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Prejudicial Character Evidence: How the Circuits Apply *Old Chief* to Federal Rule of Evidence 403

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PREJUDICIAL CHARACTER EVIDENCE: HOW THE CIRCUITS APPLY *OLD CHIEF* TO FEDERAL RULE OF EVIDENCE 403

*Hannah J. Goldman**

It is a fundamental principle of the American justice system that a defendant should be judged on the facts of the case at issue and not for the defendant's general character or past indiscretions. Federal Rule of Evidence 404, which prohibits character evidence, addresses this issue. Rule 403 represents another principle of the justice system: the legal system favors admissibility of evidence over its exclusion. There are some exceptions to this principle, including when evidence is so highly prejudicial that it outweighs the benefits of its admission. As 404(b) character evidence is almost always highly prejudicial to the defendant, trial judges are often asked to use their discretion to decide when to admit 404(b) evidence.

The lower courts often have been inconsistent when applying Rule 403 to 404(b) evidence. Understanding when to admit or exclude 404(b) evidence becomes more complicated when the defendant offers to concede to a point so that the prosecution does not need to introduce 404(b) evidence in order to prove it. In Old Chief v. United States*, the U.S. Supreme Court addressed this issue. The holding, however, was narrowly tailored to its facts and provided little guidance in other cases. In addition, the Court introduced new concepts for trial judges to consider when deciding whether to admit 404(b) evidence. This Note examines the discrepancies in lower courts' methods for admitting 404(b) evidence in light of* Old Chief *and offers a unifying and comprehensive test for trial judges to use when faced with this issue.*

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* J.D. Candidate, 2016, Fordham University School of Law; B.A., 2009, University of Michigan. I would like to say thank you to my parents, without whom none of this would be possible. I also would like to say thank you to my family, and especially to Danny, for not only supporting me through this process, but for making it so much easier. Finally, thank you to Professor James Kainen for your guidance and advice throughout this process.

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INTRODUCTION

Johnny Lynn Old Chief was a convicted felon.[1] He served a little more than seven years in prison on two separate charges, including assault resulting in serious bodily injury.[2] On October 23, 1993, he was once again arrested for his alleged role in a drunken fight that resulted in a gunshot putting a hole in the fender of someone's car.[3] There was contradicting evidence on who fired the shot, but the gun belonged to a friend of Old Chief's and only one fingerprint was found on the pistol, which did not

1. Old Chief v. United States, 519 U.S. 172, 174–75 (1997).
2. D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force": Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 447–49 (1998).
3. *Id.* at 403. No one was injured. *Id.*

belong to Old Chief.[4] Old Chief was subsequently charged with assault with a dangerous weapon and possession of a firearm during a crime of violence.[5] As a convicted felon, he also was charged as a felon in possession of a firearm.[6] With such weak evidence against him, Old Chief pled not guilty.[7]

One of the elements of a felon-in-possession charge is that the defendant has a prior felony conviction.[8] Old Chief's plea of not guilty put his convicted felon status at issue in the case, requiring the prosecution to prove the status element beyond a reasonable doubt.[9] To prove the convicted felon status, the prosecution chose the prior conviction that most closely resembled the current charge, putting "a powerful weapon in the prosecution's hands to introduce evidence of the sort generally explicitly forbidden by the propensity rule."[10] Old Chief was left in a catch-22: he had a strong case that he was not guilty, but by so pleading, he opened the door for the prosecution to introduce his prior conviction to the jury.[11] By pleading not guilty at trial, the jury learned that Old Chief had previously committed the same crime for which he was currently charged.[12]

This evidence may well have dispelled the jury's doubt about whether Old Chief ever possessed the gun or used it on that day, practically sealing his fate.[13] In an attempt to avoid this outcome, Old Chief's defense counsel offered to stipulate to the prior felony status element of the conviction.[14] The prosecution refused to accept the stipulation, and the district court allowed the evidence of Old Chief's prior assault conviction as permissible 404(b) evidence to prove an element of the crime.[15] Old Chief was sentenced to fifteen years in prison.[16]

The importance of Rule 404(b) cannot be overstated. Numerous studies show that the effects on a jury of admitting 404(b) evidence are virtually

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4. *Id.* at 446–48.

5. *Id.* at 448.

6. *Old Chief*, 519 U.S. at 174–75.

7. *See* Risinger, *supra* note 2, at 450–51.

8. *See* 18 U.S.C. § 922(g)(1) (2006). Almost any prior felony conviction will do, but there are some qualifications. *See infra* notes 149, 193 and accompanying text.

9. *See* Risinger, *supra* note 2, at 419. A plea of not guilty puts every element of an offense at issue for the prosecution to prove. *See id.*

10. *Id.* at 420. The "propensity rule" refers to Federal Rule of Evidence 404, which explains when evidence of one's prior crimes, wrongs, or other acts are permitted or prohibited at trial. FED. R. EVID. 404. Rule 404(a) generally prohibits the prosecution from admitting a defendant's prior criminal convictions if the defendant does not testify. *See id.* Rule 404(b)(2) explains when evidence, otherwise prohibited under Rule 404(a) as character evidence, may nevertheless be permissible to prove certain elements of the crime with which the defendant is charged. *See id.* This Note refers to this type of evidence as "404(b) evidence."

11. *See* Risinger, *supra* note 2, at 450–51.

12. *Id.*

13. *See id.*

14. *See* Old Chief v. United States, 519 U.S. 172, 175 (1997).

15. *Id.* at 177.

16. *See* Risinger, *supra* note 2, at 448. This sentence was later vacated and remanded. *See id.* at 448 n.110.

irreversible,[17] regardless of any limiting instruction the judge issues to the jury.[18] While it has long been a staple of the U.S. judicial system to judge a defendant only for the act for which he is charged, and not for the person he appears to be,[19] it is human nature to look at a person's character when deciding his guilt. In Old Chief's case, the trial judge concluded that there was a permissible purpose for the 404(b) evidence, but that does not answer the question of whether the evidence should have passed the Rule 403 balancing test and ultimately been admitted at trial.[20]

Scholars and courts have hotly debated Rule 404 since its inception.[21] The circuit courts have never agreed on when to allow 404(b) evidence at trial.[22] This is especially true when a judge is faced with a defense offer to stipulate to an element of the crime that 404(b) evidence purportedly addresses.[23] Under Rule 403, the trial judge must decide whether to admit 404(b) evidence by weighing the probative value of the evidence against its potential prejudicial effect.[24] This balancing methodology is often where lower courts differ. The divergence among the circuits' interpretation of these rules has become even more pronounced over the last eighteen years.

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17. *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 1:41 (4th ed. 2013); *see also Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 (1961) [hereinafter *Other Crimes*]; Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 944–45 (1997) (suggesting that a juror who learns about a defendant's prior bad acts might believe the defendant is more likely to have committed the crime in question, demand less of the government either consciously or subconsciously, or, if unsure about guilt, lean toward convicting the defendant for reasons of convenience).

18. For purposes of this Note, a "limiting instruction" is a type of explanation that trial judges give to the jury to explain that it may only use certain evidence to make definitive, limited conclusions. *See* EDWARD J. IMWINKELRIED, 2 UNCHARGED MISCONDUCT EVIDENCE § 9:73–74 (2008).

19. *See Other Crimes*, *supra* note 17, at 776–77. Over a century ago, the U.S. Supreme Court held that bad act evidence

> tend[s] to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that [the defendants] were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings.

Boyd v. United States, 142 U.S. 450, 458 (1892).

20. This Note discusses the admissibility of 404(b) evidence, and specifically focuses on when a court should permit 404(b) evidence at trial and when it should exclude the evidence for failure to pass the Rule 403 balancing test.

21. *See* Stephanie Yost, Note, *Reversals of Fortune: How the Ninth Circuit Reviews Erroneously Admitted "Other Acts" Evidence Under Federal Rules of Evidence 404(b)*, 23 SW. U. L. REV. 661, 661 (1994) (citing Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1467 (1985)).

22. *See infra* Parts I.B, II.

23. *See infra* Parts I.B, II. While the defense may offer to stipulate to—or concede—an element of a crime in order to avoid the admission of 404(b) evidence, the prosecution need not accept the offer, leaving the trial judge with discretion to proceed with the evidence under a Rule 403 balancing test. *See infra* Parts I.B, II. For purposes of this Note, a stipulation refers to a defense offer to stipulate, not an official evidentiary admission. When a trial court accepts a proffered stipulation, the stipulation manifests itself in a "must convict" jury instruction. *See infra* Part I.B.3.

24. *See* FED. R. EVID. 404(b) advisory committee's note.

In 1997, in *Old Chief v. United States*,[25] Old Chief's case was brought to the U.S. Supreme Court. In *Old Chief*, the Court overturned the U.S. Court of Appeals for the Ninth Circuit and held that the prosecution must accept a defense offer to stipulate to the status element because the prior conviction's prejudicial effect outweighs its probative worth under Rule 403.[26] Lower courts have interpreted the Court's holding in *Old Chief* in various ways, and a majority of circuits continue to afford the trial judge broad discretion when ruling on the admissibility of 404(b) evidence.[27]

This Note explores the different ways lower courts use the Rule 403 balancing test to determine the admissibility of 404(b) evidence at trial in the face of alternative evidence. Part I of this Note focuses on the background of Rules 404 and 403 and how courts have interpreted these rules differently, resulting in inconsistent admissions of 404(b) evidence. This part also analyzes the degree to which lower courts in the 1980s and 1990s weighed the probative value of 404(b) evidence against its prejudicial effect when alternative evidence was available,[28] concluding with a discussion of the 1997 Supreme Court decision of *Old Chief*. Part II discusses how *Old Chief* affected circuit courts' interpretations of the Rule 403 balancing test with regard to 404(b) evidence. This part analyzes how circuits interpret *Old Chief* in different ways, resulting in a more divided circuit landscape. It demonstrates how some circuits interpret *Old Chief* to overrule its 404(b) admissibility jurisprudence in spite of available alternative evidence, and it shows how some circuits interpret *Old Chief* to further its method of Rule 403 balancing, whether or not the court's method is permissive of 404(b) evidence under these circumstances. Finally, Part III of this Note explores how courts might better understand *Old Chief* and presents a unified Rule 403 balancing test for admitting 404(b) evidence in light of the teachings of *Old Chief*.

I. *OLD CHIEF* IN CONTEXT: UNDERSTANDING HOW THE COURT CAME TO ITS RULE 403 HOLDING ON 404(B) ADMISSIBILITY AND STIPULATIONS

Part I of this Note discusses the background of the *Old Chief* decision. Part I.A discusses Rules 404 and 403 of the Federal Rules of Evidence and analyzes how they intersect. Then, Part I.B addresses the different ways that a defendant may seek to exclude relevant and otherwise permissible 404(b) evidence and how the circuits approached these possibilities prior to *Old Chief*. Finally, Part I.C presents a thorough analysis of the *Old Chief* opinion.

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25. 519 U.S. 172 (1997).

26. *Id.* at 191–92.

27. This Note analyzes whether 404(b) evidence is admissible under Rule 403, and assumes, unless otherwise asserted, that the other acts evidence in question has a permissible 404(b) purpose.

28. *See* FED. R. EVID. 403 (requiring lower courts to engage in this balancing test).

A. Federal Rules of Evidence 404 and 403

The Federal Rules of Evidence were enacted in 1972[29] and, in the decade following, no individual evidence rule generated more reported court decisions than Rule 404(b).[30] Rule 404(b) states that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character,"[31] essentially barring the use of other acts evidence to show a person has a propensity to act in a certain way.[32] The second sentence of Rule 404(b), however, permits the use of other acts evidence for other nonpropensity purposes, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[33] The advisory committee's notes state that there is no "mechanical solution" for when to admit or bar 404(b) evidence, but rather, under the Rule 403 balancing test, a judge must consider the availability of other means of proof before determining whether to permit the evidence.[34] Thus, in order for 404(b) evidence to be permissible, it not only needs to fall under the "permissible uses" in 404(b), but it also must survive the Rule 403 balancing test.

As mentioned above, Rule 403 provides that courts may exclude otherwise relevant evidence if "its probative value is substantially outweighed by a danger of . . . unfair prejudice."[35] The advisory committee defined "unfair prejudice" as a "tendency to suggest decision on an improper basis, commonly . . . an emotional one," or to use evidence for an

29. FED. R. EVID. historical note.

30. *See* Yost, *supra* note 21, at 661.

31. FED. R. EVID. 404(b)(1).

32. *See* FED. R. EVID. 404(b) advisory committee's note (stating that 404(b) "deals with a specialized but important application of the general rule *excluding* circumstantial use of character evidence" (emphasis added)); DAVID P. LEONARD, THE NEW WIGMORE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 1.2 (2009).

33. FED. R. EVID. 404(b).

34. *Id.* advisory committee's note. It should be noted that before even reaching this point, the evidence must be relevant under Rule 401. Rule 401 states that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FED. R. EVID. 401. Notably, for Rule 401 relevancy purposes, it does not matter if other means of proof exist or if the element the evidence would be used to prove is at issue in the case—that is what the Rule 403 balancing test is for. *See id.* advisory committee's note ("The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations [under Rule 403] . . . rather than under any general requirement that evidence is admissible only if directed to matters in dispute.").

35. FED. R. EVID. 403. In the Preliminary Draft of the Federal Rules of Evidence, the drafters required the exclusion of evidence that is outweighed by a danger of unfair prejudice and provided for judicial discretion—as in the Rule's current form—for exclusion involving undue delay, waste of time, or cumulative evidence. *See* Kathryn Cameron Walton, Note, *An Exercise in Sound Discretion:* Old Chief v. United States, 76 N.C. L. REV. 1053, 1066–67 (1998). Upon the recommendation of the Department of Justice, this draft was rejected as virtually unreviewable due to the ambiguity of phrases like "substantially outweighed" and "undue prejudice" and the threat that trial courts would classify evidence to fit the demands of the rule. *See id.*

impermissible purpose.[36] Furthermore, it is proper to consider other means of proof in weighing the probative value of the evidence against the potential for unfair prejudice.[37] In other words, while the advisory committee's notes to Rule 404(b) paint it as a rule of inclusion,[38] the drafters crafted Rule 403 to address, among other things, the concerns that are inherent in admitting 404(b) evidence.[39]

What can a defendant do when the government wants to admit 404(b) evidence—such as a prior conviction—for a permissible purpose, such as to prove knowledge? One option is to offer to stipulate to the fact that the defendant has the requisite knowledge to commit the crime with which he is charged, conceding that the prosecution no longer needs to prove knowledge.[40] Another option is to not dispute the element at trial, thereby conceding that it is proved on its face.[41] Lastly, the defense can request that the judge instruct the jury that if all the elements other than knowledge are proven beyond a reasonable doubt, the jury "must convict"[42] the defendant.[43]

The theory behind each of these options is premised on reducing or eliminating the probative value of the 404(b) evidence to such an extent that Rule 403 requires the court to exclude the evidence as insufficiently probative to justify its cumulative effect or high degree of prejudice.[44] If the prosecution still wants to use the prior conviction to prove knowledge, the advisory committee notes require the trial judge to consider these alternative methods of proof, which may be less prejudicial to the defendant.[45] The degree to which circuit courts considered these alternative methods, and the degree to which the courts believed they reduced the probative value of the evidence, varied widely, resulting in the admissibility of 404(b) evidence in some circuits and exclusion in others.[46]

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36. FED. R. EVID. 403 advisory committee's note.

37. *See id.*

38. *See* LEONARD, *supra* note 32, § 4.3.2.

39. *See* Yost, *supra* note 21, at 669.

