St. John's Law Review

Volume 58
Number 3 *Volume 58, Spring 1984, Number 3*

Article 13

CPL § 400.21: The Defendant Has the Burden of Proving the Unconstitutionality of a Predicate Conviction Asserted by the People

Steven F. Siegel

paired the effectiveness of the plea bargain in the criminal justice system.

Thomas M. Gandolfo

CRIMINAL PROCEDURE LAW

CPL § 400.21: The defendant has the burden of proving the unconstitutionality of a predicate conviction asserted by the People

Section 400.21 of the Criminal Procedure Law governs the procedure for sentencing a defendant as a second felony offender.[102] Pursuant to this section, the prosecution must prove the existence of any predicate felony conviction it intends to use to enhance the defendant's sentence.[103] The defendant, however, is

---

[102] *See* CPL § 400.21 (1983). A second felony offender is defined as "a person, other than a second violent felony offender . . . who stands convicted of a felony . . . other than a class A-I felony, after having previously been subjected to one or more predicate felony convictions." N.Y. PENAL LAW § 70.06(1)(a) (McKinney Supp. 1983-1984).

CPL § 400.21 contains provisions substantially identical to three other enhancement statutes. *See* CPL § 400.15 (1983) (procedure for determining whether defendant is a second violent felony offender); CPL § 400.16 (1983) (procedure for determining whether defendant is a persistent violent felony offender); CPL § 400.20 (1983) (procedure for determining whether defendant should be sentenced as a persistent felony offender). These sections generally are applied in a similar manner, *see* People v. Leston, 117 Misc. 2d 712, 714, 459 N.Y.S.2d 364, 366 (Sup. Ct. N.Y. County 1983); People v. Graham, 111 Misc. 2d 666, 669-70, 444 N.Y.S.2d 988, 990 (Sup. Ct. N.Y. County 1981); CPL § 400.15, commentary at 218-19 (1983), and, therefore, for the purposes of this survey, will be referred to interchangeably.

Recidivist statutes, such as CPL § 400.21, are designed to subject repeat offenders to punishment of a more severe nature. *See* CPL § 400.21, commentary at 235 (1983). Recidivist statutes have survived a wide range of constitutional attacks. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (cruel and unusual punishment); Oyler v. Boles, 368 U.S. 448, 451-54 (1962) (notice and opportunity to be heard); Graham v. West Virginia, 224 U.S. 616, 625, 629-30 (1912) (due process and equal protection); *Leston*, 117 Misc. 2d at 713, 459 N.Y.S.2d at 365 (ex post facto challenge). *See generally* Note, *Recidivist Procedures: Prejudice and Due Process*, 53 CORNELL L. REV. 337, 337 & n.1 (1968) (discussion of the continued stability of recidivist statutes despite numerous constitutional attacks).

[103] CPL § 400.21(7)(a) (1983). In addition to proving the existence of a predicate conviction, the prosecution must prove that the defendant to be sentenced was in fact the person convicted of the prior felony. *Id.* Section 400.21(2) of the CPL requires that the prosecutor file a statement before sentence is imposed. *Id.* § 400.21(2). The statement must set forth the specifics of the date and place of each alleged predicate felony conviction the People intend to use for enhancement purposes. *Id.*; *see* People v. Towns, 94 App. Div. 2d 973, 973, 464 N.Y.S.2d 100, 100 (4th Dep't 1983); People v. Brown, 54 App. Div. 2d 719, 719,

afforded the opportunity to controvert any alleged predicate conviction on the ground that it was obtained unconstitutionally.[104]

---

387 N.Y.S.2d 470, 471 (2d Dep't 1976); *see also* R. PITLER, NEW YORK CRIMINAL PRACTICE Under CPL § 13.26, at 721-22 (1972), the defendant must be given a copy of the prosecutor's statement, and if the defendant wishes to contest an allegation made in the statement, he must specify the allegation he wishes to controvert. CPL § 400.21(3) (1983).

[104] CPL § 400.21(7)(b) (1983); R. PITLER, *supra* note 103, § 13.31, at 724. Section 400.21(7)(b) provides in pertinent part:

> The defendant may, at any time . . . controvert an allegation with respect to such conviction in the statement on the grounds that the conviction was unconstitutionally obtained.

CPL § 400.21(7)(b) (1983).

A predicate hearing is held whenever the defendant controverts an allegation in the prosecutor's statement and the uncontroverted allegations "are not sufficient to support a finding that the defendant has been subjected to a predicate felony conviction." *Id.* § 400.21(5); *see, e.g.*, People v. Nalo, 91 App. Div. 2d 957, 957, 458 N.Y.S.2d 570, 571 (1st Dep't 1983); People v. Jensen, 89 App. Div. 2d 1020, 1020, 454 N.Y.S.2d 681, 681 (2d Dep't 1982); *see also* R. PITLER, *supra* note 103, § 13.30 at 723. Any allegation not controverted is deemed admitted by the defendant. CPL § 400.21(3) (1983). However, a hearing is not required when the defendant fails to raise any factual support for his claim, *see* People v. Spencer, 32 N.Y.2d 446, 450-51, 299 N.E.2d 651, 653, 346 N.Y.S.2d 225, 227-28 (1973), or when the record clearly establishes the existence and constitutionality of the predicate conviction, *see* People v. Stewart, 96 App. Div. 2d 622, 623, 464 N.Y.S.2d 885, 886-87 (3d Dep't 1983); People v. Ayala, 112 Misc. 2d 821, 827-28, 448 N.Y.S.2d 354, 358-59 (Sup. Ct. Kings County 1982).

