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NOTES

EXAMINING MONTANA'S RIGHT TO ATTACK UNCONSTITUTIONAL PRIOR CONVICTIONS AT SENTENCING: *STATE V. MAINE*

Paul M. Leisher*

I. INTRODUCTION

In *State v. Maine*,¹ the Montana Supreme Court diverged from United States Supreme Court precedent and ruled that a prior conviction cannot be used to increase the punishment for a subsequent offense if the prior conviction is tainted by any kind of constitutional violation.² In *Burgett v. Texas*³ and *U.S. v. Tucker*,⁴ the U.S. Supreme Court held convictions obtained in violation of a criminal defendant's right to appointed counsel⁵ could not be used to enhance the sentence for a subsequent offense.⁶ Montana, like most of the federal circuit courts,⁷ interpreted the language and reasoning of *Burgett* and *Tucker* to forbid sentence enhancements based on a prior conviction that violated any fundamental constitutional right.⁸ In

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1. *State v. Maine*, 255 P.3d 64 (Mont. 2011).

2. *Id.* at 73–74.

3. *Burgett v. Tex.*, 389 U.S. 109 (1967).

4. *U.S. v. Tucker*, 404 U.S. 443 (1972).

5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. *Burgett*, 389 U.S. at 115 (citing *Gideon*, 372 U.S. 335); *Tucker*, 404 U.S. at 447.

7. Alan C. Smith, *More Than a Question of Forum: The Use of Unconstitutional Convictions to Enhance Sentences Following Custis v. United States*, 47 Stan. L. Rev. 1323, 1328 (1995) (discussing interpretation of *Burgett* and *Tucker* by federal circuit courts pre-*Custis*).

8. See *State v. Okland*, 941 P.2d 431, 434 (Mont. 1997).

Custis v. United States,⁹ however, the U.S. Supreme Court held that *Gideon* violations are unique and a prior conviction cannot be challenged for violation of any other constitutional right, even the closely-related right to effective assistance of counsel.¹⁰ In *State v. Maine*, the Montana Supreme Court rejected *Custis* and held that Montana's Constitution protects a defendant from having his sentence enhanced based on *any* constitutionally infirm prior conviction.¹¹

The Montana Supreme Court wisely rejected *Custis*. Some rights are so fundamental to the truth finding process that their violation renders any resulting conviction unreliable.¹² A defendant whose sentence is enhanced based on an unreliable prior conviction is made to suffer punishment twice for a conviction that was not reliable enough to punish him the first time. Hence, faced with the choice of adopting or rejecting a rule that would severely restrict a defendant's ability to collaterally attack in a sentencing proceeding the constitutionality of a prior conviction, the Montana Supreme Court chose well.

However, not all of the rights in Article II of Montana's Constitution affect the reliability of convictions. Some, such as the right to be free from unreasonable searches and seizures,¹³ and the right to not have excessive punishments imposed,¹⁴ do not undermine the reliability of a conviction. For that reason, the Montana Supreme Court may, in a future case, wish to restrict the scope of *Maine* to only those prior convictions suffering from constitutional infirmities that render the conviction unreliable.

This note explains how the right to collaterally attack prior convictions at sentencing arose in the federal system and in Montana and assesses the implications and potential future developments of the *Maine* holding. Parts II and III outline the federal and Montana jurisprudence that form the foundation of the Court's decision in *Maine*. Part IV describes the legal and factual background of *Maine* and the majority and dissenting opinions. Part V assesses *Maine*, first by examining *Maine*'s reasoning, then by exploring probable implications of the holding, and finally by suggesting future restrictions the Court may wish to place on *Maine*. Part VI concludes the note.

9. *Custis v. U.S.*, 511 U.S. 485 (1994).

10. *Id.* at 487.

11. *Maine*, 255 P.3d at 72–73.

12. See *Satterwhite v. Tex.*, 486 U.S. 249, 256 (1988) (discussing rights fundamental to a fair criminal process: "Some constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless.").

13. Mont. Const. art. II, § 11.

14. Mont. Const. art. II, § 22.

II. FEDERAL JURISPRUDENCE

In *Williams v. Oklahoma*,¹⁵ the U.S. Supreme Court held the practice of considering prior convictions in determining the sentence for a present crime constitutionally permissible.¹⁶ A few years later, in *Gideon v. Wainwright*,¹⁷ the Court held the Sixth Amendment (applied to states through the Fourteenth Amendment) requires states to provide criminal defendants with counsel if they cannot afford their own.

In *Burgett*, the Court decided whether a prior conviction obtained in violation of *Gideon* was admissible at trial.¹⁸ Burgett was charged in Texas with assault with the intent to murder and four charges of recidivism based on prior convictions.¹⁹ Burgett faced life in prison if found guilty of both the assault and recidivism.²⁰ At trial, Burgett objected to the introduction into evidence of a prior conviction for forgery in Tennessee.²¹ Burgett argued the conviction was invalid because he had not waived his right to counsel and the State of Tennessee had not provided him with an attorney as required by *Gideon*.²² The trial court overruled the objection and allowed the State to present the Tennessee conviction to the jury.²³ On appeal, the Texas Court of Criminal Appeals found no error.²⁴

The U.S. Supreme Court, however, found the trial court erred when it admitted the unconstitutional conviction into evidence.²⁵ The Court held:

To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.²⁶

Allowing consideration of a prior unconstitutional conviction, according to the Court's rationale, would renew the constitutional violation. In dicta, the Court also noted that it could not allow the renewed violation of "a specific federal right,"²⁷ language interpreted by some lower courts to mean *any* constitutional right.²⁸

15. *Williams v. Okla.*, 358 U.S. 576 (1959).

