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Author's Note

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the state have been fully litigated in a prior federal forum, then a subsequent state proceeding stemming from the same act constitutes double jeopardy.⁶⁹

Because double jeopardy is the import of the Pennsylvania court's analysis, it stands in apparent conflict with the United States Supreme Court's holding in *Barthkus*. The *Barthkus* court neglected to consider the interest of the individual, to which the Pennsylvania court has given primary consideration under circumstances where the state's interests have been satisfied in a prior federal proceeding. It is suggested that the Pennsylvania Supreme Court under the facts of *Mills* has made an appropriate and necessary decision and, therefore, ought to be followed by the highest court in the land. Therefore, the United States Supreme Court ought to overrule *Barthkus* in order to permit double jeopardy to serve as a defense to a state prosecution following a federal prosecution where the state's interest has been sufficiently vindicated. To maintain judicial consistency in decision making, the Court ought to overrule *Abbate v. United States*⁷⁰ and permit double jeopardy to serve as a defense to a federal prosecution following a state prosecution where the federal interest has been sufficiently vindicated.

C. Steven Miller

AUTHOR'S NOTE: Subsequent to the decision by the Supreme Court of Pennsylvania in *Commonwealth v. Mills*, the Pennsylvania legislature enacted section III of the Crimes Code.⁷¹ The statute bars a

69. Fifteen state jurisdictions have provided a statutory double jeopardy defense for any person prosecuted in a state court after being tried in a federal court for the same offense. See, e.g., ILL. REV. STAT. ch. 38, §§ 3-4 (1972). See also MODEL PENAL CODE § 1.10 (Prop. Offic., Draft 1962).

70. 359 U.S. 187 (1959).

71. PA. STAT. ANN. tit. 18, § 111 (1973) states:

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 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.

subsequent prosecution in Pennsylvania for crimes which have been prosecuted in the federal or a state jurisdiction under two circumstances.

First, a second prosecution is a bar where the defendant is acquitted or convicted in the first prosecution and the second prosecution is based on the same conduct. Under this circumstance the statute provides for two exceptions. First, a subsequent prosecution is permitted if proof of the offense requires proof of a fact which was not required by the first prosecution and proof of the offense in the first prosecution required proof of a fact not required in the subsequent prosecution. Additionally, in order to fall within the first exception the law defining each of the offenses must prevent a substantially different harm or evil. The second exception allowing a subsequent prosecution is applicable when the commission of the second offense was not completed at the time the first prosecution was commenced.

The second circumstance under which a second prosecution is barred involves the situation where the first prosecution was terminated by an acquittal or by a final order or judgment. If such an acquittal or final order or judgment has not been set aside, reversed or vacated; and such acquittal, order or judgment required a determination inconsistent with a fact which must be proven for conviction in the subsequent prosecution, the subsequent prosecution is barred.

The statutory language is broader in scope than the *Mills* court holding, since the statute bars a second prosecution following a prosecution in other state jurisdictions as well as the federal jurisdiction. The statute appears to have specified the factors a court must consider in determining the *Mills* court's test as to whether the state's interest in prosecuting the accused has been sufficiently vindicated in the federal or other state jurisdiction. The application of these statutory factors will be the subject of judicial interpretation as cases begin to arise.

Although the statute supersedes *Commonwealth v. Mills* as the law of Pennsylvania, the case remains valuable in two respects. The case may be cited as an example of a factual setting which served to bar a state prosecution following a federal prosecution. More importantly, the *Mills* case represents decisional law and may provide the impetus for a United States Supreme Court decision overruling *Barthkus v. Illinois*.⁷²

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72. 359 U.S. 121 (1959).