2019

*Nolo Contendere* Convictions: The Effect of No Confession in Future Criminal Proceedings

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NOLO CONTENDERE CONVICTIONS: THE EFFECT OF NO CONFESSION IN FUTURE CRIMINAL PROCEEDINGS

Ramy Simpson

I. INTRODUCTION

It is well established that evidence of a defendant's prior convictions can significantly impact the outcome of a criminal trial. Therefore, society has an interest in ensuring that the conviction reliably proves that the defendant committed the prior crime. When courts admit convictions into evidence for purposes allowed by the Federal Rules of Evidence or applicable state rules, the rationale behind their use is that the convictions are reliable and trustworthy. This rationale is also why there is a hearsay exception for admitting them into evidence. However, does the notion that guilt is certain differ based on whether the conviction is the result of a trial, a guilty plea, or a no contest plea? Courts have not wavered in holding that for the purposes of the legal proceeding, a conviction based on a trial or a guilty plea is sufficient to prove that the defendant committed the prior act. However, when a defendant pleads no contest, commonly known as “no contest,” the defendant does not expressly admit guilt, and the judge is not procedurally required to determine whether there is a factual basis for the charge. Is the defendant's guilt here as certain as a conviction based on a trial or guilty plea? Courts have differed on whether the government can proffer records of no contest convictions (hereinafter “no contest convictions”) under Federal Rule of Evidence 404(b) as evidence of prior bad acts. This comment argues that the guilt is less certain, and that because of the lesser degree of certainty, the history of no contest pleas, and the construction of the Federal Rules of Evidence, records of no contest convictions cannot be used to prove prior bad acts under Rule 404(b). Instead, the government must proffer evidence of the facts underlying the no contest conviction to prove matters under 404(b).

3 Hiroshi Motomura, Using Judgments As Evidence, 70 Minn. L. Rev. 979, 988-89 (1986).
4 E.g., United States v. Green, 873 F.3d 846, 865 (11th Cir. 2017) (en banc); United States v. Frederickson, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).
5 Id. Section II(A), (A)(2).
6 The law is clear that the government can proffer records of no contest convictions for impeachment purposes and when a conviction is an element of the crime the defendant is currently charged with, such as the charge of “Felon in Possession of a Firearm.” Therefore, this comment will not take a position on the use of no contest convictions for those purposes.
II. BACKGROUND

Federal Rule of Evidence 404(b)(2) allows proof of prior bad acts if the evidence is used to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” This includes evidence of crimes that the defendant was not charged with.8

For a federal court to admit evidence of prior bad acts, the judge needs to make a preliminary determination under Rule 104(a).9 The judge must determine that “the jury can reasonably conclude that the act occurred and that the defendant was the actor” before allowing the government to use the evidence.10 This is a modest standard that the government can meet with a certified record of a conviction based on a trial or guilty plea, even without any other evidence accompanying the record.11 However, courts differ on whether a record of a nolo conviction can be admitted under 404(b) when considering other provisions of the Federal Rules of Evidence and what a defendant admits when pleading nolo.12

A. An Overview of Nolo Contendere Pleas

It is not entirely certain what a defendant admits when pleading nolo contendere. In Lott v. United States, decided in 1961, the Supreme Court held that a defendant who pleads nolo is implicitly admitting “every essential element of the offense that is well pleaded in the charge,”13 and that it “is tantamount to ‘an admission of guilt for the purposes of the case.’”14 In United States v. Alford,15 decided nine years after Lott, the Supreme Court hedged on the notion that a nolo plea is an admission of guilt. The Court asserted that “it is impossible to state precisely what a defendant does admit when he enters a nolo plea in a way that will consistently fit all the cases.”16 The Court then explained that historically, the plea has not been treated as an “express admission of guilt,” but rather as the defendant simply not contesting the charges and agreeing to be punished as if he or she were guilty.17

Alford did not overrule Lott because its analysis on the issue was dictum and it did not cite Lott in its analysis of the nolo plea. However, Alford’s assertion that it is uncertain what a defendant admits when pleading nolo was highly influential in lower court holdings that a nolo conviction cannot be used in subsequent criminal proceedings to prove that the defendant committed the prior crime.18 Not surprisingly, the Circuit that held that nolo convictions can be used in subsequent criminal proceedings for this purpose cited Lott in

