Criminal Law - Double Jeopardy Clause - Successive Prosecutions - Lesser Included Offense

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Criminal Law—Double Jeopardy Clause—Successive Prosecutions—Lesser Included Offense—The Pennsylvania Supreme Court has held that the double jeopardy protections of Rule 1120(d) of the Pennsylvania Rules of Criminal Procedure applied only to successive prosecutions and could not be invoked to bar a retrial following a mistrial precipitated by a hung jury.


On August 4, 1984, Alvie Donald McCane was arrested and charged with driving under the influence of alcohol.\(^1\) Three days later, a criminal complaint was filed, charging McCane with homicide by vehicle while driving under the influence in addition to the offense of driving under the influence of alcohol.\(^2\) Subsequently, the Commonwealth filed an information containing both charges on November 29, 1984.\(^3\) McCane waived arraignment and a jury trial commenced on April 22, 1985, in the Court of Common Pleas of Lackawanna County.\(^4\) The jury returned a guilty verdict on the driving under the influence charge, but was unable to reach a ver-

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   a) Offense defined.—A person shall not drive, operate or be in actual physical control of the movement of any vehicle while:
      1) under the influence of alcohol to a degree which renders the person incapable of safe driving;
      2) under the influence of any controlled substance . . . to a degree which renders the person incapable of safe driving;
      3) under the combined influence of alcohol and any controlled substance to a degree which renders the person incapable of safe driving; or
      4) the amount of alcohol by weight in the blood of the person is 0.10% or greater.
   *Id.*

2. Brief for McCane at 3. Homicide by vehicle while driving under the influence is a violation of § 3735 of the Motor Vehicle Code. 75 Pa. Cons. Stat. Ann. § 3735 (Purdon Supp. 1988). The operative language of § 3735 is as follows:
   a) Offense defined.—Any person who unintentionally causes the death of another person as the direct result of a violation of section 3731 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3731 is guilty of a felony of the third degree when the violation is the cause of death. . . .
   *Id.*

3. Brief for McCane at 3.
4. *Id.*
dict on the homicide by vehicle charge.⁵ The guilty verdict was entered against McCane on the driving under the influence charge; however, a mistrial was declared with respect to the charge of homicide by vehicle while driving under the influence.⁶

Thereafter, the district attorney scheduled the retrial of McCane on the charge of homicide by vehicle.⁷ Upon learning of the prosecutor's attempt to retry the case, McCane moved to quash the information and to dismiss the homicide by vehicle charge.⁸ In support of these motions, McCane argued that Rule 1120(d) of the Pennsylvania Rules of Criminal Procedure,⁹ section 109 of the Pennsylvania Crimes Code¹⁰ and the double jeopardy clauses of the Pennsylvania¹¹ and United States Constitutions¹² barred his reprosecution on the charge of homicide by vehicle while driving under the influence because he was previously tried and convicted of driving while under the influence, a lesser included offense.¹³ McCane argued that driving under the influence is an included of-

⁵ McCane, 517 Pa. at 492, 539 A.2d at 342.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ Id. Rule 1120(d) provides:
If there are two or more counts in the information or indictment, the jury may report a verdict or verdicts with respect to those counts upon which it was agreed, and the judge shall receive and record all such verdicts. If the jury cannot agree with respect to all the counts in the information or indictment if those counts to which it has agreed operate as an acquittal of lesser or greater included offenses to which they cannot agree, these latter counts shall be dismissed. When the counts in the information or indictment upon which the jury cannot agree are not included offenses of the counts in the information or indictment upon which it has agreed, the defendant or defendants may be retried on those counts in the information or indictment.

PA. R. CRIM. P. 1120(d).

¹⁰ Section 109 of the Pennsylvania Crimes Code states, in pertinent part:
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.


¹² The double jeopardy clause of the Pennsylvania Constitution reads, in pertinent part, as follows: "No person shall, for the same offense, be twice put in jeopardy of life or limb. . . ." Pa. Const. art. I, cl. 10.

¹³ The double jeopardy clause of the United States Constitution is set forth in the fifth amendment as follows: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ." U.S. Const. amend. V.

¹³ McCane, 517 Pa. at 493-94, 539 A.2d at 342.
fense of the crime of homicide by vehicle while driving under the influence, and his conviction of the lesser included offense precludes reprosecution on the greater included offense.\(^\text{14}\)

Subsequent to oral argument on McCane’s motions to quash and to dismiss the information, the trial court disposed of McCane’s motions on the basis of Rule 1120(d) alone, holding that Rule 1120(d) barred further prosecution of McCane.\(^\text{15}\) The trial court’s decision turned on whether homicide by vehicle while driving under the influence is a greater included offense\(^\text{16}\) of driving under the influence.\(^\text{17}\) Ultimately, the trial court concluded that the offenses of homicide by vehicle while driving under the influence and driving under the influence of alcohol or a controlled substance are “included offenses”\(^\text{18}\) for purposes of Rule 1120(d).\(^\text{19}\) Consequently, the trial court held that reprosecution of McCane was prohibited.

\(^{14}\) Id. at 495, 539 A.2d at 343-44. In Pennsylvania, the test for determining whether an offense is a lesser included offense is whether the greater offense “necessarily involves” the lesser offense. See Commonwealth ex rel. Moszczynski v. Ashe, 343 Pa. 102, 104, 21 A.2d 920, 921 (1941); Commonwealth v. Ackerman, 239 Pa. Super. 187, 191, 361 A.2d 746, 748 (1976). One offense necessarily involves another when all of the essential elements of the lesser offense are included in the greater offense. See Commonwealth v. Wood, 327 Pa. Super. 351, 353, 475 A.2d 834, 835 (1984); Ackerman, 239 Pa. Super. at 192, 361 A.2d at 748. For a thorough discussion of the lesser included offense doctrine in Pennsylvania, see Comment, The Lesser Included Offense Doctrine in Pennsylvania: Uncertainty in the Courts, 84 Dick. L. Rev. 125 (1979).

\(^{15}\) McCane, 517 Pa. at 493, 539 A.2d at 343-44.

\(^{16}\) See supra note 13. See also infra note 19.

\(^{17}\) Commonwealth v. McCane, No. 84 Cr. 767, slip op. at 3 (C.P.Ct. Lackawanna Co., Oct. 2, 1985) [hereinafter McCane slip op.].

\(^{18}\) An included offense is defined in Black’s Law Dictionary as follows: “Included offense. In criminal law, a crime which is part of another crime... To be an ‘included offense,’ all elements of the lesser offense must be contained in the greater offense, the greater containing certain elements not contained in the lesser.” BLACK’S LAW DICTIONARY 689 (5th ed. 1979) (citation omitted).

