

# Tulsa Law Review

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Volume 22 | Number 1

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Fall 1986

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### Recommended Citation

Hunt L. Charach, *Proof of Prior Convictions in Oklahoma: The Prima Facie Standard*, 22 Tulsa L. J. 29 (1986).

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# PROOF OF PRIOR CONVICTIONS IN OKLAHOMA: THE PRIMA FACIE STANDARD

Hunt Lee Charach\*

## I. INTRODUCTION

An overwhelming majority of states, including Oklahoma, have enacted criminal recidivism statutes which impose greater punishments on repeat offenders. Under such statutes, a critical element of proof is the defendant's prior conviction. The history, development, and application of the rules for proving prior convictions under Oklahoma's habitual offender statutes show that the Oklahoma Court of Criminal Appeals has gradually eased the burden of establishing the existence of a prior conviction. The current practice in Oklahoma which permits proof of prior convictions through uncorroborated documentary evidence, in effect, shifts the burden of proof to the defendant to disprove the habitual offender charge.

## II. HISTORICAL APPLICATION OF OKLAHOMA'S RECIDIVISM STATUTES

Oklahoma has maintained a general "habitual offender" provision in its statutes since 1887.<sup>1</sup> Prior to 1936, however, application of the statute

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1. DAK. COMP. LAWS §§ 6946, 6948 (1887). In 1890, the territorial habitual offender laws were codified in the Oklahoma Statutes. OKLA. STAT. ch. 25, art. 59, §§ 12, 14 (1890). These original provisions roughly distinguished prior felony convictions from prior "misdemeanor" convictions, with more stringent sentence enhancements imposed on habitual felons. The dispositive factor determining which provision was to be applied was the maximum prison sentence which could be imposed for the prior crime. A potential five-year sentence for the prior conviction constituted the dividing point. Interestingly, if the prior conviction was for petit larceny, the 1890 statute directed the court to apply the more stringent provision, notwithstanding that the maximum sentence on the larceny crime may have been less than five years. A similar distinction for prior petit larceny conviction

in reported cases was largely non-existent.<sup>2</sup> The foundational evidentiary and procedural rules concerning proof of prior conviction developed in prosecutions under a 1911 statute<sup>3</sup> which provided enhanced penalties for repeat violations of Oklahoma's liquor laws.<sup>4</sup>

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tions has survived in the modern provisions. See OKLA. STAT. tit. 21, § 52(3) (1981); *Simmons v. State*, 549 P.2d 111 (Okla. Crim. App. 1976).

The current habitual offender statute appears at OKLA. STAT. ANN. tit. 21, § 51 (West Supp. 1985). Subsection (B) of the present statute was substantially rewritten after *Thigpen v. State*, 571 P.2d 467 (Okla. Crim. App. 1977), which declared unconstitutional the former version of the subsection. Prior to *Thigpen*, the statute was capable of an interpretation which would impose significantly greater sentences on second offenders than on third offenders. Because this result could not possibly accord with legislative intent, the court found the subsection void for vagueness. However, it is unclear whether the holding was based on the United States Constitution or the Oklahoma Constitution. *Id.* at 471; see also *Hicks v. Oklahoma*, 447 U.S. 343, 350 (1980) (Rehnquist, J., dissenting).

2. Judicial reference to the statute was first made in *Johnston v. State*, 46 Okla. Crim. 431, 287 P. 1068 (1930). The case essentially involved a prosecution under the habitual offender provision of the alcohol prohibition laws. See *infra* note 3 and accompanying text. *Johnston* is notable, however, for the court uttered an important statement concerning a defendant's rights in a habitual offender prosecution.

When the defendant pleaded 'not guilty,' he put in issue . . . the fact of the alleged former conviction. To sustain a conviction in this case, the state must prove beyond a reasonable doubt . . . [that the defendant] had been convicted . . . as alleged. Defendant was not required to prove his innocence or to offer any testimony. He had the constitutional right to a trial by jury, and to have the charge against him submitted to the jury upon the question of his guilt of the offense for which he was on trial, which included the fact of a prior conviction and of his identity with the person so convicted. The court could not take judicial notice of the former conviction, and, although proven by the record and undisputed by defendant, could not invade the province of the jury and instruct them that this essential allegation of fact was true; that is, the court could not take any of these essential facts from the jury and submit the others, and, when he attempted to do so, he in effect denied defendant a trial by jury.

*Id.* at 434, 287 P. at 1069. See also *Bassett v. State*, 42 Okla. Crim. 126, 274 P. 893 (1929).

Although not recorded as such, the decision in *Johnston* can be read as overruling an earlier decision under the same statute. In *Files v. State*, 16 Okla. Crim. 363, 182 P. 911 (1919), the defendant demurred to the documentary evidence introduced as proof of his former conviction on the grounds that the state submitted no independent evidence proving that he was the same person as the "Files" whose name appeared on the court records in the earlier cases. The court held that "proof of his identity was not necessary. Defendant was being prosecuted as Bert Files, and if he was not the same person referred to in the records showing the former conviction of Bert Files, the burden was upon him to show such fact." *Id.* at 367, 182 P. at 912. The *Files* decision is the earliest recorded utterance in Oklahoma in support of the (present) view that documentary evidence of prior convictions bearing the name of the defendant, standing alone, is *prima facie* proof of his identity as a repeat offender in prosecutions under habitual offender statutes. The quoted section from *Files* bears a great resemblance to judicial utterances on the subject which appear in many recent cases.

3. Intoxicating Liquors—Prohibition Enforcement Act, ch. 70, §§ 16, 18, 1911 Okla. Sess. Laws 154, 165-66, repealed by Oklahoma Alcoholic Beverage Control Act, ch. 1, § 1, 1959 Okla. Sess. Laws 141. An exhaustive history of pre-1950 legislative amendments and judicial interpretations of the statute is provided in *Harrigill v. State*, 90 Okla. Crim. 347, 350-54, 214 P.2d 263, 266-70 (1950). For a general discussion of the history of Oklahoma's liquor laws see *Bandy, Intoxicating Liquors in Oklahoma, reprinted in OKLA. STAT. ANN. tit. 37, at 1* (West 1981).

4. These decisions repeatedly refer to the habitual offender provision of the liquor laws as "The Habitual Criminal Act," see, e.g., *Fowler v. State*, 14 Okla. Crim. 316, 317, 170 P. 917, 918 (1918); this denotation should not be confused with the general habitual offender statute which is the subject of this study.

### A. *The Liquor Cases*

Beginning in 1917 with the case of *Tucker v. State*,<sup>5</sup> the Oklahoma Court of Criminal Appeals (“the court”) set forth what was to become a procession of evidentiary and procedural requirements necessary to support a conviction under the habitual offender provision of the alcohol prohibition laws. The *Tucker* court ruled that, in order to sustain a conviction, the charging instrument must clearly aver that the principal offense charged is in fact a second or subsequent violation of the liquor laws.<sup>6</sup> Furthermore, the information or indictment must also show that the defendant was convicted in a court that possessed jurisdiction over the subject matter and the person.<sup>7</sup>

One year later in *Fowler v. State*,<sup>8</sup> the court clarified the *Tucker* standard by reversing the defendant’s conviction because the charging instrument did not properly allege the previous conviction. Although the document averred that Fowler had entered a plea of guilty to the prior offense, the court observed that “a plea of guilty is not a conviction,”<sup>9</sup> therefore, the information was insufficient to charge the defendant with a felony under the habitual offender provision. The absence of the requisite factual averment deprived the trial court of jurisdiction under the statute, which could not be cured by any “intendment, inference or implication.”<sup>10</sup> Without the necessary particularity in the pleadings, *any* evidence offered to prove the defendant’s prior conviction was deemed inadmissible. Thus, even if a pleading sufficiently alleged the defendant’s prior conviction, documentary evidence that established only a previous

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5. 14 Okla. Crim. 54, 167 P. 637 (1917). It should be noted that the dicta in the *Tucker* case has been overruled regarding pardoned offenses. See *supra* note 7.

6. The habitual offender provision of the liquor laws was only applicable when the prior and principal offenses were violations of the liquor laws. *But cf.* OKLA. STAT. ANN. tit. 21, § 51 (West Supp. 1985) (general habitual offender statute applicable to persons previously convicted of any offense punishable by imprisonment in the penitentiary).

7. *Tucker*, 14 Okla. Crim. at 55, 167 P. at 638. The court also ruled the provision inapplicable to persons who had been pardoned of the prior offense by the Governor. *Id.* at 57, 167 P. at 640. The existence of a pardon was an affirmative defense. *Id.* The exemption for pardoned offenses was later distinguished as dicta in *Newton v. State*, 56 Okla. Crim. 391, 394, 40 P.2d 688, 691 (1935), a prosecution brought under the general habitual offender statute. The exemption for pardoned offenses was expressly overruled in *Scott v. Raines*, 373 P.2d 267, 270 (Okla. Crim. App. 1962).

8. 14 Okla. Crim. 316, 170 P. 917 (1918).

9. *Id.* at 318, 170 P. at 918.

10. *Id.*; accord *Wright v. State*, 16 Okla. Crim. 458, 184 P. 158 (1919). Although the court later adopted more flexible pleading rules, *Littlejohn v. State*, 32 Okla. Crim. 401, 241 P. 210 (1925), the jurisdictional requirement that the defendant’s prior conviction must be affirmatively alleged in the charging instrument for the principal offense has survived to date. See *Roberson v. State*, 362 P.2d 1115 (Okla. Crim. App. 1961). The allegation of previous conviction is necessary to bring a case within the habitual offender provisions because it is not a distinct charge of the principal offense, but goes to punishment only. *Bilbrey v. State*, 444 P.2d 225 (Okla. Crim. App. 1968).

jury verdict against the defendant or a guilty plea entered by him, absent additional evidence of a judgment and sentence imposed, would be inadequate to sustain the defendant's conviction under the liquor law habitual offender statute.

