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Double Jeopardy Provisions of the New Crimes Code

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Note

DOUBLE JEOPARDY PROVISIONS OF THE NEW CRIMES CODE

INTRODUCTION

The concept of double jeopardy is thoroughly imbued in Anglo-American law.[1] In Pennsylvania, the plea of double jeopardy, in its strictest sense, was limited to capital offenses,[2] for only in such instance was the defendant in danger "of life or limb."[3] In noncapital offenses, the same prohibition was statutorily enacted as the pleas of autrefois convict and autrefois acquit.[4] Unfortunately, the tests utilized to apply the pleas resulted in superficially disparate results.[5]

The Crimes Code attempts to establish detailed criteria concerning those situations in which a former prosecution for an offense will preclude a subsequent prosecution. The four specific provisions deal with subsequent prosecutions for the same offense,[6] for different offenses,[7] for offenses previously prosecuted in an-

1. *See* Comment, *Double Jeopardy: Its History, Rationale and Future*, 70 DICK. L. REV. 377 (1966); 10 P.L.E. *Criminal Law* §§ 151-64 (1970).

2. *See, e.g.*, Commonwealth v. Kubacki, 208 Pa. Super. 523, 224 A.2d 80 (1966). In light of the Supreme Court decision in Furman v. Georgia, 408 U.S. 238 (1972), effectively abolishing the death penalty as it existed prior to the decision, no plea of double jeopardy would be available.

3. PA. CONST. art. 1, § 10.

4. PA. STAT. ANN. tit. 19, § 464 (1960).

5. *See, e.g.*, Commonwealth v. Moon, 151 Pa. Super. 549, 30 A.2d 704 (1943) (prosecution for adultery no bar to subsequent prosecution for assault and battery with intent to ravish on same facts; prosecution for rape would raise the bar).

6. PA. STAT. ANN. tit. 18, § 109 (Supp. 1973). *See* Appendix.

7. PA. STAT. ANN. tit. 18, § 110 (Supp. 1973). *See* Appendix.

other jurisdiction,[8] and for offenses in which the previous court did not have jurisdiction.[9] Each provision will be discussed herein; reference to previous cases will be used only as necessary to elucidate the new enactment. The four sections are set forth in the Appendix.

I. *Section 109. Former Prosecution for the Same Offense*

Section 109 bars subsequent prosecutions for the same offense in four enumerated situations: (1) prior acquittal; (2) prior determination inconsistent with criminal liability; (3) prior conviction; (4) prior improper termination.[10] The section primarily represents a codification of the lay concept of double jeopardy—no person shall be twice tried for an offense of which he has been formerly placed in jeopardy. Such a facile statement, however, ignores the ramifications implicit in the section. The preamble to the provision establishes the applicability thereof: the subsequent prosecution must be based both on the same statutes and the same facts.[11]

The first subsection deals with a previous acquittal, encompassing a verdict of not guilty and a determination of insufficient evidence.[12] In both instances the provision parallels existing law.[13] The subsection further prohibits prosecution for a greater inclusive offense if the defendant has been found guilty of a lesser included offense, although the conviction is subsequently set aside.[14] Such a bar is in direct contravention of the Model Penal Code[15] but in accord with former Pennsylvania law, at least in respect to those offenses formerly classified as capital.[16] The principal concern of the ALI draftsmen focused on two situations, those in which: (1) the state obtains a reversal of the earlier prosecution for prejudicial error (not possible in Pennsylvania);[17] or (2) the de-