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8 Fed. R. Evid. 404(b)(2).
9 E.g., United States v. Ford, 784 F.3d 1386, 1393-94 (2015); United States v. Green, 617 F.3d 233, 249-50 (3d Cir. 2010); see Fed. R. Evid. 404 advisory committees’ note to 2000 amendments.
11 Id.
12 E.g., United States v. Green, 873 F.3d 846, 865 (11th Cir. 2017) (en banc); United States v. Calderon, 127 F.3d 1314, 1332 (11th Cir. 1997); United States v. Arambula–Ruiz, 987 F.2d 599, 603 (9th Cir. 1993).
13 See infra Section II(B).
14 367 U.S. 421, 426 (1961) (quoting United States v. Lair, 195 F. 47, 52 (8th Cir. 1912)) (internal quotation marks removed).
15 Id. (quoting United States v. Hudson, 272 U.S. 451, 455 (1927)).
17 Id. at 35 n.8. Alford is best known for holding that a defendant may plead guilty even while adamantly declaring innocence if the evidence against the defendant is strong and he pleads guilty at the advice of his counsel to avoid the uncertainty of a sentence after trial. Id. at 38. This opinion created the “Alford plea.” The Court discussed nolo pleas to show that that Constitution allows defendants to accept punishment without expressly admitting guilt if going to trial would likely result in worse consequences. Id. at 35.
18 See infra Section II(B).
its analysis.\(^\text{19}\) The range in interpretations of what defendants admit when pleading nolo has contributed to the circuit split on whether the resulting convictions are admissible to prove the defendant committed the prior crime.

1. How the Nolo Contendere Plea Originated

English common law inspired the use of nolo contendere pleas in the American legal system.\(^\text{20}\) The Supreme Court has even suggested that the plea originated as an early medieval practice where defendants would request to end the criminal case by offering to pay the King money.\(^\text{21}\) When defendants sought this compromise, they did not have to admit guilt.\(^\text{22}\) They only had to submit to the King’s mercy and ask for a fine.\(^\text{23}\) According to an early 19th century treatise, early English law considered this an “implied confession”:

An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king’s mercy, and desiring to submit to a small fine; in which case, if the court think fit to accept of such submission . . . without putting him to a direct confession, or plea (which in some cases seems to be left to discretion), the defendant shall [a] not be estopped to plead not guilty to an action for the same fact, as he shall [b] be where the entry is quod cognovit indictamentum.”\(^\text{24}\)

In English common law, the court entered a judgment of quod cognovit indictamentum after a defendant expressly confessed to the crime, making quod cognovit indictamentum the equivalent of a guilty verdict in the United States today.\(^\text{25}\) This passage shows that defendants who implicitly confessed by submitting to the King’s mercy were allowed to plead not guilty in subsequent proceedings that arose from the same occurrence, but those who expressly confessed were forced to plead guilty in those future proceedings.\(^\text{26}\) Thus, the King provided protections that accompanied “implied confessions,” but these protections were unavailable for “express confessions.”\(^\text{27}\) This philosophy of leniency extended to American courts in the eighteenth and nineteenth century, which believed that nolo convictions could not “rightly be used against [the defendant] in any other case.”\(^\text{28}\)

\(^{19}\) United States v. Frederickson, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).

\(^{20}\) See Alford, 400 U.S. at 35 n.8 (citing old English authorities when explaining how the nolo contendere plea originated).

\(^{21}\) Id.; see 2 Pollock & Maitland, The History of English Law Before the Time of Edward I (1st Ed. 1899) (explaining that English judges could “pronounce a sentence of imprisonment and then allow the culprit to ‘make fine,’ that is to make an end (finem facere) of the matter by paying or finding security for a certain sum of money.”).

\(^{22}\) Alford, 400 U.S. at 35 n.8 (citing Anon., Y.B.Hil., 9 Hen. 6, f. 59, pl. 8 (1431)).

\(^{23}\) Id.

\(^{24}\) 2 William Hawkins, Pleas of the Crown; Or, a System of the Principal Matters Relating to That Subject, Digested Under Proper Heads 466 (8th ed. 1824).

\(^{25}\) Id. (explaining that an express confession “carries with it so strong a presumption of guilt that an entry on record, ‘quod cognovit indictamentum,’ etc., in an indictment of trespass estops the defendant to plead ‘not guilty’ to an action brought afterwards against him for the same matter.”).

\(^{26}\) Id.

\(^{27}\) Id.

