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FOR COMMISSION MEMBERS AND STAFF ONLY

November 23, 1965

MEMO TO COMMISSION

FROM: Richard G. Denzer, Chief Counsel

TO: All Commissioners and Ex-Officio Members

RE: Previous Prosecution (Double Jeopardy)

At the meeting of November 11, 1965, during the discussion of draft §105.40 "Motion to dismiss indictment; previous prosecution," it was suggested that the Commissioners consider, as a possible alternative, the American Law Institute's formulation on the subject. The following are the pertinent Model Penal Code sections:

"Section 1.07. Method of Prosecution When Conduct Constitutes More Than One Offense.

(1) Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other, as defined in Subsection (4) of this Section; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses; or

(d) 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; or

(e) the offense is defined as a continuing course of conduct and the defendant's course

of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

(2) Limitation on Separate Trials for Multiple Offenses. Except as provided in Subsection (3) of this Section, 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.

(3) Authority of Court to Order Separate Trials. When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(4) Conviction of Included Offense Permitted. A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) it consists of an attempt or solicitation 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 less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(5) Submission of Included Offense to Jury. The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

"Section 1.08. 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 included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside.

(2) The former prosecution was terminated, after the information had been filed or the indictment 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 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. 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. 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 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 entered 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 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 voire dire prevent a fair trial."

*States like Connecticut and Wisconsin which give the prosecution a broad right of appeal will want to add a clause at this point substantially as follows: "unless such acquittal has been set aside because of an error of law prejudicial to the prosecution."

"Section 1.09. 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 1.08 and the subsequent prosecution is for:

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

(b) any offense for which the defendant should have been tried on the first prosecution under Section 1.07, unless the Court ordered a separate trial of the charge of such offense; or

(c) 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 information was filed or the indictment 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 1.08, and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated."

*See footnote, supra, Sec. 1.08(1).

"Section 1.10. Former Prosecution in Another Jurisdiction: When a Bar.

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

(1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is based on 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 offenses is intended to prevent a substantially different harm or evil or (b) the second offense was not consummated when the former trial began; or

(2) The former prosecution was terminated, after the information was filed or the indictment 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 offense of which the defendant is subsequently prosecuted."

"Section 1.11. Former Prosecution Before Court Lacking Jurisdiction or When fraudulently Procured by the Defendant.

A prosecution is not a bar within the meaning of **Sections** 1.08, 1.09 and 1.10 under any of the following circumstances:

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

(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; or

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