\(^{19}\) McCane slip op. at 5. In concluding that homicide by vehicle while driving under the influence is a greater included offense, the trial court relied on the test propounded in Blockburger v. United States, 284 U.S. 299 (1932) and adopted by the Pennsylvania Superior Court in Commonwealth v. Pounds, 281 Pa. Super. 19, 421 A.2d 1126 (1980). McCane slip op. at 4. Under this test, two offenses are “included” for double jeopardy purposes if the same act or transaction gives rise to a violation of two distinct statutory provisions and neither offense requires proof of a fact which the other does not. Id. at 3-4 (quoting Blockburger, 284 U.S. at 304). Applying this test to the statutory provisions violated in McCane, the trial court opined that homicide by vehicle while driving under the influence always necessitates proof of driving under the influence, and thus, the two offense are the “same” for the purpose of invoking the protection of the double jeopardy clause. McCane slip op. at 6. The majority in McCane, however, did not apply the Blockburger test; rather, they considered the test propounded in Commonwealth ex rel. Moszczynski v. Ashe, 343 Pa. 102, 21 A.2d 920 (1941). For a full explanation of the test employed in Moszczynski, see infra text accompanying notes 125-133.
by Pennsylvania Rule of Criminal Procedure 1120(d).\textsuperscript{20}

A timely appeal was taken by the Commonwealth to the Pennsylvania Superior Court.\textsuperscript{21} In a memorandum opinion, a three judge panel of the superior court adopted the opinion of the trial court and affirmed the order dismissing the charge of homicide by vehicle.\textsuperscript{22}

The Commonwealth filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was granted.\textsuperscript{23} In a 6-0 decision, the supreme court reversed the order of the superior court and remanded the case to the court of common pleas for retrial.\textsuperscript{24} McCane then filed an Application for Reargument which was subsequently denied.\textsuperscript{25}

Justice Larsen, who delivered the opinion for the majority,\textsuperscript{26} looked first to the operative language of Rule 1120(d).\textsuperscript{27} The court also examined the comment to Rule 1120,\textsuperscript{28} the purpose of Rule 1120(d)\textsuperscript{29} and the pertinent case law.\textsuperscript{30} Based upon Justice Larsen's analysis, the court concluded that Rule 1120(d) only applied to "successive prosecutions," and not to a retrial following a mistrial caused by a deadlocked jury.\textsuperscript{31} Since the Commonwealth was at-

\textsuperscript{20} McCane slip op. at 5.
\textsuperscript{21} McCane, 517 Pa. at 492, 539 A.2d at 342.
\textsuperscript{22} Commonwealth v. McCane, 359 Pa. Super. 608, 515 A.2d 618 (1986). The three judge panel of the superior court was comprised of Judges Beck, Popovich and Hoffman. Id.
\textsuperscript{23} 515 Pa. 575, 527 A.2d 537 (1987).
\textsuperscript{24} McCane, 517 Pa. at 501, 539 A.2d at 346.
\textsuperscript{26} Justice Larsen's majority opinion was joined by Justices Flaherty, McDermott, Zappala and Papadakos. Chief Justice Nix filed a concurring opinion. Id. at 490-91, 539 A.2d at 341-42.
\textsuperscript{27} Id. at 493, 539 A.2d at 342. The court found the following language of Rule 1120(d) to be pivotal in resolving the question of whether McCane's conviction of driving under the influence of alcohol had the effect of an acquittal on the homicide by vehicle charge: "If the jury cannot agree with respect to all the counts in the information or indictment if those counts to which it has agreed operate as an acquittal of lesser or greater included offenses to which they cannot agree, these latter counts shall be dismissed. . . ." Id. at 493, 539 A.2d at 342-43 (emphasis in original).
\textsuperscript{28} Id. at 497, 539 A.2d at 344. The comment to Rule 1120 provides that: "Sections (c), (d) and (e) serve only to codify the procedure where conviction or acquittal of one offense operates as a bar to a later trial on a necessarily included offense. . . ." Pa. R. Crim. P. 1120.
\textsuperscript{29} The court found that the purpose of Rule 1120(d) is to prevent successive prosecutions which violate double jeopardy. McCane, 517 Pa. at 497, 539 A.2d at 344.
\textsuperscript{30} See infra notes 84 and 101 and accompanying text.
\textsuperscript{31} McCane, 517 Pa. at 497, 539 A.2d at 344. Successive prosecution is explained in the introductory paragraph of § 109 of the Pennsylvania Crimes Code as follows: "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 follow-
tempting to reprosecute McCane on the charge of homicide by vehicle while driving under the influence after a mistrial precipitated by a hung jury, the supreme court held that Rule 1120(d) did not preclude reprosecution of McCane.\textsuperscript{32}

In reaching its holding, the supreme court rejected McCane's argument that reprosecution is precluded because driving under the influence is a lesser included offense of homicide by vehicle while driving under the influence.\textsuperscript{33} Specifically, McCane argued that since section 3735 required a conviction of a particular specified offense, driving under the influence, in order to convict a person of homicide by vehicle,\textsuperscript{34} driving under the influence was an included offense of homicide by vehicle, and therefore, retrial was barred.\textsuperscript{35} McCane attempted to distinguish the superior court's holding in \textit{Commonwealth v. Pounds}\textsuperscript{36} by contrasting the expressed and implied language of the homicide by vehicle statutes at issue in \textit{Pounds} with those in the instant case.\textsuperscript{37}

In \textit{Pounds}, Judge Van der Voort found that a conviction of vehicular homicide did not imply a finding of guilt as to any particular offense under section 3732. Consequently, the motor vehicle offenses at issue in \textit{Pounds} were not deemed "included offenses" of homicide by vehicle for double jeopardy purposes.\textsuperscript{38} In response to McCane's argument, the supreme court stated, in a conclusory fashion, that retrial was not precluded, even though a conviction of section 3731 was required under section 3735.\textsuperscript{39} Justice Larsen appeared to intimate that even if driving under the influence was a lesser included offense of the vehicular homicide charge, reprosecution following a mistrial caused by a hung jury would not be precluded since such "retrial" did not constitute a "successive

\begin{itemize}
\item \textsuperscript{32} \textit{McCane}, 517 Pa. at 497, 539 A.2d at 344.
\item \textsuperscript{33} \textit{Id.} at 495, 539 A.2d at 344.
\item \textsuperscript{34} For a definition of homicide by vehicle, see supra note 2.
\item \textsuperscript{35} \textit{McCane}, 517 Pa. at 495, 539 A.2d at 343-44.
\item \textsuperscript{36} 281 Pa. Super. 19, 421 A.2d 1126 (1980), petition for allowance of appeal denied.
\item \textsuperscript{37} 517 Pa. at 495, 539 A.2d at 343-44. The statute violated in \textit{Pounds}, 75 Pa. Cons. Stat. Ann. § 3732 (Purdon Supp. 1988), did not require a violation of a particular motor vehicle law as a condition of imposing guilt for homicide by vehicle, whereas the statute involved in \textit{McCane}, 75 Pa. Cons. Stat. Ann. § 3735 (Purdon Supp. 1988), requires a violation of § 3731. For a complete definition of these offenses, see supra notes 1-2 and infra note 86.
\item \textsuperscript{38} \textit{Pounds}, 281 Pa. Super. at 26, 421 A.2d at 1129.
\item \textsuperscript{39} \textit{McCane}, 517 Pa. at 495, 539 A.2d at 344.
\end{itemize}
prosecution."  

Next, the supreme court considered the Commonwealth's argument that reprosecution of McCane on the charge of homicide by vehicle while driving under the influence was not prohibited by section 109 of the Pennsylvania Crimes Code. The supreme court agreed with the Commonwealth and similarly interpreted section 109 to bar only successive prosecutions. Because the Commonwealth's reprosecution of McCane involved a retrial following a mistrial, and not successive prosecutions, Justice Larsen concluded that section 109 was inapplicable here. The corollary drawn by the supreme court in reliance upon Commonwealth v. Vincent was that since section 109 was inapplicable, there could be no acquittal on the greater included offense of homicide by vehicle while driving under the influence.

