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“Screw Your Courage to the Sticking-Place”: The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts

by

JAMES JOSEPH DUANE*

Much should be written, and will be, about the decision in *Old Chief v. United States*.¹ Like Professor Risinger, I do not dispute that the case was correctly decided on its precise facts,² and will not comment here on what it means for the future trials of defendants charged as felons in possession of a firearm.³ Enough has been written on those topics already.⁴

In my judgment, Professor Risinger correctly recognizes that the most significant portion of *Old Chief* is a curious four-paragraph dollop of dictum buried in the middle of the majority opinion.⁵ In bending over backward to emphasize the narrowness of its holding, the majority offered an extended explanation why the Government will almost always prevail in any other context when a defendant seeks to dispose of some element of the prosecution’s case by admitting it.⁶ The Court vowed to protect the prosecution’s “broad discretion” to choose its own evidence and refuse a stipulation,⁷ and insisted that “a defendant’s Rule 403 objection offering to concede a point generally cannot prevail over the Government’s choice to offer evidence showing guilt and all the circumstances surrounding the offense.”⁸

* Associate Professor of Law, Regent University Law School, Virginia Beach, Virginia. A.B., Harvard College, 1981; J.D., Harvard Law School, 1984. Copyright © 1997, James J. Duane (jamedua@regent.edu).

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

2. See generally James Joseph Duane, *Stipulations, Judicial Notice, and a Prosecutor’s Supposed “Right” to Prove Undisputed Facts: Oral Argument from an Amicus Curiae in Old Chief v. United States*, 168 F.R.D. 405, 442-44 (1996).

3. See James Joseph Duane, *Litigating Felon-with-a-Firearm Cases After Old Chief: Trial Strategies for Lawyers and Judges*, CRIM. JUSTICE, Fall 1997, at 18.

4. See, e.g., sources cited *supra* notes 2-3.

5. This portion of the majority opinion, Part II.B.3, appears at 117 S. Ct. 653-54.

6. See *id.* at 653-54, 656. The lower federal courts, quick to read the writing on the wall, have had no trouble recognizing that “the Supreme Court intended its decision in *Old Chief* to be limited to stipulations involving a defendant’s status as a convicted felon.” *United States v. Grimmond*, 137 F.3d 823, 833 n.14 (4th Cir. 1998).

7. *Old Chief*, 117 S. Ct. at 651 n.7.

8. *Id.* at 651. These promises are already paying off for prosecutors, and have been

One of the most interesting questions surrounding this dubious discussion is why the majority bothered to include it at all. It was not necessary to reach the holding, included some highly controversial assertions,⁹ and (as I will show) involved several marked departures from points the Court had itself long regarded as settled. It is quite likely that this four-paragraph disclaimer was the price the majority paid to pick up the crucial and rather unlikely fifth vote of Justice Anthony Kennedy, who himself stated to Old Chief's counsel at oral argument:

It seems to me what you have to say in order to avoid some of these very difficult problems is that evidence of the prior crime for the felon in possession statute is somehow *sui generis* and we should have a special rule for that. . . . I think that's a difficult principle to explain if I have to write the opinion, but it seems to me that that's where you're going.¹⁰

It is extremely rare for Justice Kennedy to supply the tie-breaking fifth vote to reverse a criminal conviction.¹¹ It is almost as if the majority opinion's "pledge of allegiance" to prosecutorial discretion was intended to cater to Kennedy's insistence that any opinion in

cited by lower courts in rejecting defense challenges to prejudicial photographs offered to prove undisputed facts. *See, e.g.*, *Gonzalez v. DeTella*, 127 F.3d 619, 620 (7th Cir. 1997); *United States v. Ortiz*, 125 F.3d 630, 632 (8th Cir. 1997). Following a remand in light of *Old Chief*, the D.C. Circuit Court of Appeals recently reversed itself and has now held that evidence about a defendant's criminal background offered to prove knowledge or intent under Federal Rule of Evidence 404(b) is not inadmissible merely because he offers to stipulate to those facts. *United States v. Crowder*, 141 F.3d 1202. (D.C. Cir. 1998) (en banc).

