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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHNNY LYNN OLD CHIEF V THE UNITED STATES

CASE NO: No. 95-6556

PLACE: Washington, D.C.

DATE: WEDNESDAY, OCTOBER 16, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHNNY LYNN OLD CHIEF, :

Petitioner :

v. : No. 95-6556

UNITED STATES :

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Washington, D.C.

Wednesday, October 16, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

DANIEL DONOVAN, ESQ., Great Falls, Montana; on behalf of the Petitioner.

MIGUEL A. ESTRADA, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 95-6556, Johnny Lynn Old Chief v. United States.

Mr. Donovan, you may proceed whenever you're ready.

ORAL ARGUMENT OF DANIEL DONOVAN

ON BEHALF OF THE PETITIONER

MR. DONOVAN: Mr. Chief Justice and may it please the Court:

The fact of the prior felony conviction, not the nature of the prior felony conviction, is an element of the offense of felon in possession of a firearm. The name and nature of that underlying conviction is not relevant to that issue.

QUESTION: Well, when we're talking about -- we're talking about admissibility of evidence, here, I take it.

MR. DONOVAN: Yes.

QUESTION: Ordinarily you don't start talking about the relevance of a -- you look at the piece of evidence and you say, is it relevant, don't you?

MR. DONOVAN: Yes, and in this particular case there were pieces of evidence that we contended weren't

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relevant.

QUESTION: Well, what was it, a certificate of prior conviction?

MR. DONOVAN: Well, also the indictment itself. It's a practice of this judge to have the prosecutor read the indictment to the jury at the time of the voir dire, so we had come in pretrial and filed a motion in limine asking the judge to prohibit that reading as well as the prejudicial -- we contend the prejudicial parts from the judgment --

QUESTION: But that's not raised in your petition for certiorari. The question is, if the defendant in a felon in possession of firearms case offers to stipulate to his status as a felon, should the district court require the Government to accept the stipulation. So it's no different whether the judge read the indictment or whether there was a certificate of prior conviction, is there, under that question?

MR. DONOVAN: Well, yes, but we did do three things. The first thing was move in limine to exclude, the second thing was offer to stipulate, and the third thing, we submitted a proposed jury instruction we felt even went farther than stipulation and admitted, basically, the fact or the element.

QUESTION: But your -- the question you raise

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with us is whether the Government should have been required to accept the stipulation.

MR. DONOVAN: That's correct.

QUESTION: And so we're talking now about a piece -- what, a certificate of conviction of some sort was offered?

MR. DONOVAN: Well, we only made a verbal offer. We never got farther than that because the Government basically said we don't have to stipulate if we don't want to. The trial judge said they don't have to stipulate if they --

QUESTION: So what was it that the Government offered?

MR. DONOVAN: They offered a -- well, aside from reading the indictment and mentioning it during the trial, they offered the judgment and conviction document.

QUESTION: Okay, so the question, it seems to me, if you're talking about normal application of the rules of evidence, is, is this judgment of conviction relevant, and it seems to me you have to answer yes, don't you?

MR. DONOVAN: Well, it may be relevant in general, but what I was saying was, parts of it were not relevant, and I tried to solve that problem pretrial, and the judge basically said no.

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QUESTION: Mr. Donovan, when the judge had said no, did you then offer the statement as a signed admission, even though the Government had not stipulated to its correctness?

MR. DONOVAN: No. I just fell back and put the Government to their proof, basically, but I still renewed the objection during the trial.

QUESTION: Well, do you agree that the Government -- I mean the stipulation is by -- I think is by definition a statement in which each party concurs.

MR. DONOVAN: That's correct.

QUESTION: And I presume there isn't any power in a court to make the Government concur in something it doesn't want to concur in.

MR. DONOVAN: That's true. What I'm really saying is that I think a stipulation is the best remedy for this problem, and I'm asking --

QUESTION: No, but the problem doesn't arise under the rule until there is at least some alternative evidence under the rule, and if you're saying the evidence is the stipulation, and the Government hasn't signed it, you haven't got a stipulation, and you don't have that kind of evidence.

And that's why I asked you the question, when the Government wouldn't stipulate so that you couldn't

offer a stipulation, did you have a kind of fallback evidence like saying, okay, judge, we've signed it, and my client has signed a statement saying, I did thus and so, or I was convicted of thus and so, and we're offering this as evidence as an admission. That, I presume, would have been evidence, but I take it that was not in this case.

MR. DONOVAN: What I did, though, I did offer a proposed jury instruction whereby the jury would instruct the -- or the judge would instruct the jury that you are hereby instructed that the defendant, Johnny Lynn Old Chief, has been convicted of an offense punishable by a term of imprisonment exceeding 1 year, and I think that's --

QUESTION: That was in the nature of an admission, you're saying?

MR. DONOVAN: Right.

QUESTION: Yes, but you did that on the assumption, or in order to build a case that the evidence of the nature of the crime must have been -- must be excluded based on your instruction.

MR. DONOVAN: Yes, that's true.

QUESTION: Well --

QUESTION: It seems to me this is very much of a 403 case, and I think the Government concedes as much. I don't see that as necessarily presented by your

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question. That's why the case is a little hard to grasp, and I don't see you arguing it in your brief.

MR. DONOVAN: I think the problem is the Ninth Circuit case, the Breitkreutz case, which the Government -- the prosecutor and the trial judge relied on I think is decided wrong, because it says if there is an offer to stipulate in this kind of a case you don't apply 403, but I think clearly the Government's admitted here, and they admitted I think in 1992 in a case that was argued called Hadley, that an offer to trigger, or offer to stipulate --

QUESTION: Well --

MR. DONOVAN: -- does trigger a 403 balancing analysis --

QUESTION: Well --

MR. DONOVAN: -- and we never had such an analysis here. It's therefore --

QUESTION: I don't -- excuse me.

QUESTION: Supposing that a criminal defendant is charged with the offense of murder, is the Government required to simply accept a statement from him that yes, I killed this person, rather than have the evidence put on by the Government as to how the person was killed, and that sort of thing?

MR. DONOVAN: I don't -- I don't think the

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Government's required to do that.

