* should be clarified so as to comport with *Old Chief*.

In the present case, the state introduced into evidence a certified copy of a past conviction for carrying a concealed firearm over defense objection. This evidence carried no probative value because the state had established the defendant's felony-convict status through proof of two other prior convictions for burglary and robbery. Moreover, defense counsel had offered to stipulate to the defendant's status as a felon. However, the danger of unfair prejudice from the concealed firearm conviction was substantial. The latter offense and the pending offense of possession of a firearm by a convicted felon involve the very same conduct-- possession of a firearm. There is a strong possibility that the jury concluded that Mr. Tucker has a propensity toward this conduct, and therefore must be guilty of the pending offense. Moreover, during closing arguments, the prosecutor specifically urged the jury to engage in improper propensity reasoning by directing the jurors to "look at the *particular felonies* for which he [the defendant] was convicted." Because the danger of unfair prejudice in this case substantially outweighed the probative value of the prior conviction for carrying a concealed firearm, in violation of section 90.403, the trial court erred in permitting the state to introduce this evidence. Given the highly inconsistent and self-contradicting testimony of the state's sole eyewitness in

this case, the error cannot be deemed harmless.

ARGUMENT

THE LOWER COURT ERRED IN AFFIRMING THE DEFENDANT'S CONVICTION, WHERE THE STATE INTRODUCED EVIDENCE OF THE DEFENDANT'S PRIOR CONVICTION FOR CARRYING A CONCEALED FIREARM, OVER DEFENSE OBJECTION, AND WHERE THE PROBATIVE VALUE OF THIS EVIDENCE, IF ANY, WAS FAR OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

Forty years ago, in *Shargaa v. State*, 102 So. 2d 814 (Fla. 1958), this Court held that in a criminal case, the defendant's presumption of innocence is destroyed where the jury is confronted with evidence of past crimes that bear no connection to the offense for which the defendant stands trial. Specifically, this Court held:

[W]e think it literally impossible for any jury to eliminate from their thinking any consideration of the separate unconnected crime for which the appellant had been convicted when they deliberated the matter of his guilt or innocence on the charge [at hand]....The state should not be permitted merely to charge the accused with the commission of a crime and buttress its current charge with a simultaneous allegation that the accused had previously been convicted of a totally unrelated crime committed years before. *It appears to us that the product of such a procedure would substantially destroy the historical presumption of innocence which clothes every defendant in a criminal case and in the mind of the average juror would in a measure place upon the accused the burden of showing himself innocent rather than upon the State the responsibility of proving him guilty.*

Id. at 815-16. Such evidence of unrelated past offenses eviscerates the presumption of innocence, and its introduction is presumed to be harmful error because of the likelihood that the jury will generalize the defendant's earlier act into a pattern of bad conduct, and improperly take that as evidence of guilt of the crime now charged. See *Straight v. State*, 397 So. 2d 903, 908 (Fla. 1981).

A limited class of Florida's criminal statutes requires the prosecution to prove, as a substantive element of an offense, that the defendant has been previously convicted of other crimes. For example, section 812.014(3)(c), Florida Statutes (1997), provides that upon a third or subsequent conviction for petit larceny, the offender shall be guilty of a felony in the third degree. In *State v. Harris*, 356 So. 2d 315 (Fla. 1978), this Court acknowledged that the existence of two or more prior petit theft convictions is an essential fact constituting the substantive offense of felony petit theft. Nevertheless, in *Harris*, this Court reaffirmed its holding in *Shargaa*, and held that bifurcated proceedings are required to prevent the jury from learning of the defendant's prior convictions, and to thereby preserve the defendant's constitutional presumption of innocence. Specifically, this Court held:

If the presumption of innocence is destroyed by proof of an unrelated offense, it is more easily destroyed by proof of a similar, related offense....The Legislature had the right to create the substantive offense of 'felony petit larceny,' but we have the right to dictate the procedure to be employed in the courts to implement it....We therefore hold that Section 812.021(3) creates a substantive offense to be tried in the circuit court when felony petit theft is charged *without bringing to the attention of the jury the fact of prior convictions as an element of the new charge.* Upon conviction of the third petit larceny, the Court shall, in a separate proceeding, determine the historical fact of prior convictions and questions regarding identity in accord with general principles of law....