Procedures for challenging the constitutionality of a predicate conviction in a multiple felony offender hearing were first incorporated into law in 1964. N.Y. PENAL LAW § 1943, ch. 446, § 1, [1964] N.Y. Laws 668 (repealed 1967) (current version as amended at CPL § 400.20(6) (1983)). It was believed that a statutory method would be a timely and convenient procedure to challenge state convictions. People v. DiGiacomo, 96 App. Div. 2d 1127, 1128, 467 N.Y.S.2d 726, 728 (3d Dep't 1983); Memoranda of State Attorney General, *reprinted in* [1964] N.Y. LEGIS. ANN. 57 [hereinafter cited as Memoranda]. Moreover, since it was considered a violation of due process not to afford the defendant an in-state forum in which to challenge the constitutionality of an out-of-state conviction, *see* People *ex. rel.* Warren v. Smith, 79 Misc. 2d 643, 644, 361 N.Y.S.2d 125, 127 (Wyoming County Ct. 1974), *appeal dismissed*, 54 App. Div. 2d 820, 388 N.Y.S.2d 1021 (4th Dep't 1976); Governor's Memoranda on Bills Approved (S.I. 445, Pr. 4007, McEwen), *reprinted in* [1964] N.Y. LEGIS. ANN. 514, 515 [hereinafter cited as Memo]. In Governor's Memoranda on Approval of ch. 446, N.Y. Laws, an additional procedure was created to provide a New York forum to challenge a conviction obtained out-of-state, *see DiGiacomo*, 96 App. Div. 2d at 1128, 467 N.Y.S.2d at 728; *Smith*, 79 Misc. 2d at 645, 361 N.Y.S.2d at 127; Memo, *supra*, at 514-15; Memoranda, *supra*, at 57.

The only permissible challenge to the constitutionality of a predicate conviction is an allegation of a violation of the United States Constitution. CPL § 400.21(7)(b) (1983); *see* R. PITLER, *supra* note 103, § 13.31, at 724. Accordingly, violations of the state constitution or of statutory procedures will not suffice to discount the predicate conviction. *See, e.g.*, People v. Alston, 83 App. Div. 2d 744, 745, 443 N.Y.S.2d 499, 500 (4th Dep't 1981) (alleged violation of CPL § 720.20); People v. Ayala, 112 Misc. 2d 821, 822, 448 N.Y.S.2d 354, 357 (Sup. Ct. Kings County 1982) (alleged violation of state policy). If the court determines that the predicate felony conviction was obtained in violation of the Constitution, then the conviction cannot be used as a predicate felony conviction. CPL § 400.21(7)(b) (1983); *see* People v.

The Appellate Division has been divided on the issue of which party bears the burden of proving the constitutionality of the alleged predicate conviction.[105] Recently, however, in *People v. Harris*,[106] the Court of Appeals held that section 400.21 of the CPL places the burden of proving the unconstitutionality of the predicate conviction on the defendant.[107]

In *Harris*, six cases presenting the identical issue were consolidated on appeal.[108] In each case, the People sought an increased sentence of imprisonment pursuant to section 70.06 of the Penal Law.[109] The defendants challenged the use of their respective prior felony convictions, alleging that their guilty pleas had been ob-

---

McNeil, 117 Misc. 2d 96, 100, 457 N.Y.S.2d 409, 412 (Sup. Ct. N.Y. County 1982); R. PITLER, *supra* note 103, § 13.31, at 724.

[105] *Compare* People v. Thompson, 60 App. Div. 2d 765, 765, 400 N.Y.S.2d 957, 958 (4th Dep't 1977) (burden of proving constitutionality of predicate conviction on People) *with* People v. Bonk, 83 App. Div. 2d 695, 695, 442 N.Y.S.2d 281, 282 (3d Dep't 1981) (burden of proving unconstitutionality upon defendant) *and* People v. Harley, 52 App. Div. 2d 698, 698, 382 N.Y.S.2d 585, 585 (3d Dep't 1976) (defendant has burden of establishing unconstitutionality of previous conviction). Just as the departments of the Appellate Division have differed as to the proper allocation of the burden of proof, there has been a split among the trial courts that have addressed the burden of proving the constitutionality of predicate conviction. *Compare* People v. Leston, 117 Misc. 2d 712, 716, 459 N.Y.S.2d 364, 367 (Sup. Ct. N.Y. County 1983) (burden of proof as to constitutionality on People) *and* People v. Celli, 105 Misc. 2d 1005, 1008, 430 N.Y.S.2d 949, 951 (Westchester County Ct. 1980) (People met their burden of proving predicate conviction constitutionally obtained) *with* People v. Abbott, 113 Misc. 2d 766, 781, 449 N.Y.S.2d 853, 863 (Sup. Ct. N.Y. County 1982) (placing upon defendant the burden of establishing unconstitutionality of previous conviction) *and* People v. Broderick, 43 Misc. 2d 1014, 1016, 252 N.Y.S.2d 838, 840 (Sup. Ct. Kings County 1964), *appeal dismissed*, 24 App. Div. 2d 638, 262 N.Y.S.2d 188 (2d Dep't 1965) (defendant has burden of proving deprivation of his constitutional rights). Similarly, there has been no consensus among the courts as to the level of proof necessary to sustain that burden. *See, e.g.*, *Leston*, 117 Misc. 2d at 717, 459 N.Y.S.2d at 367 (ultimate burden on People probably one of "clear and convincing evidence"); People v. Anderson, 117 Misc. 2d 284, 284, 458 N.Y.S.2d 463, 464 (Sup. Ct. Queens County 1982) (People have burden beyond a reasonable doubt); *Abbott*, 113 Misc. 2d at 781, 449 N.Y.S.2d at 863 (defendant must show prior conviction unconstitutional by "some quantum of evidence"); *Broderick*, 43 Misc. 2d at 1016-20, 252 N.Y.S.2d at 840-44 (burden on defendant "by a fair preponderance of the evidence").

