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CRIMINAL PROCEDURE—HABITUAL OFFENDERS—COLLATERAL
ATTACK ON PRIOR FOREIGN COVICTIONS IN A
RECIDIVIST PROCEEDING*

Under New Mexico's habitual offender laws, a defendant's prior felony convictions may be used to increase his sentence upon conviction of a subsequent felony.¹ Similar recidivist statutes are in general use throughout the United States.²

The Supreme Court of the United States has said, regarding recidivist statutes, "that the constitutionality of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge."³ This is primarily because a determination that a person is an habitual criminal or multiple offender is not a conviction for a substantive crime.⁴ As stated by the Supreme Court,

The sentence as . . . [an] habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.⁵

In the United States, the most common method of recidivist ad-

* *State v. Dalrymple*, 407 P.2d 356 (N.M. 1965).

1. N.M. Stat. Ann. §§ 40A-29-5 to 40A-29-8 (Repl. 1964). Section 40A-29-5 specifies the punishment to be imposed on habitual offenders. Section 40A-29-6 delineates the duty of district attorneys regarding charging persons as habitual offenders. Section 40A-29-7 concerns the proceedings for prosecution of habitual offenders. This section requires that a defendant be informed of the charge alleging his prior convictions, and that he state whether he is the same person whose prior convictions are alleged in the charge. The section continues,

If the defendant denies being the same person or refuses to answer, or remains silent, his plea or the fact of his silence, shall be entered of record and a jury shall be empaneled to inquire if the offender is the same person mentioned in the several records as set forth in the information. If the jury finds that the defendant is the same person and that he has in fact been convicted of such previous crimes as charged . . . then the court shall sentence him to the punishment prescribed in section 29-5 [§ 40A-29-5] governing habitual offenders. . . .

2. See, *e.g.*, N.Y. Pen. Law §§ 1941-1943; Okla. Stat. Ann. tit. 21, § 51 (1963); Utah Code Ann. §§ 76-1-18, 76-1-19 (1953).

3. *Oyler v. Boles*, 368 U.S. 448, 451 (1962). See also *Graham v. West Virginia*, 224 U.S. 616 (1912), in which it was held that a recidivist statute did not violate the due process, privileges and immunities, and equal protection clauses of the fourteenth amendment. In *McDonald v. Massachusetts*, 180 U.S. 311 (1901), sentencing under a recidivist statute was held not to inflict cruel and unusual punishment.

4. *Gryger v. Burke*, 334 U.S. 728 (1948).

5. *Id.* at 732. The New Mexico Supreme Court has adopted this reasoning in support of New Mexico's habitual offender laws. See, *e.g.*, *French v. Cox*, 74 N.M. 593, 396 P.2d 423 (1964).

judication is the supplementary procedure, which requires that a person charged as a multiple offender receive a hearing on the issue subsequent to, and separate from, his trial for the present, substantive crime.⁶ Although a charge of being a multiple offender or habitual criminal is not a charge of a substantive crime, recent decisions require that a defendant in a recidivist proceeding be afforded the same procedural rights and privileges available to an accused in a prosecution for a substantive crime.⁷ The severity of the increased punishment resulting from a determination that a defendant is a multiple offender surely demands this protection.

Under New Mexico's habitual offender statutes,⁸ if a person has been convicted of a felony within the state, and it appears that he has previously been convicted of a felony in New Mexico or convicted of a crime in another jurisdiction which would be a felony if committed in New Mexico, it is the prosecuting district attorney's duty to file an information charging the person as an habitual offender.⁹ The defendant is informed of the allegations in the information and of his right to a trial on the charge.¹⁰ He is then required to state whether or not he is the same person charged in the information.¹¹ The procedure thereafter depends on the defendant's answer to the charge. For example, in New Mexico,

If the defendant denies being the same person, or refuses to answer, or remains silent, his plea or the fact of his silence shall be entered of record and a jury empaneled to inquire if the defendant is the same person mentioned in the several records as set forth in the information. *If the jury finds that the defendant is the same person and that he has in fact been convicted of such previous crimes as charged . . .* then the court shall sentence him to the punishment prescribed in section 29-5 [§ 40A-29-5] governing habitual offenders. . . .¹²