Two cases typical of the era and representative of the application of the liquor law habitual offender statute are *Martin v. State*<sup>11</sup> and *Hancock v. State*.<sup>12</sup> The facts presented in both cases are nearly identical. Martin and Hancock were convicted at trial of transporting intoxicating liquor. Their sentences were enhanced because both had allegedly been convicted of prior alcohol related offenses. In *Martin*, the state attempted to prove the defendant's prior conviction through an ambiguous court record which did not clearly evidence that Martin, as opposed to a co-defendant, had formerly been convicted of an offense. Relying on an earlier case, *Browder v. State*,<sup>13</sup> in which the Attorney General on appeal admitted that the evidence at trial was insufficient to establish the defendant's conviction of a prior crime, the court found that Martin's former conviction was inadequately proved and reversed the trial court judgment against him.<sup>14</sup> As proof of former conviction in *Hancock*, the state submitted documentary evidence which showed that one "L. J. Hancock" was previously charged with an alcohol related offense and an appearance docket entry which noted that "the defendant" had pleaded guilty to the charge and received a jail sentence and fine. The prosecution also submitted court records which indicated that one "J. L. Hancock" had paid the fine in the case. On appeal, the court found the documentary evidence insufficient to prove that the present defendant, J. L. Hancock, was the same person who suffered conviction in the earlier case.<sup>15</sup>

Although both of these cases resulted in reversal of the defendant's convictions, in neither did the court set forth evidentiary guidelines for proving a defendant's prior convictions in a prosecution under a recidivist statute. Aside from the necessary pleading of particularities, the court's pronouncements up to this point provided little guidance in determining the quantum of evidence of prior conviction necessary to support sentence enhancement. The trend of reversals on both procedural and

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11. 30 Okla. Crim. 49, 234 P. 795 (1925).

12. 33 Okla. Crim. 47, 241 P. 1108 (1925).

13. 15 Okla. Crim. 287, 176 P. 96 (1918), *aff'd*, 16 Okla. Crim. 41, 180 P. 570 (1919).

14. *Martin*, 30 Okla. Crim. at 50, 234 P. at 796.

15. *Hancock*, 33 Okla. Crim. at 48, 241 P. at 1109. It is a curious fact that the evidence of prior conviction held insufficient in *Hancock* might well be deemed adequate today. See *infra* note 51 and accompanying text.

substantive grounds, however, indicated the court's pronounced concern that the statute be implemented in a guarded manner.

In *Rogers v. State*,<sup>16</sup> the court, for the first time, affirmatively enumerated the specific documentary proofs necessary to establish the existence of a prior conviction. The court held that "the showing of a former conviction should be supported by proof of the indictment or information, a copy of the minutes, showing the plea or demurrer, the verdict of the jury, if any, and the final judgment on the verdict or plea."<sup>17</sup> The *Rogers* court then carved out an exception to the above requirements applicable to prior offenses which had been affirmed on appeal.<sup>18</sup> The

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16. 34 Okla. Crim. 15, 244 P. 461 (1926).

17. *Id.* at 17-18, 244 P. at 462. The court declared that it was relying on evidentiary proofs which were "inferentially" set forth in *Browder v. State*, 15 Okla. Crim. 287, 176 P. 96 (1918), *aff'd*, 16 Okla. Crim. 41, 180 P. 570 (1919). *Rogers*, 34 Okla. Crim. at 17, 244 P. at 462.

In 1938, during the waning years of enforcement of the liquor law recidivist provision, the court decided *Morse v. State*, 63 Okla. Crim. 445, 77 P.2d 757 (1938), wherein it issued a slightly different guideline for proving the defendant's former conviction.

The best method of proving a prior conviction is by offering in evidence the indictment or information and the judgment of conviction, and after these instruments are introduced proof should be offered to show that the case has not been appealed, or, if appealed, that final disposition has been made of the same.

*Id.* at 456, 77 P.2d at 762.

The court, citing *Halbert v. State*, 18 Okla. Crim. 378, 380, 195 P. 504, 506 (1921), again noted that a mere entry on an appearance docket which references the defendant's prior conviction will not satisfy the state's burden of proof. *Morse*, 63 Okla. Crim. at 455-56, 77 P.2d at 762. *Halbert* presented a double jeopardy issue in which the defendant asserted that a prior conviction for assault and battery arising out of the same incident precluded a subsequent prosecution for attempted rape. To establish his former conviction, the prosecution introduced an appearance docket which noted the defendant's guilty plea to the charge. Suspecting that the defendant collusively procured the prior conviction to avoid prosecution on the more serious rape charge, the court denied his double jeopardy claim because, *inter alia*, the appearance docket was not the "best evidence" of the prior conviction and the alleged identity between the facts underlying it and the present charge. *Halbert*, 18 Okla. Crim. at 384-85, 195 P. at 506-07.

The quoted statement from *Morse* has only historical value because it was not the holding in the case. Many years later, however, the court reactivated nearly identical proof requirements in prosecutions under the general habitual offender provisions. See *infra* notes 51-62 and accompanying text. However, two modern differences are noteworthy. First, the information (or other charging instrument) of the prior offense is not admissible into evidence because it proves only the fact that a charge was filed, not the existence of a conviction. Moreover, charging instruments tend to set forth sordid details of the crime which are prejudicial to the defendant and entirely irrelevant to the fact of conviction. See *Browning v. State*, 648 P.2d 1261, 1265 (Okla. Crim. App. 1982); *Wade v. State*, 624 P.2d 86, 92 (Okla. Crim. App. 1981); *Jones v. State*, 456 P.2d 613, 616 (Okla. Crim. App. 1969). Second, the court has recently held that, in the absence of proof that the prior conviction has not been appealed or affirmed on appeal, proof that the trial court notified the defendant of his right to appeal coupled with a lengthy span of time from the date judgment and sentence was entered at trial, will raise a presumption that the prior conviction is final. See *Bickerstaff v. State*, 669 P.2d 778, 780 (Okla. Crim. App. 1983). The defendant now has the burden of going forward with evidence to show that the prior conviction relied on by the prosecution is not final. In *Bickerstaff*, the court also held that the defendant bears the burden of establishing, as an affirmative defense, that the prior felony offenses relied on by the prosecution did not arise out of a single criminal transaction. *Id.*

18. *Rogers*, 34 Okla. Crim. at 16, 244 P. at 462.

exception allowed the introduction of documentary evidence of a judgment and sentence entered against the defendant at trial to be substituted with an opinion and judgment of the court (Oklahoma Court of Criminal Appeals) affirming the prior conviction. In retrospect, the *Rogers* decision reaffirms the court's preoccupation with pleading rules and the inclusion of minute details in court documents.

### B. *The Early Cases Under Oklahoma's Habitual Offender Statute Section 51*

Beginning in the mid-1930's, prosecutorial use and misuse of Oklahoma's general habitual offender statutes became well-documented in the recorded opinions of the court.<sup>19</sup> As a result of the many cases appealed, the court promulgated a panoply of rules governing the implementation of the statutes. Most of the doctrines announced, although vital to the proper administration of the provisions, are beyond the scope of this study,<sup>20</sup> which is limited to the proofs and procedures necessary to establish the accused's prior convictions at trial.

As noted above, the earliest decisions applying section 51 of the Oklahoma Statutes, the most often used general habitual offender statute, adopted the proof requirements of former conviction as set forth in the

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19. Perhaps due to the pressures of the depression era, many of the early prosecutions involved repeat petit larceny offenses. See, e.g., *Ex parte Wray*, 61 Okla. Crim. 162, 66 P.2d 965 (1937); *Ex parte Weaver*, 60 Okla. Crim. 290, 64 P.2d 925 (1937); *Ex parte Bailey*, 60 Okla. Crim. 278, 64 P.2d 278 (1936).

In all three of the cited cases, the court granted the petitioners' applications for writs of habeas corpus upon finding that the trial courts erred in construing the habitual offender statute as creating a new substantive offense of "habitual criminal." The court, relying on extra-jurisdictional precedent, declared that habitual criminality is a state of being and not a crime in itself. Therefore, the habitual offender provisions do not create or define a new or independent offense, but rather, describe circumstances wherein one found guilty of a specific crime may be more severely penalized because of previous convictions. See *Bailey*, 60 Okla. Crim. at 282-83, 64 P.2d at 280. In this regard, the modern interpretation of the statutes has not changed. See, e.g., *Simmons v. State*, 549 P.2d 111, 116-17 (Okla. Crim. App. 1976).

20. Treatment of the established rules and procedures applicable to the habitual offender provisions, and the challenges thereto, has been surprisingly sparse in Oklahoma's scholarly periodicals. Two short comments, touching upon discrete applications of the statutes, appear in the Oklahoma Law Review. See *Criminal Law: Use of Prior Convictions as Evidence*, 32 OKLA. L. REV. 246 (1979); Comment, *Criminal Law: Necessity of Preliminary Hearing for Charge of Habitual Criminal*, 11 OKLA. L. REV. 76 (1958). For general, cross-jurisdictional commentary on habitual offender statutes, see Comment, *Recidivist Procedures: Prejudice and Due Process*, 53 CORNELL L. Q. 337 (1968); Comment, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332 (1965); Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U. L. REV. 210 (1958). For a short, practical article evaluating various defensive challenges to prior conviction evidence, see Mueller, *Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike*, 11 COLO. LAW. 1225 (1982).

case law under the alcohol prohibition recidivist statute.<sup>21</sup> The court recognized no evidentiary or procedural distinctions between the application of the two statutes, despite their very diverse natures.<sup>22</sup> In these cases, the defendant's prior conviction, as alleged in the charging instrument, was proved through documentary evidence<sup>23</sup> during the prosecution's case in chief on the principal offense.<sup>24</sup>

A perceptible current of change enveloped the court's opinions in the 1940's and 1950's. Quite unobtrusively, the court seemed to shift its focus away from matters of pleading and the contents of documentary evidence toward the more vital concern of accurately establishing the defendant's identity as being one and the same with the person whose name appeared in the court records of the prior conviction. A preliminary example is *Bird v. State*,<sup>25</sup> wherein the court, without reference to pertinent

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21. See *supra* note 6 and accompanying text. Compare, e.g., *Pitzer v. State*, 69 Okla. Crim. 363, 368-69, 103 P. 2d 109, 111-12 (1940) with *Spann v. State*, 69 Okla. Crim. 369, 373, 103 P.2d 389, 393 (1940). See also *Lee v. State*, 67 Okla. Crim. 283, 288, 94 P.2d 5, 7 (1939) (documentary evidence sufficient to sustain defendant's conviction under habitual offender statute, fact that defendant admitted prior conviction held merely cumulative).

Although not dispositive of the case, the *Spann* court, in a syllabus preceding the opinion, indicated that, in addition to documentary evidence, "an identification of the defendant as being the party against whom the [prior] judgment was rendered" was a necessary element of proof of prior conviction. *Spann*, 69 Okla. Crim. at 370, 103 P. 2d at 390. In the body of the opinion, however, the court approvingly cited *Files v. State*, 16 Okla. Crim. 363, 182 P. 911 (1919) for establishing the procedure the state must follow to prove the fact of the defendant's previous conviction. In *Files*, the court held that the defendant bears the burden of "proving" his lack of identity with the person whose name appears on the court records introduced as proof of his prior conviction. See *supra* note 2. The facts of *Spann*, however, render the conflicting nature of the court's pronouncements moot; on cross-examination *Spann* admitted his former conviction. *Spann*, 69 Okla. Crim. at 377-78, 103 P.2d at 393.