16. *Id.* at 585.

17. *Gideon*, 372 U.S. 335.

18. *Burgett*, 389 U.S. at 114.

19. *Id.* at 112.

20. *Id.* at 111.

21. *Id.* at 112.

22. *Id.*

23. *Id.* at 113.

24. *Burgett*, 389 U.S. at 113.

25. *Id.* at 114–115.

26. *Id.* at 115.

27. *Id.* at 116.

28. Smith, *supra* n. 7, at 1330.

In *U.S. v. Tucker*, the Court revisited the question of using uncounseled convictions to enhance the sentence for another offense, again finding it impermissible but this time for a different reason. The district court that sentenced Tucker considered his three prior convictions when sentencing him.²⁹ Those convictions were subsequently found unconstitutional for violation of the right to appointed counsel.³⁰ The Court held that Tucker's sentence could not stand because it was "[f]ounded at least in part upon misinformation of constitutional magnitude."³¹ In contrast to the Court's concern in *Burgett* about renewal of the constitutional violation, the Court's concern in *Tucker* appeared to be the unreliability of unconstitutional convictions.³²

In both *Burgett* and *Tucker*, the prior convictions were found infirm because they violated the right to appointed counsel. Nevertheless, the Court's reasoning appeared to extend beyond just violations of the right to appointed counsel, to also forbid consideration of prior convictions obtained in violation of most any constitutional right.³³ Most of the federal circuit courts interpreted *Burgett* and *Tucker* this way and held they forbid consideration of any unconstitutional conviction at sentencing, or at least those convictions whose claimed constitutional violations raised doubts about the reliability of the conviction.³⁴

In *Custis*, the U.S. Supreme Court explicitly considered the scope of *Burgett* and *Tucker* and held that a defendant may only collaterally attack convictions obtained in violation of the right to appointed counsel.³⁵ *Custis* was convicted of two federal felonies.³⁶ The government moved to enhance his sentence based on three prior convictions.³⁷ *Custis* claimed two of the three prior convictions were infirm because of a variety of constitutional defects, including ineffective assistance of counsel.³⁸ The district court rejected *Custis*' claims and the Fourth Circuit affirmed the sentence enhancement.³⁹

The Supreme Court addressed *Custis*' claims under *Burgett* and *Tucker* and found those cases applicable only to *Gideon* violations.⁴⁰ The Court

29. *Tucker*, 404 U.S. at 444.

30. *Id.* at 444–445.

31. *Id.* at 447.

32. Smith, *supra* n. 7, at 1328.

33. *Id.* at 1330.

34. *Id.* at 1330–1333.

35. *Custis*, 511 U.S. at 487.

36. *Id.* at 488.

37. *Id.* at 487.

38. *Id.* at 488.

39. *Id.* at 489.

40. *Id.* at 496.

held the failure to appoint counsel unique among constitutional defects.⁴¹ It based this finding on *Johnson v. Zerbst*,⁴² a 1938 decision that attributed jurisdictional significance to the failure to appoint counsel.⁴³ The *Custis* Court then identified a “theme” starting in *Johnson v. Zerbst* and “running through” *Burgett* and *Tucker* that held the failure to appoint counsel unique among constitutional violations.⁴⁴ The Court ultimately rested its decision however, on two policy considerations: 1) with the exception of *Gideon* violation claims, collateral attacks create untenable administrative burdens; and 2) the importance of judgment finality.⁴⁵ The Court noted that *Gideon* claims do not create the same kinds of administrative burdens as other claimed constitutional violations because they are generally easy to verify from the judgment itself or an accompanying minute order.⁴⁶

In 2001, in back-to-back cases, *Daniels v. United States*⁴⁷ and *Lackawanna County District Attorney v. Coss*,⁴⁸ the Court applied the *Custis* holding to habeas corpus petitions challenging sentences enhanced by prior convictions the petitioners claimed were unconstitutional. Both cases addressed claims of constitutional violations other than the failure to appoint counsel. The Court refined the *Custis* holding into a concise rule:

[O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid.⁴⁹

In other words, a defendant may not attack a prior conviction during sentencing proceedings. The sole exception to this rule is for attacks based on the claim that a prior conviction was obtained in violation of the right to counsel.⁵⁰

III. MONTANA JURISPRUDENCE

In *Lewis v. State*,⁵¹ the Montana Supreme Court acknowledged and adopted the rule announced in *Burgett*, holding a conviction obtained in

41. *Custis*, 511 U.S. at 496.

42. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

43. *Custis*, 511 U.S. at 494. Oddly, the *Custis* decision openly admits the *Johnson v. Zerbst* Court attached jurisdictional significance to the failure to appoint counsel largely to allow a Sixth Amendment violation to be shoehorned into a federal habeas corpus action at a time when the habeas statute was interpreted to only allow collateral attack on judgments with jurisdictional defects.