The supreme court then engaged in a discussion of under what circumstances one offense would be included in another. The court distinguished the offenses of driving under the influence and

40. Id. at 498, 539 A.2d at 345.
41. Id. at 497, 539 A.2d at 344. For a full discussion of § 109, see supra note 10. Although the trial court did not reach this issue in deciding McCane's motions to quash and to dismiss the information, McCane raised the question in his motions before the trial court of whether § 109 operated to bar his reprosecution on the homicide by vehicle charge. McCane slip op. at 2.
42. McCane, 517 Pa. at 498, 539 A.2d at 345. Justice Larsen looked to the introductory paragraph of § 109 to ascertain when reprosecution is barred under that section. See supra note 31.
43. McCane, 517 Pa. at 498, 539 A.2d at 345.
44. 345 Pa. Super. 173, 497 A.2d 1360 (1985). In Vincent, the superior court was asked to consider whether retrial was barred by double jeopardy considerations where a defendant was convicted of a specified traffic offense, but the jury could not reach a decision on a related homicide by vehicle charge. Id. at 174, 497 A.2d 1360. The superior court ruled that "section 109 applies only to successive prosecutions, not to the distinct problem of retrial following a deadlocked jury." Id. at 176, 497 A.2d at 1362 (footnote omitted). Looking at the specific facts in Vincent, the superior court found that there was no attempt at successive prosecutions because the vehicular homicide charge and the underlying traffic offenses were prosecuted in the same proceeding. Id. Thus, the superior court concluded that § 109 did not provide a statutory basis for invoking the protection of the double jeopardy clause. Id. For a thorough discussion of the superior court's opinion in Vincent, see infra text accompanying notes 84-100.
45. McCane, 517 Pa. at 498, 539 A.2d at 345. The Commonwealth argued in its brief that McCane's conviction on the driving under the influence charge did not act as an acquittal of the homicide by vehicle charge since the latter offense required proof of an additional fact, namely, that McCane's driving while under the influence of alcohol caused the victim's death. Brief for Commonwealth at 9.
46. McCane, 517 Pa. at 498-99, 539 A.2d at 345. The court stated the test to be "whether the greater offense necessarily involves the lesser." Id. The court cited several examples, such as a conviction of robbery necessarily includes the crime of larceny, and a conviction of murder necessarily includes assault and battery. Id.
homicide by vehicle from two greater offenses that necessarily include lesser offenses: robbery, which necessarily includes the crime of larceny, and murder, which necessarily contains the offenses of assault and battery. 47

Initially, the court acknowledged that, inasmuch as section 3735 requires that the accused be convicted of driving under the influence as a prerequisite to a conviction under that section, driving under the influence of alcohol is an included offense of homicide by vehicle while driving under the influence. 48 However, Justice Larsen was quick to note that the two statutory violations were not included offenses in the same sense as larceny is included in robbery, and as assault and battery is included in murder. 49 The court explained that unlike section 3735, a conviction of robbery does not require that the accused be found guilty of larceny and that the said act caused the loss as a prerequisite to assessing guilt for robbery. 50 The same analogy was drawn by the court between assault and battery and murder. 51

A further distinction made by the McCane court was that the offense of driving under the influence sought to protect a different interest than that to be protected by the homicide by vehicle statute. 52 Based on its analysis of the lesser included offense doctrine, the supreme court concluded that the offense of driving under the influence was not a lesser included offense of the crime of homicide by vehicle while driving under the influence. 53

Justice Larsen also addressed the Commonwealth's argument that the double jeopardy clauses of the Pennsylvania and United States Constitutions do not preclude the retrial of McCane. 54 Rely-

47. Id. The homicide by vehicle statute requires that the accused be convicted of driving under the influence before he can be found guilty of homicide by vehicle. See 75 Pa. Cons. Stat. Ann. § 3735 (Purdon Supp. 1988). For a full text of § 3735, see supra note 2. In contrast, larceny or assault and battery do not have to be proven as a prerequisite to convicting a criminal defendant of robbery or murder, respectively. McCane, 517 Pa. at 498-99, 539 A.2d at 345.

48. McCane, 517 Pa. at 498, 539 A.2d at 345.
49. Id.
50. Id. at 498-99, 539 A.2d at 345.
51. Id.
52. Id. at 499, 539 A.2d at 345. Homicide by vehicle while driving under the influence involves victims whose lives the statute seeks to protect, while the offense of driving under the influence, according to the court, is a victimless crime, the main purpose of which is to keep the highways free from the dangers presented by intoxicated drivers. Id.
53. Id.
54. Id. For the pertinent text of the constitutional provisions, see supra notes 11 and 12.
ing on firmly embedded precedent. Justice Larsen stated that the protection of the double jeopardy clause may only be invoked against a subsequent prosecution for the same offense after a conviction or an acquittal, or against multiple punishments for the same crime. As a general rule, the court stated that a mistrial precipitated by a deadlocked jury does not fall within these protections. Because McCane was tried for both offenses in the same proceeding, Justice Larsen determined that the retrial of McCane would not involve a successive prosecution.

In support of this holding, Justice Larsen reiterated his previous thesis that successive prosecutions are required before the protections of the double jeopardy clause can be applied. Inasmuch as the retrial of McCane did not constitute a successive prosecution, McCane could not invoke the protection of the double jeopardy clause. Thus, the court concluded that double jeopardy would not be violated by the reprosecution of McCane on the homicide by vehicle charge. In reaching this conclusion, the court also gave consideration to important public policies aimed at protecting society from those individuals guilty of crimes, and at preventing insurmountable obstacles from blocking the administration of justice.

Finally, in reaching the conclusion that the defendant had not raised a valid constitutional double jeopardy claim, the majority in McCane relied on Richardson v. United States. Based on Rich-

55. See infra notes 159, 164, 169 and 176 and accompanying text.
56. McCane, 517 Pa. at 499, 539 A.2d at 346.
57. Id.
58. Id. at 500, 539 A.2d at 346.
59. Id.
60. Id.
61. Id. at 500-01, 539 A.2d at 346. Without citing any authority, the majority in McCane noted that the double jeopardy provision of the Pennsylvania Constitution involved the same meaning, purpose, and end. Id. at 500 n.5, 539 A.2d at 346 n.5.
62. Id. at 500, 539 A.2d at 346. The court considered various policy arguments articulated by the United States Supreme Court in Wade v. Hunter, 336 U.S. 684 (1949). In Wade, the Supreme Court suggested that a rule allowing a defendant to go free whenever the trial fails to end in a final judgment would create havoc in the administration of justice in cases where there are no double jeopardy violations. Id. at 688-89. In the instance where the jury failed to reach a verdict, the Supreme Court felt that prohibiting retrial of the defendant would frustrate the purpose of the law to protect society from those guilty of crimes. Id. at 689. Weighing the various interests at issue, the Wade court concluded that, in some circumstances, society's interest in obtaining fair trials resulting in just judgments outweighs an accused's right to have his trial decided by a particular tribunal. Id.
63. 468 U.S. 317 (1984). In Richardson, the Supreme Court held that retrial following a hung jury does not violate double jeopardy principles. Id. at 324. For a thorough discussion of this case, see infra notes 176-183 and accompanying text.
ardson, the McCane court concluded that the jury's failure to reach a verdict on the charge of homicide by vehicle while driving under the influence was not an event that terminated jeopardy. Accordingly, the court in the instant case held that a retrial of McCane was not barred by double jeopardy principles.