40. *See, e.g.*, United States v. Mohel, 604 F.2d 748, 753 (2d Cir. 1979); *see also infra* Part I.B.1.

41. *See, e.g.*, United States v. Silva, 580 F.2d 144, 148 (5th Cir. 1978); *see also infra* Part I.B.2.

42. For a description of "must convict" jury instructions, see *supra* note 23 and accompanying text.

43. *See, e.g.*, United States v. Crowder (*Crowder I*), 87 F.3d 1405 (D.C. Cir. 1996) (en banc), *vacated*, 519 U.S. 1087 (1997), *rev'd en banc*, 141 F.3d 1202 (D.C. Cir. 1998); *see also infra* Part I.B.3. These three methods are not mutually exclusive.

44. *See* Daniel J. Buzzetta, Note, *Balancing the Scales: Limiting the Prejudicial Effect of Evidence Rule 404(b) Through Stipulation*, 21 FORDHAM URB. L.J. 389, 392 (1994).

45. FED. R. EVID. 404(b) advisory committee's note; *see also* Buzzetta, *supra* note 44, at 407–08.

46. *See infra* Parts I.B, II. Rule 403 left the decision to admit potentially unfair prejudicial evidence to the judge by stating purposefully broad categories for exclusion, requiring a discretionary balancing of probative worth against prejudicial value. *See* Donnie L. Kidd, Jr., *Pretending to Upset the Balance:* Old Chief v. United States *and Exclusion of Prior Felony Conviction Evidence Under Federal Rule of Evidence 403*, 32 U. RICH. L. REV. 231, 237 (1998).

In reviewing the circuits' approaches to dealing with these methods, judges and commentators have analyzed divisions among the lower courts in different ways. For instance, prior to *Old Chief*, the D.C. Circuit divided the Third and Fifth Circuits into one camp, the Fourth, Sixth, Seventh, and Ninth Circuits into another, and the First, Second, Eighth, and Eleventh Circuits into a third.[47] Meanwhile, one commentator split the Sixth, Eighth, and Ninth Circuits into one camp and the First, Fourth, Tenth, and D.C. Circuits into another.[48] The Eighth Circuit was cited on both sides of the debate, indicating inconsistent application of the law even within a single circuit.[49]

B. How Defendants Can Attempt to Exclude 404(b) Evidence

Circuit courts have responded inconsistently to the available methods that defense teams use to convince a trial judge to exclude 404(b) evidence. Some circuits factored proffered stipulations into their balancing test and some did not.[50] Some believed that a stipulation or not bringing the element into issue at trial, coupled with a jury instruction, required excluding 404(b) evidence, while others did not.[51] Notably, alleged errors in admission of 404(b) evidence formed the most common ground for appeal in many jurisdictions.[52] Circuit courts therefore have become "a crucial battleground in the fight to limit district judges' discretion in applying this rule."[53] This section discusses the different approaches lower

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47. *See Crowder I*, 87 F.3d at 1409–10; *see also* Richard M. Thompson II, *The Perfect Storm: Rule 404(b), Unequivocal Stipulations, and* Old Chief*'s Dicta on Narrative Integrity and Evidentiary Richness*, 37 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 55, 64–65 (2011).

48. Scott Patterson, Old Chief v. United States*: Radical Change or Minor Departure? How Much Further Will Courts Go in Limiting the Prosecution's Ability to Try Its Case?*, 49 MERCER L. REV. 855, 857–59 (1998).

49. *Compare* United States v. Smith, 520 F.2d 544, 548 (8th Cir. 1975), *abrogated by* Old Chief v. United States, 519 U.S. 172 (1997) (holding that the government is not required to accept a defendant's stipulation in lieu of 404(b) evidence), *with* United States v. Jenkins, 7 F.3d 803, 806 (8th Cir. 1993), *overruling recognized by* United States v. Johnson, 439 F.3d 947, 952 (8th Cir. 2006) (holding that 404(b) evidence is permissible to prove intent if the defendant's theory is that he was not part of the alleged crime at all), *and* United States v. Thomas, 58 F.3d 1318, 1323 (8th Cir. 1995) (overruling the district court's decision to prohibit 404(b) evidence because a defense stipulation took it out of the dispute on the grounds that *Jenkins* sets a high bar and the stipulation was not made with sufficient clarity).

50. *See infra* Part II.B.1; *see also* United States v. Taylor, 17 F.3d 333, 338–39 (11th Cir. 1994) ("Further, where the defendant offers to stipulate to the issue the government seeks to prove, evidence of prior convictions is inadmissible." (citing United States v. Costa, 947 F.2d 919, 925 (11th Cir. 1991))); United States v. Breitkreutz, 8 F.3d 688, 690–92 (9th Cir. 1993) ("A stipulation thus has no place in the Rule 403 balancing process."), *abrogated by Old Chief*, 519 U.S. at 190–91; United States v. Mohel, 604 F.2d 748, 754 (2d Cir. 1979) ("The record must reflect, as it does here, an unequivocal concession of the element by the defendant. Once that offer is made, the other-crime evidence should be excluded.").

51. *See infra* Part II.B.2; *see also* United States v. Mounts, 35 F.3d 1208, 1217 (7th Cir. 1994) (holding that exclusion of evidence is not required when there is a sufficient jury instruction); United States v. Tarricone, 996 F.2d 1414, 1421 (2d Cir. 1993) (holding that "evidence is not relevant to an issue" if the issue is not disputed).

52. *See* Yost, *supra* note 21, at 662.

53. *Id.*

courts used in dealing with each of these three methods prior to the *Old Chief* decision.[54]

1. Defense Offers to Stipulate

A defendant may offer to stipulate to exclude 404(b) evidence that does not directly relate to the currently charged crime.[55] A sufficient stipulation may diminish the probative value of the 404(b) evidence to the point that it no longer outweighs its prejudicial effect under a Rule 403 balancing test.[56] In *United States v. Mohel*,[57] a leading decision on this method, defendant Michael Mohel was charged with possession of cocaine with intent to distribute.[58] Nelson Griffith was a cooperating witness for the prosecution and provided the most damaging evidence against Mohel.[59] Against vigorous objection by the defense, Griffith testified that shortly after his arrest, he told Mohel that he had heard that Mohel had been ripped off by two men in jail, and that Mohel responded, "if he [hadn't been] ripped off he would have been something."[60] Agent Swint, who arrested Mohel, testified that when he told Mohel that he knew Mohel had been ripped off for cocaine in the past, Mohel replied, "I don't know how I can help you in that area. The two individuals that I was fronting for are no longer in the country."[61] On appeal, the Second Circuit held that these two statements suggesting Mohel's previous involvement with cocaine were inadmissible 404(b) evidence.[62]

The government argued that the evidence was admissible to prove Mohel's knowledge of the cocaine and intent to sell it, two necessary elements of the crime charged.[63] The record left no doubt, however, that the defense sought to remove intent and knowledge from the case.[64] The defense's theory was that the alleged sale was a complete fabrication and that Griffith was a liar, and therefore, defense counsel repeatedly offered to stipulate to the elements of intent and knowledge.[65] The defense conceded that if the jury found that Mohel had in fact sold the cocaine, then there was no need to prove knowledge or intent.[66] Both at pretrial conference and on the first day of the trial, the defense counsel informed the court that it would not dispute the elements of knowledge and intent and that if the jury found

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54. For a discussion of the circuits' varying approaches in the aftermath of *Old Chief*, see *infra* Part II.

55. *See* David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 242 (2011).

56. *See infra* note 82 and accompanying text.

57. 604 F.2d 748 (2d Cir. 1979).

58. *See id.* at 750.

59. *Id.*

60. *Id.*

61. *Id.* at 751.

62. *See id.* at 755 (reversing the conviction and remanding for a new trial).

63. *See id.* at 751.

64. *See id.* at 752.

65. *See id.*

66. *See id.*

that the alleged transaction took place, knowledge and intent could be inferred from the transaction.[67]

The defense argued that because knowledge and intent were not at issue at trial, the 404(b) evidence was inadmissible.[68] The Second Circuit agreed that "[s]uch an unequivocal offer of stipulation" removed the elements as issues in the case.[69]

The Second Circuit further held that a written stipulation was not necessary, but rather it was enough for the defense to "unequivocally *offer*[] the concession and then act[] accordingly."[70] As the defense took this approach in *Mohel*, the court held that the government could not evade the defense's unequivocal offer to stipulate to intent and knowledge for the purpose of creating a dispute that would give the 404(b) evidence a permissible purpose for admission.[71]

The Second Circuit revisited its holding in *Mohel* a decade later, in *United States v. Colon*.[72] The issue on appeal in *Colon* was whether testimony was properly admitted concerning two prior occasions in which Onel Colon, the defendant, had participated in the sale of heroin.[73] As in *Mohel*, the government argued that the evidence was admissible to prove knowledge and intent.[74] The court examined Colon's defense theories at trial in order to determine whether the 404(b) evidence had been properly admitted.[75]

The defense counsel posited two opposing theories: first, that Colon gestured to the undercover officer that he might find drugs down the street, but not to the dealer in particular;[76] second, that Colon did not remember ever being approached by the undercover officer.[77] Because the defense was unsure prior to trial which theory it would pursue, the trial judge permitted the 404(b) evidence.[78]

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67. *See id.*

68. *See id.*

69. *Id.* at 753 (figuring that because "other crimes evidence is inadmissible to prove intent when that issue is not really in dispute," the evidence is inadmissible (quoting United States v. Williams, 577 F.2d 188, 191 (2d Cir. 1978))).

70. *Id.* at 754.

71. *See id.* at 754. The court emphasized that "[t]he record must reflect, as it does here, an unequivocal concession of the element by the defendant. Once that offer is made, the other-crime evidence should be excluded." *Id.*

72. 880 F.2d 650 (2d Cir. 1989).

73. *See id.* at 653.

74. *See id.* at 654.

75. *See id.* at 653. The case revolved around Colon's involvement in the sale of heroin and whether he facilitated a drug sale to an undercover officer by pointing the officer in the direction of the dealer down the street. *See id.*

76. *See id.* at 654. On this theory, the trial judge allowed the evidence, finding that it could be used to prove intent. *See id.*

77. *See id.* The defense argued that, under this theory, knowledge and intent would not be at issue, because the only question would be whether the interaction between Colon and the officer happened in the first place. *See id.* The defense was prepared to concede that if the jury found that the officer had approached Colon, then the elements of knowledge and intent could be considered proven. *See id.* at 658–59.

78. *See id.* at 655.

The Second Circuit reversed.[79] While the court agreed that the evidence would be admissible to prove intent if the defense argued that Colon innocently directed the officer toward the dealer, the court was convinced that the defense argued the second theory and that, as in *Mohel*, the offer to stipulate to intent removed the issue from the case.[80] The stipulation in *Colon* was much less explicit than the one in *Mohel*, but the court nevertheless found that changing the defense theory reaffirmed the defendant's proffered stipulation.[81]

Mohel and *Colon* are two examples of the Second Circuit's approach to dealing with stipulations: if defense counsel offers to stipulate to an element of the crime which the prosecution claims the 404(b) evidence proves, and the stipulation suffices to remove the issue from the case, the trial judge should exclude the evidence. This approach does not label the evidence irrelevant under Rule 401; rather, it diminishes the probative value of the evidence so that, under Rule 403, the evidence's prejudicial effect outweighs its probative value.[82]

Prior to *Old Chief*, other circuits adopted the Second Circuit's approach. The Eleventh Circuit, for example, followed a rule that prohibited the prosecution from introducing 404(b) evidence to prove an element of a crime if the defense has offered to stipulate to the element.[83] Similar to the Second Circuit, the stipulation must sufficiently remove the element as an issue in the case.[84] The First[85] and D.C.[86] Circuits also took similar approaches to defense offers to stipulate. For example, in *United States v. Crowder*[87] (*Crowder I*), the D.C. Circuit held that "[w]hile a defendant's concession or offer to stipulate is not 'proof,' it may serve the same function, and the trial judge should factor it into the 403 balance. That is the analysis the Advisory Committee envisioned, and it is one this court has endorsed."[88]

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79. *See id.* at 656.

80. *See id.* at 658–59.

81. *See id.* at 659.

82. *See* Old Chief v. United States, 519 U.S. 172, 179 (1997) (citing the Federal Rules of Evidence and holding that exclusion of otherwise relevant evidence must be based on the Rule 403 balancing test); *see also infra* Part I.C.1.

83. *See* United States v. Taylor, 17 F.3d 333, 338 (11th Cir. 1994) (citing United States v. Costa, 947 F.2d 919, 925 (11th Cir. 1991)).

84. *See id.* at 339. In *Taylor*, the defense's proffered stipulation to intent was insufficient because the prosecution wanted to introduce the 404(b) evidence to prove knowledge, motive, and absence of mistake as well, and thus, the 404(b) evidence still had high probative value on issues not stipulated. *See id.*

85. *See* United States v. Tavares, 21 F.3d 1, 3–4 (1st Cir. 1994) (en banc) (holding that forcing the prosecution to accept a stipulation to the status element in a felon-in-possession case does not weaken the prosecution's argument).

86. *See Crowder I*, 87 F.3d 1405, 1407–10 (D.C. Cir. 1996) (en banc), *vacated* 519 U.S. 1087 (1997), *rev'd en banc* 141 F.3d 1202 (D.C. Cir. 1998) (holding that the 404(b) evidence offered by the prosecution to prove intent and knowledge "is inadmissible because the defendant's concession of intent and knowledge deprives the evidence of any value other than what Rule 404(b) . . . unambiguously prohibits").

87. 87 F.3d 1405 (D.C. Cir. 1996) (en banc), *vacated* 519 U.S. 1087 (1997), *rev'd en banc* 141 F.3d 1202 (D.C. Cir. 1998).

88. *Id.* at 1422–23 (citation omitted).

Meanwhile, the Ninth Circuit took the absolute opposite view. In *United States v. Breitkreutz*,[89] the court emphatically held that the government is permitted to admit 404(b) evidence despite an explicit and unequivocal offer to stipulate to the proffered element.[90] The court reasoned that a defense stipulation does not relieve the prosecution of its burden of proving every element of the crime.[91] Further, the court held that the defense "goes astray in presuming that a proffered stipulation is an alternative means of proof which the district court should consider in its [Rule] 403 balancing. . . . A stipulation is not proof . . . [and] has no place in the Rule 403 balancing process."[92]

2. Element Not Contested

The idea behind stipulating to an element of a crime is that the element is no longer at issue in the case. Similarly, the defendant can remove an issue in a case by not contesting it at trial.[93] The defense theory is that if the element is not contested, the facts of the case will speak for themselves, and the jury will hold that the element is proved.[94] There are some crimes, for example, where a mental element of the crime will be inferred from the act of the crime itself if the mental element is not contested.[95]

Under these circumstances, the Second Circuit once again adopted a novel position. In *United States v. Figueroa*,[96] the court held that if the prosecution wants to offer 404(b) evidence to prove elements such as knowledge or intent, then it may only do so at the conclusion of the defendant's case.[97] This approach allows the trial judge to determine if the issue the evidence is supposed to prove is actually in dispute before weighing its probative value against its prejudicial effect.[98] In a similar vein, if the prosecution seeks to admit 404(b) evidence under another rubric, such as identity or common scheme, then—absent a defense theory that the defendant did not commit the alleged act—the evidence may be

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89. 8 F.3d 688 (9th Cir. 1993), *abrogated by* Old Chief v. United States, 519 U.S. 172 (1997).

90. *See id.* at 690–91 (finding that a court cannot compel the prosecution to accept a stipulation because it would allow the defendant to "plead out" an element of the offense).