QUESTION: Well, why -- if you're right on the felony point, why isn't the Government required to accept a stipulation on some other element of the crime?

MR. DONOVAN: I think this -- I'm asking the Court just to focus on this one statute, and I'm saying in addition to the stipulation issue that the nature of the prior conviction is not relevant, and --

QUESTION: Well, maybe -- can't the defendant in my hypothesis argue that this -- the evidence as to how he killed the defendant could be very prejudicial, and it really doesn't make any difference in the eyes of the law so long as he killed him.

MR. DONOVAN: I think that's true, but you start with a proposition that that evidence is relevant, and then of course you could argue 403.

QUESTION: But you start with the proposition that this evidence is relevant.

MR. DONOVAN: Well, if you combine the total -- if you're calling the total judgment and conviction document itself relevant, yes, but what I'm saying is part of that judgment includes the nature and name of the prior felony, which isn't relevant, as well as the fact that Old Chief got 60 months, obviously, which is more than --

QUESTION: But why doesn't that just raise a

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section 403 balance question, rather than some question of whether the Government has to accept a stipulation?

MR. DONOVAN: Well, I did raise that at the trial level, and the problem with the Ninth --

QUESTION: But not here.

MR. DONOVAN: I argued 403 balance here. I'm saying if you assume this is --

QUESTION: But the question, as the Chief Justice pointed out, just asks whether we have to accept the offer of the defendant to stipulate.

MR. DONOVAN: Yes, and --

QUESTION: And surely the answer to that is no.

MR. DONOVAN: Well, that's true, Justice O'Connor, but what I'm trying to get the Court to look at are some of the circuit cases, Tavares in the First Circuit, and what -- basically what that says is the offer to stipulate triggers a process and then the Government has to come in and prove under 403 that there is probative value which --

QUESTION: I don't see what relevance the offer to stipulate has. I mean, if the Government doesn't have to accept it, and I think it doesn't, then it just doesn't trigger anything.

MR. DONOVAN: Well --

QUESTION: You'd have to raise the 403 issue,

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and ask whether what is offered by the Government is unduly prejudicial and unfair.

MR. DONOVAN: And I think I did that, but I got ignored, and again, I feel because of the law in the Ninth Circuit, the case -- Breitkreutz says if you object, if you offer to stipulate, you don't apply the 403 balancing test.

QUESTION: But --

QUESTION: Well, I think it's true that even the Government at page 28 of its brief, a paragraph I can't quite square with its position, says that once there is an unconditional offer to stipulate, then 403 analysis is triggered, so in that sense I think the Government seems to agree with you on that point.

MR. DONOVAN: Yes, and Ninth Circuit law says you don't trigger it.

QUESTION: But the -- Tavares was a pure 403 case, wasn't it? I mean, I think I remember. I think I was on the panel.

MR. DONOVAN: Yes.

QUESTION: Pure 403. It says that in the presence -- there are a lot of ways you can keep the prejudicial thing out. You can redact it. There may be dozens of ways, and if the defendant comes in, offers to stipulate, then there's just one additional important way

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that the Government doesn't need it, and that goes in the 403 balance.

MR. DONOVAN: And the Tavares test in the first Circuit stands for the proposition if the Government refuses to stipulate, you still exclude that evidence by some other means, and the First --

QUESTION: I thought --

QUESTION: Mr. Donovan, your argument and also your reliance on 403 assumes that the only evidence admissible is evidence which is probative. That's what 403 says, if it's probative value is outweighed by something else.

Is that the case? It seems to me a lot of evidence gets in in trial routinely to simply place a crime in its context. For example, the identity of the victim, as the Chief Justice was alluding to. Do you think the identity of the victim, if it happened to be Mother Teresa, could be kept out of the case --

MR. DONOVAN: No, I --

QUESTION: -- on the grounds of what difference does it make who it was? It was a murder, and pleading 403, you should suppress the fact that it was Mother Teresa. I doubt whether you have to do that. It's part of the circumstances of the event which the State is entitled to get in.

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MR. DONOVAN: I think in comparison you start with the proposition that the victim of the -- the evidence of the victim of the crime is a relevant question.

QUESTION: No. It's no more relevant than the nature of the prior crime in your case. It was a dead human being is all that's necessary for the conviction. The identity of the human being makes no difference.

MR. DONOVAN: Well --

QUESTION: So if I come in with a stipulation, I stipulate there was a dead human being, whereupon you think the State could be precluded from introducing who the human being was, placing this event in its real life context, simply because that would be harmful to the defendant? I doubt it.

MR. DONOVAN: I think that does place it in the real life context and get into evidence of the act and intent of the crime, and one thing I'm saying here, the status of the felon is not part of the act and intent of the crime. It's something different.

QUESTION: Are you saying that because of the state of the law in the Ninth Circuit there was no way you could have gotten a 403 balance? I'm confused about what -- the exact question you were asking us to decide, however you phrased it in your cert petition. I thought

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you said that in the Ninth Circuit, as distinguished from the First Circuit, there is no possibility for a 403 balancing on whether the jury will be told the name of the felony.

MR. DONOVAN: That's how I read the Ninth Circuit Breitkreutz case, Justice Ginsburg.

QUESTION: So what you're challenging is circuit law that says that the character, the crime, the actual crime, the name of that crime is not something that the judge should weigh in a 403 balance, it just comes in automatically. Is that what you're saying?

MR. DONOVAN: I think the Ninth Circuit says that automatically comes in regardless of defense objection or defense offer to stipulate. And I think that's how I got here. That's why I got here.

QUESTION: But that certainly isn't the question you present us with. It's whether that Ninth Circuit decision might be wrong.

MR. DONOVAN: No, I -- I mean, it's an aspect of the question, yes.

QUESTION: Well, what if a criminal defendant and his lawyer figure that our only chance is to raise a defense of justifiable homicide, that you killed in self-defense, can that defendant come in and say, I stipulate to all the elements of the crime of murder, that it was --

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I killed him unlawfully, et cetera, et cetera, and can the Government be required to accept that sort of stipulation, and only argue about -- the only evidence you really hear is about whether there was justification or not?

MR. DONOVAN: I don't think so. I think the Government is entitled to present a full picture of that, and it also relates to whether or not there was self-defense.