Until quite recently, if a defendant remained silent or denied

6. Dubroff, *Recidivist Procedures*, 40 N.Y.U.L. Rev. 332 (1965).

7. See, e.g., *Oyler v. Boles*, 368 U.S. 448 (1962) (requirement of reasonable notice of the charge); *Chewning v. Cunningham*, 368 U.S. 443 (1962) (right to counsel). Neither *Chewning* nor *Chandler v. Fretag*, 348 U.S. 3 (1954), answers the question of whether a state *must* provide counsel in recidivist proceedings. But in view of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Douglas v. California*, 372 U.S. 353 (1963), it is most probable that a state would be constitutionally required to furnish counsel for an indigent defendant in a recidivist proceeding.

8. N.M. Stat. Ann. §§ 40A-29-5 to 40A-29-8 (Repl. 1964).

9. N.M. Stat. Ann. § 40A-29-6 (Repl. 1964).

10. N.M. Stat. Ann. § 40A-29-7 (Repl. 1964).

11. *Ibid.*

12. N.M. Stat. Ann. § 40A-29-7 (Repl. 1964). (Emphasis added.)

the charge, the only issue to be resolved at trial was whether the accused was the same person convicted in the prior convictions.¹³ In *State v. Dalrymple*,¹⁴ however, the New Mexico Supreme Court held that evidence amounting to a collateral attack on prior *out-of-state* convictions is admissible in such a trial. Although the supreme court had previously hinted that prior New Mexico convictions might be inquired into in a recidivist proceeding,¹⁵ *Dalrymple* presented for the first time the question of whether the statute would permit a direct attack. Although the court, in deciding *Dalrymple*, did not consider prior New Mexico convictions, the decision was undoubtedly meant to affect them as well. In view of the fact that prior New Mexico convictions may have already been susceptible to attack by habeas corpus,¹⁶ *Dalrymple* appears to have created a remedy for the alleged multiple offender whose prior convictions were in another state. The purpose of this Comment is to examine the probable prospective effect of the *Dalrymple* decision in view of the change it makes in New Mexico law.

In *Dalrymple*, the defendant had pleaded guilty to one count of armed robbery. On the same day, he was charged with being an habitual offender on the ground that he had previously been convicted in Texas of three crimes which would have been felonies if committed in New Mexico. The defendant pleaded not guilty to the habitual offender charge, and pursuant to section 40A-29-7 of the New Mexico statutes he was tried on the issue of his prior convictions. At trial, the defendant offered evidence that he had received only pro forma representation by counsel in each of the three Texas proceedings that resulted in the convictions upon which the New Mexico habitual offender charge was based. The district attorney moved to strike this evidence on the ground that it amounted to a collateral attack on the Texas judgements, and that such a collateral attack could not be made on proceedings which appeared regular on their face. The trial court granted the motion, and the jury subsequently found that the defendant was the same person convicted in each of the Texas cases. In accordance with the statute, he was then sentenced to life imprisonment.¹⁷

13. See, e.g., *Lott v. Cox*, 401 P.2d 93 (N.M. 1965); *State v. McCraw*, 59 N.M. 348, 284 P.2d 670 (1955).

14. 407 P.2d 356 (N.M. 1965).

15. Cf. *State v. Powers*, 401 P.2d 775 (N.M. 1965).

16. Cf. *French v. Cox*, 74 N.M. 593, 396 P.2d 423 (1964); *Sneed v. Cox*, 74 N.M. 659, 397 P.2d 308 (1964); *Jordan v. Swope*, 36 N.M. 84, 8 P.2d 788 (1932).

