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DOUBLE JEOPARDY AND THE NEW KENTUCKY PENAL CODE

INTRODUCTION

Double jeopardy, a complicated and often confusing constitutional principle which has produced extensive litigation and numerous commentaries, resists easy categorization or precise definition, and attempts to codify it could easily create more problems than it solves. However, in spite of the inherent precariousness of the task, the drafters of the new Kentucky Penal Code¹ have codified the law of double jeopardy.² These new statutory provisions represent the General Assembly's first attempt to deal with double jeopardy.

In the past Kentucky, like most jurisdictions, protected defendants from being twice placed in jeopardy for the same offense through constitutional provisions³ and common law doctrine.⁴ The constitutional principle expressed in very broad and general terms, necessarily required judicial interpretation. Consequently, the Kentucky Court of Appeals has heard numerous cases involving double jeopardy issues. Unfortunately, the Court has often taken inconsistent positions upon the issues while treating the cases as if there were no conflict between them.⁵ Such inconsistencies are not easily resolved, and resulted in much confusion concerning the precise scope of the constitutional prohibition.⁶ Hopefully, the new statutory approach will resolve some of the conflict.

In addition to the difficult task of reducing the double jeopardy principle to a legislative enactment, the General Assembly was faced with a difficult constitutional problem. When the legislature enacts provisions affecting a constitutional principle, the legislation must be flexible enough to endure possible judicial extensions of that principle or it will be vulnerable to future constitutional attacks.⁷ Therefore,

¹ The KENTUCKY PENAL CODE enacted by the 1972 General Assembly becomes effective July 1, 1974.

² Ky. ACTS ch. 385 §§ 45, 46, 47, 48, 49 (1972) [chapter 385 is hereinafter cited as KYPC] [PROPOSED KY. REV. STAT. §§ 433C.3-020 to 433C.3-060] [hereinafter cited as [KRS]].

³ Kentucky was the second state to adopt a constitutional provision nearly identical to the federal clause. See J. SIGLER, DOUBLE JEOPARDY 78-83 (1969) [hereinafter cited as SIGLER].

⁴ *Id.* at 16-27.

⁵ See notes 135-43 *infra* and accompanying text.

⁶ SIGLER, *supra* note 3, at 100.

⁷ The risk of a successful constitutional attack diminishes with the use of broader statutory language. A narrow statutory provision runs a greater risk due to the fact that the court's interpretation of the double jeopardy provision has never been predictable. *Id.*

any legislation dealing with double jeopardy must be consistent with the policies upon which the constitutional prohibition is based.

This note will explore the double jeopardy provisions of the Kentucky Penal Code to determine their meaning and, more importantly, whether they accomplish their purposes. I will first explore the need for statutory reform and examine the rationale for including these provisions in the Code. Next, the new provisions will be discussed and compared with present law and alternative reforms, and the policies behind the constitutional provision analyzed to determine whether these new enactments are consistent therewith. Finally, possible improvements upon the new statutory provisions will be suggested.

I. THE NEED FOR STATUTORY REFORM

The double jeopardy clause contained in the fifth amendment of the United States Constitution is expressed in the following language: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." ⁸ The section dealing with double jeopardy in the Kentucky Constitution is essentially a copy of the federal provision. ⁹ These constitutional mandates, the basis for the double jeopardy protection granted a defendant in Kentucky are directed at the prosecutor and the judiciary. In essence these provisions limit the power of the state, acting through its judicial system, to cumulatively punish any criminal defendant or to harass him with multiple trials, ¹⁰ thereby preventing the state from gaining an unfair advantage in criminal prosecutions. However, no limits are placed on the power of the legislature to create additional crimes or to impose harsh punishments. ¹¹

The need for statutory reform in the area of double jeopardy has developed largely because the General Assembly has created new crimes. Originally, this country's criminal law was based primarily upon the common law, which included only a limited number of crimes. When a common law criminal act was committed, it generally resulted in only one criminal violation. The defendant underwent one criminal prosecution, and the double jeopardy clause barred any subsequent prosecution. Therefore, the constitutional double jeopardy prohibition provided adequate protection to a defendant given the

⁸ U.S. CONST. amend. V. See *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the double jeopardy clause of the fifth amendment applied to the states through the fourteenth amendment.

⁹ KY. CONST. § 13.

¹⁰ Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 266-67 (1965).

¹¹ *Id.* at 302-04.

criminal justice system which existed at the time of its enactment.¹²

When legislative provisions defining criminal conduct replaced the common law as the primary source of criminal law, the protection provided by the double jeopardy clause was weakened. To protect its citizens from an increasing number of criminal activities, legislatures rapidly increased the number of statutory offenses.¹³ Thus the situation developed where particular conduct could violate several criminal statutes permitting the prosecution to obtain a conviction under any of them. Therefore, the power of the prosecutor became greatly enhanced. He could (1) use these multiple offense crimes to obtain a guilty plea to one or more of the charges, (2) try the defendant upon one or more of the offenses and reserve action on the remaining offenses in case he failed to get a conviction at the first trial, or (3) increase the initial punishment by subsequent convictions. This permitted the prosecutor to use these multiple offenses to increase the probability of obtaining a guilty verdict or securing the punishment he believed appropriate. One writer described the problem as follows:

The great range of choices presented the prosecution is due to the multiplication of legislatively created criminal categories. Every new criminal statute further extends the alternatives available to the prosecution while increasing the number of possible convictions and sentences which a defendant may suffer. A deed which might have violated one criminal proscription in 1800 may violate five today.¹⁴

When the prosecutor's task of proving the defendant's guilt is made easier, the defendant's ability to establish his innocence is made more difficult.¹⁵ Therefore, it is important that the courts and legislature consider whether they have provided the prosecutor with excessive power and discretion. If the judgment of the police and the prosecutor could always be trusted, there would be no need for trial by jury. However, prosecutors do make mistakes and can be overzealous in their attempts to prove a particular defendant's guilt. Further, there are instances where a prosecutor has apparently used multiple prosecutions to harass a defendant.¹⁶ Courts have often overlooked these obvious abuses, and it has become relatively common to find an accused charged with several separate and distinct statutory offenses, although he committed only one criminal act.¹⁷

¹² *Id.* at 279; *cf.* SIGLER, *supra* note 3, at 170.

¹³ SIGLER, *supra* note 3, at 181.

¹⁴ *Id.* at 64.

¹⁵ *Id.* at 166.

¹⁶ *Id.* at 168-69.

¹⁷ *See, e.g.,* *Gore v. United States*, 357 U.S. 386 (1958).

Based upon court interpretations of the double jeopardy clauses of the federal and state constitutions, the prosecutor is permitted to try a defendant twice for what amounts to the same aberrant conduct.¹⁸ This result has produced extensive criticism from commentators and legal scholars who believe that it is fundamentally unfair to subject a defendant to multiple prosecutions for essentially the same criminal conduct.¹⁹ They argue that to try someone twice for the same conduct by the simple expedient of applying different labels to that conduct violates the spirit of the double jeopardy clause. The elimination of this injustice is normally dependent solely upon the constitutional protection of the double jeopardy clause; however, the courts have been generally unreceptive to this argument. Even those courts which have on occasion extended the scope of the double jeopardy principle to cover multiple offense situations have failed to be consistent in the application of the principle, frequently retreating to a more restricted application in subsequent cases.²⁰

Various tests have evolved to define the scope of the double jeopardy clause based upon what is perceived to be the underlying policy of the constitutional principle. Of these tests, the four most common are the "same offense" test, the "same evidence" test, the "same act" test, and the "same transaction" test.²¹

The "same offense" test is the most restrictive. If the offenses are located in different places in the statute books, there is more than one offense and multiple prosecutions are appropriate.²² This test pays little, if any, attention to the substantive content of the offenses to ascertain whether they prohibit identical activity. If a separate definition is provided in the statutes, the prosecutor is free to use each offense against the defendant. The "same offense" test, therefore, gives broad powers to the prosecutor and allows him to use multiple offenses to potentially unfair advantage.

The "same evidence" test, which is most commonly adopted by the courts,²³ provides that if an act constitutes a violation of two distinct statutory provisions, the defendant may be prosecuted for each if each statute requires proof of facts not required by the other.²⁴ This test is based upon the proposition that the legislature has the power to create as many offenses as it deems necessary from a single

¹⁸ See, e.g., *Commonwealth v. Ladusaw*, 10 S.W.2d 1089 (Ky. 1928).

