JURIES AND PRIOR CONVICTIONS: MANAGING THE DEMISE OF THE PRIOR CONVICTION EXCEPTION TO *APPRENDI*

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THIS essay offers procedural alternatives to cope with the potential, some would say inevitable,[1] abandonment of the prior conviction exception to the rule in *Apprendi v. New Jersey*.[2] Many states already require a prior conviction to be proven like any other element whenever it extends the penalty range beyond the range allowed without the conviction, and their experience belies the claim that the exception must be preserved to prevent jury prejudice against defendants.[3] For courts and legislatures interested in anticipating this development in *Apprendi* law, this essay provides a handy reference to existing rules and statutes that could serve as blueprints for reform.

Part I briefly explains the constitutional doctrine surrounding the rule in *Apprendi*, and the exception the Court has recognized for the fact of previous conviction. Part II examines the jury-prejudice concern so often voiced as one of the reasons for the exception. Part III reviews three procedures courts have used to prevent the jury from learning about a defendant's prior conviction before assessing the proof of other elements, avoiding the risk that the jury would improperly infer guilt from the defendant's criminal history: (1) partial guilty pleas; (2) partial jury waivers and (3) bifurcation of the trial proceeding. Part IV discusses a fourth option—minimizing potential prejudice through stipulations and evidentiary limitations. Part V concludes.

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1. *See* Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of Prior Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523, 563 n.194 (criticizing the basis for the exception, and noting that "Justices Scalia, Ginsburg, and Thomas have already made their opposition to the exception clear, so its demise would require only two more votes from Justices Kagan, Sotomayor, or Breyer"); Brent E. Newton, Almendarez-Torres *and the Anders Ethical Dilemma*, 45 HOUS. L. REV. 747, 752 (2008). Judges have also recognized the exception's tenuous status. *See, e.g.*, United States v. Harris, 741 F.3d 1245, 1250 (11th Cir. 2014) ("We recognize that there is some tension between *Almendarez-Torres* on the one hand and *Alleyne* and *Apprendi* on the other. However, we are not free to do what the Supreme Court declined to do in *Alleyne*, which is overrule *Almendarez-Torres*.").

2. 530 U.S. 466, 490 (2000).

3. King, *supra* note 1, at 558.

PART I. THE *APPRENDI* RULE AND THE PRIOR CONVICTION EXCEPTION

In *Apprendi*, the Supreme Court held that if the maximum penalty a defendant faces increases upon a finding of fact, then that fact must be treated as an element of an aggravated crime.[4] Just as with other elements, a defendant has a right to have a jury determine that fact, based upon proof beyond a reasonable doubt.[5] A legislature cannot shift from jury to judge the responsibility for determining the existence of a fact that essentially changes a lesser offense into a greater one simply by labeling that fact as a sentencing factor, the Court explained.[6] Thereafter, the Court extended this rule to facts that trigger eligibility for the death penalty, facts that raise a sentencing guideline range, facts that permit larger fines, and facts that require judges to impose more severe minimum sentences.[7]

But the Court has never applied its rule to the fact of "prior conviction."[8] Statutes often designate more severe punishment for former offenders, and often mandate that judges determine whether or not the defendant was convicted previously as part of sentencing, after the defendant has already been convicted by verdict or plea.[9] In the *Apprendi* case, the defendant's sentence range was not aggravated by a prior conviction, but the Court expressly exempted prior convictions from its rule anyway.[10] It has declined to revisit that exemption ever since.[11]

The exception means that a convicted defendant may learn only at sentencing that his conviction actually carries a higher sentence range than he was told when facing the decision to admit guilt or go to trial.[12] For example, a defendant convicted of an offense carrying a six-year maximum sentence may find himself sentenced to life in prison because of his prior convictions.[13] And it means that a judge invokes this higher range simply by deciding at sentencing that the defendant was probably convicted earlier, even though any other penalty-raising fact must be admitted by the defendant or established to a jury beyond a reasonable doubt at trial.[14]

This hands-off approach to prior convictions is purportedly justified by

4. *Apprendi*, 530 U.S. at 490; King, *supra* note 1, at 550. *See also* Alleyne v. United States, 133 S. Ct. 2151, 2160–61 (2013) ("[T]he core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury").

5. *Apprendi*, 530 U.S. at 490.

6. *Id.* at 467.

7. *See* Wayne LaFave, Jerold Israel, Nancy King, & Orin Kerr, 6 CRIM. PROC. § 26.4(i) at nn.176–188.1, 200.1–200.3 (3d ed. 2013).

8. King, *supra* note 1, at 551.

9. *Id.* at 526.

10. *Apprendi*, 530 U.S. at 466.

11. *See id.* at nn.192–200; King, *supra* note 1, at 548 nn.127–28.

12. King, *supra* note 1, at 563.

13. *Id.* (relating case of David Appleby).

14. *See id.* at 563–64.

precedent, history, and policy.[15] I explain elsewhere why neither history nor precedent supports this exception, how the relative ease of proving prior convictions does nothing to remedy lack of notice, and how the original policy reason for the exception—that an offender's prior conviction status often would not be discovered until he arrived at the penitentiary to serve his sentence—has long since disappeared.[16] Here, I address a different policy interest that is often invoked to support the exception: the interest in protecting defendants from the jury prejudice that may result if the jury learns the defendant has been convicted before.

PART II. THE PROBLEM OF PREJUDICE

Most empirical work attempting to test if and how information about a defendant's prior convictions affects verdicts has concluded that criminal history information increases the probability of conviction.[17] But more recent research has suggested this effect is not inevitable. In a sophisticated study examining data from 300 actual criminal trials and controlling for the strength of the evidence of guilt as assessed by the jurors and the judge in each case, Valerie Hans and the late Theodore Eisenberg found that this effect appeared only in particular cases.[18] They concluded that in strong cases, prior record evidence "does not materially contribute to conviction probability" and the weakest cases tend to end in acquittal. "But," they explained, "in the strongest of weak cases, the existence of a prior criminal record can prompt a jury to convict. The prior record effectively leverages the existing evidence over the threshold needed to support conviction."[19] At least for defendants whose cases fall into this Goldilocks zone, requiring prior convictions to be treated as elements

15. *See id.* at 551–64.