\(^{28}\) United States v. Lair, 195 F. 47, 52 (8th Cir. 1912) (citing United States v. Hartwell, 26 F. Cas. 196, 201 (D. Mass. 1869); Commonwealth v. Horton, 26 Mass. 206 (1 Pick.) (1829)).
2. The Procedural Differences Between Nolo Pleas and Guilty Pleas

There are three major procedural differences between nolo pleas and guilty pleas, which help explain why nolo convictions should be treated differently in future litigation. First, Federal Rule of Criminal Procedure 11(b)(3) requires that the judge inquire into the factual basis for a guilty plea before accepting it. The advisory committee notes explain that the inquiry is meant to “protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.”\(^{29}\) However, when accepting a nolo plea, the judge does not have to extend this protection to the defendant because Rule 11(b)(3) purposefully omits nolo pleas from requiring a factual inquiry.\(^{30}\) Thus, a defendant who pleads nolo can theoretically be convicted of a crime outside the range of his conduct.

Second, Federal Rule of Evidence 410 allows evidence of a defendant’s guilty plea if it becomes relevant in future litigation unless the defendant withdrew the plea.\(^{31}\) This means that evidence of the plea is allowed when it results in a conviction. However, Rule 410 expressly bans evidence of nolo pleas, regardless of whether they were withdrawn, in future litigation with the same defendant.\(^{32}\) Therefore, evidence of a nolo plea is not admissible even when the plea results in a conviction, which is inevitable unless the defendant withdraws the plea or the court rejects it.\(^{33}\) It is generally accepted that this ban extends to convictions based on a nolo plea in a civil proceeding arising out of the same facts.\(^{34}\) However, there is uncertainty over whether the inevitable resulting conviction from the plea is admissible against the defendant in another criminal case.\(^{35}\)

Third, Federal Rule of Evidence Rule 803(22), a hearsay exception, states that felony convictions based on guilty pleas are a hearsay exception, but explicitly adds that convictions based on nolo pleas are not an exception.\(^{36}\) These differences indicate that there was a clear congressional intent to treat nolo convictions differently from guilty convictions in future proceedings.

### B. The Circuit Split

The Eighth Circuit was the first Court of Appeals to answer whether a record of a nolo conviction is admissible under Rule 404(b) as evidence of prior bad acts.\(^{37}\) In United States v. Frederickson, the defendant was convicted for to dispose of the case without creating adverse evidence for subsequent civil or criminal litigation.”).

\(^{29}\) Fed. R. Crim. P. 11 advisory committees’ note to 1966 amendments.

\(^{30}\) Id. (“For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea. The factual inquiry is not, therefore, made applicable to pleas of nolo contendere.”).

\(^{31}\) Fed. R. Evid. 410(a)(1).

\(^{32}\) Id. 410(a)(2); see Roger C. Park et al., Evidence Law: A Student’s Guide to the Law of Evidence as Applied to American Trials 229 (3d. 2011) (“In many cases the most compelling motivation to utilize the nolo contendere plea is precisely

\(^{33}\) See Fed. R. Crim. P. 11(c)(5)-(d).


\(^{35}\) See Miller, supra note 34, at 12-13 (explaining that courts are “split over whether Rule 410(a)(2) solely precludes the admission of the nolo contendere plea itself or whether it also precludes admission of the resulting conviction.”).

\(^{36}\) Fed. R. Evid. 803(22)(A).

\(^{37}\) United States v. Frederickson, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).
three counts of knowingly and willfully making threats to harm the President.\textsuperscript{38} Given that the defendant’s intent when making the threats was at issue, the trial court admitted the defendant’s prior nolo conviction for making a false bomb threat under Rule 404(b) to prove his intent in the current case.\textsuperscript{39} On appeal, the Eighth Circuit held that the nolo conviction was admissible.\textsuperscript{40} Quoting the Supreme Court in Lott, it reasoned that there is no basis for distinguishing between guilty convictions and nolo convictions for purposes of admissibility under 404(b) because a defendant who pleaded nolo to a prior crime admitted “every essential element of the offense.”\textsuperscript{41} However, the court did not discuss the statutory distinctions between guilty pleas and nolo pleas nor the propriety of using nolo convictions in future proceedings.