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8. PA. STAT. ANN. tit. 18, § 111 (Supp. 1973). *See* Appendix.
9. PA. STAT. ANN. tit. 18, § 112 (Supp. 1973). *See* Appendix.
10. PA. STAT. ANN. tit. 18, § 109 (Supp. 1973). *See* Appendix.
11. *Id.*
12. *Id.* at subsection (1).
13. Acquittal or conviction: Commonwealth *ex rel.* Walker v. Banmiller, 186 Pa. Super. 338, 142 A.2d 758 (1958); Commonwealth v. McEvans, 92 Pa. Super. 124 (1927); PA. STAT. ANN. tit. 19, § 464 (1960). Insufficient evidence: Commonwealth v. Light, 5 Lycoming 212 (Pa. C.P. 1956).
14. PA. STAT. ANN. tit. 18, § 109(1) (Supp. 1973). *See* Appendix.
15. MODEL PENAL CODE TENTATIVE DRAFT NO. 5 § 109(1) (1956) [hereinafter cited as TENATIVE DRAFT NO. 5].
16. *E.g.*, Commonwealth v. Jordan, 328 Pa. 439, 196 A. 10 (1938):
> Defendant, upon a retrial, cannot be convicted of murder, but only of the lesser degree of homicide of which the jury found him guilty. Since, however, . . . he could, under the evidence, have been found guilty of the greater crime he is not entitled now to be discharged merely because on a retrial he can be convicted only of a lesser offense involved in an indictment for murder.

Id. at 448, 196 A. at 16.
17. The most important question of law involved is as to the Commonwealth's right to appeal in the circumstances. It is only where the ques-

fendant wins an appeal on the basis that his conduct violated the greater offense but not the lesser.[18] Apparently the legislature felt that the bar should nevertheless operate.

The second subsection bars a subsequent prosecution if the first prosecution was terminated in a final order or judgment for the defendant which has the legal effect of negating any criminal liability.[19] As illustrated in the ALI comment, such situations would arise if, for instance, the following determinations were made: (1) the statute of limitations had run;[20] (2) the prohibitions in other subsections of section 109 were applicable; (3) the defendant had been previously pardoned for the offense; (4) the defendant had been granted immunity from prosecution.[21]

A subsequent prosecution following a prior conviction is barred by subsection (3).[22] The bar operates from the time of a verdict capable of supporting a judgment is rendered, unless failure to enter judgment is upon the motion of the defendant, until the conviction is in some manner overturned. The prohibition in point of time is contrary to past Pennsylvania law, the courts having stated the time of jeopardy as follows:

> The plea of autrefois convict . . . applies only to a conviction followed by a judgment. And a verdict of guilty upon which sentence is deferred, though a conviction in a popular sense is not a conviction in law . . . . A judgment upon which a plea of autrefois conviction may be predicated must of necessity be a final judgment.[23]

The rationale behind the ALI proposal is that a determination of guilty subjects the defendant to punishment under that judgment, regardless of whether the punishment has yet been imposed.[24]

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tion is purely one of law that the Commonwealth may appeal from an adverse ruling in a criminal case, for example where a new trial is granted to a convicted defendant on the sole ground that the introduction of certain evidence at his trial was prejudicial error; or where an indictment has been quashed or judgment arrested after a verdict of guilty; or where the defendant's demurrer to the Commonwealth's evidence has been sustained. Where, however, the reason for the action of the trial, whereof the Commonwealth complains, is based upon an admixture of law and fact, the Commonwealth is without any right of appeal therefrom. Commonwealth v. Melton, 402 Pa. 628, 629, 168 A.2d 328 (1961) (citations omitted).

18. TENTATIVE DRAFT No. 5 at 49.
19. PA. STAT. ANN. tit. 18, § 109(3) (Supp. 1973). *See* Appendix.
20. *E.g.*, United States v. Johnson, 76 F. Supp. 542 (M.D. Pa. 1947).
21. TENTATIVE DRAFT No. 5 at 50.
22. PA. STAT. ANN. tit. 18, § 109(3) (Supp. 1973). *See* Appendix.
23. Commonwealth v. Belles, 163 Pa. Super. 464, 469, 62 A.2d 91, 94 (1948).
24. TENTATIVE DRAFT No. 5 at 52.

