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CPL 470.05: Defendant's Failure to Assert Double Jeopardy Defense at Trial No Bar to Review on Appeal

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iff's sale.[178] In illustrating and emphasizing the availability of CPLR 5240 before the sale, the Court approvingly cited lower court orders that directed creditors to satisfy judgments by "less intrusive means" than the sale of residences[179] and that varied the terms of sales of real property to improve the chances of obtaining representative prices.[180] It appears, therefore, that the CPLR 5240 remedies available during an enforcement proceeding are limited, in large measure, only by the imagination and inventiveness of the debtor's attorney and the court.[181] It is hoped that the courts will continue to implement CPLR 5240 where appropriate to protect debtors from the harsh consequences often associated with the enforcement of money judgments.

Robert W. Corcoran, Jr.

CRIMINAL PROCEDURE LAW

CPL 470.05: Defendant's failure to assert double jeopardy defense at trial held no bar to review on appeal

In a criminal proceeding, the Court of Appeals generally may

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[178] *Id.* at 519, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59. Unfortunately, as noted by various courts, the typical judgment debtor is unaccustomed to the legal intricacies of enforcement procedures and often does not resort to an attorney until the sale is completed. Concord Landscapers, Inc. v. Pincus, 41 App. Div. 2d 759, 760, 341 N.Y.S.2d 538, 541 (2d Dep't 1973). As one court characterized it, a debtor is "beset by apathy, indifference and fear until confronted with the unyielding legality of the sale of his personal residence." Lee v. Community Capital Corp., 67 Misc. 2d 699, 702, 324 N.Y.S.2d 583, 586 (Sup. Ct. Nassau County 1971).

[179] 47 N.Y.2d at 519, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59.

[180] *Id.* CPLR 5240 is designed to protect "any person, whether or not a party, who is in danger of suffering pecuniary loss or of being subjected to harassment through use of an enforcement procedure." 6 WK&M ¶ 5240.02. CPLR 5240 has been invoked to protect against various abuses accompanying the sale, or threatened sale, of a judgment debtor's property. *See, e.g.*, Abby Financial Corp. v. Angelis, 45 App. Div. 2d 968, 359 N.Y.S.2d 585 (2d Dep't 1974) (sale of guarantor's home vacated due to false statements in the execution); Seyfarth v. Bi-County Elec. Corp., 73 Misc. 2d 363, 341 N.Y.S.2d 533 (Sup. Ct. Nassau County 1973) (sale of husband's interest in tenancy by the entirety postponed); Hammond v. Econo-Car of the North Shore, Inc., 71 Misc. 2d 546, 336 N.Y.S.2d 493 (Sup. Ct. Nassau County 1972) (creditor ordered to wait until husband's interest in tenancy by entirety destroyed by death, divorce, or sale of house); Holmes v. W. T. Grant, Inc., 71 Misc. 2d 486, 336 N.Y.S.2d 601 (Sup. Ct. Nassau County 1972) (creditor ordered to accept $20 per week in lieu of execution upon welfare recipient's home); Gilchrist v. Commercial Credit Corp. 66 Misc. 2d 791, 322 N.Y.S.2d 200 (Sup. Ct. Nassau County 1971) (interest of children paramount to that of creditor), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 378 (1971).

[181] *See* note 180 *supra*. *See also* CPLR 5228, commentary at 309-10 (appoint receiver for private sale); CPLR 5236, commentary at 425 (motion for extension of time to pay).

review only questions of law that were raised either before or during the trial.[182] As an exception to this general rule, however, the Court has recognized that certain claims are so fundamental to the criminal process that they may be asserted at any time.[183] In *People v. Michael*,[184] the Court of Appeals recently ruled that double jeopardy[185] is such a claim and that the failure to object to retrial

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[182] *See* People v. Gruttola, 43 N.Y.2d 116, 122, 371 N.E.2d 506, 510, 400 N.Y.S.2d 788, 791 (1977); CPL § 470.35 (1971). *See generally* People v. Coppa, 45 N.Y.2d 244, 380 N.E.2d 195, 408 N.Y.S.2d 365 (1978). Unlike the appellate divisions, in criminal cases the Court of Appeals generally may review only questions of law. People v. Gruttola, 43 N.Y.2d 116, 122, 371 N.E.2d 506, 510, 400 N.Y.S.2d 788, 791 (1977); CPL § 470.35 (1971); *cf.* CPLR 5501(b) (in civil cases Court may review facts where appellate division has reversed or modified on finding new facts). The Court, however, may review the facts in cases imposing capital punishment. N.Y. CONST. art. VI, § 3(a); *see* SIEGEL § 529, at 732 n.6 (1978).