In 2006, the Ninth Circuit inquired about the admissibility of nolo convictions in United States v. Nguyen.\textsuperscript{42} However, the question before the court was not whether the convictions are admissible under 404(b), but more broadly whether they are admissible to prove that the defendant actually committed a prior crime.\textsuperscript{43} In Nguyen, the defendant was convicted for “willful failure to comply with terms of release under supervision.”\textsuperscript{44} The term the defendant allegedly violated stated that the defendant must not “commit any crimes” while on release, and the defendant was convicted of violating this term based solely on two misdemeanors to which he pleaded nolo contendere.\textsuperscript{45} Citing Alford, the Ninth Circuit explained that a nolo plea “is, first and foremost, not an admission of factual guilt.”\textsuperscript{46} It determined that this contributed to nolo pleas being a less reliable indicator of actual guilt than a guilty plea.\textsuperscript{47}

With this as its guiding philosophy, the Ninth Circuit held that Federal Rule of Evidence 410, which explicitly prohibited evidence of nolo pleas, also prohibited “the convictions resulting from them as proof that the pleader actually committed the underlying crimes charged.”\textsuperscript{48} It explained that allowing the convictions resulting from the pleas, but not the pleas themselves, would produce an irrational result.\textsuperscript{49} The court elaborated by stating that “Rule 410’s exclusion of a nolo contendere plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea.”\textsuperscript{50}

Additionally, the court held that nolo convictions are also barred under a Federal Rule of Evidence hearsay exception, 803(22), which includes felony guilty judgments in the exception but expressly excludes judgments based on nolo pleas.\textsuperscript{51} However, the court did hold that records of convictions could be admissible under 803(8), the public records hearsay exception, to prove the mens rea of a defendant accused of a subsequent crime under 404(b), but it still reversed the defendant’s conviction because the evidence was not proffered for that reason.\textsuperscript{52} The court’s holding suggests

\textsuperscript{38} Id. at 1360.
\textsuperscript{39} Id. at 1364.
\textsuperscript{40} Id. at 1365 n.10.
\textsuperscript{41} Id. (quoting Lott v. United States, 367 U.S. 421, 426 (1961)).
\textsuperscript{42} 465 F.3d 1128 (9th Cir. 2006).
\textsuperscript{43} Id. at 1129.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 1130.
\textsuperscript{47} Id. (citing Olsen v. Correiro, 189 F.3d 52, 60 n.8 (1st. Cir. 1999)).
\textsuperscript{48} Id. at 1131.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 1131-32; see Fed R. Evid. 803(22) (Stating that the following is a hearsay exception: “[e]vidence of a final judgment of conviction if: (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea.”).
\textsuperscript{52} Nguyen, 465 F.3d at 1132.
that the Ninth Circuit believes that admitting a prior conviction under Rule 404(b) to prove a defendant’s knowledge or intent in a subsequent crime is distinguishable from using the evidence to prove the defendant was guilty of the prior crime.

Finally, in 2017, the Eleventh Circuit issued an en banc ruling on the matter in *United States v. Green*.53 In *Green*, the defendant was convicted of “being a felon in possession of a firearm or ammunition.”54 The district court admitted evidence of the defendant’s prior 2006 conviction from a *nolo* plea “for being a felon in possession of a firearm, ammunition, or an electric weapon” as evidence of prior bad acts under Rule 404(b).55 The government intended to use the evidence to help prove that the defendant had the intent to possess a firearm on this occasion.56 The judge instructed the jury that the evidence could only be used to assess whether the defendant had the required mental state for the charge he is currently facing.57

In a thoughtful opinion where the court analyzed both the *Frederickson* and *Nguyen* opinions, discussed the policy implications, and detailed the differences between pleas and convictions, the court held that Federal Rule of Evidence 803(22) barred records of *nolo* convictions from being admissible to prove matters under Rule 404(b).58 It explained that admitting the *nolo* conviction under 404(b) was erroneous because it was used to indicate that the defendant committed the prior crime, and thus, the *nolo* conviction was not admissible under 404(b).59 The court elaborated by stating that the government should have presented evidence of the underlying facts of the conviction—that the “Defendant so possessed ammunition on the date in question.”60

However, it limited its ruling to Rule 803(22) because it determined that Rule 410 was “an uncertain basis on which to rest a determination that a *nolo* conviction is not admissible.”61 The court reasoned that the plain language of the Rule only excluded *nolo* pleas, and that because *nolo* convictions were commonly used to prove the fact of conviction,62 this counseled “against a reading that Rule 410 contains an absolute prohibition on the use of *nolo* convictions.”63 The court did not rely on either *Lott* or *Alford* in its holding.