Id. at 317.

The due process concerns that prompted the decisions in *Shargaa* and *Harris* have been subsequently reaffirmed by this Court. In *State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991), this Court held that bifurcated proceedings are also required in prosecutions for felony driving under the influence (D.U.I.)-- an offense which requires proof of three or more prior D.U.I. convictions-- in order to protect the defendant's presumption of innocence. In *State v. Williams*, 444 So. 2d 13 (Fla. 1984), this Court held that in prosecutions for escape, the state need only prove that the defendant was in custody, as opposed to "lawful custody," at the time of his escape. Significantly, this Court was concerned with

the fact that "[t]he appellant would undoubtedly be prejudiced by the introduction of...proof of the details of the nature of his [past] arrest." *Id.* at 15.

In the present case, this Court must again determine which are the proper procedures to protect the defendant's presumption of innocence where the charged offense requires proof of the historical fact of a prior conviction. The statute at issue here, section 790.23(1), Florida Statutes (1997), prohibits the possession of a firearm by a convicted felon. Like the felony petit larceny statute, and the felony D.U.I. statute, section 790.23(1) makes a prior conviction an essential element of the crime. Sixteen years ago, in *Parker v. State*, 408 So. 2d 1037 (Fla. 1982), this Court held that in a prosecution for possession of a firearm by a felon, the state was entitled to refuse an offer by defense counsel to stipulate to the previous conviction, in favor of introducing a certified copy of the defendant's judgment and sentence for breaking and entering. Significantly, the *Parker* Court did not rule that such evidence of a prior conviction will always be admissible. Rather, the Court specifically held that a prior judgment of conviction is admissible "unless its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, misleading of the jury, or needless presentation of cumulative evidence." *Id.* at 1038. The *Parker* Court, however, did not reach the issue of how to apply this balancing test, codified in section 90.403, Florida Statutes (1997), in prosecutions for possession of a firearm by a felon, where the state must prove the defendant's convicted-felon status. Thus, in the absence of further clarification from this Court, the following question remains unanswered in Florida: Under what circumstances would the probative value of the defendant's prior conviction record be substantially outweighed by the danger of unfair prejudice, so as to preclude the introduction of such evidence in a prosecution for possession of a firearm by a felon?

In January of 1997, the Supreme Court of the United States answered the latter question by applying Rule 403 of the Federal Rules of Evidence-- which also renders relevant evidence inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice-- to determine whether a defendant's prior judgment of conviction would be admissible as evidence in a federal prosecution for possession of a firearm by a felon under 18 U.S.C. § 922(g).¹ In *Old Chief v. United States*, 519 U.S. ___, 117

¹ The federal offense at issue in *Old Chief* is virtually identical to Florida's version of the statute. Specifically, 18

S. Ct. 644, 136 L. Ed. 2d 574 (1997), the United States Supreme Court held that it is an abuse of discretion, in a trial for possession of a firearm by a felon, to spurn a defense offer to stipulate to the defendant's status as a felon, in favor of admitting into evidence the defendant's prior judgment of conviction, *if the nature of the prior offense is likely to support a conviction tainted by improper considerations*. Specifically, the Supreme Court found that the risk of unfair prejudice as a result of prior conviction evidence is particularly high, and undoubtedly outweighs any probative value that the prior conviction may have, where a defense stipulation is available, and where the prior conviction offered into evidence was for either: a) a gun crime, or b) a crime similar to other charges in the pending case.