17. N.M. Stat. Ann. § 40A-29-5 (Repl. 1964).

On appeal, the New Mexico Supreme Court, *held*, Reversed, with instructions to grant the defendant a new trial.¹⁸ The defendant contended that the trial court's refusal to admit the evidence challenging the regularity of the Texas convictions as a defense to the habitual criminal charge was a denial of due process. The supreme court said that there was nothing in the statute to prevent the trial court from hearing evidence directed to the validity of the prior convictions; that the statute must have "contemplated that the convictions were valid and not void because of some constitutional defect."¹⁹

In *Dalrymple*, the court recognized that constitutionally void convictions cannot be used to support increased penalties under a recidivist statute, since a void conviction is a nullity.²⁰ The precise question facing the court, however, was whether section 40A-29-7 of the New Mexico statutes precludes a defendant from contesting the validity of a foreign conviction in the recidivist proceeding.²¹ Although the court in *Dalrymple* decided only that the statute permits such collateral attacks, it appears the decision was primarily motivated by a notion that due process requires this result. Although a normal reading of the language in the statute indicates the only issue to be resolved at trial is one of identity,²² the statute must be so interpreted if New Mexico's procedure regarding multiple offenders is to have constitutional validity. The court, as previously mentioned, did not decide the case on constitutional grounds, and refused to comment on whether prior foreign convictions could be successfully attacked in a petition for habeas corpus. In determining only that the *statute permits* an attack, it would appear that the court precluded a retroactive application of the decision.

Although the New Mexico Supreme Court avoided the constitu-

18. 407 P.2d at 361.

19. *Ibid.*

20. The court adopted the view of the West Virginia Supreme Court, as stated in *State ex rel. Carver v. Boles*, 142 S.E.2d 731 (W. Va. 1965):

It is now well established that the denial of the fundamental right of the defendant to the assistance of counsel in a criminal proceeding applies to and invalidates any prior conviction of an offense within the meaning of a recidivist statute, and that such conviction . . . being null and void because of such denial, can not justify or support the imposition of any additional punishment under such statute.

142 S.E.2d at 733.

21. Compare *State v. Powers*, 401 P.2d 775 (N.M. 1965).

22. *State v. Dalrymple*, 407 P.2d 356 (N.M. 1965): "It would appear from the language [in the statute] . . . that the only issue to be determined is whether the defendant is the same person who was previously convicted of other crimes as charged." *Id.* at 358.

tional issue of whether a state *must* provide a forum in which prior foreign convictions used to support a multiple offender charge may be attacked, the issue was faced directly by the New York courts. Prior to 1964, the New York multiple offender laws were virtually the same as those of New Mexico;²³ the statutory language provided no method by which a person charged thereunder could contest the validity of prior convictions. Although a person sentenced as a multiple offender could contest the validity of prior *New York* convictions by a writ of error coram nobis,²⁴ a defendant sentenced on the basis of prior *foreign* convictions was without a remedy. The New York courts had repeatedly held that neither habeas corpus²⁵ nor coram nobis²⁶ would lie to attack prior foreign convictions.

The rationale for precluding the use of habeas corpus was that "that remedy comes into use only when the court entering the judgement attacked was without jurisdiction of the person or . . . the crime,"²⁷ unless a defendant could show there was no possibility of seeking redress from the foreign court which rendered the judgement under attack.²⁸ The New York courts seemed to ignore the fact that, as a very practical matter, an imprisoned defendant is in no position to proceed in the foreign jurisdiction which rendered the judgement and thus could really do very little about a foreign conviction. The courts further stated that New York was under no duty to provide a forum to contest the constitutional validity of prior foreign convictions, and that the refusal of its courts to do so did not violate a defendant's fundamental rights.²⁹ If there was a constitutional defect in the New York procedure, it was cured by the fact that a defendant could seek federal habeas corpus relief if

23. N.Y. Pen. Law §§ 1941-43.

24. *People v. Wilson*, 13 N.Y.2d 277, 196 N.E.2d 251, 246 N.Y.S.2d 608 (1963), *appeal dismissed*, 377 U.S. 925 (1964):

It is, of course, settled that a New York State court will entertain and act on a *coram nobis* petition which prays for the setting aside of a prior conviction in that same court and if the allegations of the petition are proven will direct that the multiple offense conviction be corrected so as to eliminate therefrom any additional punishment visited upon the petitioner because of the invalidated earlier criminal judgement.