*Frederickson, Nguyen,* and *Green* are the only three federal circuit court cases where the answer to whether *nolo* convictions are admissible as proof the defendant committed the prior crime was central to their holdings. In *Olsen v. Corriero*, the First Circuit recognized the problems with not interpreting Rule 410’s ban on *nolo* entendre pleas to encompass the resulting convictions when the government proffers the evidence to prove the defendant committed a prior crime.64 However, it stopped short of holding that Rule 410 applies to the resulting convictions because the court did not have to answer that question.65

53 873 F.3d 846 (11th Cir. 2017).
54 Id. at 850.
55 Id. at 857.
56 Id. at 868.
57 Id. at 851.
58 Id. at 861-63, 866.
59 Id. at 866.
60 Id.
61 Id. at 865.
62 An example of this would be using a *nolo* conviction to prove that a defendant was a felon in possession of a firearm, rather than using it to prove that the defendant in fact committed the crime that made him a felon.
63 873 F.3d at 865.
64 189 F.3d 52, 60 (1st Cir. 1999) (“If such convictions and sentences were offered for the purpose of demonstrating that the pleader is guilty of the crime pled to, then the *nolo* plea would in effect be used as an admission and the purposes of Rule 410 would be undermined.”).
65 Id. at 62 (“Accordingly, there is no reason here to expand Rule 410 beyond the scope of its plain language, which in relevant part encompasses only *nolo* pleas.” (citation omitted)).
Additionally, in United States v. Adedoyin,66 the Third Circuit suggested that Rules 410 and 803(22) barred the use of nolo convictions to prove that the defendant actually committed the prior crime,67 which is congruent with the holdings in Nguyen and Green. Both the courts in Olsen and Adedoyin only had to answer whether the defendant’s prior nolo conviction could be used to prove that the defendant had been convicted in the past, not whether the defendant actually committed the crime he was charged with.68 Both courts held that the convictions could be admitted to prove the fact of conviction, if that is an essential element to the crime.69

III. ANALYSIS

A. The Key Statutory Distinctions between Nolo Contendere Pleas and Guilty Pleas and the Legislative History of the Federal Rules of Evidence

Federal Rule of Criminal Procedure 11 provides for a key difference between guilty pleas and nolo pleas that helps show that a nolo plea is not tantamount to a guilty plea.70 The difference is that if a defendant pleads guilty, the court must determine that there is a factual basis for the plea.71 The court must ensure that “the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.”72 However, if the defendant pleads nolo, then the court does not need to make a factual inquiry into whether the defendant’s conduct corresponds with the charge.73 This means that if the defendant is charged with the wrong crime, or if the facts are more congruent with a lesser charge, the rules allow the court to convict the defendant anyway because it is within the court’s discretion whether to review the facts. Therefore, even if it is unlikely that the judge will not make a factual inquiry into the basis for the charge, courts must be cautious when evaluating the reliability of a nolo conviction in future proceedings as a procedural matter.

Federal Rule of Evidence 410 provides a second key difference between guilty pleas and nolo pleas. It states that for a guilty plea to be inadmissible against a defendant in a subsequent case, the defendant needs to withdraw the guilty plea.74 However, the defendant’s nolo plea is inadmissible even if the defendant does not withdraw it, and thus, even when it leads to a conviction.75 Therefore, to allow evidence of the conviction that inevitably results from the plea would seemingly undermine any intended benefits that would come with prohibiting evidence of the plea. As the Ninth Circuit stated in Nguyen, construing Rule 410 to permit nolo convictions would produce an “illogical result” and would make Rule 410’s prohibition on nolo pleas meaningless.76

A third distinction is that Federal Rule of Evidence 803(22) makes evidence of a guilty conviction a hearsay exception, but explicitly states that nolo contendere convictions are not

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66 369 F.3d 337 (3d Cir. 2004).
67 Id. at 344 (“It is true that a plea of nolo contendere is not an admission of guilt and thus the fact that a defendant made such a plea cannot be used to demonstrate that he was guilty of the crime in question.” (citing Olsen, 189 F.3d at 60)).
68 Adedoyin, 369 F.3d at 345; Olsen, 189 F.3d at 62.
69 Adedoyin, 369 F.3d at 344; Olsen, 189 F.3d at 61-62.
71 Id. 11(b)(3).
72 Id. advisory committees’ note to 1966 amendments.
73 Id.
74 Fed. R. Evid. 410(a)(1).
75 Id. 410(a)(2).
76 United States v. Nguyen, 465 F.3d 1128, 1131 (9th Cir. 2006).
a hearsay exception. This is an important distinction based on the notion that “an implied confession of guilt cannot rise to the degree of certainty which would make it the equivalent of an express confession.”77 The differences in the Federal Rules of Criminal Procedure and the Federal Rules of Evidence suggest that a guilty plea is more serious, and more indicative of guilt, than a nolo plea.