The facts of *Old Chief* are as follows: The defendant was charged with assault as well as possession of a firearm by a convicted felon. Defense counsel offered to stipulate to Old Chief's status as a convicted felon. Nevertheless, the government

U.S.C. § 922(g) makes it unlawful for anyone "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm..." Florida's counterpart, section 790.23(1), Florida Statutes (1997), makes it unlawful "for any person to own or to have in his or her care, custody, possession or control any firearm" if that person has been convicted of a felony in this state, any other state, or in federal court.

introduced evidence of a past felony conviction for the offense of assault, over defense counsel's objection. Upon review, the United States Supreme Court held that the nature of the prior assault offense was likely to support a conviction on improper grounds, and therefore, the government's prior conviction evidence should have been excluded in favor of the offered stipulation. Specifically, the Court reasoned as follows:

In dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries risk of unfair prejudice to the defendant. That risk will vary from case to case....but will be substantial whenever the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning. *Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious, and Old Chief sensibly worried that the prejudicial effect of his prior assault conviction, significant enough with respect to the current gun charges alone, would take on added weight from the related assault charges against him. The District Court was also presented with alternative, relevant, admissible evidence of the prior conviction by Old Chief's offer to stipulate....Old Chief's proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element....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 possessing a gun and this point may be made readily in a defendant's*

admission....In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, 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.

117 S.Ct. at 652-655.

The prosecution in *Old Chief* argued that tradition entitles a prosecutor to reject a defense offer to stipulate to an element of the charged offense in favor of proving the case by evidence of the prosecutor's choice. The United States Supreme Court, however, found that this general rule has no application where the element at issue is the defendant's prior *status* as a convicted felon, as opposed to an element that forms part of the natural sequence of the events and acts that form the basis of the current charge. The Court reasoned as follows:

[T]he Government invokes the familiar, standard rule....that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it....[T]he reason for the rule is to permit a party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission may rob the evidence of much of its fair and legitimate weight....This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however,

virtually no application when the point at issue is a defendant's legal status....[P]roof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense. Proving 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 substitute....Given the peculiarities of this element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other.

Id. at 653-55. Thus, the Supreme Court concluded that in prosecutions for possession of a firearm by a felon, the balancing test of Federal Rule 403 precludes the introduction of the defendant's prior conviction record when two conditions are present: 1) where the nature of the prior conviction that the state seeks to introduce will likely support a verdict based upon improper "bad character" or propensity reasoning, such as when the prior offense is for another gun crime, or for an offense similar to another pending charge against the defendant, and 2) where there

is alternative evidence available that conclusively establishes the defendant's status as a felon, such as a defense offer to stipulate to this status element.

In the present case, the Third District certified the following question to this Court as one of great public importance:

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, 117 S. CT. 644 (1997)?

Again, while the *Parker* Court observed that the balancing test of section 90.403 may preclude the admission of the state's prior conviction evidence in a trial for possession of a firearm by a felon, this Court never reached the issue of how to apply the 90.403 test to these cases. Thus, *Parker v. State* is not necessarily inconsistent with the United States Supreme Court's holding in *Old Chief*, which delineates the circumstances under which a defendant's prior conviction record must be excluded in favor of less prejudicial, but equally probative, evidentiary alternatives.² Nevertheless, the very phrasing of the certified

²In *Williams v. State*, 492 So. 2d 1051 (Fla. 1986), this Court suggested that a defendant's record of prior convictions would be admissible as evidence in a trial for possession of a firearm by a felon unless the prior convictions were for the same

question in this case, inquiring whether *Parker* should be overruled in favor of the evidentiary requirements of *Old Chief*, illustrates the confusion that exists in this area of the law. Specifically, *Parker* is commonly invoked to support the proposition that the prosecution is always entitled to reject a defense offer to stipulate to the felony-convict status element in favor of introducing into evidence the defendant's record of past convictions, regardless of the nature and/or number of convictions chosen by the state. This interpretation of *Parker* destroys the constitutional presumption of innocence, and is inconsistent with this Court's prior decisions in *Shargaa*, *Harris*, and *Rodriguez*. Therefore, *Parker* must be clarified, re-examined, or, to the extent necessary, overruled.