16. *Id.* at 551–65 (including appendix of early state law).

17. *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1356–57 (2009) (summarizing previous studies as finding that jurors use similar criminal-record information to develop propensity judgments and other generally negative evaluations of a defendant); Merideth Allison & Elizabeth Brimacombe, *Alibi Believability: The Effect of Prior Convictions and Judicial Instructions*, 40 J. APPLIED SOC. PSYCHOL. 1054, 1058 (2010) (collecting research that concluded that when participant-jurors know that a defendant has been convicted of a prior offense, they are more likely to disbelieve the defendant if he testifies and find him guilty); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 76 (1995) (finding "mock jurors who learned that the defendant had been previously convicted were significantly more likely to convict him of a subsequent offense than were jurors without this information").

18. Eisenberg & Hans, *supra* note 17, at 1353.

19. *Id.* at 1385; *see also* T. M. Honess & G. A. Mathews, *Admitting Evidence of a Defendant's Previous Conviction (PCE) and Its Impact on Juror Deliberation in Relation to Both Juror-processing Style and Juror Concerns over the Fairness of Introducing PCE*, 17 LEGAL & CRIMINOLOGICAL PSYCHOL. 360, 377 (2012) (reporting results of experimental study using jury eligible adults from the local community and introducing prior conviction evidence as part of detailed prosecution evidence requiring jurors to recall evidence, provide opinion, and justify verdicts that found that prior conviction evidence was considered by some jurors as aggravating, others as mitigating).

could make trial riskier.[20]

Managing this risk, however, is something that courts and legislatures have been doing for nearly two centuries; it is not a problem that eliminating the prior conviction exception to *Apprendi* will create anew.[21] Early American courts did not consider prior convictions exempt from the principle that every fact that aggravates an offense must be proven to a jury beyond a reasonable doubt.[22] From the early nineteenth century onward, state courts adopted several different methods of providing to a defendant a jury decision on his conviction status when that status increased his sentence exposure, while at the same time addressing the concern that the jury would use the information that he had been convicted before improperly.[23] Today, as outlined in Part III, courts have added to the venerable procedures of years past their own rules for managing this type of prejudice.[24] Courts apply these rules not only when a prior conviction is an element of an offense, but also when a factual element that falls outside the prior conviction exception would necessarily inform the jury that the defendant was convicted before.[25]

These old and new tactics for managing potential jury prejudice can be divided into two groups: (1) rules that postpone a jury's exposure to prior conviction allegations or evidence until after the jury decides whether the government has proved the other elements,[26] and (2) rules that allow the jury to learn a prior conviction is part of the charged offense, but that limit what the jury hears about the prior conviction.

PART III. PREVENTING THE JURY FROM LEARNING OF THE PRIOR CONVICTION ALLEGATION UNTIL AFTER VERDICT ON OTHER ELEMENTS

A. PERMITTING A PARTIAL GUILTY PLEA

One option for avoiding prejudice while providing a jury determination of conviction status is to allow the defendant to plead guilty only to the

20. Contrary to the findings in experimental studies, other authors have noted that the rate at which defendants with prior convictions are convicted is the same regardless of whether or not the jury learns of the prior convictions. *See* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 507–08 (2011) ("[J]urors learned of the defendants' prior convictions from the evidence in only about a third of the cases in which defendants have them. Despite that lack of information, jurors convicted defendants with priors significantly more often than they convicted defendants without a record and they convicted defendants with unknown priors about as often as they convicted defendants with known priors.").

21. *See* King, *supra* note 1, at 558–60.

22. *See id.* at 530–32.

23. *See id.*

24. *See also id.* at 136–37.

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

26. Rules that permit the judge to shield the jury from prior conviction evidence until after the other elements are resolved typically note that such evidence remains admissible if relevant for other reasons, such as impeachment, or to establish motive, plan, etc. *E.g.*, People v. Calderon, 885 P.2d 83, 90 (Cal. 1994).

prior conviction, and go to trial on the remaining elements of the charge. Normally courts and prosecutors would not consider permitting a defendant to plead guilty to one element of an offense. When trial must go forward on the remaining elements, avoiding only part of a trial generates relatively little savings to the government or the justice system compared to standard guilty pleas that slash litigation costs.

Nevertheless starting in the nineteenth century, states have permitted what are essentially partial guilty pleas to prior conviction elements in some cases, namely cases in which the elements other than prior conviction define a crime and the prior conviction serves to aggravate that crime.[27] This alternative is not followed when the charge involves conduct that would be innocent but for the defendant's criminal history status, such as being a convicted felon in possession of a firearm. For example, in certain cases in Oregon today, a statute compels the judge and the prosecutor to accept a defendant's admission to his prior conviction, provides that the defendant's stipulation establishes the prior conviction, and precludes any mention of that prior conviction to the jury except for purposes of impeachment.[28] This approach is also followed for some offenses in North Dakota[29] and for sentence enhancements that carry the right to jury determination in California.[30] The Mississippi Supreme Court has suggested this process be adopted in certain murder cases.[31] New York and North Carolina follow a similar rule: If the defendant admits the conviction, no mention of it is made to the jury; if the defendant does not

27. *See* People v. McNeill, 50 P. 538 (Cal. 1897) ("Section 1158 provides that when a previous conviction is charged in an indictment or information, the jury must find a special verdict as to such charge, 'unless the answer of the defendant admits the charge.'").