9. Prior to the decision in *Old Chief*, at least some lower courts and scholarly commentators had offered thoughtful reasons to conclude that it would often be unfair, if not unconstitutional, to admit evidence relevant to nothing but some issue the defendant was willing to admit unconditionally. *See, e.g.*, *United States v. Crowder*, 87 F.3d 1405, 1410-13 (D.C. Cir. 1996) (en banc), *vacated and remanded*, 117 S. Ct. 760 (1997), *reversed on remand*, 141 F.3d 1202 (D.C. Cir. 1998) (en banc); Edward J. Imwinkelreid, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L. J. 341 (1991).

10. Transcript of *Old Chief* Oral Argument, 1996 WL 605007, at *16-17 (Oct. 16, 1996). The published transcript does not disclose the names of the Justices who posed each question at oral argument, but I was at the argument and know Justice Kennedy well enough to pick him out of a lineup.

11. Whenever the Supreme Court is closely divided over the rights of criminal defendants or prisoners, Justice Kennedy frequently supplies the deciding fifth vote in favor of the Government, typically by joining with Justices O'Connor, Scalia, Thomas, and Chief Justice Rehnquist—the four dissenters in *Old Chief*. *See, e.g.*, *Calderon v. Thompson*, 118 S. Ct. 1489 (1998); *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997); *O'Dell v. Netherland*, 117 S. Ct. 1969 (1997); *McMillian v. Monroe County*, 117 S. Ct. 1734 (1997); *Lambrix v. Singletery*, 117 S. Ct. 1517 (1997); *Board of County Commissioners v. Brown*, 117 S. Ct. 1382 (1997); *Gray v. Netherland*, 116 S. Ct. 2074 (1996).

Old Chief's favor emphasizes why almost any other case on similar facts would be resolved in favor of the Government. But why should that be so? The Court offered only two reasons. In this brief comment, I wish to suggest that both reasons are implausible and simply cannot bear the weight the Court has tried to place upon them.

I. "Narrative Integrity"

In explaining why a prosecutor will almost always prevail over a defendant's attempt to establish some point by stipulation, the Court offered what it called the prosecutor's legitimate interest in "narrative integrity."¹² By this term, the Court explained, it meant "the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be."¹³ The Court reasoned that jurors may expect certain facts to be proved in a certain manner, based in part on their experience of the trial, and the Court quoted Professor Saltzburg for the conclusion that jurors "may penalize the party who disappoints them by drawing a negative inference against that party."¹⁴ Hence, the Court concluded, forcing the prosecution to accept a stipulation over its objection might unfairly saddle it with "a story interrupted by gaps of abstraction," which may leave jurors "puzzled at the missing chapters."¹⁵

This account of "narrative integrity" sounds superficially plausible and probably makes good sense in many situations. But in *this* context, it is an utterly specious makeweight. Indeed, it almost appears that the Court had forgotten the actual question under discussion. Remember, the Court supposedly was *not* explaining whether jurors are likely to draw an adverse inference against a litigant who, without any evident reason or explanation, seemingly fails to prove a point the jurors expect to see proved. We may assume for the sake of argument, as Professor Saltzburg persuasively argues, that a litigant might be so penalized for his *unexplained* failure of proof, especially on a disputed matter. But that does not even remotely justify the altogether different—and quite absurd—suggestion that a jury is also apt to penalize a litigant who offers no evidence to prove a point that was admitted in open court by his adversary! The Court cites no authority to support that proposition, and common sense squarely repudiates it.¹⁶ No sane jury would ever draw an adverse inference

12. Old Chief v. United States, 117 S. Ct. 644, 651 (1997).

13. *Id.* at 654.

14. *Id.* (quoting Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1019 (1978)).

15. *Id.*

16. The article by Professor Saltzburg, one of only two sources cited by the Court for

against a party when the jury was given a sensible and uncontradicted explanation for the absence of proof on a point.

