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## HABITUAL OFFENDER PROSECUTIONS IN NEW JERSEY

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### Introduction

New Jersey's Habitual Offender Act<sup>1</sup> is capable of being utilized in a large number of criminal prosecutions, thus playing an important role in determining the length of a convicted defendant's sentence. The statute, however, is rarely invoked by the courts and prosecutors of this State. As a result of this lack of utilization, and because of frequent amendments since the enactment of New Jersey's first recidivist statute, the applicability of this law and the procedures to be followed when imposing it are not well settled. This article will describe the habitual offender statute, its scope and applicability and the roles of the courts and prosecutors in its utilization. Cases upholding and interpreting the act will be discussed. Finally, several proposals for change and their potential effects will be examined.

The Habitual Offender Act<sup>2</sup> provides for enhanced punishment for those convicted of a misdemeanor or high misdemeanor, if they have been convicted of a high misdemeanor on one or more prior occasions. An individual with a single prior high misdemeanor conviction is subject, for a subsequent conviction, to a sentence twice the maximum which could have been imposed had the latter offense been his first.<sup>3</sup> A third offender is exposed to a sentence three times as severe as that provided for the latest conviction<sup>4</sup> and a fourth offender is thereby "declared to be an habitual criminal" and a sentence "for any term of years or for life" may be imposed.<sup>5</sup> For the purposes of this act, convictions of several prior high misdemeanors charged in "one

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1 *N.J.S.A. 2A:85-8 to 13 (1953).*

2 *Id.*

3 *N.J.S.A. 2A:85-8 sets forth:*

Any person convicted of a high misdemeanor under the laws of this State, or of a crime under the laws of the United States or any other State or country, which crime would be a high misdemeanor under the laws of this State, and who thereafter is convicted of a misdemeanor or a high misdemeanor under the laws of this State, may be sentenced to imprisonment in the State prison for not more than double the maximum period for which he might have been sentenced for a first offense.

Conviction of two or more of such crimes or high misdemeanors charged in one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

4 *N.J.S.A. 2A:85-9 provides:*

Any person twice convicted of high misdemeanors under the laws of this State, or of crimes under the laws of the United States or any other State or country, which crimes would be high misdemeanors under the laws of this State, and who thereafter is convicted of a misdemeanor or a high misdemeanor under the laws of this State, may be sentenced to imprisonment in the State Prison for not more than three times the maximum period for which he might have been sentenced for a first offense.

Conviction of two or more of such crimes or high misdemeanors charged in one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

5 *N.J.S.A. 2A:85-12 states:*

Any person convicted on three separate occasions of high misdemeanors in this State, or of crimes under the laws of the United States or any other State or country, which crimes would be high misdemeanors under the laws of this State, or whose convictions for such offenses in this State or under the laws of the United States or any other State or country shall total three or more, and who thereafter is convicted of a misdemeanor or a high misdemeanor under the laws of this State, is hereby declared to be an habitual criminal, and the court in which such fourth or subsequent conviction is had, may impose upon the person so convicted a sentence in the State Prison for any term of years or for life.

Conviction of two or more of such crimes or high misdemeanors charged in one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

indictment or accusation, or in two or more indictments or accusations consolidated for trial" are considered as only one conviction.<sup>6</sup>

### Constitutionality of the Act

Habitual offender laws in this state, as well as in other jurisdictions, have been challenged on numerous grounds, generally without success. In 1901, the United States Supreme Court upheld the constitutionality of a Massachusetts recidivist statute in *McDonald v. Massachusetts*.<sup>7</sup> The Court held that the statute in question imposed an increased punishment upon the latest crime of a prior offender rather than any additional punishment for the former crimes. It therefore was not an *ex post facto* law and did not "put the accused twice in jeopardy for the same offense."<sup>8</sup> The statute was also held not to deny a defendant the equal protection of the laws and not to impose a cruel or unusual punishment.<sup>9</sup> The Supreme Court has reaffirmed these conclusions in subsequent cases.<sup>10</sup>

The New Jersey courts have also had occasion to consider the validity of their own habitual offender laws. In *In re Caruso*,<sup>11</sup> the court rejected a claim that a forerunner to the present habitual offender statute violated a defendant's right to due process of law. This State's habitual offender laws have also been challenged on several occasions as *ex post facto* laws where one or more of the defendant's prior convictions occurred before the effective date of the applicable statute. For example, in *In re Zee*<sup>12</sup> the defendant was sentenced pursuant to the 1940 habitual offender statute,<sup>13</sup> which authorized enhanced punishment for convictions subsequent to any high misdemeanor. The earlier version of the Act<sup>14</sup> applied only to prior offenses for which a prison sentence had been served. All of the defendant's prior convictions antedated the 1940 act and for one of them he had been granted probation. The defendant argued that the 1940 act was *ex post facto* in that it applied to convictions which would not have fallen within the purview of the law in effect when those convictions were obtained.<sup>15</sup> The court dismissed this argument, by emphasizing the purpose and effect of such laws:

Habitual offender statutes, such as the one in effect here, do not undertake to punish again for the prior offenses. They enhance the punishment for the subsequent offense. A statute is not constitutionally offensive which enhances the punishment for the offense which culminates the repetitive criminal conduct, even though the prior offenses occurred before the statute was enacted or became effective. Such legislation is held not to increase the penalty for the prior crimes, but only to impose punishment for the latter, the gravity of which is increased by the persistence of the accused in criminality.