QUESTION: Well, why can't it present a full picture of the felony that the person was convicted of?

MR. DONOVAN: Well, my first argument is, it's not relevant.

QUESTION: Well, if it's not relevant, then you don't ever get to a 403 balancing.

MR. DONOVAN: That's right.

QUESTION: You simply would exclude it automatically.

MR. DONOVAN: And I think that's the rule of the First Circuit, is just that, but --

QUESTION: It is a relevant part. The relevant part is that the felony was committed.

MR. DONOVAN: That's --

QUESTION: The question is, how do you -- I mean, the question is, how do you get in that relevant part without going into all the details, and the

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difference between doing that with an ancient felony and doing it with the details of the accused felony, i.e. the present crime, the difference, because you don't allow it with the present crime, I thought the Chief Justice's question is, why do you allow it with the past crime, and the answer to that is?

MR. DONOVAN: Well, the -- I believe the answer is whether or not it's a qualifying crime is a question of law for the Court to determine, and whether or not the defendant in fact committed that crime, or was convicted of that crime, is a question of fact --

QUESTION: Well, perhaps --

MR. DONOVAN: A question of fact for the jury.

QUESTION: -- on a somewhat broader picture, can the criminal defense in a sense require the Government to accept a lot of stipulations so that a very abstract picture is presented to the jury simply almost in terms of judges, rather than having live evidence describe what happened?

MR. DONOVAN: No. No, I don't think it can, but the defendant can offer to stipulate or object and get a 403 analysis and ask the Court to exclude that over Government objection.

QUESTION: It seems to me what you have to say in order to avoid some of these very difficult problems is

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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'm --

MR. DONOVAN: That's essentially --

QUESTION: 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.

MR. DONOVAN: Well, I think I am going there, and I'm asking the Court to consider the Tavares rule, and I think the Tavares rule is better summarized in the case of Melvin, which is cited in the amicus brief, and that basically Melvin states that in a felony possession of a firearm case, evidence of the nature of a prior -- of the nature of the prior conviction is not admissible unless the Government establishes probative value in the 403 balancing process, and I think that is a simple rule to apply.

QUESTION: Could I go back to your answer to the Chief Justice's question? I really didn't understand it. He asked you whether the defendant could in effect render a trial a very abstract proceeding by asking the Government to stipulate all of the elements of the crime with the only issue left being whether the defendant in fact committed it or not, and you said no, but then you followed up with an explanation that seemed to me to mean

yes.

MR. DONOVAN: Well --

QUESTION: You said no, but the --

MR. DONOVAN: -- I think that --

QUESTION: -- but the defendant could offer the Government a stipulation, and if the Government refused the trial court could exclude that information, which I think is the opposite of your first answer.

MR. DONOVAN: Well, I think what I'm trying to say is that the defendant can't preclude -- cannot on his own preclude, but he could offer to stipulate it, otherwise object and ask the judge to preclude, and of course the Government would -- would not --

QUESTION: Are you saying the Government -- and what must the judge do? You think the judge should preclude?

MR. DONOVAN: No, the Gov -- the judge -- well, I would argue in certain cases, in certain situations the judge should apply 403 and exclude the evidence, but the Government would argue, and --

QUESTION: What cases are they? I mean, in all cases, it seems to me, putting before the jury the gory, real life facts is always going to be harmful to the defendant, number 1. Number 2, it is always going to be unnecessary in the strictest sense. You can always

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stipulate there was a dead human being.

What criterion are you urging upon us?

MR. DONOVAN: Well, I think -- if I may give an example, I think the trial court's rule on photographs, for example, every day, and the defense may say, this photograph is too gory, but this one isn't, and the prosecution may say, we want to use a real gory photograph, and the judge applies 403 and decides that gory photograph is so highly prejudicial I'm going to keep it out, even though the Government wants to introduce it.

QUESTION: What if we were to rule in your favor in this case and then a year from now you get a defendant, maybe, and the felony -- a similar charge, the felony of which he's convicted is having trafficked in counterfeit Louis Vuitton bags. And this time the Government wants to stipulate what the felony is, and you say, no, I think the jury should know that this guy was just trafficking in counterfeit Louis Vuitton bags.

(Laughter.)

QUESTION: Or short lobsters.

MR. DONOVAN: The First Circuit addressed that, and in me advocating the First Circuit rule, the First Circuit basically says, that would also be irrelevant, so that doesn't come in.

QUESTION: So the defendant couldn't make that

point.

MR. DONOVAN: Right. It applies both ways.

QUESTION: Under your view I take it the certified copy of previous conviction cannot be shown to the jury. It seems to me a very odd evidentiary rule.

MR. DONOVAN: Unless it's --

QUESTION: Redacted.

MR. DONOVAN: Redacted.

QUESTION: And then the jury has to read something that's redacted. That's an odd way to proceed, it seems to me.

MR. DONOVAN: I think -- and that's one of my arguments to advocate a stipulation is better than a redacted judgment and conviction, because if you redact the judgment and conviction by crossing out lines and such, I think that invites jury speculations of what was crossed out, whereas if you have a clean stipulation, it is hereby stipulated, the jury either hears that or reads that, and there's less likelihood for speculation to come up.

QUESTION: Well, but if there's so much trouble in enforcing the rule you propose, maybe that indicates that we shouldn't try to make the effort. The historical fact is the historical fact and the jury considers it for what it's worth.

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MR. DONOVAN: Well, but I think the reason this Court has to do something is, there's a different rule in some of the circuits, and my circuit, obviously the Ninth Circuit happens to be against the defendant, and the other circuits, most of the other circuits now would rule in my favor.

QUESTION: Well, I guess the first question is whether the evidence of the nature of the felony offense, the prior offense is relevant.

MR. DONOVAN: And that's --

QUESTION: That would be the starting point, I would guess.

MR. DONOVAN: That's my first points. That isn't -- the nature of the offense is not relevant.

QUESTION: If it is relevant, then the section 403 balance would exclude it if it unfairly prejudices the defendant.

MR. DONOVAN: Unless the Government had some other legitimate reason for --

QUESTION: And I think it's pretty hard to say that disclosing the name of the offense is an unfair prejudice. I mean, what the defendant did, he did.

