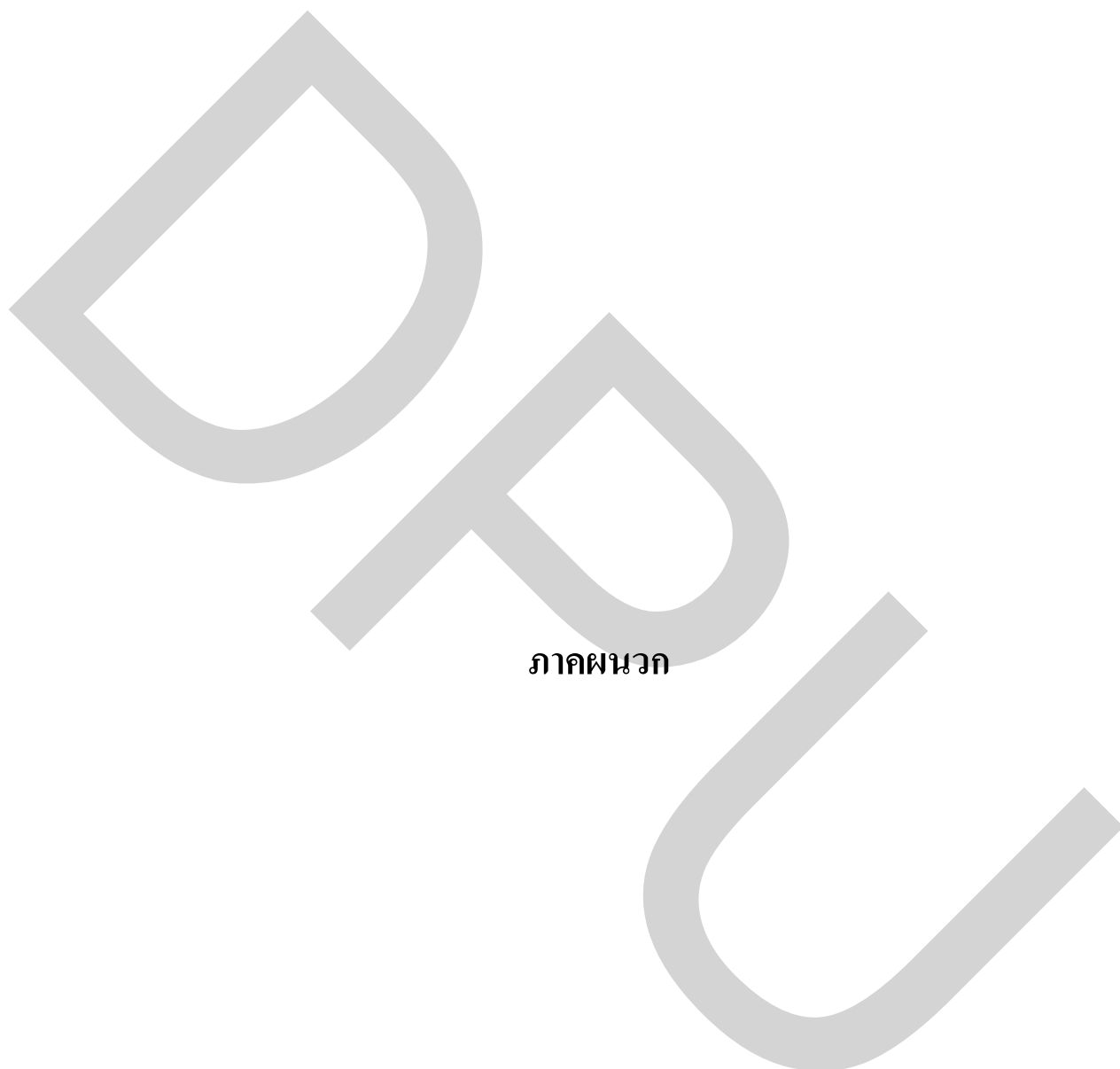




ภาคผนวก

German Criminal Procedure Code (Strafprozeßordnung, StPO)

Part Four Re-opening of Proceedings Concluded by a Final Judgment

Section 359. [Reopening for the Convicted Person's Benefit]