22. For example, penalties under the general statute were much more severe than penalties under its liquor law counterpart. Further, as previously observed, the general statute was applicable in cases where the defendant formerly had been convicted of any crime punishable by imprisonment in the penitentiary (or petit larceny), whereas the liquor law statute was confined to prior convictions under the prohibition laws. See *supra* note 6.

23. An argument can be made that documentary proof of prior conviction, absent independent identification evidence, was more justifiable under the liquor law statute than under the general statute. Many of the prohibition laws proscribed conduct *malum prohibitum*. The ineffectiveness of these laws in curbing behavior is as well-documented by the history of the prohibition era as are current provisions proscribing such crimes as public drunkenness or possession of marijuana. Thus, it was reasonable to believe that repeat offenses were likely to occur. The same assumption does not necessarily arise under statutes proscribing acts *malum in se*. Credibility is lent to this argument by the sheer number of repeat prosecutions under the liquor laws, as compared to other crimes falling within the general statute, evidenced by the recorded opinions of the court between 1911 and 1940.

24. This procedure was later changed by the court. See *infra* note 69 and accompanying text. The prejudicial effect of introducing the defendant's criminal past to the jury during the case in chief on the principal offense is readily imaginable, particularly when the accused has invoked his right not to testify. For a particularly egregious application of the old procedure, see *Carr v. State*, 91 Okla. Crim. 94, 99, 216 P.2d 333, 336 (prosecution introduced evidence of numerous prior convictions before offering any evidence related to principal charge), *cert. denied*, 340 U.S. 840 (1950).

25. 85 Okla. Crim. 313, 188 P.2d 242 (1947).



citation, affirmed the defendant's conviction as a second offender on grounds that:

[T]he introduction in evidence of the judgment, sentence and commitment of former conviction . . . , with the identification by the sheriff . . . , as to the defendant being the identical person named in said judgment and sentence, was sufficient in the absence of any evidence to the contrary, to prove beyond a reasonable doubt that the defendant was the person so charged and convicted . . . .<sup>26</sup>

In response to the defendant's challenge to the sufficiency of evidence connecting him with the prior conviction, this holding clearly imports the court's view that the identification of the defendant, apart from court records bearing his name, is an essential element of proof necessary to sustain conviction on appeal.<sup>27</sup>

In the next important case, *Stroud v. State*,<sup>28</sup> the court appeared to retreat from the direct identification requirement established in the *Bird* decision. In *Stroud*, the defendant was charged with robbery after former conviction of a felony. As proof of the former conviction, the trial court admitted documentary evidence establishing that a person bearing the defendant's name had been convicted of felonies in Oklahoma. Additionally, a police officer testified that the defendant was the same "James D. Stroud" whose name appeared in the court records of the prior conviction. On cross-examination, however, the officer admitted that his identification was based on photographs of the defendant he had seen in police department records of the prior offenses and that he had no personal knowledge that the defendant was convicted and imprisoned on those charges. Sustaining the defendant's objection to the officer's testimony, the trial court instructed the jury to disregard all evidence of the defendant's prior convictions because no direct identification evidence was offered by a witness with personal knowledge of the fact. The jury then convicted the defendant of the principal offense. On appeal, the defendant claimed prejudicial error in the trial court's admission of the court records pertaining to his prior convictions. Denying the claim, the court held that the trial judge committed error in favor of the defendant by excluding the habitual offender charge.<sup>29</sup> Relying on *Files v. State*,<sup>30</sup>

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26. *Id.* at 319, 188 P.2d at 245 (emphasis added). The court purported to rely on a case that contained no independent identification requirement.

27. Research indicates that *Bird* is the first case in which the court premised an actual holding on an independent identification requirement.

28. 95 Okla. Crim. 113, 240 P.2d 1125 (1952).

29. *Id.* at 116, 240 P.2d at 1128.

30. 16 Okla. Crim. 363, 364, 182 P. 911, 912 (1919). For a discussion of the *Files* decision, see *supra* note 2.

the court declared that circumstantial proof of prior convictions suffices to take the habitual offender charge to the jury. The court observed that, although direct identification is the best method of proof of prior conviction:

[W]here the date set forth in the information, judgment, and sentence, and other exhibits introduced in connection with the former convictions show the person to have the identical name of the accused, and that such convictions were sustained in the county where accused resided, and that, as shown here by the testimony of the police officer, that during the period of time during which the accused was allegedly in the penitentiary that he was absent from his usual place of residence in his home county, the same makes out a prima facie case, and, in the absence of any rebutting evidence, is sufficient to require such issue to be submitted to the jury.<sup>31</sup>

The holding in *Stroud*, despite its reliance on *Files*, did not necessarily signal a return to the old documentary evidence standard. Clearly, the court required "something more" than court records to satisfy the prosecution's prima facie case. *Stroud* simply announced that the incremental proofs of the defendant's identity may be established through circumstantial evidence which tends to show that the defendant was in fact convicted of a prior offense.<sup>32</sup> Seen in this light, *Stroud* comports with the holding of *Bird* and later cases discussed below.

In *Tice v. State*,<sup>33</sup> the court instructed that subsequent to the introduction of court records evidencing a prior conviction, "Proof of the fact should then be made that the defendant, in the case on trial, is one and the same person as the defendant in the prior conviction relied upon to establish the offense of a second or subsequent conviction."<sup>34</sup> Although the defendant in *Tice* did not challenge his trial court identification on appeal,<sup>35</sup> the incremental proof of identity made at trial was referred to

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31. *Stroud*, 95 Okla. Crim. at 116, 240 P.2d at 1128.

32. Evidence that the prior conviction was sustained in the county where the accused resided combined with testimony that the accused was absent therefrom during the period of incarceration for the sentence imposed, should stand as a valuable circumstantial identity link in habitual offender prosecutions. In many cases, however, these elements of proof may be more difficult (or even impossible) to obtain than direct identification evidence.

33. 283 P.2d 872 (Okla. Crim. App. 1955).

34. *Id.* at 874.

35. *Id.* *Tice* asserted that, *inter alia*, inadequate evidence was offered to prove that the Texas judgment and sentence, relied on to enhance his sentence on the principal offense, was a final judgment. The court determined that the finality of a former conviction may be established through the introduction of a judgment sentence, indictment, and a prison commitment entered thereupon. It is interesting to note that the court relied solely on documentary evidence as proof of the finality of the defendant's prior conviction; whereas, when discussing the sufficiency of evidence to sustain the conviction as a whole, the court referred to the incremental evidence connecting the present defendant with the former conviction. *Id.* at 874-5.

in the court's opinion.<sup>36</sup> A close reading of the decision indicates that the court found it essential to *any* challenge to a conviction under the habitual offender provisions that some proof, beyond mere documentation, was offered to connect the defendant with the prior offenses.<sup>37</sup> Interestingly, the rule of *Tice* and its immediate progeny *Woods v. State*<sup>38</sup> gave rise to a parallel federal doctrine in the United States Court of Appeals for the Tenth Circuit.<sup>39</sup> Although the requirement of independent sub-

36. The court observed that the defendant's father testified at trial that he had personal knowledge of his son's prior conviction, sentence, and incarceration. *Id.* at 875.

37. Although the identification of the defendant by his father was not crucial to any claim of error raised on appeal, the court's reference to the father's testimony was not purely gratuitous. In the court's words, the proof of former conviction through documentary evidence and independent testimony was necessary to "fulfill the requirements of the law." *Id.*

Of course, if the defendant admits his prior convictions by stipulating to the validity of the judgment and sentence forms introduced by the prosecution, the need for further independent proof is obviated. *See Clore v. State*, 282 P.2d 780, 783 (Okla. Crim. App. 1955).

*Tice* was later relied on in *Woods v. State*, 327 P.2d 720 (Okla. Crim. App. 1958), wherein the court held that a defendant's extra-judicial admissions detailing his former convictions to police officers, absent admissible documentary evidence showing those convictions, could not satisfy the State's burden of proof under the habitual offender statute. The court referred to *Tice* as setting forth the "essential steps" for proving a former conviction. One of the essential steps noted is independent proof of the defendant's identity. *Id.* at 721-22.

38. 327 P.2d 720 (Okla. Crim. App. 1958), *appeal dismissed*, 346 P.2d 950 (Okla. Crim. App. 1959).

39. The seminal case is *Gravatt v. United States*, 260 F.2d 498 (10th Cir. 1958), wherein the panel held that documentary evidence of former conviction was insufficient, standing alone, to sustain the defendant's conviction under a federal habitual offender statute. In *Gravatt*, the prosecution introduced a state-court judgment and sentence evidencing that one "Earl E. Gravatt" had been convicted of a prior felony. A certified copy of the sheriff's return showing execution of the sentence imposed on the former conviction was also submitted. On appeal, the defendant "Earl Elmer Gravatt" contended that the documentary evidence constituted insufficient proof of his identity as the same person who suffered the earlier conviction. Relying on the *Woods* independent proof standard, the panel agreed.

It is . . . Hornbook law that in criminal cases, the Government must prove the defendant guilty beyond a reasonable doubt, and that if the undisputed evidence is as consistent with innocence as with guilt, the Government has failed to make a case to go to the jury. It is common knowledge that in many instances men bear identical names. How then can it be said, without more, that Earl E. Gravatt who was convicted in the Oklahoma State Court in 1939 was one and the same person as Earl Elmer Gravatt on trial in this case. The middle initial "E" certainly bears some significance. It could have been Edgar or Edward, or some other name. It was not incumbent on the defendant to establish that he was not the same person as Earl E. Gravatt. That duty rested upon the Government. . . . Merely introducing the indictment or information and the judgment and sentence of the prior trial is not sufficient to discharge the burden resting on the Government to take the case to the jury on the question of identity of the two persons, especially when, as here, the two names are not identical.

*Id.* at 499 (citations omitted).