MR. DONOVAN: Well --

QUESTION: And he was convicted of it, and it's hard for me at least to say it's unfair to have it known.

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A much harder question for me is to answer whether it is relevant at all.

MR. DONOVAN: It's unfair in the sense of this case is a prior conviction, and was assault resulting in serious bodily injury which first brands Old Chief as a violent felon. And then when you have this case where you have count 1 as a felon in possession, count 3 as a new felony assault, then we have the propensity, well, if he did it before --

QUESTION: Well, but what's unfair about it? He was convicted of what he was convicted of, and I don't see why it's unfair that the jury know it. It's a matter of public record. So I have trouble saying it's unfair, but I don't know, yet, whether I think it's irrelevant.

MR. DONOVAN: Okay. Well, if the element is a conviction of an offense, of a crime for an offense with the punishment exceeding 1 year, then I'm saying that's all the jury needs to know. It doesn't need to know that it was assault, or theft, or whatever.

QUESTION: But as a practical matter, the Government doesn't have to stipulate, you agree. Under your view, what can the Government bring in to prove the prior felony that you think would be permissible?

MR. DONOVAN: Aside from the redacted and -- the redacted judgment and conviction they could bring in the

Clerk of the Court to testify, a probation officer to testify --

QUESTION: These are superior to the certificate? Because -- and I suppose the Clerk could not be asked what the prior felony was?

MR. DONOVAN: That would be my position, yes.

QUESTION: How would you know it was felony? Would the Clerk of the Court know it was a felony?

MR. DONOVAN: Well, the judge would -- the judge I think would instruct the jury that this offense that the Government has introduced, this prior case --

QUESTION: This offense which shall remain nameless was a felony?

MR. DONOVAN: Yes.

QUESTION: Is this only if the defendant stipulates that he's not going to contest the prior conviction? Suppose he says, I'm going to contest the prior conviction.

MR. DONOVAN: I think if he contests the prior conviction the whole thing's open for evidence, but if he says, I'm going to contest whether or not I was convicted of it, but I admit that it was an offense for which the term of imprisonment could exceed 1 year, then I think the judge could instruct the jury that that part of the element's proven as a matter of law.

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QUESTION: So you have a rule in advance based on what the defendant's tactical decision is and how that tactical decision is communicated to the prosecution and to the court. That also strikes me as a little odd.

QUESTION: And how does the best evidence rule fit in here? Normally the best evidence is considered the official order or record, and that is what the State would be required to offer and seek admission of, because that's better evidence than the testimony of some clerk or probation officer. So I don't know how the application of that rule would --

QUESTION: Mr. Donovan, I don't understand why -- I've been in a lot of courtrooms -- why if the defendant comes in and says I'm willing to stipulate to X, Y, and Z, why does the Government have to sign that stipulation? Can't the judge accept that as a fact that's taken as proved?

MR. DONOVAN: The judge accept it as an admission of fact?

QUESTION: Sure.

MR. DONOVAN: I think the judge could.

QUESTION: I don't understand why there's all this complication about this. This fellow was convicted of a crime punishable by more than a year, or whatever it was, and he's willing to admit it. That takes care of the

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whole issue in about 15 seconds, it would seem to me.

QUESTION: Is there a provision in the criminal rules for admission of facts the way there is in the civil rules?

MR. DONOVAN: I believe -- I don't know if there's a difference, but there's a jury instruction that as I understand it would say if the parties have -- or a party has admitted this fact. You should consider this fact proven.

QUESTION: And the other party can be required to accept that?

MR. DONOVAN: I don't think so.

QUESTION: Mr. --

QUESTION: Mr. Donovan, could we be concrete about that? I thought that you have been trying to tell us that this crime is different from all others. There are cases out there, like one in the D.C. Circuit, the Crowder case, which does say defendant wants to admit -- as in Rule 36 of the Civil Rules, defendant can admit so intent can be taken out of the case, knowledge can be taken out of the case.

I thought you had consistently distinguished your case from those others on the ground that the only thing that Congress has made relevant is that there was a prior felony conviction.

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MR. DONOVAN: And I think I tried to say to that previously was that that doesn't relate to the act and the intent of the offense or the picture of the offense. It only relates to the accused's status.

QUESTION: In the case of your client, were there other prior felony convictions that could have been used to establish this that were less close to the current charge?

MR. DONOVAN: There actually was one that the Government considered more prejudicial, was a robbery. He had a robbery --

QUESTION: Did he have any that was less?

MR. DONOVAN: No, none less. There were just two to pick from, basically.

QUESTION: Mr. Donovan, I want to get clear on what happened in this case, because in responding to Justice Stevens' question about the general rule, I think you're talking about a case which as you described it was different from what you described to me earlier.

I take it in this case you said we are prepared to stipulate. The Government said no, we won't stipulate. We won't sign this document, or whatever you wanted it to agree to, and the judge said, okay, they don't have to. That's the end of that.

Your response came in effect later on when you

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said I would like a jury instruction.

MR. DONOVAN: See, it was all --

QUESTION: Is that what happened?

MR. DONOVAN: It was all part of a written motion.

QUESTION: No, but is that what happened? Did you -- let me put it the other way, then. Did you ever -- when the Government said, I won't -- we won't stipulate, did you ever say to the judge, all right, we will sign an admission or make an admission in open court in some fashion that in fact he was convicted and he has this status. Did you ever offer to do that?

MR. DONOVAN: No, but in the process of -- what I did in writing was -- I tried to say this. Not only did I offer to stipulate, but I moved in limine to exclude the evidence, and I offered this jury instruction, and the judge's motion denied the whole motion in limine, so -- I've been dealing with the judge for 15 years. You state your objection, you get overruled, and that's it, you know.

(Laughter.)

QUESTION: Well, that's -- that probably moves things right along.

(Laughter.)

MR. DONOVAN: And another thing that happened

here is the judge read the jury instructions to the jury before we had a settlement conference, so I didn't have an opportunity to object or resubmit or have any discussions with the court until after the instructions were read.

QUESTION: So all you can do then is object. You can't argue it.

MR. DONOVAN: Right. I can't submit -- ask to change the instructions or withdraw, you know, so I was kind of boxed in.