[183] *See* People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976), *aff'd*, 432 U.S. 197 (1977); People v. McLucas, 15 N.Y.2d 167, 172, 204 N.E.2d 846, 848, 256 N.Y.S.2d 799, 802 (1965); People *ex rel.* Battista v. Christian, 249 N.Y. 314, 319, 164 N.E. 111, 113 (1928); Cancemi v. People, 18 N.Y. 128, 138 (1858). The *McLucas* Court ruled that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right." 15 N.Y.2d at 172, 204 N.E.2d at 848, 256 N.Y.S.2d at 802 (citations omitted). In *People v. Patterson*, however, the Court seemed to narrow the scope of the exception. Patterson had been convicted of murder in the second degree. 39 N.Y.2d at 294, 347 N.E.2d at 901, 383 N.Y.S.2d at 576. It was not until his appeal reached the Court of Appeals when the defendant claimed that his due process rights had been violated by requiring him to prove the affirmatve defense of extreme emotional disturbance. 39 N.Y.2d at 294, 347 N.E.2d at 902, 383 N.Y.S.2d at 577. The Court held that the claim was reviewable since it fell within the "very narrow exception" to the timely objection rule. *Id.* at 295, 347 N.E.2d at 902, 383 N.Y.S.2d at 577. According to the *Patterson* Court:

> [a] defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings prescribed by law . . . . Thus, the rule has come down to us that where the court had no jurisdiction, or where the right to trial by jury was disregarded, or where there was a *fundamental*, nonwaivable defect in the mode of procedure, then an appellate court must reverse, even though the question was not formally raised below.

Id. at 295, 347 N.E.2d at 902-03, 383 N.Y.S.2d at 577 (citations omitted) (emphasis added).

[184] 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979), *rev'g per curiam*, 64 App. Div. 2d 873, 406 N.Y.S.2d 944 (1st Dep't 1978).

[185] The double jeopardy clause of the United States Constitution provides that no person "shall be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In Benton v. Maryland, 395 U.S. 784 (1969), the clause was held applicable to the states through the due process clause of the fourteenth amendment. The purpose of the prohibition against double jeopardy is:

> that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957); *see* Breed v. Jones, 421 U.S. 519, 532-33 (1975).

The New York State Constitution also guarantees freedom from double jeopardy. N.Y. CONST. art. I, § 6. In addition, New York provides statutory protection against retrial where

prior to appeal neither precludes review by the Court[186] nor constitutes a waiver of the defense.[187]

The defendant in *Michael* was charged with burglary, robbery, rape, and sodomy.[188] Several days after his trial had commenced, the court was notified that the defendant's attorney would be unable to attend that day because of the unexpected death of his father.[189] Disregarding the prosecutor's suggestion to adjourn until the return of defense counsel, the trial judge declared a mistrial, without the consent of the defendant or his attorney, to accommodate the vacation plans of the court and several jurors.[190] The defendant was retried and convicted on the same charges, but never raised a double jeopardy claim either before or during his subsequent trial.[191] The Appellate Division, First Department, affirmed

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there has been a previous prosecution. CPL § 40.20 (1971).