The final subsection bars subsequent prosecutions for the same offense when the first proceeding was improperly terminated.[25] The legislature deleted both the ALI definition of an improper termination[26] and the specified instances of terminations that would not invoke the bar.[27] The questions that will thus arise under the prohibition will conjecturally center on whether these same instances would constitute an improper termination under the Crimes Code. In prior cases it has been held improper to discharge a jury in a capital case without absolute necessity,[28] or to discharge a jury without the consent of the defendant.[29] It has been held proper to grant a severance to a defendant before the jury is sworn,[30] to discharge the jury because of the District Attorney's prejudicial arguments,[31] newspaper publicity,[32] or flight of the defendant,[33] and to grant a mistrial for the protection of the defendant.[34] The examples shown would have been decided similarly under the proposal as it was originally worded;[35] the basis of the deletion is not readily apparent.

Because the various subsections are but differing possibilities arising from the same circumstances, prosecutions based on the same statutes and facts as previous prosecutions, it is not difficult to envision situations in which several are applicable. An illus-

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25. PA. STAT. ANN. tit. 18, § 109(4) (Supp. 1973). *See* Appendix.

26. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. TENTATIVE DRAFT No. 5, § 109(4).

27. Termination under any of the following circumstances is not improper:

(a) The defendant consents to the termination or waives by motion to dismiss or otherwise, his right to object to the termination.

(b) The trial court in the exercise of its discretion, finds that the termination is necessary because:

(1) It is physically impossible to proceed with the trial in conformity with law; or

(2) There is a legal defect in the proceedings which would make any judgment enforced upon a verdict reversible as a matter of law; or

(3) Prejudicial conduct, in or outside the courtroom makes it impossible to proceed with the trial without manifest injustice to either the defendant or the State; or

(4) The jury is unable to agree upon a verdict; or

(5) False statements of a juror on voir dire prevent a fair trial.

TENTATIVE DRAFT No. 5, § 1.09(4).

28. Commonwealth v. Warfield, 424 Pa. 555, 227 A.2d 177 (1967); Commonwealth v. Simpson, 310 Pa. 381, 165 A. 498 (1933) (but allowed retrial on lesser offenses).

29. Commonwealth v. Bates, 413 Pa. 105, 196 A.2d 382 (1964).

30. United States v. Dorsch, 156 F. Supp. 61 (W.D. Pa. 1957).

31. Commonwealth v. Robinson, 317 Pa. 321, 176 A. 908 (1935).

32. Commonwealth v. Kubacki, 208 Pa. Super. 523, 224 A.2d 80 (1966).

33. Commonwealth *ex rel.* Green v. Rundle, 422 Pa. 236, 221 A.2d 187 (1966).

34. Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 220 A.2d 859 (1966).

35. *See* notes 26 and 27 and accompanying text *supra*.

trative case is *Commonwealth v. Haines.*[36] The defendant, a policeman, was indicted for four offenses arising from his involvement in a bookmaking operation. After the close of the testimony, the trial judge submitted binding instructions for acquittal on two of the counts, based on insufficient evidence. The jury could not reach accord on any of the counts, and the defendant requested a verdict of "not guilty" on the two counts for which the evidence was insufficient. The motion was overruled and, at a subsequent trial, the defendant was found guilty of all four counts. Under Section 109, subsections (1) and (2) would mandate a prohibition of prosecution for the two counts in issue, inasmuch as there was a determination of insufficient evidence and such a determination involves a legal proposition inconsistent with a subsequent conviction. Under subsection (4) the termination of the first trial and subsequent prosecution would not be improper. The superior court, while reversing on other grounds, nevertheless stated that "[n]othing short of an acquittal supports a plea of former acquittal."[37]

The section should present few problems in administration other than in distinguishing the applicable subsections in some instances. The major differences from the ALI proposal concern the ramifications of an improper dismissal. Since prior case law in Pennsylvania is in conformity with the draft proposal, the outcome should be the same in any event.