¹⁹ See SIGLER, *supra* note 3, at 193.

²⁰ See notes 135-43 *infra* and accompanying text.

²¹ Other tests have been developed, but most are closely related to these four tests. See Note, *Twice in Jeopardy*, *supra* note 10, at 269-77.

²² SIGLER, *supra* note 3, at 66-67.

²³ *Id.* at 66.

²⁴ *Id.*

criminal transaction.²⁵ Courts utilizing the "same evidence" test assert that to hold otherwise would limit the legislature's power to make law, and that the double jeopardy clause was never intended to restrict the legislature in this manner.²⁶ As long as a fact not proved at the first trial must be proved at the second, the prosecutor is free to bring multiple prosecutions.

The "same evidence" test does not eliminate the potential unfairness to the defendant of being twice tried for essentially the same bad conduct as is illustrated in *Gore v. United States*.²⁷ In *Gore* the defendant's criminal conduct was selling narcotics; however, he was charged with three offenses: selling narcotics without a written order, selling narcotics in a container other than the original stamped package, and facilitating the concealment and sale of narcotics. The Supreme Court held that the double jeopardy clause did not apply since each offense required proof of a different fact.²⁸ The defendant in *Gore* was clearly the victim of overlapping crimes which could be used in a manner fundamentally unfair to him.

The "same act" test weakens the power of the prosecutor and extends greater protection to the defendant under the double jeopardy clause.²⁹ This test provides that if two offenses result from the same act, the defendant cannot be tried for both. Therefore, if this test were applied to the *Gore* case, the defendant would be guilty of only one offense, since he committed only one criminal act, *i.e.*, selling narcotics.

The "same transaction" test, similar in scope to the "same act" test, prevents the state from prosecuting a defendant a second time for any offense arising out of the same criminal transaction or episode.³⁰ The "same transaction" test tends to weaken the power of the prosecutor and eliminates unfairness created by overlapping statutes.

Exactly what amounts to the same criminal transaction or same criminal act is not easily determined. Different courts, using the above tests, have reached opposite results.³¹ None of the tests actually provides a solution to the problem. "The principle shortcoming of [the same act or transaction] approach is that any sequence of conduct can be defined as an 'act' or a 'transaction'."³² Therefore,

²⁵ Note, *Twice in Jeopardy*, *supra* note 10, at 302-04.

²⁶ *Id.*

²⁷ 357 U.S. 386 (1958).

²⁸ *Id.* at 389.

²⁹ SIGLER, *supra* note 3, at 67.

³⁰ *Id.*

³¹ Note, *Twice in Jeopardy*, *supra* note 10, at 276-77.

³² *Id.* at 276. See also SIGLER, *supra* note 3, at 68, where the author states: In cases in which a single physical movement has produced several

(Continued on next page)

if critics hope to eliminate the unfairness created by overlapping statutes, they must look elsewhere. Since the courts have not provided the answer, redefining double jeopardy by statute is a reasonable alternative. A properly drawn legislative enactment could restore the principle of double jeopardy to the effective safeguard it was prior to the legislative proliferation of overlapping statutory crimes.³³ By providing a precise definition of its scope, such statutes could facilitate understanding and application of the doctrine.

Double jeopardy legislation must balance the interests of the prosecution with the rights of the defendant. Although defendants must be protected from unscrupulous and overzealous prosecutors, the prosecutor's effectiveness must not be eliminated or seriously reduced.³⁴ The drafters of the Kentucky Penal Code have attempted to strike this balance in the provisions dealing with double jeopardy. The next section will attempt to determine to what extent these major interests have been protected.

II. THE CODE PROVISIONS

The Kentucky Penal Code devotes five sections to double jeopardy. The first section concerns multiple offenses committed by a defendant and determines whether he is subject to prosecution and conviction for each separate offense.³⁵ The other four sections focus upon the effect of a former prosecution upon a subsequent prosecution under varying circumstances: (1) a former prosecution for the same offense;³⁶ (2) a former prosecution for a different offense;³⁷ (3) a former prosecution in another jurisdiction;³⁸ and (4) a former prosecution fraudulently procured by a defendant for the purposes of preventing the state from prosecuting him for a more serious offense and a former prosecution obtained in a court lacking jurisdiction.³⁹ Discussion of these individual sections will include examination of the effect each will have upon existing case law with particular emphasis on whether the new provisions sufficiently strengthen the double jeopardy principle to remedy the difficulties that provided the impetus for statutory reform.

(Footnote continued from preceding page)

statutory violations, the 'single act,' 'single transaction,' 'same offense,' and 'same evidence' rules have been used more as a justification and rationalization of desired results than as an analytical tool.

³³ SIGLER, *supra* note 3, at 189.

³⁴ *Id.* at 181.

³⁵ KYPC § 45 [KRS § 433C.3-020].

³⁶ KYPC § 46 [KRS § 433C.3-030].

³⁷ KYPC § 47 [KRS § 433C.3-040].

³⁸ KYPC § 48 [KRS § 433C.3-050].

³⁹ KYPC § 49 [KRS § 433C.3-060].

A. *The Power to Prosecute For Multiple Offenses*

Because of statutory overlap, rarely does criminal conduct give rise to a single offense; rather the defendant is often subject to charges for multiple offenses.⁴⁰ This situation demands inquiry into whether the prosecutor should be given the option of bringing all charges against the defendant, or whether he should have some limitations placed upon him. If the prosecutor is allowed to prosecute the defendant for multiple offenses arising from the same criminal activity, he may be in a position to overcharge or harass the defendant, thereby gaining an unfair advantage.⁴¹ On the other hand, if he is not allowed to bring all related charges against the defendant, the prosecutor may be placed at the distinct disadvantage of having to select the offense which he believes presents the strongest case.⁴² Further, it is difficult to know in advance what the proof will show since charges must frequently be brought before there is time for extensive investigation. Since the defendant has a right to be informed of the charges against him and the prosecutor's right to amend indictments is severely limited, the state is probably justified in bringing charges to cover every contingency of proof at the trial.⁴³

The Kentucky Penal Code provides that the state may prosecute the defendant for all offenses arising from his criminal conduct, adopting the view that the need to provide the prosecutor with this power outweighs any disadvantage placed upon the defendant. The text of KYPC § 45 [KRS § 433C.3-020] is as follows:

(1) When a single course of conduct of a defendant may establish the commission of more than one offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense when:

(a) One offense is included in the other, as in Subsection (2);

or

(b) Inconsistent findings of fact are required to establish the commission of the offenses; or

(c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.

(2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

⁴⁰ See 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 332 (1970) [hereinafter cited as WORKING PAPERS].

⁴¹ *Id.* at 334.

⁴² *Id.* at 335.

⁴³ *Id.*

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offenses charged; or
- (b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
- (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
- (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.⁴⁴

These provisions only partially restrict the power of the prosecutor in multiple offenses situations since limitations are placed on the conviction rather than the prosecution of the defendant.⁴⁵

Historically, the prosecutor has been free to charge a defendant with all offenses arising from his criminal conduct.⁴⁶ In many instances this would seem both fair and logical. For example, where the defendant robs a bank and, in his attempt to escape, kills a guard or steals a car, the legislature probably intended for the defendant to be tried for each separate offense and suffer the consequences of multiple convictions, since he has demonstrated a criminal proclivity which makes him more dangerous to society.⁴⁷ However, not all offenses arising from a single criminal transaction involve distinctly separate criminal acts, or demonstrate greater criminal proclivity. Although difficult to categorize, several multiple offense patterns occur with some regularity and do not justify separate charges, multiple trials or greater punishment.

One recurring multiple offense pattern involves situations where "different legal norms enter into apparent or real competition for the punishment of the same act."⁴⁸ This is clearly demonstrated in *Gore v. United States*,⁴⁹ where the defendant was charged and convicted of violating laws controlling the importation, taxation, and prescription of narcotic drugs, although his only act was selling the drugs.⁵⁰

A second multiple offense situation occurs where "a single activity is divided into different independent parcels, different stages of which

⁴⁴ KYPC § 45 [KRS § 433C.3-020].

⁴⁵ See KENTUCKY LEGISLATIVE RESEARCH COMMISSION, KENTUCKY PENAL CODE § 610, Commentary (Final Draft 1971) [hereinafter cited as LRC].