Jeopardy attaches when the jury is empanelled and sworn, or in the case of a non-jury trial, when the first witness is sworn. Crist v. Bretz, 437 U.S. 28 (1978). Whether retrial will be permitted once jeopardy has attached depends on the manner in which the first trial was terminated. Note, *Double Jeopardy,* [1979] ANNUAL SURVEY OF AMER. LAW 52. If the first trial results in acquittal of the defendant by judge or jury, retrial is foreclosed. Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam); *see* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Conviction similarly bars retrial of a defendant, *see* North Carolina v. Pearce, 395 U.S. 711, 717 (1969), unless the conviction is reversed on appeal. United States v. Tateo, 377 U.S. 463, 466 (1964); United States v. Ball, 163 U.S. 662, 672 (1896). Where the reversal is predicated on a finding that the evidence adduced at trial was insufficient as a matter of law to convict, however, retrial is precluded. Burks v. United States, 437 U.S. 1 (1978). Retrial of a defendant on the basis of either a greater or lesser included offense generally is precluded unless each offense " 'requires proof of a fact which the other does not.' " Brown v. Ohio, 432 U.S. 161, 166 (1977) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). Where a mistrial is ordered upon the request of or with the consent of the defendant, double jeopardy does not bar retrial. *See* United States v. Dinitz, 424 U.S. 600, 606-07 (1976). On the other hand, if the mistrial is ordered without the defendant's consent or over his objection, retrial is foreclosed unless the mistrial was premised on "manifest necessity." United States v. Jorn, 400 U.S. 470, 481 (1971); United States v. Perez, 22 U.S. [9 Wheat.] 579 (1824). Dismissal of a prosecution on the defendant's motion on grounds other than acquittal, conviction, or mistrial, before the issue of guilt or innocence is submitted to the trier of the facts, generally will not preclude retrial. *See* United States v. Scott, 437 U.S. 82, 84 (1978).

[186] 48 N.Y.2d at 7, 394 N.E.2d at 1136, 420 N.Y.S.2d at 373.

[187] *Id.* at 5 n.1, 394 N.E.2d at 1135 n.1, 420 N.Y.S.2d at 372 n.1.

[188] *Id.* at 4, 394 N.E.2d at 1135, 420 N.Y.S.2d at 372. The defendant was tried jointly with another defendant in the Supreme Court, New York County, in July, 1975. *Id.* at 5, 394 N.E.2d at 1135, 420 N.Y.S.2d at 372.

[189] *Id.* at 8, 394 N.E.2d at 1137, 420 N.Y.S.2d at 374.

[190] *Id.* Both the prosecutor and the codefendant's attorney had advised the court that a mistrial might give rise to a double jeopardy problem. *Id.* at 9, 394 N.E.2d at 1137, 420 N.Y.S.2d at 375.

[191] *Id.* at 6, 9, 394 N.E.2d at 1136, 1138, 420 N.Y.S.2d at 373, 375.

his conviction without opinion,[192] and the defendant appealed.[193]

In a per curiam opinion, a closely divided Court of Appeals[194] reversed and held that the prohibition against double jeopardy barred the defendant's retrial on the same charges.[195] The majority initially addressed the issue whether it had jurisdiction to review the double jeopardy defense since the claim had been asserted for the first time on appeal.[196] While the failure to raise an issue either before or during trial generally precludes review by the Court of Appeals,[197] the *Michael* Court observed that certain claims are so fundamental to the criminal justice system that they may be raised at any time.[198] Finding that the double jeopardy doctrine has "obvious jurisdictional overtones"[199] and protects the citizenry from governmental intimidation,[200] the majority concluded that double jeopardy fell within the class of objections that need not be preserved at trial.[201] Turning to the waiver issue, the Court noted that

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[192] 64 App. Div. 2d 873, 406 N.Y.S.2d 944 (1st Dep't 1978), *rev'd per curiam*, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979).

[193] 48 N.Y.2d at 9, 394 N.E.2d at 1138, 420 N.Y.S.2d at 375.

[194] Chief Judge Cooke and Judges Gabrielli, Fuchsberg and Meyer joined in the majority opinion. Judge Jasen dissented in an opinion in which Judges Jones and Wachtler concurred.

[195] 48 N.Y.2d at 5, 394 N.E.2d at 1135, 420 N.Y.S.2d at 372.

[196] *Id.* at 5-8, 394 N.E.2d at 1135-37, 420 N.Y.S.2d at 372-74.

[197] *See* note 182 and accompanying text *supra*.

[198] 48 N.Y.2d at 6, 394 N.E.2d at 1136, 420 N.Y.S.2d at 373; *see* note 183 and accompanying text *supra*.