The only judicial authority cited by the Supreme Court in support of its “narrative integrity” theory is its own decision in *Lakeside v. Oregon*, which held that a nontestifying accused may demand that a jury be instructed not to draw any adverse inference from his silence.¹⁷ This, the Court reasoned, reflects “the fact that juries have expectations as to what evidence ought to be presented by a party, and may well hold the absence of that evidence against the party.”¹⁸ That is true. But once again, that analogy suggests at most that parties may be penalized for their *unexplained* failure to satisfy jury expectations—as the defendant may have been in *Lakeside* for sitting silent in the face of incriminating accusations that fairly seemed to cry out for contradiction or explanation.

Suppose a prosecutor promised a jury in the opening statement:

Of the four defendants named in the indictment and seated here in court today, we will prove that only three are guilty of any crime. We now know that the fourth one, Wilson, was indicted in error, and we have since moved to dismiss all charges against him. But he insists on sitting up here at counsel table with the other parties because he wants to be told by a jury of his peers that he did nothing wrong—and I hope you do just that. There is no evidence he did anything illegal, and you will never hear any witness mention his name once.

If Wilson subsequently remained silent throughout such a bizarre trial, surely he would have no need for—or constitutional right to—an instruction to the jury to draw no adverse inference from his silence. No jury would ever penalize a man for failing to testify to his innocence when the opposing counsel had already stipulated to that fact and offered no evidence at trial to the contrary. That is why the logic of *Lakeside* is utterly out of place here, and simply has no bearing on the central issue of whether a party is likely to be prejudiced by failing to satisfy jurors’ evidentiary expectations on a point that has been unconditionally admitted by his adversary in open court.

Justice Souter tacitly acknowledged these points. He stated that when a jury expects to see an actual gun produced in a trial, “[a]

its theory of “narrative integrity,” never suggests otherwise, and does not even discuss that distinct issue at all. His lengthy article is entirely devoted to the implications of a trial attorney’s *unexplained* failure to satisfy the jurors’ expectations about the proof that should be produced at trial. See generally Stephen A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011 (1978).

17. See *Old Chief*, 117 S. Ct. at 654 n.9 (citing *Lakeside v. Oregon*, 435 U.S. 333, 340 & n.10 (1978)).

18. *Id.*

prosecutor who fails to produce one, *or some good reason for his failure*, has something to be concerned about.”¹⁹ That is quite true. But such “good reason for one’s failure” is always decisively established when, in the full view of the jury, (1) the court ordered the prosecutor not to offer any evidence on some point, (2) the order was granted on the motion of the defense, and (3) the motion was granted on the basis of a formal judicial admission by the defense that the point was true. No other explanation or excuse could possibly be any more compelling or direct. Although it is true, in the words of Justice Souter, that a party has reason for apprehension if he is “seemingly responsible for cloaking something,”²⁰ that description simply never fits a prosecutor who is precluded from proving a stipulated point by a court order granted at the request of the defense. That is why the Court’s imaginative account of “narrative integrity,” though interesting, is entirely beside the point in this context.

II. “Evidentiary Richness”

Evidently perceiving the weaknesses of its “narrative integrity” theory, the Court wisely placed its primary reliance upon what it called “the offering party’s need for evidentiary richness.”²¹ In the most remarkable passage of the entire opinion, the Court asserted that the “probative value” of an item of evidence must be reckoned by its “power not only to support conclusions but to sustain the *willingness* of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.”²² When faced with an objection under Rule 403, the Court held, a trial judge should consider the potential of the evidence “not just to prove a fact but to establish its human significance,” and “to convince the jurors that a guilty verdict would be *morally* reasonable as much as to point to the discrete elements of a defendant’s legal fault.”²³

Thus, the Court is now telling us, the probative value of an item of evidence, and thus the case for its admissibility under Rule 403, is measured in part by its capacity to persuade a jury—in the words of Lady MacBeth—to “screw your courage to the sticking-place.”²⁴ The admissibility of evidence is determined by its capacity to influence jurors’ hearts as well as their minds, even in ways that are not strictly logical, and even if the evidence has no rational tendency to prove

19. *Id.* at 654 (emphasis added).

20. *Id.*

21. *Id.* at 651. Elsewhere the Court described this concept in terms of evidence that “tells a colorful story with descriptive richness.” *Id.* at 653.

22. *Id.* at 653 (emphasis added).