Furthermore, the legislative history of the Federal Rules of Evidence discusses nolo pleas, albeit briefly, and it leans towards an interpretation that the convictions are barred under Rules 410 and 803(22).78 The advisory committee that drafted the Federal Rules of Evidence supported Rule 803(22) by stating that convictions based on nolo contendere pleas were not included because “[t]his position is consistent with the treatment of nolo pleas in Rule 410 and the authorities cited in the Advisory Committee’s Note in support thereof.”79 Thus, the advisory committee drafted Rules 410 and 803(22) with the intention that the nolo convictions would be inadmissible, and Congress accepted the proposed rules without altering this.80 The court in Nguyen used this language as a basis for holding that nolo convictions are inadmissible under Rules 410 and 803(22) to prove that the defendant committed the prior bad act.81

The statutory distinctions and legislative history are congruent with what American courts held in the 18th and early 19th Century: that nolo convictions could not “rightly be used against [the defendant] in any other case.”82 It is well recognized in the United States that a nolo conviction cannot be used against the defendant in a civil proceeding arising from the same occurrence, and that guilt in the civil case will be litigated.83 Therefore, there is no reason why this same rule should not apply when the government proffers the evidence in a criminal case to prove that the defendant committed a prior crime. As in a civil case, evidence proving the facts underlying the conviction should be admissible in a criminal case, but the record of the conviction should not be admissible.

B. Where the Courts Were Correct and Where They Went Awry

The Eighth Circuit in Frederickson erred in holding that nolo convictions are admissible under 404(b) as evidence of prior bad acts.84 The court only considered the Supreme Court’s holding in Lott, that a defendant who pleads nolo admits “every essential element of the offense (that is) well pleaded in the charge,” when holding this way.85 However, the court should have considered the history of nolo pleas and the statutory protections provided for those in future proceedings who pleaded nolo to a prior charge. The history of nolo pleas and statutory protections provided for those in future proceedings who pleaded nolo to a prior charge.

77 Nathan B. Lenvin & Ernest S. Meyers, Nolo Contendere: Its Nature and Implications, 51 YALE L. J. 1255, 1258 (discussing why nolo contendere pleas cannot be used for capital crimes (quoting Commonwealth v. Shrope, 264 Pa. 246, 250, 107 Atl. 729, 730 (1919))) (internal quotation marks omitted); See Nguyen, 465 F.3d at 1131 (citation omitted); Olsen v. Correiro, 189 F.3d 52, 60 (1st Cir. 1999).
79 Id.
80 Id.
81 465 F.3d 1128, 1131-32 (9th Cir. 2006).
82 United States v. Lair, 195 F. 47, 52 (8th Cir. 1912) (citing United States v. Hartwell, 26 F. Cas. 196, 201 (D. Mass. 1869); Commonwealth v. Horton, 26 Mass. 206 (1 Pick.) (1829)).
83 Walker v. Schaeffer, 854 F.2d 138, 143 (6th Cir. 1988) (“Rule 410 was intended to protect a criminal defendant’s use of the nolo contendere plea to defend himself from future civil liability.”); Miller, supra note 34, at 8; David L. Shapiro, Should a Guilty Plea Have a Preclusive Effect?, 70 IOWA L. REV. 27, 36 (1984) (“[T]he nolo plea has no effect in a later civil suit.” (quoting 2 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 11:14 (1966))).
84 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).
85 Id. (alteration in original) (quoting Lott v. United States, 367 U.S. 421, 426 (1961)).
protections should have been the basis of the court’s analysis because they reflect the common law and congressional intent better than a sole inquiry into what a defendant admits when pleading guilty.

Additionally, the court’s explanation of what a defendant admits when pleading nolo is debatable because the Supreme Court in United States v. Alford explained in dictum that “it is impossible to state precisely what a defendant does admit” when doing so. Furthermore, even if a court determines it is bound by Lott rather Alford on the issue and that this is an adequate legal basis for determining whether nolo convictions are admissible under 404(b), it should still hold that the convictions are not admissible because Lott made clear that the plea was an admission of guilt “for the purposes of the case.” The plea would only act as an admission for the purposes of the case because at common law, the conviction could not be used against the defendant in any subsequent proceeding. Therefore, even if a court follows Lott’s determination of what a defendant admits, the court should not allow a nolo conviction to be admitted under 404(b) because that would be using the conviction against the defendant in a future proceeding.