Reopening of the proceedings concluded by a final judgment shall be admissible for the convicted person's benefit:

1. if a document produced as genuine, to his detriment, at the main hearing was false or forged;
2. if a witness or expert, when giving testimony or an opinion to the convicted person's detriment, was guilty of willful or negligent violation of the duty imposed by the oath, or of willfully making a false, unsworn statement;
3. if a judge or lay judge participated in drafting the judgment who was guilty of a criminal violation of his official duties in relation to the case, unless the violation was caused by the convicted person himself;
4. if a civil court judgment on which the criminal judgment is based is quashed by another judgment which has entered into force;
5. if new facts or evidence were produced, which, independently or in connection with the evidence previously taken, tend to support the defendant's acquittal, or, upon application of a less severe penal norm, a lower penalty or an essentially different decision on a measure of reform and prevention;
6. if the European Court of Human Rights has found that there was a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and if the judgment was based on that violation.

Section 360. [No Obstacle to Execution]

- (1) An application for reopening the proceedings shall not constitute an obstacle to execution of the judgment.
- (2) The court may, however, order postponement or interruption of execution.

Section 361. [Execution or Death No Bar to Reopening]

- (1) An application for reopening the proceedings shall not be barred either by execution of sentence or by the convicted person's death.
- (2) In the event of death, the spouse, relatives in ascending and descending line, as well as the brothers and sisters of the deceased person shall be entitled to file the application.

Section 362. [Reopening to the Defendant's Detriment]

Reopening of proceedings concluded by a final judgment shall be admissible to the defendant's detriment:

1. if a document produced as genuine, for his benefit, at the main hearing was false or forged;
2. if a witness or expert, when giving testimony or an opinion for the defendant's benefit, was guilty of willful or negligent violation of the duty imposed by the oath, or of willfully making a false, unsworn statement;
3. if a judge or lay judge participated in drafting the judgment who was guilty of a criminal violation of his official duties in relation to the case;
4. if the person acquitted made a credible confession, in or outside the court, that he committed the criminal offense.

Section 363. [Inadmissibility]

- (1) Reopening the proceedings shall not be admissible for the purpose of imposing another sentence on the basis of the same penal norm.
- (2) Reopening of the proceedings for the purpose of mitigating sentence on account of diminished criminal responsibility (section 21 Penal Code) shall also be excluded.

Section 364. [Allegation of a Criminal Offense]

An application to reopen the proceedings which is to be based upon an allegation of a criminal offense shall only be admissible if a final conviction has been imposed for this offense, or if criminal proceedings cannot be commenced or conducted for reasons other than lack of evidence. This shall not apply in the case of Section 359, number 5.

Section 364a. [Appointment of Defense Counsel]

The court competent to give decisions in the reopened proceedings shall, upon application, appoint defense counsel for the reopened proceedings to represent a convicted person who has no defense counsel, if due to the complexity of the factual or legal position the participation of defense counsel appears to be necessary.

Section 364b. [Appointment of Defense Counsel to Prepare Proceedings]

(1) The court competent to give decisions in the reopened proceedings shall, upon application, appoint defense counsel for the convicted person who has no defense counsel, also for the purpose of preparing the proceedings to be reopened, if:

1. there are sufficient factual indications that certain investigations will result in facts or evidence which may substantiate the admissibility of an application to reopen the proceedings;
2. due to the complexity of the factual or legal position the participation of defense counsel appears to be necessary and
3. the convicted person is unable to engage defense counsel at his own expense without detriment to his and his family's necessary maintenance.

If defense counsel has already been appointed for the convicted person, the court shall, upon application, determine, in an order, that the conditions in numbers 1 to 3 of the first sentence have been fulfilled.

(2) Section 117 subsections (2) to (4) and section 118 subsection (2), first sentence, and subsections (2) and (4) of the Civil Procedure Code shall apply *mutatis mutandis* to the procedure to determine whether the conditions in subsection (1), first sentence, number 3, have been fulfilled.

Section 365. [General Provisions on the Application]

The general provisions on appellate remedies shall also be applicable to the application to reopen proceedings.

