

**SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE
NOTICE OF PROPOSED RULEMAKING**

Proposed Amendment of Pa.R.Crim.P. 587

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Rule 587 (Motions for Dismissal) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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Criminal Procedural Rules Committee
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All communications in reference to the proposal should be received by **no later than Friday, August 31, 2018**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

July 2, 2018

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

*Brian W. Perry
Chair*

RULE 587. MOTION FOR DISMISSAL.

(A) Untimely Filing of Information

(1) Upon motion and a showing that an information has not been filed within a reasonable time, the court may order dismissal of the prosecution, or in lieu thereof, make such other order as shall be appropriate in the interests of justice.

(2) The attorney for the Commonwealth shall be afforded an opportunity to respond.

(B) Double Jeopardy **and Sections 109 through 111 of the Crimes Code**

(1) A motion to dismiss on double jeopardy grounds **or pursuant to Sections 109-111 of the Crimes Code, 18 Pa.C.S. §§ 109-111,** shall state specifically and with particularity the basis for the claim of double jeopardy **or of violation of Sections 109-111 of the Crimes Code, 18 Pa.C.S. §§ 109-111,** and the facts that support the claim.

(2) A hearing on the motion shall be scheduled in accordance with Rule 577 (Procedures Following Filing of Motion). The hearing shall be conducted on the record in open court.

(3) At the conclusion of the hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law and shall issue an order granting or denying the motion.

(4) In a case in which the judge denies the motion, the findings of fact shall include a specific finding as to frivolousness.

(5) If the judge makes a finding that the motion is frivolous, the judge shall advise the defendant on the record that a defendant has a right to file a petition for review of that determination pursuant to Rule of Appellate Procedure 1573 within 30 days of the order denying the motion.

(6) If the judge denies the motion but does not find it frivolous, the judge shall advise the defendant on the record that the denial is immediately appealable as a collateral order.

COMMENT: *Cf.* Pa.R.J.A. 1901 concerning termination of inactive cases.

A motion filed pursuant to this rule must comply with the provisions of Rule 575 (Motions and Answers) and Rule 576 (Filing and Service by Parties).

In any case in which a summary offense is joined with a misdemeanor, felony, or murder charge, and therefore is part of the court case, a dismissal of the prosecution pursuant to paragraph (A)(1) would include the dismissal of the summary offense. See the *Comment* to Rule 502 (Instituting Proceedings in Court Cases).

Paragraph (B) was amended in 2018 to provide that this rule applies to motions to dismiss alleging a bar to prosecution under Sections 109-111 of the Crimes Code, 18 Pa.C.S. §§109-111. See *Commonwealth v. Diggs*, 172 A.3d 661 (Pa. Super. 2017).

“Hearing,” as used in paragraph (B)(2) includes the taking of testimony, or the hearing of argument, or both. See Rule 115 for the procedures for the recording and transcribing of the hearing.

Paragraph (B)(4) requires the judge to make a specific finding whether the motion is being dismissed as frivolous. The judge should expressly cite on-point controlling case law that would make the claim frivolous. See, e.g., *Commonwealth v. Gains*, 383 Pa.Super. 208, 217, 556 A.2d 870, 874 (1989) (“A frivolous claim is a claim clearly and palpably without merit; it is a claim which presents no debatable question.”). A mere adverse decision of the case does not mean the matter is frivolous.

Although the judge is required to advise the defendant of his or her appellate rights in paragraphs (B)(5) and (B)(6) upon dismissing the motion, nothing in this rule is intended to preclude the defendant from proceeding to trial without first appealing the double jeopardy question. See, e.g., *Commonwealth v. Lee*, 490 Pa. 346, 350, 416 A.2d 503, 504 (1980) (“Unquestionably, appellant could have sought immediate appellate review of the question involved. For whatever reason, however, appellant proceeded to trial without first appealing the double jeopardy question. We believe that a defendant may choose to proceed to trial and if convicted, still challenge the propriety of the pretrial motion to dismiss on double jeopardy grounds on appeal.” (citations omitted)).

For the procedures for challenging the denial of the motion to dismiss on double jeopardy grounds when the judge

makes a finding that the motion is frivolous, see Rule of Appellate Procedure 1573.

Pursuant to Rule of Appellate Procedure 1701(d), the filing of a petition for review does not affect the judge's power to proceed further in the case while the petition for review is pending.

NOTE: Rule 316 adopted June 30, 1964, effective January 1, 1965; amended June 8, 1973, effective July 1, 1973; amended February 15, 1974, effective immediately; renumbered Rule 315 and amended June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; *Comment* revised January 28, 1983, effective July 1, 1983; amended August 12, 1993, effective September 1, 1993; renumbered Rule 587 and amended March 1, 2000, effective April 1, 2001; amended March 3, 2004, effective July 1, 2004; *Comment* revised March 9, 2006, effective September 1, 2006; amended June 4, 2013, effective July 4, 2013 [.] ; **amended _____, 2018, effective _____, 2018.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the August 12, 1993 amendments published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the March 3, 2004 amendment of paragraph (B) published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).