Despite its apparent holding that documentary evidence, absent corroboration of identity, fails to prove beyond a reasonable doubt the fact of a prior conviction, the rule of *Gravatt* has not been interpreted as one of constitutional dimension. *See Shaw v. Johnson*, 786 F.2d 993, 999-1000 (10th Cir. 1986) (independent evidence requirement is a matter of federal procedural law); *but cf.* *Chase v. Crisp*, 523 F.2d 595, 596 (10th Cir. 1975) (court indicated in dicta that state-court reliance on docu-

stantiating proof of identity has since been vitiated in Oklahoma,<sup>40</sup> it has endured as a federal requirement in cases before the Tenth Circuit.<sup>41</sup>

The rule requiring independent proof of identity reached its zenith in *Gilmore v. State*<sup>42</sup> and *Baker v. State*,<sup>43</sup> cases in which the court, with unmistakable clarity, declared that the prosecution erred in its failure to present direct evidence linking the identity of the defendant with the person whose name appeared on court records of prior convictions.<sup>44</sup> In *Gilmore*, the defendant denied on cross-examination the existence of a previous conviction which was alleged in the charging instrument of the principal offense. In rebuttal, the prosecution offered the judgment and sentence form from the former conviction. The court found that the documentary evidence, standing alone, was insufficient as a matter of law to rebut the defendant's denial.

The identity of the accused in the case must also be established on trial as one and the same person as that convicted of the prior offense.

...

[W]hen the defendant positively denies on cross-examination the conviction inquired about, that ends the matter, except by proof thereof in rebuttal. A certified copy of the judgment and sentence without proof of identity is not sufficient to establish the conviction of the defendant.<sup>45</sup>

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mentary evidence violates defendant's rights under the due process clause if no independent substantiating evidence of identity is presented), *cert. denied*, 424 U.S. 947 (1976) .

40. See *infra* notes 51-63 and accompanying text.

41. See, e.g., *United States v. Kilburn*, 596 F.2d 928, 935 (10th Cir. 1978) (independent corroboration of identity supplied by fact that trial judge on principal offense was same judge who presided over and signed judgment and sentence in prior case against defendant), *cert. denied*, 440 U.S. 966 (1979); *Matula v. United States*, 327 F.2d 337, 338 (10th Cir. 1964) (extra-judicial admission by defendant that he had suffered prior felony conviction when coupled with introduction of judgment and sentence from that conviction sufficient to prove defendant's commission of prior felony; although, neither, standing alone, would have satisfied Government's burden of proof).

42. 365 P.2d 573 (Okla. Crim. App. 1961).

43. 432 P.2d 935 (Okla. Crim. App. 1967).

44. In *Gilmore*, failure to present direct evidence of identity on one prior conviction was held to be harmless error because direct evidence establishing the defendant's conviction of other former offenses had been offered. *Gilmore*, 365 P.2d at 575-76.

45. *Id.* at 575 (citations omitted). Because the defendant took the stand and affirmatively denied the prior conviction alleged, *Gilmore* presented a slightly different situation than that which arises in most cases where the issue of identity as a former offender is raised. It should not be distinguished, however, from the typical case where the defendant simply chooses not to testify at all. In terms of satisfying the burden of proof on a fact in issue in a criminal prosecution, no legal distinction detrimental to the defendant should be fashioned on the exercise of the right not to testify. The quantum of evidence necessary to prove beyond a reasonable doubt the defendant's prior conviction should remain the same, regardless of the tactical defense decisions made at trial. Requiring the defendant to affirmatively deny the existence of an alleged prior conviction would, moreover, place the defendant between the scylla of documentary proof sufficiently establishing the prosecution's case where he chooses not to testify, and the charybdis of prior "bad acts" evidence and other forms of character impeachment if he chooses to deny the alleged former offenses on the stand.

In *Baker*, the prosecution introduced documentary evidence purporting to prove that the defendant, Leonard Joe Baker, had suffered four prior felony convictions.<sup>46</sup> On appeal, the court introspectively observed that it had "consistently and repeatedly"<sup>47</sup> held that the defendant's identity must be proved independently of court records bearing his name in habitual offender prosecutions.<sup>48</sup>

Thus, for two decades prosecutors in Oklahoma could not rely solely on court documents to prove a defendant's prior conviction. If the defendant affirmatively denied the alleged prior conviction, or chose not to testify, the prosecution was required to offer direct or circumstantial evidence that the defendant on trial for the principal offense was in fact the same person whose name appeared on the records of a prior felony conviction. The rationale for the rule was rarely stated in the reported cases; perhaps the court thought it was obvious that the critical factor of identity could not be proved reliably from a form containing no information about the defendant other than his name, or a name similar to his, typewritten in a blank space.<sup>49</sup> Beginning in 1961, however, the court abruptly shifted back to the documentary evidence standard.

### III. THE MODERN PRIMA FACIE RULE

Under current law, a certified copy of a judgment and sentence bearing a name similar or identical to that of the defendant from a prior prosecution submitted into evidence in a case brought under Oklahoma's habitual offender statutes, absent rebutting evidence to the contrary, constitutes prima facie evidence sufficient to prove beyond a reasonable doubt that the defendant on trial for the principal offense is a convicted felon.<sup>50</sup> Independent evidence in corroboration of the matters set forth in the judgment and sentence is unnecessary.<sup>51</sup> The genesis of the modern

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46. With regard to one of the four alleged convictions, the court records indicated the name of the defendant as "Joe Leonard Baker." Apparently, the three other records listed the defendant's correct name. *Baker*, 432 P.2d at 938.

47. *Id.*

48. *Id.* Decided in 1967 after the court had returned to the documentary evidence standard, *see infra* note 52 and accompanying text, the court's statements in *Baker* departed significantly from the then existing doctrine. The court cited none of the current cases holding that documentary evidence of former convictions satisfied the prosecution's burden of proof in habitual offender prosecutions. One explanation for the court's departure is that numerous additional errors were committed at Baker's trial, any one of which was sufficient to justify the court's modification of his sentence.

49. See the example of a typical judgment and sentence form in the appendix.

50. See *infra* note 55 and accompanying text.

51. In light of the recent Supreme Court decision in *McMillan v. Pennsylvania*, 106 S. Ct. 2411 (1986), it is important to note that Oklahoma has always adhered to the rule that proof of prior conviction in the punishment phase of a habitual offender proceeding must be established beyond a

rule is found in the 1961 case of *Williams v. State*.<sup>52</sup>

#### A. *Williams v. State*

In *Williams*, the prosecution attempted to prove the defendant's status as a repeat offender through the introduction of judgment and sentence forms evidencing that one "Otto Williams" had been twice convicted of felonies in Oklahoma. The prosecution offered no evidence identifying the defendant as the same Williams whose name appeared on the documents. Williams cited "numerous Oklahoma cases"<sup>53</sup> which purportedly supported his argument that the mere fact that the name appearing on the court records was identical to his was insufficient to establish the former convictions. He asserted that the allowance of this proof only worked an undue hardship on defendants because it forced them to take the witness stand in order to rebut the proof. Although the court agreed that Williams' argument was "not without merit,"<sup>54</sup> it declared that "identity of name of the defendant and the person previously convicted is prima facie evidence of identity of person, and in the absence of rebutting testimony, supports a finding of such identity."<sup>55</sup> Therefore, the documentary evidence introduced was sufficient, standing alone, to support the jury's verdict against the defendant on the habitual offender

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reasonable doubt, and that it is a question for the jury to determine. See, e.g., *Mitchell v. State*, 659 P.2d 366 (Okla. Crim. App. 1983). Although the court has held that the habitual offender statute does not create a new substantive criminal offense, defendants in the punishment phase are accorded all of the procedural and substantive rights available to them during the trial on the principal offense. The prescribed procedures and the statute itself are quite unlike the mandatory sentencing provision addressed in *McMillan*.

52. 364 P.2d 702 (Okla. Crim. App. 1961).

53. *Id.* at 704.

54. *Id.*

55. *Id.* (citations omitted). Seemingly as an afterthought to its holding, the court advised that "the better practice is (and should be followed whenever at all possible) to establish identity with efficiency and diligence whenever the same is not rendered impossible by extenuating circumstances." *Id.* at 705. What the court meant by "efficiency and diligence" is open to (a rather moot) question. The advice, coming as it did after a lamentation of the difficulty of acquiring independent evidence of former conviction, probably means that the court would prefer such evidence to be adduced wherever possible. After declaring that documentary evidence suffices to take the case to the jury, one could well expect that, with the exception of extremely close cases, few prosecutors would undertake the burden of finding corroborative evidence. For example, in *Conner v. State*, 518 P.2d 1271 (Okla. Crim. App. 1974), both the defendant and the prosecution relied on *Williams* on the question whether the prosecution has any duty to attempt to obtain independent identification evidence (the "better practice"). Resolving the issue in favor of the prosecution, the court concluded that once a judgment and sentence of prior conviction has been introduced, the burden then shifts to the defendant to rebut the prima facie evidence. If no rebuttal is offered, then the documentary evidence is sufficient to sustain the conviction. *Id.* at 1272. In effect, the court's holding renders the "better practice" language of *Williams* merely precatory. Research indicates no case in which the court has since reversed a habitual offender conviction based on its expressed preference for independent evidence.

charge. The court's reasoning in *Williams* is difficult to understand and, taken on its face, somewhat questionable. However, *Williams* is the seminal case on which later cases uniformly relied, and thus it is necessary to take a closer look at the court's analysis.<sup>56</sup>

In establishing the documentary evidence prima facie rule, the court relied primarily on the purported difficulty of obtaining witnesses with personal knowledge of the defendant's criminal past. Although the *Williams* case involved prior Oklahoma convictions, the court reasoned that prosecutors would bear a difficult burden of proving prior convictions from other states if identification witnesses were a necessary element of proof. Moreover, loss of memory by potential witnesses, or their intervening death, could result in a similar impediment to the implementation of the statute.<sup>57</sup> In sum, the court crafted the documentary evidence rule because of its fear that situations would arise where independent proof of identity was not obtainable.<sup>58</sup>

Finally, the court advised that the new rule would "leave the question of identity to be determined by the jury upon a consideration of all surrounding facts and circumstances,"<sup>59</sup> such as commonness or unusual-

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56. It should be noted, however, that the Oklahoma Court of Criminal Appeals does not habitually overload its decisions with expansive analysis of its reasoning. Moreover, the court often does not set forth sufficient facts to allow its readers to discern accurately and confidently the ramifications of its holdings. *Williams* stands apart from a multitude of decisions addressing similar issues under the habitual offender statutes in that the court supplied a clear, albeit questionable, rationale for the decision it rendered.

57. *Williams*, 364 P.2d at 704. Citing these possibilities, the court then asked the following rhetorical question: "Is this any reason for not invoking the habitual criminal act when it [sic] clearly falls within the purview of the act?" *Id.* The question can be reframed with more precision. In effect, the court was inquiring whether it was justified in crafting a broad rule for all cases allowing the imposition of severe penal consequences based on evidence of questionable probative value because more competent evidence might be beyond the prosecution's reach in individual cases.