QUESTION: Well, could you raise a 403 objection?

MR. DONOVAN: I just -- I renewed the motion in limine when the judgment and conviction was admitted into the evidence, and I also renewed it as a basis of the objection to --

QUESTION: Did you base your objection on 403?

MR. DONOVAN: I didn't use the words 403 except pretrial, Mr. Justice Kennedy.

May I reserve the remaining --

QUESTION: Yes, you may.

MR. DONOVAN: Thank you.

QUESTION: We'll hear from you now, Mr. Estrada.

ORAL ARGUMENT OF MIGUEL A. ESTRADA

ON BEHALF OF THE RESPONDENT

MR. ESTRADA: Thank you, Mr. Chief Justice, and

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may it please the Court:

Section 922(g) expressly requires proof that a defendant has been convicted before. There can be no doubt, and I think it has been conceded here today, that in the absence of a proffered stipulation the certified judgment of conviction would no longer be the most probative evidence, but the evidence that the Government naturally would be expected to rely on.

The question, then, in this case is whether a criminal defendant can keep the Government from proving a criminal case in the usual and ordinary way by interjecting its own alternative method of proof.

QUESTION: Well, Mr. Estrada, under the particular statute that we're -- that says if the defendant has been convicted of a felony punishable by more than a year in prison, is the nature of the prior offense relevant under that statute?

MR. ESTRADA: Under our view, yes, it is, Justice O'Connor.

QUESTION: Why?

MR. ESTRADA: Because the definitional section that lets us know what is a felony, or what is a crime punishable for more than 1 year imprisonment, exclude certain offenses, and in order for the jury to fulfill its factfinding function it would have to be instructed as to

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what offenses are covered and whether the one that they have heard evidence on is actually one of those offenses.

In other words, under our theory of the case, a proper instruction would be, I instruct you that mail fraud is one of the offenses that is covered. It is for you to find that -- whether this particular defendant has been found guilty of mail fraud.

Under their view, the instruction would be, I instruct you that he has been convicted of a covered felony and you have no further factual finding functions in this case as to that element. And I think that that difference highlights that at the threshold, to get back to your earlier question, the type of the felony is indeed relevant, even taking their own conception of how relevancy should work.

QUESTION: Is it true that the Ninth Circuit says that there would never have to be a 403 balancing in these cases?

MR. ESTRADA: No. That is close to true, but not exactly, and I think it is sufficiently distinct to warrant some emphasis. What they say is that a stipulation, as a stipulation, does not get factored into the Rule 403 balance, and I think if you take what a stipulation is strictly, that would be true.

It is possible to conceive of an offer to

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stipulate in the sense that Justice Souter pointed out earlier as an offer to tender an admission and then put in an admission, and viewed in that light, we would concede that (a) it wouldn't truly be a stipulation in the technical sense, but (b) that Rule 403 could contemplate that that could be factored into the Rule 403 --

QUESTION: Well, what about the best evidence rule?

MR. ESTRADA: I think --

QUESTION: How does that fit in?

MR. ESTRADA: The best evidence rule I think textually would apply, and I think it is not usually thought to have direct bearing because everybody understands in the more specific factual context here that the relevant unit of what the evidence is is the judgment of conviction itself, as the Chief Justice pointed out, rather than particular information within the judgment or conviction, and --

QUESTION: Well, why is 403 balancing, Mr. Estrada, necessary if your position is that the nature of the offense is relevant for the jury's consideration, or for the jury's determination? I had that trouble with -- at page 28 of your brief.

MR. ESTRADA: Maybe we didn't --

QUESTION: It seems to me that you con -- I read

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it as a concession that 403 analysis can apply in these cases.

MR. ESTRADA: Well, I guess that is literally true, but it does not convey the understanding that maybe we inartfully put into it. What we meant is that in every ruling in a trial court there is always a 403 issue. That is to say, there is always open the argument that upon a consideration of the proper factors the evidence should be excluded.

The fact that a weighing might be conducted, and the fact that an admission might properly be considered in the weighing says nothing about the outcome of the weighing, and --

QUESTION: Mr. Estrada, I have problems with that argument in this context, that we can allow every district judge in the land to have a 403 balance when, say, the conviction is for assault with a deadly weapon, and Judge A will come out this way, and Judge B will come out that way. I think that's why the Court had some interest in this case, because there is disarray, and the one thing that we all have an interest in is to say what the law is, and it should be that same law, so what's disturbing about your suggestion is that, oh, 403, and that's it, it will all wash out in every individual court.

MR. ESTRADA: Well --

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QUESTION: That can't be the Government's position.

MR. ESTRADA: -- that's not what we mean to convey, Justice Ginsburg. Let me step back and put Rule 403 in context from our point of view.

Rule 402 in effect says all evidence must come in unless it is specifically excludable by some source of law, and if it is a rule made up by a court, it has to be made by this Court, noting the exercise of freewheeling authority, but under statutory authority.

Rule 403 is an exclusionary rule that gives the district courts authority to have play in the joints, if you will, but it's not a source of rulemaking authority.

QUESTION: Nothing escapes it, so that it really is a question to be considered under 403 whether the identity of the victim as Shirley Temple or Mother Teresa can get to the jury. It's up to -- that's really a 403 question?

MR. ESTRADA: Well, there are lots of questions, Justice Scalia. It doesn't mean that they all require the same answer, and I agree with you that in a criminal case in effect you have a categorical rule that this evidence always comes in.

But let me make this point, and I think the Chief Justice pointed out to what the problem is here

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earlier, which is trying to tease this particular result out of the rules of evidence is to some extent an exercise in misdirection, because these are matters that tend to flow from the controlling substantive law.

They may be different in civil cases or in criminal cases, and they're dealt, to the extent that they're different, in the civil rules or in the criminal rules.

In the civil rules, you are encouraged to get your adversary to narrow down the issues and under Rule 8 you have to say what's true and what isn't and what is not under dispute, and that's enforced through Rule 11. Under Rule 36 of the civil rules, you can ask your adversary for an admission that you can use.