The sound reasoning of the United States Supreme Court in *Old Chief* should be adopted by this Court. Again, both the federal firearm statute at issue in *Old Chief*, and the federal evidentiary

crime currently charged. However, the *Williams* case did not involve a defense offer to stipulate to the element of felony-convict status, and therefore, this Court did not reach the issue of how to weigh such an offer to stipulate against a proposed judgment of conviction. Moreover, Justice Shaw's concurring opinion, in which Justice Overton concurred, indicated that even where such prior conviction evidence is admissible, severe limits should be placed on exactly what information is revealed to the jury.

balancing test of Rule 403, are virtually identical to their Florida counterparts. While Florida courts are not legally bound by the United States Supreme Court's interpretations of federal law, our state courts have traditionally and consistently looked to federal jurisprudence in interpreting and applying our virtually identical rules of evidence, which were patterned after the Federal Rules.³ Moreover, where Florida's rule is a verbatim adoption of its federal counterpart, "it *must* be assumed that the Supreme Court intended to achieve the same results that would inure under the

³See *State ex rel. Packard v. Cook*, 108 Fla. 157, 146 So. 223 (1933) (in construing Florida statute taken from similar federal statute, *Florida courts will "take the same construction...as its prototype has been given in the federal courts, in so far as such construction is not inharmonious with the spirit and policy of our own legislation..."*); *Savage v. Rowell Distributing Corp.*, 95 So. 2d 415 (Fla. 1957) (where Florida rule of procedure was patterned after the federal rule, federal case law will be applied in Florida); *Brown v. Brown*, 432 So. 2d 704 (Fla. 3d DCA 1983) ("[T]here being nothing in the history of the adoption of the Florida rule to indicate that our Supreme Court intended that its purpose or scope was to be any different than its federal model, we look to...the construction given it by the federal courts as authority for the correct interpretation of the Florida rule"); *Barber v. State*, 413 So. 2d 482 (Fla. 2d DCA 1982) (where section of Florida Evidence Code is identical to federal counterpart, and federal interpretation was "founded in logic," Florida court adopted the federal construction); *Palm Beach Newspapers, Inc. v. Burk*, 471 So. 2d 571 (Fla. 4th DCA 1985) ("It has been frequently stated that where a provision of Florida rules of procedure is substantially identical with a federal rule, we should use federal court decisions to illuminate our rule.").

federal rule." *Brown v. Brown*, 432 So. 2d 704, 707 (Fla. 3d DCA 1983) (citing *Savage v. Rowell Distributing Corp.*, 95 So. 2d 415 (Fla. 1957)). Thus, *Old Chief* is, at the very least, highly persuasive authority. Furthermore, several other states, including Michigan, Indiana, Washington, Wisconsin, and Illinois, have adopted the Supreme Court's reasoning in *Old Chief* to interpret their analogous state statutes and rules of evidence.⁴ Florida should follow the lead of these states.

Under the rule announced by the Supreme Court in *Old Chief*,

⁴See *People v. Swint*, 572 N.W.2d 666 (Mich. Ct. App. 1997) (adopting *Old Chief* and holding that trial court abused its discretion by refusing to accept defendant's stipulation in a trial for possession of a firearm by a felon); *Sams v. State*, 688 N.E.2d 1323 (Ind. Ct. App. 1997) (adopting reasoning in *Old Chief*, and applying it to prosecution for operating a vehicle while license forfeited for life, to hold that trial court abused its discretion in admitting defendant's prior driving record instead of allowing the defendant to stipulate that license was suspended for life); *State v. Johnson*, 950 P.2d 981 (Wash. Ct. App. 1998) (adopting *Old Chief* and holding that trial court abused its discretion by allowing the prosecution to introduce evidence of defendant's prior conviction for rape in a trial for possession of a firearm by a felon where defendant offered to stipulate to the element); *State v. Alexander*, 571 N.W.2d 662 (Wis. 1997) (adopting reasoning in *Old Chief*, and applying it to prosecution for driving under the influence after two previous violations, to hold that admission of defendant's prior convictions was erroneous where motorist admitted to the third conviction element); *People v. Atkinson*, 679 N.E.2d 1266 (Ill. App. 1997) (adopting the reasoning in *Old Chief* and holding that trial court abused discretion in allowing state to give the name of prior offenses when impeaching defendant).