[199] *Id.* at 7, 394 N.E.2d at 1136, 420 N.Y.S.2d at 373. The Court observed that the jurisdictional implications of double jeopardy are evidenced by its status as a ground for obtaining a writ of prohibition, a remedy which is usually available "only where there is an attempt to act without or in excess of jurisdiction." *Id.* (citing BT Prods. v. Barr, 44 N.Y.2d 226, 231, 376 N.E.2d 171, 172, 405 N.Y.S.2d 9, 11 (1978); La Rocca v. Lane, 37 N.Y.2d 575, 582, 338 N.E.2d 606, 613, 376 N.Y.S.2d 93, 100 (1975), *cert. denied*, 424 U.S. 968 (1976); Nolan v. Court of Gen. Sessions, 11 N.Y.2d 114, 118, 181 N.E.2d 751, 754, 227 N.Y.S.2d 1, 4 (1962)). It should be noted that the writ also has been employed when double jeopardy resulted from an unnecessary declaration of mistrial. People *ex rel.* Luetje v. Ketcham, 45 Misc. 2d 802, 803, 257 N.Y.S.2d 681, 683 (Sup. Ct. Nassau County 1965); *see* Snee v. County Court, 31 App. Div. 2d 303, 307, 297 N.Y.S.2d 414, 419 (4th Dep't 1969).

[200] 48 N.Y.2d at 7, 394 N.E.2d at 1136, 420 N.Y.S.2d at 373. The *Michael* Court stated:

> [D]ouble jeopardy implicates the very power of the State to prosecute a particular defendant for a particular crime and serves as an important check on the potential power of the State to intimidate its citizenry. The constitutional prohibition against double jeopardy is fundamental not only to the process of criminal justice, but to our system of government itself.

Id.

[201] *Id.* Although a purpose of the timely objection rule is to conserve judicial time and resources, the *Michael* majority reasoned that excepting double jeopardy from the rule would not impinge upon the state's interest in avoiding prolonged or multiple proceedings, because, successful or not, the claim will not bring about another trial. *Id.* at 6-8, 394 N.E.2d at 1136-

although the questions of waiver and reviewability are "conceptually distinct,"[202] the defendant's failure to protest timely his retrial was not equivalent to a waiver of his constitutional right not to be tried twice for the same crime.[203] Proceeding to the merits of the double jeopardy defense, the *Michael* Court held that the mistrial, "founded solely upon the convenience of the court and the jury" and without the defendant's consent, had been ordered improvidently.[204]

Judge Jasen, writing for the dissent, maintained that the defendant had waived his "personal defense" of double jeopardy by

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37, 420 N.Y.S.2d at 373-74. Moreover, the Court noted that double jeopardy is not a defense that, if timely raised, could result in prompt correction by the trial court so that the proceeding could continue untainted by the error. *Id.* at 8, 394 N.E.2d at 1137, 420 N.Y.S.2d at 374.

The Court distinguished its prior decision in People v. LaRuffa, 37 N.Y.2d 58, 332 N.E.2d 312, 371 N.Y.S.2d 434, *cert. denied*, 423 U.S. 917 (1975). In *LaRuffa*, the defendant's conviction for second-degree murder on a guilty plea was sustained by the Court of Appeals on reconsideration following remand from the Supreme Court. *Id.* at 60, 332 N.E.2d at 313, 371 N.Y.S.2d at 435. The Court held that LaRuffa's guilty plea constituted a waiver of his claim of double jeopardy since the defense must be raised affirmatively at trial. *Id.* at 60-61, 332 N.E.2d at 314, 371 N.Y.S.2d at 436. The *Michael* majority maintained that the *LaRuffa* Court implicitly found that a double jeopardy claim presented a reviewable question of law even though not asserted at trial because, otherwise, the Court never could have reached the waiver issue. 48 N.Y.2d at 7 n.2, 394 N.E.2d at 1137 n.2, 420 N.Y.S.2d at 374 n.2. *But see id.* at 13, 394 N.E.2d at 1140-41, 420 N.Y.S.2d at 377-78 (Jasen, J., dissenting); note 24 *infra*.

[202] *Id.* at 5 n.1, 394 N.E.2d at 1135 n.1, 420 N.Y.S.2d at 372 n.1 (citing People v. Iannone, 45 N.Y.2d 589, 600, 384 N.E.2d 656, 663, 412 N.Y.S.2d 110, 117 (1978)).

[203] *Id.* at 7-11, 394 N.E.2d at 1136-39, 420 N.Y.S.2d at 373-76. The Court reasoned that since a guilty plea does not constitute a waiver of the double jeopardy defense, Menna v. New York, 423 U.S. 61, 62 (1975); *see* note 212 *infra*, the mere failure to raise a double jeopardy defense, which is even less indicative of intent to waive, will not suffice to waive that objection. 48 N.Y.2d at 5 n.1, 394 N.E.2d at 1135 n.1, 420 N.Y.S.2d at 372 n.1.