[106] 61 N.Y.2d 9, 459 N.E.2d 170, 471 N.Y.S.2d 61 (1983).

[107] *Id.* at 15, 459 N.E.2d at 172, 471 N.Y.S.2d at 63.

[108] *Id.* In addition to People v. Harris (No. 679), the five cases involved in the appeal were: People v. Lewis (No. 580), People v. Ramsey (No. 581), People v. Vargas (No. 582), People v. Alicea (No. 583), and People v. Burgo (No. 584). The consolidated issue was "whether a prior felony conviction, based upon a guilty plea which was entered without the defendant having been advised by the court of the specific constitutional rights being waived by that plea, may constitute a predicate felony for the purpose of sentencing the defendant as a second felony offender." *Id.*

[109] *Id.*

tained unconstitutionally.[110] The Court held that a guilty plea is not invalid solely because the trial judge failed to enumerate each of the rights the defendant waives by entry of the plea.[111] Consequently, the Court ordered that five of the six defendants be sentenced as second felony offenders.[112]

Writing for the Court, Judge Jasen acknowledged that the defendant must knowingly, voluntarily, and intelligently waive his rights upon entering a guilty plea.[113] The Court, however, disagreed with the defendants' contention that a specific recitation of rights and multiple explicit waivers is required.[114] Rather, the Court concluded that the crucial inquiry should be whether, in the totality of circumstances, the plea " 'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' "[115] In reviewing the applicable procedure under section 400.21 of the CPL, the Court stated that after the prosecution established the fact of the prior conviction, it was incumbent upon "the defendant to allege and prove the facts underlying the claim

---

[110] *Id.*

[111] *Id.* at 16, 459 N.E.2d at 173, 471 N.Y.S.2d at 64.

[112] *See id.* at 15-16, 459 N.E.2d at 173, 471 N.Y.S.2d at 64.

[113] *Id.* at 17, 459 N.E.2d at 173, 471 N.Y.S.2d at 64; *see* Boykin v. Alabama, 395 U.S. 238, 242 (1969); People v. Lewis, 94 App. Div. 2d 670, 671, 462 N.Y.S.2d 665, 666 (1st Dep't), *aff'd*, 61 N.Y.2d 9, 459 N.E.2d 170, 471 N.Y.S.2d 61 (1983); People v. McNeil, 117 Misc. 2d 96, 99, 457 N.Y.S.2d 409, 411 (Sup. Ct. N.Y. County 1982).

[114] 61 N.Y.2d at 16, 459 N.E.2d at 173, 471 N.Y.S.2d at 64; *see* Boykin v. Alabama, 395 U.S. 238, 242-44 (1969). In *Boykin*, the Supreme Court was presented with a guilty plea where the record was virtually silent as to the circumstances surrounding the plea. 395 U.S. at 239-40. The *Boykin* Court reversed the conviction because the record did not disclose whether the guilty plea was entered intelligently and voluntarily. *Id.* at 244. The Court noted that several constitutional rights are involved whenever a defendant enters a guilty plea, namely, the right against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Id.* at 243; *see Harris*, 61 N.Y.2d at 17, 459 N.E.2d at 174, 471 N.Y.S.2d at 65; People v. McNeil, 117 Misc. 2d 96, 98, 457 N.Y.S.2d 409, 411 (Sup. Ct. N.Y. County 1982).

The *Harris* Court noted that *Boykin* approved a "colloquy procedure" in which the trial court examines the defendant to determine whether he understands the nature of the charges, his right to a jury trial, and the elements of the offense. 61 N.Y.2d at 18-19, 459 N.E.2d at 174, 471 N.Y.S.2d at 65 (citing *Boykin*, 395 U.S. at 244 n.7). The *Boykin* Court, however, did not require the trial judge to include a specific enumeration of each right being waived. *See* 395 U.S. at 242-44. Furthermore, the *Harris* Court noted that the Federal court of appeals and state courts that have considered the question have held that a detailed articulation and waiver of the individual rights is not constitutionally mandated. 61 N.Y.2d at 19, 459 N.E.2d at 175, 471 N.Y.S.2d at 66.