II. *Section 110. Former Prosecution for a Different Offense*

Of the four sections of the Crimes Code discussed in this Note, section 110 may present the most problems for practitioners because of the substantial deviation from the Model Code. As originally drafted, section 110 relied heavily on another section for interpretation; that section was deleted from the Crimes Code. The rewording necessitated by the omission is at times contradictory and ambiguous. Section 110 in application deals with those instances in which a subsequent prosecution is barred by a previous prosecution based on different statutes or different facts.[38]

The first subsection bars further prosecutions if the prior prosecution resulted in an acquittal or conviction[39] and the subsequent prosecution is for any offense of which the defendant could

36. 147 Pa. Super. 153, 24 A.2d 85 (1942).
37. *Id.* at 169, 24 A.2d at 92 (citations omitted).
38. PA. STAT. ANN. tit. 18, § 110 (Supp. 1973). *See* Appendix.
39. As stated previously the Crimes Code definition of conviction will overrule prior law. *See* note 23 and accompanying text *supra.*

have been convicted initially.[40] As such, the ban is readily grasped—no subsequent prosecutions for included offenses—and has been subscribed to by past decisions.[41]

The subsection further prohibits subsequent prosecutions based on the same conduct or criminal episode,[42] with the proviso that such offenses were (1) known to the appropriate prosecuting officer at the inception of the prior trial;[43] and (2) within the jurisdiction of a single court. This prohibition needed to be completely reworded because of the deletion of the compulsory joinder provisions of the Model Penal Code.[44] The addition of "criminal episode" to "conduct" should make the subsection considerably easier to implement, since the connotation of "criminal episode" is more inclusive than the explicit definition of conduct.[45] The single court jurisdiction caveat may create some problems, for the criteria as written is not whether the court which tried the different offense only had a limited jurisdiction, but whether any one court could have heard the whole case.[46] The prohibition in this subsection is not applicable if separate trials are ordered by the court.

The last prohibition in the subsection bars subsequent prosecutions for the same conduct unless (1) the evidence necessary for conviction is inconsistent and (2) a substantially different harm

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40. PA. STAT. ANN. tit. 18, § 110(1)(i) (Supp. 1973). *See* Appendix

41. *E.g.*, Commonwealth *ex rel.* Maszczynski v. Ashe, 343 Pa. 103, 21 A.2d 920 (1941); Commonwealth v. Cox, 209 Pa. Super. 457, 228 A.2d 30 (1967); Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943).

42. In some instances, the bar will merely be the inverse of that stated in subsection (1)(i), *i.e.*, no prosecution for the greater offense if there was a prior conviction or acquittal of the included offense. Pennsylvania courts are in accord with such a bar:

> [W]here a person is convicted or acquitted of a crime which is a constituent of a greater crime, he may not thereafter be prosecuted for the greater crime.

Commonwealth *ex rel.* Papy v. Mahoney, 417 Pa. 368, 371, 207 A.2d 814, 815 (1965) (citations omitted).

43. Cases such as Commonwealth v. McNair, 29 Pa. D. & C.2d 585 (C.P. Lyc. 1963), holding that an indictment for aggravated assault does not preclude a subsequent prosecution for murder when the victim dies would remain the same.

44. TENTATIVE DRAFT No. 5, § 1.08.

45. "Conduct: An act or omission and its accompanying state of mind or, where relevant, a series of acts and omissions." PA. STAT. ANN. tit. 18, § 103 (Supp. 1973).

The standard will thus supersede former measurements such as the "same evidence" test. *See* Balles v. Henry, 248 F. Supp. 778 (E.D. Pa. 1965); Commonwealth *ex rel.* Garland v. Ashe, 344 Pa. 407, 26 A.2d 190 (1942); Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943).

46. Thus the bar would operate if, for instance, a court of common pleas has jurisdiction over the gamut of offenses arising from one criminal episode, and the defendant is first prosecuted in a municipal court for a lesser offense. A single court had jurisdiction. For a discussion of the various problems endemic to similar situations, *see* Comment, *Double Jeopardy—Municipal Prosecutions as a Bar to Subsequent State Prosecutions for Offenses Arising from the Same Criminal Actions*, 76 DICK. L. REV. 282 (1972).

or evil is intended to be proscribed by the two offenses.[47] The draftsmen of the Model Penal Code intended the prohibition to apply when for some reason the compulsory joinder provisions did not operate,[48] i.e., even though the second trial might be allowable under that section, the prosecution is nevertheless barred unless the qualifications of this subsection are fulfilled. As enacted, the provision is open to a similar interpretation: if the offense is not known to the prosecuting officer, such that subsection (1)(ii) is not applicable, prosecution will be barred unless the above criteria are fulfilled.