The court also surmised that where the name appearing on the documentary evidence of prior conviction was identical to the defendant's name, there would be "an extremely narrow margin of mistake." *Id.* In view of the court's expressed apprehension of out of state prior offenders and the difficulties associated with proving foreign offenses, it is curious that the court could so confidently presume, without reference to any statistical evidence, that disparities between names and identities are likely to be remote. Even if one could assume that the court had philological expertise with regard to both national and local patterns of name-giving and access to statistics correlating the number of persons with identical names and their propensity to commit acts of recidivism, the resulting generalization would remain questionable.

58. Interestingly, the court asserted that "[a]n exhaustive search of all Oklahoma cases relating to the manner of proving the former convictions when the names are identical reveal[ed] that the direct question ha[d] never been squarely ruled upon." *Id.* The opinion contains not a single citation to any of the predecessor cases under the habitual offender or liquor law recidivist provisions.

For authority, the court noted that other jurisdictions had adopted the documentary evidence prima facie rule. *See* Annot., 11 A.L.R.2d 870 (1950) (discussing cases dealing with the necessity, character, and sufficiency of evidence of identity for the purposes of a statute enhancing punishment in case of prior conviction).

59. It should be noted that *Williams* was decided prior to the modern bifurcation requirement

ness of the name, the character of the former crime or crimes,<sup>60</sup> and the place of its commission.”<sup>61</sup> The court did not, however, advise trial courts that a jury instruction to this effect was necessary.<sup>62</sup> As discussed below, the court’s newfound emphasis on jury consideration signaled a shift in the court’s focus which resulted in the application of a much more arduous standard of appellate review, from the defendant’s perspective, than had previously been applied.<sup>63</sup>

### B. *Application of the Modern Standard*

With regard to the quantum of evidence necessary to sustain a conviction, the history of the case law applying Oklahoma’s habitual offender provisions bespeaks three significant changes in judicial thinking. Appellate review under the initial documentary evidence standard, which was derived from the early application of the liquor law recidivist statutes, turned on a critical evaluation of the written contents of the documents introduced as proof of former conviction.<sup>64</sup> Even minor discrepancies in pleading and proof were not tolerated. Gradually, the focus of review shifted away from the specific words and phrases appearing in court documents toward a more exacting scrutiny of the trial record as a whole, with particular emphasis placed on the need for independent direct or circumstantial evidence connecting the defendant with the alleged prior convictions.<sup>65</sup> The modern *prima facie* standard, which has become quite entrenched since its early application in the 1960’s, can best be summarized as one of judicial disengagement. The

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in prosecutions under the habitual offender statutes. See *infra* note 69 and accompanying text for a discussion of the modern bifurcation procedure. Thus, the jury’s consideration of “all the surrounding facts and circumstances” took place while it was deliberating the defendant’s guilt on the principal charge.

60. For the purpose of assessing identity *as a prior offender*, it is curious that the court believed that the “character of the former crime or crimes” was a relevant criterion. Moreover, detailed evidence concerning the character of alleged prior offenses, if at all relevant to the question of identity, would have been extremely prejudicial to the defendant, particularly if the evidence was inadmissible for the purpose of proving the defendant’s guilt on the principal charge. Cf. OKLA. STAT. tit. 12, § 2404 (B) (1981) (evidence of prior crimes not admissible to prove “bad” character of defendant in order to show that he acted in conformity therewith; it may, however, be admissible as proof of identity on the principal offense); *Burks v. State*, 594 P.2d 771 (Okla. Crim. App. 1979) (prior to admission, prosecution must prove the defendant’s commission of former crimes by clear and convincing evidence).

61. *Williams*, 364 P.2d at 704.

62. In subsequent cases, the court has at least implied that a jury instruction directing consideration of the totality of circumstances present should be given. See, e.g., *Sessions v. State*, 494 P.2d 351, 354 (Okla. Crim. App. 1972).

63. See *infra* notes 78-81 and accompanying text.

64. See *supra* notes 10-17 and accompanying text.

65. See *supra* notes 37-50 and accompanying text.



elevation of documentary evidence to its current status as presumptive proof of recidivism has had the residual effect of reposing a vast amount of discretion in trial juries whose determinations are practically unassailable on appeal.

The court has frequently held that all questions of fact are vested exclusively in the domain of the jury once a prima facie case has been established by the prosecution.<sup>66</sup> If a prima facie case has been met, the court will not interfere with a jury verdict, notwithstanding the existence of sharp conflicts in the evidence or the fact that inferences from the evidence contradictory to the verdict were more plausible.<sup>67</sup> Although this rule is a common general principle of criminal procedure, it takes on new meaning in habitual offender prosecutions where, by judicial fiat, the prosecutorial burden is extremely slight.<sup>68</sup> A brief look into the typical jury perspective illuminates the hazards faced by defendants in habitual offender cases.

The modern bifurcation procedure for habitual offender cases was established by the court with an eye toward protecting the defendant from the inherent prejudice associated with apprising the jurors of the defendant's alleged former crimes prior to determination of guilt on the principal offense.<sup>69</sup> The court decisions, however, fail to recognize that a

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66. See *Cardenas v. State*, 695 P.2d 876 (Okla. Crim. App. 1985); *Renfro v. State*, 607 P.2d 703, 705 (Okla. Crim. App. 1980).

67. See *Glover v. State*, 557 P.2d 922, 927 (Okla. Crim. App. 1976), *cert. denied*, 431 U.S. 922 (1977) (quoting *Williams v. State*, 373 P.2d 91, 94 (Okla. Crim. App. 1962)).

68. See *infra* notes 85-97 and accompanying text for a discussion of the kinds of documentary evidence which can sustain the prosecution's prima facie case.

69. The court adopted the bifurcation procedure in *Harris v. State*, 369 P.2d 187 (Okla. Crim. App. 1962). In a syllabus to the opinion, the court set forth the following requirements:

5. The information should be divided into two parts. In the first the particular offense with which the accused is charged should be set forth, and this should be upon the first page of the information and signed by the prosecuting officer. In the second part former convictions should be alleged, and this should be upon the second page of the information, separable from the first page and signed by the prosecuting officer.

6. The entire information should be read to the accused and his plea taken in the absence of the jurors. When the jury has been impaneled and sworn, there should be read to them only that part of the information which sets forth the crime for which the accused is to be tried. The trial should then proceed in every respect as if there were no allegations of former convictions, of which no mention should be made in the evidence or in the remarks of counsel, or in the charge of the court. When the jury retire to consider their verdict, only the first page of the information on which the charged [sic] is set out, should be given to them.

7. The jury at this junction of the trial should be charged with the sole responsibility of reaching a verdict as to the guilt or innocence of the defendant upon the charge for which he is being tried. If the jury then returns with a verdict of guilty, then evidence should be presented to prove the second portion of the information as to the previous convictions. The jury will then retire to assess the punishment within the limits prescribed by statute for the primary offense or if they find he was guilty of a previous conviction, then and in that event they may set the punishment as set forth in [the habitual offender statute].

jury operating under the bifurcated procedure may be similarly prejudiced in the habitual offender stage of the proceeding because it had just convicted the defendant of the principal offense.<sup>70</sup> Indeed, the prejudice may be even greater in the second stage because the jury is certain that the defendant has committed the principal offense. Under the bifurcation procedure, the taint of the "prior" offense, the principal crime, on the juror's perception of the defendant's character is fresh in the juror's mind because the presentation of minute details concerning the defendant's criminal acts has just been completed. At this point in the proceeding, it is unlikely that a jury can address with fairness and impartiality a new factual issue which bears directly on the sentence the defendant will ultimately receive.<sup>71</sup> The extremely slight burden of presumptively establishing the defendant's guilt through documentary evidence coupled with the corresponding jury instruction to this effect act as catalysts to the pre-existing prejudice, thereby increasing substantially the likelihood of conviction.

Further stacking the deck against the defendant is the prosecutorial invective which becomes permissible during the second stage of the proceedings. The stigma of alleged prior convictions can invoke a lashing derogation of the defendant's character during the prosecutor's closing argument.<sup>72</sup> For example, in *Louder v. State*,<sup>73</sup> the court upheld commentary which explained to the jury that the defendant "likes to burglarize things."<sup>74</sup> In *Fogle v. State*,<sup>75</sup> the court approved the practice of referring to the defendant as a "career criminal" and allowed the prosecutor to suggest to the jury that the defendant will commit more crimes

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*Id.* at 189.

This court established procedure was later enacted into law by the Oklahoma legislature, see OKLA. STAT. tit. 22, § 860 (1981). It should be noted that the procedure is inapplicable in cases where the former conviction is an element of the principal offense. See, e.g., *Hines v. State*, 684 P.2d 1202 (Okla. Crim. App. 1984) (jury must have knowledge of defendant's prior felony conviction in order to convict him of possessing firearm after former conviction of felony).

70. Although the legislative purpose underlying the habitual offender provisions is to impose lengthier punishments on recidivists for subsequent offenses, the factual question of recidivism focuses on prior crimes. In deciding the issue, the jury should not be influenced by the defendant's guilt on the principal charge.

71. As a general rule in Oklahoma, the jury assesses the sentence against the defendant. The judge, however, may determine the length of punishment if the defendant affirmatively requests him to do so, or if the jury fails or is unable to do so. OKLA. STAT. tit. 22, §§ 926-28 (1981).

72. The opprobrious closing statements permissible during the second stage of the case would, in most cases, amount to reversible error if uttered during the first stage. See *Fogle v. State*, 700 P.2d 208, 211 (Okla. Crim. App. 1985); *Conway v. State*, 581 P.2d 40 (Okla. Crim. App. 1978).

73. 568 P.2d 344 (Okla. Crim. App. 1977).

74. *Id.* at 348.

75. 700 P.2d 208 (Okla. Crim. App. 1985).

in the future.<sup>76</sup> Even predicting the defendant's return to a life of crime is permissible if it "is not unfounded in the evidence."<sup>77</sup> In sum, the defendant in the second stage of a habitual offender proceeding is likely to face a jury that is both predisposed toward conviction and inclined to impose the maximum sentence allowable.

A final factor which ultimately weighs heavily against defendants in habitual offender prosecutions is the nature and amount of scrutiny with which the court reviews appeals of habitual offender convictions. An initial hurdle arises from the court's long-standing precedent that in reviewing evidence to determine whether the state has established a prima facie case, it will view the evidence in the light most favorable to the state.<sup>78</sup> Secondly, as previously observed, an adverse verdict rendered on prima facie evidence is practically unchallengeable on sufficiency grounds.<sup>79</sup> Therefore, the prosecution enjoys a relatively light burden of proof to establish its prima facie case,<sup>80</sup> and an exceedingly small number of appellate modifications<sup>81</sup> result from the appeals.