Now you switch to the criminal rules. In the criminal rules, you have a trial of the general issue unless you enter a complete guilty plea. There is no in-between. There is Rule 11 that says that you can have a guilty plea, but there is nothing that contemplates what is being argued for here, which is in effect a partial --

QUESTION: Mr. Estrada, this situation is a little bit different, in that the defendant isn't contending that any of the part of the story of the crime at issue, the current possession, can be kept out. He's just talking about an element that puts the defendant

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eligible for this particular guilt.

And if for your -- to give an example that troubles me, supposing there are two felonies that the man had been guilty of before. In your view, does the Government have the right to put both in?

MR. ESTRADA: We can -- generally, yes, but I would like to qualify that in the following respect, Justice Stevens. The principle that we are contesting here is not that the district court has no discretion.

QUESTION: Let me put them the other way. Does -- would -- I guess the same question. Do you think the district judge could not exclude one of the two felonies?

MR. ESTRADA: The answer is, probably it could, and when it did, we likely would have no remedy in most of the cases, but let me --

QUESTION: And why could he exclude one? What would be the reason?

MR. ESTRADA: Okay --

QUESTION: Is -- would it not be that the second felony is really irrelevant because the condition --

MR. ESTRADA: No.

QUESTION: -- had been established?

MR. ESTRADA: No. It would be that the second felony is cumulative. It is relevant, but I as the

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district judge have to keep this trial moving along. You, the Government, have the burden of proof as to every fact, and conceivably you could bring 20 people to testify as to every relevant fact --

QUESTION: Yes, but you could certainly put two -- you could certainly put two convictions in in 2 minutes. You wouldn't need -- I think you can't -- cumulative evidence to save the time is a waste of time, but you think that's the only reason for excluding it, would be that it would be cumulative? You don't think the fact it would be prejudicial would be relevant?

MR. ESTRADA: No, I think all -- I'm sorry?

QUESTION: You don't think the fact that the second conviction would be prejudicial and would not add to the person's eligibility for the particular offense he's now on trial for, you don't think that the relevance is a factor in that?

MR. ESTRADA: I don't think relevance is a factor in that. I think that if you have more than one, and if it is plain that the Government is just piling on, as someone said, it is --

QUESTION: Well, what else could be the Government's purpose?

QUESTION: Well --

MR. ESTRADA: Well, let me get to that, because

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I think that is an important issue, and it has gone -- and the argument has been that we could have no conceivable purpose to turn down a stipulation. And let me outline four for you.

1. We get to try our own case, and what I mean by that is that there is a tactical value in not letting our opponent set for the jury what the case is about. Have the argument to the jury that we only fight the Government on the little detail on which they are wrong, which incidentally is all you need to find to let my client go.

The second point is that we want the jury to have evidence that it can touch and see. It is an exhibit. Under their approach the jury would hear nothing from the Government during the trial on one entire element of the offense. Under our approach --

QUESTION: Well, that's not necessarily true. The Government -- the stipulation could be the first element of the Government's proof. The Government could start out by saying, we've accused him of X and they have admitted X, so we don't have to waste any time proving it.

MR. ESTRADA: Well, that wasn't done here, Justice Stevens. It is --

QUESTION: Well, what if there was -- what if there was the written admission? The Government offers

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the paper, exactly what you want it to be able to do.

MR. ESTRADA: I think that that is a somewhat different case, but not enough, and let me explain to you why. The principle that we're sticking up for here is not that the district judge has to let us run how the courtroom is run, but that we have a right to try our own case without our adversary shaping how our evidence comes in --

QUESTION: Well, I'll grant --

MR. ESTRADA: -- through technical concessions.

QUESTION: I'll grant you that as a general principle, but how does it square with what you said before, because I thought you said before that in the instance in which the written admission is offered so that it's evidence within the meaning of Rule 403, that there would at least have to be a 403 balancing.

Are you saying now that although there would have to be a 403 balancing, your interest in structuring your own case is such that you will always win that balancing?

MR. ESTRADA: When the facts are those, yes, that is what I'm saying.

QUESTION: Well, then that's not much of a balancing.

MR. ESTRADA: Well, no --

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QUESTION: I mean, you're saying you win as a matter of law. I mean, I assume balancing means there's a real issue.

MR. ESTRADA: No. What I said earlier about what the rules of evidence contemplate as being within the proper scope, I think there's emphasis, because at the time that the rules came into being in 1975, it was already a settled rule that the Government could not be required to accept a stipulation because it always has the burden of proof and it always bears the risk of nonpersuasion, and it is their burden to show that there is something in the rules that changes that.

QUESTION: Is there such a thing in -- is -- what has been referred to as a written admission, is there any recognition of that sort of an instrument in the Rules of Criminal Procedure?

MR. ESTRADA: No. I guess the close that you could -- the closest that you could come is that there are cases in which a defendant will confess, and under the hearsay rules you can have evidence of the confession as an admission, which is not hearsay, but it is not in the same --

QUESTION: That comes under the Rules of Evidence.

QUESTION: Could I ask you, we found this -- I

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still find it quite a difficult case. In Tavares the circuit felt that we had to answer the question, pure 403 question.

You could say leave it up to the judges, but we felt we had to answer it because these cases came up all the time and different judges were making in the mill, mine-run average case, the same calls differently, so we thought we had to answer it, telling them how they should exercise their discretion, either let it in or don't let it in.

And I guess we are in that same boat here, though normally 403 is just up to the district judge, but if we have to answer it, and I guess we do, we ultimately in the First Circuit said, well, there are four special things. Of course the Government can present anything, it's normal order of proof, all the facts, et cetera, but here the reason for that rule doesn't apply. The reason was to give the Government a chance to present the full picture. That reason doesn't apply.

MR. ESTRADA: Let me --

QUESTION: And the second part was that by and large, with the exception whether it's an antitrust violation or not, you know, by and large it's not relevant except for the fact that it was committed, and the third reason was, by and large it's very prejudicial.

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All right, so you add those three things together, and the fourth reason was, it's easily separable from the rest of the case, very administrable, people won't get mixed up.

They added those four things together, and then the -- we said in Tavares, we are not saying the Government's -- the stipulation has to be accepted. It doesn't have to be accepted, but if it's offered and the Government refuses to accept it, at that point the judge in his 403 exercise of discretion should require the Government, if it wants to prove the point, to submit or redact it, a piece of paper telling of the fact of conviction.