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6 *N.J.S.A.* 2A:85-8; *N.J.S.A.* 2A:85-9; *N.J.S.A.* 2A:85-12.

7 180 *U.S.* 311 (1901).

8 *Id.* at 313.

9 *Id.* It should be noted, however, that in a given situation the application of a recidivist statute, constitutional on its face, may serve to impose a punishment which is grossly disproportionate to the severity of the crime, thus constituting cruel and unusual punishment. See *e.g.*, *Rummel v. Estelle*, 568 F.2d 493, 1195 (5 Cir. 1978); *Hart v. Coimer*, 483 F.2d 136 (4 Cir. 1973), *cert. den.* 415 *U.S.* 983 (1974).

10 See *Oyler v. Boles*, 368 *U.S.* 448 (1962); *Gryger v. Burke*, 334 *U.S.* 728(1948); *Graham v. West Virginia*, 224 *U.S.* 616 (1912).

11 131 *N.J.L.* 505 (Sup. Ct. 1944), *cert. den.* 135 *N.J.L.* 522 (Sup. Ct. 1947).

12 13 *N.J. Super.* 312 (Law Div. 1951), *aff'd* 16 *N.J. Super.* 171 (App. Div. 1951), *cert. den.* 343 *U.S.* 931 (1952).

13 1940 *N.J. Laws*, c.219 §§1 - 3.

14 1927 *N.J. Laws*, c 219 §§1 and 2; 1927 *N.J. Laws*, c.263, §1.

15 13 *N.J. Super.* at 317-318.

[T]he punishment for the culminant offense is greater not by relation back to the previous offenses, but only because such criminal has brought himself within a class established by law as deserving and requiring a more severe punishment and restraint than the class of criminals less hardened to crime. The punishment is for the new crime only, but is the heavier if the offender is an habitual criminal. The Statute thus imposes a punishment on none but future crimes and is not *ex post facto*.<sup>16</sup>

The New Jersey Supreme Court subsequently gave its express approval to this interpretation,<sup>17</sup> and the validity of this State's habitual offender laws is now well established.<sup>18</sup>

More recent challenges to the habitual offender laws have been based upon their infrequent utilization. Those defendants against whom such statutes are invoked have claimed that their right to equal protection under the law has thereby been violated. The United States Supreme Court entertained such a claim in *Oyler v. Boles*,<sup>19</sup> and held that to establish such a violation the defendant must show that the invocation of the enhanced punishment procedure "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>20</sup> The present New Jersey statute simply authorizes enhanced punishment for prior offenders<sup>21</sup> and vests the sentencing court with discretion to invoke the statute when it sees fit.<sup>22</sup> The courts of this State have thereby held that rare or infrequent utilization of the statute, in and of itself, will not support an equal protection claim, and that invidious discrimination must be established. For example, in *State v. Kozarski*,<sup>23</sup> the court noted that within a ten year period in Camden County the habitual offender statute had been invoked only once, and that over a period of a year between 1972 and 1973 the Public Defender's Office had, on a state-wide basis, defended against only one habitual offender charge.<sup>24</sup> The court, nonetheless, found no equal protection violation since there had been "no showing of intentional and purposeful discrimination through the application of an invidious standard."<sup>25</sup> It is thus clear that challenges to habitual offender prosecutions based upon their infrequency as well as other constitutional attacks on New Jersey's habitual offender statute are unlikely to succeed.

#### Procedures for Applying the Act

*N.J.S.A.* 2A:85-13<sup>26</sup> sets out the procedure to be followed in invoking New Jersey's present habitual offender law. According to this statute, enhanced punishment may be imposed at the court's discretion, by way of accusation filed after the

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16 13 *N.J. Super.* at 318-319. (citation omitted).

17 *In re Caruso*, 10 *N.J.* 184 188-189 (1952). The United States Supreme Court, in *Gryger v. Burke*, 334 *U.S.* 728, 732 (1948), also rejected a similar claim.

18 *In re Zee, supra*, 13 *N.J. Super.* at 319-321, also held that the statute in question did not deprive a defendant of the equal protection of the laws and did not provide for cruel and unusual punishment.

19 368 *U.S.* 448 (1962).

20 *Id.* at 456.

21 See notes 3-5 *supra*.

22 *N.J.S.A.* 2A:85-13.