Standing alone, the preceding peculiarities of habitual offender cases may not appear so egregious. When they are considered in conjunction

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76. *Id.* at 211. See also *Roberts v. State*, 550 P.2d 971, 973 (Okla. Crim. App. 1976) (upholding the prosecutor's use of the word "thief" when referring to defendant in closing statement).

77. *Fogle*, 700 P.2d at 211. The court's use of a double negative raises some interesting possibilities. Is a reference to future acts of recidivism justified when no credible evidence of former convictions has been presented? Certainly the prosecutor, on appeal, can point out that the jury had just determined the defendant's guilt for the principal offense. In short, the court has not yet recognized the potential effect such obloquy may have on a jury in the rare case where it finds the defendant not guilty on the habitual offender charge. Because the bifurcation procedure postpones sentencing on the principal offense until the completion of the second stage of the proceedings, the prosecution's comments, although error if uttered during the first stage, would be communicated to the jury with the same prejudicial impact. Simply because the court frequently exercises its power to reduce sentences because of the commission of irreversible error does not mean it should approve practices which tend to "set the stage" for such mistakes to occur.

78. *Renfro v. State*, 607 P.2d 703, 705 (Okla. Crim. App. 1980); *Alderman v. Territory*, 1 Okla. Crim. 562, 98 P. 1026 (1909).

79. See *supra* note 67 and accompanying text.

80. The effort required of the prosecutor is truly minimal. In most cases, a telephone call or a computer name check will produce prima facie evidence. In sum, the duties of the prosecutor can be entirely delegated to a secretary. The prima facie rule encourages prosecutors to include habitual offender charges in charging documents upon the uncovering of a judgment and sentence form bearing the defendant's name without any further investigation. Naturally, this leads to the adoption of a "wait and see" attitude: if the defendant is able to produce rebutting evidence, the prosecutor has lost nothing because his conviction on the principal offense is already secured.

81. The court has ruled that errors committed in the second stage of a habitual offender proceeding do not justify reversal, but rather sentence modification, because the conviction on the principal charge remains outstanding. See, e.g., *Shoemaker v. State*, 479 P. 2d 621 (Okla. Crim. App. 1971) (where improper instruction to jury might have caused jury to impose greater sentence, sentence was modified from not less than 15 years nor more than 45 years to indeterminate term of not less than 10 years nor more than 30 years). The court's power to modify sentences is statutory. See OKLA. STAT. tit. 22, § 1066 (1981).

with the documentary evidence prima facie standard, however, it becomes apparent that defendants have suffered, in the last twenty years, a rather large diminution of their rights. Defendants charged under a habitual offender provision are in a precarious position because of the nature of the documentary evidence which is deemed to satisfy the prosecution's case and because they are literally forced to present rebutting evidence under the current standard. Juror prejudice, the inflammatory remarks of prosecutors, and the meager standard of appellate review only add to the defendant's woes.

As previously observed, the *Williams* documentary evidence rule evolved as a result of the court's belief that corroborating evidence, direct or circumstantial, might be difficult to obtain. Thus, the court had no qualms with shifting the burden of production to the defendant to rebut the documents introduced to prove his former conviction. Perhaps the court felt that defendants could more easily acquire the necessary rebutting evidence in cases of mistaken identity. The validity of this proposition, however, is by no means unquestionable. If the prosecution is unable to find any person with personal knowledge of the defendant's previous conviction, the defendant faces a similar hardship in producing someone who can testify that the defendant was not previously convicted.<sup>82</sup> Moreover, the rule invites prosecutors to end their investigations when they have "uncovered" a court record bearing a name similar to the defendant's.<sup>83</sup> A defendant mistakenly charged under a habitual offender statute may be tempted not to engage in a pretrial search for rebutting evidence because of an erroneous belief that the prosecution will be unable to prove a former conviction that did not occur. Indeed, it is reasonable to assume that such a defendant would more likely concentrate on preparing his defense to the principal charge.

The documentary evidence prima facie rule also betrays a judicial

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82. The defendant faces this hardship, for example, when the alleged prior conviction occurred outside of Oklahoma and the defendant had been incarcerated since the time of his arrest on the principal charge. Of course the defendant may always choose to testify in his own behalf. However, the weight accorded the defendant's testimonial denials during the second stage of the proceedings would likely be much less than the prejudicial consequences of his choice to take the stand. The prosecutor can impeach the defendant with his former conviction on the principal offense, effectively reminding the jury that it has convicted the witness of a felony, and introduce general character evidence against the defendant. It can be fairly stated that during the second stage of a habitual offender prosecution, a defendant would be unwise to take any chances of exacerbating the negative light in which he is already held by the jury. Therefore, the documentary evidence standard imposes a Hobson's choice on the defendant who is unable to produce a rebutting witness.

83. The sheer number of cases reported in which the state relied solely on court records to prove the defendant's former conviction support this assertion.

conviction that such evidence is inherently reliable as proof of the defendant's former conviction.<sup>84</sup> Unfortunately, the nature of the documentary evidence which has been deemed to satisfy the standard belies the court's conviction. For example, the most typical case arises where the prosecution utilizes a certified copy of an Oklahoma judgment and sentence form as proof of prior conviction.<sup>85</sup> Introduction of judgment and sentence forms has consistently been upheld as satisfying the prosecution's prima facie case.<sup>86</sup> Judgment and sentence documents, however, are not uniform throughout the state. Each judicial district typically composes its own version. As a general rule, the only information on the form concerning the identity of the defendant is his name typewritten into a blank space on the sheet. No other identifying characteristics are set forth.<sup>87</sup>

In cases where judgment and sentence forms were unavailable, the court has cast its imprimatur on other kinds of documentary evidence submitted as proof of former conviction. In *Wade v. State*<sup>88</sup> for instance, the prosecution proved the defendant's prior Louisiana convictions through the introduction of a "court minute" which named the defendant and recited that sentence was rendered against him upon a plea of guilty to the felony charge. The documents did not bear the presiding judge's signature. On appeal, the defendant challenged the document as inadmissible hearsay, not within the exception for "final judgments."<sup>89</sup> Upholding the conviction, the court reasoned that the "final judgment" exception, which requires, along with other elements, the presence of the presiding judge's signature, "applies by its terms to a final judgment offered to prove a fact essential to the judgment. This is not the case where the fact to be proved is the historical occurrence of the conviction for

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84. Would it not be reasonable to infer, where corroborating evidence is unavailable, that documentary evidence is less reliable because the prosecution cannot corroborate it?

85. See *Fogle v. State*, 700 P.2d 208, 212 (Okla. Crim. App. 1985); *Welliver v. State*, 620 P.2d 438, 440 (Okla. Crim. App. 1980).

86. Prior to 1981, proof of out of state convictions by documentary evidence fell within an Oklahoma statute requiring triple certification. OKLA. STAT. tit. 12, § 485 (1971). In 1981, the court held the statute inapplicable to the admission of foreign court documents as proof of prior conviction in habitual offender proceedings. *Wade v. State*, 624 P.2d 86, 91 (Okla. Crim. App. 1981). Such documents now typically qualify for admission under the self-authentication provision of the Oklahoma Evidence Code. OKLA. STAT. tit. 12, § 2902 (1981).

87. Some districts indicate on their forms that the defendant is over twenty-one years of age; others actually state the defendant's age. The defendant's name is the only additional identification provided. Thus, the court in adopting the documentary evidence standard, also necessarily embraced the rule that identity of name constitutes prima facie evidence of identity of person.

88. 624 P.2d 86 (Okla. Crim. App. 1981).

89. *Id.* at 91.

habitual offender purposes.”<sup>90</sup> The court went on to hold the court minute admissible under the hearsay exception for public records because “no issue as to the definition of judgment is presented.”<sup>91</sup> Moreover, the court minute was deemed sufficient to establish prior conviction.<sup>92</sup> “Final judgments” are not the only acceptable means of proving prior convictions; therefore, the exact nature of alternative “public records” which will satisfy the state’s prima facie case remains an open question.<sup>93</sup>

Equally unclear is the necessary degree of uniformity between the name appearing on the court records and the name of the defendant on trial. Although the prima facie rule vests ultimate discretion in the jury to determine whether the defendant is the same person whose name appears on the introduced documents, the reported decisions demonstrate that for purposes of establishing the prima facie case, the name listed on the court records need not exactly match the defendant’s name. For example, middle initial or middle name discrepancies between the documented name and the defendant’s name will not extinguish the prima facie case.<sup>94</sup> Moreover, the court has intimated that the entire name of the defendant may be different from that appearing on the documents so long as the names are “similar.”<sup>95</sup> Finally, it should be noted that the court has on occasion implied that if a defendant’s name is “sufficiently common,” a prima facie case based solely on documentary evidence bear-

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90. *Id.*

91. *Id.* (citation omitted).

92. *Id.* at 92. The court noted that a judge’s signature is not required under Louisiana law and that use of court minutes to prove the former conviction charge is an accepted mode of evidence in Louisiana’s own courts for proving habitual offender charges.

93. At a minimum, acceptable documentary evidence must be certifiable and must also show that the defendant was represented by counsel in the prior case wherein the defendant was convicted of a penitentiary offense. *See, e.g.,* *Lawson v. State*, 486 P.2d 759, 762 (Okla. Crim. App. 1971) (police “rap sheet” held inadmissible to prove former conviction); *Pearce v. State*, 456 P.2d 630, 632 (Okla. Crim. App. 1969) (Kansas trial judge’s “certificate” held insufficient to prove former conviction). The nature of the “certificate” deemed inadequate in *Pearce* is not described in the opinion; after *Wade*, it seems possible that such a certificate would be sufficient if it complied with the minimum elements of proof in the state from which it originated. *See supra* notes 88-92 and accompanying text for a discussion of *Wade*. *See also* *State v. Frazier*, 563 P.2d 656, 658 (Okla. Crim. App. 1977) (a certified order of deferment of judgment and sentence should be given the same weight on the issue of identification as a judgment offered as proof of a prior conviction).

94. *See, e.g.,* *Lewis v. State*, 681 P.2d 772, 774 (Okla. Crim. App. 1984) (defendant Alexander Dumas Lewis’ argument that judgment and sentence bearing name Alexander D. Lewis was insufficient to create presumption of identity held “wholly without merit”); *Dodson v. State*, 674 P.2d 57, 59 (Okla. Crim. App. 1984) (fact that defendant’s middle initial was missing did not render judgment and sentence insufficient as prima facie evidence of identity of the person).