⁴⁶ See LRC § 610, Commentary.

⁴⁷ This is assuming, of course, that there is some validity to increasing the punishment of a defendant whose criminal acts and criminal tendencies are more dangerous to society.

⁴⁸ WORKING PAPERS, *supra* note 40, at 333.

⁴⁹ 357 U.S. 386 (1968).

⁵⁰ See text accompanying notes 27-28 *supra*.

are made separately criminal.⁵¹ This includes the inchoate crime and the complete crime, i.e., attempted robbery and robbery. Burglary and larceny are also covered since burglary is often preliminary to larceny. Crimes that have been divided into various stages are included, i.e., possession of forgery devices, forgery, possession of forged instruments, and uttering a forged instrument. Finally, crimes that have traditionally been considered lesser included offenses would fall within this category since they often involve different stages or degrees of the same criminal activity.

A third pattern encompasses circumstances in which a single act gives rise to criminal liability under both a special and a general statute, such as automobile theft and general theft.⁵² Multiple charges and punishment are clearly illogical under these circumstances.

A fourth multiple offense situation involves offenses which must inevitably be committed together,⁵³ such as stealing a check and forging an endorsement upon it. Included in this category would be a series of repeated offenses closely related in time, such as robbing several victims at the same time.

The final multiple offense situation involves instances in which one act results in injury to more than one victim.⁵⁴ This occurs, for example, where two persons are shot or killed, although the defendant fired his pistol only once.

Under KYPC § 45 [KRS § 433C.3-020], the prosecutor remains free to charge the defendant with all overlapping and multiple offenses in the situations described above; however, limitations are placed upon conviction. For example, under KYPC § 45(1)(a) [KRS § 433C.3-020(1)(a)], the defendant cannot be convicted of both the greater offense and an included offense.⁵⁵ This limitation, based on the rationale that a defendant should be subject to punishment only for the most serious offense growing out of the criminal activity committed, is consistent with existing law, which has long recognized the lesser included offense doctrine.⁵⁶

The second limitation, KYPC § 45(1)(b) [KRS 433C.3-020(1)(b)], covers situations where the defendant is indicted in the alternative.⁵⁷ Since it would be legally impossible to be guilty of two offenses con-

⁵¹ WORKING PAPERS, *supra* note 40, at 333.

⁵² *Id.* at 332-33.

⁵³ *Id.* at 333.

⁵⁴ *Id.* at 333-34.

⁵⁵ LRC § 610, Commentary.

⁵⁶ *Id.* citing *Hughes v. Commonwealth*, 115 S.W. 744 (Ky. 1909).

⁵⁷ Since the state is free to prosecute the defendant for conflicting offenses, the situation is analogous to the civil practice of pleading in the alternative.

sisting of the same conduct but requiring different mental states, the defendant can be convicted for only one of the offenses. The Commentary to the Kentucky Penal Code [hereinafter cited as Commentary] provides the following example:

D takes the automobile of another without the latter's consent. His conduct *could* constitute a commission of two distinct offenses, one being larceny (which requires an intent to deprive the owner of the car permanently) and the other being "joy-riding" (which requires an intent to deprive the owner of temporary use of the car). A conviction of both of these offenses could result only from inconsistent findings of fact, i.e., an intent to deprive *permanently* in one and an intent to deprive *temporarily* in the other.⁵⁸

KYPC § 45(1)(c) [KRS § 433C.3-020(1)(c)] constitutes the final limitation upon the number of convictions that can be obtained against a defendant involved in a continuing offense situation. The Commentary to the final draft of KYPC illustrates this limitation with the crime of nonsupport.⁵⁹ The mere fact that a defendant has been guilty of nonsupport over an extended period of time does not give rise to more than one offense. The legislature must either specify a period that gives rise to a second offense or the defendant must be indicted for one period of time and then fail to terminate his activity or omission, which would give rise to a second offense over a second period of time. Although consistent with existing law in Kentucky,⁶⁰ the need for this restriction is questionable, since it serves more as a definition of a continuing offense than as any real limitation of the prosecutor's power. Essentially a rule of construction, it does not prevent the legislature from multiplying offenses. Unlike the other two limitations, the legislature could defeat this one by specifically multiplying the offense after certain time periods. Therefore, because of the General Assembly's inherent power to define criminal conduct, this limitation serves little purpose.

These provisions of the double jeopardy statutes restrict the prosecutor to a relatively limited extent and ignore other complications created by overlapping and multiple offense situations. However, due to the Code's expanded definition of "included offenses,"⁶¹ the limitation upon conviction for both the greater and the included offense essentially eliminates the prosecutor's power to obtain a conviction in many multiple offense situations where multiple conviction would

⁵⁸ LRC § 610, Commentary.

⁵⁹ *Id.*

⁶⁰ *Id.* citing *Wilson v. Cooper*, 60 S.W.2d 359 (Ky. 1933).

⁶¹ KYPC § 45(2) [KRS § 433C.3-020(2)]. See text accompanying notes 79-83 *infra*.

be inappropriate.⁶² But other of the multiple offense problems previously discussed remain. Therefore, KYPC § 45 [KRS § 433C.3-020] fails to completely resolve all the problems created by overlapping and multiple offenses; as the defendant is subject not only to multiple charges, but also to multiple convictions and to multiple punishment in many instances.

Advocates of statutory double jeopardy standards have suggested a variety of methods for reducing the ills of prosecution for multiple offenses.⁶³ The most highly regarded technique is the compulsory joinder approach of the American Law Institutes's Model Penal Code,⁶⁴ which provides that "a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court."⁶⁵ The elimination of multiple trials for overlapping offenses by forcing the prosecutor to join all charges in a single accusation is the single most important innovation in the reform of double jeopardy law since it resolves many of the problem situations previously discussed.⁶⁶ It significantly diminishes the prosecution's power to force a defendant to undergo a second prosecution for essentially the same conduct as a means of either increasing the probability of a finding of guilt or increasing punishment by additional convictions and sentences. On the other hand, compulsory joinder is only a partial remedy.⁶⁷ Since the defendant can still be tried and convicted for all offenses arising from the same criminal conduct or episode except included offenses, he remains subject to multiple punishment if the offenses are properly joined. Therefore, the basic injustice and irrationality of the existing law would survive enactment of a compulsory joinder provision alone.⁶⁸

The drafters of the Kentucky Penal Code rejected compulsory joinder. This omission was not, however, due to the fact that it is only a partial remedy since no other provision was substituted to provide more complete relief. It would seem at first glance that the drafters simply overlooked or ignored the significance of the prosecutor's power to seek convictions at multiple trials. If compulsory

⁶² See text accompanying notes 48-55 *supra*.

⁶³ SIGLER, *supra* note 3, at 199 n.36.

⁶⁴ MODEL PENAL CODE § 1.07(a) (Official Draft 1962).

⁶⁵ *Id.*

⁶⁶ SIGLER, *supra* note 3, at 213.

⁶⁷ *Id.* at 223.

⁶⁸ *But see* text accompanying notes 70-76 *infra*.

joinder was intentionally omitted, the rationale for inclusion of the other double jeopardy provisions is a complete mystery unless intended merely as a codification of pre-Code case law.

Perhaps, rather than intending to overlook the problems created by multiple offenses, multiple trials and multiple punishment, the drafters perceived the Penal Code to be an inappropriate vehicle for establishing compulsory joinder, a procedural device.⁶⁹ Following this line of reasoning, compulsory joinder would be more appropriately enacted by amendment to the Rules of Criminal Procedure by the Court of Appeals. Unfortunately, this approach allows the possibility that no action will be taken by the Court. Further, assuming the Court should decide to amend its rules, the law of double jeopardy would then be scattered among three compilations: the constitution, the statutes, and the Rules of Criminal Procedure. Unless care is taken to coordinate these various provisions, greater confusion may result.