28. *See* OR. REV. STAT. §§ 163.103 (2013) (requiring the state to accept the stipulation of a defendant charged with aggravated murder under ORS 163.095(1)(c) to the existence and validity of a prior conviction), 813.326(1) (requiring the state to accept a defendant's stipulation to a prior DUII conviction in a prosecution for felony DUII under ORS 813.010(5)). By contrast, a defendant's stipulation to a prior conviction will be presented to the jury if the offense "includes as a material element that the defendant previously was convicted of the offense that is the subject of the stipulation and the charged conduct does not constitute a criminal offense except with that element." OR. REV. STAT. § 136.433 (A).

29. State v. Tutt, 732 N.W.2d 382, 384 (N.D. 2007); State v. Saul, 434 N.W.2d 572, 575 (N.D. 1989) ("[I]f the defendant stipulates to prior convictions when charged under the enhancement provisions of Section 39-08-01, the submission of evidence of the defendant's prior convictions to a jury constitutes prejudicial and reversible error.").

30. *See* CAL. PENAL CODE § 1025(e) (West 2008) ("If the defendant pleads not guilty, and answers that he or she has suffered the prior conviction, the charge of the prior conviction shall neither be read to the jury nor alluded to during trial, except as otherwise provided by law."); *see* People v. Alvarado, No. E036684, 2005 WL 3105624, at *1, *3 (Cal. Ct. App. Nov. 21, 2005) ("[T]he trial court erred in refusing to accept defendant's offer to admit the truth of his prior conviction for purposes of the charged offense . . . [of] corporal injury to a spouse with a prior spousal abuse conviction. . . .The jury should not have been permitted to hear and determine the truth of the prior conviction for the purpose of determining defendant's guilt on the charged offense."); People v. Estrella, No. E034151, 2005 WL 74136, at *5 (Cal. Ct. App. Jan. 13, 2005) (same); People v. Hall, 78 Cal. Rptr. 2d 809, 813 (Ct. App. 1998) (same, carrying a concealed weapon and having been convicted of a felony).

31. Taylor v. State, 672 So. 2d 1246, 1263 (Miss. 1996) (terming the "better procedure" Oregon's approach, requiring the court to accept the stipulation whether or not the prosecution agrees, and not allowing it to go to the jury).

admit the conviction, the state must prove it beyond a reasonable doubt.[32] Explained New York's high court, the procedure "affords a defendant the option to keep the jury from hearing about earlier convictions, an option the Legislature obviously believed promoted a fair trial."[33]

This option might be less appealing to the government than presenting the prior conviction to the jury along with the other elements of the offense, especially since proving a defendant's prior conviction typically is a low-cost task. However, the partial guilty plea approach has significant advantages for the prosecution. The defendant's admission of the prior conviction element, like any other guilty plea, would likely preclude most challenges on appeal or collateral review to that aspect of his conviction. For example, objections to whether the particular conviction falls within the scope of the statute would be waived, and the defendant limited to claiming that the guilty plea was unknowing or involuntary.[34] Also, a jurisdiction need not provide an unqualified right to the defendant to plead guilty to the prior offense, but may instead condition the waiver of trial on the prosecutor's consent.[35] Because keeping the jury in the dark about a prior conviction may be worth a lot to a defendant, making the waiver conditional provides the state with a bargaining chip. Even if a defendant was provided the unconditional right to avoid a jury decision on the prior conviction by admitting it, a prosecutor may continue to limit sentencing and charging concessions to cases in which a defendant admits the entire offense.

To obtain a valid waiver of the right to a jury trial on the fact of prior conviction, some states, including California, insist the defendant receive the same warnings he would receive for any guilty plea.[36] If the Supreme

32. N.C. GEN. STAT. § 20-179 (a1)(2) (2013) (providing aggravating factor admitted "shall be treated as though it were found by a jury" and authorizing bifurcated trial if the judge determines that "the interests of justice require that a separate sentencing proceeding be used to make that determination."); People v. Cooper, 78 N.Y.2d 476, 483 (1991).

33. *Cooper*, 78 N.Y.2d at 483 (noting that "if a defendant admits a previous conviction, 'that element of the offense . . . is deemed established, no evidence in support thereof may be adduced by the people, and the court must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense.'"). This was also apparently the practice in New Jersey in the past. *See* State v. Cubbler, 67 A.2d 206, 207 (N.J. Super. Ct. App. Div. 1949) (citing additional cases from Massachusetts and Connecticut).

34. *See, e.g.*, Hodges v. State, 78 P.3d 67, 69 (Nev. 2003).

35. Requiring prosecutor consent to dispense with proof of a prior conviction appears to be the effect of a recent amendment in Nevada, where prior convictions must be charged and proven at sentencing. Previously prior convictions that raise punishment ranges could be established by "stipulation"; now "agreement" is required. *See* NEV. REV. STAT. ANN. § 207.016(6) (LexisNexis 2012 & Supp. 2013).

36. The failure to comply with the waiver requirements in California is known as "Yurko" error, after the case establishing the requirements. *See* People v. Allen, 981 P.2d 525, 533 (1999) (citing *In re* Yurko, 519 P.2d 561 (Cal. 1974)); People v. Heier, C072531, 2013 WL 6327995, at *2 (Cal. Ct. App. Dec. 5, 2013) ("In California, the *Boykin–Tahl* advisements must also be given before the trial court may accept a criminal defendant's admission that he or she has prior felony convictions," citing *Yurko*). For a collection of other state authority regarding the waiver of jury trial on facts aggravating sentence range, see State v. Dettman, 719 N.W.2d 644, 650–51 (Minn. 2006) (holding "defendant must