44. *Id.*

45. *Id.* at 497.

46. *Id.* at 496.

47. *Daniels v. U.S.*, 532 U.S. 374 (2001).

48. *Lackawanna Co. Dist. Atty. v. Coss*, 532 U.S. 394 (2001).

49. *Id.* at 403.

50. *Id.* at 404.

51. *Lewis v. State*, 457 P.2d 765 (Mont. 1969).

violation of the right to counsel could not be used to enhance punishment for another offense.⁵² Two years after the U.S. Supreme Court's decision in *Burgett*, Lewis sought review of the sentence he was serving, arguing primarily that his due process rights had been violated when an earlier conviction was used to enhance his current sentence.⁵³ In a short per curiam opinion, the Court cited *Burgett* and found Lewis' earlier conviction was void because it violated *Gideon*'s right to appointed counsel.⁵⁴

Nearly 30 years later, in *State v. Okland*,⁵⁵ the Montana Supreme Court held that *Lewis* required the exclusion of *any* constitutionally infirm conviction from consideration at sentencing.⁵⁶ Even though *Lewis* dealt only with a conviction obtained in violation of the right to appointed counsel, the Court in *Okland* cited *Lewis* for the proposition that, "In Montana, it is well established that the State may not use a constitutionally infirm conviction to support an enhanced punishment."⁵⁷ The Court apparently assumed, without ever explicitly addressing the question, that the rule announced in *Burgett* and adopted in *Lewis* prohibited enhancement of a sentence based on any constitutionally infirm conviction. The Court did not expressly address that assumption until *State v. Maine*.

IV. *STATE V. MAINE*

A. *Factual and Procedural History*

On the evening of July 27, 2009, Sergeant Spencer Anderson of the Rosebud County Sheriff's Office found Gregory Alan Maine ("Maine") asleep behind the wheel of his car, which was parked on the wrong side of the road.⁵⁸ After speaking with Maine and conducting several field sobriety tests, Sergeant Anderson arrested him for driving under the influence.⁵⁹ Maine's criminal record revealed prior DUI convictions from 1991, 1994 and 1997.⁶⁰ He was accordingly charged with DUI, fourth or subsequent offense, a felony.⁶¹

Maine moved to reduce his charge to a misdemeanor, claiming he received ineffective assistance of counsel for the 1997 DUI conviction.⁶²

52. *Id.* at 766.

53. *Id.* at 765.

54. *Id.* at 766.

55. *Okland*, 941 P.2d 431.

56. *Id.* at 434.

57. *Id.* (citing *Lewis*, 457 P.2d at 766).

58. *Maine*, 255 P.3d at 66.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 66–67.

During a hearing on the motion, Maine testified that on July 28, 1996, he attended a rodeo in Ingomar, Montana.⁶³ According to Maine, at the rodeo he drank several beers and accused his former boss of sleeping with his wife. This sparked an altercation that ended with five men holding Maine down while his former boss beat him unconscious.⁶⁴ Maine regained consciousness, went to wash his face in a horse trough, then saw his assailants heading toward him.⁶⁵ Feeling threatened and believing Ingomar lacked a safe haven, Maine got in his truck and fled toward Forsyth.⁶⁶ About 20 miles from Ingomar, two sheriff's deputies—responding to a report that Maine was drunk and trying to start a fight at the rodeo—recognized Maine's truck driving the other direction and pulled him over.⁶⁷ The deputies observed cuts and abrasions on Maine.⁶⁸ They administered field sobriety tests and subsequently arrested Maine for DUI.⁶⁹ Appointed counsel represented Maine at trial and argued Maine was not under the influence while driving.⁷⁰ The defense proved unpersuasive and Maine was convicted for DUI.⁷¹ Maine apparently did not appeal the conviction.⁷²

In his 2009 DUI, Maine moved to reduce his charge to a misdemeanor, arguing that his attorney for the 1997 DUI failed to inform him that he could raise a compulsion defense.⁷³ Maine claimed his departure from Ingomar was compelled by the threat of violence.⁷⁴ He further claimed his attorney's failure to raise the compulsion defense constituted ineffective assistance of counsel, thus rendering his conviction constitutionally infirm.⁷⁵ The district court denied Maine's motion, noting the difficulty of ascertaining the viability of an affirmative defense asserted twelve years after the original trial.⁷⁶ Maine subsequently entered into a plea agreement that reserved his right to appeal the denial of his motion.⁷⁷

On appeal to the Montana Supreme Court, Maine argued that he met his burden below by overcoming the presumption that his prior conviction

63. *Id.* at 66.

64. *Maine*, 255 P.3d at 66.

65. *Id.*

66. *Id.* at 66–67.

67. *Id.* at 67.

68. *Id.*

69. *Id.*

70. *Maine*, 255 P.3d at 67.

71. *Id.*

72. There is no mention in the 2009 case of any appeal of the 1997 DUI.

73. *Id.* at 66–67 (citing *State v. Leprowse*, 221 P.3d 648 (Mont. 2009) (compulsion is a valid affirmative defense to a charge of DUI)).

74. *Maine*, 255 P.3d at 67.

75. *Id.*

76. *Id.* at 66.