23 128 *N.J. Super.* 513 (Law Div. 1974), *aff'd* 143 *N.J. Super.* 12 (App. Div. 1976).

24 *Id.* at 520.

25 *Id.* at 521-522. See also *State v. Rowe*, 140 *N.J. Super.* 5, 9 (App. Div. 1976), *aff'd* \_\_\_ *N.J.* \_\_\_ (1978); *State v. Jennings*, 126 *N.J. Super.* 70, 79-80 (App. Div. 1972), *certif. den.* 60 *N.J.* 512 (1972).

26 *N.J.S.A.* 2A:85-13 states:

If at any time, before sentence, it shall appear that a person convicted of a misdemeanor or a high misdemeanor under the laws of this State has previously been convicted as set forth either in sections 2A:85-8, 2A:85-9 or 2A:85-12 of this Title, and it also appears to the court by whom such person is to be sentenced that the offenses resulting in such conviction are such as to warrant the imposition of a penalty greater than the maximum which may be imposed upon a person convicted of such misdemeanor or high misdemeanor who had not previously been convicted as aforesaid, then the court shall direct the

defendant has been convicted of the offense bringing him within the purview of the statute. It is unclear, however, whether this is the exclusive procedure to be followed in imposing enhanced punishment upon multiple offenders.

The New Jersey recidivist statutes in effect prior to 1951 prescribed no specific procedure to be followed in punishing a defendant as an habitual offender.<sup>27</sup> The common law procedure called for an allegation of the prior conviction in the indictment for the principal offense and proof thereof at the trial.<sup>28</sup> Cases applying the early New Jersey statutes held that either the common law method or a separate post-conviction procedure could be utilized to determine a defendant's liability to enhanced punishment.<sup>29</sup> Despite the express provision for a post-conviction proceeding in *N.J.S.A. 2A:85-13*, it has been held that either of the above procedures may still be utilized.<sup>30</sup> It is submitted, however, that the statutory procedure currently provided for should be viewed as the exclusive method by which enhanced punishment may be imposed upon a multiple offender.

Initially, it should be noted that the common law recidivist procedure has been upheld and is widely utilized.<sup>31</sup> In *Spencer v. Texas*,<sup>32</sup> the United States Supreme Court considered a claim that the Texas recidivist procedure resulted in a denial of due process because it permitted the prosecution to allege and prove a defendant's prior convictions at his trial for the principal offense, thereby permitting the jury to simultaneously consider the guilt and habitual offender status of the defendant. In a 5-4 decision the Court held that the procedure, although possibly prejudicial, was not unconstitutional.

In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases.<sup>33</sup>

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26 (cont.)

prosecutor of the county in which such conviction was held to file an accusation accusing the said person of such previous convictions. Whereupon, the court in which such conviction was had, shall cause the said person to be brought before it and shall inform him of the allegations contained in such accusation and of his right to be tried as to the truth thereof, and shall require such person to plead to the accusation. If such person refuses to plead or remains silent or pleads not guilty, a not guilty plea shall be entered and a jury shall be impanelled as outlined in sections 2A:85-8, 2A:85-9 and 2A:85-12 of this Title, respectively.

If the jury finds said person guilty or if he pleads guilty or non vult, the court may sentence him to the punishment prescribed in sections 2A:85-8, 2A:85-9, and 2A:85-12, as the case may be.

The said person shall have the right to waive, in writing, the trial by jury provided in this section, and if he shall do so, the court, in its discretion, may accept the waiver and try and decide the issue without a jury, and if the said person is found guilty, the court may impose the same sentence as though said person had been found guilty by the jury.

27 See 1927 *N.J. Laws*, c.219 §§1 and 2; 1927 *N.J. Laws*, c.263 §1; 1940 *N.J. Laws*, c.219, §§1, 2 and 3.

28 See e.g. *Graham v. West Virginia*, 224 *U.S.* 616 (1919); Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 *N.Y.U.L. Rev.* 210, 211 (1958). [hereinafter cited as *The Pleading and Proof*].

29 *State v. Janiec*, 9 *N.J. Super.* 29, 33 (App. Div. 1950), aff'd 6 *N.J.* 608 (1951); *State v. Lutz*, 135 *N.J.L.* 603, 604-605 (Sup. Ct. 1947).

30 *Worbetz v. Goodman*, 47 *N.J. Super.* 391 (App. Div. 1957), cert. den. 26 *N.J.* 245 (1958), cert. den. 357 *U.S.* 941 (1958). The Court in this case stated:

Although [*N.J.S.A. 2A:85-13*] now provides for an independent hearing on the issue of habitual criminality . . . , the previous conviction upon which the increased sentence will rest may be alleged in the main indictment and established at trial, and an independent proceeding to adjudicate defendant to be an habitual criminal is unnecessary. 47 *N.J. Super.* at 405.

31 See *The Pleading and Proof*, *supra* note 28 at 211.

32 385 *U.S.* 554 (1967).