23. *Id.* at 654 (emphasis added).

24. WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc. 7.

any historical fact that is disputed at trial. Incredibly, this breathtakingly radical vision of the trial process was asserted with virtually no supporting authority.²⁵

Although the Court wisely refrained from saying so explicitly, its description of the trial process in *Old Chief* effectively offers an unprecedented new construction of which facts are truly "material" in a criminal case. Evidence is relevant, and therefore admissible, only if it has some tendency to help establish some "fact that is of consequence to the determination of the action."²⁶ But precisely which facts are those? Under the traditional view, long accepted by the Supreme Court without question, the only material facts in a criminal case involve empirical issues of historical fact surrounding who did what and with what intent.²⁷ *Old Chief* has now effectively introduced the radical new suggestion that some of the "facts of consequence to the determination" of a criminal trial include relatively subjective moral "facts"—such as "the fact that the victim in this case died a hideous death deserving of our moral outrage," or "the fact that it is morally right and ethically responsible for the jury to put aside any reluctance to convict, and to obey the judge's instruction that it must convict if it is satisfied that the defendant is guilty beyond a reasonable doubt."²⁸ Never before to my knowledge has the Supreme Court, or any other court, come so close to formally declaring that evidence which logically proves no disputed historical fact may nevertheless have probative value arising out of its capacity to help persuade the jurors to heed and obey the requirements of the law.²⁹

In the very long run, it will be most interesting to see whether the Court will be willing to embrace the logical implications of this posi-

25. In support of this description of the trial process, the Court ironically cited no authority other than the decision in *United States v. Gilliam*, 994 F.2d 97, 100-02 (2d Cir.), cert. denied, 510 U.S. 927 (1993). *Old Chief*, 117 S. Ct. at 654. That reliance was unfortunate. As I have explained elsewhere, this same aspect of the *Gilliam* opinion is patently and demonstrably false in its description of the criminal trial process as a forum for resolution of claims about what sort of conduct is morally reasonable. See James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to 'Send a Message' With Their Verdict?*, 22 AM. J. CRIM. L. 565, 590-602, 611-12 (1995).

26. FED. R. EVID. 401 (defining relevant evidence). See also FED. R. EVID. 402 (declaring that only relevant evidence is admissible).

27. See *infra* notes 42-46. See also *Lockhart v. McCree*, 476 U.S. 162, 183 (1986) (noting "the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant"); *Stone v. Powell*, 428 U.S. 465, 490 (1976) (stating "the ultimate question of guilt or innocence . . . should be the central concern in a criminal proceeding."); *Herring v. New York*, 422 U.S. 853, 862 (1975) (holding "[a] criminal trial . . . is in the end basically a fact-finding process.>").

28. *Old Chief*, 117 S. Ct. at 653-54.

29. I am tempted to describe this as an example of what Professor Friedman has dubbed "meta-relevance." Richard D. Friedman, *Irrelevance, Minimal Relevance, and Meta-Relevance*, 34 HOUS. L. REV. 55, 67-71 (1997).

tion, or to apply it even-handedly in favor of defendants and prosecutors alike. Suppose an imaginative defendant someday wishes to call his wife and children to testify, even though they admittedly know nothing about his guilt or innocence, merely to describe how their lives would be devastated by his extended incarceration. He also offers a graphic but accurate film of living conditions in the only local prison. After the prosecutor made the predictable objection on relevance grounds, the defense counsel replied:

Your Honor, I am not offering this testimony to support a defense of nullification, or to suggest that the jurors should acquit out of mercy even if they are convinced of his guilt beyond a reasonable doubt. In fact, you have our consent to tell the jurors that they cannot and should not do such a thing. I am offering this testimony simply to help "put a human face" on the reasons for our law's seemingly unnatural insistence that a juror must vote to acquit (or hold out for acquittal) if he has a reasonable doubt, even if it appears the defendant is probably guilty of a terrible crime. Surely *that* rule of law is even harder for jurors to understand and obey than the converse rule that jurors must convict when guilt is proved beyond a reasonable doubt, which prosecutors are routinely allowed to help "prove" through prejudicial evidence of undisputed facts.³⁰ *Old Chief* clearly held that evidence may enjoy unique probative value by virtue of its capacity to persuade and inspire the jury to do what the law requires of them.