[204] 48 N.Y.2d at 9-11, 394 N.E.2d at 1138-39, 420 N.Y.S.2d at 375-76. The Court stated that when a mistrial is declared without the defendant's consent, the double jeopardy clause bars retrial for the same crime "unless there is a manifest necessity for [the mistrial], or the ends of public justice would otherwise be defeated." *Id.* at 9, 394 N.E.2d at 1138, 420 N.Y.S.2d at 375 (citing United States v. Perez, 22 U.S. [9 Wheat.] 579, 580 (1824); Nolan v. Court of Gen. Sessions, 11 N.Y.2d 114, 119, 181 N.E.2d 751, 753, 227 N.Y.S.2d 1, 4 (1962)); *see* CPL § 280.10(3) (1971). Although a trial judge is vested with considerable discretion to determine whether a mistrial is manifestly necessary, the majority held that, in this case, it was an abuse of discretion to declare a mistrial solely to convenience the court and jury and that an adjournment would have been more appropriate. 48 N.Y.2d at 9-11, 394 N.E.2d at 1138-39, 420 N.Y.S.2d at 375-76; *see* United States v. Jorn, 400 U.S. 470 (1971). *But see* Illinois v. Somerville, 410 U.S.458 (1973). *See generally* Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449 (1977). The Court maintained that personal sacrifice by both judges and jurors is an unfortunate but necessary aspect of the criminal justice system. 48 N.Y.2d at 10, 394 N.E.2d at 1138, 420 N.Y.S.2d at 375. Only when a juror's discontent interferes with his ability to decide the case fairly will a mistrial be justified. *Id.*

"failing to preserve a question of law" for review by the Court.[205] Acknowledging that double jeopardy is related to jurisdiction, Judge Jasen nevertheless criticized the majority for placing the defense within the "narrowly drawn exception" to the preservation requirement, since double jeopardy neither concerns the organization of the court nor its method of proceeding.[206] The dissent further contended that premising the defendant's waiver on his failure to preserve a question of law reviewable by the Court would not be constitutionally objectionable.[207]

It is submitted that the *Michael* Court's holding that a claim of double jeopardy is reviewable on appeal notwithstanding the failure to raise it at trial is supported by both policy considerations and prior precedent.[208] The exception to New York's preservation requirement was designed to promote society's interest in the protection of basic statutory or constitutional privileges and to ensure the legitimate exercise of a court's jurisdiction.[209] Moreover, the Su-

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[205] *Id.* at 11, 394 N.E.2d at 1139, 420 N.Y.S.2d at 376 (Jasen, J., dissenting). Judge Jasen relied upon People v. LaRuffa, 37 N.Y.2d 58, 332 N.E.2d 312, 371 N.Y.S.2d 434, *cert. denied*, 423 U.S. 917 (1975). *See generally* note 201 *supra*, stating that one of the grounds for the holding in that case was that the defendant had waived his double jeopardy claim by not preserving a question of law for review by the Court of Appeals. 48 N.Y.2d at 13, 394 N.E.2d at 1140-41, 420 N.Y.S.2d at 377-78.

[206] *Id.* at 12, 394 N.E.2d at 1139-40, 420 N.Y.S.2d at 377 (Jasen, J., dissenting); *see* People v. Patterson, 39 N.Y.2d 288, 295, 347 N.E.2d 898, 902-03, 383 N.Y.S.2d 573, 577 (1976), *aff'd*, 432 U.S. 197 (1977); note 183 and accompanying text *supra*. Judge Jasen further observed that to allow the defendant to assert a double jeopardy claim notwithstanding his failure to raise it at his retrial would cause a needless waste of judicial time and resources. 48 N.Y.2d at 13, 394 N.E.2d at 1140, 420 N.Y.S.2d at 377 (Jasen, J., dissenting).