33 *Id.* at 564. See also *State v. Lutz*, 135 *N.J.L.* 603, 605 (Sup. Ct. 1947).

New Jersey and any other state remain free, of course, to authorize an independent proceeding to determine multiple offender status, and such authorization, as part of a "highly penal" habitual offender law "should be strictly construed and applied."<sup>34</sup> Adherence to the procedure set forth in *N.J.S.A.* 2A:85-13 would avoid the prejudicial effects of the common law procedure. Indeed, in *State v. Washington*,<sup>35</sup> the New Jersey Supreme Court recognized the supplemental proceeding as the preferred recidivist procedure:

Before the enactment of *N.J.S.A.* 2A:85-13 in 1951 it was the practice in this State for the indictment to allege both the crime charged and the accused's earlier convictions. The jury would then decide not only whether the defendant was guilty of the immediate criminal charge but also whether he was the same person who had been convicted on the previous occasions set forth in the indictment. See *State v. Lutz*, 135 *N.J.L.* 603 (Sup. Ct. 1947). This procedure, however, created difficulties for both the defendant and the State. As to the defendant, it placed before the jury as part of the State's case evidence of prior convictions which under the usual rules of evidence are admissible only for purposes of impeaching a defendant who takes the stand. See *N.J.S.* 2A:81-12. And as to the State, it prevented the application of habitual offender laws when information concerning a defendant's criminal record was not available to a prosecutor until after the trial had already started. *N.J.S.* 2A:85-13 eliminates these difficulties for both sides. The defendant is protected because the determination of the habitual offender charge in a separate proceeding cannot possibly influence the determination of his guilt or innocence of the crime for which he is indicted. See Comment, 44 *Journal of Criminal Law, Criminology and Police Science* 759, 760-761 (1954). The statute gives the defendant every opportunity, including a jury trial on the issue of identity if he so desires, to show that the provisions of the habitual offender law should not be applied to him. And the State is given additional time to uncover a defendant's previous record in that it can now present an habitual offender accusation at any time before sentence.<sup>36</sup>

It is thus clear that an independent post-conviction proceeding to determine habitual offender status, if not required by law, is at least the preferred procedure.

Before the court orders the filing of a multiple offender accusation and before the prosecution complies with this order, care should be taken to ensure that the defendant's prior convictions are sufficient in number and character to permit the invocation of the habitual offender law. The current statutes clearly state that only prior high misdemeanors may be considered for this purpose.<sup>37</sup> For a conviction obtained in another jurisdiction, it must be determined whether the underlying criminal act would have been a high misdemeanor had it been committed in this State. If so, it falls within the scope of this act.<sup>38</sup> For example, in *State v. Hines*,<sup>39</sup> the

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34 *State v. Janice*, 20 *N.J. Super.* 471, 478 (App. Div. 1952), rev'd other grounds, 11 *N.J.* 397 (1953). See also *State v. Johnson*, 109 *N.J. Super.* 69, 73 (App. Div. 1970).

35 47 *N.J.* 244 (1966).

36 *Id.* at 249-250. See also *State v. Smith*, 137 *N.J. Super.* 89, 98-99 (Law Div. 1975). In that case, the defendant was charged with several crimes including possession of a firearm after having previously been convicted of a crime in violation of *N.J.S.A.* 2A:151-8. The court held that the charge of possession after a previous conviction should be severed from the other counts to avoid prejudicing the defendant, and it noted that its holding was consistent with the State's recidivist statute.

37 See generally notes 3-5 *supra*.

38 *Id.*

39 109 *N.J. Super.* 298 (App. Div. 1970), certif. den. 56 *N.J.* 248 (1970), cert. den. 400 *U.S.* 867 (1970).

defendant had been convicted in Pennsylvania for violating a statute making it a felony to commit larceny. Confronted with a multiple offender accusation, the defendant argued that on its face a violation of the Pennsylvania statute would not necessarily have amounted to a high misdemeanor in New Jersey where under the statute in effect at the time only larceny of property with a value in excess of fifty dollars was a high misdemeanor. The court held, however, that the entire record of conviction must be examined in such cases. The indictment for the Pennsylvania offense indicated that the value of the stolen goods was \$564 and it was therefore held that this conviction was properly alleged in the defendant's multiple offender accusation.<sup>40</sup>

The sequence of the prior and principal offenses and resulting convictions is of paramount importance in determining a defendant's liability for enhanced punishment. In *State v. McCall*,<sup>41</sup> the court noted that in enacting a multiple offender statute the legislature intended to penalize an individual for his recidivism, *i.e.*, his failure to avoid criminal activity after having been convicted of a prior offense. The court held that this policy required that a defendant be given an opportunity to rehabilitate himself following each of his convictions, and that only upon a failure to do so could an individual be characterized as a recidivist. Therefore, it was held that for the purposes of determining liability as a multiple offender, each of the defendant's prior convictions as well as the principal conviction must be based upon an offense committed subsequent to the last prior conviction.<sup>42</sup> Finally, as indicated earlier, the Habitual Offender Act itself states that convictions for several prior crimes charged in one indictment or in several indictments consolidated for trial, are to be considered as only one conviction for the purposes of the Act.<sup>43</sup>