the trial court in this case abused its discretion by rejecting defense counsel's offer to stipulate to the defendant's felony-convict status, and instead allowing the introduction of certified copies of the defendant's three prior felony convictions. Specifically, the state sought to introduce copies of three prior felony convictions-- burglary, robbery and carrying a concealed firearm-- to establish Dyron Tucker's felony-convict status (TR. 135). Defense counsel objected to the evidence of the carrying a concealed firearm offense because of the potential for unfair prejudice, given the similarity to the current charge of possession of a firearm by a felon, and the danger that the jury would engage in bad character or propensity reasoning (TR. 136). The trial court overruled the objection (TR. 136). The state then attempted to show that Mr. Tucker's conviction in case #95-31565-- which was later shown to be the conviction for carrying a concealed firearm-- was entered under an alias (TR. 138). At this point, defense counsel again objected to the evidence and offered to stipulate to the fact that Mr. Tucker was a convicted felon, stating:

I am not challenging the fact that he has a prior conviction, and those three convictions are his. I never questioned it to the court. It is not an issue. I have conceded that. The mere fact that you have prejudiced information not relevant to the court. [sic] The court

also has the obligation to make sure the defendant receives a fair trial. *I am stipulating those were his convictions.* What is the relevancy of trying to further bias this jury by putting in a different name.

(TR. 141). The trial judge reserved ruling on the issue of whether evidence of the concealed firearm conviction should be shown to the jury (TR. 141). However, the state's witness ultimately revealed to the jury the nature of all three of the prior convictions, including the conviction for carrying a concealed firearm (TR. 142). Moreover, the trial judge allowed the state to introduce all of the proposed certified convictions into evidence over previously made objections (TR. 142).⁵ In his closing argument, the prosecutor urged the jury to look at Mr. Tucker's certified convictions, and to look specifically "at the particular felonies for which he was convicted." (TR. 237).

The probative value of the prior conviction for carrying a concealed firearm was far outweighed by the potential for unfair

⁵The state argued in its brief to the Third District that the jury was never appraised of the nature of the defendant's prior convictions. This assertion is refuted by the record. The judge allowed the prosecutor to introduce into evidence the unedited certified copies of all three prior convictions, over defense counsel's objections (TR. 142). Moreover, the state's fingerprint technician witness informed the jury through his testimony that the prior convictions were for the offenses of burglary, robbery, and carrying a concealed firearm. (TR. 142).

prejudice. Proof of the burglary and robbery convictions conclusively established Mr. Tucker's felony-convict status. Moreover, defense counsel offered to stipulate to the defendant's status as a convicted felon (TR.141). Therefore, the information that Mr. Tucker had been convicted for carrying a concealed firearm had no probative value whatsoever. On the other hand, the danger of unfair prejudice is obvious. The past offense of carrying a concealed firearm and the pending offense of possession of a firearm by a convicted felon involve the very same conduct-- possession of a firearm by Mr. Tucker. There is a strong possibility that the jury concluded that Mr. Tucker has a propensity toward this conduct, and therefore must be guilty of the pending offense. This high risk of unfair prejudice, which stems from evidence of a past "gun crime" which is strikingly similar to the present offense, is precisely what the United States Supreme Court holding in *Old Chief* seeks to prevent. Moreover, during closing arguments, the prosecutor urged the jury to engage in improper propensity reasoning. Specifically, the prosecutor directed the jurors not only to review the certified convictions, but also to "look at the *particular felonies* for which he [the defendant] was convicted." (TR. 237). Because the danger of unfair

prejudice in this case substantially outweighed the probative value of the concealed firearm conviction, the trial court erred in permitting the state to introduce this evidence.