91. *See id.* at 690 (citing Estelle v. McGuire, 502 U.S. 62, 69 (1991)).

92. *See id.* at 691–92.

93. *See* United States v. Tarricone, 996 F.2d 1414, 1421 (2d Cir. 1993) ("In some circumstances the very nature of a defense put forward by the defendant may itself remove an issue from a case.").

94. *See, e.g.*, United States v. Payne, No. 93-5381, 1994 WL 36849, at *4 (6th Cir. Feb. 8, 1994) ("Because of the large amount of crack cocaine in defendant's possession and the evidence that this amount had an approximate street value of $1,700, there was sufficient evidence from which a jury could properly conclude beyond a reasonable doubt that defendant had an intent to distribute the crack cocaine.").

95. *See supra* notes 93–94; *see also* Sonenshein, *supra* note 55, at 249 ("Thus, by merely proving the actus reus in the vast majority of criminal prosecutions, the government has already offered sufficient evidence of intent from which the fact finder can find guilt beyond a reasonable doubt.").

96. 618 F.2d 934 (2d Cir. 1980).

97. *See id.* at 939.

98. *See id.* at 938–39.

offered during the prosecution's case-in-chief.[99] This allows the judge to determine if the 404(b) evidence has any probative value, for a purpose other than to prove character, before admitting the evidence.[100]

In addition to laying out this new procedure, the *Figueroa* court also held that an unequivocal offer to stipulate is unnecessary to remove an issue from dispute to exclude 404(b) evidence.[101] Here, the government sought to admit evidence that the defendant, Ralph Acosta, was previously convicted of selling narcotics to prove that he intended to deal heroin.[102] At no point during the trial, however, did Acosta's counsel question whether Acosta intended to sell heroin or if he instead intended to sell some other non-narcotic substance.[103] Counsel made clear that this was not his defense; instead, he denied that the alleged conduct occurred at all.[104] The Second Circuit held that Acosta's counsel raised no issue concerning Acosta's intent and so "had sufficiently removed that issue from the case."[105]

While the government argued that Acosta did not remove intent as a disputed issue in the case,[106] the court held that whether an issue remains "sufficiently in dispute" does not depend on the words used, but depends rather on the effect that the trial court gives to the words.[107] Therefore, while a stipulation suffices to remove an issue from dispute, it is not always necessary.[108] Instead, defense counsel may remove an issue from dispute if counsel were to

> express a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any subsequent cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all the other elements established beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed.[109]

A formal stipulation is not required; rather, it is enough for the defense to not contest the issue during trial.[110]

Similarly, in *United States v. Estabrook*,[111] the Eighth Circuit affirmed that its general rule was to "delay admission of 404(b) evidence until after the defense rests."[112] The court reasoned that this was the best time to

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99. *See id.*
100. *See id.*
101. *See id.* at 942.
102. *See id.* at 939.
103. *See id.* at 940. If this had been his defense, then evidence may have been permitted to prove knowledge or absence of mistake.
104. *See id.*
105. *Id.*
106. *See id.* at 941.
107. *See id.* at 942.
108. *See id.*
109. *Id.*
110. *See id.* The *Figueroa* court proceeded to discuss jury instructions, which this Note considers in the next section.
111. 774 F.2d 284 (8th Cir. 1985).
112. *Id.* at 289.

determine whether the issue the 404(b) evidence seeks to prove was really in dispute and to properly weigh its probative worth and prejudicial effect.[113]

Predictably, other circuits disagreed with this approach. The Seventh Circuit expressly rejected the *Figueroa* approach in *United States v. Mounts*,[114] relying on its precedent that entitles the government to introduce 404(b) evidence to prove intent even when the defendant has not disputed intent.[115] The Third Circuit concluded that its case law precluded it from accepting the Second Circuit approach[116] but left "the door open" for district courts to exclude 404(b) evidence when a defendant makes it clear that he is not contesting the issue.[117]

3. "Must Convict" Jury Instructions

Even when a court accepts a defense stipulation or agrees that the element at issue is not disputed, the trial judge must give the jury some explanation on how to deliberate.[118] The jury instruction, which often goes hand-in-hand with the first two defense methods for excluding 404(b) evidence,[119] emphasizes that the jury need not find proof of a certain element, which further diminishes the probative value of any 404(b) evidence.[120]

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113. *See id.* (citing United States v. Wagoner, 713 F.2d 1371, 1376 (8th Cir. 1983), and *Figueroa*, 618 F.2d at 939). The Fifth Circuit took a similar approach. *See* United States v. Silva, 580 F.2d 144, 148 (5th Cir. 1978) (holding that there was no issue of intent when the defendant claimed mistaken identity and denied participating in the alleged crime and further stating that "if the act be proven the intent will usually be inferred"). The First Circuit also considered the *Figueroa* approach, but did not officially adopt it because it was apparent that intent would be in dispute in the case in question. *See* United States v. Simon, 842 F.2d 552, 555 (1st Cir. 1988).

114. 35 F.3d 1208, 1215 (7th Cir. 1994) (rejecting the defendant's argument that the 404(b) evidence was not relevant to any fact at issue at the time the evidence was offered as "unavailing because unlike the Second Circuit . . . this Circuit permits the government to present Rule 404(b) evidence in its case in chief if the crime requires proof of specific intent"). The Seventh Circuit distinguishes between general intent crimes and specific intent crimes. *See infra* notes 299–305 and accompanying text.

115. *See* United States v. Liefer, 778 F.2d 1236, 1243 (7th Cir. 1985) (citing United States v. Weidman, 572 F.2d 102, 107 (7th Cir. 1978)).

116. *See* United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994).

117. *See id.*

118. *See* DAVID P. LEONARD, THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBILITY § 1.11.5 n.58 (2002) ("When parties 'stipulate' to a fact, the trial judge . . . tell[s] the jury that '[I]f . . . you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty.'"); *see also* CLIFFORD C. FISHMAN, 3 JONES ON EVIDENCE § 17:99 (7th ed. 1998).

119. *See supra* Part I.B.1–2.

120. *See Crowder I*, 87 F.3d 1405, 1415 (D.C. Cir. 1996) (en banc), *vacated* 519 U.S. 1087 (1997), *rev'd en banc* 141 F.3d 1202 (D.C. Cir. 1998) (holding that a stipulation coupled with a "must convict" jury instruction should result in the same outcome as admitting 404(b) evidence coupled with a limiting instruction; otherwise, "not only would the jury have to disregard a clear, simple instruction, but it also would have to acquit on a theory of the facts not advanced by either party and unsupported by any record evidence"); *see also* Sonenshein, *supra* note 55, at 248–49 (providing as a possible jury instruction, "if you the jury find that the defendant committed the charged act beyond a reasonable doubt,

For instance, in *Crowder I*, the D.C. Circuit, sitting en banc, adopted the Second Circuit's view toward stipulations.[121] There, the defendant, Horace Lee Davis, was convicted of intent to distribute crack cocaine.[122] His defense theory was mistaken identity, arguing that he had nothing to do with the sale.[123] Prior to trial, the government notified the defense that it intended to introduce three of Davis's prior cocaine sales to prove knowledge and intent.[124] Subsequently, the defense offered to stipulate to both of these elements, conceding "that the person who possessed the drugs both knew that they were drugs and intended to sell them."[125] On appeal, the D.C. Circuit held that the stipulation, coupled with a sufficient jury instruction, was enough to prevent the government from introducing any other evidence that the jury could use for impermissible propensity purposes.[126]

In *Figueroa*, the Second Circuit considered the conditional type of stipulation at issue in *Crowder I*: where the defendant claims no involvement in the crime but concedes that if the jury finds that the prosecution proves the identity as to the defendant, it must also find that the defendant had the requisite knowledge and intent.[127] The court reasoned that the stipulation's conditional nature can be confusing, but the risk can be minimized by a simple "must convict" jury instruction.[128]

The Second Circuit similarly held in *Mohel* that once a concession is made by the defendant, the trial judge can instruct the jury that if it finds "beyond a reasonable doubt that all the other elements of the offense have been established a verdict of guilty may be returned."[129]

The First Circuit took a different approach in *United States v. Garcia*.[130] Recognizing the increasing frequency of 404(b) admissibility appeals, the court offered guidance on how to approach the issue.[131] As it pertained to defense offers to stipulate, the court held that if the judge determined the proffered stipulation was sufficient, the judge should confirm that the defendant was aware of the implications his stipulation would have on the judge's jury instruction before directing the jury to resolve the issue against the defendant.[132] With regard to an uncontested element, rather than a

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you may infer from the act and all its surrounding circumstances that the defendant intended the natural and probable consequences of that act beyond a reasonable doubt" (quoting Sandstrom v. Montana, 442 U.S. 510, 514–15 (1979))).

121. *See Crowder I*, 87 F.3d at 1410 ("[W]e think the . . . Second . . . Circuit['s] treatment of an offer to concede is most convincing.").

122. *See id.* at 1408.

123. *See id.*

124. *See id.*

125. *Id.*

126. *See id.* at 1410.

127. *See generally* United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980).

128. *See id.* at 942; *cf. Crowder I*, 87 F.3d at 1415 (suggesting that a "must convict" instruction is actually "clear" and "simple").

129. United States v. Mohel, 604 F.2d 748, 754 (2d Cir. 1979).

130. 983 F.2d 1160 (1st Cir. 1993).

131. *See id.* at 1175.

132. *Id.* at 1175–76.

proffered stipulation, the court found this defense method inadequate to allow the judge to instruct the jury that the element need not be considered.[133]

When a court does not accept these methods and allows 404(b) evidence at trial, the judge can—and, in many circuits, is required to—give a limiting instruction to the jury.[134] When a trial judge is deciding whether to admit 404(b) evidence, however, the judge is supposed to consider the effect that the limiting instruction might have on the jury.[135] A majority of lower courts accept the notion that a limiting instruction effectively lessens the potential for 404(b) evidence to have a prejudicial effect.[136] This remains the case even though the Court has recognized that limiting instructions may not work, especially when the evidence is likely to invoke high emotions in the jury.[137]

Other courts, however, did not require a limiting instruction to be issued unless requested[138] and also never entertained the idea that a "must convict" jury instruction could further devalue the probative worth of 404(b) evidence. In *United States v. Hadley*[139]—and again in *Breitkreutz*[140]—the Ninth Circuit made clear that whether the defense elects not to contest an issue or unequivocally offers to stipulate to an issue does not matter; the prosecution may present its case the way it sees fit.[141] Thus, coupling a

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133. *See id.* at 1175 ("[D]efense counsel's comments suggesting that the defendant would not argue an issue . . . were quite different from saying that the judge may instruct the jury that . . . the defense w[ould] not dispute the 'knowledge' or 'intent' needed to support the conviction.").

134. *See* LEONARD, *supra* note 32, § 4.7 (finding that the Court's ruling in Huddleston v. United States, 485 U.S. 681 (1988), suggests that the general framework for admissibility of 404(b) evidence should include a limiting instruction and, at the least, the Third, Fourth, and Tenth Circuits include one in their respective rules).

135. *See* FED. R. EVID. 403 advisory committee's note ("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."); *see also* 22A CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5222 (2d ed. 2014).

136. *See* LEONARD, *supra* note 118, § 1.11.5. *But cf.* WRIGHT & GRAHAM, *supra* note 135, § 5222; Sonenshein, *supra* note 55, at 254 ("[S]ocial science has unequivocally demonstrated the utter futility of relying on limiting instructions to cure whatever error might occur in the admission of similar acts evidence.").

137. *See* MUELLER & KIRKPATRICK, *supra* note 17, § 4:13 n.25; *see also* Sonenshein, *supra* note 55, at 271 (explaining that the inefficiency of limiting instructions may derive from jurors' failure to understand the instruction or that they comprehend the instruction but ignore it in favor of what they think is right); *cf.* Walton, *supra* note 35, at 1082 ("[E]ven when passions are low, not everyone can follow jury instructions." (quoting Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 249 (1976))).

138. *See* United States v. Sangrey, 586 F.2d 1312, 1315 (9th Cir. 1978) (holding that while a limiting instruction would have been preferred, the judge's failure to issue one was reversible error because no instruction was requested by the defendant).

139. 918 F.2d 848 (9th Cir. 1990), *cert. granted*, 503 U.S. 905 (1992), *and dismissed as improvidently granted*, 506 U.S. 19 (1992).

140. 8 F.3d 688 (9th Cir. 1993), *abrogated by* Old Chief v. United States, 519 U.S. 172 (1997); *see supra* Part I.B.1.

141. *Hadley*, 918 F.2d at 852 ("This burden is not relieved by a defendant's promise to forgo argument on an issue. . . . Hadley's choice of defense did not relieve the government of its burden of proof . . . .").

jury instruction with a proffered stipulation or uncontested issue did not suffice to exclude permissible 404(b) evidence during the Rule 403 balancing test in the Ninth Circuit.

Subsequently, the Supreme Court recognized the different approaches of the lower courts in admitting 404(b) evidence and granted certiorari in *Hadley*.[142] Eight months later, however, the Court dismissed the case as improvidently granted without giving an explanation.[143] With the dismissal of certiorari in *Hadley*, the lower courts continued to be divided over when to admit 404(b) evidence.

C. The Turning Point: Old Chief v. United States

In 1997, the Supreme Court revisited the subject, albeit in a much more limited manner. *Old Chief* addressed the much narrower issue of how to treat defense offers to stipulate to the prior conviction "status" element in felon-in-possession cases.[144] Prior to the decision, some circuits had ruled that a defense stipulation to a qualifying prior conviction prohibited evidence of the nature of the crime.[145] Other circuits held that a prosecutor need not accept a defense offer to stipulate to the prior conviction, thus freeing the prosecutor to prove the nature of the defendant's prior crime.[146] In *Old Chief*, the Court held that a prosecutor in a felon-in-possession case must accept a defense offer to stipulate to the status element.[147]

Old Chief was convicted in the U.S. District Court for the District of Montana on, inter alia, felon in possession of a firearm charges.[148] The federal statute, 18 U.S.C. § 922(g)(1), makes it unlawful for a person previously convicted of a felony to possess a firearm, punishable by imprisonment for a term exceeding one year.[149] At trial, Old Chief offered to stipulate to this element, effectively relieving the prosecution of the need

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142. Hadley v. United States, 503 U.S. 905 (1992).

143. Hadley v. United States, 506 U.S. 19 (1992).

144. *See* Old Chief v. United States, 519 U.S. 172, 172 (1997); *see also* Walton, *supra* note 35, at 1068–69. The status element in felon-in-possession cases is important because the act charged would not be a crime if the defendant was not a convicted felon, as opposed to a case in which a prior felony conviction bears only on sentencing. *See* Risinger, *supra* note 2, at 425.

145. *See* United States v. Tavares, 21 F.3d 1, 3–4 (1st Cir. 1994) (en banc) (holding that forcing the prosecution to accept a stipulation to the status element in a felon-in-possession case in no way weakens the prosecution's argument); United States v. Gilliam, 994 F.2d 97, 103 (2d Cir. 1993) (holding that in a felon-in-possession case, the jury need only know that there was a prior conviction, and the underlying facts of a prior conviction are irrelevant to a jury); *see also* United States v. Jones, 67 F.3d 320, 323–24 (D.C. Cir. 1995) (adopting the First Circuit's holding in *Tavares*).

146. *See* United States v. Old Chief, No. 94–30277, 1995 WL 325745, at *1 (9th Cir. May 31, 1995), *rev'd*, 519 U.S. 172 (1997) (holding that "[r]egardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence"); *see also* United States v. Burkhart, 545 F.2d 14, 15 (6th Cir. 1976); United States v. Smith, 520 F.2d 544, 548 (8th Cir. 1975). *Old Chief* abrogated both *Burkhart* and *Smith*.

