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Constitutional Criminal Procedure - Double Jeopardy - Waiver - Mistrial

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CONSTITUTIONAL CRIMINAL PROCEDURE—DOUBLE JEOPARDY—WAIVER—MISTRIAL—The Supreme Court of Pennsylvania has held that where a trial judge sua sponte declares a mistrial without a request for or consent to the declaration by the defendant's counsel, the defendant does not waive a later claim of double jeopardy despite his failure to timely and specifically object at the first trial to the jury's discharge.

Commonwealth v. Bartolomucci, 362 A.2d 234 (Pa. 1976).

In 1973, Frank Bartolomucci was tried before a jury in the Mercer County Court of Common Pleas on a narcotics charge.[1] After nearly ten hours of deliberation following the trial, the jury had still not reached a verdict. Believing the jury to be deadlocked, the court held two conferences with both prosecuting and defense counsel regarding a possible discharge of the jury. Although defense counsel neither requested nor consented to it, the court declared a mistrial and dismissed the jury.[2] Bartolomucci's counsel made no specific objection to the dismissal of the jury in the first trial. When the Commonwealth attempted to re-try Bartolomucci, his counsel objected on the grounds that such a trial would place his client in double jeopardy.[3] This objection was overruled, and Bartolomucci was convicted and sentenced after the second trial. The Superior Court of Pennsylvania, in a 5-2 decision, reversed the conviction, stating that since the jury was improperly discharged in the first trial, Bartolomucci's second trial violated the fifth amendment's proscription against double jeopardy.[4]

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1. The charge was based on a violation of the Uniform Controlled Substance, Drug, Device and Cosmetic Act. *See* 35 PA. CONS. STAT. ANN. § 780-113(a)(30) (Purdon Supp. 1977-1978). Bartolomucci allegedly sold 15 methaqualone pills for the sum of $15.00. Commonwealth v. Bartolomucci, 362 A.2d 234, 236 n.2 (Pa. 1976).

2. The trial judge asked Bartolomucci's attorney whether he thought the jury should be discharged. Bartolomucci's attorney requested that the jury be given additional instructions concerning their responsibilities to consider each other's positions, and the right to retain their own position. The judge denied the request and dismissed the jury. *Id.* at 241.

3. *Id.* at 237. In post-trial briefs after the second trial, Bartolomucci argued there was no manifest necessity that the jury be dismissed in the first trial since the trial judge did not ascertain whether the jury was hopelessly deadlocked. Absent the request or consent of the defendant, manifest necessity is the only ground on which a state can re-try a defendant without violating his double jeopardy right. United States v. Jorn, 400 U.S. 470 (1971), *cited with approval in* United States v. Dinitz, 424 U.S. 600 (1976).

4. 232 Pa. Super. Ct. 559, 335 A.2d 747 (1975). Judge Cercone, speaking for the majority, concluded that had the trial judge by personal communication with the jury determined that

Rejecting the Commonwealth's waiver argument and the defendant's jurisdictional challenge,[5] a divided Pennsylvania Supreme Court affirmed. Despite the rule of *Commonwealth v. Clair*[6] that allegations of basic and fundamental error were not reviewable unless properly preserved by timely objection,[7] counsel's failure to specifically object to the mistrial did not constitute a waiver to the defense of double jeopardy.[8] Justice Eagen, writing for a majority

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a unanimous verdict could not be reached, the jury could have been appropriately dismissed. *Id.* at 563, 335 A.2d at 749.

5. The defendant argued that the court lacked jurisdiction because it had entered an order denying the Commonwealth's petition for allowance of an appeal on June 19, 1975, and without the Commonwealth having petitioned for reconsideration of that order, had sua sponte vacated the earlier denial order and granted the Commonwealth's petition. Bartolomucci contended that reinstating the Commonwealth's appeal after expiration of the ten-day period for appeals rendered too great a hardship on persons who thought their cases were finally adjudicated. Brief for Appellee at 6, Commonwealth v. Bartolomucci, 362 A.2d 234 (Pa. 1976). The supreme court dismissed this issue. It held that the order of June 19th was made erroneously and that the court had inherent power to correct such administrative mistakes. 362 A.2d at 237 n.2.

6. 458 Pa. 418, 326 A.2d 272 (1974). *See* text accompanying notes 32-36 *infra.*

7. *See* 362 A.2d at 238.

8. *Id.* at 238. Double jeopardy does not prevent reprosecution in every aborted trial. The Supreme Court has long recognized that the public has an interest in fair trials which end in just results. *See, e.g.*, Wade v. Hunter, 336 U.S. 684, 689 (1949) (military emergency precluding continuation of a trial justified calling a mistrial and re-trying defendant). The purpose of double jeopardy is essentially to prevent the state from making 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 state of anxiety and insecurity. Repeated trials would also increase his chances of being found guilty even though innocent. *See, e.g.*, Green v. United States, 355 U.S. 184, 187-88 (1957) (defendant initially tried for either first or second degree murder and found guilty of second degree murder cannot be retried for first degree murder on remand).

Prior to 1969, double jeopardy claims arising in Pennsylvania criminal proceedings were controlled by PA. CONST. art. I, § 10, which states in part: "[N]o person shall, for the same offense, be twice put in jeopardy of life or limb . . . ." This provision was interpreted by the Pennsylvania courts as applicable only to capital offenses. *See, e.g.*, Commonwealth v. Baker, 413 Pa. 105, 109-12, 196 A.2d 382, 384-86 (1964). In 1969, however, the United States Supreme Court held that the fifth amendment's prohibition of double jeopardy applied to the states through the fourteenth amendment, and extended the prohibition to non-capital cases. Benton v. Maryland, 395 U.S. 784, 794 (1969).

