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Constitutional Law -- Current Trends in Recidivist Statute Procedures

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the decision in *Sigma Chi* will be similarly pragmatic. No doubt college authorities will adopt it as a lever for implementing both the letter and spirit of judicial determinations supporting racial equality in public educational institutions.[23]

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Constitutional Law—Current Trends in Recidivist Statute Procedures

The United States Supreme Court recently affirmed the convictions of three Texas petitioners and in so doing upheld the constitutionality of the common law procedure in applying recidivist statutes.[1] The petitioners urged that due process was violated when it was explained to each juror on voir dire examination that the state was contending the petitioners had been convicted of similar crimes earlier, and further that they were deprived of an impartial trial and jury when the present indictment containing allegations of the prior convictions was read and evidence of the prior convictions put to the jury at trial.[2] The Court, in a 5-4 decision, held that because the jury was instructed not to consider past criminal conduct in deciding present guilt that minimum constitutional demands were met.[3]

The case should be of interest in North Carolina since it sustains the same procedure used here.[4] It should also encourage a re-exami-

clauses might be injurious to the University's position with the Federal Government because the fraternities are chartered by this institution. If this legal connection is strong enough to place the University in jeopardy under the 1964 Civil Rights Act, then the clauses clearly will have to go.

The Daily Tar Heel, Feb. 17, 1965, p. 2.

[23] See McClaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Brown v. Board of Educ., 347 U.S. 483 (1954).

[1] Spencer v. Texas, 87 Sup. Ct. 648 (1967). The three cases disposed of are reported below as Reed v. Beto, 343 F.2d 723 (5th Cir. 1965); Spencer v. Texas, 389 S.W.2d 304 (1965); Bell v. Texas, 387 S.W.2d 411 (1965).

[2] Brief for Petitioner, pp. 4-5, Spencer v. Texas, 87 Sup. Ct. 648 (1967).

[3] 87 Sup. Ct. at 653.

[4] N.C. GEN. STAT. § 15-147 (1965); State v. Lawrence, 264 N.C. 220, 141 S.E.2d 264 (1965); State v. Morgan, 263 N.C. 400, 139 S.E.2d 708 (1965); State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964); State v. Powell, 254 N.C. 231, 118 S.E.2d 617 (1961); State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956); State v. Miller, 237 N.C. 427, 75 S.E.2d 242 (1953); State v. Davidson, 124 N.C. 839, 32 S.E. 957 (1899).

nation of the procedure in the light of the state's policy of providing a fair trial and jury.[5]

It has long been recognized that while evidence of prior convictions is relevant and of probative value, it is so highly prejudicial that, with limited exceptions, a fair trial demands its exclusion.[6] Such evidence is generally admitted only in cases where the defendant raises the question of his own character or where defendant offered himself as a witness.[7]

The common law recidivist statutes provide an additional avenue for placing this same evidence before the jury notwithstanding its volatile nature. The justifying rationale is that the jury is, upon proper instructions, to suppress the knowledge of prior crimes in deciding the issue of guilt in the present case. This is questionable. There is much controversy among authorities as to how effectively jurors are able to accomplish this mental juxtaposition,[8] but it is safe to assume that even the most intellectually agile and impartial juror would be hard pressed by the task.[9] Because of this the majority of American jurisdictions and England have changed their procedures to conform with the *spirit* of providing an impartial jury and not with just meeting the minimum standard that will be tolerated. Twenty-seven states[10] have by statute or decision adopted some form of bifurcation procedure whereby evidence of prior crimes is withheld from the jury until the question of guilt in the present

[5] U.S. CONST. amend. VI; N.C. CONST. art I, § 13.

[6] Michelson v. United States, 335 U.S. 469 (1948); State v. Tessnear, 265 N.C. 319, 144 S.E.2d 43 (1965); State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952); MCCORMICK, EVIDENCE § 157 (1954); STANSBURY, NORTH CAROLINA EVIDENCE § 104 (2d ed. 1963); 1 WIGMORE, EVIDENCE § 57 (3d ed. 1940).