95. *Cardenas v. State*, 695 P.2d 876, 879 (Okla. Crim. App. 1985). In *Cardenas*, the court did not disclose the disparity between the defendant’s name and the name appearing on the judgments and sentences introduced as proof of his former convictions.

ing the common name may be negated.<sup>96</sup> The court, however, has never set forth standards for determining "sufficient commonality," and has only once held that the defendant's name met the unspecified standard.<sup>97</sup>

The recent concurring opinion of Judge Parks in *Henager v. State*<sup>98</sup> analyzes the application of the prima facie identity aspect of the prima facie rule, whereas the majority opinion merely reaffirms the panoply of decisions applying the documentary evidence prima facie rule.<sup>99</sup> In *Henager*, the defendant on appeal challenged the constitutionality of the rule and urged the court to adopt the Tenth Circuit's rule<sup>100</sup> that corroborating evidence of identity must be introduced to support a conviction under a habitual offender statute. Quite surprisingly, Judge Parks declared that the court's prior cases did not establish a prima facie rule based on identity of name.<sup>101</sup> He interpreted the case law as "clearly indicat[ing] that there must be other 'facts and circumstances' for the jury to consider in reaching their verdict."<sup>102</sup> In his opinion, however, the fact that the defendant possesses an "unusual" name is an additional "fact and circumstance" which justifies a jury finding of identity of per-

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96. See *Brown v. State*, 578 P.2d 364, 366 (Okla. Crim. App. 1978) ("John Hubert Brown" not sufficiently common to warrant negation); *State v. Frazier*, 563 P.2d 656, 658 (Okla. Crim. App. 1977) ("Dennis Frazier" not sufficiently common as to negate the prima facie identification).

97. *Smith v. State*, 695 P.2d 1360, 1364 (Okla. Crim. App. 1985) ("James E. Smith" deemed to be "far too common a name" to support prima facie case grounded solely on documents bearing that name). In *Smith*, the court observed that the documents introduced as proof of former conviction originated from Texas and were eleven years old. Perhaps, the court's observation may serve to distinguish a future case involving a defendant with a common name if the alleged prior conviction is local and recent.

98. 716 P.2d 669 (Okla. Crim. App. 1986).

99. One interesting statement in the opinion refers to the defendant's claim that the documentary evidence prima facie rule is constitutionally deficient and that the court should adopt the Tenth Circuit's corroboration requirement. The court noted that "adoption of [the Tenth Circuit's] position may, at some future point, be necessary." *Id.* at 676. One wonders why the court would make such a statement if it did not suspect that its rule stood on questionable footing.

100. See *supra* note 39 and accompanying text.

101. The Judge asserted that "this Court has never held that identity of name *alone* is sufficient evidence of former conviction." *Henager*, 716 P.2d at 677-78. However, Judge Parks own opinion in *Gross v. State*, 706 P.2d 914 (Okla. Crim. App. 1985), rendered just five months earlier, tends to belie this assertion. The prosecution in *Gross* introduced, in addition to prior judgment and sentence forms, "mug shots" of the defendant and a document containing a copy of his fingerprints from his former conviction. Writing for the court, Judge Parks stated the following: "We first note that the State produced the appellant's photograph in addition to the judgment abstract. Furthermore, even if the State had produced only the abstracts, *the similarity of names would have provided a sufficient basis for the jury's finding.*" *Id.* at 915 (emphasis added).

102. *Henager*, 716 P.2d at 678. The Judge cited *Williams v. State*, 364 P.2d 702, 704 (Okla. Crim. App. 1961) for this proposition. See *supra* notes 52-63 and accompanying text for a discussion of *Williams*. Nowhere in *Williams*, however, is there a requirement that evidence must be introduced over and above court records bearing the defendant's name to sustain the state's prima facie case. The reference to "facts and circumstances" in *Williams* only indicates that the jury should be instructed to take into account surrounding facts and circumstances on the identity issue.

son. The correct rule according to Judge Parks is that, in the absence of additional "facts and circumstances," identity of name only *supports* a finding of identity of person but is not *sufficient* standing alone to sustain such a finding.<sup>103</sup>

Judge Parks' statement that an unusual name constitutes an additional "fact and circumstance" sufficient to sustain a jury's finding of identity is problematic. Without providing any "standard of unusualness," it will not only be difficult to apply; but, when applied, it might open the door to an equal protection challenge. Clearly, an additional burden placed on the shoulders of a criminal defendant which is based on the defendant's name, something which he is powerless to control, amounts to a classification properly subject to fourteenth amendment analysis. In light of the frequency of habitual offender appeals, an analysis becomes necessary.

In view of the court's decision in *Smith v. State*,<sup>104</sup> where it held that the name "James E. Smith" was too common to support a *prima facie* case based on documents alone, it is odd that Judge Parks in *Henager* chose to frame a "new" analysis grounded on unusualness of name as an *additional* fact or circumstance bearing on the establishment of a *prima facie* case. Perhaps he perceived a potential constitutional invalidity in the rule that identity of name, without more, is sufficient to prove beyond a reasonable doubt identity of person. If such an invalidity exists, however, it is doubtful that Judge Parks' new way of addressing the situation will provide a sufficient cure.

#### IV. THE PRIMA FACIE RULE AND THE CONFRONTATION CLAUSE

From the foregoing analysis, it should not pass unnoticed that the *prima facie* rule allows prosecutors to establish their case without calling a single witness to the stand. The punishment stage of the habitual offender proceeding is complete upon the introduction of self-authenticating hearsay evidence. In our adversarial system, however, the denial of the criminal defendant's right of cross-examination is not rendered automatically constitutional simply because the proffered evidence fits within a legislatively recognized hearsay exception. Yet, this is the practical effect of the *prima facie* rule.

The Supreme Court has invoked the protections embodied in the

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103. *Henager*, 716 P.2d at 678.

104. 695 P.2d 1360 (Okla. Crim. App. 1985). *See supra* note 97 and accompanying text.



sixth amendment confrontation clause<sup>105</sup> to reverse convictions when the defendant was deprived an opportunity to challenge critical inculpatory evidence through cross-examination, notwithstanding the technical admissibility of the evidence.<sup>106</sup> The decisions evince a marked preference by the Court for the production of witnesses over hearsay evidence.

To date, the Oklahoma Court of Criminal Appeals has not reconciled the mandates of the confrontation clause with its procedure for establishing the prima facie guilt of habitual offenders.<sup>107</sup> Clearly, the

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105. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The right to confrontation is essentially a "trial right" which, in 1965, was made applicable to the states through the due process clause of the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965).

106. In *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), the Court recognized that the confrontation clause "countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule' (which forbids its use)." (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)). In *Roberts*, the Court held that the sixth amendment bars admission of hearsay statements asserted by declarants who are unavailable for cross-examination at trial, unless the proffered statement bears adequate "indicia of reliability." Reliability, however, can be inferred if the evidence falls within a "firmly rooted hearsay exception." *Roberts*, 448 U.S. at 66. See also *California v. Green*, 399 U.S. 149, 156-57 nn.9-10 (1970) ("it is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause").

In the most recent case addressing the subject, the Court reaffirmed that "there are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Lee v. Illinois*, 106 S. Ct. 2056, 2062 (1986) (quoting *Pointer v. Texas* 380 U.S. 400, 405 (1965)). In *Lee*, the defendant's murder conviction was based on the trial court's substantive use of a co-defendant's hearsay confession (the co-defendant did not testify) implicating the defendant. The Court determined that accomplice confessions, despite their technical admissibility in joint trials, are presumptively unreliable and the trial court's reliance thereon deprived the defendant of her rights guaranteed by the confrontation clause.

107. On three occasions, the court has superficially addressed the sixth amendment confrontation clause implications of its recidivist procedure. In *Hardin v. State*, 649 P.2d 799 (Okla. Crim. App. 1982), the defendant asserted on appeal "that the mere presentation of the judgment and sentence documenting his prior conviction, without providing an authenticating witness, denied him of his right to confront witnesses against him and to cross-examine the witnesses." *Id.* at 803. Holding that "an authenticating witness clearly is not required," the court chided the defendant for his failure to support his sixth amendment argument "with any reference to evidence or citation of authority." *Id.* Aside from restating its prima facie rule, the court furnished no further reasoning for its holding. It should be noted that the claim was directed only to the hearsay use of the judgment and sentence. At trial, the defendant submitted to cross-examination and admitted the existence of prior convictions. Therefore, any assertions concerning the identity issue, had they been made, would have probably encountered harmless error analysis. This writer sympathizes with the defendant's failure to cite appropriate authority because little authority exists which is directly applicable to the issues presented.

In *Tucker v. State*, 620 P.2d 1314 (Okla. Crim. App. 1980) and *Williams v. State*, 661 P.2d 911 (Okla. Crim. App. 1983), the defendants claimed due process error in the trial court's handling of pre-trial stipulations in which they had admitted they were the same persons who had been previously convicted of crimes based on judgment and sentence forms. In *Tucker*, the defendant asserted that the stipulation, which was not a guilty plea, had the effect of impermissibly relieving the state of its burden of proving the existence of his prior convictions beyond a reasonable doubt. *Tucker*, 620

prosecution's case relies on the introduction of hearsay evidence which is admitted through the well-recognized exception for "public records." The document, typically a judgment and sentence form, is used first for the truth of the matter it asserts—that the person named in it has suffered a previous conviction. Arguably, no further hearsay problem is presented when the prosecutor utilizes the document to establish the critical identity link between the defendant on trial and the person whose name appears on the document. In this secondary function, however, the name appearing on the document takes on independent significance—it establishes the existence of the name itself. Thus, the relevancy of the court record derives, in the first instance, from its inherent reliability as proof of the existence of a prior conviction, which justifies its exception from the hearsay rule, and then, from the similarity of names. Although this distinction<sup>108</sup> has never been identified in the reported cases, it raises

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P.2d at 1317. Moreover, the defendant urged that the stipulation in effect acted as an (invalid) waiver of his right to confront and cross-examine witnesses against him. The court noted:

The stipulation in no way relieved the State of its burden of proof. . . . [T]his burden was met [because] [c]opies of the judgments and sentences with the name of the appellant thereon were entered into evidence. This alone, in the absence of rebutting evidence, could have supported a finding that there had been former convictions. Such a finding was merely buttressed by the stipulation of the appellant.

*Id.* (citation omitted).

More importantly, on the second claim, the court determined that the stipulation entered into was not a guilty plea, which under due process standards would have required the judge to inform the defendant that he was relinquishing his rights to confront and cross-examine witnesses against him. *Id.* at 1317-18. Because the judgment and sentences entered into evidence constituted independent prima facie proof of his former conviction, the court held that by virtue of the stipulation "The appellant waived his right to confront and cross-examine the State's witnesses as to his former felony convictions." *Id.* at 1318.