There would be nothing intrinsically absurd or incoherent about a criminal justice system which admitted evidence on a theory like this. Just the same, no American judge will give such a proposal any serious consideration in the foreseeable future, simply because it would mark such a profound break with our traditional conception of the parameters of a criminal trial. But future generations of judges may eventually wake up to this perfectly natural implication of *Old Chief's* logic. Lawyers one century from now may look back on *Old Chief* as the beginning of a gradual but radical shift in our collective conception of the criminal trial process.

But even while we wait to see if the courts will ever give *Old Chief* a truly even-handed application, there are two more immediate and pressing inconsistencies created by that Court's summary disregard for past precedents. For the first time in nearly thirty years, a

30. "Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal." *Old Chief*, 117 S. Ct. at 653. Indeed, there is excellent reason to suspect that voting to convict is easier for jurors than holding out for acquittal; 77% of all criminal defendants tried in federal court are convicted. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at 206 tbl. no. 333 (based on data collected from all federal criminal trials concluded in 1991 and 1992).

majority of the Supreme Court has almost casually cast aside its long-standing and dogmatic allegiance to "the almost invariable assumption of the law that jurors follow their instructions."³¹ The Court's almost breathtaking faith in the obedience of jurors has been confirmed in numerous cases where jurors have been trusted to obey instructions that are barely intelligible to nonlawyers,³² or that fly in the face of basic principles of human psychology.³³ Prior to *Old Chief*, not since Earl Warren was Chief Justice had a majority of the Court recognized any new exceptions to this assumption or identified any instruction that a jury could not be trusted to obey.³⁴

When parties "stipulate" to a fact, the trial judge typically gives the jury a standard instruction that the fact was admitted by the defendant, and that "[t]here is no disagreement over that, so there was no need for evidence by either side on that point. *You must accept that as fact, even though nothing more was said about it one way or the other.*"³⁵ Judges also tell the jury that "[i]f . . . you are firmly convinced that the defendant is guilty of the crime charged, you *must* find

31. *Shannon v. United States*, 512 U.S. 573, 585 (1994) (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); *accord Yates v. Evatt*, 500 U.S. 391, 403 (1991) (announcing the "sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given").

32. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 70-75 (1991) (presuming that jurors understood and heeded an instruction that evidence of prior injuries to defendant's alleged murder victim could be considered by them as evidence of "a clear connection between the other two offense[s] and the one of which [he] is accused" and that "he also committed the crime charged in this case," but *not* "to prove that he is a person of bad character or that he has a disposition to commit crimes"); *Harris v. New York*, 401 U.S. 222, 223 (1971) (trusting jurors to understand and heed an instruction that statements attributed to the defendant by the prosecution were admissible on the credibility of defendant's testimony denying his guilt but not proof of the defendant's guilt).

33. *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 13 (1994) (presuming that jurors "followed" instructions which, *by negative implication*, allowed jurors to pay no attention to the fact that man before them for sentencing was already under a sentence of death!); *United States v. Shannon*, 512 U.S. 573, 584-85 & n.10 (1994) (presuming that jurors considering insanity defense in violent crime case would follow instruction to disregard likely punishment, even if they harbored mistaken view that accepting that defense would result in his immediate release).

34. *See Bruton v. United States*, 391 U.S. 123, 126, 135-36 (1968); *Jackson v. Denno*, 378 U.S. 368, 381-82 (1964). I am not counting *Cruz v. New York*, 481 U.S. 186, 191-92 (1987), which announced no real change in the law, and was little more than an honest refusal to overrule the obvious implications of *Bruton*.