Chief Justice Nix filed a concurring opinion in which he agreed with the result reached by the majority to allow the reprosecution of McCane on the vehicular homicide charge. However, the Chief Justice parted ways with the majority in two respects. First, Chief Justice Nix disagreed with the majority's analysis of the Rule 1120(d) argument. Specifically, the Chief Justice rejected the reasoning employed by the majority in reaching the conclusion that driving under the influence of alcohol is not a lesser included offense of homicide by vehicle while driving under the influence. In fact, Chief Justice Nix agreed with the trial court that driving under the influence and homicide by vehicle while driving under the influence are included offenses.

Notwithstanding this finding, the Chief Justice still concluded that there was no acquittal of the vehicular homicide charge for purposes of Rule 1120(d). In support of his conclusion, Chief Justice Nix stated that the trial court misapplied section 109 of the Pennsylvania Crimes Code. In this regard, the trial court read Rule 1120(d) and section 109 in tandem and dismissed the deadlocked charge of vehicular homicide because the trial judge found that driving under the influence was clearly a lesser included offense of homicide by vehicle while driving under the influence.

64. McCane, 517 Pa. at 500, 539 A.2d at 346. A criminal defendant in a jury trial is first put in jeopardy when the jury is empaneled. Richardson, 468 U.S. at 325. Jeopardy for that offense continues until the jury renders a verdict. Id. Thus, when the jury fails to reach a verdict, the original jeopardy never ends and continues for purposes of retrial. Id. See also S. Singer & M. Hartman, Constitutional Criminal Procedure Handbook §§ 16.1-.23 (1986).

65. McCane, 517 Pa. at 500-01, 539 A.2d at 346.

66. Id. at 501, 539 A.2d at 346.

67. Id. at 501-02, 539 A.2d at 346-47.

68. Id. The Chief Justice referred to the majority's analysis as convoluted. Id. Chief Justice Nix further noted that the majority seemed to be implying that the lesser included offense doctrine was confined to common law offenses and did not encompass statutory offenses. Id. at 501 n.1, 539 A.2d at 347 n.1.

69. Id. at 501, 539 A.2d at 347.

70. Id. at 502, 539 A.2d at 347.

71. Id. at 501-02, 539 A.2d at 347.

72. Id. at 501, 539 A.2d at 346. The concurrence found that the trial court was motivated to dismiss the greater offense against McCane by erroneously interpreting § 109 to mean a conviction of the lesser offense operated as an acquittal of the greater offense, even
Chief Justice Nix, on the other hand, construed section 109 to apply only where the sole offense charged in the information or indictment was the greater offense and the jury returned a guilty verdict on the lesser included offense.\(^7\) The Chief Justice explained that section 109 was never intended to apply where a defendant has been charged in the same proceeding with two separate offenses, both of which are included offenses, but is convicted of only one offense.\(^4\) Chief Justice Nix concluded that the commonwealth was free to reprosecute McCane on the vehicular homicide charge as there was no acquittal as defined under Rule 1120(d).\(^7\)

The concurrence also disagreed with the majority's decision to consider the constitutional claim raised by McCane.\(^7\) The Chief Justice commented briefly that since the trial court resolved the defendant's petition to quash the information solely on the basis of Rule 1120(d) and section 109, the majority should have abstained from deciding McCane's constitutional double jeopardy claim.\(^7\) Chief Justice Nix would have reversed the decision of the superior court on nonconstitutional grounds only.\(^7\)

The starting point for the McCane court's analysis was an examination of Pennsylvania Rule of Criminal Procedure 1120(d).\(^7\) Promulgated just twenty years ago,\(^8\) Rule 1120 was enacted to prevent successive prosecutions in violation of the double jeopardy clause.\(^8\) In particular, the plain meaning of that portion of Rule 1120(d) relied on by the trial court and McCane\(^8\) suggests that double jeopardy is activated to bar only successive prosecutions.\(^8\)

though both charges were brought in the same proceeding. Id.
73. *Id.* at 502, 539 A.2d at 347.
74. *Id.*
75. *Id.*
76. *Id.* at 502-03, 539 A.2d at 347.
77. *Id.*
78. *Id.*
79. *Id.* at 493, 539 A.2d at 342-43.
81. *McCane,* 517 Pa. at 497, 539 A.2d at 344.
82. See supra note 27.
83. 517 Pa. at 497, 539 A.2d at 344. See also Commonwealth v. Jones, 274 Pa. Super. 162, 418 A.2d 346 (1980), cert. denied, 449 U.S. 876 (1980). In *Jones,* the superior court held that double jeopardy only precludes successive prosecutions. 274 Pa. Super. at 170, 418 A.2d at 350. The court went on to explain that successive prosecution occurs where there is a
In concluding that Rule 1120(d) did not bar the retrial of McCane on the homicide by vehicle charge, the McCane court relied heavily upon the Pennsylvania Superior Court's decision in Commonwealth v. Vincent. In that case, the superior court was asked to consider whether a retrial was barred by double jeopardy considerations where a defendant was convicted of a specified traffic offense, but the jury could not reach a decision on a related homicide by vehicle charge. The defendant in Vincent was charged with two counts of vehicular homicide, as well as two summary traffic offenses, and was tried on all four counts in the same proceeding. The trial court found the defendant guilty of both traffic offenses, but the jury was deadlocked on the two homicide by vehicle counts. Thereafter, the defendant moved to dismiss the vehicular homicide charges, arguing that the traffic offenses for which he had been adjudicated guilty were lesser included offenses of homicide by vehicle. The defendant in Vincent contended that retrial second prosecution for the same offense after a conviction or acquittal. Id. Thus, the Jones court concluded that where all the charges are brought against a defendant in one proceeding, and a mistrial is declared on one of the charges as a result of a hung jury, this situation is not the same as a successive prosecution. Id. Retrial on the deadlocked charge is not precluded. Id.

85. Id. at 174, 497 A.2d 1360.
86. Id. The defendant in Vincent was charged with violating 75 Pa. Cons. Stat. Ann. § 3732 (Purdon Supp. 1988), which states:

Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic except section 3731 (relating to driving under influence of alcohol or controlled substance) is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death.

Id.

89. Id.
90. Id. The defendant in Vincent attempted to distinguish his case from Commonwealth v. Pounds, 281 Pa. Super. 19, 421 A.2d 1126 (1980), on the basis that the Commonwealth used a bill of particulars to specify the underlying motor vehicle offenses for the two vehicular homicide charges. Vincent, 345 Pa. Super. at 175-76, 497 A.2d at 1361. See supra text accompanying notes 34-35, 37-38. Where a bill of particulars is used, the prosecution is required to establish homicide by vehicle in the manner set forth in the bill. Vincent, 345 Pa. Super. at 176, 497 A.2d at 1361. In this instance, then, the Commonwealth could not establish guilt on the vehicular homicide charge without first proving defendant's guilt on the underlying motor vehicle offenses. Id. Thus, the defendant in Vincent argued that Pounds was inapposite and the underlying motor vehicle offenses were lesser included of-
on the two counts of vehicular homicide would violate the double
jeopardy clause. 91

The trial court in Vincent rejected the defendant's double
jeopardy claim, and the superior court affirmed the decision. 92 Taking
into account the specific facts before it, the superior court deter-
mined that a retrial following a mistrial does not provide either a
statutory or constitutional basis for invoking the protection of the
double jeopardy clause. 93 As to the defendant's constitutional
claim, the court found that it was unnecessary to consider whether
the underlying motor vehicle offenses were lesser included offenses
of vehicular homicide because there was no attempt at successive
prosecutions. 94 The defendant cited Illinois v. Vitale 95 and Brown
v. Ohio 96 in support of the lesser included offense argument, but
the superior court distinguished both cases on the basis that they
dealt with successive prosecutions and not a retrial following a
mistrial precipitated by a hung jury. 97

After discussing the substantive elements of the defendant's
Rule 1120(d) claim, the superior court in Vincent also noted that

[Note references and citations added for clarity and coherence.]
the defendant could not use the double jeopardy protections of Rule 1120 to make a claim independent of substantive constitutional and statutory double jeopardy claims. In arriving at this conclusion, the court found the comment to Rule 1120 to be instructive, as the comment clearly indicated that subsections (c), (d) and (e) merely codified the procedure to be followed when a substantive double jeopardy claim had been established.

