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Criminal Law–Time Limitations in Initiating Habitual Criminal Proceedings

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of participants in an unorganized political movement seeking to outlaw conscription through their martyrdom. The other classification includes members of an organized group who seek to oppose the interests of government, such as the American Communist Party. 36 Minn. L. Rev. 65, 75 (1951). There would be little question in this case as to their sincerity in their beliefs, but the element of religion would be negated when applied in the sense of a belief occupying a place in the life of a Communist parallel to that filled by the orthodox belief in God.

Perhaps the most difficult problem is that posed by the moral or ethical objectors. The views of this group which are usually voiced by a highly intelligent and literate registrant must be rejected as being the result of a religious training or belief. Berman v. United States, supra at 380, stated that the words "religious training and belief" were embodied in the 1940 statute "for the purpose of distinguishing between a conscientious social belief or a sincere devotion to a highly moralistic philosophy and one based on an individual's belief in his responsibility to an authority higher and beyond any worldly one . . . ." Congress indicated its preference to this view by substantially adopting this position in 1948. S. Rep. No. 1268 80th Cong. 2d Sess. 14 (1948).

The decision in the instant case opens the way to a definition of religion that transcends traditional theism and recognizes a wide variety of religious beliefs. The ruling also avoids an implication that a secular ideology must be characterized as religion. This seems to be consistent and in harmony with the settling principles more clearly emerging from the Court's interpretation and application of the first amendment freedoms.

Frank Cuomo

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While confined in the penitentiary on an escape charge, D was sentenced to an additional ten-year period of confinement under a recidivist proceeding. The recidivist information had been filed at a time of a prior conviction for larceny and D had been convicted and sentenced under both. After completing the larceny sentence, but while D was still in the penitentiary under the escape
sentence, the recidivist sentence was voided because $D$ was not represented by counsel. $D$ was held in prison under the escape conviction and a new sentence under the recidivist statute was entered. $D$ appealed claiming he had served all sentences for convictions alleged in information and that there was no existing sentence for which the punishment could be enhanced. Held, affirmed. $D$ can be sentenced as a recidivist, if he is still an inmate in a penitentiary, though he has completed the sentence upon which information is based. *Deiter v. Commonwealth*, 139 S.E.2d 788 (Va. 1965).

In the principal case the court noted that $D$ had been tried and convicted under the recidivist statute promptly after the substantive offense sentence had been imposed. The sentence under this original recidivist action was declared void. However, the information was not declared void but was still valid, outstanding, and unsatisfied. Thus $D$ could be tried again under this valid information. $D$ argued that the basic sentence under the substantive offense had been fully satisfied and there was no existing sentence for which the punishment could be enhanced. The Virginia court took the position that the recidivist proceeding could be started at any time so long as the defendant is in prison. The fact that the prisoner had completed serving the time imposed under the conviction on which the information is based was of no consequence.

The principal case raises the problem of the time limit in which the procedure for prosecution under a recidivist statute must be begun and this comment will be limited to that area. There is a wide diversity of opinion concerning time requirements for commencing habitual criminal actions. Some states set no time limit for initiating recidivist proceedings. In *People v. Kaiser*, 230 App. Div. 646, 246 N.Y. Supp. 309, aff'd. 256 N.Y. 581, 177 N.E. 149 (1930), the New York court took the position that a prisoner can be tried at any time as a habitual criminal even though he has completed serving his sentence under a prior conviction and has been released from prison. Louisiana has adopted this same view. In *State v. George*, 48 So.2d 265 (La. 1950), $D$ was convicted as a habitual criminal though he had completed his sentence under the substantive offense and had been released from prison for over a month.

The Ohio court in *State v. Sudekatus*, 172 Ohio App. 165, 51 N.E.2d 22 (1943) followed the New York view. However, in the
recent case of *State v. Shank*, 115 Ohio App. 291, 185 N.E.2d 63 (1962) the court stated that it could not accept the reasoning of the *Sudekatus* case but did not expressly overrule it.

In *Reynolds v. Cochran*, 138 So.2d 500 (Fla. 1962), *D* was convicted of larceny and served his sentence and was discharged. Two months later he was arrested and charged under Florida’s Habitual Criminal Act. On appeal, it was held that a court may not sentence a habitual offender to an enhanced punishment once he has fully satisfied the sentence imposed on him, pursuant to his conviction for the last offense. The Florida court took a position directly contra to the New York and Louisiana courts. Florida limits the time a felon may be charged under its habitual criminal statute to the period of time during which the convicted felon is serving the sentence imposed on him for his last offense.