77. *Id.*

was valid.⁷⁸ Maine claimed the evidence presented at the hearing “overwhelmingly” showed that his attorney for the 1997 DUI should have considered a compulsion defense and, by failing to do so, rendered ineffective assistance.⁷⁹ Maine argued that, per *Okland*, having met his burden, the burden then shifted to the State, and the State failed to prove by a preponderance of the evidence that counsel had rendered effective assistance.⁸⁰ The State countered by arguing Montana should adopt the reasoning of the U.S. Supreme Court in *Custis*, *Daniels*, and *Lackawanna* and limit collateral attacks to denial of counsel claims.⁸¹

B. Majority Holding

The Court addressed the State’s argument by looking first at the federal jurisprudence the State urged the Court to follow.⁸² The Court noted the origin of excluding constitutionally infirm convictions from sentencing in both *Burgett* and *Tucker*.⁸³ The Court then examined the *Custis*, *Daniels*, and *Lackawanna* opinions, paying particular attention to the dissenting opinions.⁸⁴

Turning to Montana jurisprudence, the Court found that *Okland* prohibits the enhancement of punishment based on unconstitutional convictions.⁸⁵ The majority first noted, “Montana law may be more protective of individual rights than the floor established by federal law.”⁸⁶ The Court then noted *Okland*’s assertion that “it is well established that the State may not use a constitutionally infirm conviction to support an enhanced punishment.”⁸⁷ The Court acknowledged, however, that most rights are not absolute and the State has a compelling interest to deter habitual offenders as well as an interest in the finality of convictions.⁸⁸ The Court accordingly defined its task as balancing the rights of defendants with the interests of the State.⁸⁹

Addressing the rights of defendants, the Court rejected the U.S. Supreme Court’s approach in *Custis*. Noting the Court’s recent efforts to clar-

78. Appellant’s Br., *State v. Maine*, 2010 WL 3623274 at *5 (No. DA 10-0329, 255 P.3d 64 (Mont. 2011)).

79. *Id.*

80. *Id.*

81. *Id.* at **4–5.

82. *Maine*, 255 P.3d at 69–72.

83. *Id.* at 69–70.

84. *Id.* at 70–72.

85. *Id.* at 72.

86. *Id.*

87. *Id.* (quoting *Okland*, 941 P.2d at 434).

88. *Maine*, 255 P.3d at 72–73.

89. *Id.* at 73.

ify the meaning of “jurisdiction,” the majority rejected the “jurisdictional approach” of *Custis*, finding no standard for determining what constitutes a jurisdictional right.⁹⁰ The Court then rejected what it characterized as the “uniqueness” standard of *Custis*, finding it “another arbitrary and unworkable approach.”⁹¹ Noting that all rights contained in Article II of the Montana Constitution are fundamental, the Court declined to pick and choose between which rights may be asserted on collateral attack.⁹²

The Court then turned to the State’s interest in the finality of judgments and the difficulty defending against collateral attacks. The Court rejected the assertion in *Custis* that *Gideon* claims do not implicate concerns about ease of administration because they are ascertainable from the face of the record. The Court noted that some *Gideon* violations will not be ascertainable from the face of the record and that *Gideon* claims are not necessarily the only kind that will be ascertainable from the face of the record.⁹³ According to the Court, this shows the administrative burdens inherent in collateral attacks do not justify limiting the kinds of constitutional violations that may be asserted.⁹⁴

The majority concluded the appropriate balance was struck by adhering to the rule that the State may not use a constitutionally infirm conviction to support an enhanced punishment and by continuing to use the three-part burden shifting analysis set out in *Okland*, but with a slight modification.⁹⁵ *Okland*’s framework for evaluating collateral challenges to prior convictions provides that 1) a rebuttable presumption of regularity attaches to the prior conviction; 2) the defendant has the initial burden to demonstrate that the prior conviction is constitutionally infirm; and 3) once the defendant has done so, the State has the burden to rebut the defendant’s evidence.⁹⁶ The *Maine* Court modified this framework by placing the ultimate burden of proof on the defendant:

[T]he ultimate burden of proof—which includes the burden of production and the burden of persuasion—shall be on *the defendant*, who must prove by a preponderance of the evidence that the conviction is *invalid*. The burden is not on *the State* to prove by a preponderance of the evidence that the convic-

90. *Id.*

91. *Id.* (citing *Custis*, 511 U.S. at 494–496). The majority’s reading of *Custis* here appears mistaken. The *Custis* Court called violation of *Gideon* “a unique constitutional defect” to indicate the right to appointed counsel has no like or equal. “Strictly speaking, *unique* is an absolute term meaning ‘one of a kind.’” Bryan A. Garner, *The Redbook: A Manual on Legal Style* 276 (2d ed., West 2006). Thus, *Custis* did not establish a “uniqueness standard,” as the majority says, but instead ruled that one, and only one, constitutional right can form the basis of a collateral attack.

92. *Maine*, 255 P.3d at 73.

93. *Id.*

94. *Id.*

95. *Id.* at 73–74.