[115] 61 N.Y.2d at 19, 459 N.E.2d at 175, 471 N.Y.S.2d at 66 (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)).

that the conviction was unconstitutionally obtained."[116] In five of the cases the Court held that the defendant's burden was not sustained because the presumption of regularity accorded the prior convictions was not overcome by substantial evidence to the contrary.[117]

The *Harris* Court, in a terse resolution of the issue, concluded that the defendant bears the burden of proving the unconstitutionality of a predicate conviction.[118] It is suggested that the Court incorrectly applied section 400.21 of the CPL, and in so doing failed to afford the defendants their due process rights. Subsection (7)(a) of section 400.21 places upon the prosecution the burden of proving beyond a reasonable doubt both the existence of the predicate conviction and that the defendant is the person who was previously convicted.[119] Satisfaction of this burden, therefore, is an es-

---

[116] 61 N.Y.2d at 15, 459 N.E.2d at 172, 471 N.Y.S.2d at 63; *see* CPL § 400.21(7)(a) (1983); R. PITLER, *supra* note 103, § 13.32, at 724. There has been no dispute concerning who bears the burden of proving the prior conviction, nor has there been a dispute as to the level of proof required to sustain it. *See, e.g.*, People v. Allah, 66 App. Div. 2d 665, 665, 410 N.Y.S.2d 833, 833-34 (1st Dep't 1978); People v. Korsen, 117 Misc. 2d 875, 876, 459 N.Y.S.2d 380, 381 (Sup. Ct. N.Y. County 1983); People v. Tesoriero, 108 Misc. 2d 1055, 1057, 439 N.Y.S.2d 91, 93 (Nassau County Ct. 1981). For a further discussion of § 400.21(7)(a), see *infra* notes 119-20 and accompanying text.

[117] 61 N.Y.2d at 16, 459 N.E.2d at 173, 471 N.Y.S.2d at 64.

[118] *Id.*

[119] CPL § 400.21(7)(a) (1983); *see* People v. Leston, 117 Misc. 2d 712, 715-16, 459 N.Y.S.2d 364, 367 (Sup. Ct. N.Y. County 1983); People v. Abbott, 113 Misc. 2d 766, 780, 449 N.Y.S.2d 853, 863 (Sup. Ct. N.Y. County 1982). Section 400.21(7)(a) provides in pertinent part:

> The burden of proof is upon the people and a finding that the defendant has been subjected to a predicate felony conviction must be based upon proof beyond a reasonable doubt.

CPL § 400.21(7)(a) (1983). Section 70.04(1)(b) of the Penal Law sets forth the criteria for determining whether a prior conviction qualifies as a predicate violent felony conviction. *See* N.Y. PENAL LAW § 70.04(1)(b) (McKinney Supp. 1983-1984); *see also* People v. Korsen, 117 Misc. 2d 875, 876, 878, 459 N.Y.S.2d 380, 382 (Sup. Ct. N.Y. County 1983); People v. Tesoriero, 108 Misc. 2d 1055, 1057, 439 N.Y.S.2d 91, 93 (Nassau County Ct. 1981).

At least one court has held that the unchallenged production of a certificate of conviction is sufficient to sustain the People's burden as to the defendant's identity. *See* People v. Seppinni, 119 Misc. 2d 125, 131, 462 N.Y.S.2d 956, 960 (Sup. Ct. N.Y. County 1983); *see also* R. PITLER, *supra* note 103, § 13.32, at 724 (certificate from Commissioner of Correction is prima facie evidence of predicate conviction); *cf.* People v. Allah, 66 App. Div. 2d 665, 665, 410 N.Y.S.2d 833, 834 (1st Dep't 1978) (uncertified arrest record insufficient). Mug shots and fingerprints also may be used to sustain the People's burden of proving the defendant's identity. *See Allah*, 66 App. Div. 2d at 665, 410 N.Y.S.2d at 834. In *Allah*, the court concluded that an uncertified arrest record containing information compiled from other records would not suffice to connect the defendant, beyond a reasonable doubt, to the prior felony conviction. *Id.*; *see also Korsen*, 117 Misc. 2d at 878, 459 N.Y.S.2d at 382 (People proved only a prior misdemeanor); People v. Taylor, 86 Misc. 2d 445, 448, 382 N.Y.S.2d 688,

sential element of the prosecutor's use of the enhanced sentencing procedure.[120] Subsection (7)(b), while not allocating the burden of proof,[121] permits the defendant to contest the constitutionality of the predicate conviction.[122] Once the conviction is challenged, the existence of a constitutional conviction becomes an essential element of the prosecutor's case,[123] since an unconstitutional conviction may not be used to invoke the enhanced sentence mechanism.[124] Therefore, it is submitted that since the elements of

---

690 (Sup. Ct. Suffolk County 1976) (where sentence had been set aside, previous conviction could not be used as a predicate felony).

[120] CPL § 400.21(7)(a) (1983); *see* People v. Allah, 66 App. Div. 2d 665, 665, 410 N.Y.S.2d 833, 834 (1st Dep't 1978); People v. Leston, 117 Misc. 2d 712, 716, 459 N.Y.S.2d 364, 367 (Sup. Ct. N.Y. County 1983).

[121] *See* CPL § 400.21(7)(b) (1983); People v. Leston, 117 Misc. 2d 712, 714, 459 N.Y.S.2d 364, 366 (Sup. Ct. N.Y. County 1983); People v. Abbott, 113 Misc. 2d 766, 780, 449 N.Y.S.2d 853, 863 (Sup. Ct. N.Y. County 1982).