The Eleventh Circuit in Green considered the statutory protections and interpreted the law correctly when it held that nolo convictions are not admissible under 404(b) to prove the defendant’s guilt of the prior crime. It held that 803(22) was the only basis for this, and not Rule 410. However, courts should interpret both Rules 410 and 803(22) as barring nolo convictions from evidence to prove guilt. The legislative history of the Federal Rules of Evidence explains that the advisory committee intentionally did not include nolo convictions as a hearsay exception under Rule 803(22) so that the Rule was consistent with Rule 410’s “treatment of nolo pleas.” This legislative history should have remedied the court’s concern that the plain language of the Rule only prohibits the admission of nolo pleas. Additionally, the court’s argument that Rule 410 cannot act as an absolute prohibition on nolo convictions because courts have allowed their use to prove the fact of conviction does not mean that Rule 410 theoretically could allow nolo convictions to be used to prove the defendant committed the prior crime. Proving the fact of conviction has been distinguished from proving actual guilt because records of a nolo conviction have been considered reliable enough to prove the defendant was convicted, and courts have construed certain federal statutes to allow nolo convictions to prove the fact of conviction.

87 Lott, 367 U.S. at 426 (quoting Hudson v. United States, 272 U.S. 451, 455 (1926)) (internal quotation marks removed).
88 Hudson, 272 U.S. at 455 (describing how at common law, a defendant who pleaded nolo can plead not guilty in any other case brought against the defendant) (citation omitted); United States v. Lair, 195 F. 47, 52 (1906) (explaining that even though a defendant who pleads nolo admits to every essential element of the crime, “the conviction cannot rightly be used against him in any other case. Such is the effect of the plea of nolo contendere.”) (citations omitted); LEONARD W. LEVY & KENNETH L. KARST, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1820 (2d ed. 2000) (“Of the same immediate effect as a guilty plea, [a nolo plea] admits the facts charged but cannot be used as a confession of guilty in any other proceeding.”); see supra II.A.1.
89 873 F.3d 846, 866 (11th Cir. 2017) (en banc).
90 Id. at 865.
92 873 F.3d at 865.
93 See United States v. Adedoyin, 369 F.3d 337, 344 (3d Cir. 2004) (quoting Pearce v. United States Dep’t of Justice, 836 F.2d 1028, 1029 (6th Cir.1988) (“Notwithstanding Rule 410, a conviction pursuant to a nolo contendere plea is a conviction within the meaning of [21 U.S.C. § 824] and gives rise to a variety of collateral consequences in subsequent proceedings.”)); Olsen v. Correia, 189 F.3d 52, 61 (1st Cir. 1999) (quoting Fed.R.Crim.P. 11(e)(6) advisory committee’s notes, 1974 amendment (“A judgment upon the plea is a conviction and may be used to apply multiple offender statutes.”)).
Therefore, the Eleventh Circuit should have held that both Rules barred records of *nolo* convictions to prove matters under 404(b). The First Circuit in *Olsen* and the Third Circuit in *Adedoyin* were correct to distinguish between the use of *nolo* convictions to prove the fact of conviction and their use to prove the defendant’s guilt of the underlying facts that led to the conviction.94 Those circuits were correct to assert, although in dicta, that Rule 410 prohibited the use of *nolo* convictions to prove the defendant’s guilt of the prior crime.95

The Ninth Circuit’s opinion in *Nguyen* was the most puzzling compared to the other cases. The court was correct in most of the opinion when it determined that Rules 410 and 803(22) both barred evidence of *nolo* convictions to prove the defendant committed the prior crime.96 However, it undermined its reasoning when it held that these convictions are admissible under Rule 803(8), the public records hearsay exception, to prove the defendant’s mental state under Rule 404(b), such as intent or knowledge, in a subsequent criminal case.97 The court, explicitly discussing misdemeanor convictions but also referring to *nolo* convictions, stated that these convictions “may be admissible under Rule 803(8) to prove some other element of a subsequently charged crime, but they are not admissible to prove that the defendant actually committed the underlying crimes charged...”98

In justifying this, the Ninth Circuit cited *United States v. Loera*, which was a case where the court admitted evidence of a prior conviction under 803(8) to prove the defendant’s knowledge under 404(b).99 The defendant in *Loera*, Reginald Loera, was charged with second-degree murder after driving while under the influence of alcohol and causing a traffic accident that killed someone.100 Loera had three prior convictions in California for “driving under the influence of intoxicating liquor,” and the trial judge allowed the prosecution to introduce evidence of those records to prove the malice required in second-degree murder.101 The Ninth Circuit held that it was permissible to introduce these records under Rule 404(b).102