There is further indication that the drafters of the Code did not completely ignore the difficulties created by multiple convictions. In KYPC § 270 [KRS § 435A.1-110], the drafters restrict multiple punishment through consecutive sentences. A misdemeanor and a felony will always run concurrently and both convictions will be satisfied by service of the felony term.⁷⁰ The aggregate of consecutive sentences for conviction of two or more misdemeanors shall be not more than one year, *i.e.*, the maximum misdemeanor term of imprisonment.⁷¹ The aggregate of consecutive sentences for conviction of two or more felonies shall be not greater than the longest term authorized under the habitual criminal statute⁷² for the highest class of crime for which the consecutive sentences are imposed.⁷³ Under the habitual offender statute, convictions for a Class A felony would limit the court to the sentence for the Class A felony.⁷⁴ If the highest offense for which the defendant is convicted is a Class B felony, the court is limited to a maximum sentence of life imprisonment;⁷⁵ if the highest offense is a class C or D felony, the court is limited to a sentence of 20 years.⁷⁶ Therefore, the defendant is provided some protection against excessive punishment through conviction for multiple offenses.

The included offense limitation, probably the most significant restriction found in KYPC § 45 [KRS § 433C.3-020], extends the

⁶⁹ SIGLER, *supra* note 3, at 207.

⁷⁰ KYPC § 270(1)(a) [KRS § 435A.1-110(1)(a)].

⁷¹ KYPC § 270(1)(b) [KRS § 435A.1-110(1)(b)].

⁷² KYPC § 267 [KRS § 435A.1-080].

⁷³ KYPC § 270(1)(c) [KRS § 435A.1-110(1)(c)].

⁷⁴ LRC § 3445, Commentary.

⁷⁵ KYPC § 267(4)(a) [KRS § 435A.1-080(4)(a)].

⁷⁶ KYPC § 267(4)(b) [KRS § 435A.1-080(4)(b)].

common law definition of included offenses. Case law defines an included offense as one that requires proof of the same or less than all the facts required to prove the offense charged.⁷⁷ However, there are offenses that require proof of different facts that also appear to come within the definition of an included offense. For instance, negligent homicide would seem to have been intended as an included offense of murder, since the offenses differ only as to the degree of intent involved. However, negligent and intentional are different mental states and require proof of a different fact. Therefore, under the traditional definition negligent homicide would not be an included offense of murder.

The Code has abolished this illogical distinction and includes under its definition of included offense those offenses that require proof of a "lesser kind of culpability"⁷⁸ or a "less serious injury or risk of injury to the same person, property or public interest."⁷⁹ Under this definition negligent homicide would be an included offense of murder since it only requires proof of a lesser kind of culpability. Assault would be an included offense of murder, assuming there was a question as to whether the defendant's assault was the cause of the victim's death, since assault differs from murder only as to the seriousness of the injury and the type of intent involved.⁸⁰ Consistent with existing law, the new Code defines an attempt as an included offense.⁸¹

Some difficulties may arise from this expanded definition of included offense. Since the defendant can be convicted for an included offense on evidence presented to substantiate the greater charge,⁸² the defendant might argue that the expanded definition of included offense violates his sixth amendment right "to be informed of the nature and cause of the accusation."⁸³ Under the traditional definition (*i.e.*, "proof of the same or less than all the facts required to prove the greater offense") the defendant would necessarily be defending against the lesser included offense when he defended against the greater.⁸⁴ Under the new test, however, the defendant may have to defend against a broad spectrum of conceptually different yet related crimes without being given specific notice of additional charges. In other words, some

⁷⁷ SIGLER, *supra* note 3, at 107.

⁷⁸ KYPC § 45(2)(c) [KRS § 433C.3-020(2)(c)].

⁷⁹ KYPC § 45(2)(d) [KRS § 433C.3-020(2)(d)].

⁸⁰ LRC § 610, Commentary.

⁸¹ KYPC § 45(2)(b) [KRS § 433C.3-020(2)(b)].

⁸² See LRC § 610, Commentary, *citing* Ky. R. CRIM. P. 9.86.

⁸³ U.S. CONST. amend. VI.

⁸⁴ This is because proof of any different or additional facts was not required to be offered. The accused would, therefore, defend against all the elements of the lesser included offense.

element of surprise may exist in allowing conviction for some of the more broadly defined included offenses.⁸⁵

As the foregoing discussion of multiple offenses indicates the Kentucky Penal Code provides no panacea for all of the difficulties and injustices of the present system. Because of the multitudinous circumstances under which overlapping offenses arise,⁸⁶ establishing an equitable formula for general application is extremely difficult. The test formulated by the courts to determine identity of offenses demonstrates the perils confronted.⁸⁷ Recognizing the inherent difficulties, the drafters confined their attempts to remedy multiple offense problems to restrictions on consecutive sentencing,⁸⁸ leaving to the Court of Appeals the option of adding a compulsory joinder provision to the Rules of Criminal Procedure.⁸⁹

B. *The Effect of a Former Prosecution*

The remainder of the Code's double jeopardy provisions concern traditional situations wherein the defendant had been tried and is subsequently prosecuted for the same or a related offense. Under both federal and state constitutional prohibitions, the primary difficulty has involved the determination of what constitutes "the same offense."⁹⁰ This generally depended upon which of several tests (*i.e.*, "same offense," "same evidence," "same act," or "same transaction") the court adopted.⁹¹

When the subsequent prosecution is for the same offense under identical facts and final judgment has not been reversed, the authorities unanimously agree that subsequent prosecution violates constitutional prohibitions against double jeopardy.⁹² However, the authorities differ where (1) a case is terminated prior to a final determination by the judge or jury; (2) the reprosecution involves a similar statutory offense requiring proof of many, if not all, of the same facts, but which is not technically the same statutory offense; (3) the former prosecution occurred in another jurisdiction; or (4) a defendant attempts to

⁸⁵ KYPC § 45(2)(c), (d) [KRS § 433.3-020(2)(c), (d)] could require a defense against a conceptually different element of intent or injury. For instance, the accused might defend against intentional conduct on the basis of diminished capacity or some other mitigating circumstance that might be unavailable if the conduct were reckless or negligent.

⁸⁶ See text accompanying notes 48-55 *supra*.

⁸⁷ See text accompanying notes 21-32 *supra*.

⁸⁸ KYPC § 270 [KRS § 435A.1-110].

⁸⁹ See text accompanying note 71 *supra*.

⁹⁰ See SIGLER, *supra* note 3, at 100.

⁹¹ See text accompanying notes 21-32 *supra*.

⁹² Even courts adopting the most narrow test have applied the constitutional principle in this situation. See notes 135-43 *infra* and accompanying text; LRC § 615, Commentary.

use the double jeopardy provisions in a fraudulent manner to cut off subsequent prosecution, by getting convicted in a lower court on a lesser charge. Each of these situations is covered in the new Code.

C. *The Effect of a Former Prosecution of the Same Offense*

Where the same statutory offense is prosecuted a second time under identical facts the constitutional protection will generally apply to prevent the re prosecution.⁹³ The Kentucky Penal Code extends this same protection. KYPC § 46 [KRS § 433.2-030] provides the following limitations upon subsequent prosecution for the same offense:

When a prosecution is for a violation of the same statutory provision and is based upon the same facts as a former prosecution, it is barred by the former prosecution under the following circumstances:

- (1) The former prosecution resulted in:
 - (a) an acquittal, or
 - (b) a conviction which has not subsequently been set aside; or
- (2) The former prosecution resulted in a determination by the court, which has not subsequently been set aside, that there was insufficient evidence to warrant a conviction; or
- (3) The former prosecution was terminated by a final order or judgment, which has not subsequently been set aside, and which required a determination inconsistent with any fact or legal proposition necessary to a conviction in a subsequent prosecution; or
- (4) The former prosecution was improperly terminated after the first witness was sworn but before findings were rendered by a trier of fact.

Termination under either of the following circumstances is not improper:

- (a) The defendant expressly consents to the termination or by motion for mistrial or some other manner waives his right to object to the termination; or
- (b) The trial court, in exercise of its discretion, finds that the termination is manifestly necessary.⁹⁴

This section limits the application of the double jeopardy principle to those instances where it has commonly been applicable in the past. KYPC §§ 46(1), (2) [KRS §§ 433C.3-030(1), (2)] are consistent with existing case law.⁹⁵ Since the state is not allowed to appeal an acquittal, the defendant can never be re prosecuted for an offense for

⁹³ See LRC § 615, Commentary.

⁹⁴ KYPC § 46 [KRS § 433C.3-030].