[122] *See supra* note 104 and accompanying text.

[123] The constitutionality of the predicate conviction is not an essential element of the offense charged because enhancement statutes relate only to defendants who already stand convicted of an offense. *See* CPL § 400.21(1) (1983); *see also* People v. Taylor, 86 Misc. 2d 445, 446-47, 382 N.Y.S.2d 688, 689 (Sup. Ct. Suffolk County 1976). In State v. Martin, 336 S.W.2d 394 (Mo. 1960), the Missouri court stated that:

> [W]hile a prior conviction charged for the purpose of increasing punishment is not an "essential element of the offense" for which a defendant is on trial, it is an "essential element of the case" on trial, as to which element the state has the same burden of proof . . . as it has to any other essential element of the case.

Id. at 397 (quoting loosely, State v. Kimbrough, 166 S.W.2d 1077, 1081 (Mo. 1942)); *see* State v. Barry, 605 S.W.2d 148, 149 n.1 (Mo. 1980).

[124] *See* CPL § 400.21(7)(b) (1983). Section 400.21(7)(b) of the CPL provides in pertinent part:

> A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction.

Id.; *see also* United States *ex. rel.* Lasky v. LaVallee, 472 F.2d 960, 964 (2d Cir. 1973) (absent proof that defendants had counsel the people may not use prior conviction); People v. Johnson, 62 App. Div. 2d 1174, 1174, 404 N.Y.S.2d 200, 200 (4th Dep't 1978) (conviction obtained in violation of constitutional rights may not be used to heighten defendant's sentence); People v. Taylor, 86 Misc. 2d 445, 445-46, 382 N.Y.S.2d 688, 689 (Sup. Ct. Suffolk County 1976) (failure to treat defendant as youthful offender denied People right to use prior conviction.)

Various lower courts have denied enhanced sentencing when the People failed to show the constitutionality of the predicate conviction. *See, e.g.*, People v. Kordresse, 118 Misc. 2d 243, 246, 460 N.Y.S.2d 449, 451 (Sup. Ct. N.Y. County 1983); People v. Anderson, 117 Misc. 2d 284, 291-92, 458 N.Y.S.2d 463, 468 (Sup. Ct. Queens County 1982); People v. McNeil, 117 Misc. 2d 96, 99-100, 457 N.Y.S.2d 409, 411-12 (Sup. Ct. N.Y. County 1982). In *Kordresse*, the court stated that since it was impossible to conclude that the defendant's plea was entered voluntarily, the prior conviction could not be used as a predicate felony for the purpose of increased sentencing. *Kordresse*, 118 Misc. 2d at 246, 460 N.Y.S.2d at 451. In *Ander-*

subsections (7)(a) and (7)(b) are both prerequisites to the enhancement of a sentence, the allocation and degree of proof should be identical.

An enhanced penalty statute includes the previous commission of the same or similar crime as an element in the prosecution for a more severely punished offense.[125] Reflecting the importance society places on an individual's right to life and liberty, due process considerations have been held applicable to enhanced penalty statutes.[126] Although the prior conviction under such a statute is an actual element of the offense,[127] it is proposed that the rationale behind the allocation of the burden of proof in an enhanced pen-

---

son, the court stated that since the People failed to sustain their burden of proving the constitutionality of the prior conviction, the defendant could not be sentenced as a second felony offender. *Anderson*, 117 Misc. 2d at 291-92, 458 N.Y.S.2d at 468; *accord McNeil*, 117 Misc. 2d at 99-100, 457 N.Y.S.2d at 411-12.

It is important to note that once the prior conviction is found to be constitutional, the sentencing procedures provided for in the statute become mandatory. N.Y. PENAL LAW § 70.04(2) (McKinney Supp. 1983-1984); *see* People v. Brown, 54 App. Div. 2d 719, 719, 387 N.Y.S.2d 470, 471 (2d Dep't 1976); People v. Taylor, 86 Misc. 2d 445, 446, 382 N.Y.S.2d 688, 689 (Sup. Ct. Suffolk County 1976).

[125] *See* Baldasar v. Illinois, 446 U.S. 222, 222-23 (1980). Some examples of enhancement statutes in New York are § 265.02 of the Penal Law, *see* People v. Solomon, 113 Misc. 2d 790, 800, 449 N.Y.S.2d 875, 882 (Sup. Ct. Kings County 1982), and § 1192 of the New York Vehicle and Traffic Law, *see* People v. Dorn, 105 Misc. 2d 244, 246-47, 431 N.Y.S.2d 974, 975-76 (Oneida County Ct. 1980). New York Vehicle and Traffic Laws § 1192(5) provides in pertinent part:

> A violation of subdivision two, three or four of this section shall be a misdemeanor. . . . A person who operates a vehicle in violation of subdivisions two or three of this section *after having been convicted of a violation* of subdivisons two or three of this section . . . shall be guilty of a felony.

N.Y. VEH. & TRAF. LAW § 1192(5) (McKinney Supp. 1983-1984) (emphasis added); *see* People v. Sirianna, 109 Misc. 2d 781, 781, 440 N.Y.S.2d 988, 988-89 (Cattaraugus County Ct. 1981), *rev'd*, 89 App. Div. 2d 775, 453 N.Y.S.2d 485 (4th Dep't 1982); *Dorn*, 105 Misc. 2d at 244-45, 431 N.Y.S.2d at 976.