The position of the courts may be summarized into the following groups: (1) the prisoner can be tried under a habitual criminal act at anytime in the future; (2) the prisoner must be tried as a habitual criminal before he completes his sentence under conviction for principal offense; (3) the prisoner can be tried under the habitual criminal act as long as he is in prison under any conviction; and (4) there is a time limit specified in habitual criminal statute in which state must bring its information charging defendant as a habitual criminal.

What is the position of the West Virginia court in this matter? The prosecuting attorney, when he has knowledge of former sentences of the defendant, must give information to the court immediately upon conviction and before sentence, and the prisoner must be sentenced as a habitual criminal at the same term of court. *W. Va. Code* ch. 61, art. 11, § 19 (Michie 1961). The court must strictly comply with the requirements of the statute or the judgment will be declared void. *State v. Tucker*, 142 W.Va. 830, 98 S.E.2d 740 (1957). In *State v. Adams*, 143 W.Va. 601, 103 S.E.2d 873 (1958), *D* was sentenced to a criminal offense in one term of court and in a subsequent term of court he was charged and sentenced under the habitual criminal act. The sentence was held
void as the state had not complied strictly with the statute. If the prosecuting attorney has knowledge that the defendant has committed prior felonies at the time of the trial for the primary offense, he cannot wait but must immediately file an information charging defendant as a habitual criminal, and failure to do so will bar further action by the prosecuting attorney under the habitual criminal act.

What if the prosecuting attorney does not have knowledge of the prior convictions of the prisoner at the time of the conviction for the present offense? W.Va. Code ch. 62, art. 8, § 4 (Michie 1961), provides that a prisoner convicted of an offense and sentenced to confinement may be tried as habitual criminal by the circuit court of Marshall county, where the penitentiary is located, if he has been convicted before of any crime punishable by imprisonment in a penitentiary. Thus as long as the prisoner is confined in the penitentiary he can be tried as a habitual criminal. An inference from the wording of the statute is that the court in Marshall county can begin proceedings at any later time, so long as the prisoner is confined in the penitentiary.

The principal case demonstrates the wide diversity in regard to application and constructions of habitual criminal statutes. The courts seem to follow very few set principles and precedents in deciding cases under habitual criminal statutes and this arbitrary treatment of cases under these statutes gives rise to much controversy. It would appear that there is a need for strict principles in limiting the time in which the state can bring an action under a habitual criminal act. Certainly the view of the New York court giving the state an unlimited period of time would seem unjust. The very purpose of these statutes is to inflict greater punishment as a result of past conduct and is based on the fact that the prisoner has consistently violated the law and despite prior punishment has persisted in his criminal way. Under the New York view, a prisoner might commit several felonies for which he is punished and then reform and live a useful life, and years later he might be charged as a habitual criminal though he has demonstrated his repentance for his criminal ways. There should be some time limit in proceeding against an individual as a habitual criminal.

The West Virginia position seems to be a satisfactory one. The information should be filed as soon as the prosecutor learns of prior
convictions, and if this is at the time defendant is being tried it must be filed at this time or the prosecuting attorney will be barred. In all cases if the prior convictions are not discovered by the time $D$ is released from prison, prosecution under the habitual criminal act is barred. Of course if the defendant is convicted again, the habitual criminal act could be used against him. This would give the state an additional period of time while $D$ is a prisoner to discover his prior criminal record. With modern police techniques and complete records of criminal convictions, this should not impose too great a burden on the state.

John Payne Scherer

Trusts—Limitations on Distributions from Incompetent’s Estate

The trustee of an incompetent sought authority, as provided by statute, to make certain charitable contributions and gifts from the income and principal of his ward’s estate. Held, permission granted. The evidence permitted the court to reach the factual conclusion that the action to be taken was such that the incompetent if capable would have done the same. In the Matter of Trusteeship of Kenan, 138 S.E.2d 547 (N.C. 1964).

Before discussing the issues that arise concerning the distributions from the surplus of an incompetent’s estate a more detailed examination of the history and problem involved in the principal case is required. In 1955 Mrs. Kenan, age seventy-nine, a widow with no dependents or descendants, had an estate worth approximately 52,000,000 dollars. In that year she executed a will making charitable bequests totaling about 800,000 dollars. She provided other relatively small legacies for certain relatives and servants with the residue going to two nephews. In 1962 Mrs. Kenan was declared incompetent and one of the nephews was appointed her trustee.

In 1963 the North Carolina Legislature passed certain enabling acts, codified as N.C. Gen. Stat. § 35-29.1 to 35-29.16 (Michie Supp. 1963), which provide that the trustee of an incompetent’s estate may, with court approval and if certain conditions are met, make gifts from income and principal to tax exempt institutions and to the incompetent’s devisees and heirs.