[7] MCCORMICK, EVIDENCE § 157 (1954); STANSBURY, NORTH CAROLINA EVIDENCE § 104 (2d ed. 1963); 1 WIGMORE, EVIDENCE §§ 192-94 (3d ed. 1940); 28 N.C.L. REV. 124 (1949).

[8] Krulewitch v. United States, 336 U.S. 440 (1949); Blumenthal v. United States, 332 U.S. 539 (1947); United States v. Banmiller, 310 F.2d 720 (3d Cir. 1962). For an extended discussion on juries, their functions, and effectiveness, see Skidmore v. Baltimore & Ohio R. Co., 167 F.2d 54 (2d Cir. 1948).

[9] The difficulty is evidenced by the fact that in *Spencer v. Texas* the majority at 554 and the minority at 660 both cited KALVEN & ZEISEL, THE AMERICAN JURY 180 (1966) as support for their respective positions.

[10] Researchers have reached different results on the exact number of states. See, 87 Sup. Ct. at 665 where 28 states are listed and North Carolina Attorney General as Amicus Curiae, pp. 7-8, Spencer v. Texas, 87 Sup. Ct. 648 (1967) where it is maintained that less than half the states have adopted new procedures. This researcher found that 27 states now apply a two-step procedure. See note 11 *infra*.

indictment is determined. Then, if the defendant is convicted, a second determination is made as to the prior convictions for sentencing purposes.[11] These procedures assure a fair trial while still permitting the state to effectuate its policy of increased sentences for habitual criminals. It is significant to note that Texas has joined the majority of states now using a bifurcation procedure since the convictions of the petitioners of *Spencer v. Texas*[12] and that the Attorney General of Texas even while urging affirmance acknowledged that there could be a "better method of proving prior crimes for the purpose of enhancing punishment. . . ."[13] The majority in *Spencer v. Texas* while upholding constitutionality also noted the inferiority of the single step procedure.[14] In his concurring opinion Justice Stewart stated that "it is clear to me that the recidivist procedures adopted in recent years by many other states . . . are far superior to those utilized in the cases now before us."[15]

The North Carolina Attorney General filed an amicus curiae brief in *Spencer v. Texas* asking the Court to uphold the common law procedure and thereby sanction the North Carolina approach.[16] The conclusion of the Attorney General's brief states:

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[11] Those states now employing a two step procedure in applying recidivist statutes are: *Alaska,* ALASKA STAT. § 12.55.060 (Supp. 1966); *Arkansas,* ARK. STAT. ANN. § 43-2328 (1964); *Colorado,* COLO. REV. STAT. ANN. § 39-13-3 (1963); *Connecticut,* Conn. Public Act. No. 588 § 5310 (1963); *Delaware,* DEL. CODE ANN., tit. 11, § 3912(b) (Supp. 1966); *Florida,* FLA. STAT. ANN. § 775.11 (1965; *Idaho,* IDAHO CODE ANN. § 19-2514 (1948); *Kansas,* KAN. STAT. ANN. § 21-107a 1964); *Louisiana,* LA. REV. STAT. ANN. § 15:529.1 (Supp. 1965); *Maryland,* MD. RULE OF PROC. 713 (1963); *Michigan,* MICH. STAT. ANN. § 28.1085 (1954); *Minnesota,* MINN. STAT. ANN. § 609.155 (1964); *Nebraska,* NEB. REV. STAT. § 29-2221 (1964); *New York,* N.Y. PENAL LAW § 1943; *New Mexico,* Johnson v. Cox, 72 N.M. 55, 380 P.2d 199 (1963); *North Dakota,* N.D. CENT. CODE § 12-06-23 (1960); *Ohio,* OHIO REV. CODE ANN. § 2961.13 (1954); *Oklahoma,* OKLA. STAT. ANN., tit. 22, § 860 (Supp. 1966); *Oregon,* ORE. REV. STAT. § 168.065 (Supp. 1963); *Pennsylvania,* PA. STAT. ANN. tit. 18, § 5108 (1963); *South Dakota,* S.D. CODE § 13.0611 (1939); *Tennessee,* TENN. CODE ANN. § 40-2801 (1955) as construed in Harrison v. State, Tenn., 394 S.W.2d 713 (1965); *Texas,* TEX. CODE OF CRIM. PROC. ANN. art. 36.01 (1966); *Utah,* UTAH CODE ANN. § 76-1-19 (1953); *Virginia,* VA. CODE ANN. § 53-296 (Supp. 1966); *Washington,* WASH. REV. CODE ANN. § 9.92.090 (1961); *West Virginia,* W. VA. CODE ANN. § 61-11-19 (1966).