Another superior court case given considerable weight in both McCane and Vincent was Commonwealth v. Pounds. The issue raised in Pounds was whether homicide by vehicle was a greater included offense of driving under the influence of alcohol or driving to the left of the center line, such that a conviction on either one of the lesser two offenses would bar a retrial on the greater offense. The defendant in Pounds was found guilty of driving to the left of the center line by the trial court. At the same trial, the jury returned a guilty verdict on the charge of driving under the influence of alcohol, but was unable to reach a decision as to the vehicular homicide charge. The Commonwealth attempted to retry the defendant on the vehicular homicide charge, but the

98. Vincent, 345 Pa. Super. at 178, 497 A.2d at 1362. The superior court’s statement was made with regard to Rule 1120(e). Id. However, Rules 1120(e) and 1120(d) are essentially the same with the former rule applying to cases involving two or more informations, and the latter applying when there are two or more counts in the same information. Pa. R. Crim. P. 1120(d) and 1120(e). In addition, the comment following Rule 1120 applies to both subsections (d) and (e). Vincent, 345 Pa. Super. at 178, 497 A.2d at 1362. See supra note 29 for a text of the comment.

99. For a full text of the comment to Rule 1120, see supra note 29.


101. 281 Pa. Super. 19, 421 A.2d 1126 (1980), petition for allowance of appeal denied. Pounds was argued before a three judge panel of the superior court consisting of Judges Van der Voort, Spaeth, and Hoffman. Id. at 21, 421 A.2d 1126. Although Judges Spaeth and Hoffman concurred only in the result, the superior court in Vincent considered Pounds to be binding since all three judges had concurred in the result. Vincent, 345 Pa. Super. at 175, 497 A.2d at 1361.


103. Id. at 21, 421 A.2d 1126.

104. Id. For a definition of driving under the influence of alcohol, see supra note 1.

105. Pounds, 281 Pa. Super. at 21, 421 A.2d 1126. The superior court noted that the jury was apparently unable to determine whether the defendant’s motor vehicle violations were the cause of the victim’s death. Id. at 21, 421 A.2d at 1127.

The vehicular homicide statute that defendant was charged with violating is codified at 75 Pa. Cons. Stat. Ann. § 3732 (Purdon 1977) and provides:

Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death.
defendant filed a petition to quash the indictment, alleging *inter alia* that the motor vehicle offenses for which he was convicted were lesser included offenses of homicide by vehicle, and thus, operated as an acquittal of the greater offense. The superior court ruled that the defendant's convictions for driving under the influence of alcohol and driving to the left of center did not imply an acquittal on the vehicular homicide charge, reasoning that homicide by vehicle required proof of an additional fact, namely, that the violations of the traffic offenses caused the victim's death.

In keeping with the holding in *Vincent* that a substantive double jeopardy claim must be established separate and apart from Rule 1120(d), a review of the statutory double jeopardy charge under section 109 of the Pennsylvania Crimes Code is mandated. Since 1973, the application of double jeopardy to bar a second prosecution has been codified by statute in the Pennsylvania Crimes Code. Section 109, which sets forth the circumstances under which a second prosecution is barred by a former prosecution for the same offense, was derived from section 1.08 of the Model Penal Code. The annotation to the Pennsylvania Crimes Code Annotated, which has incorporated the Model Penal Code comments from Tentative Draft No. 5, implies that section 109 applies only to successive prosecutions, and not to the distinct problem of retrial necessitated by a hung jury. The Official Draft of the Model Penal Code, which was released in 1962, expressly affirmed the implication derived from the Tentative Draft in section 1.08.


107. *Id.* at 24, 421 A.2d at 1127.

108. *Id.* at 26, 421 A.2d at 1129.


111. For a full text of § 109, see supra note 10.

112. Model Penal Code § 1.08 (Official Draft 1962). See also Belsky, supra note 110, at 804 n.82.


114. *Id.* at 41. The comment to § 1.09(1) of the Model Penal Code, Tentative Draft No. 5, was directed to the situation where either party appeals and obtains a reversal of the conviction for the lesser included offense and upon reprosecution the commonwealth again charges the defendant with the greater offense. Model Penal Code § 1.09 comment (Tent. Draft. No. 5, 1956). Section 1.09 of the Model Penal Code, Tentative Draft No. 5, was renumbered as § 1.08 in the Official Draft. See Model Penal Code § 1.08, n. at 136 (Official Draft 1962).

115. See Model Penal Code § 1.08(4)(b)(iv) (Official Draft 1962). Section 1.08 (4)(b)(iv) provides that a former prosecution will bar a subsequent prosecution when "[t]he former prosecution was improperly terminated. . . . Termination under any of the following
The expressed and implied premise of section 1.08 of the Model Penal Code and the comments thereto was cited with approval in Commonwealth v. Vincent. 116

Following a basic canon of statutory construction, the superior court in Vincent held that the third sentence of subsection 109(1), 117 upon which the criminal defendant based his double jeopardy argument, must be construed in light of the introductory paragraph 118 to that section. 119 In so doing, the superior court found that the prefatory clause clearly indicated that all of section 109 applied only to successive prosecutions. 120 As the problem in Vincent involved a retrial following a mistrial precipitated by a hung jury, and not successive prosecutions, the superior court held that the defendant had no valid statutory double jeopardy claim under section 109. 121 In reaching this conclusion, the court assumed that the defendant was correct in claiming that the traffic violations were lesser included offenses of homicide by vehicle. 122 The Vincent court commented that any other interpretation of section 109 would lead to the ludicrous conclusion that a defendant would have to be acquitted of the greater offense even though the factfinder found him guilty of that offense, so long as the trier of fact also convicted him of the lesser included offense. 123

The majority opinion in McCane also discussed the lesser included offense doctrine in Pennsylvania. 124 The test for determining whether one offense is included in another was first articulated in Commonwealth ex rel. Moszczynski v. Ashe. 125 Under this standard, one offense is included in another when the greater offense necessarily involves the lesser offense. 126 One offense necessarily in-

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117. For a full text of section 109, see supra note 10.
118. See supra note 30.
120. Id.
121. Id. The precise holding of the superior court in Vincent stated: "Like all subdivisions of section 109, however, this sentence must be read in the context of the introductory paragraph, which makes it clear that all of section 109 applies only to successive prosecutions, not to the distinct problem of retrial following a deadlocked jury." Id. (footnotes and citation omitted).
122. Id.
123. Id.
125. 343 Pa. 102, 21 A.2d 920 (1941). The Moszczynski test is also applied to questions of merger. McCane, 517 Pa. at 498, 539 A.2d at 345.
126. Moszczynski, 343 Pa. at 104, 21 A.2d at 921.
volves another when all of the essential elements of the lesser offense are included in the greater offense.\textsuperscript{127}

The issue in \textit{Moszczynski} involved the applicability of the merger doctrine.\textsuperscript{128} In that case, the defendant was charged with three separate crimes\textsuperscript{129} arising out of an attempted bank robbery.\textsuperscript{130} The defendant argued that since all three crimes were part of the same continuous, unbroken transaction, he could only be sentenced on the most serious charge.\textsuperscript{131} The Pennsylvania Supreme Court in \textit{Moszczynski} held that whether a single act or series of acts constitutes two or more separate offenses is determined by whether each offense requires proof of some additional fact.\textsuperscript{132} Since any one of the three crimes charged could have been committed without any of the others being committed, the supreme court upheld separate sentences for burglary, robbery, and felonious intent to kill.\textsuperscript{133}

Another aspect of the lesser included offense doctrine considered by the \textit{McCane} court was whether the lesser and greater offenses sought to protect different interests.\textsuperscript{134} In support of its position, the supreme court cited two cases dealing with the merger doctrine, \textit{Commonwealth v. Sayko}\textsuperscript{135} and \textit{Commonwealth v. Rhodes}.\textsuperscript{136}
In Sayko, the defendant was charged with indecent assault, indecent exposure and corrupting the morals of a minor. The defendant pled guilty and received separate sentences on each charge, with both sentences to run consecutively.