Court abandons the exception for prior convictions and rules that prior convictions that raise ranges are elements of aggravated offenses, this approach is the proper one. As the Supreme Court of Minnesota recently observed, there is "no principled basis for differentiating between a waiver of the right to a jury trial on the elements of an offense and a waiver of the right to a jury determination of aggravating sentencing factors. Both rights arise from the same Sixth Amendment guarantee, and the Supreme Court has said that a fact used to enhance a sentence is the 'functional equivalent of an element of a greater offense.'"[37]

B. Permitting Partial Jury Waivers

A second method of managing potential prejudice is to allow any defendant who contests the government's allegation of prior conviction to insist on proof beyond a reasonable doubt but waive the jury as fact finder for that element alone. The Court itself observed that this would be an option if the prior conviction exception to the *Apprendi* rule were eventually abandoned:

> The dissent charges that our decision may portend the extension of *Apprendi* . . . to proof of prior convictions, a move which (if it should occur) "surely will do no favors for future defendants in Shepard's shoes." According to the dissent, the Government, bearing the burden of proving the defendant's prior burglaries to the jury, would then have the right to introduce evidence of those burglaries at trial, and so threaten severe prejudice to the defendant. It is up to the future to show whether the dissent is good prophesy, but the dissent's apprehensiveness can be resolved right now, for if the dissent turns out to be right that *Apprendi* will reach further, any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions.[38]

Jury waivers for prior conviction findings would be a simple solution in states that already grant to defendants a right to a bench trial without the consent of either the prosecution or the judge.[39] In such states, case law, statute, or rule would merely have to recognize the validity of a waiver of the right to a jury determination of the prior conviction element alone, as well as waiver of jury trial of the entire offense.[40]

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expressly, knowingly, voluntarily, and intelligently waive his right to a jury determination of facts supporting an upward sentencing departure before his statements at his guilty-plea hearing may be used to enhance his sentence."). *See also* State v. McCullough, No. 12-7-09, 2008 WL 2485366, at *11 (Rogers, J., concurring in part and dissenting in part) (Ohio Ct. App. June 23, 2008) (arguing that such safeguards should be provided before stipulation); Luckett v. State, 394 S.W.3d 577, 580 (Tex. App. 2012).

37. *Dettman*, 719 N.W.2d at 647, 651, 653 (citation omitted) (judicial finding of aggravating facts of cruelty and psychological impact on victim required explicit waiver).

38. Shepard v. United States, 544 U.S. 13, 26 n.5 (2005) (citations omitted).

39. *See, e.g.*, Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309, 321 (1993) (listing states).

40. *See* Minn. Stat. Ann. § 244.10, subdiv. 7 (West 2010) ("The defendant may waive the right to a jury determination of whether facts exist that would justify an aggravated

In states where bench trials are conditioned on the court's consent, it is doubtful that judges would object to taking over this particular task from the jury. With the prior conviction exception in place, judges are making these findings already in cases where the defendant does not admit the prior conviction as part of a guilty plea. Implementing the jury waiver approach would not require judges to change much. The judge would have to apply a higher standard of proof and use trial evidence standards (unless of course those are waived as well) instead of the looser proof requirements applied at sentencing. But proving a defendant was actually convicted previously is generally a simple matter. Most prior-conviction litigation these days raises questions of law: Does the particular offense fit within the statutory definition? Does it qualify if it was committed at the same time as the other conduct charged?[41] And determining whether a defendant was or was not convicted previously is not the type of issue that judges might prefer to leave to a jury, unlike credibility disputes between witnesses, difficult questions of "reasonableness," or mens rea assessments. Indeed, Alaska's high court has held that it is an abuse of discretion for a trial judge to reject a jury waiver for the fact of prior conviction when the state does not argue the conviction has other relevance.[42]

Permitting jury waivers for prior conviction elements would give judges the new responsibility of ensuring a valid waiver of the right to jury on the fact of prior conviction alone, if the defendant chose not to waive the jury for the remaining elements. Just as a valid admission of a prior conviction element should meet guilty plea standards, a valid waiver of the right to the jury as factfinder should meet the same standards applied to other jury waivers. Specifically, if state law requires that a jury waiver be in writing, the waiver of jury for determining prior convictions should be in writing as well.[43]

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sentence. Upon receipt of a waiver of a jury trial on this issue, the district court shall determine [those facts] beyond a reasonable doubt. . . .").

41. Such questions are questions of law for the judge. *See, e.g.*, James v. United States, 550 U.S. 192, 214 (2007) (decision involves "statutory interpretation, not judicial factfinding"); State v. Duran, 262 P.3d 468, 476 (Utah 2011).

42. Ostlund v. State, 51 P.3d 938, 941–42 (Alaska Ct. App. 2002) (joining the "majority of jurisdictions considering this issue have created procedures for the trial court to try the felony DWI without the jury being informed of the prior convictions during its consideration of the current DWI offense [and] have concluded that . . . bifurcation, stipulation, or waiver . . . are the proper ways to try felony DWI offenses to protect a defendant from being unfairly prejudiced by evidence of his earlier DWI convictions").

43. *See, e.g.*, MINN. R. CRIM. P. 26.01(b), subdiv. 1(2)(b) ("Where the prosecutor seeks an aggravated sentence, the defendant, with the approval of the court, may waive a jury trial on the facts in support of an aggravated sentence provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to a trial by jury, and after having had an opportunity to consult with counsel."). On rules regarding jury waivers, see LAFAVE ET AL., *supra* note 7 § 22.1 at nn.132-137.