However, the Ninth Circuit in *Nguyen* and *Loera* erred in ruling that Rule 803(8) is a basis for admitting prior *nolo* convictions to prove the defendant’s mental state because Rule 803(22), the hearsay exception for prior convictions, already explicitly states that *nolo* convictions are not included in the exception.103 To use 803(8) as a basis for admitting *nolo* convictions would undermine 803(22) and make it irrelevant on the issue.104 Even the court in *Nguyen* stated that “[a]ll judgments of conviction may be said to be public records, but the exemption under Rule 803(8) cannot be deemed to cover such judgments because it would make Rule 803(22) superfluous.”105 It appears the court determined that a *nolo* conviction is admissible as evidence to prove the defendant’s mental state in a sub-

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94 *Adedoyin*, 369 F.3d at 344; *Olsen* 189 F.3d at 61.
95 *Adedoyin*, 369 F.3d at 344; *Olsen* 189 F.3d at 60-61.
96 465 F.3d 1128, 1131-32 (9th Cir. 2006).
97 Id. at 1132.
98 Id. (citation omitted).
99 923 F.2d 725, 729-30 (9th Cir. 1991).
101 Id. at 727.
102 Id. at 729.
103 Fed. R. Evid. 802(22)(A).
104 PARR, supra note 32, at 357 (“It would be peculiar to allow the broader rule, Rule 803(8), which was drafted without an eye to the problem of evidentiary use of criminal convictions, to be used as a way of getting around [the] intended limit [of Rule 803(22)].”); see HANCOCK v. DOSSON, 958 F.2d 1367, 1378 n.3 (6th Cir. 1991) (holding that issues arise when other hearsay requirements are used to “avoid the requirements of Rule 803(22).”).
105 *Nguyen*, 465 F.3d at 1132.
sequent case because it is not being used to prove that the defendant actually committed the prior crime. However, this logic is flawed because to use it to show that the defendant had the required mens rea in the subsequent case is to show that the defendant had the required mens rea because he or she committed the prior crime. To use the Ninth Circuit’s own example in Loera—admitting evidence of a prior drunk driving offense to establish “the element of malice required for second degree murder, i.e., that the defendant had grounds to be aware of the risk that drunk driving presented to others”—is to show that the defendant was aware of the risks of drunk driving because he committed the prior drunk driving offense. Using a nolo conviction to prove matters under 404(b) undermines the notion that nolo convictions cannot be used to prove that the defendant actually committed the prior crime.

C. The Effect This Will Have On Defendants

Disallowing the use of conviction records as proof of prior bad acts when the conviction was based on a nolo contendere plea will not close all avenues for the government to prove that the prior crime occurred. Federal Rule of Evidence 404(b) permits evidence of uncharged crimes as proof of prior bad acts. Thus, even though a record of a nolo conviction is inadmissible, independent proof of the underlying facts of the crime through testimony or appropriate hearsay exceptions will be admissible under 404(b).

If the government cannot proffer any independent evidence of the underlying facts that led to the conviction, then this could significantly impact a defendant’s trial because studies have shown that evidence of prior convictions and bad acts has a devastating impact on a defendant’s likelihood of acquittal. One prominent study by Professors Roselle Wissler and Michael Saks conducted using mock jurors in a hypothetical simulation showed that the conviction rate when the jury learned of a prior crime was 75% when the crime was similar in nature, 52.5% when it was not similar, and 42.5% when it did not know about the crime. If a prosecutor only has a record of a nolo conviction as proof that a prior crime occurred and is unable to obtain evidence of the nolo conviction’s underlying facts, that could be the difference between a conviction and an acquittal.

106 Fed. R. Evid. 404(b). The evidentiary standard the government must meet for the court to admit evidence of prior bad acts is whether “the jury can reasonably conclude that the act occurred and that the defendant was the actor.” Huddleston v. United States, 485 U.S. 681, 689 (1988).
111 Dodson, supra note 1, at 38; Antonia M. Kopeć, Comment, They Did It Before, They Must Have Done It Again: The Seventh Circuit’s Propensity to Use a New Analysis of 404(b) Evidence, 65 DePaul L. Rev. 1055, 1087-88 (2016) (citing Wissler, supra note 1, at 40).
IV. Conclusion

Based on the nolo contendere plea’s origin, its history, and statutory distinctions between guilty pleas and nolo pleas, records of the resulting convictions should not be admissible for the purposes of proving any matter under 404(b). The records of the convictions cannot be used to prove that the defendant actually committed the prior crime. Therefore, the government instead must proffer evidence of the underlying facts that led to the nolo conviction to prove matters under 404(b).
ABOUT THE AUTHOR

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