96. *Id.* at 74.

tion is *valid* and this facet of the framework is accordingly modified to this extent.⁹⁷

Applying these standards to Maine's claims, the Court held Maine failed to carry his ultimate burden because he did not satisfy either of the two prongs of an ineffective assistance of counsel claim.⁹⁸ Accordingly, the Court held Maine failed to prove by a preponderance of the evidence that his 1997 conviction was constitutionally infirm due to ineffective assistance of counsel.⁹⁹

C. *Dissenting Opinion*

Justice Rice concurred in the result but dissented from the majority's reasoning. Justice Rice objected to what he called "[t]he creation of the expansive right to challenge prior judgments."¹⁰⁰ As this implies, Justice Rice interpreted Montana's prior jurisprudence (specifically *Okland* and *Lewis*) to allow collateral attacks only for violations of the right to counsel.¹⁰¹ Justice Rice's concerns mirror those of the *Custis* Court—the finality of judgments and the difficulty of administration presented by collateral challenges.¹⁰² Like the *Custis* Court, Justice Rice cited *United States v. Addonizio*¹⁰³ to express those concerns:

Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful.¹⁰⁴

Justice Rice bolstered his position by citing decisions from Arkansas, Idaho, Kansas, North Dakota, Michigan, New Hampshire, Hawaii, Wisconsin, Minnesota, and Virginia that limit challenges to prior convictions based on concerns of finality of judgments and ease of administration.¹⁰⁵

According to Justice Rice, there are other, more appropriate mechanisms in place for a defendant to challenge a sentence for constitutional infirmities. Justice Rice pointed out that a defendant can directly appeal his conviction, challenge it within one year based on new evidence, or chal-

97. *Id.* (emphasis in original) (internal citations omitted).

98. *Maine*, 255 P.3d at 74–75 (citing *State v. Ankeny*, 243 P.3d 391, 400 (Mont. 2010)).

99. *Maine*, 255 P.3d at 76.

100. *Id.* (Rice, J., concurring and dissenting).

101. *Id.*

102. *Id.* at 77.

103. *U.S. v. Addonizio*, 442 U.S. 178 (1979).

104. *Maine*, 255 P.3d at 77 (quoting *Addonizio*, 442 U.S. at 184).

105. *Maine*, 255 P.3d at 77–80.

lenge facially illegal sentences by habeas corpus.¹⁰⁶ Those procedures, Justice Rice argued—rather than a subsequent proceeding—are the proper venue for challenging the constitutionality of a conviction.¹⁰⁷ Like the U.S. Supreme Court, Justice Rice argued that *Gideon* violations should be the only exception because the right to counsel is unique.¹⁰⁸ Justice Rice—perhaps to avoid getting bogged down in questions of the jurisdictional significance of the right to counsel—focused on the *Custis* Court’s mention that the uniqueness was “perhaps” because the right to counsel is foundational to most other rights.¹⁰⁹ In Justice Rice’s words, “the right’s uniqueness derives from the fact that, without it, other constitutional rights could be jeopardized because of the accused’s lack of understanding to assert them.”¹¹⁰

V. ASSESSING *MAINE*

The *Maine* Court had good reason to rule the way it did. Faced with the choice of following or rejecting *Custis*, the Court did well to choose the latter. While empirical evidence is lacking, there doesn’t appear to be any evidence that allowing collateral attacks to prior convictions at sentencing previously placed an onerous burden on the courts. If the rule that “the State may not use a constitutionally infirm conviction to support an enhanced punishment”¹¹¹ placed a heavy burden on Montana’s courts, neither the courts nor commentators appear to have made much noise about it. The Montana Supreme Court may, however, in the future find that there are sound reasons to restrict the holding in *Maine* to only those constitutional violations that undermine the reliability of a conviction.

Maine’s impact will not be far reaching. Contrary to the dissent’s claim, *Maine* did not create a new right.¹¹² Prior to *Maine*, there was nothing in Montana law suggesting a limitation on the right to challenge prior convictions used to enhance punishment for a subsequent crime. *Maine* merely made explicit what had previously been assumed: that a defendant may collaterally attack a prior conviction on the basis of any constitutional infirmity. Furthermore, its impact is curtailed by the new rule, which shifts the ultimate burden of proof to the defendant.¹¹³ As will be discussed in more detail below, the primary impact of *Maine* is likely to be increased

106. *Id.* at 77.

107. *Id.* at 79.

108. *Id.* at 78.

109. *Id.* (citing *Custis*, 511 U.S. at 494–496).

110. *Maine*, 255 P.3d at 78.

111. *Okland*, 941 P.2d at 434.

112. *Maine*, 255 P.3d at 76.

113. *Id.* at 74 (majority).

awareness among criminal defense attorneys of the availability of *Maine* challenges as a tool for reducing their clients' exposure.

The kinds of cases in which trial courts are likely to see *Maine* challenges are predictable. Mostly they can be expected to arise in cases involving criminal statutory schemes with stacking provisions that expose a defendant to significantly higher penalties for consecutive violations. As will be discussed in more detail below, by successfully attacking a prior conviction under a statutory scheme that stacks offenses, a defendant can significantly reduce his exposure. *Maine* challenges can also be expected in cases involving statutory provisions that grant leniency to first-time offenders and impose harsher sanctions on persistent offenders because they create the same strong incentive to attack the validity of prior convictions.