C. Bifurcating the Jury Trial—Postponing Jury Trial of the Prior Conviction Element Until After a Guilty Verdict on the Other Elements

Several states authorize or mandate a bifurcated or two-phase jury trial when the state must prove to the jury a prior conviction,[44] a fact related to a prior conviction,[45] or an additional charge that includes a prior con-

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44. Habitual offender charges have been bifurcated in Arkansas since 1965. *See* Ark. Code Ann. § 5-4-502 (2013), Miller v. State, 394 S.W.2d 601, 604 (Ark. 1965); Benton v. State, 850 S.W.2d 36, 38 (1993) ("Under bifurcated procedure to be used when defendant is charged as habitual offender, jury first decides guilt or innocence and, if defendant is found guilty, trial court then hears evidence as to prior convictions. . . . "). California also requires bifurcation in some circumstances. Cal. Penal Code § 1158 (West 2004); People v. Burch, 55 Cal. Rptr. 3d 892, 896 (Ct. App. 2007) ("The primary consideration for the trial court in ruling on a request to bifurcate a sentence enhancement is whether the admission of evidence relating to the enhancement during the trial on the charged offenses would pose a substantial risk of undue prejudice to the defendant."). North Carolina has required bifurcated proceedings since 1967. N.C. Gen. Stat. § 14-7.5 (2013).

See also State v. Harbaugh, 754 So. 2d 691, 694 (Fla. 2000) ("[F]elony DUI trials must be conducted before the jury in two stages"); State v. Roy, 899 P.2d 441, 443 (Idaho 1995) ("Where a criminal defendant is charged under the persistent violator statute" or repeat offender DUI, "the information must be prepared in two parts, the first setting forth the substantive offense charged, and the second alleging prior convictions," and the trial is bifurcated); Conn R. Ct. § 36-14 (providing for two-part indictments); Conn R. Ct. § 42-2 (providing for bifurcated trials when prior conviction raises penalty); Mass. Ann. Laws ch. 278, § 11A (Nexis 2002); N.D. Cent. Code § 12.1-32-09 (bifurcated jury proceedings for dangerous special offender cases, but not habitual offender allegations); Chapple v. State, 866 P.2d 1213, 1217 (Okla. Crim. App. 1993) ("Whenever a defendant is charged with multiple counts, one or more which require a prior conviction as an element of the crime, and one or more which do not, trial shall be bifurcated."); State v. Cross, 362 S.W.3d 512, 517 (Tenn. 2012) (noting that for subsequent driving under the influence offense, bifurcated jury proceeding required, if the jury convicts, it would then be informed of the prior conviction allegations); S.D. Codified Laws § 22-7-12 (2006) (providing for two-part indictments, stating "The habitual offender information may not be divulged to the jury in any manner unless and until the defendant has been convicted of the principal offense."); State v. Brillon, 995 A.2d 557, 563 (Vt. 2010); State v. McCraine, 588 S.E.2d 177, 193–94 (W. Va. 2003) (holding that "[c]ourt must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of an alleged prior conviction" and makes a timely request).

In Kentucky, where the jury also selects the sentence in felony cases, the courts sometimes trifurcate proceedings. *See, e.g.*, Simms v. Commonwealth, No. 2011-CA-000249-MR, 2012 WL 4464437, at *3 (Ky. Ct. App. Sept. 28, 2012) ("[T]rial was trifurcated, and the second phase involved the charge of possession of a handgun by a convicted felon," after "jury returned a guilty verdict on that charge, jury considered sentence."); Greer v. Commonwealth, No. 2008-SC-000847-MR, 2010 WL 2471842, at *5 (Ky. June 17, 2010) ("[F]irst phase was the guilt phase for the assault and endangerment charges; . . . second phase was the guilt phase for the PFO charge;" and final phase was penalty).

45. Iowa R. Crim. P. 2.6(5) ("If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code to an increased penalty because of prior convictions, the allegation of such convictions, if any, shall be contained in the indictment. A supplemental indictment shall be prepared for the purpose of trial of the facts of the current offense only, and shall satisfy all pertinent requirements of the Code, except that it shall make no mention, directly or indirectly, of the allegation of the prior convictions, and shall be the only indictment read or otherwise presented to the jury prior to conviction of the current offense."); State v. Williams, 244 P.3d 1018, 1021 (Wash. Ct. App. 2011) (noting jury must find that the offense was committed "shortly after being released from incarceration" and that "trial was bifurcated in order to prevent the jury from hearing evidence related to the aggravating factor unless it first determined that Williams had committed the assault"). Minnesota requires bifurcation for finding facts that aggravate sentences "when

viction as an element.[46] Bifurcation is one of the oldest approaches to the problem of jury prejudice, practiced since Connecticut first chose to adopt bifurcated findings in its habitual-offender cases in the early 1800s.

In theory, this option would be more costly to the state than a partial guilty plea or jury waiver. The government would have to convince a jury beyond a reasonable doubt, using admissible evidence, that the defendant has a qualifying conviction; and although this is generally not difficult to do, nothing is ever certain in a jury trial.[47] More importantly, the defendant would remain free to seek appellate and post-conviction review of that aspect of his conviction.

In practice, however, the bifurcation option may not be much more costly than the waiver approaches described above. In several states it appears that it is not unusual for a defendant who has the option of forcing the government to prove a prior conviction to the jury to choose not to exercise that option once he has been convicted of the underlying offense or other elements. Instead, the defendant may choose to admit the prior conviction allegation[48] or consent to a judicial finding on that fact alone.[49] Doing so may be in the defendant's best interest—once jurors have been convinced the defendant is guilty of the underlying offense, they are even less likely to question the state's evidence that it wasn't his first time.[50] In other words, once a defendant loses the first phase of a bifurcated trial, he has little to lose and perhaps even something to gain

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the evidence in support of an aggravated departure (1) includes evidence that is otherwise inadmissible at a trial on the elements of the offense; and (2) would result in unfair prejudice to the defendant." MINN. STAT. ANN. § 244.10, subdiv. 5(c) (West 2010).

46. *E.g.*, 11 GA. PROC. CRIM. PROC. § 24:47 (requiring felon in possession charges be bifurcated from other counts except in certain circumstances).