Having determined that a convicted defendant is liable to enhanced punishment as a multiple offender, the prosecutor is obliged, at the court's direction, to file an accusation, accusing the defendant of the previous convictions. This procedure has been challenged on the grounds that an allegation of recidivism is tantamount to being charged with a criminal offense and must therefore be preceded by a presentment or indictment of a grand jury rather than by accusation. In *State v. Washington*,<sup>44</sup> the New Jersey Supreme court rejected such an argument, adhering to the accepted view that recidivism is not a crime. In reaching this conclusion, the Court pointed out that:

[h]abitual offender legislation does not create a new substantive crime, but rather imposes a greater penalty for the particular crime for which the defendant is convicted, where such defendant has persistently engaged in unlawful activities.<sup>45</sup>

The accusation should be served on defendant personally<sup>46</sup> and due process would appear to demand that the prior conviction be alleged with sufficient particularity, including the time and place of the conviction, the court of jurisdiction and the sentence imposed.<sup>47</sup>

The post-conviction accusation procedure has also been challenged as providing insufficient notice to a defendant. In *Oyler v. Boles*,<sup>48</sup> the United States Supreme Court recognized that a defendant must be given reasonable and adequate notice with

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40 *Id.* at 304-306.

41 14 *N.J.* 538 (1954).

42 *Id.* at 546-549. See also *State v. Harris*, 97 *N.J. Super* 510, 512 (App. Div. 1967).

43 See generally notes 3-5 *supra*. See also *State v. McCall*, 14 *N.J.* 538, 547-548 (1954).

44 47 *N.J.* 244 (1966).

45 *Id.* at 248. See also *Graham v. West Virginia*, 224 *U.S.* 616 (1912).

46 *State v. Wimbush*, 54 *N.J. Super.* 283, 287 (App. Div. 1959).

47 See generally, Annot., 39 *Am. Jur.* 2d §21 at 325.

48 368 *U.S.* 448 (1962).

respect to a recidivist accusation, but it held that due process does not require notice prior to the trial on the substantive offense. The Court thus concluded that initial notification at the start of a post-conviction proceeding was not inadequate.<sup>49</sup> The Court again stressed the distinction between determinations of substantive guilt and multiple offender status.<sup>50</sup>

Upon the filing of the multiple offender accusation the defendant must be brought before the court in which he was convicted, apprised of the allegations against him and of his right to defend against them, and required to plead to the accusation.<sup>51</sup> He is entitled to the assistance of counsel at this and every other stage of the habitual offender proceeding.<sup>52</sup> If he pleads guilty to the accusation the court may thereupon sentence him as provided in the Habitual Offender Act.<sup>53</sup> If the defendant refuses to plead or pleads not guilty, a jury trial will be held to determine his recidivist status.<sup>54</sup> The defendant must be afforded the same rights and privileges at this hearing as he would be entitled to at a trial for a substantive crime.

[T]he defendant has the same rights to a speedy trial, a time for preparation, assistance of counsel, compulsory process for witnesses, to be confronted with the witnesses against him, to require proof beyond a reasonable doubt, and to all other rights enjoyed by a defendant on trial for a criminal offense.<sup>55</sup>

Special care should be taken to conclusively identify the defendant as the party against whom the prior convictions were obtained. Mere identity between the defendant's name and that contained in the record of conviction will not suffice.<sup>56</sup> Fingerprint records, photographs or other extrinsic evidence should be introduced to accomplish this purpose.<sup>57</sup> The inquiry during the recidivist proceeding should concern only the fact of the prior conviction and the identity of the convicted party rather than the commission or guilt of the prior offenses.<sup>58</sup> It has been held, however, that the defendant may establish that a prior conviction was obtained in violation of a constitutional right<sup>59</sup> or that the court in which the prior conviction was obtained lacked jurisdiction,<sup>60</sup> thus rendering the conviction unavailable to establish the defendant's status as a multiple offender.

If, following the hearing, the defendant is found to be a multiple offender an enhanced sentence may be imposed for the principal offense. If the defendant has been convicted of several principal offenses, it is clear that he must be sentenced on each of the offenses separately.<sup>61</sup> It appears, however, that enhanced punishment may be

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49 *Id.* at 452-453.

50 *Id.* See also *Note, Recidivist Procedures*, 40 N.Y.U.L. Rev. 333 (1965). [hereinafter cited as *Recidivist Procedures*].

51 *N.J.S.A.* 2A:85-13.

52 See *Chewing v. Cunningham*, 368 U.S. 443, 447 (1962).

53 *N.J.S.A.* 2A:85-13. See also *State v. Cubbler*, 4 *N.J. Super.* 297, 300 (App. Div. 1949).