Id. at 281, 196 N.E.2d at 253, 246 N.Y.S.2d at 611.

25. *People v. McCullough*, 300 N.Y. 107, 89 N.E.2d 335 (1949); *People v. Wilson*, *supra* note 24.

26. See cases cited note 25 *supra*.

27. *People v. Wilson*, 13 N.Y.2d 277, 280, 196 N.E.2d 251, 252, 246 N.Y.S.2d 608, 610 (1963).

28. *People v. McCullough*, 300 N.Y. 107, 89 N.E.2d 335 (1949).

29. *People v. Wilson*, 13 N.Y.2d 277, 196 N.E.2d 251, 246 N.Y.S.2d 608 (1963), *appeal dismissed*, 377 U.S. 925 (1964).

there was no state remedy available.³⁰ The reasoning supporting this argument seemed to be that if a defendant's constitutional rights *were* violated, they were violated by the court that rendered the prior conviction, not by the New York courts in later using the conviction at its face value.

The federal courts, in granting habeas corpus to New York multiple offenders, did not agree with the position taken by the New York state courts. The United States Court of Appeals for the Second Circuit concluded that the violation of due process was by the state that used an invalid prior conviction to increase criminal penalties.³¹ This conclusion seriously jeopardized the constitutionality of New York's refusal to test prior foreign convictions:

To the extent that any State makes its penal sanctions depend in part on the fact of prior convictions elsewhere, necessarily it must assume the burden of meeting attacks on the constitutionality of such convictions. Constitutional guarantees should not be shorn of their vitality merely to facilitate the administration of a penal policy whereby the sentence on one conviction depends in part on a prior conviction.³²

The New York courts realized, however, that the constitutionality of the state's multiple offender procedures was threatened. Whether this realization resulted from the federal court's attack on the New York procedure, or was prompted by the apparent unfairness of the New York procedure itself is not clear. Nevertheless, the realization was present, as reflected in *People v. Wilson*.³³

Because a grave question is raised as to the lawfulness, under constitutional principles, of defendant's continued detention [under a multiple offender sentence] . . . the issues raised should not be disposed of on a narrow procedural rule . . . without further exploration. Sensitivity to the constitutional rights of defendants without precious adherence to procedural niceties is of long standing in this State . . . [citations omitted].³⁴

The New York courts refused, however, to change their position

30. *Ibid.*

31. *United States ex rel. LaNear v. LaVallee*, 306 F.2d 417 (2d Cir. 1962); *United States ex rel. Savini v. Jackson*, 250 F.2d 349 (2d Cir. 1957).

32. *United States ex rel. Savini v. Jackson*, *supra* note 31, at 355. See also *United States ex rel. LaNear v. LaVallee*, *supra* note 31.

33. 18 App. Div. 2d 424, 239 N.Y.S.2d 900, *aff'd*, 13 N.Y.2d 277, 196 N.E.2d 251, 246 N.Y.S.2d 608 (1963), *appeal dismissed*, 377 U.S. 925 (1964).

34. 239 N.Y.S.2d at 903.

regarding collateral attacks on prior foreign convictions in New York multiple offender proceedings; the courts felt that they were bound by prior state decisions on the question. A person charged as a multiple offender remained without a procedure to attack as constitutionally invalid a prior foreign conviction supporting the New York multiple offender charge.

Realizing the doubtful constitutional status of New York's multiple offender law and the somewhat reluctant attitude of its courts toward maintaining the then existing interpretation of it, the New York legislature amended the statute in 1964.³⁵ The amendment provides that upon arraignment of a defendant as a multiple offender, he may challenge the constitutionality of a prior foreign or New York conviction supporting the charge.³⁶ Thus, New York, perhaps led by the United States Court of Appeals for the Second Circuit, appears to have remedied any constitutional infirmity in the statutory and procedural requirements for multiple offender proceedings.