47. Proof beyond a reasonable doubt of the qualifying features of the prior convictions may prove difficult in some cases. *See, e.g.*, State v. Chauvin, 723 N.W.2d 20, 23 (Minn. 2006) ("After extensive arguments on the state's ability to prove the dates of Chauvin's prior convictions, the state withdrew its motion for an upward departure based on the career offender statute.").

48. *E.g.*, People v. Manzano, 284 Cal. Rptr. 812, 814 (Ct. App. 1991) ("After a jury verdict of guilty, Manzano waived further trial and admitted the conviction of the offenses."); CONN. R. CT. § 42-2 (requiring judge to take plea to second part of indictment alleging prior conviction, and proceed with trial "if necessary"); WYO. STAT. ANN. § 6-10-203(b) (2013) ("If the defendant is convicted of the charged felony *and does not plead guilty to the charge of the previous convictions*, he shall be tried immediately by the same jury or judge on the charge of the previous convictions.") (emphasis added).

49. *See, e.g.*, UTAH CODE ANN. § 76-3-203.5(4)(b) (LexisNexis 2003) ("If the jury's verdict is guilty, the defendant shall be tried regarding the allegation of being an habitual violent offender by the same jury, if practicable, unless the defendant waives the jury, in which case the allegation shall be tried immediately to the court."). This possibility was also noted by Michigan law professors J.J. Prescott and Sonja Starr in their article advocating the adoption of bifurcated jury proceedings to accommodate *Blakely*. *See* J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the* Blakely *Revolution*, 2006 U. ILL. L. REV. 301, 324 (2006) ("There might be other ways to minimize the costs of bifurcation. For example, courts could permit 'sentence bargaining,' bargaining regarding disputed sentencing facts, or waiver of jury fact-finding after conviction.").

50. For examples of cases in which a defendant has argued that it was a violation of due process for the jury that convicted him to assess his prior conviction status, and that he was entitled to a fresh, untainted jury on this question, see State v. Lapia 522 A.2d 272, 276 (Conn. 1987).

by admitting his prior conviction or turning the decision over to the judge. Even if the prosecutor is unwilling to trade charge or sentencing concessions for a waiver of process regarding prior convictions, a judge might be more generous to a defendant who is willing to permit the jurors to go home than to one who insists they keep working.

PART IV. LIMITING THE INFORMATION THE JURY RECEIVES ABOUT PAST CONVICTIONS

Rather than remove the prior conviction allegation from the jury entirely, a legislature or court may decide to permit the jury to learn that a prior conviction is part of the charge but limit what the jury hears about that prior conviction. This approach is popular when the elements that the jury must assess other than the fact of prior conviction do not themselves constitute a crime, such as the charge of being a felon in possession of a firearm.[51] These particular cases are categorically different from cases in which a prior conviction functions as a grading element, making a lesser offense into a greater one. In a felony firearm case, without information about the prior conviction, a jury may be baffled, understandably, about why the prosecutor is trying to convict the defendant for conduct that seems perfectly lawful. As one court explained, "Because possession of a concealable firearm was generally legal, the government's prosecution would not make sense to the jury unless it could show that [defendant] was a convicted felon."[52] In Oregon, for example, these cases fall within an exception to the rule that a stipulation to a conviction status operates as a guilty plea, barring the jury from hearing about the prior conviction. Where the "statute that defines the charged offense includes as a material element that the defendant previously was convicted . . . and the charged conduct does not constitute a criminal offense except with that element,"[53] the stipulation is read to the jury, and no other evidence of the prior conviction is allowed.[54]

This approach is also employed in cases in which the prior conviction to be proved is a conviction for the same crime (*e.g.*, felony DUI requiring proof of several previous DUI convictions),[55] and in cases involving

51. *See, e.g.*, OR. REV. STAT. § 136.433 (2013); Old Chief v. United States, 519 U.S. 172, 174 (1997); United States v. Belk, 346 F.3d 305, 309–11 (2d Cir. 2003) (denying defendant bifurcation of his trial on charge of possession of a weapon by a convicted person and introducing stipulation); Carter v. State, 824 A.2d 123, 141 (Md. 2003) (same); State v. Brown, 853 A.2d 260, 261 (N.J. 2004) (same).

52. Morrow v. State, 80 P.3d 262, 266–68 (Alaska Ct. App. 2003) (upholding trial judge's rejection of bifurcation of finding on whether defendant failed to appear for felony or misdemeanor proceeding in case where defendant charged with felony failure to appear).

53. OR. REV. STAT. § 136.433(2)–(3) (2013).

54. *Id.* For similar distinctions between cases in which bifurcation should be provided and cases in which it need not, see Milton v. State, 19 So. 3d 1143, 1146 (Fla. Dist. Ct. App. 2009) (citing authority from Florida and Alaska).

55. *See, e.g.*, State v. Sandholm, No. 68413-2-I, 2014 WL 645031, at *5 (Wash. App. Feb. 18, 2014) ("Sandholm's stipulation did not tell the jury that his 'four or more prior offenses' were DUIs, only that they were qualifying offenses under the relevant stat-

crimes that punish misconduct while incarcerated, such as escape or assault by a prisoner.[56] Several states manage potential prejudice in such cases with stipulations.[57] Allowing a stipulation to go to the jury permits the prosecutor and court to explain to the jury the entirety of a defendant's offense—engaging in prohibited conduct having been convicted previously of a crime—while also barring information that might increase jury prejudice.[58] And stipulations that include valid waivers may also bar later claims that the prior conviction was not a "qualifying" conviction, or that it was not of the type specified by the statutes defining the offense and its punishment.[59]

There are two types of rules governing the introduction at trial of stipulations to establish prior convictions: rules that require the jury to find the element whenever a stipulation is introduced, and those that do not. Both of these options generally limit the information that the jury can hear about the prior conviction.[60]

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ute. Moreover, the trial court . . . gave a limiting instruction and bifurcated the jury instructions so that the jury considered whether the prior convictions were proven only after, and if, it found the State had proven the other elements of the crime, [and] also ruled that the parties must refrain from using the word 'felony' to identify Sandholm's current offense.") (citation omitted).