The issue considered by the supreme court in Sayko was under what circumstances acts committed during a criminal transaction are merged into a single crime for sentencing purposes. The court looked at the nature of the offenses to see if there had been more than one injury to the Commonwealth, that is, whether the offenses charged were proscribed by separate statutes which sought to prevent different interests or harms. The Sayko court concluded that merger was not required because the offenses at issue involved different fundamental interests of the Commonwealth.

In Commonwealth v. Rhodes, the Pennsylvania Supreme Court applied a different interests analysis in deciding whether to invoke the merger doctrine. In that case, the court was asked to decide, among other things, whether double jeopardy principles or the merger doctrine barred a conviction and sentence for both rape and statutory rape arising out of a single act of sexual intercourse. The supreme court concluded that neither the double jeopardy clause nor the merger doctrine prohibited such a conviction and sentence. The rationale for the supreme court's decision

concurring opinions. Id. at 565-66, 510 A.2d at 1231-32. Justice Zappala concurred separately in an opinion joined by Justice McDermott. Id. at 566-67, 510 A.2d at 1231-32.

137. Sayko, 511 Pa. at 612, 515 A.2d at 895. The victim was a four year old child. Id. at 611, 515 A.2d at 895.

138. Id. at 612, 515 A.2d at 895.

139. Id. at 613, 515 A.2d at 895.

140. Id. at 615-16, 515 A.2d at 896-97.

141. Id. at 616, 515 A.2d at 897. For example, the supreme court stated that the interest protected by the statute prohibiting indecent exposure was proscribing exhibitionism, while indecent assault involves the victim’s right to be free from offensive touching. Id. Both of these interests were different from the Commonwealth's interest in protecting minors from corrupting influences. Id.


143. Id. at 561, 510 A.2d at 1229. The defendant in Rhodes was convicted of numerous sex offenses in the rape of an eight year old girl. Id. at 540-42, 510 A.2d at 1218-19. The defendant was convicted of rape, statutory rape, involuntary deviate sexual intercourse, indecent assault, indecent exposure, and corruption of minors. Id. The trial court imposed sentences on the convictions for rape, involuntary deviate sexual intercourse and corruption of a minor, but suspended the sentence on the statutory rape conviction. Id.

144. Id. at 561, 510 A.2d at 1229. On appeal, the superior court in Rhodes found the evidence to be insufficient to sustain defendant's conviction for rape, and accordingly vacated the defendant's rape conviction and all of the sentences imposed by the trial court. Id. at 542-43, 510 A.2d at 1219-20. The supreme court, however, concluded that there was sufficient evidence to sustain the defendant's rape conviction. Id. at 563, 510 A.2d at 1230.
in *Rhodes* was predicated upon the different interests analysis utilized in *Commonwealth v. Sayko*.145

The essence, then, of the lesser included offense doctrine is determining whether one of the following factors is present in a particular case: (1) whether each offense requires proof of some additional fact; or (2) whether the violated statutes seek to protect different interests, that is, whether there is more than one injury to the Commonwealth, as evidenced by the designation of separate statutes for each offense.146 If either factor is shown to exist, the charged offenses will not be considered included for either merger or double jeopardy purposes.147

Finding no statutory basis for McCane's double jeopardy argument, the majority opinion finally considered whether a constitutional basis existed for McCane's double jeopardy claim under the Pennsylvania and United States Constitutions.148 McCane contended that the double jeopardy clauses of the Pennsylvania and United States Constitutions prevented his reprosecution for homicide by vehicle while driving under the influence.149

In addition to the statutory prohibition on double jeopardy in Pennsylvania,150 both the state and federal constitutions contain a double jeopardy clause.151 In 1969, the United States Supreme Court first applied the double jeopardy clause of the fifth amendment to the states through the fourteenth amendment in *Benton v. Maryland*.152 Concluding that the double jeopardy prohibition of the fifth amendment involves a fundamental right which was at

145. *Id.* at 562-63, 510 A.2d at 1230. *See supra* notes 140-41 and accompanying text.
147. *See supra* note 146.
149. *Brief for McCane* at 11-12.
150. *See supra* notes 10, 110 and 111.
151. *See supra* notes 11 and 12.
152. 395 U.S. 784 (1969). *See also* Belsky, *supra* note 110, at 804. Prior to the court's decision in *Benton*, double jeopardy violations were governed by article I, section 10 of the Pennsylvania Constitution. Belsky, *supra* note 110, at 804 n.80. However, Pennsylvania courts applied the equivalent state constitutional prohibition against double jeopardy only to capital offenses. *Id.* *See also* Commonwealth v. Williams, 344 Pa. Super. 108, 146, 496 A.2d 31, 51-52 (1985) (Spaeth, J., concurring). Consequently, the common law doctrine of merger was created by the Pennsylvania courts to bar multiple punishments for the same offense in situations where the accused was charged with noncapital crimes. *Id.* at 146, 496 A.2d at 51. Notwithstanding the constitutional evolution of double jeopardy in Pennsylvania, the issue of when and how double jeopardy should attach has been prescribed by statute in the Pennsylvania Crimes Code since 1973. *See* Belsky, *supra* note 110, at 804.
least equal in importance to the right to trial by jury in criminal cases.\textsuperscript{153} the United States Supreme Court in \textit{Benton} held that the defendant's larceny conviction was to be scrutinized pursuant to the double jeopardy provisions of the fifth amendment.\textsuperscript{154}

In \textit{Benton}, the accused was tried for burglary and larceny in a Maryland state court.\textsuperscript{155} The jury acquitted the defendant on the larceny charge but found him guilty of burglary.\textsuperscript{156} Thereafter, it was discovered that the jurors had been selected under an invalid provision of the Maryland Constitution, and the conviction was set aside.\textsuperscript{157} Interpreting the fifth amendment double jeopardy considerations, the Supreme Court in \textit{Benton} ruled that where a subsequent trial is necessitated by a constitutionally invalid jury selection process, a criminal defendant cannot be forced to waive the protection of double jeopardy on the acquitted charge.\textsuperscript{158}

The United States Supreme Court further interpreted the double jeopardy provisions of the fifth amendment in \textit{North Carolina v. Pearce}.\textsuperscript{159} The majority in \textit{McCane} cited \textit{Pearce} as authority for situations where the constitutional guarantee against double jeopardy prohibits a second prosecution.\textsuperscript{160} In \textit{Pearce}, the United States Supreme Court held that the double jeopardy clause provides three distinct constitutional safeguards: protection against a second prosecution for the same offense after an acquittal; protection against a second prosecution for the same offense after a conviction; and protection against multiple punishments for the same

\\n153. \textit{Benton}, 395 U.S. at 794. The United States Supreme Court previously made the right to a trial by jury in criminal cases applicable to the states through the fourteenth amendment in \textit{Duncan v. Louisiana}, 391 U.S. 145, 149 (1968).