147. *See Old Chief*, 519 U.S. at 178.

148. *See id.* at 172.

149. *See id.* at 174; *see also* 18 U.S.C. § 922(g)(1) (2006).

to prove this element by admitting evidence of Old Chief's prior convictions.[150] The prosecutor refused to agree to the stipulation, asserting that he could prove his case in the way he saw fit.[151]

On appeal, Old Chief argued that the district court abused its discretion when the trial judge allowed prejudicial evidence concerning Old Chief's prior conviction.[152] Old Chief was previously convicted of an assault causing serious bodily injury, and because his current case involved an altercation with a gun, allowing the use of Old Chief's prior conviction could prejudice the jury.[153] The Ninth Circuit affirmed the lower court's ruling, holding that "[r]egardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence."[154] After granting certiorari, the Supreme Court reversed.[155]

1. Majority Holding: Relevancy and the Holistic Method

The decision in *Old Chief* addressed whether a district court judge abuses her discretion by allowing the prosecution to reject a defendant's offer to stipulate to the status element of a felon-in-possession charge.[156] The issue is whether the danger that the jury will use the name and nature of the prior conviction for propensity purposes can ever be outweighed by its probative worth in these cases.[157]

In an opinion by Justice Souter, the majority held that when a trial court does not accept a stipulation of this sort, it abuses its discretion.[158] The Court divided its opinion into two tests of admissibility: first, the evidence must pass through Rule 401; and second, the evidence must pass the Rule 403 balancing test.[159] When applying the Rule 403 balancing test, the court must consider the effect of offered stipulations against the prosecution's need for narrative integrity and evidentiary richness.[160]

To begin, the Court noted that Old Chief's offer to stipulate did not make the prior conviction evidence irrelevant under Rule 401.[161] Pointing to the advisory committee note to Rule 401, the Court held that evidence is not irrelevant just because it is not a disputed issue, but rather, if otherwise relevant evidence is to be excluded, it must be excluded under Rule 403.[162]

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150. *See Old Chief*, 519 U.S. at 175.
151. *See id.* at 177.
152. *Id.*
153. *Id.* at 174–75; *see also supra* notes 9–12 and accompanying text.
154. *Id.* at 177 (quoting United States v. Old Chief, No. 94-30277, 1995 WL 325745 (9th Cir. May 31, 1995)).
155. *See id.* at 178.
156. *Id.* at 174.
157. *See id.* While the issue in this case pertains narrowly to the element of a prior conviction, it has had a significant effect on stipulations to any element of a crime. *See infra* Part II.
158. *See Old Chief*, 519 U.S. at 174.
159. *See id.* at 178, 180.
160. *See id.* at 183; *see also infra* Part I.C.2.
161. *See Old Chief*, 519 U.S. at 179.
162. *See id.*

In other words, a defense stipulation that could serve to remove an issue from dispute does not make evidence any less relevant.[163]

Then, the *Old Chief* majority addressed the more complicated matter of the Rule 403 balancing test.[164] While noting that relevant evidence can be excluded if its probative value is outweighed by "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence,"[165] the Court focused on the danger of unfair prejudice.[166] The danger is clear: introducing evidence of a defendant's prior bad act can cause a jury to equate that prior act with the defendant's character.[167] This might lure the jury into thinking the defendant is more likely to have committed the current crime because he committed the past one, or it might naturally prejudice the jury's opinion, convincing it that the defendant should be convicted regardless of his guilt.[168] It is precisely for this reason that Rule 404(a) exists.[169]

Recognizing that courts use different approaches to Rule 403 balancing, the majority presented two possibilities: first, "[a]n item of evidence might be viewed as an island," with judges considering only that item's probative value against its prejudicial risk; or second, "the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case."[170]

The Court readily adopted the second, more "holistic" approach in *Old Chief*, explaining that if there was an objection to the admissibility of an item of evidence, the trial judge should consider the probative value and unfair prejudice in light of any available substitutes for that evidence.[171] If an available substitute has a lower danger of prejudice and the same probative value, then a proper exercise of judicial discretion seems to require a court to exclude 404(b) evidence under Rule 403.[172] The Court qualified this substantial instruction to trial judges by pointing out the need to weigh the discounted value of the item of evidence against the need for "evidentiary richness and narrative integrity."[173]

163. FED. R. EVID. 401 advisory committee's note.

164. *Old Chief*, 519 U.S. at 180.

165. FED. R. EVID. 403.

166. *Old Chief*, 519 U.S. at 180.

167. *See id.*

168. *See id.* at 180–81.

169. *See* FED. R. EVID. 404(a) (stating the permissible and impermissible uses of character evidence); *see also Old Chief*, 519 U.S. at 181 (quoting Michelson v. United States, 335 U.S. 469, 475–76 (1948)).

170. *Old Chief*, 519 U.S. at 182.

171. *See id.*; *see also* Kidd, *supra* note 46, at 257 ("Thus, a holistic approach to Rule 403 concerning prior convictions should bar evidence of the name and nature of the offense since less prejudicial alternatives exist which reduce the probative value of the prior convictions.").

172. *Old Chief*, 519 U.S. at 182–83.

173. *See id.* at 183. *But cf.* Thompson, *supra* note 47, at 71 (arguing that the Court should have ended its opinion at this point and that the subsequent paragraphs on narrative integrity and evidentiary richness were mere dictum, which, in effect, undermined the true holding).

a. Evidentiary Richness and Narrative Integrity

Responding to Justice O'Connor's contention that there is a well-accepted rule entitling the prosecution to prove its case in the manner in which it chooses,[174] Justice Souter questioned whether Old Chief's proffered stipulation carried the same evidentiary value as the evidence the government wanted to introduce.[175] Does the Court's holding allow the defendant to stipulate his way out of the case?[176] What happens if the 404(b) evidence addresses a number of different elements, increasing the force of that piece of evidence?[177]

The Court conceded in its opinion that a singular piece of evidence could have great weight with a jury.[178] The Court reasoned that a stipulation is abstract and may not be able to tell a "colorful story with descriptive richness" in the same manner as 404(b) evidence could.[179] A stipulation, in other words, may be less effective in implicating "the law's moral underpinnings and a juror's obligation to sit in judgment."[180] Lastly, the Court addressed the ideas that a juror has expectations of what proper proof should look like and that the prosecution must be allowed to satisfy these demands,[181] explaining that "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it."[182]

b. The Narrow Holding

The majority found that the name and nature of Old Chief's prior conviction would be highly prejudicial and the district court should have considered Old Chief's offer to stipulate to his prior conviction when

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174. *See Old Chief*, 519 U.S. at 198 (O'Connor, J., dissenting).

175. *Id.* at 186.

176. *See id.*

177. *See id.* at 187.

178. *See id.* ("When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could . . . .").

179. *See id.*

180. *See id.* at 187–88 ("[T]he prosecution may fairly seek to place its evidence before the jurors . . . to convince [them] that a guilty verdict would be morally reasonable . . . .").

181. *Id.* at 188 (suggesting that a juror might penalize the prosecution for not producing evidence that satisfies the jury's expectations).

182. *Id.* at 189; *cf.* ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK § 2:3 (2d ed. 2001) (reasoning that, if this principle is carried to its logical extreme, it would "revolutionize the law of relevancy"). Park goes on to interpret the Court's language as entitling the prosecution to admit evidence that is not needed for the jury to make logical inferences, but might be needed for the jury to establish "human significance" and adhere to its moral reasoning. *See id.* § 2:3; *see also* James Joseph Duane, *"Screw Your Courage to the Sticking-Place": The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463, 463–64 (1998) (citing Risinger, *supra* note 2, for the proposition that this portion of the *Old Chief* opinion, "a curious four-paragraph dollop of dictum buried in the middle of the majority opinion," involved a marked departure from several points that the Court had long regarded as settled). Duane surmises that this "four-paragraph disclaimer" was the price the majority paid in order to pick up the crucial fifth vote from Justice Kennedy. *Id.* at 464.

deciding to admit the evidence.[183] Reversing the Ninth Circuit, the Court held that Old Chief's offer to stipulate to the element amounted to an offer to admit to the prior conviction "and a defendant's admission is, of course, good evidence."[184] The Court stressed that because the name and nature of the prior conviction was not pertinent to the current crime charged, allowing evidence of the prior conviction would not have further explained a part of the element that the stipulation would not otherwise cover.[185] Logic, Justice Souter explained, would thus require the trial court to accept the stipulation when balancing under Rule 403.[186]

Old Chief made clear that the prosecution has no need for evidentiary depth to tell a story with respect to Old Chief's—or any defendant's—legal status.[187] The prior conviction element of the crime that is alleged does not treat different felonies differently, the prior conviction is not purportedly used to prove any other elements, and excluding the name and nature of the prior conviction does not leave any sort of gap in the prosecution's story of the defendant's crime.[188] The Court thus held that under the Rule 403 balancing test, the stipulation to the prior conviction and the evidence describing the name and nature of the prior conviction are distinguishable "only by the risk inherent in the one and wholly absent from the other."[189] Therefore, it was an abuse of discretion for the trial court to allow the 404(b) evidence.[190]

2. The *Old Chief* Dissent

In dissent, Justice O'Connor disagreed with both the holding of *Old Chief*, that the government must accept a defense stipulation to a prior conviction in a felon-in-possession case, and its reasoning, that revealing the name and nature of the defendant's prior conviction is unfairly prejudicial to the defendant under Rule 403.[191] In Justice O'Connor's view, while evidence of this nature may harm the defendant, it is not "unfair" and thus not precluded by Rule 403.[192]

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183. *See Old Chief*, 519 U.S. at 186.

184. *Id.* (citing FED. R. EVID. 801(d)(2)(A)). *But see* United States v. Old Chief, No. 94-30277, 1995 WL 325745, at *1 (9th Cir. May 31, 1995), *rev'd*, 519 U.S. 172 (1997) ("Under Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the [Rule] 403 balancing process."). While the Supreme Court reversed the holding of this case, it did not specifically reverse the Ninth Circuit's rule that a stipulation is not sufficient proof in cases other than status. *See infra* Part II.B.2, II.C.

185. *See Old Chief*, 519 U.S. at 186.

186. *See id.*

187. *See id.* at 190.

188. *See id.* at 190–91 ("[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.").

189. *Id.* at 191.

190. *See id.*; *see also* Kidd, *supra* note 46, at 258 ("The court abuses its discretion if it fails to exclude the full record when it is unnecessary, does not damage the prosecution's burden of proof on the status element, and will lead to improper jury considerations.").

191. *Old Chief*, 519 U.S. at 192–93 (O'Connor, J., dissenting).

192. *See id.* at 193; *see also* FED. R. EVID. 403.

Justice O'Connor explained that the relevant statute envisioned the necessity for jurors to learn the name and nature of the crime because the accused must have previously committed a particular type of crime to satisfy the prior conviction element.[193] The dissent argued that any harm that may result from introducing the name and nature of the prior conviction could be mitigated by a limiting instruction.[194]

Finally, the dissent argued that the majority's reasoning in concluding that the defense stipulation has the same probative value as the government's evidence is inherently flawed.[195] The dissent believed that a jury would be just as confused by the "missing chapter" of the defendant's prior conviction as by a defense concession to any other element of the crime.[196] Perhaps more importantly, Justice O'Connor asserted that even when a defendant attempts to stipulate or successfully stipulates to an element of the crime, it does not remove the government's burden to prove each element of that crime beyond a reasonable doubt.[197] Because the government has this burden, "it must be accorded substantial leeway to submit evidence of its choosing to prove its case."[198]

II. *OLD CHIEF*'S AFTERMATH

Justice Souter's majority opinion concerning narrative integrity and evidentiary richness produced strong reactions and varied interpretations as to how those portions of the opinion applied to elements of a crime other than the status element. It is indisputable, however, that *Old Chief* significantly clarified Rule 403, explicitly holding that the probative value of evidence must be determined by comparing alternative evidence.[199] While the advisory committee's notes to Rule 403 suggest this, lower courts

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193. *See Old Chief*, 519 U.S. at 194. The crime must have been punishable by imprisonment for a term exceeding one year, and particular crimes, such as business crimes, require a potential imprisonment of at least two years. *See id.* Justice O'Connor reasoned that the Government was allowed to admit the specific gun that Old Chief possessed even though any firearm would satisfy the requirement and that this is no different than admitting the name and nature of the prior felony. *See id.* at 194–95.

194. *See id.* at 196. *But see* Walton, *supra* note 35, at 1082 (noting that Justice O'Connor failed to recognize the shortcomings of limiting instructions and that her argument "implies that they are a magical solution to a material problem . . . [that] fails to justify or to remedy the likelihood of unfair prejudice that will result from admitting evidence on the nature of a prior conviction").

195. *See Old Chief*, 519 U.S. at 198 (O'Connor, J., dissenting).

196. *Id.*

197. *See id.* at 199–200. Justice O'Connor's view is clearly inconsistent with the majority's determination that a stipulation is the equivalent to an admission, which is, of course, "good evidence." *See id.* at 186.

198. *See id.* at 200. *But see* Risinger, *supra* note 2, at 451–53 ("Justice O'Connor's treatment of the defendant's judicial admission as not formally binding seems disingenuous. . . . Functionally, [refusing to permit a "must convict" jury instruction] is no more than saying that the right to a jury trial on every formal issue belongs to the government as well as the defense, and that the government may insist on it under all circumstances.").

199. *See Rule 403—Unfair Prejudice*, 111 HARV. L. REV. 360, 365 (1997).

did not always heed that instruction, sometimes failing even to conduct a Rule 403 balancing test.[200]

The previous part discussed the background of *Old Chief* and analyzed the Court's opinion. Part II of this Note focuses on the effects of that opinion and how the lower courts' interpretations have changed in light of the Supreme Court's holding. Part II.A looks at the circuit courts that changed their approaches to admitting 404(b) evidence in light of *Old Chief*, some of which explicitly overruled precedent while others merely tweaked their tests. Part II.B focuses on the circuits that did not alter their 404(b) admissibility tests, either because or in spite of *Old Chief*'s discussion on narrative integrity and evidentiary richness. This section looks at circuits on both sides of the 404(b) admissibility spectrum, with a focus on their application of the Rule 403 balancing test. Finally, Part II.C analyzes the current trends of the Ninth Circuit in the wake of the Supreme Court's reversal of its *Old Chief* decision.

A. Reversal Effect of Old Chief

As seen in Part I, many circuits prior to *Old Chief* held that 404(b) evidence would not be allowed as proof of an element that was uncontested, whether the element was undisputed or the defense offered to stipulate to it.[201] These circuits held that when an element was uncontested, a jury instruction would be sufficient to relieve the prosecution of its burden of proof on that element.[202] Following *Old Chief*, however, some of these circuits understood *Old Chief*'s discussion on narrative integrity and evidentiary richness as overruling, either explicitly or implicitly, some of their prior holdings and 404(b) jurisprudence.

1. *Crowder II*: The D.C. Circuit Is the First to Fall

The D.C. Circuit was the first court to determine how *Old Chief* affected stipulations other than status. As discussed in Part I, the D.C. Circuit found in *Crowder I* that a trial court abuses its discretion when it admits 404(b) evidence to prove an element of a crime if the defendant has offered to stipulate to that same element.[203] The Supreme Court granted certiorari on *Crowder I* to review this holding but vacated and remanded the decision in light of the Court's concurrent holding in *Old Chief*.[204]

On remand, the D.C. Circuit considered the case again (*Crowder II*) and reversed, holding that "despite a defendant's unequivocal offer to stipulate to an element of an offense, Rule 404(b) does not preclude the government

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200. *See id.* ("The Court's mandate that lower courts weigh the probative and prejudicial values of evidentiary alternatives along with the evidence in question should add structure to trial court decisionmaking and facilitate review of such decisions.").