Final Report explaining the March 9, 2006 Comment revision concerning joinder of summary offenses with misdemeanor, felony, or murder charges published with the Court's Order at 36 Pa.B. 1385 (March 25, 2006).

Final Report explaining the June 4, 2013 provisions of the new paragraph (B) concerning motions to dismiss on double jeopardy

grounds published with the Court's Order at 43 Pa.B. (, 2013).

Report explaining the proposed amendment concerning the applicability of paragraph (B) to motions to dismiss based on 18 Pa.C.S. §§109-111 published for comment at 48 Pa.B. (, 2018).

REPORT

Proposed Amendment of Pa.R.Crim.P. 587

MOTIONS FOR DISMISSAL PURSUANT TO 18 PA.C.S. §§109-111

The Committee received a suggestion to add a reference to Section 110 of the Crimes Code, 18 Pa.C.S. §110, to Rule 587 (Motion for Dismissal) in light of the holding in *Commonwealth v. Diggs*, 172 A.3d 661 (Pa. Super 2017). *Diggs* held that motions to dismiss pursuant to Section 110, which provides for compulsory joinder, should follow the procedure in Rule 587. In *Diggs*, the defendant was charged with a misdemeanor and several summary offenses. After he was tried on the summary offenses in the Philadelphia Traffic Court, the misdemeanor was listed for trial in the Philadelphia Municipal Court. The defendant sought to have the misdemeanor dismissed pursuant to Section 110. On appeal from the denial of the motion, the Superior Court remanded the case to the lower courts for a determination of the factors required in Rule 587(B), holding that the procedures in Rule 587 applied to motions to dismiss alleging a violation of Section 110, and that Section 110 “embodies the same basic purposes as those underlying the double jeopardy clauses....”

The Committee noted that there are several other related sections of the Crime Code to which the same rationale in *Diggs* could be applied. These are Sections 109, 111, and, possibly, 112. Collectively, these statutes bar prosecutions because of prior related prosecutions. Section 109 (When Prosecution Barred by Former Prosecution for the Same Offense), as the title states, bars instances of a second prosecution for the same occurrence under the same statute. According to the *Official Comment* to Section 109, the purpose of the section is to codify the rule that “a former conviction of the accused bars a later prosecution of him for the same offense.” Section 110 (When Prosecution Barred by Former Prosecution for Different Offense) prohibits a second prosecution for the same occurrence or conduct or criminal episode but under different statutes. In addition to codifying the constitutional doctrine of collateral estoppel, Section 110 also codifies the holding in *Commonwealth v. Campana*, 314 A.2d 854 (Pa. 1974) which created the compulsory joinder rule determined under the Court’s supervisory powers. Section 111 (When Prosecution Barred by Former Prosecution in

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Another Jurisdiction) bars a second prosecution for the same occurrence or conduct in a different jurisdiction. Section 111 provides that, when a defendant raises a non-frivolous *prima facie* claim that such a prosecution is barred, the Commonwealth must prove by a preponderance of the evidence that the “same conduct” is not involved, or that a statutory exception to the statutory bar on re-prosecution applies. See *Commonwealth v. Wetton*, 591 A.2d 1067 (Pa. Super. 1911), aff'd 641 A.2d 574 (Pa. 1994).

The Committee concluded that all three of these statutes should be incorporated into the procedures provided in Rule 587. Motions for dismissal based on these statutes therefore would require a hearing with the judge required to make findings of fact, including a specific finding as to frivolousness, and conclusions of law. If the judge finds that the motion is frivolous, the defendant has a right to file a petition for review of that determination within 30 days. If the judge denies the motion but does not find it frivolous, the denial is immediately appealable as a collateral order. The proposed changes would modify the title to paragraph (B) of Rule 587 and add the above statutory sections to be adjudicated pursuant to the procedures in paragraph (B)(1). The *Comment* would contain a cross-reference to *Diggs*.

The Committee was uncertain whether Section 112 should be included as well. Section 112 (Former Prosecution before Court Lacking Jurisdiction or When Fraudulently Procured by the Defendant) provides exceptions to Sections 109 to 111. In other words, even if Sections 109 through 111 barred a second prosecution, Section 112 would allow a second prosecution if the former prosecution was before a court lacking jurisdiction, was procured fraudulently to avoid a sentence, or if the former prosecution ending in a conviction which was held invalid in a subsequent proceeding.

The inclination of the Committee was not to include this Section in the rule since it seemed that it would not be the basis of a motion for dismissal but rather would be raised as a defense to a motion for dismissal pursuant to Sections 109-111. However, the Committee wondered if there might be circumstances in which it would be helpful to apply the Rule 587(B) procedures to situations involving Section 112. The Committee therefore is seeking comment specifically on whether this Section should be included in the proposed amendments.