In light of the rewording, however, the provision may be interpreted as a direct contradiction of the preceding subsection. For instance, the Crimes Code proscribes voluntary deviate sexual intercourse[49] and involuntary deviate sexual intercourse.[50] If a defendant is prosecuted for the former and acquitted, common sense and subsection (1)(ii) dictate that he should not then be prosecuted for the latter on the same facts. Under subsection (1)(iii), however, the exceptions would be activated. Each offense requires proof of a fact not required by the other (consent or nonconsent of the victim) and the proscriptions are intended to prevent a substantially different harm or evil. Voluntary deviate sexual intercourse was presumably intended to protect society from acts deemed loathsome; the proscription against involuntary deviate sexual intercourse was presumably intended to protect individual members of society and to punish those who violate such proscriptions. To allow such an interpretation would seem to be contradictory to the stated purpose of the Crimes Code; it would be hoped that the courts ignore some past cases[51] which permitted the second prosecution and rely on subsection (1)(ii) instead.

Subsection (2), as with the preceding subsection, will probably create some problems in implementation. In the Model Penal Code, this subsection was intended to prohibit repeated prosecutions when, for instance, the defendant is acquitted of an offense and subsequently charged with aiding and abetting commission of the same offense. Under the draft proposal, such repeated prosecutions would not be barred by previous provisions, because the of-

47. PA. STAT. ANN. tit. 18, § 110(1)(iii) (Supp. 1973). *See* Appendix.
48. TENTATIVE DRAFT No. 5 at 57.
49. PA. STAT. ANN. tit. 18, § 3123 (Supp. 1973).
50. PA. STAT. ANN. tit. 18, § 3124 (Supp. 1973).
51. *E.g.*, Commonwealth v. Balles, 163 Pa. Super. 467, 62 A.2d 91 (1948) (acquittal of indecent assault no bar for rape prosecution); Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943) (adultery—intent to ravish).

fenses may have arisen from different acts of "conduct" by the defendant.[52] Since the Pennsylvania legislature added "same criminal episode" to the modifying subsection, the defendant could not be charged with aiding and abetting the same offense without obliterating any sensible construction of "criminal episode."[53] If the second prosecution involves proof of a fact *not* inconsistent with the previous offense, the prohibitions of subsections (1) (ii) and (iii) already bar the second prosecution. Removed of such superfluous provisions, the subsection may be interpreted to permit a subsequent prosecution if an acquittal, final order or judgment for the defendant is set aside, reversed or vacated because of a legal error. If such a situation occurs, the defendant may be retried both for the same offense (under § 109(2)) and a different offense under this provision. Since an acquittal cannot be set aside by an appeal in Pennsylvania,[54] this subsection is further narrowed to encompass only situations where there is an appealable final order or judgment for the defendant. Examples of such orders have been previously listed.[55]

Subsection (3) bars subsequent prosecutions if the previous prosecution was improperly terminated. The bar only applies to those offenses of which the defendant could have been convicted had the previous proceeding not been improperly terminated. By omitting the compulsory joinder of the Model Penal Code, this subsection invites abuse by prosecutors. For instance, a defendant who has committed a murder by shooting his victim could be charged with aggravated assault. Once the defense is tested, the prosecution could in some manner induce an improper termination, possibly by merely withdrawing from the proceedings. Since the proceeding did not result in an acquittal or conviction or final order for the defendant, the bars applicable thereto never arise.[56] The defendant could not have been convicted of murder had the trial continued since he was never indicted for the crime. A subsequent prosecution for murder falls into none of the prohibitions enacted. The entire subsection is further obfuscated by the reference to the definition of improper termination found in section 109.[57] The definition has been deleted from the Crimes Code.[58]