155. \textit{Id.} at 785.

156. \textit{Id.}

157. \textit{Id.} at 785-86.

158. \textit{Id.} at 796-97.

159. 395 U.S. 711 (1969). In \textit{Pearce}, two cases were consolidated for argument before the Supreme Court: Appeal no. 413 and Appeal no. 418. \textit{Id.} In each case, the criminal defendant was found guilty and sentenced to a prison term. \textit{Id.} at 713-14. Each defendant instituted a post-conviction proceeding in their respective state courts, resulting in a reversal of the convictions on constitutional grounds. \textit{Id.} Both criminal defendants were retried and convicted on the original charge. \textit{Id.} In Appeal no. 413, the sentence imposed for the second conviction, when added to the time already served by the criminal defendant, resulted in a longer aggregate sentence than the one imposed for the first conviction. \textit{Id.} at 713. Similarly, in appeal no. 418, the criminal defendant received a longer sentence for the second conviction and was not given any credit for the time already served on the first conviction. \textit{Id.} at 714. Thereafter, the criminal defendants brought separate habeas corpus actions in federal court challenging the constitutionality of the sentence for the second conviction. \textit{Id.} at 713-15.

160. \textit{McCane}, 517 Pa. at 499, 539 A.2d at 345-46.
offense. Because the double jeopardy violation in *Pearce* involved the third safeguard, imposition of multiple punishments for the same offense, the Supreme Court held that the criminal defendant must be given credit for time already served in imposing a sentence for a new conviction for the same offense.

The Pennsylvania Supreme Court examined a criminal defendant's constitutional rights under the double jeopardy clause in *Commonwealth v. James*. The majority in *McCane* cited *James* for the proposition that a mistrial caused by a deadlocked jury generally does not fall within the double jeopardy safeguards enumerated in *Pearce*, and thus, does not bar reprosecution. In *James*, the issue pondered by the court was whether a prosecutor may appeal from a pretrial suppression order after a mistrial for manifest necessity. According to the supreme court, manifest necessity arose because the jury was unable to agree on a verdict. Thus, the court held that a mistrial for manifest necessity did not

161. *Pearce*, 395 U.S. at 717. Specifically, the Supreme Court stated that “[the Fifth Amendment] guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” *Id.* (footnotes omitted).

162. *Id.* at 713.

163. *Id.* at 718-19.

164. 506 Pa. 526, 486 A.2d 376 (1985). In *James*, the criminal defendant pled guilty to charges of involuntary deviate sexual intercourse, indecent assault, terroristic threats, and simple assault, but subsequently withdrew his guilty plea. *Id.* at 529, 486 A.2d at 377. Before trial, the criminal defendant sought to suppress prior and in-court identification testimony of the victim. *Id.* at 529, 486 A.2d at 377-78. The suppression court denied the defendant's request as to the victim's prior identification testimony, but allowed the suppression of the in-court identification testimony. *Id.* at 529, 486 A.2d at 378. The case proceeded to trial and the jury was discharged after failing to agree upon a verdict. *Id.* Thereafter, the Commonwealth filed an appeal with the superior court, requesting that the suppression order be vacated to allow the in-court identification testimony and that a new trial be granted. *Id.* The superior court reversed the order of the suppression court and found in favor of the Commonwealth. *Id.* at 530, 486 A.2d at 378. On appeal to the Pennsylvania Supreme Court, the criminal defendant argued that the Commonwealth should have taken a direct appeal of the suppression order prior to trial and, by failing to do so, had waived any right to appeal the suppression order after the trial. *Id.*

165. *McCane*, 517 Pa. at 499-500, 539 A.2d at 346. In *McCane*, the supreme court applied the double jeopardy clauses of the Pennsylvania and the United States Constitutions. *Id.* at 500 & n.5, 539 A.2d at 346 & n.5.

166. *James*, 506 Pa. at 530, 486 A.2d at 378. Manifest necessity is defined in Black's Law Dictionary as follows: “Doctrine of 'manifest necessity' which will authorize granting of mistrial in criminal case, and preclude defendant from successfully raising plea of former jeopardy, contemplates a sudden and overwhelming emergency beyond control of court and unforeseeable, and it does not mean expediency.” BLACK'S LAW DICTIONARY 868 (5th ed. 1979) (citation omitted).

bar reprosecution of the defendant on various sex offenses.¹⁶⁸

Certain public policy arguments, advocated by the United States Supreme Court in *Wade v. Hunter*,¹⁶⁹ provide additional justification for finding no constitutional double jeopardy claim. The issue in *Wade* was whether the double jeopardy provision of the fifth amendment barred a second court-martial after a first court-martial had been commenced, but was later terminated because of a pressing military tactical situation at the time and because of the location of the witnesses.¹⁷⁰ In holding that the double jeopardy clause of the fifth amendment did not bar the second court-martial,¹⁷¹ the Supreme Court articulated two policy arguments to support its conclusion.¹⁷²

First, the Court suggested that a rule allowing a defendant to go free whenever the trial fails to end in a final judgment would create havoc in the administration of justice in cases where there are no double jeopardy violations.¹⁷³ Second, the Supreme Court recognized that the law’s purpose of protecting society from criminals would be frustrated if the criminal defendant was set free every time the jury was unable to reach a unanimous verdict.¹⁷⁴ Weighing the various interests, the Supreme Court in *Wade* concluded that in some circumstances society’s interest in obtaining fair trials

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¹⁶⁸ *Id.* The criminal defendant was charged with involuntary deviate sexual intercourse, indecent assault, terroristic threats, and simple assault. *Id.* at 529, 486 A.2d at 377.

¹⁶⁹ 336 U.S. 684 (1949). In *Wade*, an American soldier was arrested and charged with the rape of two German women while stationed in Krov, Germany during world war II. *Id.* at 685-86. Between the time of the soldier’s arrest and the commencement of his court-martial, his troop had advanced 22 miles further into Germany. *Id.* at 686. A general court-martial was convened at the troop’s new location, but was subsequently continued until a later date so that the testimony of certain witnesses, who were unavailable at the time due to the military division’s tactical situation and their location, could be taken. *Id.* at 686-87.

¹⁷⁰ *Id.* at 687-88.

¹⁷¹ *Id.* The Supreme Court in *Wade* held that:
Under the rule [in *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824)], a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice. We see no reason why the same broad test should not be applied in deciding whether court-martial action runs counter to the Fifth Amendment’s provision against double jeopardy. Measured by the *Perez* rule to which we adhere, petitioner’s second court-martial trial was not the kind of double jeopardy within the intent of the Fifth Amendment. *Id.* at 690.

¹⁷² *Id.* at 688-89.