56. *See* State v. James, 81 S.W.3d 751, 762 (Tenn. 2002).

57. *See, e.g.*, N.C. GEN. STAT. § 14-7.39 (2013) (For felony firearm offenses, "a prior conviction may be proved by stipulation of the parties."); Moore v. Chrones, 687 F. Supp. 2d 1005, 1029–30 (C.D. Cal. 2010) (upholding state conviction for second offense theft after stipulation); People v. Bouzas, 807 P.2d 1076, 1078 (Cal. 1991) (reversing lower court's admission evidence of prior conviction when defendant offered to stipulate); State v. Highsmith, 619 S.E.2d 586, 590 (N.C. Ct. App. 2005) ("Defendant stipulated to prior DWI convictions pursuant to N.C. Gen. Stat. § 15A–928(c) (2004)). 'The purpose of this procedure is to afford the defendant an opportunity to admit the prior convictions which are an element of the offense and prevent the State from presenting evidence of these convictions before the jury.'") (citation omitted).

58. *E.g.*, State v. McCullough, No. 12-07-09, 2008 WL 2485366, at *4–5 (Ohio Ct. App. June 23, 2008) (noting that court read stipulation, verbatim, to the jury at the beginning of trial, gave cautionary instruction twice; and that without the stipulation, "the State would have been forced to, and was prepared to, call witnesses to" prove the prior conviction, and that "identification evidence may well have included prior victims of these offenses or, at the very least, police detectives who investigated the cases").

59. Gordon v. State, 161 S.W.3d 188, 190–91 (Tex. App. 2005) (by signing a written stipulation to two prior DWI convictions, defendant waived his right to appellate review of claim that one of his prior driving while intoxicated (DWI) convictions, used to enhance DWI offense to a felony, was too remote to be used). *But see Ex parte* Roemer, 215 S.W.3d 887, 887, 890 (Tex. App. 2007) ("Applicant for habeas relief, who had stipulated to prior conviction for involuntary manslaughter for enhancement purposes and pled guilty to felony driving while intoxicated (DWI), was not estopped from asserting a claim that his sentence for felony DWI was illegal; applicant did not invite the erroneous felony enhancement, but merely stipulated to a prior conviction that was erroneously used to enhance his sentence to a felony rather than a Class A misdemeanor, and, although applicant pled guilty to an offense of a higher classification than that for which he was eligible, this was not invited error.").

60. States have also adopted statutes or rules that provide that a defendant's prior conviction will be established upon admission of "a certified copy of the entry of judgment" and "evidence sufficient to identify the defendant named in the entry," allowing a judge to limit unduly prejudicial proof of the prior conviction even without a stipulation. *E.g.*, State v. Day, 651 N.E.2d 52, 54 (Ohio Ct. App. 1994) ("R.C. 2945.75(B) limits the scope of prior conviction evidence at trial [to] . . . 'a certified copy of the entry of judgment

A. Stipulations that Function as Directed Verdicts for the Prior Conviction Element

When a defendant wants a trial, is willing to stipulate that he was convicted previously, but state law requires submitting that question to the jury and does not allow either a partial plea or jury waiver, a court can approximate the partial plea scenario by instructing the jury that as part of the charge the prosecutor must prove beyond a reasonable doubt that the defendant has a prior conviction, but that element has been established by stipulation so the jury need not address it as part of its verdict. For one example of such an instruction, consider the pattern instruction in Hawaii:

> The defense and the prosecution have stipulated to this element, which means that both sides agree that the Defendant had two or more prior misdemeanor convictions, the last of which occurred within two years of (*insert date of charged offense*). Based on this stipulation, you must accept as proven beyond a reasonable doubt the "prior conviction element." You must not consider the stipulation for any other purpose. You must not speculate as to the nature of the prior convictions.[61]

Because the Constitution does not allow a court to direct a verdict of guilt on a criminal charge or an individual element, such an instruction requires a knowing and voluntary waiver by the defendant.[62]

B. Stipulations that Limit Proof but do not Foreclose Consideration

In a jurisdiction that does not authorize a judge to instruct the jury that a prior conviction element is established once a defendant stipulates to that element, judges may instruct a jury that the element is uncontested, and limit additional, potentially prejudicial information about the conviction or the circumstances of the convicted offense. Although the jury would have to consider whether the defendant was convicted before, it would have no basis for finding that he wasn't if the only evidence on the issue was the stipulation.

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in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar.'").

61. Haw. Pattern Jury Instr.–Crim. 11.07 (2012). *See* State v. Murray, 169 P.3d 955, 962 (Haw. 2007) ("[D]efendant should be allowed to stipulate to the fact of the required prior convictions . . . [t]he stipulation may be accepted only after engaging [the defendant] in an on-the-record colloquy [to ensure] . . . a knowing and voluntary waiver of his right to have the "prior conviction element" proved beyond a reasonable doubt and decided by a jury . . . The court must preclude any mention of the [name] or nature of [the] prior convictions at any point during the trial," *i.e.*, jury selection, opening statements, presentation of evidence, closing arguments, or instructions); *see also* Tamez v. State, 11 S.W.3d 198, 202 (Tex. App. 2000) (holding that upon stipulation, "the proper balance is struck when the State reads the indictment at the beginning of trial, mentioning only the two jurisdictional prior convictions, but is foreclosed from presenting evidence of the convictions during its case-in-chief."). This approach has been used for decades. State v. Durfee, 290 P. 962, 965 (Utah 1930).