[12] TEX. CODE OF CRIM. PROC. ANN. art. 36.01 (1966).

[13] Brief of Respondent, p. 9. Spencer v. Texas, 87 Sup. Ct. 648 (1967).

[14] 87 Sup. Ct. at 655, 656.

[15] *Id.* at 656.

[16] Appreciation is extended to the Office of the Attorney General of North Carolina for furnishing briefs of counsel as well as its own amicus curiae brief.

> North Carolina, therefore, asks that its procedure shall remain in force and not be disturbed. The criminals of the underworld are not stupid, and they quickly become aware of the facts that repeated acts of crime can bring more severe punishment. When a State legislature says that a prior conviction can bring about increase of punishment and a State supreme court holds that the issue as to the prior conviction can be tried at the same time as the trial of the subsequent offense, then why should the criminal be protected as to his criminal record? We suggest that the protection of law abiding citizens who go about their daily lives should weigh more heavily than the protection of the criminal.[17]

It is submitted that the force behind the current trend toward two-step trials is not to undermine the purpose of recidivist statutes nor to protect the convicted criminal from his past record nor to lessen the law abiding citizen's protection. Rather, an effort is being made to afford every defendant a fairer trial untainted by prejudicial evidence normally excluded.[18] It is to remove the means by which prosecutors under the guise of due process and statutory fulfillment circumvent established rules of evidence.[19] It is further submitted that no valid state policy should be founded upon advocation of a procedure on its face inferior to alternatives having not only the same ultimate effect but also desirable intermediate safeguards. For these reasons North Carolina should consider amending its statutes so that prosecutors are denied probative benefit derived from intro-

[17] Brief of the Attorney General of North Carolina as Amicus Curiae, p. 13, Spencer v. Texas, 87 Sup. Ct. 648 (1967).

[18] See *supra* notes 6-7 and accompanying text. *Compare*, Collins v. State, 70 Okla. Crim. 340, 106 P.2d 273 (1940) where it is held that a defendant is presumed innocent and therefore entitled to appear in court in civilian clothing rather than prison garb. Is the distinction between the state's physically dressing a defendant in prison clothing and mentally dressing him the same way with evidence of prior convictions great? *Cf.* Shultz v. State, 131 Fla. 757, 179 So. 764 (1938).

[19] The principal case is a prime example of this. There the defendant attempted to stipulate before the trial that he had been convicted earlier as the indictment alleged. The prosecutor refused to accept the stipulation and used the recidivist statute to present evidence to the jury of the defendant's criminal record. 87 Sup. Ct. at 662.

Three states by statute and case law allow the defendant to stipulate his prior record even though not providing a two step trial. See, CAL. PENAL CODE § 1025; ARIZ. RULES CRIM. PROC. 180 (1956); State v. Meyer, 258 Wis. 326, 46 N.W.2d 341 (1951). Quaere whether it is good policy to force a defendant to make the impossible choice between stipulating a false allegation in order to exclude prejudicial evidence or allowing the prejudicial evidence in order to avoid enhanced punishment under the state's recidivist statute.

duction of evidence going only to the question of sentencing.[20] To do so would effectuate the due process standards by affording an impartial jury to every defendant.