Although the United States Supreme Court has never directly answered the question whether a state using a recidivist statute must allow a collateral attack on prior convictions, the Court's opinions on related questions indicate that a state must do so. In *Oyler v. Boles*,³⁷ the precise question confronting the Court was whether a defendant must receive notice of the multiple offender charge before his trial for the substantive crime. Although the narrow holding was that a defendant need have only reasonable notice and an opportunity to be heard regarding the charge, the Court's reasoning in *Oyler* bears upon the present problem. The requirement of notice is in part to enable a defendant to prepare his case; and, as stated by the Court, "Indeed, we may assume that any infirmities in the prior convictions open to collateral attack could have been reached in the recidivist proceedings, either because the state law so permits or due process so requires."³⁸ Similarly, the Supreme Court has held that due process requires that a defendant be afforded the right to counsel in recidivist proceedings on the ground,

35. N.Y. Laws 1964, ch. 446.

36. N.Y. Pen. Law §§ 1941-43.

37. 368 U.S. 448 (1962).

38. *Id.* at 454. The Court also commented on the precise question facing the New Mexico court in *Dalrymple*: "The fact that the statute expressly provides for a jury trial on the issue of identity and is silent as to how other issues are to be determined does not foreclose the raising of issues other than identity." *Id.* at 454 n.9.

inter alia, that counsel might find some defect in a prior conviction that would preclude its use in a multiple offender proceeding.³⁹ Thus, it appears that the Supreme Court would require not only that a state provide a method by which to attack prior convictions, but also that the method provided be a part of the recidivist proceedings.⁴⁰

The New Mexico Supreme Court's decision in *Dalrymple* appears to represent the development of recidivist law in this area as embodied in United States Supreme Court decisions, decisions by the United States Court of Appeals for the Second Circuit, and the evolution of New York's present law. *Dalrymple* may accurately reflect a constitutional mandate requiring any state seeking to increase criminal penalties on the basis of prior felony convictions to permit the defendant to challenge the validity of the prior convictions.

Although the *Dalrymple* decision now permits a defendant in a New Mexico multiple offender proceeding to attack the validity of prior foreign convictions, the New Mexico Supreme Court did not reveal the procedure by which this should be done. It is therefore recommended that the New Mexico legislature amend section 40A-29-7 of the New Mexico statutes to provide: (1) a method by which a defendant charged as a multiple offender may contest the constitutional validity of the prior convictions upon which the multiple offender charge is based, and (2) a procedure by which the validity of the challenged prior convictions is determined solely by the court on the basis of the previous records and the facts asserted and supported by corroborative affidavits.

To accomplish these proposals, it is further recommended that the New Mexico legislature adopt the related language of section 1943 of the New York Penal Law, as follows:

[N]o previous conviction in this or any other state shall be utilized for multiple offender treatment pursuant to this . . . [section] if

39. *Reynolds v. Cochran*, 365 U.S. 525 (1961); *cf. Chewning v. Cunningham*, 368 U.S. 443 (1962).

40. In *Oyler v. Boles*, 368 U.S. 448 (1962), Mr. Justice Douglas, dissenting, stated that

unless any infirmities in the prior convictions that can be reached on collateral attack can be reached in [the recidivist] . . . proceedings, the wrong done is seriously compounded.

Id. at 461-62. The reasoning in Justice Douglas' dissenting statement did not affect the narrow procedural ground on which the case was decided.

such conviction was obtained in violation of the rights of the person accused under the applicable provisions of the constitution of the United States.

An objection that the previous conviction was unconstitutionally obtained may be raised at any time and the court shall so inform the person accused. Such an objection shall be entered in the record and shall be determined by the court, without empanelling a jury. The failure of the person accused to challenge the previous conviction in the manner provided herein shall constitute a waiver on his part of any allegation of unconstitutionality unless good cause be shown for his failure to make timely challenge. . . .

Regardless of the ultimate effect of *Dalrymple* on the language of the New Mexico multiple offender statute, the decision is a significant step in the direction of assuring constitutional due process to an alleged multiple offender.

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