54 *N.J.S.A.* 2A:85-13 permits a defendant to make a written waiver of the jury trial, in which case his recidivist status will be determined by the court.

55 *State v. Janiec*, 9 *N.J. Super.* 29, 33 (App. Div. 1950), *aff'd* 6 *N.J.* 608 (1951), *cert. den.* 341 U.S. 955 (1951). See also *In re Zee*, 13 *N.J. Super.* 312, 317 (Law Div. 1951), *aff'd* 16 *N.J. Super.* 171 (App. Div. 1951); *In re Cooley*, 12 *N.J. Super.* 97, 100 (Law Div. 1951).

56 *State v. Wyckoff*, 27 *N.J. Super.* 322, 326 (App. Div. 1953).

57 *State v. Wimbush*, 54 *N.J. Super.* 283, 287 (App. Div. 1959).

58 See *Graham v. West Virginia*, 224 U.S. 616 (1911); *In re McBride*, 12 *N.J. Super.* 402, 406 (Law Div. 1951), *aff'd* 15 *N.J. Super.* 436 (App. Div. 1951), *cert. den.* 342 U.S. 894 (1951).

59 *Burgett v. Texas*, 339 U.S. 109 (1967); *United States ex rel Miscavage v. Howard County District Court*, (339 F. Supp. 292 (D.N.J. 1972).

60 *State v. McCall*, 14 *N.J.* 538, 550 (1954).

61 *State v. Rowe*, 140 *N.J. Super.* 5, 8-9 (App. Div. 1976), *aff'd* ... *N.J.* ... (1978).

imposed on only one of the constituent convictions.<sup>62</sup> Finally, if a conviction upon which an habitual offender sentence is based is subsequently overturned, that conviction can no longer support the enhanced punishment and the defendant must be resentenced to an appropriate term.<sup>63</sup>

It is clear from the above discussion that the courts have displayed some ambivalence with respect to their views toward, and characterizations of, habitual offender prosecutions.<sup>64</sup> They have stressed that recidivism is not a crime, but a status, in response to arguments that habitual offender laws are *ex post facto* and place a defendant in double jeopardy or that such prosecutions should be preceded by formal indictment. On the other hand, defendants charged with being habitual offenders have been guaranteed the full panoply of rights and privileges afforded individuals charged with a crime. The courts have apparently concluded that whatever the abstract nature of recidivism, the threat of significantly increasing the punishment for which a convicted defendant is liable is serious enough to require that the highest standards of due process accompany the determination of that liability.

### Proposed Legislation to Amend the Act

Proposed and pending legislation in the area of recidivist sentencing would drastically alter the enhanced punishments and procedures discussed above. The proposed New Jersey Penal Code,<sup>65</sup> although more restrictive with respect to the number of prior convictions necessary for enhanced punishment would greatly enlarge the grounds upon which that punishment could be imposed. Section 2C:44-3 of the Code authorizes a court to sentence a defendant to an extended term of imprisonment,<sup>66</sup> if it determines that the defendant is one or more of the following: (a) a persistent offender, *i.e.*, an individual over 21 years of age with two previous convictions obtained on separate occasions, (b) a professional criminal, *i.e.*, one who is over 21 years of age and has "knowingly devoted himself to criminal activity as a major source of livelihood" or "has a substantial income or resources not explained to be derived from a source other than criminal activity", (c) a "dangerous, mentally abnormal person whose commitment for an extended term is necessary for the protection of the public", such status to be determined following a psychiatrist examination, (d) a multiple offender, who is to be sentenced for two or more principal offenses in which case the defendant's aggregate sentence may not exceed the maximum of the longest extended term to which he is liable, and (e) a dangerous armed criminal.<sup>67</sup> The purpose of this final section is to replace the current statutory provision for enhanced punishment for armed criminals as provided in *N.J.S.A. 2A:151-5*.

Discretion to impose an extended term remains vested in the court. The defendant is entitled to a hearing to determine whether he falls within any of the above categories,<sup>68</sup> but this determination is to be made by the court, rather than a jury. The commentary to Section 2C:44-3 explains that this modification of the current law

is based on the position that "since the issue bears entirely on the nature of the sentence, rather than on guilt or innocence, [there is] no reason why a

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62 In *State v. Quatro*, 40 *N.J. Super.* 111, 115 (Law Div. 1956), remanded other grounds 44 *N.J. Super.* 120 (App. Div. 1957), the court held that the defendant could not be sentenced as a third offender on more than one indictment of a multiple indictment prosecution.

63 *State v. Ford*, 92 *N.J. Super.* 356, 360 (App. Div. 1966).

64 See *Recidivist Procedures*, *supra* note 50, at 343-344.

65 *Final Report of the New Jersey Criminal Law Revision Commission*, New Jersey Penal Code (1971).

66 See *id.* at Section 2C:43-7, describing the permissible extended punishment, which varies according to the degree of the principal offense.