⁹⁵ See LRC § 615, Commentary, citing *Commonwealth v. Ramey*, 132 S.W.2d 342 (Ky. 1939); *Commonwealth v. Duvall*, 295 S.W. 1047 (Ky. 1927); *Turner v. Commonwealth*, 272 S.W.726 (Ky. 1925); *Commonwealth v. Murphy*, 109 S.W. 353 (Ky. 1908).

which he has been acquitted.⁹⁶ If the defendant is convicted but the judgment is reversed on appeal, the state can re prosecute on remand.⁹⁷ If a court's determination that evidence is insufficient to support a conviction is set aside, another trial would be permissible; if upheld, that determination would bar re prosecution.⁹⁸ KYPC § 46(2) [KRS § 433C.3-030(2)] requires the prosecutor to present sufficient evidence to create a jury question upon every element of his case; otherwise, the defendant must be set free. Therefore, the prosecution is prevented from taking a defendant to trial for mere harassment. Unless the prosecutor has enough evidence to prove his case, the state will be forever barred.

KYPC § 46(3) [KRS § 433C.3-030(3)] governs situations where the former prosecution is dismissed by a final court order or judgment prior to trial. This provision places the point at which jeopardy attaches very early in the prosecution;⁹⁹ however, it is limited to situations where the basis for the dismissal was such that any subsequent prosecution for the same offense would be inconsistent with that ruling.¹⁰⁰ It would apply, for instance, where the former prosecution was dismissed because of the statute of limitations or immunity;¹⁰¹ however, it would not apply to a dismissal for improper venue or a defective indictment. If the cause of the dismissal can be corrected, subsequent prosecution is proper; if it cannot be corrected, the former prosecution bars subsequent prosecution. The legislature therefore essentially extended the civil concept of *res judicata* to criminal prosecutions.¹⁰²

The Code also deals with the situation where the trial is terminated after the first witness takes the stand, but prior to a jury verdict.¹⁰³ If the trial is improperly terminated, the defendant can never be re-prosecuted for that offense.¹⁰⁴ The purpose of this restriction is to assure the defendant that his guilt or innocence will be determined

⁹⁶ An acquittal is to be restricted to those situations where a jury or judge renders a verdict or finding of not guilty, and is not intended to be dependent upon the formal entry of a judgment or order. LRC § 615, Commentary.

⁹⁷ This is consistent with existing law. See Note, *Twice in Jeopardy*, *supra* note 10, at 264 n.6.

⁹⁸ LRC § 615, Commentary.

⁹⁹ *Id.* The Commentary points out that this section is not dependent upon the "attachment of jeopardy," since there is no requirement that any evidence be presented. However, it has the same effect as if jeopardy has attached in the traditional sense.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* The concept of *res judicata* is not followed exactly, since the prosecutor cannot use a determination in a prior prosecution against the defendant in a subsequent prosecution. See SIGLER, *supra* note 3, at 90-91.

¹⁰³ KYPC § 46(4) [KRS § 433C.3-030(4)].

¹⁰⁴ *Id.*

by the first jury to which he consents and to prevent an overzealous prosecutor from withdrawing from a poorly prepared or presented case because he fears acquittal.

The definition of "improper termination" provides only two occasions where termination prior to a final determination is proper. The first is where the defendant requests or consents to the termination.¹⁰⁵ For example, if the defendant requests a mistrial, the termination is proper, as it is under existing double jeopardy case law.¹⁰⁶ If the defendant believes he will be prejudiced by continuation of the original prosecution, he can be retried by another jury. Proper termination also occurs if the trial court in its discretion finds termination "manifestly necessary."¹⁰⁷ For example, if a juror dies or a defense attorney becomes ill, the trial judge may find termination of the trial necessary.¹⁰⁸ The guilty defendant would be unjustly benefitted if he were allowed to escape punishment when the trial had to be terminated for reasons other than prosecution misconduct or circumstances which make termination "manifestly necessary." This provision and its rationale are consistent with past double jeopardy decisions.¹⁰⁹

D. *The Effect of a Former Prosecution for Different Offenses*

The next section of the Code dealing with the double jeopardy principle concerns situations where a defendant is prosecuted for one statutory offense, and is later prosecuted for a different offense. KYPC § 47 [KRS § 433C.3-040] determines whether prosecution is barred by a former prosecution for a different offense.

Generally, prosecution for one offense should not bar subsequent prosecution for a separate offense.¹¹⁰ The double jeopardy prohibition was never intended to shield a defendant from the consequences of his various criminal acts; rather its purpose is to prevent the state from charging a defendant with the same crime more than once. However, under the present statutory scheme numerous offenses may arise from a single criminal act.¹¹¹ The offenses differ only in the elements that must be proved at trial.¹¹² By redefining criminal conduct in a more

¹⁰⁵ LRC § 615, Commentary.

¹⁰⁶ *Id.* citing *Riley v. Commonwealth*, 227 S.W. 146 (Ky. 1921).

¹⁰⁷ See LRC § 615, Commentary.

¹⁰⁸ One critic argues that the test should be whether the cause was "intrinsic" or "extrinsic" to the trial. If an extrinsic circumstance caused the termination, there should be no bar. If an intrinsic circumstance caused the delay, the bar to reprosecution would depend upon whether it was caused by the prosecutor, trial judge, or the defendant. See SIGLER, *supra* note 3, at 223-24.

¹⁰⁹ See LRC § 615, Commentary, citing *Mullins v. Commonwealth*, 80 S.W.2d 606, 608 (Ky. 1935).

¹¹⁰ See WORKING PAPERS, *supra* note 40, at 333.

¹¹¹ *Id.* at 332. See also SIGLER, *supra* note 3, at 63-64.

¹¹² See, e.g., *Gore v. United States*, 357 U.S. 386 (1958).

logical and comprehensive manner the Code eliminates much of the overlap of pre-Code law.¹¹³ However, some overlap remains, and the legislature may amend or supplement the Code in a manner that destroys its internal consistency and creates greater overlapping of offenses.

The drafters of the Code attempted to solve this problem by limiting the power of the prosecutor to try a defendant twice for different but similar offenses. KYPC § 47 [KRS § 433C.3-040], dealing with the effect of a former prosecution for a different offense, provides:

Although a prosecution is for a violation of a different statutory provision than a former prosecution or for a violation of the same provision but based upon different facts, it is barred by the former prosecution under the following circumstances:

- (1) The former prosecution resulted in:
 - (a) an acquittal, or
 - (b) a conviction, or
 - (c) a determination that there was insufficient evidence to warrant a conviction and the subsequent prosecution is for:
 - (1) An offense of which the defendant could have been convicted at the first prosecution; or
 - (2) An offense involving the same conduct as the first prosecution, unless each prosecution requires proof of a fact not required in the other prosecution or unless the offense was not consummated when the former prosecution began; or
- (2) The former prosecution was terminated by a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or
- (3) The former prosecution was improperly terminated, as that term is used in Section 46(4) of this act, and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.¹¹⁴

The first limitation upon subsequent prosecution involves offenses for which the defendant could have been convicted at the former trial.¹¹⁵ This applies primarily to an included offense for which the defendant can be convicted without being formally charged.¹¹⁶ The rationale is that since the defendant was subject to conviction for the

¹¹³ See SIGLER, *supra* note 3, at 195-204.

¹¹⁴ KYPC § 47 [KRS § 433C.3-040].

¹¹⁵ KYPC § 47(1)(a) [KRS § 433C.3-040(1)(a)].