201. *See supra* Part I.B.

202. *See supra* Part I.B.3.

203. *See* United States v. Crowder (*Crowder II*), 141 F.3d 1202, 1203 (D.C. Cir. 1998) (en banc) (summarizing *Crowder I*).

204. *See* United States v. Crowder, 519 U.S. 1087, 1087 (1997).

from introducing evidence of other bad acts to prove that element."[205] The court reversed because it found its theory in *Crowder I* invalid in light of *Old Chief*.[206] The *Crowder I* holding rested on the theory that the government does not need to prove knowledge and intent if the defendant concedes these elements and the concession is combined with an explicit jury instruction.[207] The *Crowder I* court reasoned that the defendant's proffered stipulation combined with the judge's instruction to the jury eliminated the relevancy of the 404(b) evidence with respect to the knowledge and intent elements; without another "nonpropensity purpose, its only function would be to prove what Rule 404(b) barred."[208]

On remand from the Supreme Court, the D.C. Circuit found its reasoning in *Crowder I* to be flawed because it rested on the notion that the 404(b) evidence was no longer relevant.[209] As the Court held in *Old Chief* that an issue need not be in dispute to be relevant and that alternative methods of proof do not bar evidence from being relevant, the D.C. Circuit considered its *Crowder I* theory overruled.[210] The court reasoned that if the 404(b) evidence remains relevant and the government seeks to admit it for a nonpropensity purpose, then Rule 404(b) guarantees the government the right to seek its admission.[211] If the trial court were then to exclude the evidence, it would have to be on a finding that the evidence is unfairly prejudicial in light of the proposed stipulation coupled with a jury instruction.[212] Under this analysis, and in light of *Old Chief*'s notions of narrative integrity and evidentiary richness, the D.C. Circuit reversed its prior holding.[213]

The *Crowder II* holding relied heavily on *Old Chief*'s discussion about stipulations, concluding that the Court's objective was to distinguish the status element from other elements where a stipulation would not be satisfactory to the jury.[214] Quoting *Old Chief*'s language on the importance of narratives,[215] the D.C. Circuit was convinced that when it came to the elements of intent and knowledge, the probative value of the evidence of

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205. *Crowder II*, 141 F.3d at 1203.

206. *See id.* at 1206. *But see* Thompson, *supra* note 47, at 73 (noting that *Crowder II* is "in no uncertain terms, a holding that runs counter to *Old Chief*'s actual holding and what FRE 404(b) requires").

207. *See Crowder II*, 141 F.3d at 1205.

208. *Id.*

209. *See id.* at 1206.

210. *See id.* The D.C. Circuit rested its holding in *Crowder I* on Rule 401, while the Supreme Court rested its holding in *Old Chief* on Rule 403, and for this reason, the D.C. Circuit re-evaluated its holding in light of the Court's opinion. *See id.*

211. *See id. But see id.* at 1215 (Tatel, J., dissenting) (quoting the trial judge, then-Chief Judge Penn, in *Crowder I*: "Let's not kid ourselves, . . . the reason the government seeks to introduce [404(b) evidence] is because it's prejudicial." (citations omitted)).

212. *See id.* at 1206–07 (as opposed to a finding that the stipulation and jury instruction rendered the 404(b) evidence irrelevant).

213. *See id.* at 1207–09.

214. *See id.* at 1207.

215. *See id.* (arguing that "a syllogism is not a story" and the "evidentiary account of what a defendant has thought and done can accomplish what no abstract statements ever could" (quoting Old Chief v. United States, 519 U.S. 172, 187–89 (1997))).

Davis's prior cocaine sales was not outweighed by its potential prejudicial effect.[216] On the issue of whether Davis had the intent to distribute, the court reasoned that the evidentiary strength of stipulating to intent by concession (i.e., that whomever possessed the drugs in question possessed them with the intent to distribute) was not as good as evidence that Davis had previously possessed and sold cocaine.[217]

In sum, the court held that the evidentiary richness of the 404(b) evidence added to the narrative integrity of the prosecution and tilted the Rule 403 balance in favor of admission.[218] As to Rule 403, the court held that (1) "each case will turn on the discretionary judgment of the trial court and its assessment, not of relevance, but of the evidentiary value of the government's Rule 404(b) evidence,"[219] and (2) the government also will have the effects of a limiting instruction to the jury to balance the scale further in its favor.[220]

2. The *Crowder* Effect

The *Crowder II* majority believed that the force of evidence can affect its worth and that the way that proof is delivered to the jury affects its richness and value.[221] Narrative integrity is about giving the prosecution the tools—here, the evidence—it needs to convince the jury of the defendant's guilt.[222] The jury, naturally, is interested in learning what happened.[223] Some courts and commentators believe that jurors might punish the government if there seems to be a missing piece of evidence in the story, even if both parties

216. *See id.* at 1209–10.

217. *See id.* at 1208 ("Far from a choice between 'propositions of slightly varying abstraction,' the choice in these cases was between concrete evidence of the defendants' actions giving rise to natural and sensible inferences, and abstract stipulations about hypothetical persons not on trial."). *But see id.* at 1215 (Tatel, J., dissenting) ("The [majority] court worries that [because the stipulations did not reference the defendants by name,] a confused jury may decline to convict, but Crowder's and Davis's willingness to accept a 'must convict' jury instruction removes this danger. . . . The offered instruction makes abundantly clear that possession, not knowledge or intent, remains the only issue in dispute.").

218. *See id.* at 1210.

219. *Id.*

220. *See id. But see* MICHAEL H. GRAHAM, 3 HANDBOOK OF FEDERAL EVIDENCE § 404:5 (7th ed. 2012) ("The availability of a limiting instruction . . . while theoretically a factor in balancing, is of little practical significance since logic and experience indicate that the jury will be both uninterested in and incapable of considering the evidence solely for the purpose offered and not as evidence of the guilt of the defendant for the crime charged." (citing United States v. Bradley, 390 F.3d 145, 155 (1st Cir. 2004))).

221. *See Crowder II*, 141 F.3d at 1210.

222. *See* Old Chief v. United States, 519 U.S. 172, 187–88 (1997). The Court's discussion on the matter focused on appeasing the jury and providing them with a complete narrative. *See id.*

223. *See* Richard O. Lempert, *Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15, 17–18 (2002); *see also* Kidd, *supra* note 46, at 231 (suggesting that a voter on election night wants to know the story of the campaign trail more than the tally of the vote and analogizing that to the jury wanting to know the narrative of a crime rather than hearing a stipulation).

and the judge assure the juror that it is not needed.[224] The *Crowder II* majority thus understood *Old Chief* to give a green light to evidence that can fill in these missing pieces.[225]

Crowder II had a profound effect on the Eighth Circuit, which, prior to *Old Chief*, had adopted the Second Circuit's rule that a defendant can avoid the prosecution's 404(b) evidence if his defense is one of mistaken identity.[226]

In the wake of *Old Chief* and *Crowder II*, the Eighth Circuit effectively held this line of cases overruled in *United States v. Hill*.[227] Even conceding that the 404(b) evidence in question—a prior drug conviction—in *Hill* was "remote in time" from the acts charged,[228] limiting its ability to assist the prosecution's narrative, the court held the 404(b) evidence admissible to prove intent.[229] The *Hill* court found the remote criminal acts of the defendant admissible because they could still be "a critical part of the story of [the] crime, and may be introduced to prove what the defendant was thinking or doing at the time of the offense."[230] Some argue, however, that prior bad acts, especially those remote in time, are by their nature separate

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224. *See* Lempert, *supra* note 223, at 18 ("The jury is, not unreasonably, suspicious when evidence is provided in strange or unfamiliar ways, as by stipulations."). *But see* Duane, *supra* note 182, at 465–66 ("The [*Old Chief*] Court cites no authority to support that proposition, and common sense squarely repudiates it. No sane jury would ever draw an adverse inference against a party when the jury was given a sensible and uncontradicted [sic] explanation for the absence of proof on a point." (footnotes omitted)). Duane proceeded to explain that a jury accepts the prosecution's "failure" to provide proof of an element when it is established, and when they are instructed that the trial judge denied the prosecution the opportunity to offer evidence on the point because the defense formally admitted to the court that the element was satisfied. *See id.* at 467.

225. *Crowder II*, 141 F.3d at 1208–09. Others argue that this allows the story to be told "at great cost to the defendant." *See* Thompson, *supra* note 47, at 72 ("The need for a story should never outweigh the highly prejudicial nature of prior bad acts."). Rather than determining the admissibility of evidence based on its ability to prove a historical fact that is disputed at trial, courts are determining admissibility based on "its capacity to influence jurors' hearts as well as their minds." *See* Duane, *supra* note 182, at 467–68 (interpreting *Old Chief*'s discussion about "moral reasonableness" as establishing a need for evidence that has the power to emotionally appeal to a jury and convince it to "reach an honest verdict" and suggesting that this was a "radical" idea "with virtually no supporting authority").

226. *See* United States v. Hill, 249 F.3d 707, 710–11 (8th Cir. 2001). Note that knowledge and intent are naturally undisputed in this type of defense, unlike a defense where the defendant claims to have innocently or mistakenly committed the act, in which 404(b) evidence would be appropriate. *See id.* (citing United States v. Colon, 880 F.2d 650, 657 (2d Cir. 1989)); *supra* notes 94–95 and accompanying text.

227. 249 F.3d 707 (8th Cir. 2001); *see also, e.g.*, United States v. Johnson, 439 F.3d 947, 952 (8th Cir. 2006).

228. Inter alia, possession with intent to distribute cocaine. *See Hill*, 249 F.3d at 709, 713.

229. *See id.* at 713 ("The evidence was relevant to show Hill's intent, thus it passed Rule 404(b)'s relevancy test. Based upon the Supreme Court's decision in *Old Chief*, this evidence also satisfied Rule 403's balancing test.").

230. *Id.* (quoting *Crowder II*, 141 F.3d 1202, 1207 (D.C. Cir. 1998) (en banc)); *see also* United States v. Williams, 238 F.3d 871, 874 (7th Cir. 2001) (holding that the district court denied the defendant's motion offering to stipulate to knowledge and intent because it was easier for the jury to understand the concepts of knowledge and intent in this case if they focused on the facts prior to the search and recovery of the cocaine).

from the offense being tried and should not be integral to the story.[231] By allowing the introduction of Hill's previous drug conviction at trial, the court enabled the jury to make the inference—whether subconsciously or not—that Hill had the propensity to commit drug offenses.[232]

The Eighth Circuit reaffirmed its post-*Old Chief* interpretation of Rule 404(b) in *United States v. Walker*.[233] Explaining that the line of cases arising out of *United States v. Jenkins*[234] had been narrowed—if not overturned completely—by *Old Chief*'s affirmation that the government has the right to prove its case in the manner it sees fit, the Eighth Circuit held that even though the defendant did not "actively" dispute the elements of motive or intent, the Government was still permitted to offer evidence to prove these factors.[235]

While other circuits are not quite as clear as to where on the 404(b) admissibility spectrum they fall post-*Old Chief*, other circuits have followed the D.C. and Eighth Circuits in broadening admissibility. The Fifth Circuit, for example, held in *United States v. Jackson*[236] that even when the defendant claims mistaken identity and does not dispute intent, intent will automatically be at issue in a specific intent crime.[237] Meanwhile, the Sixth Circuit affirmed its prior holdings excluding 404(b) evidence, but, at the same time, opened the door for inclusion of this evidence when the underlying crime requires specific intent.[238] These decisions demonstrate

231. *Crowder II*, 141 F.3d at 1214 (Tatel, J., dissenting) (citations omitted). Past crimes "risk[] creating too many narrative connections between past and present," and by allowing the prosecution to create these narratives, the court is authorizing the jury to make character inferences. Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 22 (2006). It is precisely for this reason that narratives should not include 404(b) evidence of uncontested elements. *See* Sonenshein, *supra* note 55, at 216–17. Introducing evidence of prior similar acts at trial could produce the greatest prejudice "because it makes the propensity inference almost inescapable." *See id.* at 217.

232. *See* Sonenshein, *supra* note 55, at 218. The principle that a past drug conviction can be admitted to prove intent in the current drug prosecution is "fatally flawed; its application almost always violates Rule 404(b). What chain of reasoning can link the prior drug history . . . to the charged crime other than one that infers that the defendant has a drug-related propensity . . . ? There is no propensity-free chain." *See id.* (quoting Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 191–92 (1998)).

233. 428 F.3d 1165 (8th Cir. 2005).

234. 345 F.3d 928 (6th Cir. 2003).

235. *See Walker*, 428 F.3d at 1169–70 (quoting *Hill*, 249 F.3d at 712); *see also id.* at 1170 ("Hill's attempt to remove intent as an issue in the case did not lift the Government's burden of proving Hill's intent." (quoting *Hill*, 249 F.3d at 712)).

236. 339 F.3d 349 (5th Cir. 2003).

237. *See id.* at 355. This holding is contrary to the Fifth Circuit's view on the issue prior to *Old Chief*, *see supra* note 113, and was subsequently extended to include general intent crimes. *See* United States v. McCall, 553 F.3d 821, 828 (5th Cir. 2008).

238. *Compare* United States v. Bilderbeck, 163 F.3d 971, 977–78 (6th Cir. 1999) (holding that when a crime requires specific intent, the prosecution may use 404(b) evidence to prove it in light of *Old Chief*, despite a proffered stipulation by the defense), *with Jenkins*, 345 F.3d at 939 (holding that the district court's limiting instruction did not cure the prejudicial effect of letting in 404(b) evidence); *see also infra* notes 248–61 and accompanying text. *But see* United States v. Carter, 779 F.3d 623, 627 (6th Cir. 2015) (narrowing *Bilderbeck* and holding that "mere possession of a controlled substance is not

that courts do not have a clear understanding on how to interpret *Old Chief*. While some courts interpret *Old Chief* to overrule its jurisprudence, others, like the Sixth Circuit, briefly equivocated before reaffirming their precedents.[239]

B. Other Circuits Double Down on 404(b) Jurisprudence

While some circuits shifted course after *Old Chief*, others stuck to their precedent. This section first examines how the Sixth Circuit used *Old Chief*'s concepts of narrative integrity and evidentiary richness to continue excluding 404(b) evidence.[240] Next, this section discusses the Second Circuit's reaffirmation of its holdings in *Figueroa*, *Mohel*, and *Colon*, which prohibit 404(b) evidence if alternative evidence is available.[241] Finally, this section addresses how the Seventh Circuit interpreted *Old Chief* to reinforce its 404(b) admissibility jurisprudence, which is contrary to the Second Circuit's stance on undisputed elements.[242] Accordingly, this section demonstrates that the divergent views among the courts in Rule 403/404(b) admissibility persist in the wake of *Old Chief* and, arguably, have been distended due to inconsistent interpretations of *Old Chief*.