67 See *id.* at Section 2C:44-5(e).

68 See *id.* at Section 2C:44-6(e).



jury trial should be accorded in a system where questions of sentence otherwise are for determination by the Court."

New Jersey's present Habitual Offender Act is consistent with the American Bar Association standards<sup>69</sup> on this subject in some respects, while it departs from those standards in others. Like New Jersey's Act, the ABA standards call for recidivist sentencing to be a matter within the discretion of the sentencing court, with the determination to be made following the defendant's conviction of the principal offense.<sup>70</sup> The ABA standards recommend that any authorization of increased punishment should be related in severity to the sentence otherwise provided for the principal offense, with a maximum authorized term not to exceed 25 years under any circumstances.<sup>71</sup> The enhanced punishment authorized for second and third offenders in New Jersey,<sup>72</sup> as multiples of the basic sentence authorized for the principal offense, adheres to the ABA recommendation. However, by permitting a fourth offender to be sentenced to any term of years or life imprisonment,<sup>73</sup> the New Jersey statute conflicts with the ABA recommendations.

The ABA Standards also recommend against enhanced punishment unless (1) the defendant has two or more prior convictions, (2) the principal offense has been committed within five years of the commission of the last prior offense or the defendant's release from any incarceration imposed for a prior conviction, and (3) the defendant was over 21 years of age at the time of the commission of the principal offense.<sup>74</sup> New Jersey's Habitual Offender Act requires none of these. The ABA standards call for notice to the defendant that the court intends to sentence him as a multiple offender, and a full adversary hearing on this issue.<sup>75</sup> The recommended procedure differs in two key aspects from the procedure required in New Jersey. The sentencing court, rather than a jury, is to make all determinations involved in this matter, and each of the facts required to make the defendant liable for enhanced punishment are to be established "by a preponderance of the evidence" rather than beyond a reasonable doubt.<sup>76</sup>

The Commentary to the ABA standards takes the position that the sentencing of a multiple offender demands no stricter safeguards or higher standards of due process than any other aspect of the sentencing process.<sup>77</sup> If multiple offender prosecutions are considered simply as an aspect of sentencing, with all discretion in this regard vested in the sentencing court, then this position and the ABA recommendations on recidivist sentencing procedures would appear to be reasonable. In New Jersey, as in most other jurisdictions, authority to sentence is vested in the court. Under standard sentencing practice the court may consider any information contained in the defendant's presentence report, including his record of prior arrests and convictions. The defendant may challenge what he perceives to be any incompleteness or inaccuracy in the report,<sup>78</sup> but the courts have never held that a full adversary proceeding with all the safeguards and guarantees of a criminal trial is necessary to resolve such a dispute,<sup>79</sup> and there would appear to be little reason to demand that a

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69 ABA Project on Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures*, (Approved Draft 1968). [hereinafter cited as ABA Standards].

70 *Id.* at §3.3(b).

71 *Id.* at §§3.3(a)(i) and (ii).

72 *N.J.S.A.* 2A:85-8 and 9.

73 *N.J.S.A.* 2A:85-12.

74 *ABA Standards*, *supra* note 69 at §3.3(b).

75 *Id.* at §5.5(b)

76 *Id.* at §5.5(b)(iv).

77 *Id.* at Commentary to §5.5(b) at 262 and §5.5(d) at 267.

78 *State v. Green*, 62 *N.J.* 547, 564 (1973).

79 See *State v. Kunz*, 55 *N.J.* 128, 144-145 (1967).

recidivist proceeding take such form. Moreover, a simplified hearing would be much less cumbersome and time-consuming than that required by the present New Jersey statute and would be more consistent with the previously discussed judicial characterizations of recidivism as a status rather than a substantive crime.

A pending amendment to *N.J.S.A.* 2A:85-13 would, however, remove much of the court's discretion with respect to multiple offender prosecutions.<sup>80</sup> This proposed amendment would authorize the county prosecutor to file a multiple offender accusation following conviction for the principle offense when he considered such a course of action appropriate. If, following a trial, the defendant was found to be a multiple offender, the court would be required to sentence him as prescribed in *N.J.S.A.* 2A:85-8, 9 or 12. Initially, the question may be raised as to whether such an arrangement would have any significant effect upon the sentences imposed for multiple offenders. The proposed amendment states that if the defendant is found guilty of the prior convictions "the court shall sentence him to the punishment prescribed in Sections 2A:85-8, 2A:85-9 and 2A:85-12, as the case may be." Sections 2A:85-8 and 9 state that a prior offender "may be sentenced to imprisonment in the state prison for not more than [double or triple] the maximum period for which he might have been sentenced for a first offense." Section 2A:85-12 states that for a fourth offender the court "may impose . . . a sentence in the State Prison for any term of years or for life." The punishment prescribed in those sections may be interpreted as any prison term up to the designated maximum, in which case the amendment under discussion would not require the imposition of enhanced punishment for an individual found to be a multiple offender.<sup>81</sup> Furthermore, vesting discretion with respect to multiple offender accusations in the prosecutor would conflict with the characterization of such procedures as sentencing matters. Nevertheless, such a shifting of responsibility could make the Habitual Offender Act a viable factor in determining a convicted defendant's sentence, and would be consistent with the acknowledged responsibilities and duties of the prosecutor.