¹¹⁶ KYPC § 45(2) [KRS § 433C.3-010(2)].

included offense at the first prosecution, he has already been put in jeopardy for that offense. Therefore, a defendant cannot be tried for murder and then later prosecuted for attempted murder, manslaughter, or assault based upon the same facts.¹¹⁷ This provision protects the defendant from harassment and reduces the unfair advantage that would otherwise accrue to the prosecutor. The double jeopardy clause as interpreted by the courts has long provided similar protection; hence, this provision merely codifies existing law.¹¹⁸

The Code extends the limitation upon subsequent prosecutions to include offenses for which the defendant could have been convicted at the first prosecution had it not been improperly terminated.¹¹⁹ The exceptions to improper termination, discussed above, which permit subsequent prosecution are applicable to this section.¹²⁰ KYPC § 47(3) [KRS § 433C.3-040(3)] essentially codifies existing law.¹²¹ However, neither it nor KYPC § 47(1)(a) [KRS § 433C.3-040(1)(a)], which prevents prosecution for an included offense after final determination of the greater offense, actually eliminate the unfairness caused by overlapping crimes. In most instances, the defendant would still be subject to multiple prosecutions for the same criminal conduct because most multiple offenses do not fit into the category of an included offense.¹²²

KYPC § 47(2) [KRS § 433C.3-040(2)] further restricts reprosecution by applying *res judicata* to criminal cases.¹²³ Where the former prosecution required a determination inconsistent with conviction at the subsequent prosecution, the former judgment will bar subsequent prosecution. The purpose of this provision is to prevent the defendant from being tried twice upon the very same issues. For example, if the defendant is first prosecuted for burglary, interposes the sole defense of alibi, and is acquitted, he could not be later prosecuted for a larceny involving the same burglary, since a conviction for larceny would be inconsistent with the former jury determination that the defendant was someplace else.¹²⁴ *Hoag v. New Jersey*¹²⁵ illustrates the need for this provision. In that case, the defendant had been tried for the robbery of A, B and C in a single transaction. He defended upon the grounds of alibi and was acquitted.

¹¹⁷ LRC § 620, Commentary.

¹¹⁸ *Id.* citing *Commonwealth v. Ladusaw*, 10 S.W.2d 1089, 1090 (Ky. 1928).

¹¹⁹ KYPC § 45(3) [KRS § 433C.3-040(3)].

¹²⁰ See text accompanying notes 103-09 *supra*.

¹²¹ LRC § 620, Commentary.

¹²² See text accompany notes 48-54 *infra*.

¹²³ *But see* note 87 *supra*.

¹²⁴ For another example, see LRC § 615, Commentary.

¹²⁵ 356 U.S. 464 (1958).

Later, the prosecutor, not satisfied with the result, prosecuted the defendant for the robbery of *D*, even though the robbery of *D* occurred at the same time and place as the robbery of *A*, *B* and *C*. He was found guilty, and the Supreme Court affirmed on the basis of the same evidence rule.¹²⁶ One of the juries was obviously wrong, and it makes little sense to resolve such conflict in favor of the prosecutor. In order to protect against such an unjust result, KYPC § 47(2) [KRS § 433C.3-040(2)] was needed; however, difficulty arises when the basis of the verdict is not clear.¹²⁷ For example, a defendant could defend a charge of disorderly conduct on the grounds that the incident did not occur in a public place and self defense. If the defendant was acquitted and later charged with assault arising from the same incident, it would be uncertain which defense was the basis for the former acquittal. If the acquittal was based on the defense that the place of the incident was not public, then a subsequent prosecution for assault would be proper. However, if self defense was the basis, the first acquittal should stand as a bar to the subsequent prosecution. Therefore, unless all applicable defenses introduced at the former trial are allowed as *res judicata* to a subsequent prosecution, this restriction will not be effective.

The final limitation upon prosecution for a different offense is KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)], which provides subsequent prosecution for a different offense is barred by an acquittal, conviction, or determination that there was insufficient evidence to warrant a conviction at a former prosecution, and the subsequent prosecution is for "an offense involving the same conduct as the first prosecution."¹²⁸ This provision, taken alone, would seem intended to eliminate the present inequities caused by overlapping offenses. If the defendant is subject to only one prosecution when he is charged with multiple offenses arising from the same conduct, the state would not be in a position to harass the defendant with multiple prosecutions or use the related offenses in any unfair manner. Therefore, this section eliminates multiple trials for overlapping offenses, although the defendant would still be subject to multiple punishment since all offenses could be joined at one trial.¹²⁹

The Commentary to the Legislative Research Commission's final draft of the Code supports the conclusion that this provision was intended to eliminate multiple prosecutions for overlapping offenses:

¹²⁶ *Id.* at 467.

¹²⁷ See Note, *Twice in Jeopardy*, *supra* note 10, at 265.

¹²⁸ KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)].

¹²⁹ *But see* text accompanying notes 70-76 *supra*.

Following an acquittal, a conviction, or a determination by the court that there was insufficient evidence to warrant a conviction, a subsequent prosecution is barred by [KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)]] if it is for an offense involving the *same conduct* as a former prosecution. For example: D is charged with committing breach of peace by assaulting V, tried for this offense, and convicted. He is then tried for assault and battery of V. The former conviction would serve to bar the subsequent prosecution under [KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)]].¹³⁰

This provision is a step in the proper direction, and was intended to eliminate much of the confusion and unfairness now arising from judicial interpretations of the double jeopardy principle. However, the term "same conduct" is subject to a rather broad interpretation.¹³¹ In an effort to inform the courts that no such broad interpretation was intended, the drafters placed an exception upon the "same conduct" rule.

Unfortunately, the exception appears to consume the general rule barring subsequent prosecution for an offense involving the "same conduct." The exception permits subsequent prosecution of a defendant even for an offense involving the "same conduct," where "*each prosecution requires proof of a fact not required in the other prosecution.*"¹³² This language is so similar to the language used by courts adopting the "same evidence" test that it is difficult to assign it any other meaning.¹³³ Therefore, although the general rule seems to eliminate some of the inequities caused by overlapping offenses, the exception reinstates the confusion of current double jeopardy law and destroys the potential effectiveness of the general rule.

The confusion caused by the "same conduct" rule and its exception is demonstrated by the cases which the drafters cite in the Commentary to show that these rules are consistent with existing law.¹³⁴ They refer to *Carman v. Commonwealth*¹³⁵ as being consistent with the "same conduct" rule. In that case the Court, citing from an earlier case, stated:

And the Commonwealth, by giving different names to the same thing, or by prosecuting under different statutes, cannot multiply

¹³⁰ LRC § 620, Commentary.

¹³¹ For instance, it could be interpreted to include totally unrelated offenses where they arose during the same criminal episode. Therefore, a defendant under this interpretation would be subject to only one prosecution for murder and robbery if they occurred during the same criminal transaction.

¹³² KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)].

¹³³ See text accompanying notes 23-28 *supra*.

¹³⁴ LRC § 620, Commentary.

¹³⁵ 76 S.W. 1078 (Ky. 1903).

offenses out of one or the same series of acts committed by the accused.¹³⁶

While the Legislature may pronounce as many combinations of things criminal as it pleases, resulting not unfrequently [sic] in a plurality of crimes in one transaction, or even in one act, for any of which there may be a conviction without regard to the others, "it is," in the language of Cockburn, D. J., "a fundamental rule of law that out of the same facts a series of charges shall not be preferred." To give our constitutional provision the force evidently meant, and to render it effectual, "the same offense" must be interpreted as equivalent to the same act. And judicial utterances have even gone apparently to the extent that there can be only one punishment for one criminal transaction.¹³⁷

This language indicates that the defendant should not be prosecuted where both offenses arise out of the same act. Thus, it appears to be an attempt on the part of the Court to adopt the "same act" test.¹³⁸

The Commentary then cites *Centers v. Commonwealth*¹³⁹ as demonstrating the exception to the "same act" or "same conduct" rule. In *Centers* the Court quotes the language of an earlier case¹⁴⁰ which states:

But if the facts, which will convict on the second prosecution, would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed in the same transaction. If the evidence required to convict under the first indictment would not be sufficient to convict under the second, but proof of an additional fact would be necessary to constitute the offense charged in the second, then the former conviction or acquittal cannot be pleaded in bar to the second indictment.¹⁴¹

The Court thus appears to adopt the "same evidence" test,¹⁴² which permits a second prosecution if the subsequent prosecution requires proof of an additional fact not required at the former prosecution. Reconciliation of *Carman* and *Centers* is difficult, for each espouses a different, conflicting concept of the scope of the double jeopardy clause. The "same evidence" test is not an exception to the "same act" or "same conduct" test; on the contrary, it is diametrically opposed. In other words, where the "same evidence" test is employed, the

¹³⁶ *Id.* at 1078.

¹³⁷ *Id.* at 1079.

¹³⁸ See text accompanying note 29 *supra*.

¹³⁹ 318 S.W.2d 57 (Ky. 1958).

¹⁴⁰ *Medlock v. Commonwealth*, 288 S.W. 670, 671 (Ky. 1926).

¹⁴¹ 318 S.W.2d 57, 58 (Ky. 1958).