[207] 48 N.Y.2d at 13, 394 N.E.2d at 1140, 420 N.Y.S.2d at 377 (Jasen, J., dissenting). The dissent acknowledged that since a guilty plea following an unsuccessful double jeopardy defense does not constitute a waiver, *see* Menna v. New York, 423 U.S. 61, 62 (1975) (per curiam); note 213 and accompanying text *infra*, it would follow that in *Michael*, the defendant's waiver could not be premised upon a voluntary and intelligent abandonment of a known right. 48 N.Y.2d at 13, 394 N.E.2d at 1140-41, 420 N.Y.S.2d at 378 (Jasen, J., dissenting). Nevertheless, Judge Jasen opined that the waiver constitutionally could be based upon the defendant's failure to preserve a question of law by not timely objecting to his retrial. *Id.*

[208] *But cf.* People v. Dodson, 48 N.Y.2d 36, 396 N.E.2d 194, 421 N.Y.S.2d 47 (1979) (per curiam)(statutory prohibition against double jeopardy must be raised timely at trial).

[209] People *ex rel.* Battista v. Christian, 249 N.Y. 314, 319, 164 N.E. 111, 113 (1928); *see* note 183 and accompanying text *supra*. It is submitted that the *Michael* decision can be viewed as having expanded both the *McLucas* and *Patterson* approaches to reviewability, *see* note 183 *supra*, since it suggests that the exception to the preservation requirement applies not only to claims involving fundamental constitutional rights, *see* People v. McLucas, 15 N.Y.2d 167, 172, 204 N.E.2d 846, 848, 256 N.Y.S.2d 799, 802 (1965), but to any question of law implicating rights that are "basic to the validity of a criminal proceeding." 48 N.Y.2d at 6, 394 N.E.2d at 1136, 420 N.Y.S.2d at 373.

preme Court has recognized the fundamental nature of the guarantee against double jeopardy[210] and that a state is powerless to haul a defendant into court where the double jeopardy clause prohibits prosecution.[211]

In addition to expanding the exception to the timely objection requirement, the *Michael* decision represents an apparent repudiation of the Court's restrictive view concerning the protection afforded by the double jeopardy clause. Double jeopardy previously had been considered a personal defense that could be waived by a defendant's conduct—such as pleading guilty.[212] *Michael,* however, indicates that neither a guilty plea nor the failure to assert the claim before or during trial will serve as a waiver.[213] If neither a guilty plea nor the failure to raise the objection timely constitutes a waiver,[214] it is conceivable that express consent to retrial may be the only instance where the right to assert the constitutional claim may be lost.[215] In view of the abuses that may be generated by

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[210] Benton v. Maryland, 395 U.S. 784, 795 (1969). *See also* note 185 *supra.*

[211] Menna v. New York, 423 U.S. 61, 62 (1975)(per curiam); Blackledge v. Perry, 417 U.S. 21, 30 (1974).

[212] *See, e.g.,* People v. LaRuffa, 37 N.Y.2d 58, 332 N.E.2d 312, 371 N.Y.S.2d 434, *cert. denied,* 423 U.S. 917 (1975); People v. Cignarale, 110 N.Y. 23, 17 N.E.135 (1888); People *ex rel.* Williams v. Follette, 30 App. Div. 2d 693, 292 N.Y.S.2d 190 (1968), *aff'd,* 24 N.Y.2d 949, 250 N.E.2d 71, 302 N.Y.S.2d 584 (1969). *But see* Menna v. New York, 423 U.S. 61, 62 (1975)(per curiam).

[213] 48 N.Y.2d at 5 n.1, 394 N.E.2d at 1135 n.1, 420 N.Y.S.2d at 372 n.1; note 203 and accompanying text *supra.* The Court's prior holding in People v. LaRuffa, 37 N.Y.2d 58, 332 N.E.2d 312, 371 N.Y.S.2d 434, *cert. denied,* 423 U.S. 917 (1975), that a guilty plea waives the double jeopardy defense, *id.* at 60, 332 N.E.2d at 313, 371 N.Y.S.2d at 435; *see* note 201 *supra* was severely restricted by the Supreme Court in Menna v. New York, 423 U.S. 61 (1975) (per curiam). Unsuccessfully claiming that his retrial was barred by the double jeopardy clause, Menna had pleaded guilty and then reasserted the claim on appeal. *Id.* at 61-62. The New York Court of Appeals affirmed the conviction on the ground that the defendant had waived the double jeopardy defense by pleading guilty. *Id.* at 62. The Supreme Court reversed, holding that "[w]here the State is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Id.* (citation omitted).