N.Y. Penal Law § 265.02 provides that a person who commits the crime of criminal possession of a weapon in the fourth degree, a class A misdemeanor, and who has also been previously convicted of any crime shall be guilty of criminal possession of a weapon in the third degree, a class D felony. N.Y. PENAL LAW § 265.02(1) (McKinney 1980); *see Solomon*, 113 Misc. 2d at 793-94, 449 N.Y.S.2d at 878.

[126] *See* Baldasar v. Illinois, 446 U.S. 222, 226-28 (1980) (Marshall, J., concurring).

[127] *See* People v. Solomon, 113 Misc. 2d 790, 800, 449 N.Y.S.2d 875; 882 (Sup. Ct. Kings County 1982). The court stated:

> Even more persuasive is that "due process of law" requires that the prosecution prove beyond a reasonable doubt every *element* which constitutes the crime charged against a defendant. Here the prior conviction is an element of the offense for the purpose of enhancing punishment by raising the crime from a misdemeanor to a felony.

Id. (citations omitted).

alty statute is equally applicable to section 400.21 of the CPL.[128] Both statutes represent a similar threat to the defendant's liberty,[129] as they both use prior convictions to increase the defendant's sentence.[130] Additionally, it is testimony to their similarity that in both statutes a prior conviction that was unconstitutionally obtained cannot be used to enhance the defendant's punishment.[131] While the CPL requires a constitutional predicate for an enhanced sentence,[132] the United States Supreme Court has held that the Due Process Clause makes the constitutionality of the prior conviction an element of the offense in an enhanced penalty statute.[133] Due process also requires that the constitutionality be

---

[128] The primary function of a standard of proof is allocation of the risk of error between the litigants. *See* Santosky v. Kramer, 455 U.S. 745, 755 (1982); Addington v. Texas, 441 U.S. 418, 423 (1979). The "proof beyond a reasonable doubt" standard works to minimize the effect of factual error on the individual, *see Santosky*, 455 U.S. at 755; *In re* Winship, 397 U.S. 358, 363 (1970), and places that risk upon society, *see Santosky*, 455 U.S. at 755; *Addington*, 441 U.S. at 424. This standard rests upon the fundamental principle that "it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring); *see Addington*, 441 U.S. at 428; Patterson v. New York, 432 U.S. 197, 208 (1977) (quoting *Winship*, 397 U.S. at 372 (Harlan, J., concurring)). The Due Process Concept is exemplified by the following passage from Speiser v. Randall, 357 U.S. 513 (1958):

> There is always in litigation a margin of error . . . which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the [prosecution] the burden of . . . persuading the factfinder . . . of his guilt beyond a reasonable doubt.

Id. at 525-26.

[129] *See supra* note 124 and accompanying text. Once the defendant is found to be a second felony offender, the enhancement of his sentence becomes mandatory. *Id.*

[130] *See supra* notes 124-25 and accompanying text.

[131] *See supra* note 124 & accompanying text; *see infra* note 132 and accompanying text.

[132] CPL] 400].21(7)(b) (1983).

[133] *See* Baldasar v. Illinois, 446 U.S. 222, 225-26 (1980) (Marshall, J., concurring). In *Baldasar*, the Court stated that a "prior [unconstitutional] . . . conviction could not be used . . . to impose an increased term of imprisonment upon a subsequent conviction." *Id.* at 226 (Marshall, J., concurring). *Baldasar* is the leading case dealing with the relationship of a prior unconstitutional conviction to an enhanced penalty statute. In *Baldasar*, the defendant was charged with a felony pursuant to a statute providing for felony treatment of a second conviction of an offense that originally was a misdemeanor. *Id.* at 223. The issue before the Court was whether an unconstitutionally obtained misdemeanor conviction could be used under an enhanced penalty statute to convert a subsequent misdemeanor to a felony. *Id.* at 224 (Stewart, J., concurring). The Court held that such conviction could not be used to elevate a misdemeanor to a felony. *See id.* at 224. In his concurrence, Justice Marshall recognized that the defendant had been deprived of his liberty as a result of the initial conviction, *id.* at 226 (Marshall, J., concurring), and concluded that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself is invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a re-

proved by the prosecutor beyond a reasonable doubt.[134] It is submitted that the defendant whose liberty is jeopardized under section 400.21(7)(b) of the CPL is no less entitled to these protections than is a defendant under an enhanced penalty statute.[135] It appears, therefore, that by failing to recognize that the prosecution should be required to prove beyond a reasonable doubt the constitutionality of the prior conviction, the *Harris* Court failed to comply with the applicable due process safeguards.[136]

It is suggested that when a defendant controverts a prosecutor's allegations sufficiently to warrant a predicate hearing, the prosecutor must bear the burden of proving the constitutionality of the defendant's previous conviction beyond a reasonable doubt.[137] The prior conviction may be accorded a presumption of regularity[138] which would shift the burden of production to the defendant

---

peat-offender statute," *id.* at 228 (Marshall, J., concurring).