35. UNITED STATES FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS Instruction No. 12 (1987) ("Stipulations of Fact") (emphasis added). Recent federal appeals courts have split over whether the judge may tell a criminal jury that it "must" accept as true a fact to which the parties have stipulated, as the Federal Judicial Center has recommended, but the better reasoned authorities have properly held that a voluntary defense stipulation amounts to a valid waiver of his right to a jury determination of that factual issue. *See Duane, supra* note 3, at 24-25; *see generally United States v. Hardin*, 139 F.3d 813 (11th Cir. 1998).

him guilty.”³⁶ If jurors could be trusted to obey these simple and direct commands, of course, it would be literally impossible for the Government to lose any legitimate tactical benefit by not being allowed to prove some stipulated fact itself. Thus, in order to uphold a prosecutor’s general right to prove even undisputed facts with “evidentiary richness,” the Court necessarily had to cast aside its almost inviolate assumption of juror obedience to instructions. Indeed, that is exactly what the Court unambiguously implied when it declared, without any supporting authority, that “[t]his persuasive power of . . . concrete and particular [evidence] is *often essential* to the capacity of jurors to satisfy the *obligations* that the law places on them.”³⁷ To say that evidence is “often essential” to inspire and motivate jurors to obey the law’s obligations is the same as declaring that the instructions alone “often” cannot be trusted to do the trick.³⁸

It is highly ironic that the Court chose this context to suddenly depart from its time-honored assumption of juror obedience, which has been systematically employed as a seemingly neutral legal device for affirming countless criminal convictions.³⁹ *Old Chief* was the first criminal case in many years where the class of *defendants* would have benefited from an even-handed application of the supposedly well-settled assumption of jury obedience to judicial instructions. And yet, probably not by coincidence, the case also marked the very first time

36. UNITED STATES FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS Instruction No. 21 (1987) (emphasis added). By the way, I do not believe it is proper or accurate for a trial judge to tell jurors that the law requires them to convict every man shown to be legally guilty beyond a reasonable doubt, or that they “must” do so, although that is what jurors are typically told in criminal cases. See James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 LITIG., Summer 1996, at 6, 12-13.

37. *Old Chief*, 117 S. Ct. at 653 (emphasis added).

38. Justice Souter wisely refrained from drawing any undue attention to this abrupt departure from 30 years of Supreme Court precedents about jury obedience, and he put the point about as subtly as one could. He tacitly made the same assertion again, however, when he later asserted: “A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an *assurance* that the missing link is really there is *never* more than second best.” *Id.* at 654 (emphasis added). Justice Souter makes the point so eloquently that one might be forgiven for forgetting that the “assurance” under discussion here is a solemn judicial instruction that the jury must regard some fact as proven! If a judicial command is “never more than second best,” the Court has apparently abandoned its fervent expressions of faith in the ability and willingness of jurors to follow their instructions.

39. As I have explained at much greater length elsewhere, the seeming neutrality of the “obedient juror” assumption is one of our legal tradition’s most cleverly constructed myths. For subtle reasons that are anything but obvious, that assumption almost invariably works in favor of the prosecution in criminal appeals, and always will. See Duane, *supra* note 2, at 411-13 & n.40. I know of only 14 cases where the Supreme Court relied on that assumption in helping to decide a criminal appeal, and in all 14 it worked to help save a conviction from reversal. See *id.*

in decades when the Court *refused* to follow its ordinary axioms about juror obedience, and elected instead to adopt a directly contrary assumption without the citation to any authority. The injustice of this double standard is highly ironic, in light of the Court's insistence that "[t]he rule that juries are presumed to follow their instructions" is supposedly rooted primarily "in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."⁴⁰ This is a most peculiar explanation for a "rule" of appellate jurisprudence that, in practice, is rigorously enforced when it works to the benefit of the prosecution, and otherwise always disregarded.⁴¹

Tragically, this is not the worst inconsistency between *Old Chief* and the pages of legal history. Less than three years earlier, in *Shannon v. United States*,⁴² a defendant charged with a violent felony raised the defense of "not guilty by reason of insanity."⁴³ Terry Lee Shannon asked the trial judge to instruct the jury that he faced involuntary commitment even if they accepted his defense, lest the jury convict him out of the mistaken fear that he would otherwise go free. He even provided the Court with recent empirical confirmation of the unsurprising conclusion that the public generally overestimated the likelihood that someone found "not guilty" by reason of insanity would be released.⁴⁴ Nevertheless, the Court affirmed the trial judge's refusal to give such an instruction, based on what it called "the well-established principle that a jury is to base its verdict on the evidence before it, without regard to the possible consequences of the verdict."⁴⁵ The Court even added:

The principle that juries are not to consider the consequences of

40. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

41. To anyone who thinks me unduly cynical for suspecting the Court of a basically pro-prosecution bias, I pose the following important question: Why does the majority opinion refer more than a half dozen times to the reasons why, in the name of evidentiary richness and narrative integrity, the *prosecution* should normally be allowed to reject an unwanted proposal to settle some undisputed point by stipulation? See *Old Chief*, 117 S. Ct. at 653-56. Why on earth didn't the Court couch its discussion in the far more natural and neutral terms of "a party" or "a litigant" or "a lawyer" who desires to refuse a proposed stipulation?

42. 512 U.S. 573 (1994).

43. *Id.* at 575.

44. *Id.* at 592 & n.2 (Stevens, J., dissenting) (citing a recent study suggesting that the public overestimates the likelihood of insanity acquitees being released). The majority acknowledged that it was at least "open to debate" whether the public had a distorted view of the consequences of a not guilty by reason of insanity verdict, but stated "[w]e are not convinced" that such was the case. *Id.* at 584-85 & n.10.

45. *Id.* at 576. The Court also described this rule as "the principle that jurors are not to be *informed* of the consequences of their verdicts," *id.* at 580 (emphasis added), thus suggesting that the rule limits the attorneys and the judge, as well as the jurors.

their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. . . . Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion.⁴⁶

This passage from *Shannon* has exercised a powerful influence in the lower courts. It is widely cited as the primary basis for rejecting any defense request to advise a jury about mandatory minimum sentences faced by the accused upon conviction, even if the charge carries a stiff penalty that might come as a great surprise to the jury.⁴⁷ In one recent extreme case, the Court of Appeals relied on *Shannon* to uphold a trial judge's refusal to inform the jury that the defendant faced mandatory life imprisonment without parole for intending to sell about three ounces of cocaine base.⁴⁸

Shannon simply cannot be reconciled with *Old Chief*.⁴⁹ In one

46. *Id.* at 579. In support of this "well established" rule, the Court cited several lower court opinions and its own decision in *Rogers v. United States*, 422 U.S. 35, 40 (1975) (in federal court, a jury should be told that it has "no sentencing function and should reach its verdict without regard to what sentence might be imposed"). *Id.* This principle is also reflected in the standard jury instruction: "If you find the defendant guilty, it will then be my job to decide what punishment should be imposed. In considering the evidence and arguments that will be given during the trial, you should not guess about the punishment. It should not enter into your consideration or discussions at any time." FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS Instruction No. 4 (1987). Even before trial begins, prospective jurors are routinely instructed that: "the jury has only to determine whether the defendant is guilty or not guilty as to each offense charged. What happens thereafter is not for the jury's consideration In other words, the sentence is not to be considered in any way by the jury in arriving at an impartial verdict as to the guilt or innocence of the defendant." UNITED STATES JUDICIAL CONFERENCE, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 3 (1996).

47. *United States v. Vardanian*, 116 F.3d 487, No. 96-50283, 1997 WL 341805, at *1 (9th Cir. June 19, 1997); *United States v. Lewis*, 110 F.3d 417, 422 (7th Cir. 1995), *cert. denied*, 118 S. Ct. 149 (1997); *United States v. Chesney*, 86 F.3d 564, 574 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 2470 (1997); *United States v. DiMarzo*, 80 F.3d 656, 660 (1st Cir.), *cert. denied* 117 S. Ct. 259 (1996); *United States v. Ludy*, 81 F.3d 164, No. 94-2948, 1996 WL 138599, at *1 (7th Cir.), *cert. denied*, 116 S. Ct. 2538 (1996); *United States v. Johnson*, 62 F.3d 849, 850-51 (6th Cir. 1995); *United States v. Mayo*, 34 F.3d 1068, No. 93-6384, 1994 WL 419581, at *1 (6th Cir.), *cert. denied*, 513 U.S. 1064 (1994); *United States v. Maison-neuve*, 954 F. Supp. 114, 116 (D. Vt. 1997).