In this regard, it should be noted that a prosecutor is vested with broad discretion in selecting matters for prosecution.<sup>82</sup> That discretion extends not only to the decision on whether or not to institute criminal proceedings but also to determinations which will have a direct bearing upon the punishment for which an accused is liable, such as the degree of crime charged<sup>83</sup> and admission into pretrial intervention programs.<sup>84</sup> Discretion as to the institution of multiple offender prosecutions would be consistent with the aforementioned responsibilities. Whether such prosecutorial discretion comports with a particular characterization of recidivism and of multiple offender proceedings should not be considered an important factor. Such procedures are obviously unique and have characteristics suggestive of both criminal prosecutions and sentencing. Multiple offender laws have been uniformly upheld and the critical inquiry should be how they can best be put into effect and their purposes and goals most

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80 N.J. Sen. Bill. No. 102 was introduced in 1978 session by Senator Weiss. This bill is presently in the Law, Public Safety and Defense Committee, *N.J. Legislative Index*, Vol. LXV, No. 14, p.53, May 22, 1978.

81 Such an interpretation appears to have been arrived at by the courts when the original version of *N.J.S.A.* 2A:85-13 was in effect. Like the pending amendment, the original 1951 act stated that where a defendant was found to be a multiple offender "the court shall sentence him to the punishment prescribed in sections 2A:85-8, 2A:85-9 and 2A:85-12, as the case may be." The statement accompanying the bill (N.J. Sen. Bill No. 285, introduced March 18, 1953 by Senator Clapp) which was eventually enacted into the present *N.J.S.A.* 2A:85-13 noted that: "Under section 2A:85-13 as it now stands, numerous accusations have been filed against defendants who thereafter were nevertheless sentenced to not more than the maximum for a first offense." See also *State v. Kozarski*, 128 *N.J. Super.* 513, 518-519 (Law Div. 1974), *aff'd* 143 *N.J. Super.* 12 (App. Div. 1976).

82 *In re Investigation Regarding Ringwood Fact Finding Commission*, 65 *N.J.* 512, 516 (1974); *State v. LeVien*, 44 *N.J.* 323, 326-327 (1965).

83 *State v. Laws*, 51 *N.J.* 494, 510-511 (1968), *cert. den.* 393 *U.S.* 971 (1968); *In re Buehrer*, 50 *N.J.* 501, 521 (1967).

84 *State v. Leonardis*, 73 *N.J.* 360, 381-384 (1977).

successfully realized. The gross underutilization of New Jersey's present Habitual Offender Act indicates that the Act as it now stands is unsatisfactory. Vesting discretion as to the invocation of the Act in the prosecutor would, in all probability, significantly increase its utilization. The fact that under such an arrangement the sentencing court would continue to possess a great deal of discretion as to the actual length of a multiple offender's sentence is consistent with the court's own discretion in matters of sentencing, and should not be viewed as a potential source of frustration to the powers of the prosecutor in this area. The obligation of a prosecutor in any criminal action is to seek a conviction if justice so requires.<sup>85</sup> Once this is achieved, the punishment to be imposed for that conviction is the court's responsibility. In invoking such an amended Habitual Offender Act the prosecutor's responsibility will be to obtain a conviction as a multiple offender. The court will then be obliged to impose a punishment pursuant to this Act, within the range authorized in the applicable section. Whether this arrangement would significantly increase the punishment imposed upon multiple offenders is open to speculation. It is questionable, however, whether this is the goal of the Habitual Offender Act. The Act may be viewed as simply a mechanism by which the courts may impose enhanced punishment in appropriate situations. The proposed modification of the law would require the court to confront the fact that the defendant has been adjudged to be a habitual criminal and that the prosecutor obviously believes enhanced punishment to be warranted. It would almost certainly lead to an increase in the utilization of the Act.

#### Conclusion

As indicated above, the Habitual Offender Act is rarely invoked. The Act, in its present form, vests complete discretion in the trial court as to both its invocation and the length of sentences imposed pursuant to it. Thus, there is little likelihood for an increase in its utilization as it now stands. Before the Act is modified, a legislative determination should be made concerning criminal sentencing in general and the purposes and goals behind a multiple offender law. The duties and responsibilities of the prosecutor and the court with respect to recidivist sentencing should be clearly established and delineated. Any modification of the present law should then reflect those determinations.

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<sup>85</sup> N.J.S.A. 2A:158-5; *State v. Winne*, 12 N.J. 152, 167 (1953).





**END**