¹⁴² See text accompanying notes 23-28 *supra*.

prosecutor is generally free to prosecute for overlapping offenses; where the “same act” test is used, prosecution for overlapping offenses is practically eliminated.¹⁴³ When faced with a case involving this problem, the courts will probably be unable to rectify the confusion and will fall back upon existing case law to reach a decision. If so, this statutory revision has done little to resolve the inequities caused by overlapping offenses.

The drafters of the Code intended to adopt neither the “same act” nor the “same evidence” test. They used the language “same conduct” in an effort to abandon these common law tests.¹⁴⁴ Further, the language of the exception, although susceptible to interpretation as a “same evidence” test, does not adopt the customary terminology of that test. The “same evidence” test allows the defendant to be prosecuted for each offense provided *either* offense requires proof of facts not required by the other,¹⁴⁵ the Code allows subsequent prosecution only if *both* or *each* offense requires proof of a fact not required by the other.¹⁴⁶ Therefore, under the Code, not only must the second prosecution require proof of a fact not required by the first, but the former offense must also require proof of a fact that need not be proved in the second prosecution.¹⁴⁷ For example, under the “same evidence” test only the second prosecution required proof of a fact not common to the first. Therefore, a defendant could be convicted for selling narcotics at the first trial and selling narcotics without a prescription at the second, since “without a prescription” was a different fact. Under the Code, on the other hand, the first prosecution would be a bar to the second prosecution since only the second prosecution required only proof of an additional fact.¹⁴⁸ The first prosecution did not require proof of any fact which did not have to be proved at the second prosecution. Therefore, KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)] appears to bar subsequent prosecution for a greater offense after a prosecution for an included offense, since generally only the greater offense requires proof of a fact not required in the former prosecution.¹⁴⁹

Even though the exception may not be as restrictive as it first appears, there are instances where a literal reading of the provision could work injustice since all offenses that overlap do not differ merely

¹⁴³ See text accompanying notes 23-29 *supra*.

¹⁴⁴ “Same conduct” is not necessarily synonymous with “same act” or “same transaction”; therefore, the courts are not forced to rely upon the old tests.

¹⁴⁵ See text accompanying notes 23-28 *supra*.

¹⁴⁶ See KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)].

¹⁴⁷ LRC § 620, Commentary.

¹⁴⁸ See text accompanying notes 48-54 *supra*.

¹⁴⁹ KYPC § 45(2) [KRS § 433C.3-020(2)].

in that one offense requires proof of an additional element. For example, if the first offense was selling narcotics without a license and the second was selling narcotics without a written order, the first prosecution would not necessarily bar the second since each requires proof of a different fact. In other words, an unscrupulous prosecutor could still prosecute a defendant twice for essentially the same criminal conduct by merely ensuring that the offenses *each* have one minor, yet different, element. Therefore, not only is the provision susceptible to a "same evidence" interpretation by the courts, it is also susceptible to a literal interpretation that would enable a clever prosecutor to circumvent its language and subject the defendant to multiple prosecutions.

An additional exception to the "same conduct" rule applies where the subsequent prosecution is for an offense that was not consummated when the former prosecution was commenced.¹⁵⁰ The purpose of this exception is to prevent the defendant from escaping the charge merely because the subsequent offense was incomplete at the time of the first prosecution. For example, where the defendant is convicted of assault and the victim later dies, a subsequent prosecution for murder would not be barred.¹⁵¹ Of course, if the defendant were acquitted at the first trial and the victim later died, KYPC § 47(2) [KRS § 433C.040(2)] would prohibit a later prosecution for murder.¹⁵²

E. *The Effect of a Former Prosecution in Another Jurisdiction*

When criminal conduct subjects a defendant to prosecution in more than one state, the general rule has been to allow prosecution in each state,¹⁵³ even when the prosecutions are for the same offense. The Kentucky Court of Appeals has adopted this view,¹⁵⁴ however, the Code reverses the judicial rule and bars subsequent prosecution in this state where the defendant has been formerly prosecuted for a similar offense in another jurisdiction.¹⁵⁵ The reason for this change is that it makes little sense to bar subsequent prosecution within one jurisdiction, but to allow it if two jurisdictions are involved. The same fundamental unfairness to the defendant exists in each case.¹⁵⁶

¹⁵⁰ KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)].

¹⁵¹ LRC § 620, Commentary.

¹⁵² A prosecution for murder would probably be inconsistent with the determination that the defendant was innocent of an alleged assault involving the same incident. KYPC § 47(2) [KRS § 433C.3-040(2)].

¹⁵³ SIGLER, *supra* note 3, at 95-96.

¹⁵⁴ LRC § 625, Commentary, *citing* Lem v. Commonwealth, 419 S.W.2d 759 (Ky. 1967).

¹⁵⁵ LRC § 625, Commentary.

¹⁵⁶ To argue that prosecution and punishment for overlapping offenses is unjust if in the same jurisdiction logically requires the same conclusion if there are two jurisdictions involved.

Therefore, to extend this protection to all Kentucky defendants, KYPC § 48 [KRS § 433C.3-050] provides:

When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state, a prosecution in such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

- (1) The former prosecution resulted in:
 - (a) an acquittal, or
 - (b) a conviction, or
 - (c) a determination that there was insufficient evidence to warrant a conviction which had not subsequently been set aside, and the subsequent prosecution is for an offense involving the same conduct unless:
 - (i) Each prosecution requires proof of a fact not required in the other prosecution; or
 - (ii) The offense involved in the subsequent prosecution was not consummated when the former prosecution began; or
- (2) The former prosecution was terminated in a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution.¹⁵⁷

This section adopts the language of KYPC 47 [KRS § 433C.3-040] involving the “same conduct” rule with its exceptions and is subject to the same problems of interpretation and scope previously discussed.¹⁵⁸ However, this section is not sufficiently broad to include as a bar to subsequent prosecution every prosecution that bars subsequent prosecution within the same jurisdiction. For example, an improperly terminated prosecution in another state does not bar subsequent prosecution in this state. The reason behind the more narrow application of double jeopardy principles to a subsequent prosecution in this state after a former prosecution in another state is, according to the Commentary, the difference in the criminal law of the various jurisdictions.¹⁵⁹

KYPC § 48(2) [KRS § 433C.3-050(2)] extends the concept of *res judicata* to a prosecution in another jurisdiction.¹⁶⁰ If the determination made in the former prosecution in another state would be inconsistent with a conviction in this state, subsequent prosecution in this state is barred.¹⁶¹ This provision extends “full-faith-and-credit” to criminal

¹⁵⁷ KYPC § 48 [KRS § 633.3-050].

¹⁵⁸ See text accompanying notes 130-49 *supra*.

¹⁵⁹ LRC § 625, Commentary.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

prosecutions brought in other states to prevent possible harassment and double jeopardy.

F. The Effect of a Former Prosecution Fraudulently Procured or Before A Court Lacking Jurisdiction

The final double jeopardy section of the Code¹⁶² is intended to prevent the defendant from using the double jeopardy provisions to fraudulently escape more severe punishment. The principal deception this section is intended to defeat occurs where the defendant goes into a lower court before all the facts are known and pleads guilty to a minor offense stemming from his criminal conduct, receives a small fine, and then seeks to invoke the protection of the double jeopardy provisions of the Code to escape the greater punishment to which he would otherwise have been subject.¹⁶³ To prevent this practice KYPC § 49 [KRS § 433C.3-060] provides:

A prosecution is not barred, as provided in [KYPC § 46, 47 and 48] of this Act if the former prosecution:

- (a) Was procured by the defendant without the knowledge of the proper prosecuting officer and with the purpose of avoiding the sentence which otherwise might be imposed; or
- (b) Was before a court which lacked jurisdiction over the defendant or the offense.¹⁶⁴

The purpose of this safeguard is to prevent abuse of the double jeopardy provisions by the defendant.

KYPC § 49(b) [KRS § 433C.3-060(2)] prevents the defendant from escaping prosecution and punishment when he is mistakenly tried before a court lacking jurisdiction.¹⁶⁵ Since prosecution in a court lacking jurisdiction is invalid from its inception, the defendant was never put in jeopardy. He could overturn the conviction and escape punishment unless a second prosecution can be maintained in the proper jurisdiction. Some injustice may result if a defendant convicted in a court lacking jurisdiction served part of his sentence before the conviction was overturned, and additional protection may be necessary to cover this contingency.