1. The Second and Sixth Circuits Stick to Their Guns on 404(b) Evidence Admissibility

Prior to *Old Chief*, some circuits excluded 404(b) evidence because it lacked probative value, reasoning that the government's burden of proof was met on an element if that element was uncontested and a "must convict" jury instruction was read explaining this was the case.[243] At the same time, these courts often found that even if the evidence had some probative value, it was outweighed by its potential for prejudice and no limiting instruction would suffice to cure the prejudice.[244] Following *Old Chief*, some circuits reaffirmed that these reasons justified the exclusion of 404(b) evidence, even when considering evidentiary richness and narrative integrity.[245]

Simply put, these circuits hold that a limiting instruction is not an adequate safeguard to justify permitting evidence that is unnecessary to satisfy the prosecution's burden of proof if that evidence could have a

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sufficiently similar to distribution to be probative of a specific intent to distribute controlled substances, even though both are obviously controlled-substance offenses").

239. *See infra* Part II.B.

240. *See infra* notes 257–63 and accompanying text.

241. *See infra* notes 264–78 and accompanying text.

242. *See infra* Part II.B.2.

243. *See* United States v. Figueroa, 618 F.2d 934, 942 (2d Cir. 1980); *see also Crowder I*, 87 F.3d 1405, 1410 (D.C. Cir. 1996) (en banc), *vacated* 519 U.S. 1087 (1997), *rev'd en banc* 141 F.3d 1202 (D.C. Cir. 1998); *supra* Part I.B. (discussing these cases within the broader Rule 404(b) context).

244. *See Figueroa*, 618 F.2d at 946 ("[L]imiting instructions cannot be regarded as a guaranty against prejudice.").

245. The rest of this section discusses these cases and how the circuits' interpretations differ from those discussed in Part II.A.

substantial prejudicial effect.[246] This is so because, compared to "must convict" instructions, the effect of limiting instructions is much more uncertain.[247]

For example, in *United States v. Jenkins*,[248] the Sixth Circuit found that the district court's limiting instruction was not a "sufficient remedy" for letting in 404(b) evidence.[249] There, the defendant, Candy Jenkins, was charged with possession with intent to distribute crack cocaine after law enforcement officers found an unopened express mail package in her residence that contained a large amount of the drug.[250] Her defense at trial was that she did not know that the package contained crack cocaine.[251]

The district court allowed the government to introduce 404(b) evidence that Jenkins had previously smoked and was a current user of crack cocaine in order to prove that she knew what was in the package.[252] The court gave a limiting instruction informing the jury that the evidence was only admissible "to the extent that [they] may determine [the testimony] might be relevant to the issue of knowledge."[253]

On appeal, the Sixth Circuit found that the district court abused its discretion in admitting this evidence.[254] The circuit court held that the substantial prejudice caused by the admitted 404(b) evidence was not sufficiently limited by the jury instruction.[255] "A limiting instruction will minimize to some degree the prejudicial nature of evidence of other criminal acts; it is not, however, a sure-fire panacea for the prejudice resulting from the needless admission of such evidence."[256]

In deciding *Jenkins*, the Sixth Circuit considered the narrative integrity and evidentiary richness concepts discussed in *Old Chief*.[257] As mentioned above, the district court let in the 404(b) evidence to help the prosecution prove that Jenkins knew what was in the packages delivered to her apartment.[258] On appeal, however, the Sixth Circuit held that her prior drug use did not help prove her knowledge of what was in the package.[259] Jenkins's personal drug use, the court reasoned, did not add to the prosecution's story that she was involved in the distribution of crack

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246. *See infra* notes 248–56 and accompanying text.

247. *See supra* notes 135–37 and accompanying text. As Judge Tatel explained in his *Crowder II* dissent, a limiting instruction requires the jury "to ignore the obvious implication of bad acts evidence, [while] a 'must convict' instruction would not require the jury to perform 'mental gymnastics.'" *See Crowder II*, 141 F.3d 1202, 1215 (D.C. Cir. 1998) (Tatel, J., dissenting) (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932)).

248. 345 F.3d 928 (6th Cir. 2003).

249. *See id.* at 939.

250. *Id.* at 930–32.

251. *See id.* at 938.

252. *See id.* at 933.

253. *Id.*

254. *Id.* at 939.

255. *See id.*

256. *Id.* (quoting United States v. Haywood, 280 F.3d 715, 724 (6th Cir. 2002) (citations omitted)).

257. *See id.* at 937–39.

258. *See id.* at 933.

259. *See id.* at 937.

cocaine;[260] rather, if it added anything at all to the prosecution's narrative, it was probative of her character.[261] Finding that there was no permissible 404(b) purpose for the admission of the evidence, the court additionally ruled that the 404(b) evidence also did not meet the requirements of Rule 403.[262] The court found that the danger of unfair prejudice substantially outweighed the probative value of the evidence and that the limiting instruction was insufficient to remedy this danger.[263]

The Second Circuit similarly found that *Old Chief* did not overrule its Rule 404(b) jurisprudence. Numerous Second Circuit decisions still cite *Mohel* and *Figueroa* as good law,[264] and the recent *United States v. Basciano*[265] decision demonstrates how the court factors *Old Chief* into its 404(b) admissibility decisions without overturning prior cases.[266] In *Basciano*, the Government sought to introduce multiple pieces of 404(b) evidence—all involving Basciano's alleged involvement in other violent crimes—in order to prove Basciano's motive for the charged crimes.[267] Basciano's counsel offered to stipulate to the existence of the Bonanno crime family, its involvement in racketeering activity, and Basciano's own rank and position within the family at the time of his arrest.[268] In light of these concessions, the district court first determined the admissibility of the 404(b) evidence under Rule 404.[269] Having found this requirement satisfied, the court then turned to Rule 403, in line with both its own jurisprudence and the method endorsed by the *Old Chief* majority.[270]

Quoting *Old Chief* throughout its analysis, the court evaluated the probative value of the 404(b) evidence, factoring in any available substitutes, including the stipulations by the defense.[271] The court found it within its discretion to exclude the government's 404(b) evidence if using a stipulation lowered the risk for prejudice and had the same probative value, as "what counts as the Rule 403 'probative value' of an item of evidence, as

260. *See id.* at 938.

261. *See id.*

262. *See id.* at 938–39. Having already answered the Rule 404(b) question, the court had no need to answer the Rule 403 question. Nevertheless, the court proceeded to conduct the analysis under Rule 403, perhaps in an attempt to clarify the court's jurisprudence in the wake of *Old Chief*. *See id.*

263. *See id.* at 939.

264. *See, e.g.*, United States v. Scott, 677 F.3d 72, 82 (2d Cir. 2012); *see also* United States v. Massino, 546 F.3d 123, 132–33 (2d Cir. 2008); United States v. Sampson, 385 F.3d 183, 193 (2d Cir. 2004).

265. No. 05-CR-060 (NGG), 2011 WL 114867 (E.D.N.Y. Jan. 12, 2011), *rev'd on reconsideration*, 2011 WL 477281 (E.D.N.Y. Feb. 4, 2011).

266. The *Basciano* case has a convoluted procedural history. For more factual detail and reasoning, see *United States v. Basciano*, No. 03-CR-929 (NGG), 2006 WL 385325 (E.D.N.Y. Feb. 17, 2006).

267. *Basciano*, 2011 WL 114867, at *2.

268. *See id.* at *5.

269. *See id.* at *2–3.

270. *See id.* at *3–4 (citing Old Chief v. United States, 519 U.S. 172, 180 (1997); United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980)).

271. *See id.* at *4 (citing *Old Chief*, 519 U.S. at 182).

distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives."[272]

The court then noted that *Old Chief* requires weighing the evidentiary alternatives against the government's "need" for evidentiary richness and narrative integrity.[273] The court also noted that even if two pieces of evidence prove the same point, that does not mean that only one of them is permissible.[274] Furthermore, the court observed that a defendant cannot use stipulations in order to deprive the government of evidentiary richness.[275]

Accordingly, the court considered the defendant's concessions to be "unequivocal" and took them into careful consideration when balancing the probative value of the government's proposed 404(b) evidence against its potential prejudicial effect.[276] The court subsequently held that some of the government's 404(b) evidence would be admissible where the court believed its worth outweighed its prejudice, while other evidence was inadmissible where alternative evidence was more prejudicial but similarly probative even in light of the prosecution's need for evidentiary richness.[277]

Basciano demonstrates that after *Old Chief*, the Second Circuit still adheres to the approach set forth in *Figueroa*. The court has held that if an element is undisputed, then 404(b) evidence is not allowed, despite *Old Chief*'s discussion on narrative integrity and evidentiary richness.[278]

2. A Narrow Reading of *Old Chief* Reinforces 404(b) Evidence Admissibility

The Seventh Circuit still strongly believes that due to the burden of proof, prosecutors should be allowed to admit 404(b) evidence as long as it is used for a permissible purpose—even if it addresses an element not in dispute. The court, which held prior to *Old Chief* that the prosecution is always entitled to prove its case in the way it sees fit,[279] determined that *Old Chief* confirmed its approach.[280] In spite of *Old Chief*'s holding that a stipulation must be accepted as proof of status, the Seventh Circuit used the majority's discussion of narrative integrity and evidentiary richness to reaffirm that the prosecution "is entitled to prove its case free from any defendant's option to stipulate the evidence away" in situations involving elements other than status.[281]

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272. *Id.* (quoting *Old Chief*, 519 U.S. at 182–84).
273. *See id.* (quoting *Old Chief*, 519 U.S. at 183).
274. *See id.* One could argue that that is exactly what Rule 403 prohibits. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence.").
275. *Basciano*, 2011 WL 114867, at *4.
276. *See id.* at *5.
277. *See id.*
278. *See id.*; *see also supra* note 264 and Part I.B.1–2.
279. *See supra* notes 89–92 and accompanying text (given that proper limiting instructions would be read to the jury to combat any prejudicial effect of 404(b) evidence).
280. *See* United States v. Williams, 238 F.3d 871, 875–76 (7th Cir. 2001).
281. *See id.* at 875 (quoting Old Chief v. United States, 519 U.S. 172, 189 (1997)).

In so concluding, the Seventh Circuit interpreted *Old Chief*'s holding narrowly.[282] The court had held in *United States v. Connor*[283] that neither stipulations nor the lack of dispute on an issue could relieve the prosecution from its burden in circumstances other than those present in *Old Chief*. "To hold otherwise would be to tie the hands of the government in meeting its burden of proof where no defense was presented on an element . . . ."[284]

Connor relied on *United States v. Williams*,[285] an earlier opinion holding that a defendant's ability to stipulate would "render prosecutors unable to meet the jury's expectations of proof" because it would break the "natural sequence of narrative evidence."[286] Here, the court followed the D.C. Circuit's lead in *Crowder II*. Reginald Williams was charged with possession with intent to distribute cocaine.[287] The court allowed the testimony of John Peeler, in which he said that he had often purchased drugs from Williams in the past, in order to demonstrate "motive, opportunity, intent, preparation, plan, knowledge and absence of mistake or accident."[288] As in *Crowder II*, the defendant offered to stipulate to the elements of intent and knowledge by conceding that whoever possessed the drugs in question had the necessary intent, leaving physical possession of the drugs as the only issue.[289]

Relying on *Crowder II* and *Old Chief*, the Seventh Circuit held that this type of stipulation is abstract and "simply does not contain the same or similar evidentiary force as a showing that *Mr. Williams himself* had such intent and knowledge."[290] The court held this completely distinguishable

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282. *See* United States v. Bowling, 770 F.3d 1168, 1176 (7th Cir. 2014) (distinguishing the facts in this case "from those in *Old Chief*, which the Supreme Court deliberately limited to cases involving proof of felon status" (citing United States v. Phillippi, 442 F.3d 1061, 1064 (7th Cir. 2006))). *But see* Sonenshein, *supra* note 55, at 249 (pointing out that nowhere in *Old Chief* did the Supreme Court hold that courts could not balance the need for 404(b) evidence against its potential prejudice in situations other than felon status).

283. 583 F.3d 1011, 1022–23 (7th Cir. 2009). The court does not mention *Old Chief* in its Rule 404(b) reasoning because the court considers *Old Chief* to be limited to its facts. *See supra* note 282.

284. *Connor*, 583 F.3d at 1023. Is this holding justified if the introduction of evidence is just a means to an end? *See* Walton, *supra* note 35, at 1087. "The only legitimate purpose for introducing evidence is to prove the ultimate . . . propositions disputed between the parties." *See id.* (citations omitted). As *Old Chief* held, a defendant's unequivocal stipulation "is, of course, good evidence." Old Chief v. United States, 519 U.S. 172, 186 (1997); *see also Crowder I*, 87 F.3d 1405, 1422–23 (D.C. Cir. 1996) (en banc), *vacated* 519 U.S. 1087 (1997), *rev'd en banc* 141 F.3d 1202 (D.C. Cir. 1998) ("While a defendant's concession or offer to stipulate is not 'proof,' it may serve the same function, and the trial judge should factor it into the 403 balance.").

285. 238 F.3d 871, 875–76 (7th Cir. 2001) (citing *Old Chief*, 519 U.S. at 188–89 (1997)).

286. *See id.* at 876 (quoting *Old Chief*, 519 U.S. at 188–89). In *Williams*, the defense was that the drugs did not belong to the defendant—essentially arguing a case of mistaken identity. *See id.* at 873–74. In *Connor*, however, the defense counsel indicated that the defendant was at the scene, but was merely an innocent bystander. *See Connor*, 583 F.3d at 1022.

287. *See Williams*, 238 F.3d at 873.

288. *See id.*

289. *See id.* at 876.

290. *Id.*

from the status issue in *Old Chief*.[291] Here, the court did not find the richness of the stipulation to be the same as that of the evidence itself and, thus, even a "must convict" jury instruction would not have the same effect on the jury as would the 404(b) evidence the prosecution sought to admit.[292]

The Seventh Circuit's ruling also emphasized that the trial judge gave a limiting instruction to the jury.[293] Before Peeler's testimony, the district court told the jury that they should consider only the testimony "on the question of motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident."[294] The Seventh Circuit agreed that the district court properly admitted the evidence and held that the limiting instruction properly cautioned the jury to consider the testimony for only those purposes—"a procedural safeguard that [the court has] often found to minimize the prejudicial effect of [404(b)] evidence."[295]

More recently, in *United States v. Gomez*,[296] the Seventh Circuit found a limiting instruction sufficient to counteract the admission of 404(b) evidence.[297] The court went to great lengths to establish what a good jury instruction would look like.[298] The court also made several findings necessary to its main point. First, the court explained its prior decisions concerning specific intent crimes versus general intent crimes and held that in crimes of specific intent,[299] the element of intent is automatically at issue.[300] Meanwhile, in crimes of general intent, the defendant's intent can be inferred from the act itself, and the defendant must put the element at issue before 404(b) evidence can be admitted to prove the element.[301] Second, the court held that even in specific intent crimes, "automatically at issue" does not mean "automatically admissible."[302] Finally, the court clarified its opinion from another recent case[303] that there is no general rule

291. *See id.*
292. *See id.*
293. *Id.*
294. *Id.* at 874.
295. *Id.* at 876.
296. 763 F.3d 845 (7th Cir. 2014).
297. *Id.* at 860–61.
298. *See id.* The court found that a sufficient limiting instruction should explain to the jurors that they must not use the 404(b) evidence to make character inferences and find that the defendant has acted "in character" by allegedly committing the crime charged. *See id.* This is so because "it does not follow from the defendant's past acts that he committed" the present act. *Id.* Furthermore, the court noted that this type of inference is not permitted because the prosecution has the burden of proof and "it cannot discharge its burden by inviting an inference that the defendant is a person whose past acts suggest a willingness or propensity to commit crimes." *Id.*
299. Possession with intent to distribute, for example, is a specific intent crime. *See id.* at 858.
300. *See id.*
301. *See id.*; *see also supra* note 257 (noting that the Sixth Circuit also makes this distinction with specific intent crimes and more readily permits 404(b) evidence in these cases).
302. *See Gomez*, 763 F.3d at 859 (holding that 404(b) evidence must still be relevant and more probative than prejudicial to be admissible).
303. *See* United States v. Richards, 719 F.3d 746, 759 (7th Cir. 2013).

that excludes 404(b) evidence if the defendant does not "'meaningfully dispute' the non-propensity issue for which the evidence is offered."[304] The court qualified this holding by noting that the district court should consider the degree to which the issue is actually contested in making its Rule 403 ruling.[305] In other words, the Seventh Circuit distinguishes between specific intent and general intent crimes in order to establish different methods for when to permit 404(b) evidence.[306]

The court went a step further in *United States v. Reed*.[307] There, the court excluded 404(b) evidence that it found to be used solely for propensity purposes.[308] The court held that "[p]attern evidence *is* propensity evidence," and it may not be admissible unless the pattern proves or suggests a fact at issue.[309]

In summary, the Seventh Circuit still permits 404(b) evidence in many cases where its sister circuits do not,[310] but it has recently started to question whether evidence that is purported to be used for a proper purpose is actually being used for the sake of demonstrating propensity.[311] Additionally, *Gomez* established that the court abides by the maxim that the prosecution is entitled to prove its case as it sees fit and an issue need not be disputed in order for the government to offer 404(b) evidence to prove it.[312]

The Fourth Circuit is similar to the Seventh Circuit in several respects. First, it also interpreted *Old Chief* narrowly.[313] Second, the court made the same distinction with specific intent crimes.[314]

In *United States v. Queen*,[315] the Fourth Circuit laid out its test for determining 404(b) admissibility.[316] In addition to requiring that evidence

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304. *See Gomez*, 763 F.3d at 859.