62. State v. Murray, 169 P.3d 955, 962 (Haw. 2007).

The Supreme Court in *Old Chief v. United States*[63] held that under the Federal Rules of Evidence, it is error to allow the government to present additional evidence regarding the defendant's prior conviction in a felon-in-possession case once a defendant offers to stipulate to his prior conviction. The Court concluded that the government's case is not harmed by requiring the court to accept a stipulation to the element as a substitute for more prejudicial evidence. "When the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him,"[64] the stipulation "neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach," the Court explained.[65] It also noted the "peculiarities of the element of felony-convict status."[66]

The rule in *Old Chief* replicates that in several states,[67] such as Tennessee where a stipulation must be accepted as a substitute for potentially prejudicial information about the nature of a defendant's criminal history in trials for the crime of escape,[68] and Arkansas, Kansas, Maryland, and Michigan where stipulations in felony firearm cases are routine.[69]

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63. 519 U.S. 172, 172–74 (1997).

64. *Id.* at 189–91.

65. *Id.* at 190; *see also* United States v. Belk, 346 F.3d 305, 310–11 (2d Cir. 2003) (reviewing authority, finding refusal to bifurcate prior conviction element in felon in possession case was not error, and terming "commendable" district judge's precautions to protect the defendant from undue prejudice, namely, delivering "a curative instruction to the jury both at the time the evidence was introduced and in its jury charge," restricting evidence of the prior conviction to "a one-sentence stipulation stating only that defendant was "convicted in New York State Supreme Court, upon his plea of guilty, of a crime punishable by imprisonment for a term exceeding one year," redacting the indictment and instructing the government "to refrain from characterizing Mr. Belk as a 'convicted felon' in its arguments at trial").

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

67. *See, e.g.*, Ross v. State, 614 S.E.2d 31, 34 (Ga. 2005) (when prior conviction is of the nature likely "raise the risk of a conviction based on improper considerations, and . . . evidence is solely to prove the defendant's status as a convicted felon, then it is an abuse of discretion for the trial court to spurn the defendant's offer to stipulate to his prior conviction"); People v. Walker, 12 N.E.2d 339, 351 (Ill. 2004) ("[W]hen proving felon status is the only purpose for admitting evidence of a defendant's prior convictions, and the defendant offers to stipulate or admit to his prior felon status, a trial court abuses its discretion when it admits the defendant's record of conviction, thus informing the jury of the name and nature of the defendant's prior convictions."). In Connecticut, a five-part test is applied to determine if a trial court abused its discretion in refusing bifurcation and opting for a stipulation alternative. *See* State v. Thompson, 839 A.2d 622, 638 (Conn. App. Ct. 2004). In Arizona prosecutors need not accept such stipulations, at least in some cases. *See* State v. Newnom, 95 P.3d 950, 951 (Ariz. Ct. App. 2004) ("Under § 13-3601.02, the existence of two or more prior convictions for domestic violence is an element of the offense of aggravated domestic violence. Newnom was not entitled to prevent the jury from hearing evidence on the elements of the offense.").

68. State v. James, 81 S.W.3d 751, 762 (Tenn. 2002) (escape); *see also* Robinson v. State, No. M2012-00781-CCA-R3PC, 2012 WL 6018063 at *4 (Tenn. Crim. App. Dec. 4, 2012) ("Trial counsel and co-counsel both testified that it was standard practice to stipulate a defendant's [Habitual Motor Vehicle Offender] status if the client admits to the status.").

69. Ferguson v. State, 204 S.W.3d 113, 116–17 (Ark. Ct. App. 2005) (abuse of discretion in felony firearm case to refuse stipulation); State v. Mitchell, 179 P.3d 394, 399 (Kan. 2008) (felony firearm cases); Nash v. State, 991 A.2d 831, 840 (Mich. 2010) (same); People v. Dupree, 788 N.W.2d 399, 399, 486 Mich. 693, 693 (2010) (same).

V. CONCLUSION

Several jurists have suggested that the prior conviction exception to the *Apprendi* rule is necessary to protect a defendant from the risk of prejudice that could result if the jury learned of his prior criminal record before it returned its verdict.[70] Yet trial judges, appellate courts, and legislatures have managed this precise risk for more than two centuries, and will continue to do so.[71] Partial pleas, partial waivers, stipulations, instructions, and proof rules are among the many options available, to be tailored to particular types of cases in particular circumstances if needed. These various solutions have never been mandated as a matter of federal constitutional law, nor would abandoning the prior conviction exception to *Apprendi* require the Court to elevate any of them to constitutional status.

The prejudice courts should worry about is not the risk to defendants raised by eliminating the exception for prior convictions; it is the prejudice perpetuated by the exception itself. So long as prior conviction enhancements may drastically increase punishment without being treated as elements, the one fact most crucial to the punishment range will merit the least procedural protection. Most disturbing of all, a prior conviction that transforms a minor crime into a major one need not be alleged (or even explained) until after conviction,[72] when it is too late for a defendant to make an informed decision about trial or plea.

70. *See, e.g.*, Shepard v. United States, 544 U.S. 13, 38 (2005) (O'Connor, J., dissenting, joined by Kennedy and Breyer, JJ.) ("[T]oday's hint at extending the *Apprendi* rule to the issue of ACCA prior crimes surely will do no favors for future defendants in Shepard's shoes."); Commonwealth v. Aponte, 855 A.2d 800, 811 n.12 (Pa. 2004); State v. Hall, 940 A.2d 645, 659 (R.I. 2008) (rejecting argument to abandon prior conviction exception under state constitution, stating "by requiring recidivism to be proven to a jury, we would directly contravene the intricate safety mechanisms that are in place to protect defendants from the potential prejudice of such disclosure of earlier offenses to the finders of fact").

71. King, *supra* note 1, at 558–60.

72. *See* King, *supra* note 1, at 562–63.