The erroneous introduction of Mr. Tucker's prior convictions cannot be deemed harmless. The evidence in this case was by no means overwhelming. Rather, the state's sole witness to the alleged offense, Joe Bellume, changed his trial testimony as to the events in question several times (TR 184-204).

Mr. Bellume first stated that he heard gunshots and immediately ran away without seeing who fired the shots (TR. 187-89, 191, 195). Mr. Bellume also testified that while he told the police that Mr. Tucker possessed a gun that night, he was in fact uncertain about this identification (TR. 189, 194, 197). At one point, the trial judge stopped the proceedings to advise Mr. Bellume that if he didn't testify truthfully he could be subject to perjury charges (TR. 198). Following this judicial warning, Bellume testified that he was robbed on the night in question by someone with a firearm, but that he was honestly unsure of the identity of the robber (TR. 201-02). However, Bellume then changed his testimony and alleged that Dyron Tucker robbed him with a firearm (TR. 203-06) Given the highly inconsistent nature of the state's key witness's testimony, the prosecution cannot possibly

meet its burden in this case of showing, beyond a reasonable doubt, that the improper prior conviction evidence did not affect the outcome of these proceedings. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Therefore, a new trial is required.

CONCLUSION

Based on the foregoing facts, authorities and arguments, Petitioner respectfully suggests that *Parker v. State* should be clarified and harmonized with the United States Supreme Court's recent decision in *Old Chief v. United States*, and urges that he be granted a new trial.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,558

DYRON TUCKER,

Petitioner,

vs.

**APPENDIX TO BRIEF OF PETITIONER
ON THE MERITS**

THE STATE OF FLORIDA,

Respondent.

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1998

DYRON TUCKER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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** CASE NO. 96-3004

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LOWER

TRIBUNAL NO. 96-7022

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Opinion filed February 18, 1998.

An Appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge.

Bennett H. Brummer, Public Defender, and Maria E. Lauredo, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Roberta G. Mandel, Assistant Attorney General, for appellee.

Before JORGENSON, COPE, and GODERICH, JJ.

PER CURIAM.

Dyron Tucker appeals his conviction and sentence for unlawful possession of a firearm by a convicted felon; sections 790.23,

775.084(4), Florida Statutes (1995). We affirm.

Tucker's prior felony convictions were essential to prove the "convicted felon" element of this charge. The trial court properly admitted into evidence the certified copies of Tucker's prior convictions for burglary, robbery, and carrying a concealed firearm.

Tucker's offer to stipulate to his felony status is not reason to reverse this conviction. "[T]he state is not bound by the defendant's offer to stipulate to essential elements of the crime, stating the exclusion of such relevant evidence is left to the discretion of the trial court based on traditional grounds."

Parker v. State, 408 So. 2d 1037, 1038 (Fla. 1982). "Therefore, proof of conviction is relevant evidence and is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless presentation of cumulative evidence." Id. at 1038.

Here, the probative value regarding the evidence of Tucker's convictions was not substantially outweighed by any of these considerations.

Tucker contends that this court should follow the United States Supreme Court opinion in Old Chief v. United States, 117 S. Ct. 644 (1997), to find that the trial court abused its discretion by admitting Tucker's convictions. However, Parker is the binding authority from the Florida Supreme Court which is directly on point. The United States Supreme Court construed federal law in

Old Chief. Therefore, its conclusions are not binding on Florida courts when construing Florida statutes and rules.

As in Brown v. State, 700 So. 2d 447 (Fla. 3d DCA 1997), we certify the same question as a matter of great public importance:

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, 117 S. CT. 644 (1997)?