[134] *See* People v. Solomon, 113 Misc. 2d 790, 800, 449 N.Y.S.2d 875, 882 (Sup. Ct. Kings County 1982). In *Solomon*, the court realized that the *Baldasar* holding precluded the prosecution from relying on unconstitutionally obtained predicate conviction and permitted a challenge to the constitutionality of defendant's prior conviction. *Id.* at 797, 449 N.Y.S.2d at 880. After a discussion of the possible methods the defendant could employ to challenge the constitutionality of the prior conviction, the court determined that the circumstances were most analogous to a motion to controvert a second felony offender statement. *Id.* at 800, 449 N.Y.S.2d at 881. After making this determination, the court stated "that the burden of proof should be upon the People and that the quantum of proof should be proof beyond a reasonable doubt." *Id.* at 800, 449 N.Y.S.2d at 882.

[135] In People v. DeJesus, 122 Misc. 2d 190, 471 N.Y.S.2d 195 (Sup. Ct. N.Y. County 1983), the court recognized that:

> [t]he urgent demands of due process have always been especially compelling when a previously unchallenged judgment is claimed to lack constitutional validity and that assertion is made at the very time that the judgment is sought to be used to enhance the sentence of one newly convicted of another crime.

Id. at 192, 471 N.Y.S.2d at 197 (citation omitted).

[136] In enacting CPL § 400.21(7)(a), the legislature acknowledged the possible deprivation of an individual's right to liberty through an enhanced sentence and afforded the defendant the desired protection by applying the same standard of proof as in a criminal case. *See* CPL § 400.21(7)(a) (1983). Under CPL § 400.21(7)(b), the defendant faces the same possible deprivation of his rights, since a prior constitutional conviction will enhance his sentence. *See id.* § 400.21(7)(b). It is therefore suggested that an enhanced sentence has as many implications in regards to the defendant's interest in life and liberty as does the initial sentence, and thus requires identical due process protections.

"The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

[137] *See* People v. Leston, 117 Misc. 2d 712, 716, 459 N.Y.S.2d 364, 367 (Sup. Ct. N.Y. County 1983); *accord* People v. Sumstine, 147 Cal. App. 3d 866, 862, 195 Cal. Rptr. 535, 537 (1983); People v. Zabala, 147 Cal. App. 3d 429, 432, 195 Cal. Rtpr. 527, 531 (1983).

[138] *See* People v. Bell, 36 App. Div. 2d 406, 408, 321 N.Y.S.2d 212, 214 (2d Dep't 1971),

and require him to produce evidence showing that his constitutional rights were infringed at the prior proceeding.[139] If the defendant were successful, the burden of production would shift back to the prosecution requiring proof of a constitutionally obtained conviction.[140] In this manner, the burden of proof would never shift to the defendant.[141] Section 400.21(7) of the CPL and due process mandate that the prosecution prove beyond a reasonable doubt that all the requirements for a predicate felony determination have been satisfied. It is hoped that the suggested procedure will be adopted by the courts to guarantee that criminal defendants are

---

aff'd, 29 N.Y.2d 882, 278 N.E.2d 651, 328 N.Y.S.2d 445 (1972); People v. Leston, 117 Misc. 2d 712, 717, 459 N.Y.S.2d 364, 367-68 (Sup. Ct. N.Y. County 1983); People v. Rosello, 97 Misc. 2d 963, 966, 412 N.Y.S.2d 975, 977 (Sup. Ct. N.Y. County 1979). The presumption of regularity assumes "that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which official duty requires to be done." RICHARDSON ON EVIDENCE § 72, at 49 (J. Prince 10th ed. 1973) (quoting *In re* Estate of Marcellus, 165 N.Y. 70, 77, 58 N.E. 796, 798 (1900)); *see* MCCORMICK ON EVIDENCE § 343, at 969 (E. Cleary 3d ed. 1984); 9 WIGMORE ON EVIDENCE § 2534, at 488 (3d ed. 1940). In addition, the presumption of regularity "compels the adversary to come forward with affirmative evidence of unlawful or irregular conduct." RICHARDSON ON EVIDENCE, *supra*, § 72, at 49; *see* People v. Richetti, 302 N.Y. 290, 298, 97 N.E.2d 908, 912 (1951); *accord* People v. Coffey, 67 Cal. 2d 204, 213, 430 P.2d 15, 24, 60 Cal. Rptr. 457, 466 (1967) (en banc). This presumption would require the defendant to specify the nature of his challenge and offer some proof in support thereof since it would be unwarranted to require the People to prove that no constitutional challenge exists. *See Leston*, 117 Misc. 2d at 717, 459 N.Y.S.2d at 367; *Rosello*, 97 Misc. 2d at 966, 412 N.Y.S.2d at 978.

[139] The defendant is required to produce substantial evidence to the contrary in order to rebut the presumption of regularity. *See* People v. Langan, 303 N.Y. 474, 480, 104 N.E.2d 861, 864 (1952); People v. Richetti, 302 N.Y. 290, 298, 97 N.E.2d 908, 912 (1951); RICHARDSON ON EVIDENCE, *supra* note 138, § 58, at 36. Once the defendant rebuts the presumption, it drops from the case. *See Richetti*, 302 N.Y. at 298, 97 N.E.2d at 912; People v. Bell, 36 App. Div. 2d 406, 408, 321 N.Y.S.2d 212, 214 (2d Dep't 1971), *aff'd*, 29 N.Y.2d 882, 278 N.E.2d 651, 28 N.Y.S.2d 445 (1972); RICHARDSON ON EVIDENCE, *supra* note 138, § 58, at 36.