The only distinction between *LaRuffa* and *Menna* is that in *LaRuffa,* the defendant pleaded guilty without previously having asserted the double jeopardy defense. The majority opinion in *Michael,* however, indicates that whether the double jeopardy defense is raised before or after pleading guilty, the plea cannot serve to waive the claim. 48 N.Y.2d at 5 n.1, 394 N.E.2d at 1135 n.1, 420 N.Y.S.2d at 372 n.1.

[214] 48 N.Y.2d at 5 n.1, 394 N.E.2d at 1135 n.1, 420 N.Y.S.2d at 372 n.1.

[215] *See id.* at 7, 394 N.E.2d at 1136, 420 N.Y.S.2d at 374. Express assent to reprosecution could be deemed an "intentional relinquishment or abandonment of a known right or privilege." *See* Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). If the violation of the double jeopardy clause is considered a jurisdictional defect, however, it should be reviewable on appeal without having been asserted at trial, since it goes to the court's power to entertain

severely limiting the defendant's ability to waive the double jeopardy defense,[216] it is suggested that, upon its next confrontation with the issue, the Court adopt more definite guidelines for determining the existence of a waiver.

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Absent an inquiry by the trial court and upon a demonstration of possible conflict, new trial required for jointly represented defendants

Due to the frequent inability of one attorney to protect adequately conflicting interests of criminal codefendants,[217] joint repre-

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criminal proceedings against a defendant. *See* Blackledge v. Perry, 417 U.S. 21, 30 (1974); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976)(right to counsel); People v. McLucas, 15 N.Y.2d 167, 204 N.E.2d 846, 256 N.Y.S.2d 799 (1965) (privilege against self-incrimination). Moreover, the double jeopardy claim benefits from "every reasonable presumption against . . . waiver . . . ." Glasser v. United States, 315 U.S. 60, 70 (1942). *Compare* Boyd v. Dutton, 405 U.S. 1 (1972) *with* United States v. Tateo, 377 U.S. 463 (1964).

[216] Restricting the instances in which the double jeopardy claim can be waived could encourage defendants to use the defense as a "sword" rather than properly as a "shield" against harassment by the sovereign. *See* People v. Key, 87 Misc. 2d 262, 266, 391 N.Y.S.2d 781, 784 (Sup. Ct. App. T. 2d Dep't 1976). For example, in order to preclude further proceedings against him, a defendant might wait until jeopardy attached to claim error, which, if corrected earlier, would have prevented a double jeopardy violation. *Id.* In *Key*, the defendant waited until jeopardy attached before moving to dismiss the information for insufficiency. *Id.* at 263, 391 N.Y.S.2d at 783. The People's motion for reargument was granted, but the trial court denied the relief sought because of the double jeopardy implications. *Id.* The appellate term reversed, holding that since the defendant was aware of the defect and could have moved to dismiss the information prior to the attachment of jeopardy, he waived his right to claim double jeopardy. *Id.* at 266, 391 N.Y.S.2d at 784. *See also* People v. Woods, 93 Misc. 2d 426, 429, 402 N.Y.S.2d 757, 759 (Dist. Ct. Nassau County 1978).

[217] For a full discussion of the types of conflict involved in joint representation of multiple defendants, see Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 125-35 (1978); Girgenti, *Problems of Joint Representation of Defendants in a Criminal Case*, 54 ST. JOHN'S L. REV. 55, 61-67 (1979); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 941-50 (1978). Typically, claims of conflict allege either counsel's failure to act in favor of one defendant for fear of implicating the other, *see, e.g.*, People v. Coleman, 42 N.Y.2d 500, 369 N.E.2d 742, 399 N.Y.S.2d 185 (1977); People v. Sprinkler, 16 App. Div. 2d 705, 227 N.Y.S.2d 818 (2d Dep't 1962), or affirmative steps taken by counsel inuring to the benefit of one client while severely damaging the case of another, *see* People v. Dell, 60 App. Div. 2d 18, 400 N.Y.S.2d 236 (4th Dep't 1977). In the latter instance, one commentator has noted, the defense attorney's role becomes prosecutorial in nature. *See* Geer, *supra*, at 133. In addition to the conflicting interests of multiple defendants that develop during the actual trial, are those that occur at the plea bargaining, pretrial, or sentencing stages of the criminal prosecution. *See* Girgenti, *supra*, at 61-67. Moreo-