305. *See id.* at 860.

306. *See id.* This Note deals mostly with cases involving specific intent crimes, which the courts have found to be the *most* permissive when it comes to allowing 404(b) evidence. *See supra* Parts I.B, II. *See generally* Sonenshein, *supra* note 55 (dissecting *Old Chief* as it applies to intent crimes).

307. 744 F.3d 519 (7th Cir. 2013).

308. *See id.* at 525.

309. *Id.* (quoting United States v. Miller, 673 F.3d 688, 699 (7th Cir. 2012)).

310. *Compare* United States v. Connor, 583 F.3d 1011, 1026 (7th Cir. 2009) (admitting 404(b) evidence in spite of a defense offer to stipulate), *with* United States v. Scott, 677 F.3d 72, 84–85 (2d Cir. 2012) (holding that an offer to stipulate is alternative evidence that affects the probative worth of potential 404(b) evidence).

311. *See supra* note 309 and accompanying text; *see also Connor*, 583 F.3d at 1025–26 (holding that a stipulation to an element cannot relieve the prosecution of its burden and does not factor the availability of alternative evidence into its Rule 403 balancing test).

312. *See* United States v. Gomez, 763 F.3d 845, 859 (7th Cir. 2014). The court did however point out that as 404(b) evidence is almost always prejudicial, the trial judge must be sensitive to the real factual disputes in the case when conducting the Rule 403 balancing test. *See id.* at 860.

313. *See* United States v. Grimmond, 137 F.3d 823, 833 n.14 (4th Cir. 1998) ("We believe that the Supreme Court intended its decision in *Old Chief* to be limited to stipulations involving a defendant's status as a convicted felon. Otherwise, the Court, without explanation, reversed a longstanding series of cases.").

314. *See* United States v. Hernandez, 975 F.2d 1035, 1040 (4th Cir. 1992) (holding that unlike the Second Circuit, the Fourth Circuit has no precept that 404(b) evidence is inadmissible when the defendant unequivocally denies committing the crime and uses the defense of mistaken identity).

be relevant, necessary, and reliable to find a permissible 404(b) purpose, the court emphasized that the evidence must also pass the Rule 403 balancing test.[317] The court further held that if a limiting instruction is requested, the judge must issue one to safeguard "against the pitfalls the rule protects against."[318] The Fourth Circuit reasoned that if admissibility of 404(b) evidence were determined according to these rules, then it would not be used to convict a defendant for his prior acts or on the basis of his character.[319]

The Fourth Circuit distinguished itself from the Seventh Circuit, however, in *United States v. McBride*,[320] when it overturned a trial court and excluded the 404(b) evidence in question.[321] In response to the government's argument that the 404(b) evidence was necessary for the government to satisfy its burden of proof, the Fourth Circuit held that "[w]hile this statement of the law is accurate, it does not provide a general license for the use of essentially unrelated prior 'bad act' evidence."[322]

The Seventh Circuit interprets *Old Chief* narrowly by its facts, but, at the same time, uses *Old Chief*'s discussion of narrative integrity and evidentiary richness.[323] This allows the court to leverage *Old Chief*'s discussion on narrative integrity and evidentiary richness, but distinguish any case that does not involve felon-in-possession crimes from the holding that a stipulation must be accepted as alternative evidence to prove an element.[324] The Fourth Circuit, however, interprets *Old Chief* narrowly, but does not use the narrative integrity and evidentiary richness discussion to allow in evidence that it otherwise would prohibit.[325] What is still unclear is if *Old Chief* requires alternative evidence to be factored into a court's Rule 403 balancing test in situations outside the facts of *Old Chief*. The answer for the Seventh Circuit at least appears to be "no."[326]

C. Where Does the Ninth Circuit Stand?

Before concluding this part of the Note, it is important to analyze how the Ninth Circuit has treated 404(b) admissibility after its decision was overturned in *Old Chief*. Conducting this analysis, however, is difficult due to the lack of relevant cases. In one of the few post-*Old Chief* cases

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315. 132 F.3d 991 (4th Cir. 1997).
316. *Id.* at 997.
317. *See id.* ("[T]he evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the factfinding process.").
318. *Id.*
319. *See id.*
320. 676 F.3d 385 (4th Cir. 2012) (holding that the evidence did not pass the *Queen* admissibility test).
321. *Id.* at 398.
322. *Id.*
323. *See supra* notes 285–95 and accompanying text. *See generally* United States v. Williams, 238 F.3d 871 (7th Cir. 2001).
324. *See supra* Part II.B.2.
325. *See McBride*, 676 F.3d at 398.
326. *See supra* notes 310–11 and accompanying text.

discussing 404(b) evidence admissibility within the Rule 403 context, *United States v. Merino-Balderrama*,[327] the Ninth Circuit seemed to accept *Old Chief*'s holding that a stipulation must be considered alternative evidence and must be factored into the Rule 403 balancing test.[328]

In *Merino-Balderrama*, the court conceded that the defendant's offer to stipulate to two of three elements of the crime "added to the pool of available evidentiary alternatives."[329] Furthermore, in stark contrast to its *Breitkreutz*[330] holding prior to *Old Chief*, here the court held that Merino-Balderrama's proffered stipulation "would have been *conclusive* on those two elements" and could have required the district court to exclude the 404(b) evidence the government wanted to use to prove those elements.[331]

This decision demonstrates that in light of the *Old Chief* opinion, the Ninth Circuit, while still inclusive of 404(b) evidence in some respects, no longer relies on its *Breitkreutz* reasoning that a stipulation is not proof and should not be considered alternative evidence.[332]

It turns out that while the Supreme Court may have resolved the narrow issue of defense stipulations to status elements of crimes in *Old Chief*, it opened the door to widening the disparity in all other 404(b) admissibility cases. Lower courts continue to struggle with two key unanswered questions: First, how should the availability of alternative evidence or lack of dispute on an issue affect the Rule 403 balancing process in deciding the admissibility of 404(b) evidence? Second, how should the availability of "must convict" and limiting instructions affect this analysis?

III. REENVISIONING THE RULES FOR ADMISSION OF 404(B) EVIDENCE AND RULE 403 BALANCING

This Note has demonstrated that Rule 403 jurisprudence concerning 404(b) admissibility is inconsistent among the circuits. There is not a definitive "circuit split," but more of a spectrum: at one end, 404(b) evidence is admitted, and at the other, it is excluded. Part III of this Note provides a guide for courts to use in deciding whether to admit 404(b) evidence and when to accept a proffered stipulation from the defense.

Part III.A of this Note proposes a comprehensive understanding of *Old Chief* and its effects and applicability to 404(b) evidence admissibility. This part examines both the holdings in the cases discussed above and scholarly opinions to explain which interpretations are most true to *Old Chief*'s teachings. Next, Part III.B suggests a unifying approach to 404(b)

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327. 146 F.3d 758 (9th Cir. 1998).

328. *See id.* at 762.

329. *Id.*

330. *See supra* notes 89–92 and accompanying text.

331. *Marino-Balderrama*, 146 F.3d at 762 (holding that a proffered stipulation is "not merely relevant but seemingly conclusive evidence of the element" (quoting Old Chief v. United States, 519 U.S. 172, 186 (1997))).

332. This differs from the Seventh Circuit, which reaffirmed after *Old Chief* that a stipulation is too abstract in most circumstances and does not provide the evidentiary richness to which the government is entitled. *See supra* notes 283–84 and accompanying text.

admissibility. In doing so, this part focuses on when the prosecution and court should accept a defense stipulation to an element. Finally, this part addresses how limiting instructions should factor into a trial judge's decision.

A. How Courts Should Interpret and Apply Old Chief

While *Old Chief* has certainly been an important decision in 404(b) admissibility jurisprudence, it has left too much room for interpretation. In response, courts and commentators have interpreted it in the way they see fit. Perhaps the *Old Chief* ruling could have been more clearly articulated. The more likely case, however, is that courts have chosen to interpret *Old Chief* through the lens required to achieve the results they desire.[333]

The main holding of *Old Chief* is not disputed: the government must accept a defense offer to stipulate to the status element of a felon-in-possession charge.[334] When one combines alternative evidence in the form of a stipulation that the government can use to prove the status element with the finding that the 404(b) evidence (i.e., the name and nature of Old Chief's prior conviction) does not add to the prosecution's need for evidentiary richness to tell a compelling narrative, it reduces the probative value of the 404(b) evidence to the point that it is outweighed by its unfairly prejudicial effect.[335] Both of these conditions are essential to *Old Chief* and support the proposition that the discussion on narrative integrity and evidentiary richness is not "mere dicta."[336] The Court noted that the general nature of Old Chief's prior conviction is so outside the natural narrative of what the prosecution needs to tell the jury that the stipulation should suffice just as well.[337]

Beyond this narrow holding, *Old Chief* left the door open for interpretations that run counter to the Court's jurisprudence. First, while the "four-paragraph dollop"[338] on evidentiary richness and narrative

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333. *See* Thompson, *supra* note 47, at 72–76.

334. *Old Chief*, 519 U.S. at 191.

335. *See id.* at 190. But some commentators feel that the narrative integrity and evidentiary richness discussion was unnecessary to the majority's holding. *See supra* note 173.

336. *See Old Chief*, 519 U.S. at 191 (holding that the presumption that the prosecution may choose its evidence is not applicable here because "proof 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"); *see also supra* notes 257–63 and accompanying text (showing how the Sixth Circuit excluded 404(b) evidence because it did not add to the narrative integrity of the prosecution's case). *But see supra* notes 285–92 and accompanying text (showing how the Seventh Circuit permits 404(b) evidence because exclusion—and acceptance of a stipulation—would break the natural sequence of the narrative).

337. *See Old Chief*, 519 U.S. at 190 ("Nor can it be argued that the events behind the prior conviction are proper nourishment for the jurors' sense of obligation to vindicate the public interest. . . . Congress, however, has made it plain that . . . the qualifying conviction is alone what matters under the statute. 'A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime . . . .'" (alteration in original) (citing United States v. Tavares, 21 F.3d 1, 4 (1st Cir. 1994))).

338. *See* Duane, *supra* note 182, at 463.

integrity is indispensable to the Court's holding, it seems to go astray when Justice Souter reasons that 404(b) evidence may be necessary to "implicate the law's moral underpinnings and a juror's obligation to sit in judgment."[339] This suggests that 404(b) evidence is allowed, and, in fact, its admissibility is determined by its ability to help persuade the jury to use its moral, not logical, judgment in deciding the outcome of the case.[340] Surely, the majority did not intend for *Old Chief* to radically alter one of the fundamental principles of the U.S. judicial system—that the jury must judge a man based on the factual evidence of the particular crime at issue and not on moral evidence of his character.[341] In fact, interpreting *Old Chief* in that way contradicts the rest of the opinion itself.[342]

Understanding that *Old Chief* could not have intended this consequence, it is possible to see how the remainder of the discussion on narrative integrity and evidentiary richness reinforces the majority's holding. Even once the Court factored in the prosecution's "need" for narrative integrity and evidentiary richness, the 404(b) evidence in Old Chief's case still did not carry enough probative worth to counteract the availability of alternative proof.[343]

Second, the Court expressed a rule specific to the status element, which essentially nullifies the need to conduct a Rule 403 balancing test in these situations.[344] In cases dealing with elements other than status, the Court predicted that the prosecutor's choice to introduce 404(b) evidence would generally survive a Rule 403 analysis even when a defendant seeks to stipulate to the element the evidence is meant to prove.[345] *But*, the Court also held that stipulations *must* be factored into the Rule 403 analysis, and, more importantly, the Court did not limit this holding to status-only cases.[346] Accordingly, any court that dismisses the fact that an issue is not disputed or that the defense has offered to stipulate to it without factoring it

339. *See Old Chief*, 519 U.S. at 188; *see also* Duane, *supra* note 182, at 474.

340. *See* Duane, *supra* note 182, at 467.

341. *See id.* at 468 ("Incredibly, this breathtakingly radical vision of the trial process was asserted with virtually no supporting authority."); *see also supra* notes 19, 182 and accompanying text.

342. *See* Brooks, *supra* note 231, at 22 ("The story of the past crime must be excluded, not because it is irrelevant, but because it may appear over-relevant: 'it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" (quoting *Old Chief*, 519 U.S. at 181)).

343. *See Old Chief*, 519 U.S. at 183, 191. Likewise, the Second Circuit understood that this holding could apply beyond the status element. *See supra* notes 266–77 and accompanying text (analyzing the court's holding in *Basciano*, No. 05-CR-060 (NGG), 2011 WL 114867, at *4 (E.D.N.Y. Jan. 12, 2011), *rev'd on reconsideration*, 2011 WL 477281, at *4 (E.D.N.Y. Feb. 4, 2011)).

344. *See Old Chief*, 519 U.S. at 191–92.

345. *See id.* at 192.