48. *Lewis*, 110 F.3d at 422.

49. By a most unlikely coincidence, I predicted this inconsistency years before it happened, when I pointed out the irreconcilable tension between *Shannon* and the Second Circuit's decision in *Gilliam*. See Duane, *supra* note 25, at 611-12. That was two years before the Court swallowed *Gilliam* in *Old Chief*.

case, the Court unanimously agreed that defendants cannot give jurors any information about, or invite juries to consider, “the consequences of their verdicts” which distract them “from their fact-finding responsibilities.”⁵⁰ Yet less than three years later, the same Court—again unanimously—contended that prosecutors should be allowed free rein to offer evidence, “not just to prove a fact but to establish its human significance, and so to implicate the law’s moral underpinnings and . . . to convince the jurors that a guilty verdict would be morally reasonable.”⁵¹

This inconsistency borders on madness. A judge trying to conscientiously follow both *Shannon* and *Old Chief* might well tell the jurors something like this at the end of a trial for possession of child pornography:

Ladies and gentlemen of the jury, you may recall that I let you, over the defendant’s strenuous objection, view the films mailed to his home, even though he denies that he ordered them and freely concedes that they are, in his own words, “revolting and utterly pornographic.” Although those films do not help to prove a single issue that the defendant has not admitted, the Supreme Court has nevertheless ordered that I let the prosecutor play them for you in order to persuade you that if the defendant *did* possess them, “a guilty verdict would be morally reasonable,”⁵² and to help you overcome any reluctance you may have “fac[ing] the findings that can send another human being to prison.”⁵³

Oh, wait: Just one more minor housekeeping matter before I let you deliberate on the moral reasonableness of a guilty verdict. You heard the defendant ask me to tell you about the mandatory minimum prison term he will serve if you convict him on this possession charge. I have denied that request because the Supreme Court says you are to neither know about nor consider what a guilty verdict will mean to the accused and his family. Understand?

Now get back in that jury room, take another close look at those admittedly revolting and pornographic videos if you wish, and let us

50. *Shannon*, 512 U.S. at 579. At least as to the general contours of this rule, the Court was unanimous. Even the two dissenters agreed that it is usually “appropriate for federal judges to adhere to the general rule that the jury should be instructed to base its decision on the evidence before it, without regard to the possible consequences of its verdict.” *Id.* at 589-90 (Stevens, J., dissenting on other grounds).

51. *Old Chief*, 117 S. Ct. at 654. On this narrow point at least, the Court was essentially unanimous in *Old Chief*; the four dissenters would have gone even further than the majority in protecting what it called “the fundamental principle that in a criminal prosecution the Government may prove its case as it sees fit,” even with regard to undisputed facts. *Id.* at 658 (O’Connor, J., dissenting). By a most ironic coincidence, *Shannon* and *Old Chief* were both prosecutions under 18 U.S.C. 922(g)(1) for unlawful possession of a firearm by a felon. See *Old Chief*, 117 S. Ct. at 647; *Shannon*, 512 U.S. at 577.

52. *Old Chief*, 117 S. Ct. at 654.

53. *Id.* at 653.

know when you decide whether a guilty verdict would be a morally reasonable response to their possession.

Obviously this is not “moral reasoning” but a sham. No jury can engage in meaningful moral reasoning when it is systematically deprived of any details about the practical implications of the choice set before it, including many that are quite surprising and unexpected.

At one point, in a poignant moment of unintended irony, the Court in *Old Chief* complained that unwanted defense stipulations to an element of the Government’s case would usually have the totally unacceptable effect of telling jurors “never mind what’s behind the door.”⁵⁴ Yet that is actually a far more accurate description—almost literally so—of the incoherence underlying the Court’s own holdings. It is in fact the Supreme Court which has effectively required trial judges to tell jurors: “Now that you have seen the gruesome and ghastly videos of the defendant’s alleged crime, let us know by your verdict whether you think it is morally right for us to let him walk out of this courtroom through the main entrance or to be taken out through the back. But never you mind what we’ll do with him if you vote to send him out through that back door.”

54. *Id.* at 654.