All right. Now, I'm bringing that up because I'm -- that was, of course, before how we balanced this difficult case and came out with it, and I want to know specifically why, which of course you don't accept that, and I just want you to focus directly on that and explain why.

MR. ESTRADA: Well, let me start out with the last point, which is the redaction point. There is no issue as to the appropriateness of redaction in this case in this Court, because the defendant never asked for it in the district court.

QUESTION: I'm not -- we're trying to get a

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rule. I'm saying that was the general rule for these cases that came up all the time, and they come up all over the country, and the different judges in the different circuits are treating them differently, so I'd say why don't you focus on Tavares, which would be most helpful to me.

MR. ESTRADA: I don't want to fight with the formulation of the question, merely to note that if you took the case to answer that question, it doesn't raise the question, because it's not within the question that he brought to the Court. The question that he brought to the Court is limited to the stipulation issue.

Moving to the merits, we have a fundamental disagreement with how your former court dealt with the question, because it seems to me that it wrongly started on the wrong assumption, which is that the nature of the type of felony is not relevant, if you want to use that word, and that was wrong. It was also wrong --

QUESTION: Yes, but wasn't -- isn't your position that the reason it's wrong is that there some felonies, some business crimes and so forth that don't give rise to this particular liability?

MR. ESTRADA: That is correct.

QUESTION: But isn't that something that the judge will cure by his instructions to the jury? In any

event, even if you put in the crime itself, the judge still has to tell the jury as a matter of law this is a qualifying felony.

MR. ESTRADA: Yes, but it is an instruction on the law that is no different from every other instruction that the judge gives, and as I said earlier, the instruction that would be the outcome of the First Circuit's case is quite different. It is, I instruct you that on this element you have no factfinding rule, which is quite different, and it opens up the Government to other risks.

QUESTION: Well, he doesn't say you have no factfinding role. He says either the stipulation if there was one, or the admission if there was one, or the redacted judgment if there was, whatever the method used, he would say that is sufficient. The Government, by using that, has proved this element of the offense.

MR. ESTRADA: Well, that was not even the -- that was not the instruction that was tendered in this case.

QUESTION: Oh, I understand that, but if you're asking us to decide whether the procedure used in this particular case was sufficient, you might win this case, but are you asking for a general rule that no matter how the defendant tries to keep this out the Government always

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can get the nature of the crime in evidence?

MR. ESTRADA: Yes, because --

QUESTION: Well, then you don't have to argue about these other -- the procedural difficulties.

MR. ESTRADA: Well, yes we do, because they're different arguments that different members of the Court --

QUESTION: You can ask for a rule broader than the question raised by the petition --

MR. ESTRADA: Well, that's right, and that seems what the question that Justice Breyer asked --

QUESTION: But that doesn't necessarily change the proposition that we decide only the question -- we may do it by invoking a broader rule than necessary.

MR. ESTRADA: Well, that's right.

QUESTION: So Mr. Estrada, 403 does not apply unless you determine first that the evidence offered is relevant.

MR. ESTRADA: That's correct.

QUESTION: You say it is relevant because of the crimes that are excluded.

MR. ESTRADA: Mm-hmm.

QUESTION: If we agree with that, then it can be excluded, may be excluded, if the probative value is substantially outweighed by the danger, not of prejudice, but unfair prejudice.

MR. ESTRADA: That is correct, Justice O'Connor.

QUESTION: Is that not right?

MR. ESTRADA: That is correct, Justice O'Connor, and --

QUESTION: So what is your position on whether it's unfair or not?

MR. ESTRADA: It is never unfair, because it is inherent in the nature of the crime that Congress necessarily contemplated that we would prove this element in the vast run of cases in which there was a trial with this very evidence, and it may be that the defendant doesn't like it, but it is his judgment of conviction, and it is relevant evidence.

QUESTION: Mr. Estrada, if you are now taking the position that the Government would win every time assuming a 403 balance, then what in the world did you mean in your brief when you said, consistent with those principles, where a defendant offers an unconditional stipulation coupled with an adequate jury charge, the trial court should consider the availability of the stipulation as one of the factors in the Rule 403 balance?

MR. ESTRADA: Maybe that wasn't clear, and that's our fault, Justice Ginsburg, but the structure of the argument is as follows:

In 1975 the rule was settled that we didn't have

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to do this. If you disagree that a stipulation is something that can be forced upon the Government, then it only comes into play once it has given us adequate insurance against the risk of nonpersuading the jury, which means that it has to be coupled with an instruction that effectively tells the jury that we are home on the element, have no doubt about it.

In this case, and it bears emphasis, while tendering an instruction that ostensibly took this issue from the jury, Mr. Old Chief also tendered an instruction that reminded the jury that we kept the burden of proof on every element of the crime, and that is exactly the danger that I'm trying to highlight for the Court.

All of the issues that Justice Breyer brought up, whether you could enter a severance, whether you could have a redacted judgment, had to do with how courts have traditionally dealt with evidence before and after the Rules of Evidence. What is --

QUESTION: I could understand what you were telling me, Mr. Estrada, if the portion I read had been proceeded by, this is the Supreme Court's case law and so because of that case law, we have to make this qualified semi-concession, but what it flows from is the Advisory Committee's note to Rule 403. It's nothing about the Court's case law. It's about --

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QUESTION: What page is this on?

QUESTION: This is on page 27 and 28 of the Government's brief, and the particular -- the paragraph is the runover paragraph starting from the bottom of page 27, and the sentence that puzzles me is, Consistent with those principles which seem to be the principle that motivated Rule 403.

MR. ESTRADA: Mm-hmm. That flows not from a case from this Court, Justice Ginsburg, but from a recognition that the Advisory Committee note indicates that the availability of alternative means of proof is a factor that should be considered by a court in ruling on the admissibility of evidence under Rule 403, and conceivably, the existence of a stipulation that acts as an alternative means of proof, if it is, in fact, such, should be considered in keeping with what the Advisory Committee said.

That is not to say that unless we're entering 20 judgments of conviction, or we're doing other things of the type that Rule 403 contemplates, that we're not entitled to prove our case in our own way.