Section 110 as enacted is not a model of clarity. The legislature, with considerable merit, added the phrase "or criminal episode" to subsection (1) (ii). With the change, lack of certainty concerning the definition of "conduct" should be ameliorated. Beyond

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52. TENTATIVE DRAFT No. 5, § 1.08(1).
53. PA. STAT. ANN. tit. 18, § 110(1)(ii) (Supp. 1973). *See* Appendix.
54. *See* note 17 *supra.*
55. *See* note 21 and accompanying text *supra.*
56. PA. STAT. ANN. tit. 18, §§ 110(1) and (2) (Supp. 1973). *See* Appendix.
57. PA. STAT. ANN. tit. 18, § 110(3) (Supp. 1973). *See* Appendix.
58. *See* notes 25-35 and accompanying text *supra.*

that change, the remainder of the section is ambiguous. To have contradictory provisions within the same section is inexplicable; to refer to non-existent definitions is an oversight. If the intent of the section is, first, to require all offenses arising from the same criminal episode to be prosecuted simultaneously and, second, to then invoke the prohibitions of Section 109 against further prosecutions (since the situation would then be prosecutions for the same offense), the wording could have been clearer.

III. *Section 111. Former Prosecution in Another Jurisdiction*

If conduct constituting an offense under Pennsylvania laws is first prosecuted in another jurisdiction, subsequent prosecution in Pennsylvania is barred.[59] The same result was reached by judicial decision in *Commonwealth v. Mills*,[60] in which the defendant having been sentenced in federal court for his involvement in a bank robbery, was subsequently prosecuted in state court. The Pennsylvania Supreme Court held that the second prosecution was barred by the first and that future cases involving similar repeated prosecutions would be determined on the basis of whether the interests of the state were fully protected in the first prosecution.[61] Such a test lacks judicial certainty in that a defendant who receives a one-year sentence may be subject to Pennsylvania prosecution if, for instance, Pennsylvania could have imposed a ten-year sentence and the court should determine that the brevity of the sentence did not fully protect the commonwealth's interests. The uncertainty would arise in determining at what point the interests of the state were sufficiently protected. If an accomplice in the hypothetical posed were sentenced to five years imprisonment, possibly because his conduct was more outrageous, the Pennsylvania court could well decide that such a sentence protected the interests of the commonwealth. Thus the defendant who was in some manner more culpable would face a five year prison term. The defendant sentenced to a one year term in federal court would face another sentence of up to ten years in state court. The anomaly thus presented was alluded to by Justice Pomeroy, who commented favorably on the more ascertainable standards presented by the Model Penal Code.[62] These standards were enacted with but minor revisions in the Crimes Code.[63]

59. PA. STAT. ANN. tit. 18, § 111 (Supp. 1973). *See* Appendix.
60. 447 Pa. 154, 286 A.2d 638 (1971).
61. *Id.* at 172, 286 A.2d at 642.
62. *Id.* at 173, 286 A.2d at 643.
63. PA. STAT. ANN. tit. 18, § 111 (Supp. 1973). *See* Appendix.

The applicability of the provision will be predicated on the judicial construction given the term "conduct." Although defined in the Crimes Code,[64] the definition solves little of the ambiguity created by the term; the ALI draftsmen acknowledged that ultimately the courts will decide the definition.[65] For instance, it will primarily be a matter of judicial interpretation whether a Pennsylvania conspiracy to rob a New Jersey bank constitutes "conduct" such that prosecution for the robbery in New Jersey bars prosecution for the conspiracy. The conflict will be even more refined in situations such as those encountered in *Mills*. A bank robbery at gunpoint includes many manifestations of "conduct," such as the preliminary preparation, the use of a deadly weapon, the robbery itself. The Pennsylvania legislature obviated a similar difficulty in Section 110 by adding "criminal episode" to the model draft.[66] It is submitted that a similar interpretation, or alternatively a test of whether Pennsylvania courts would be barred had the previous prosecution occurred in Pennsylvania, should be utilized by the courts in determining the applicability of Section 111.