The facts in *Williams* are nearly identical to those of *Tucker*. The defendant asserted that his stipulation that he was one and the same person who had been previously convicted of armed robbery in Kentucky amounted to a guilty plea and failed to comply with due process requirements. *Williams*, 661 P.2d at 913. The court's response is worthy of quotation:

We have previously addressed the issue now before us, and for the reasons stated in *Tucker v. State*, . . . , this assignment of error is without merit. A copy of the judgment and sentence, with the name of the appellant appearing thereon, was entered into evidence; this alone, in the absence of rebutting evidence, could have supported the jury's finding. The stipulation was not to the former conviction, but only what certain testimony would be; the appellant waived his right to confront and cross-examine the State's witnesses as to his former felony conviction.

*Id.* at 913-14.

These cases are as important as they are puzzling. Without question, the court's statements indicate recognition of the defendant's right to confront and cross-examine prosecution witnesses in the punishment stage of the habitual offender proceeding. The obviously puzzling factor is that in both cases, the court clearly affirms that the prosecution need not call any witnesses to the stand. No explanation of this inconsistency is offered. Although the *Williams* court adverted to "the reasons stated in *Tucker*," the *Tucker* opinion provides little explanation on this point.

108. To understand this distinction, note that one need not rely on the truth of a document which asserts that *X* committed *Y* crime in later attempting to prove that *X* is the same *X* who committed a subsequent crime. Obviously, however, if it is not first proved that *X* committed *Y*

questions of constitutional magnitude which cannot be cured by resort to the circumstantial guarantees of trustworthiness which justify the hearsay exception permitting the introduction of the documentary evidence.

Many commentators believe that, conditioned upon the specific use made of "public records" at trial, the usual attending circumstances associated with these documents strongly suggest trustworthiness sufficient to overcome the second prong of the Supreme Court's confrontation clause test.<sup>109</sup> Moreover, it has been noted that in the "typical" case where public documents are admitted into evidence, the courtroom presence of the person responsible for creating the document would not be helpful to the accused.<sup>110</sup> Although it might seem that both of these observations should apply to the normal use of court documents to evidence prior convictions in the punishment stage of recidivist proceedings, it is equally clear that neither the historical justification for the hearsay exception itself, nor the absence of a need for confrontation, suitably applies to the circumstantial use of documentary evidence as proof of identity. In short, this use of the court document is entirely unrelated to the indicia of reliability which justify its admission into evidence. While the defendant may not need to cross-examine the document's maker on the issue of whether a prior conviction in fact occurred, his need to test the memory, perception, and sincerity of a person possessing personal knowledge of the critical identity link is readily apparent.

At the same time, however, employment of the court document as the exclusive means of proving identity cannot be considered wholly separate from the fact that the proof springs from evidence which owes its admission to a hearsay exception. Before a finding of identity can be made, the jury must first accept that the name appearing in the document was the true name of the person allegedly convicted (hearsay use), and

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crime, the fact that there is only one person named *X* in the entire world would be irrelevant for the purposes of the recidivist proceeding. Thus, the circumstantial use of the name appearing in the prior court record is conditioned on the hearsay use of the document.

109. See, e.g., Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 225 (1984); Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651, 668 (1970). See also the authorities cited by the Supreme Court in *Ohio v. Roberts*, 448 U.S. at 66 n.9 (1980).

110. See Lilly, *supra* note 109, at 225, 227. Professor Lilly forecasts that the Court would not strictly adhere to the "demonstration of unavailability" prong of the confrontation clause test in situations where the utility of trial confrontation is remote. However, he does observe, "The utility of confrontation cannot always be determined from the particular hearsay exception in question, but will sometimes turn upon the circumstances in which the exception is applied." *Id.* at 227-28. For example, at least one federal circuit has required a demonstration of unavailability prior to the admission of documents under the "business records" exception. See *United States v. Washington*, 688 F.2d 953, 959 (5th Cir. 1982).

second, that the named person was actually convicted as the document asserts (hearsay use). Once these foundational steps are completed, the prosecutor offers the very same piece of evidence as the sole proof of identity. Although the presumed reliability of the document obviously does not extend to the identity question, its use becomes so inextricably intertwined with the preceding hearsay uses that a jury would naturally be misled into thinking that its probative value is uniform on both issues.<sup>111</sup> Certainly, the acknowledgement of a right to confront and cross-examine a witness would permit the defendant to shed light on the distinction.

In sum, a similarity between names may, in the abstract, raise a question of identity sufficient for jury determination, but the modern evidentiary procedure for introducing the similarity to the jury simply ignores the sixth amendment.<sup>112</sup> As previously noted, the current practice tacitly encourages prosecutors to rest their case after producing a minimum amount of evidence. No demonstration of unavailability of witnesses with personal knowledge is required; the defendant stands alone bearing a burden of production against the unchallengeable inferences created by a self-authenticating document.

## V. CONCLUSION

Regardless of the legal theory crafted to challenge the procedure for proving prior convictions, and there are a number of viable possibilities not addressed in this study, the controversy on the identity issue should most accurately and reasonably center on questions of efficacy. The concern that the modern system may not produce a consistently reliable result must be laid to rest, if possible, by convincing proof of a verifiable relationship between names in the abstract and human beings. The court's continuing dogmatic adherence to the *prima facie* rule cannot be

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111. It should again be noted that the typical judgment and sentence form offered as proof of former conviction contains no information about the person convicted other than his name. Perhaps if the state were to adopt a uniform requirement that all districts must include relevant vital statistics concerning the defendant (physical description, address, social security number, and other descriptive information) on judgment and sentence forms, their probative value on the identity issue would be increased to a tolerable level. This, however, would not obviate the prosecutor's responsibility to establish the unavailability of witnesses.

112. Although an extensive sixth amendment analysis is well beyond the scope of this study, it should be noted that the Supreme Court, construing a sentence enhancement procedure under the Colorado Sex Offenders Act, COLO. REV. STAT. ANN. §§ 39-19-1 (1963), held: "Due process . . . requires that he [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson*, 386 U.S. 605, 610 (1967). The Court noted that the case was not unlike cases under recidivist statutes where the habitual criminal issue is a "distinct issue." *Id.*

rendered palatable based on this premise. Absent a showing of at least statistical probability, the presumption of identity should be repudiated.

Every month or two, the Oklahoma Department of Corrections compiles a list of names of persons who are either presently incarcerated in Oklahoma's prisons or have been recently released. A quick glance at the most recent list reveals that the court's presumption that identity of name equals identity of person is in fact a very tenuous reed. Persons bearing identical names are frequently encountered throughout the document.<sup>113</sup> Thus, even if one were to accept the questionable assumption that a person found guilty of committing a crime in Oklahoma has likely been the subject of prior Oklahoma convictions, the list itself suggests that it would still be error to embrace the court's *prima facie* identity rule. Of course, the reality of the situation is that the rule does not limit its mischief to actual recidivists, because it can apply to any unfortunate person who happens to share his name with another.

Over the years, the Oklahoma Court of Criminal Appeals has reduced the prosecutorial burden of establishing the existence of a prior conviction to a largely ministerial duty. The evidence deemed adequate by the court, in many cases, affords only slight indicia of reliability. At the same time, however, the effort required of the defendant to rebut the prosecution's *prima facie* case has risen to a level which cannot fairly be labeled a burden of production. In effect, though not in name, the defendant must disprove the habitual offender charge by convincing an already hostile jury that he has not suffered a previous felony conviction. Regardless of whether one chooses to call it "proof" or "production," the shifting burden procedure adopted by the court is troubling in light of the marginal reliability of the prosecution's evidence. An opportunity

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113. The list is replete with examples too numerous to document here. For the disbelievers, however, note that as of June, 1986 the Department of Corrections maintained active files on: six persons named "James Alexander," nine persons named "Michael Allen," eight persons named "Bill Bailey," eight persons named "James Bailey," six persons named "Larry Barnes," five persons named "James Berry," three persons named "David Blackwell," seven persons named "James Bowen," twenty-one persons named "James Brown," three persons named "Steven Bruner," four persons named "David Harjo," three persons named "Ronald Gipson," four persons named "James Hale," four persons named "David Henderson," four persons named "Charles Henry," four persons named "Ronald Hicks," seven persons named "Richard Hill," three persons named "Richard Holloway," and three persons named "Willie Houston." Adding common middle initials, note that the department has active files on: three persons named "Jerry D. Jackson," three persons named "Larry D. Jackson," six persons named "Billy R. Johnson," six persons named "David L. Johnson," six persons named "Robert L. Johnson," four persons named "Richard W. King," three persons named "Robert E. Lee," three persons named "Gary L. McDonald," three persons named "Richard E. Moore," and three persons named "Jerry D. Powell." This listing of name similarities by no means exhausts the similarities on the file. The above names were picked out at random after looking at the file, which contains thousands of names, for no more than twenty minutes.

to cross-examine witnesses in the punishment stage of the case, coupled with a requirement of independent corroboration of identity, would adequately relieve the problem by instating a procedure more likely to achieve an accurate result which comports with traditional notions of criminal justice.

APPENDIX

IN THE DISTRICT COURT OF OKMULGEE COUNTY  
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff	)	
	)	
-VS-	)	No. CRF
	)	
_____, Defendant	)	

*JUDGMENT AND SENTENCE SUSPENDED  
ON PLEA OF GUILTY*

Now on this \_\_\_\_ day of \_\_\_\_\_, 19\_\_, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant \_\_\_\_\_ being personally present in open court, and being duly represented at all appearances before this court by h\_\_\_\_\_ attorney of record, \_\_\_\_\_, and having been legally charged with the offense of \_\_\_\_\_ and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly entered h\_\_\_\_\_ plea of guilty to the crime of \_\_\_\_\_ after having been duly advised of h\_\_\_\_\_ rights and the effect of such plea; and it appearing to the court that said defendant is of the age of \_\_\_\_\_ years and the defendant having been asked by the court whether h\_\_\_\_\_ has any legal cause to show why judgment and sentence should not be pronounced against h\_\_\_\_\_, and \_\_\_\_\_ he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of \_\_\_\_\_.

It is therefore Ordered, Adjudged, and Decreed by the court that \_\_\_\_\_ is sentenced to a term of \_\_\_\_\_ years under the direction and control of the Department of Corrections of the State of Oklahoma for the crime of \_\_\_\_\_ and said of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at \$\_\_\_\_\_, for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of h\_\_\_\_\_ right of appeal.

It is further Ordered, Adjudged, and Decreed by the court that this judgment and sentence shall be and is suspended according to the rules imposed by the court and attached hereto.

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District Judge