There is a vast difference in saying that the judge can keep the case moving along after considering all relevant facts and saying that we're going to have for the first time as a rule of law the proposition that the

criminal defendant can dictate how the Government's case is tried, because acceptance of the latter proposition is what we're fighting here.

QUESTION: Let me go back -- can I ask you to answer Justice O'Connor's question for a second, because I had thought that it was -- you said on the question of unfair prejudice the reason that I think -- and at the heart of Tavares, frankly, I think is that issue, and what we thought was the unfair prejudice was this.

Even if you assume it is relevant to show it isn't an antitrust violation, which is I guess the only way in which it's relevant, that it isn't a business violation -- there was an argument in the court about that.

We did think that there was tremendously unfair prejudice, and the reason that it was unfair prejudice was because there would be concern, as the policy of Rule 404 suggests, that a jury uncertain about whether the person committed the crime in front of them -- in front of them. You know, the present crime -- might think, well, I've just learned he was a triple ax murderer, he was -- in fact had loads of drugs previously, in fact beat his family, in fact did seven other really quite bad things previously, and therefore, although I, the juror, am uncertain about whether he committed the present crime,

he's a bad guy, we'll put him away.

I mean, it's that kind of unfair prejudice that we thought might flow from introducing the irrelevant, except for antitrust, fact of the nature of the previous crime.

So I'm putting that in front of you so you can then respond to it.

MR. ESTRADA: Well, the answer, Justice Breyer, is that the irrelevant item of evidence is the judgment of conviction. The Rules of Evidence treat the possibility that parts of a relevant piece of evidence will be misused not as a question of relevancy but as a question to be dealt with under Rule 105 with limiting instructions, because a background principle of our system is that juries will follow such instructions.

With respect, I would also suggest to you that part of what drove the court of appeals in Tavares is a little bit of a disagreement with the congressional policy that is reflected in the statute, that it is unfair to have a crime that holds someone who has already done his time and paid his debt to society, but if the evidence is what Congress necessarily must have anticipated would be used to prove that element of the crime, you may think that it is not a fair statute, but that's not a problem with the evidence, it's a problem with the policy of the

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statute, which is for the people across the street.

QUESTION: I don't think we thought that.

QUESTION: It seems to me that you have a per se answer for your position, and that Tavares is based on an assessment of the likelihood of prejudice that the two arguments don't quite meet. I'm not saying it's not responsive, but it does leave one with the lingering feeling that there's going to be unfair prejudice in some cases, and you say that's just the way the statute works.

MR. ESTRADA: Well --

QUESTION: And I know of no other area -- we're talking about the difficulty of having a per se rule in the petitioner's favor. On the other hand, you have almost a per se rule that you're arguing for in your favor, and I'm not sure I know of another one in the law.

MR. ESTRADA: Well, the answer is this, Justice Kennedy. Under the substantive criminal law, we always bear the burden of proof and the risk of nonpersuasion. We cannot get a directed verdict no matter how overwhelming the evidence, and it is open to the defendant to invite doubt as to any piece of evidence, even his own admission, and because that has always been the rule in our system, it was already the substantive law in 1975 that we could not be required to accept a stipulation from our opponent.

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Our burden --

QUESTION: But isn't the extreme -- Mr. Estrada, isn't the extreme unlikelihood of success in inviting doubt about either a stipulation or an admission what takes the stipulation and the admission about a status out of what might be a general rule in your favor about proving the elements of the -- or the case in the sense of the acts of the defendant in this particular instance?

Isn't it unlikely that they will doubt the one, more likely that they will doubt the other, and that is why bloodless and nonprejudicial evidence is more justifiable in the first case than in the second case?

MR. ESTRADA: No, and you need go no further than this case to realize -- and we quote this at page 29 of our brief. It was proposed jury instruction number 22, tendered in this very case in conjunction with their stipulation instruction, saying that his plea of guilty puts at issue every fact, and the Government retains the burden.

And it is possible for someone who has to do nothing other than to raise doubt in the minds of the jury to give what in effect amounts to Mark Anthony's speech, Brutus is an honorable man, and keep saying it. We've stipulated. Maybe it wasn't provident, but we've stipulated it, and under our rule -- under our system,

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when we always have the risk of nonpersuasion, we're entitled to put in front of the jury evidence that they can see and touch.

QUESTION: Your answer is that the evil that men do live after them.

MR. ESTRADA: That's right.

(Laughter.)

MR. ESTRADA: That's correct. That is correct, and I fully concede it is a practical concern, but it's one that has shaped what the substantive law is in this country since the beginning. Because, as I said earlier, no matter how overwhelming the evidence, we can always be nonsuited by a jury that has any doubt on any reason, even an irrational one. And our view is very simple. Seeing is believing. We want the jury to have in their hands the judgment of conviction with the gun, the shell casings, and the photos.

QUESTION: Thank you, Mr. Estrada.

MR. ESTRADA: Thank you, Mr. Chief Justice.

QUESTION: Mr. Donovan, you have 1 minute remaining.

REBUTTAL ARGUMENT OF DANIEL DONOVAN

ON BEHALF OF THE PETITIONER

MR. DONOVAN: If I may, I'd like to make four quick points.

First, the Government never objected to my proposed stipulation until this level. It was never talked about at the trial court or the circuit court, so we never had any discussion to resolve it.

QUESTION: They did refuse to stipulate it.

MR. DONOVAN: Right. That's true, and that was the entire focus.

Secondly, I agree the Government has a right or a duty to present the case as they see fit, but I don't think they can do that and violate the Rules of Evidence at the same time. We're contending they violated 401, 402, 404, and 403.

Thirdly, I think this is significant. At footnote 12, page 20 of the Government's brief, and it goes on to page 21, I feel the Government admits that the question of whether or not there's -- it is a qualifying felony is a question of law for the judge to decide, and if it's a question of law for the judge to decide, there's no need to tell the jury the nature of the felony.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Donovan.

MR. DONOVAN: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:08 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JOHNNY LYNN OLD CHIEF V UNITED STATES
CASE NO. 95-6556

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BY Ann Marie Federico

(REPORTER)