A. Examining Maine's Reasoning

The majority had good reason to rule the way it did. The majority's discussion of prior federal and Montana jurisprudence establishes a solid foundation for its holding. As the majority's overview of *Burgett* and *Tucker* shows, those decisions were rightly understood to encompass claims of any constitutional violation.¹¹⁴ In fact, prior to *Custis*, all but one of the federal circuits interpreted *Burgett* and *Tucker* to apply to violations of most, if not all, constitutional rights.¹¹⁵ Given the near-consensus among federal circuits prior to *Custis*, it is surprising that many state high courts, not bound by *Custis*, have nonetheless followed it.¹¹⁶ Thus far, Montana is one of only three states to address the holding in *Custis* and not follow it.¹¹⁷ At least eleven states have expressly or implicitly adopted *Custis*.¹¹⁸

The *Maine* majority, in discussing *Custis*, *Daniels*, and *Lackawanna*, mustered further support for its holding from the dissenting opinions in those cases. In particular, the majority relied on the arguments that: 1) it is questionable to distinguish between right-to-appointed-counsel claims and right-to-effective-assistance-of-counsel claims; 2) defendants will, at times, forgo direct and collateral challenges to a conviction for practical reasons;

114. *Id.* at 69–70.

115. Smith, *supra* n. 7, at 1330.

116. *See Me. v. Johnson*, 38 A.3d 1270, 1275 n. 7 (Me. 2012) (collecting cases).

117. *Id.* (citing *Cal. v. Allen*, 981 P.2d 525, 537 (Cal. 1999) (rejecting *Custis*); *Paschall v. Nev.*, 8 P.3d 851, 852 n. 2 (Nev. 2000) (declining to adopt *Custis*)).

118. *Johnson*, 38 A.3d at 1275 n. 7 (citing *Camp v. Ark.*, 221 S.W.3d 365, 369–370 (Ark. 2006); *Haw. v. Veikoso*, 74 P.3d 575, 582 (Haw. 2003); *Idaho v. Weber*, 90 P.3d 314, 319–320 (Idaho 2004); *Kan. v. Delacruz*, 899 P.2d 1042, 1049 (Kan. 1995); *McGuire v. Ky.*, 885 S.W.2d 931, 937 (Ky. 1994); *Mich. v. Carpentier*, 521 N.W.2d 195, 199–200 (Mich. 1994); *N.H. v. Weeks*, 681 A.2d 86, 89–90 (N.H. 1996); *N.D. v. Mund*, 593 N.W.2d 760 (N.D. 1999); *Wis. v. Hahn*, 618 N.W.2d 528, 529–530 (Wis. 2000); *Colo. v. Padilla*, 907 P.2d 601, 606 (Colo. 1995); *Vt. v. Boskind*, 807 A.2d 358, 360, 362–364 (Vt. 2002)).

and 3) collateral challenges need not be unduly burdensome given appropriate burden-of-proof rules.¹¹⁹ These arguments are persuasive, particularly the first. As noted above, all but one federal circuit court found *Burgett* and *Tucker* must apply to ineffective assistance of counsel claims. They did so because the reasons for allowing *Gideon* claims also apply to ineffective assistance of counsel claims.

The *Maine* Court followed the logic of the federal circuit courts when it recognized that allowing right to counsel claims and rejecting right to effective assistance of counsel claims “makes little sense.”¹²⁰ The *Maine* dissent claimed the right to counsel is unique because, without it, the defendant would not understand any of his other rights or know to exercise them.¹²¹ The dissent failed to acknowledge, however, those concerns apply equally to the right to effective assistance of counsel. As *Strickland v. Washington*¹²² pointed out, “the right to counsel is the right to the effective assistance of counsel.”¹²³ “That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the [right to counsel].”¹²⁴ Moreover, a violation of the right to effective assistance of counsel is often not revealed until another attorney takes a look at the case. As the U.S. Supreme Court recognized:

A layman will ordinarily be unable to recognize counsel’s errors and to evaluate counsel’s professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.¹²⁵

Presumably, in most instances another attorney will not look at the case until the defendant is accused of a later crime.

Hence, when *Gideon* claims are juxtaposed with *Strickland* claims, the argument that *Gideon* claims are somehow unique can rest only on the ease of administration in discerning *Gideon* violations. When it comes to protecting a right that is often necessary for the effective assertion of other rights, difficulty of administration in determining whether that right has been violated does not seem a sufficient reason to denigrate that right.

Beyond right to counsel claims, the *Maine* Court also rightly allowed challenges based on other constitutional violations. Coerced confessions, guilty pleas entered unwittingly or involuntarily, or denial of the right to a fair and impartial jury, all undermine confidence in the offender’s guilt. When looking at the practice of challenging prior convictions for constitu-

119. *Maine*, 255 P.3d at 70–72.

120. *Id.* at 73.

121. *Id.* at 78 (Rice, J., concurring and dissenting).

122. *Strickland v. Wash.*, 466 U.S. 668 (1984).

123. *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

124. *Strickland*, 466 U.S. at 685.