[140] *See* People v. McNeil, 117 Misc. 2d 96, 99 n.3, 457 N.Y.S.2d 409, 411 n.1 (Sup. Ct. N.Y. County 1982); RICHARDSON ON EVIDENCE, *supra* note 138, § 58, at 36; *accord* People v. Coffey, 67 Cal. 2d 204, 213, 430 P.2d 15, 24, 60 Cal. Rptr. 457, 466 (1967) (en banc); People v. Zavala, 147 Cal. App. 3d 429, 432, 195 Cal. Rptr. 527, 531 (1983). The prosecution must produce independent evidence to establish the constitutionality of the prior conviction. *See McNeil*, 117 Misc. 2d at 99, 457 N.Y.S.2d at 411; RICHARDSON ON EVIDENCE, *supra* note 138, § 58, at 36; *accord Coffey*, 67 Cal. 2d at 212, 430 P.2d at 24, 60 Cal. Rptr. at 466; *Zavala*, 147 Cal. App. 3d at 432, 195 Cal. Rptr. at 531. If the prosecutor fails to sustain this burden the prior conviction cannot be used to enhance the defendant's sentence. *See Coffey*, 67 Cal. 2d at 213, 430 P.2d at 24, 60 Cal. Rptr. at 466.

[141] *Cf.* People v. Coffey, 67 Cal. 2d 413 n.15, 430 P.2d 15, 24 n.15, Cal. Rptr. 457, 466 n.15 (1967) (en banc) ("the burden of proof as to the constitutionality of the charged prior conviction remains with the prosecution").

afforded the fullest extent of their due process rights.[142]

Steven F. Siegel

DOMESTIC RELATIONS LAW

DRL § 236(B): A professional degree or license is not marital property subject to apportionment during divorce proceedings

The Equitable Distribution Law[143] mandates that courts equitably distribute marital property between the parties during the dissolution of a marriage.[144] "Marital property" has been broadly

---

[142] California cases have placed the burden of proving the constitutionality of a predicate conviction upon the People beyond a reasonable doubt. *See, e.g.*, People v. Coffey, 67 Cal. 2d 204, 213 n.15, 430 P.2d 15, 24 n.15, 60 Cal. Rptr. 457, 466 n.15 (1967) (en banc); People v. Sumstine, 147 Cal. App. 3d 866, 871, 195 Cal. Rptr. 535, 540 (1983); People v. Zavala, 147 Cal. App. 3d 429, 432, 195 Cal. Rptr. 527, 531 (1983). In *Coffey*, the Supreme Court of California held that the defendant had sufficiently alleged infringement of his right to counsel to entitle him to a predicate hearing. 67 Cal. 2d at 213, 430 P.2d at 24, 60 Cal. Rptr. at 466. The procedure set out in *Coffey* was later adopted by statute. *See Zavala*, 147 Cal. App. 3d at 432, 195 Cal. Rptr. at 531.

[143] DRL § 236 (McKinney Supp. 1983-1984). Section 236 is divided into two subsections: Part A, governing all actions commenced prior to July 19, 1980, the effective date of the new equitable distribution law, *id.* § 236(A), and Part B, controlling all proceedings introduced on or after that date, *id.* § 236(B). Part A of § 236 retained the alimony provisions of the former law, with modifications in language to guarantee gender-neutral application. *Compare id.* § 236(B) *with id.* § 236 (1977). Part B of § 236 replaced the term "alimony" with "maintenance" to eliminate sexist stereotypes and misconceptions associated with the former. *Id.* § 236, commentary at 38-39 (McKinney Supp. 1983-1984).

[144] *Id.* § 236(B) (McKinney Supp. 1983-1984). The philosophy behind the Equitable Distribution Law recognizes marriage as an "economic partnership" of co-equal parties. Governor's Memorandum on Approval of ch. 281, N.Y. Laws (June 19, 1980), *reprinted in* [1980] N.Y. Laws 1863 (McKinney). "Under the new provision marital property is to be distributed equitably between the parties taking into consideration the circumstances of the parties, included among the other factors is a spouse's contribution as a homemaker, the age and health of the parties and the duration of the marriage." Memorandum of Assemblyman Burrows, *reprinted in* [1980] N.Y. Legis. Ann. 129. Where equitable distribution would be impractical or unduly burdensome, or where the distribution of an "interest in a business, corporation or profession would be contrary to law," the court is authorized to grant a distributive award "in order to achieve equity between the parties." DRL § 236(B)(5)(e) (McKinney Supp. 1983-1984). A distributive award is often employed where it is not physically feasible to divide the marital property, *see id.* commentary at 140, for example, where the primary asset is a pension plan or business interest, *see, e.g.*, Reed v. Reed, 93 App. Div. 2d 105, 111, 462 N.Y.S.2d 73, 77 (3d Dep't 1983) (non-vested pension plan acquired during marriage deemed marital property); Roussos v. Roussos, 106 Misc. 2d 583, 585, 434 N.Y.S.2d