IV. CONCLUSION

The Kentucky Penal Code double jeopardy provisions are basically a codification of existing law; however, in a few instances the protection

¹⁶² KYPC § 49 [KRS § 433C.3-060].

¹⁶³ LRC § 630, Commentary.

¹⁶⁴ KYPC § 49 [KRS § 433C.3-060].

¹⁶⁵ LRC § 630, Commentary.

given to the defendant has been extended. The definition of "included offense" has been expanded in KYPC § 45(2) [KRS § 433C.3-020]¹⁶⁶ to protect a defendant from multiple convictions under KYPC § 45(1) (a) [KRS § 433C.3-020(1)(a)]; the defendant is subject to conviction for either the greater offense or an included offense but not for both.¹⁶⁷ KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)] sets forth the "same conduct" rule and protects the defendant from reprosecution for a greater offense¹⁶⁸ or an offense created merely by adding an additional element to the prior offense.¹⁶⁹ Unfortunately, the Code provision which sets forth the "same conduct" rule contains an exception where "each prosecution requires proof of a fact not required in the other,"¹⁷⁰ and this creates confusion since the wording of the exception closely parallels the language of the "same evidence" test.¹⁷¹ Further a clever prosecutor could avoid the statute's intended effect in some instances if the statute was interpreted too literally. Unless steps are taken to clarify and broaden the scope of this provision, it will be ineffective as a device to curtail the power of the prosecutor in overlapping and multiple offense situations.

There is also a need for a compulsory joinder provision,¹⁷² which would remove the prosecutor's opportunity to use overlapping and multiple offenses to harass or gain an unfair advantage over a defendant.¹⁷³ He would be required to bring all known charges at one trial or be forever barred. Whether compulsory joinder would be best implemented by amendment to the Rules of Criminal Procedure or the Code is beyond the scope of this note. However, since the drafters of the Code apparently view compulsory joinder as a procedural matter,¹⁷⁴ amending the Rules may be the only foreseeable means of accomplishing this result.

The Study Draft of a New Federal Criminal Code contains a comprehensive treatment of double jeopardy problems.¹⁷⁵ It, like the Model Penal Code, provides for compulsory joinder of all offenses "based on the same conduct, arising from the same criminal episode, or based on a series of acts or omissions motivated by a common

¹⁶⁶ See text accompanying notes 77-81 *supra*.

¹⁶⁷ See text accompanying notes 55-56 *supra*.

¹⁶⁸ See text accompany note 149 *supra*.

¹⁶⁹ See text accompanying notes 145-48 *supra*.

¹⁷⁰ KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)].

¹⁷¹ See text accompanying notes 23-28 *supra*.

¹⁷² See text accompanying note 65 *supra*.

¹⁷³ See text preceding note 67 *supra*.

¹⁷⁴ See text accompanying note 69 *supra*.

¹⁷⁵ NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE §§ 703-08 (1970) [hereinafter cited as STUDY DRAFT].

purpose or plan and which result in the repeated commission of the same offense or affect the same person or persons or their property. . . .¹⁷⁶ The prosecutor is free to prefer all charges conceivably committed by the defendant. Therefore, this provision alone, like KYPC § 45 [KRS § 433C.3-020], would not prevent the defendant from suffering multiple punishment. The rationale for allowing the prosecutor to bring all separate charges and obtain a conviction on any one is that otherwise he would have the difficult task of selecting the best to bring to trial.¹⁷⁷

The Federal Penal Code limits the punishment that can be imposed upon a defendant convicted of multiple offenses. Similar to the limitation in KYPC § 270 [KRS § 435A.1-110],¹⁷⁸ this restriction reduces the effect of convictions for multiple and overlapping offenses. The Working Papers to the Federal Code explain that the premise of the draft provisions should be "not so much a matter of the number of offenses for which a person shall stand convicted, but of how offenders should be dealt with and the duration of permissible punishment reasonably determined."¹⁷⁹ Another commentator expressed the problem in another manner stating:

Finally, and most importantly, power to cumulate punishments involves an irrational kind of discretion. The aim of sentencing discretion is individualized punishment. The judge must determine the criminal's capacity for rehabilitation, and society's appetite for retribution, in each case. All species of psychological and biographical information are relevant to both decisions. But one fact which is not relevant is the number of closely related or overlapping offenses that can be spun out of the defendant's conduct.¹⁸⁰

The Federal Penal Code attempts to overcome this irrational basis for increased punishment under the existing double jeopardy approach by providing that a defendant may not be sentenced consecutively for more than one offense when "the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct."¹⁸¹ The drafters explained that an alternative and more general statement might be:

The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which

¹⁷⁶ *Id.* § 703.

¹⁷⁷ See text accompanying note 41 *supra*.

¹⁷⁸ See text accompanying notes 70-76 *supra*.

¹⁷⁹ WORKING PAPERS, *supra* note 40, at 332.

¹⁸⁰ Note, *Twice in Jeopardy*, *supra* note 10, at 307.

¹⁸¹ STUDY DRAFT, *supra* note 175, at § 3206(2).

there was no substantial change in the nature of the criminal objective.¹⁸²

This would essentially protect a defendant from multiple punishment for overlapping offenses.¹⁸³ This alternate Federal Code provision would provide greater protection than KYPC § 270 [KRS § 435A.1-110], since it specifically applies to overlapping and multiple offenses to protect the defendant from being punished twice for what is essentially the same conduct. The Kentucky provision applies to all multiple convictions regardless of the circumstances and does not completely bar multiple punishment. Therefore, enactment in Kentucky of a specific multiple punishment provision similar to that of the Federal Code should be considered for overlapping offenses.

Finally, as discussed above, KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)] may require clarification and expansion to effectively prevent the prosecutor from using overlapping offenses unfairly.¹⁸⁴ Language in the Federal Code appears to move sufficiently provide for subsequent prosecutions for different although overlapping offenses. A former prosecution for a different offense should bar subsequent prosecution where “the subsequent prosecution is based on the same conduct or arose from the same criminal episode, unless (i) the law defining the offense of which the defendant was formerly convicted or acquitted is intended to prevent a substantially different harm or evil from the law defining the offense for which he is subsequently prosecuted, or (ii) the second offense was not consummated when the first trial began.”¹⁸⁵ This provision has the advantage of not being susceptible to interpretation as a “same evidence” test since, unlike KYPC § 47(1)(b) [KRS § 433C.3-040(1)(b)], it is not couched in terms similar to the “same evidence” test.¹⁸⁶ Adoption of the language of the Federal Code would correct many of the inadequacies of the KYPC section dealing with subsequent prosecution for a different offense; yet, it would not allow a defendant to escape prosecution for unrelated offenses committed in the course of the criminal transaction or episode. A more equitable and rational resolution of the double jeopardy problem would therefore result.

In closing, it should be noted that since the Kentucky Penal Code approach to double jeopardy is not sufficiently broad to eliminate all the difficulties caused by overlapping offenses, it could be susceptible to

¹⁸² *Id.* Comments, at 289-90.

¹⁸³ See text accompanying notes 48-54 *supra*.

¹⁸⁴ See text following note 171 *supra*.

¹⁸⁵ STUDY DRAFT, *supra* note 175, at § 706.

¹⁸⁶ See text accompanying notes 132-33 *supra*.

constitutional attack.¹⁸⁷ Although under current law no immediate threat exists,¹⁸⁸ there are indications that the attitude of the Supreme Court may be changing.¹⁸⁹ Pressure to broaden the scope of double jeopardy has increased, and has pushed the prevailing attitude in that direction. If the Court should adopt a "same transaction" or "same act" approach,¹⁹⁰ the Kentucky Penal Code provisions might be ruled unconstitutional. Broadening the scope of the provisions to the extent previously suggested would decrease the likelihood that the statute could be held unconstitutional, since most of the difficulties caused by overlapping and multiple offenses would be eliminated, the constitutional mandate would be satisfied.

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¹⁸⁷ See text accompanying note 7 *supra*.

¹⁸⁸ See *North Carolina v. Pearce*, 395 U.S. 711 (1969).

¹⁸⁹ See *Price v. Georgia*, 398 U.S. 323 (1970); *Ashe v. Swenson*, 397 U.S. 436 (1970); *Waller v. Florida*, 397 U.S. 387 (1970).

¹⁹⁰ See text accompanying notes 29-30 *supra*.