346. *See id.* at 184–85 (holding that the Rule 404 advisory committee's notes "leave no question" that a Rule 403 analysis requires not only weighing the evidence's probative value with its unfair prejudice, "but by placing the result of that assessment alongside similar assessments of evidentiary alternatives"); *see also* FED. R. EVID. 404 advisory committee's note.

into its Rule 403 balancing test is in error.[347] Even if a court limits *Old Chief* to the facts of the case, the advisory committee's note to Rule 404 requires it.[348]

Third, *Old Chief* should not be interpreted to broaden the scope of 404(b) admissibility. For instance, the D.C. and Eighth Circuits interpreted *Old Chief* to overturn their line of cases on 404(b) admissibility under Rule 403.[349] In *Hill*, the Eighth Circuit cited the D.C. Circuit's reasoning in *Crowder II* to hold 404(b) evidence admissible even though the defense offered to stipulate intent, and the evidence was completely remote in time from the current charge.[350] The court held that *Old Chief* "eliminates the possibility that a defendant can escape the introduction of past crimes under Rule 404(b) by stipulating to the element of the crime at issue."[351] Nowhere in *Old Chief* does it say this; rather, the Eighth Circuit simply quotes a handful of lines from *Old Chief*'s evidentiary richness discussion and uses them, without applying them to the facts of the case, to conclude that the 404(b) evidence was properly allowed.[352]

The Eighth Circuit reasoned that because *Old Chief* held that evidence does not lose its relevance under Rule 401 when the defense offers to stipulate to the fact at issue, "it follows that Rule 404(b) evidence does not lose its relevance toward a permissible inference simply because the defendant offers to stipulate to that inference."[353] This conclusion, however, does not follow for multiple reasons: first, the inference that the jurors must make for the evidence to have any probative worth is not a *permissible* one because past actions cannot prove intent for the current action;[354] and second, while it is true that the evidence may not lose its relevance, it certainly loses some of its probative worth, which the court must still weigh against its risk of unfair prejudice.[355] Admitting 404(b) evidence makes propensity inferences almost inescapable and should be excluded when uncontested because its probative worth is outweighed by its prejudicial effect.[356] Regardless, a court abuses its discretion if it does not conduct a thorough Rule 403 balancing test, analyzing in what realistic

347. *See Old Chief*, 519 U.S. at 191. Therefore, *Old Chief* should mandate that the Seventh Circuit does factor available alternative evidence into its Rule 403 balancing test. For a discussion of the holding in *United States v. Connor*, 583 F.3d 1011 (7th Cir. 2009), see *supra* notes 283–84 and accompanying text.

348. *See* FED. R. EVID. 404 advisory committee's note; *see also supra* notes 34–37 and accompanying text.

349. *See supra* notes 229–30 and accompanying text.

350. *See* United States v. Hill, 249 F.3d 707, 713 (8th Cir. 2001).

351. *See id.* at 712. But this is directly contrary to what *Old Chief* actually holds. *See supra* notes 171–73 and accompanying text; *see also* Kidd, *supra* note 46, at 257–58.

352. *See Hill*, 249 F.3d at 712–13.

353. *See id.* at 712 (citing *Crowder II*, 141 F.3d 1202, 2016 (D.C. Cir. 1998) (en banc)).

354. Past crimes create too many narrative connections between past and present, permitting the jury to make character inferences. *See* Brooks, *supra* note 231, at 22.

355. *See supra* notes 271–77 and accompanying text (demonstrating how courts within the Second Circuit correctly conduct a Rule 403 balancing test).

356. *See* Sonenshein, *supra* note 55, at 216–17.

way the prosecution benefits from permitting the 404(b) evidence against the very real prejudice that may result.[357]

Finally, it has been arguably problematic that the Court drew such a rigid distinction between the status element and all others.[358] How would allowing evidence on the nature of Old Chief's prior conviction to prove the status element of a felon-in-possession charge be any different than allowing Hill's prior drug conviction to prove intent to distribute cocaine? In both cases, the defense offered to stipulate to the element that the evidence was intended to prove, and in both cases, the evidence was remote in time and should not have been a part of the prosecution's narrative of the charged crime.[359] In reality, both pieces of 404(b) evidence would be used to add richness to the government's story about the man on trial, not about the act he is on trial for, which is, without question, impermissible.[360] There is no propensity-free chain that allows a juror to prove intent for a current drug conviction based on a past drug conviction that does not violate Rule 404(b).[361] The Sixth Circuit understood as much and correctly prohibited this type of 404(b) evidence in *Jenkins*.[362]

The Seventh Circuit, on the other hand, permits this exact type of evidence.[363] The Seventh Circuit held that the government is free to reject a proffered stipulation and introduce 404(b) evidence of one's past drug conviction because the stipulation does not have the same evidentiary richness as the 404(b) evidence.[364] The court held that a stipulation does not have the same force as does sharing with the jury that a defendant, on trial for drug possession and distribution, has previously been convicted of the same crime.[365] This is undoubtedly true, but the richness or force of the 404(b) evidence causes prejudice by showing that the defendant has a propensity for committing the crime for which he is on trial.[366] The past drug conviction played no part in the current crime and should not be part of the story that the prosecution wants to tell.[367] Rule 404(b) evidence is supposed to be permitted when it is needed to prove an element of a crime, but if the element can be proved in a less prejudicial way—such as by stipulation—then it is not necessary to the prosecution's narrative and should be excluded.[368]

357. *See supra* notes 34–39 and accompanying text.

358. *See* Duane, *supra* note 182, at 464 (suggesting that this extreme distinction might have been the price the majority paid to acquire Justice Kennedy's vote); *see also* Thompson, *supra* note 47, at 72.

359. *See supra* notes 354, 356 and accompanying text.

360. *See supra* note 232 and accompanying text.

361. *See* Sonenshein, *supra* note 55, at 218.

362. *See supra* notes 257–61 and accompanying text.

363. *See supra* notes 287–92 and accompanying text (discussing the court's holding in United States v. Williams, 238 F.3d 871 (7th Cir. 2001)).

364. *See supra* notes 287–92 and accompanying text.

365. *See supra* notes 287–92 and accompanying text.

366. *See supra* note 361 and accompanying text.

367. *See supra* notes 354–56 and accompanying text.

368. *See* Sonenshein, *supra* note 55, at 245.

B. New Approach to 404(b) Evidence

The foregoing discussion does not mean that 404(b) evidence should never be admissible. There are many cases in which the defense does dispute an element or refuses to stipulate to an element and 404(b) evidence is needed for the government to meet its burden of proof. This Note does not suggest that the government cannot prove its case in the way it sees fit, but it does take the position, similar to the Second Circuit, that an unequivocal stipulation to an element coupled with a "must convict" jury instruction is sufficient to meet the prosecution's burden of proof on that element. Part III.B.1 suggests a new unifying rule on when to admit or exclude 404(b) evidence. Part III.B.2 provides a guideline for issuing limiting instructions when the court concludes that it is necessary to admit 404(b) evidence.

1. 404(b) Evidence on the Rule 403 Admissibility Scale

In general, the Second Circuit's approach to admission of 404(b) evidence is more sensitive to the prejudicial effects of 404(b) evidence than some of its counterparts.[369] The court still relies on its pre-*Old Chief* test, while taking cognizance of *Old Chief*'s holdings.[370] A new method for when to admit 404(b) evidence should be based off of the Second Circuit's approach.

If the prosecution wants to admit 404(b) evidence, the first step is to determine if the evidence is admissible under Rule 404(b).[371] This Note is not suggesting a change to the circuit tests for whether a piece of evidence is admissible under this rule.[372] The second step is for the trial judge to determine if the 404(b) evidence is admissible under Rule 403.[373] In order to truly balance the evidence's probative worth with its potential prejudicial effect, the judge should do so at the conclusion of the defendant's case-in-chief.[374] This allows the judge to determine how necessary the evidence is for the prosecution to meet its burden of proof, which is the only way to properly weigh it against its prejudicial effect.[375] In addition, if the issue is simply undisputed in the defendant's case-in-chief, the defendant has two options: first, leave the issue undisputed and let the judge analyze the 404(b) evidence under the Rule 403 balancing test; or, second, offer an unequivocal stipulation to the element, acknowledging that the judge would be justified in sustaining objections to any cross examination or jury argument on the issue and in instructing the jury that if it finds all other elements proven beyond a reasonable doubt, then it "must convict" the

369. *See supra* notes 97–101 and accompanying text.
370. *See supra* notes 270–77 and accompanying text.
371. *See supra* notes 31–33 and accompanying text.
372. *See supra* notes 20, 27 and accompanying text.
373. *See supra* note 24 and accompanying text.
374. *See* United States v. Figueroa, 618 F.2d 934, 939 (2d Cir. 1980).
375. *See id.*; *see also supra* notes 111–13 and accompanying text (demonstrating how the Eighth Circuit adopted this approach in United States v. Estabrook, 774 F.2d 284 (8th Cir. 1985)).

defendant.[376] In these instances, a "must convict" jury instruction is necessary to relieve the prosecution of its burden of proof on that element.[377]

This test allows the judge ample discretion if the element is simply undisputed, but removes discretion if there is an unequivocal stipulation. A stipulation, after all, is good evidence.[378] The question the judge must ask is: Does the stipulation give the prosecution everything it needs regarding the element?[379] If it does, then the 404(b) evidence should be excluded.[380] If it does not, then the defense should stipulate to whichever point of the element it fails to meet, and if they refuse, then the stipulation should be subjected to the Rule 403 balancing test.[381]

The concern that a jury might hold it against the prosecution if the prosecution does not present evidence that meets the jury's expectations seems unfounded.[382] Any "failure" by the prosecution to present this type of evidence is explained; the judge informs the jury that the point was admitted as true *by the defense* and grants the *defense*'s motion to order the prosecution not to present evidence on the point.[383] The jury should care more about the fact that the element is proven than about how it was proved.[384]

Finally, if the defense refuses to stipulate to the element and the judge is left balancing the evidence's prejudicial effect against its probative worth, the judge should determine the probative value of 404(b) evidence by evaluating how necessary it is for the prosecution's story.[385] This should include analyzing if the evidence is needed to prove a disputed element and should prohibit factoring in the evidence's ability to persuade the jury to make a moral judgment or mistaking its relevance to the defendant's

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376. *See Figueroa*, 618 F.2d at 938–39.

377. *See supra* notes 118–20 and accompanying text (explaining that a "must convict" jury instruction is more effective and easier to follow than a limiting instruction and should be issued to exclude 404(b) evidence rather than permitting 404(b) evidence and issuing a limiting instruction).

378. *See* Old Chief v. United States, 519 U.S. 172,186 (1997); *see also supra* note 184 and accompanying text.

379. *See* Sonenshein, *supra* note 55, at 245.

380. *See* Walton, *supra* note 35, at 1087 (noting that the only legitimate purpose of evidence is ultimately to prove the disputed issues); *see also supra* note 284 and accompanying text.

381. *See supra* note 376 and accompanying text.

382. *See* Duane, *supra* note 182, at 465–66 ("[*Old Chief*] cites no authority to support that proposition, and common sense squarely repudiates it. No sane jury would ever draw an adverse inference against a party when the jury was given a sensible and uncontradicted explanation for the absence of proof on a point."); *see also supra* note 224 and accompanying text.

383. *See* Duane, *supra* note 182, at 467 ("No other explanation or excuse could possibly be any more compelling or direct.").

384. *See supra* note 223 and accompanying text. In contrast to Donnie L. Kidd's belief, a voter certainly cares more about who won an election than the story about how the candidates got to where they are now. *See id.*

385. *See supra* Part I.C.1.b. (explaining the narrow holding of *Old Chief*).

character with its relevance to the actual story of the current crime.[386] If the evidence does add to the narrative of the currently alleged crime in a way that is not already available, and it is not outweighed by its prejudicial effect, then it may be permitted.[387] The 404(b) evidence cannot add to the narrative, however, by providing an "evidentiary richness" that invites the jury to make character inferences.[388] A limiting jury instruction is no cure for what goes on subconsciously in a juror's mind.[389]

2. The Effect of Limiting Jury Instructions

Although limiting instructions cannot erase what one has learned,[390] courts continually use them under the guise that the jury will be able to do just that.[391] Logic indicates that a jury is not capable of using evidence in solely the way the judge proscribes, simply ignoring it when it comes to the general question of guilt.[392] In addition, the Federal Rules of Evidence require that trial judges consider the lack of effectiveness in limiting instructions when weighing the 404(b) evidence on the Rule 403 balancing scale.[393]

The lack of effectiveness of limiting instructions is abundantly clear when one looks at some of the limiting instructions courts issue when permitting 404(b) evidence at trial. For instance, in *Jenkins*, the district court instructed the jury to use the 404(b) evidence "to the extent that [it] may determine [the testimony] might be relevant to the issue of knowledge."[394] Besides the fact that this instruction is unclear, it diminishes the possibility that the 404(b) evidence is even probative in the first place.[395] The Sixth Circuit correctly overturned the lower court in this case, holding that a limiting instruction is not a magic potion that can cure the prejudicial effects of 404(b) evidence.[396]

In contrast, the Seventh Circuit affirmed the district court's admission of 404(b) evidence in *Williams*, holding that a limiting instruction informing the jury that it should consider the testimony "on the question of motive, opportunity, intent, preparation, plan, knowledge, identity and absence of

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386. *Compare supra* notes 225, 232 (demonstrating how the D.C. and Eighth Circuits incorrectly analyzed 404(b) evidence in overturning their jurisprudence), *with supra* note 261 (demonstrating how the Sixth Circuit excludes 404(b) evidence if the evidence is only probative of character); *see also supra* notes 366–68 and accompanying text.

387. *See supra* Part I.C.1.B; *see also supra* notes 266–77 and accompanying text (demonstrating the Second Circuit's execution of this formula).

388. *See supra* notes 225, 232, 261, 366–68 and accompanying text.

389. *See infra* Part III.B.2.

390. *See supra* notes 137, 256, 366–68 and accompanying text.

391. *See* LEONARD, *supra* note 118, § 1.11.5; *see also supra* note 136 and accompanying text.

392. *See supra* note 220 and accompanying text.

393. *See supra* note 135 and accompanying text.

394. United States v. Jenkins, 345 F.3d 928, 933 (6th Cir. 2003) (citations omitted); *see also supra* note 253 and accompanying text.

395. *See supra* notes 253–56 and accompanying text.

396. *See supra* notes 253–56 and accompanying text.

mistake or accident" was sufficient.[397] This type of instruction is too confusing for even someone well versed in the law to understand, let alone the average citizen.[398] If 404(b) evidence is permitted at trial, then the judge needs to ensure that a clear, understandable limiting instruction is given.[399]

A limiting instruction would be more effective if it directly referenced the prohibition on using any evidence to make inferences about one's character or that the defendant acted in character in the currently alleged crime.[400] The judge should explain that "it does not follow from a defendant's past acts that he committed the particular crime charged in the [present] case."[401] Finally, the judge should explain that making this type of character inference does not help the prosecution meet its burden of proof and if that inference is needed for a juror to conclude guilt, then it is not sufficient.[402] A limiting instruction meeting these parameters would at least ensure that the jury understands why the judge is asking it to do the impossible.[403] This type of instruction, combined with the test laid out in Part III.B.1, should provide a more reasonable approach to the admission of 404(b) evidence.

CONCLUSION

The standards among the lower courts on when to admit 404(b) evidence at trial are inconsistent. While most circuits include a Rule 403 analysis in their tests for admissibility, its implementation in practice is less certain. When a defendant offers to concede to an element that the 404(b) evidence is meant to prove, the standards are even murkier. *Old Chief* resolved the conflict among the lower courts as to the status element, but it also introduced the concepts of narrative integrity and evidentiary richness, opening the door for lower courts to stray further away from what Rules 404(b) and 403 stand for. Trial courts should reevaluate their test for 404(b) admissibility under Rule 403 and adopt a method that accepts unequivocal stipulations and a "must convict" jury instruction as sufficient alternative evidence for meeting the prosecution's burden of proof on an element. In the absence of alternative proof, trial courts should reconsider the efficacy of limiting jury instructions and make sure to provide constructive and clear instructions to the jury when they are necessary.

397. United States v. Williams, 238 F.3d 871, 874 (7th Cir. 2001); *see also supra* note 294 and accompanying text.
398. *See* LEONARD, *supra* note 118, § 1.11.5.
399. *See id.*
400. *See* United States v. Gomez, 763 F.3d 845, 860–61 (7th Cir. 2014); *see also supra* note 298 and accompanying text.
401. *Gomez*, 763 F.3d at 860–61.
402. *See id.*
403. *See id.*