IV. *Section 112. Former Prosecution Before Court Lacking Jurisdiction*

Section 112 in essence assures that the prohibitions on subsequent prosecutions will not be utilized to subvert the criminal process in the event that a defendant should in some way arrange to be tried before a court lacking jurisdiction, then raise the bar of a former prosection. The section exempts from the sanctions of Sections 108-111 specific situations, those in which: (1) the prior court lacked jurisdiction; (2) jurisdiction was fraudulently procured by defendant; (3) the prior prosecution is held invalid on writ of habeas corpus. Prior cases[67] are fully in accord with the limitation and the section should present little difficulties.

Conclusion

The prohibitions on subsequent prosecutions enacted in the Crimes Code are of primary importance in their delineation of

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64. *See* note 45 *supra*.

65. Tentative Draft No. 5 at 37:

> 'Conduct' . . . may include more than a single act or omission to act. In view of the infinite number of possible factual situations, no effort is made to be more specific. The courts must be entrusted with interpretation of the term in light of the evident purpose of the section to eliminate undue harassment by successive trials, so far as that is possible.

66. *See* text at note 45 *supra*.

67. Habeas corpus: United States *ex rel.* Slebodnik v. Pennsylvania, 343 F.2d 605 (3d Cir. 1965); United States v. Laury, 77 F. Supp. 301 (W.D. Pa. 1948); Commonwealth *ex rel.* Patrick v. Banmiller, 398 Pa. 163, 157 A.2d 214 (1960); Commonwealth *ex rel.* Davis v. Baldi, 181 Pa. Super. 251, 124 A.2d 390 (1956). Jurisdiction: Commonwealth v. Berger, 134 Pa. Super. 62, 4 A.2d 164 (1939).

set standards; no longer will the courts be forced to examine what are at times conflicting precedents. Some of the minor inconsistencies will no doubt be soon reconciled by legislative amendment or judicial interpretation. Until such time, the precise scope and application of the sections considered herein cannot be fully measured.

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§ 109. *When Prosecution Barred By Former Prosecution For The Same Offense*

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

(1) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser include doffense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside.

(2) The former prosecution was terminated, after the indictment had been found, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty accepted by the court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant.

(4) The former prosecution was improperly terminated after the first witness was sworn but before a verdict, or after a plea of guilty was accepted by the court.

§ 110. *When Prosecution Barred By Former Prosecution For Different Offense*

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in Section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is for:

(i) any offense of which the defendant could have been convicted on the first prosecution;

(ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and was within the jurisdiction of a single court unless the court ordered a separate trial of the charge of such offense; or

(iii) the same conduct, unless:

(A) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such

offense is intended to prevent a substantially different harm or evil; or

(B) the second offense was not consummated when the former trial began.

(2) The former prosecution was terminated, after the indictment was found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.

(3) The former prosecution was improperly terminated, as improper termination is defined in Section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

§ 111. *When Prosecution Barred By Former Prosecution in Another Jurisdiction*

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

(1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is based on the same conduct unless:

(i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil; or

(ii) the second offense was not consummated when the former trial began.

(2) The former prosecution was terminated, after the indictment was found, by an acquittal or by a final order of judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

§ 112. *Former Prosecution Before Court Lacking Jurisdiction of When Fraudulently Procured by the Defendant*

A prosecution is not a bar within the meaning of Section 109 of this title (relating to when prosecution barred by former prosecution for same offense) through Section 111 of this title (relating to when prosecution barred by former prosecution in another jurisdiction) under any of the following circumstances:

(1) The former prosecution was before a court which lacked jurisdiction over the defendant or the offense.

(2) The former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence which might otherwise be imposed.

(3) The former prosecution resulted in a judgment of conviction which has been held invalid in a subsequent proceeding on a writ of habeas corpus, coram nobis or similar process.

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