The simpliest yet most expedient bifurcation procedure is the so called Connecticut method[21] whereby the indictment contains two pages. On the first page are allegations pertaining to the present crime. On the second page are allegations of prior crimes to be used in imposing sentence. The defendant is, in the absence of the jury, read both pages to give him notice of the charges. Then the jury is read only the first page. If they return a guilty verdict then the second page is read to them and a fiinding is made as to the prior crimes. Thus, one jury and one trial is utilized in deciding both questions but the defendant is not deprived of *full* due process by having a jury decide the question of his guilt with the knowledge of prior convictions in mind.

In addition to the prejudicial aspect of the present statute, perhaps the practical desirability for amendment should be examined in light of the Supreme Court's present decision, recent decisions, and possible future holdings. The recent decisions dealing with voluntariness of confessions,[22] right to a transcript on appeal,[23] right to counsel,[24] and pre-trial publicity[25] leave no room to doubt the Court's concern for fair trial under the due process clause. In *Spencer v. Texas* this same concern is evidenced in the extensive dis-

[20] It should be noted that the North Carolina Court has construed the recidivist statute strictly. In several cases tacit recognition of the prejudicial effect of the statute has been shown where convictions of the principal crime were reversed even though the sentence imposed did not exceed that permissible for a first offender. In these cases minor procedural technicalities in applying the statute were not met. State v. Powell, 254 N.C. 231, 118 S.E.2d 617 (1961); State v. Stone, 245 N.C. 42, 95 S.E.2d 77 (1956). Also see State v. Painter, 261 N.C. 332, 134 S.E.2d 638 (1964) where in reversing the court said that it was desirable if not necessary that the warrant specify as particularly as the indictment to meet the recidivist statute standards. State v. Miller, 237 N.C. 427, 75 S.E.2d 242 (1953) where the indictment was held inadequate.

[21] State v. Ferrone, 96 Conn. 160, 113 Atl. 452 (1921). For codification see, UTAH CODE ANN. § 76-1-19 (1953).

[22] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1963); Jackson v. Denno, 378 U.S. 368 (1963), where a two step procedure was required in determining the admission of a confession.

[23] Griffin v. Illinois, 351 U.S. 12 (1956).

[24] Miranda v. Arizona, 384 U.S. 436 (1966); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

[25] Sheppard v. Maxwell, 384 U.S. 333 (1966); Marshall v. United States, 360 U.S. 310 (1959).

senting opinions of the Chief Justice and Justice Fortas,[26] joined by Justices Brennan and Douglas in a separate dissent.[27] Nor is there much comport for the proponent of the *Status quo* in the majority's reluctant affirmance.[28] The announcement by Justice Clark, who voted with the majority, that he intends to retire from the Court[29] further weakens the holding of *Spencer* and leaves to speculation whether his replacement would vote for or against affirming if and when the question is again presented. More importantly, two of the dissenting Justices felt that the common law procedure for applying recidivist statutes "undermined 'the very integrity of the fact finding process' "[30] and would have applied their dissents retroactively. As is noted in the North Carolina Attorney General's amicus curiae brief, to strike down the common law procedure would be to nullify North Carolina statutes and holdings.[31] To apply such a decision retroactively would also nullify convictions obtained using these procedures. Thus, it would seem prudent to consider changing the statute on these very practical grounds as well as on the policy basis discussed above.

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Criminal Law and Procedure—Harmless Error

The harmless-error statutes and rules[1] now utilized by all the states and in the federal judicial system[2] are the product of judicial

[26] 87 Sup. Ct. at 656.
[27] *Id.* at 666.
[28] See notes 14 and 15 *supra* and accompanying text.
[29] Time, Mar. 10, 1967, p. 22.
[30] 87 Sup. Ct. at 666. *Compare*, Gideon v. Wainwright, 372 U.S. 335 (1965).
[31] Brief of the Attorney General of North Carolina as Amicus Curiae, p. 2, Spencer v. Texas, 87 Sup. Ct. 648 (1967).

[1] Typical of the harmless-error provisions is the California harmless-error provision which provides:

> No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

CAL. CONST. art. VI, § 4½.

[2] 28 U.S.C. § 2111 (1965) provides:

On the hearing of any appeal or writ of certiorari in any case, the