125. *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986).

tional violations, it's worth noting why those constitutional rights exist in the first place. Many of the rights given criminal defendants exist largely to protect the integrity of the truth-finding process—that is, they make convictions more reliable. Anglo-American culture has long abhorred punishment of the innocent.¹²⁶ The problem with enhancing a sentence based on an unconstitutional prior conviction is that it raises the specter of again punishing the innocent for a crime he did not commit. Accordingly, it's commensurate with values fundamental to our justice system to allow a defendant to show he should not receive enhanced punishment for a prior, unreliable conviction.

Finally, the majority in *Maine* effectively countered the dissent's claim that it created a new rule. The majority did so by quoting *Okland*'s assertion that, "In Montana it is well established that the State may not use a constitutionally infirm conviction to support an enhanced punishment."¹²⁷ As the majority explained, this assertion is supported by the rule in Montana protecting defendants from being sentenced based on misinformation¹²⁸ and the characterization of infirm convictions as "misinformation of constitutional magnitude."¹²⁹ The dissent's claim that the preexisting rule in Montana was limited to *Gideon* violations does not appear entirely accurate.

B. Potential Future Treatment

In future cases, the Montana Supreme Court may find there is good reason to restrict *Maine* challenges. There are compelling arguments that collateral attacks on the constitutionality of a prior conviction should only be permitted where the constitutional right asserted affects the reliability of the conviction. If the issue is presented, the Montana Supreme Court may wish to adopt such a limitation.

In considering *Custis*, the *Maine* Court had three options. First, it could have followed the U.S. Supreme Court's approach (also followed by the Third Circuit pre-*Custis*) and allow collateral attacks at sentencing only in the event of *Gideon* violations. As discussed earlier, the *Maine* Court had good reason to decline that option. The second option was to allow collateral attacks at sentencing based on any constitutional violation, which the Court chose. The third option—not raised by either party and not considered by the Court—was to distinguish between rights that affect the reli-

126. "That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved." *The Writings of Benjamin Franklin* vol. 9, 293 (Albert H. Smyth ed., The MacMillan Co. 1907).

127. *Maine*, 255 P.3d at 72 (quoting *Okland*, 941 P.2d at 434).

128. *Maine*, 255 P.3d at 72 (citing *State v. Phillips*, 159 P.3d 1078 (Mont. 2007)).

129. *Maine*, 255 P.3d at 72 (quoting *Tucker*, 404 U.S. at 447).

ability of a conviction and those that do not. Prior to *Custis*, the Ninth Circuit developed such an approach.

In *Tisnado v. United States*,¹³⁰ the Ninth Circuit held that Fourth Amendment violations do not implicate the concerns underlying the U.S. Supreme Court's ruling in *Tucker*.¹³¹ The Ninth Circuit relied on the Supreme Court's holding in *Stone v. Powell*¹³² for the proposition that "all constitutional claims do not rest on identical considerations for all purposes."¹³³ *Stone* barred state prisoners from seeking federal habeas review of Fourth Amendment claims that had already been fully and fairly litigated in state courts.¹³⁴ The Ninth Circuit interpreted *Stone* as distinguishing Fourth Amendment from other constitutional claims "on the basis of their effect on the integrity of the truthfinding process."¹³⁵ Reasoning from that basis, the Ninth Circuit declined to allow Fourth Amendment claims to form the basis for a collateral attack at sentencing on the validity of a prior conviction because illegal searches and seizures do not raise concerns about the integrity of the truth finding process. The reasoning has obvious appeal. A conviction obtained in violation of the Fourth Amendment does not undermine the reliability of the conviction. Quite the opposite in fact, illegal searches and seizures often reveal highly probative evidence such as confessions, drugs, and weapons.

In the context of Montana's constitutional rights, at least two do not implicate any concerns about the truth finding process. Article II, section 11 of Montana's constitution, like the Fourth Amendment, protects against unreasonable searches and seizures. The *Maine* holding's broad scope would allow challenges to prior convictions based on section 11 violations even though such violations do not undermine confidence in the conviction. Similarly, claims premised on violation of Article II, section 22's right to be free from excessive fines and cruel and unusual punishment do not undermine confidence in the reliability of a conviction. Again, however, the *Maine* holding allows collateral attacks based on any Article II right. Hence, a defendant could conceivably launch a successful collateral attack against a prior conviction because he was fined twice the statutory maximum.¹³⁶ If the Montana Supreme Court again addresses the scope of the

130. *Tisnado v. U.S.*, 547 F.2d 452 (1976).

131. *Id.* at 458.

132. *Stone v. Powell*, 428 U.S. 465 (1976).

133. *Tisnado*, 547 F.2d at 458 (citing *Stone*, 428 U.S. at 491 n. 31).

134. *Stone*, 428 U.S. at 494.

135. *Tisnado*, 547 F.2d at 458.

136. While it might be argued that violation of Article II, section 22 renders the defendant's previous *sentence* infirm, but not his *conviction*, Montana's criminal code treats the two as interchangeable. See *Bingman v. State*, 122 P.3d 1235, 1238–1239 (Mont. 2005) (Cotter, J., dissenting) (citing *State v. Snell*, 103 P.3d 503, 507–508 (Mont. 2004)).

right to collaterally attack prior convictions at sentencing, it may wish to consider the reasoning of *Tisnado* and exclude from consideration claims based on sections 11 and 22 because they do not undermine the reliability of a conviction.