¹⁷³ *Id.* As an example, the Supreme Court explained that unforeseeable circumstances may arise during a trial, such as the inability of a jury to agree on a verdict, making the completion of the trial impossible. *Id.* at 689. Moreover, if, in fact, the above contingency did occur, the consequence would be that those guilty of crimes would be set free, thereby frustrating the purpose of the law to protect society from such individuals. *Id.*

¹⁷⁴ *Id.*
resulting in just judgments may outweigh an accused's right to have his trial decided by a particular tribunal.\textsuperscript{175}

The final case, dispositive of the constitutional double jeopardy claim in \textit{McCane}, was \textit{Richardson v. United States}.\textsuperscript{176} In \textit{Richardson}, the Supreme Court considered whether a mistrial precipitated by the jury's failure to reach a verdict as to some, but not all, counts of an indictment was an event that terminated the original jeopardy.\textsuperscript{177} The defendant in \textit{Richardson} was indicted on three counts of federal drug offenses,\textsuperscript{178} and the jury acquitted him on one count; however, they were unable to reach a decision on the remaining two counts.\textsuperscript{179} When the trial court declared a mistrial on the deadlocked counts and scheduled a retrial, the defendant moved to bar reprosecution, contending that it would violate the double jeopardy clause of the fifth amendment.\textsuperscript{180}

In deciding \textit{Richardson}, the Supreme Court refused to deviate from established precedent that a retrial following a hung jury does not violate the double jeopardy clause.\textsuperscript{181} The Supreme Court

\begin{itemize}
  \item \textsuperscript{175} \textit{Id.} The Supreme Court in \textit{Wade} expressly held that "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." \textit{Id.} at 689.
  \item \textsuperscript{176} 468 U.S. 317 (1984). Justice Rehnquist authored the majority opinion, in which he was joined by Chief Justice Burger, and Justices White, Blackmun, Powell, and O'Connor. \textit{Id.} Justice Brennan wrote separately, concurring in part and dissenting in part, and was joined by Justice Marshall. \textit{Id.} at 326. Justice Stevens filed a dissenting opinion. \textit{Id.} at 332.
  \item In his dissent, Justice Brennan stated that the majority overlooked the criminal defendant's real objection to the retrial, namely, that the prosecution failed to present evidence which was constitutionally sufficient to support a conviction, and therefore, retrial was barred. \textit{Id.} at 330. Justice Brennan would have remanded the case to the trial court for consideration on the merits of the criminal defendant's sufficiency of the evidence claim. \textit{Id.} at 332. While the majority got beyond the jurisdictional issue in this case, Justice Stevens, on the other hand, felt that the order denying the defendant's motion for a judgment of acquittal on the basis that the evidence was legally insufficient was not appealable and, as a matter of law, did not even present a colorable question of double jeopardy. \textit{Id.}
  \item \textsuperscript{177} \textit{Id.} at 318.
  \item \textsuperscript{178} \textit{Id.} The federal drug offenses which the defendant was charged with committing were two counts of distributing a controlled substance, in violation of 21 U.S.C. § 841(a)(1), and one count of conspiring to distribute a controlled substance, in violation of 21 U.S.C. § 846. \textit{Id.}
  \item \textsuperscript{179} \textit{Id.} at 316-17. The criminal defendant was acquitted on one count of distributing a controlled substance. \textit{Id.}
  \item \textsuperscript{180} \textit{Id.}
\end{itemize}
stated that this rule can be justified by acknowledging that the protection of the double jeopardy clause applies only if there has been some event, such as an acquittal or conviction, that terminates the original jeopardy. The Supreme Court went on to hold that the failure of a jury to reach a verdict is not an event that terminates jeopardy.

The key to the analysis of both the majority and concurrence in McCane is their construction of section 109 of the Pennsylvania Crimes Code. The justices interpreted section 109 to bar retrial only where there are successive prosecutions. Successive prosecution occurs where the subsequent prosecution is for a violation of the same offense, is based on the same facts as the former prosecution, and the former prosecution results in an acquittal or conviction. The instance where all the charges are brought against a defendant in one proceeding and a mistrial is declared on one of the charges as a result of a hung jury, does not constitute a successive prosecution.

After determining that reprosecution of McCane on the homicide by vehicle charge did not constitute a successive prosecution, the court should have ended its analysis. As highlighted by Chief Justice Nix in his concurrence, whether or not driving under the influence and homicide by vehicle while driving under the influence are included offenses is irrelevant to the ultimate decision of the court, since a prerequisite to invoking the statutory double jeopardy protections of section 109 is a finding that a successive prosecution exists. Thus, Justice Larsen’s discussion regarding the lesser included offense doctrine in Pennsylvania has little

182. Richardson, 468 U.S. at 325.
183. Id.
185. See supra notes 43, 74 and 75 and accompanying text.
187. See supra note 83. The conclusion that successive prosecutions did not exist in McCane was emphasized in the supreme court’s majority opinion.
188. McCane, 517 Pa. at 500, 539 A.2d at 346 (citation omitted).
189. Id. at 501-02, 539 A.2d at 346-47 (emphasis added).
190. Id. at 498-99, 539 A.2d at 345.
precedential value. Moreover, there has been little consistency among the courts in Pennsylvania regarding the application of the lesser included offense doctrine. It is doubtful, therefore, whether the majority’s opinion in McCane will have any impact on the development of the law regarding lesser included offenses.

Of some significance is Chief Justice Nix’s comment in his con-currence that he found section 109 to be applicable only where the defendant is charged with the greater offense and the jury returns a verdict on the lesser offense. The clear implication of this statement is that where both offenses are brought in the same proceeding, and there is a mistrial as to one of the charges, the double jeopardy protections of section 109 are not applicable. Under this interpretation, the lesser included offense doctrine must be considered where section 109 is found to be applicable.

Unfortunately, a clear pattern does not appear to be emerging from the Pennsylvania Supreme Court with regard to the application of section 109 and Rule 1120(d) as a bar to reprosecution following a mistrial. The appellate courts in Pennsylvania seem to have approached each case on an ad hoc basis, the McCane decision being the most recent example. Perhaps some guidance could be provided to the courts via legislative reform. In the meantime, however, the courts will be forced to construe future cases invol-

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191. To say that driving under the influence is not a lesser included offense of homicide by vehicle while driving under the influence is really splitting a very fine hair. On the one hand, Justice Larsen acknowledged that the statutory definition of homicide by vehicle while driving under the influence requires a conviction of driving under the influence. Id. at 498, 539 A.2d at 345. Yet, the majority concludes that driving under the influence is not a lesser included offense of homicide by vehicle while driving under the influence based on: (1) a comparison of common law crimes which do not require a conviction of the lesser offense in order to obtain a conviction on the greater offense, and (2) the notion that the offenses charged in McCane protected two different interests. Id. at 498-99, 539 A.2d at 345. See supra notes 46-51, 134-45 and accompanying text. However, the proffered distinction between the interests protected by driving under the influence and homicide by vehicle while driving under the influence, the former being a victimless crime and the latter intending to protect specific victims, was contrived by the majority to justify the conclusion. McCane, 517 Pa. at 498-99, 539 A.2d at 345. Indeed, a person convicted of driving under the influence may have seriously injured innocent victims, perhaps resulting in paralysis for the rest of their lives, yet the majority considers driving under the influence to be a victimless crime. As stated earlier, the majority should have ended its analysis after determining that the retrial of McCane did not constitute a successive prosecution.

192. See Comment, supra note 14, at 126-27.
193. McCane, 517 Pa. at 502, 539 A.2d at 347.
194. For example, the results in Vincent and Pounds turned on the superior court’s interpretation of the particular facts in each case, and the application of § 109 of the Pennsylvania Crimes Code and the double jeopardy clause to the determined facts. See supra notes 93-97, 101-08 and accompanying text.
ing the applicability of Rule 1120(d) and section 109 of the Crimes Code to bar retrial in light of the existing authority which, indeed, has been scant.

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