Section 366. [Content and Form of the Application]

- (1) The application must show the statutory ground for reopening proceedings, as well as the evidence.
- (2) The defendant and the persons specified in Section 361 subsection (2) may submit the application for reopening only in the form of a document signed by defense counsel or by an attorney-at-law, or orally to be recorded by the court registry.

Section 367. [Court Jurisdiction; Procedure]

- (1) Jurisdiction of the court to give decisions in the reopened proceedings and on the application to prepare the proceedings to be reopened shall be governed by the special provisions of the Courts Constitution Act. The convicted person may submit applications pursuant to Sections 364a and 364b or an application for leave to reopen of the proceedings also to the court whose judgment is contested; it shall forward the application to the competent court.
- (2) The decisions on applications pursuant to Sections 364a and 364b and the application for leave to reopen proceedings shall be given without an oral hearing.

Section 368. [Dismissal for Inadmissibility]

- (1) The application shall be dismissed as inadmissible if it is not submitted in the prescribed form or does not invoke a statutory ground for reopening proceedings or does not adduce appropriate evidence.
- (2) In all other cases it shall be served on the applicant's opponent with a time limit being set for a response.

Section 369. [Taking Evidence]

- (1) If the application is found to be admissible, the court shall, where necessary, commission a judge to take the evidence adduced.
- (2) It shall be left to the court's discretion whether the witnesses and experts are to be examined under oath.
- (3) The public prosecution office, the defendant, and defense counsel shall be allowed to be present at the examination of a witness or expert and at a judicial inspection. Section 168c subsection (3), Section 224 subsection (1) and Section 225 shall apply *mutatis mutandis*. If

the defendant is not at liberty, he shall not be entitled to be present if the hearing is not held at the place where he is in custody and if his assistance will not serve to clarify the matter for which evidence is being taken.

- (4) After the taking of evidence has been concluded, the public prosecution office and the defendant shall be called upon to make further statements with a time limit being set.

Section 370. [Decision on Well-Foundedness]

- (1) The application to reopen proceedings shall be dismissed as unfounded, without an oral hearing, if the allegations made therein are not sufficiently substantiated, or if in the cases of Section 359, numbers 1 and 2, or Section 362, numbers 1 and 2, the assumption that the act specified in these provisions had an influence on the decision is precluded in the circumstances that pertain.
- (2) In all other cases the court shall order the reopening of the proceedings and recommencement of the main hearing.

Section 371. [Acquittal With No Main Hearing]

- (1) If the convicted person dies, the court shall, without recommencing the main hearing and after taking any evidence that may still be needed, either enter an acquittal or dismiss the application for reopening the proceedings.
- (2) In other cases, too, the court may acquit the convicted person immediately if there already is sufficient evidence therefor; where public charges are preferred, however, it may only do so with the consent of the public prosecution office.
- (3) The acquittal shall be combined with the quashing of the original judgment. If there was solely a decision imposing a measure of reform and prevention, the original judgment shall be quashed instead of entry of an acquittal.
- (4) Upon request by the applicant the quashing of the judgment shall be published in the Federal Gazette and may, at the court's discretion, also be published in newspapers.

Section 372. [Immediate Complaint]

All decisions given by the court at first instance in connection with an application to reopen the proceedings may be contested by immediate complaint. The decision of the court ordering the

reopening of the proceedings and recommencement of the main hearing may not be contested by the public prosecution office.

Section 373. [Judgment After New Main Hearing; No Reformatio in Peius]

- (1) In the new main hearing, the original judgment shall be either upheld or quashed with a new decision being given on the merits.
- (2) The original judgment, in so far as it relates to the type and degree of the legal consequences of the offense, may not be amended to the convicted person's detriment only in those cases where the defendant or his statutory representative applied to reopen the proceedings or the public prosecution office so applied. This provision shall not prevent an order committing the defendant to a psychiatric hospital or an institution for withdrawal treatment.

Section 373a. [Procedure for a Penal Order]

- (1) Reopening of proceedings concluded by final penal order to the convicted person's detriment shall also be admissible if new facts or evidence were produced which, either alone or in conjunction with earlier evidence, tend to substantiate conviction for a serious criminal offense.
- (2) In other cases Sections 359 to 373 shall apply *mutatis mutandis* to the reopening of the proceedings concluded by a final penal order.