C. Implications of *Maine*

While *Maine* did not herald a new right in Montana, by drawing attention to that right it may increase the frequency with which it is asserted. *Maine* challenges are likely to show up mostly in cases where repeat offenders are subject to significant sentence enhancement for a prior conviction—particularly, charges for fourth DUIs,¹³⁷ charges for second and third partner or family member assaults,¹³⁸ sentencing for persistent felony offenders,¹³⁹ and sentencing for second drug offenses.¹⁴⁰

The most frequent use of *Maine* so far has been in DUI cases where the defendant's guilt is reasonably clear and the defendant has three or more prior DUI convictions.¹⁴¹ In Montana, fourth and subsequent DUIs are treated as felonies while first, second, and third DUIs are misdemeanors.¹⁴² An attorney defending a client on a fourth or fifth DUI charge may have no avenue to protect the client from becoming a felon other than to attack the constitutionality of the client's prior convictions. DUI defense practice manuals frequently advise attorneys defending DUIs to attack the validity of prior convictions in order to reduce their client's exposure.¹⁴³

Maine challenges can also be expected in cases of domestic violence. Under Montana's partner or family member assault ("PFMA") statute, repeat offenders are subject to progressively higher penalties.¹⁴⁴ Under the statute, first and second offenders receive low minimum jail sentences (24 and 72 hours, respectively) and a maximum sentence of one year. Third and subsequent offenders receive a minimum jail sentence of 30 days and a maximum of five years. Like fourth DUIs, third PFMA cases make *Maine* challenges attractive because a defendant drops to a much lower level of

137. Mont. Code Ann. § 61-8-731 (2011).

138. Mont. Code Ann. § 45-5-206(3)(a).

139. Mont. Code Ann. §§ 46-18-501 to 503.

140. Mont. Code Ann. § 45-9-102(7).

141. As of this writing, the rule announced in *Maine* has been raised in four cases in front of the Montana Supreme Court. All four were appeals from convictions for a fourth DUI. See *State v. Chesterfield*, 262 P.3d 1109 (Mont. 2011); *State v. Chaussee*, 259 P.3d 783 (Mont. 2011); *State v. Hass*, 265 P.3d 1221 (Mont. 2011); *State v. Burns*, 256 P.3d 944 (Mont. 2011).

142. Mont. Code Ann. §§ 61-8-731, 714.

143. See e.g. Flem Whited, III & Donald H. Nichols, *Drinking/Driving Litigation: Criminal and Civil* vol. 1, § 3:1 (2d ed., West Aug. 2012) ("Because the existence of a prior conviction allows enhancement, it is most advantageous to attack the prior conviction in order to avoid enhancement.").

144. Mont. Code Ann. § 45-5-206(3)(a).

exposure if he can show a constitutional infirmity in one of his prior convictions.

Maine challenges can also be expected when the State seeks to sentence a defendant as a persistent felony offender. Under Montana law, a defendant who incurs two felonies within a five-year period can be designated a persistent felony offender, which increases the minimum sentence to five years imprisonment and the maximum sentence to 100 years.¹⁴⁵ An attorney whose client is facing sentencing as a persistent felony offender will likely want to raise a *Maine* challenge in the hopes of invalidating the prior felony.

Finally, *Maine* is also likely to be raised in cases where the defendant is charged with a second drug offense. Defendants charged with a first drug offense in Montana are presumptively entitled to a deferred sentence.¹⁴⁶ If the defendant can show the first drug conviction suffered from any kind of constitutional defect, the deferred sentence for a first-time drug offense would become available again.

VI. CONCLUSION

The *Maine* Court had good reason to reject *Custis*. Between 1967 when *Burgett* announced the rule that a current sentence could not be enhanced based on an unconstitutional prior sentence and 1994 when *Custis* limited the scope of that rule, all but one of the federal circuit courts to consider the issue held the *Burgett* Court's rationale for barring the use of a conviction obtained in violation of *Gideon* must apply to other constitutional rights as well.¹⁴⁷ The arguments for limiting collateral attacks on prior convictions at sentencing to only claims of *Gideon* violations are unpersuasive.¹⁴⁸ Faced with the decision of either following *Custis* or rejecting it, the Montana Supreme Court wisely chose to reject it. It may find in the future, however, that there are good reasons to restrict the scope of *Maine* to exclude claims that don't undermine confidence in the reliability of a prior conviction.

145. Mont. Code Ann. §§ 46–18–501 to 503.

146. Mont. Code Ann. § 45–9–102(7). Absent significant aggravating circumstances, sentencing courts must give a deferred imposition of sentence to a first time drug offender. *State v. Bolt*, 664 P.2d 322, 324 (Mont. 1983).

147. Paul D. Leake, *Limits to the Collateral Use of Invalid Prior Convictions to Enhance Punishment for a Subsequent Offense: Extending Burgett v. Texas and United States v. Tucker*, 19 Colum. Hum. Rts. L. Rev. 123, 136 (1987) (discussing breadth of application of *Burgett* and *Tucker* in the federal circuit courts).

148. *Id.* at 136–139 (criticizing the Third Circuit's decision to restrict application of *Burgett* to convictions invalid under *Gideon*); Smith, *supra* n. 7, at 1346 (criticizing *Custis*).