In June of 1973, the new Pennsylvania Crimes Code became effective, providing statutory guidance on when and how double jeopardy should apply. The Code provides:

> 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:
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> . . . .
>
> (4) The former prosecution was improperly terminated after the first witness was sworn but before a verdict, or after a plea of guilty was accepted by the court.

of five, acknowledged that the supreme court's earlier decision in *Clair* required specific objection to rulings and conduct of a trial judge in order to have these questions reviewed on appeal. He also conceded that the principle underlying *Clair,* giving the trial court an opportunity to correct an error, would have been served had defense counsel objected to the judge's discharge of the jury without personally ascertaining that they were hopelessly deadlocked.[9] Nevertheless, due to the peculiar nature of the constitutional prohibition of double jeopardy, in the court's view, *Clair* was inapplicable. Analyzing the substantive law of double jeopardy as recently reviewed by the United States Supreme Court in *United States v. Dinitz,*[10] the *Bartolomucci* court read *Dinitz* as requiring that absent a finding that the mistrial was manifestly necessary, a defendant must either request or consent to a mistrial in order to negate a double jeopardy claim.[11]

Since failure to make a correct, specific objection could be deemed a consent to the mistrial in *Bartolomucci,*[12] the majority concluded that the procedural rule of *Clair* and the substantive law of double jeopardy as established by *Dinitz* were in conflict. Although "conceptually" there was no clash between the two, to find that defendant's failure to object to the mistrial constituted a

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18 PA. CONS. STAT. ANN. § 109 (Purdon 1973). PA. R. CRIM. P. 1118(b) states that only a defendant may move for a mistrial, absent manifest necessity. Hence, a sua sponte declaration of mistrial by the court bars retrial in the absence of the requisite "manifest necessity." *See* Commonwealth v. Lauria, 450 Pa. 72, 297 A.2d 906 (1972). Rule 1118(b) was later limited by interpreting manifest necessity as including a hung jury situation. In those circumstances, a court could properly declare a mistrial. *See* Commonwealth v. Brown, 451 Pa. 395, 301 A.2d 876 (1973). For a thorough discussion of the history of double jeopardy in Pennsylvania see Belsky, *Criminal Procedure in Pennsylvania: Pretrial Issues,* 78 DICK. L. REV. 209, 281-302 (1973).

9. 362 A.2d at 238.

10. 424 U.S. 600 (1976). *See* text accompanying notes 44-46 *infra.*

11. 362 A.2d at 238. The question in *Dinitz* was whether the double jeopardy clause had been violated by the retrial of a defendant after his original trial had ended in a mistrial granted at his request. Defendant's counsel had been prematurely ejected from the courtroom. The Supreme Court held that where the trial judge's banishment of defense counsel was not done in bad faith, re-trying the defendant did not violate double jeopardy since the defendant had requested the retrial. 424 U.S. at 611.

12. Justice Eagen stated:

> [T]he substantive law of double jeopardy requires either a request or consent by a defendant to the mistrial in order to avoid the requirement that the mistrial be manifestly necessary. A mere failure to state the reason for an objection or to make a correct specific objection cannot be viewed as a request for or consent to the mistrial.

362 A.2d at 238.

waiver would, according to the court, make that failure the functional equivalent of consent.[13] Functionally, then, *Clair* could not be reconciled with the mandate of the double jeopardy clause in this factual setting. The court therefore rejected invoking *Clair's* waiver rule, carving out an exception to its heretofore unqualified application.[14]

Once the court was satisfied the defendant had not waived his double jeopardy claim, it considered the merits of the trial judge's sua sponte declaration of a mistrial. The majority applied a strict test of manifest necessity;[15] before a trial judge could order a mistrial, he must determine that it is clearly necessary, based on a careful and scrupulous evaluation of the circumstances.[16] Since the

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13. *Id.*

14. The court emphasized that because of the constitutional prohibition of the double jeopardy clause, a sua sponte declaration of a mistrial absent manifest necessity was unlike the majority of situations where *Clair's* requirements were strictly enforced. 362 A.2d at 238.

15. In the landmark case of United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), the Supreme Court held that a jury's inability to reach a verdict was a proper basis for declaring a mistrial and would not bar reprosecution, if a second trial were manifestly necessary. The *Perez* Court, recognizing the impossibility of developing a rigid standard for mistrial, promulgated general guidelines for trial judges who, after weighing the conflicting individual and state interests at stake, were to be cautious, scrupulous and discrete in declaring mistrials. *Id.* at 580.

United States v. Jorn, 400 U.S. 470 (1971), required greater appellate scrutiny of lower court decisions involving mistrials. *Jorn,* cited by the *Bartolomucci* majority as embodying the proper test of manifest necessity, requires a trial judge to consider procedural alternatives and then decide whether a mistrial is manifestly necessary before it can be said that a trial has been properly aborted. *Id.* at 487. The Supreme Court's more recent decisions, however, indicate a departure from the strict *Jorn* standard; they allow the trial judge broad discretion to declare a mistrial absent bad faith. *See* Illinois v. Somerville, 410 U.S. 458 (1973), which held a reprosecution appropriate when a mistrial had been declared because of a fatally defective indictment which could not be cured under Illinois law. The Court abjured the pure manifest necessity test enunciated in *Jorn. Id.* at 465-71.

16. The majority's holding that the judge's failure to personally poll the jury rendered the mistrial not manifestly necessary is in keeping with recent decisions of the Pennsylvania courts which suggest that doubts as to the existence of manifest necessity must be resolved in favor of the defendant. *See, e.g.,* Commonwealth *ex rel.* Walton v. Aytch, 466 Pa. 172, 352 A.2d 4 (1976) (trial court's failure to attempt to contact defendant's counsel created doubt as to necessity for mistrial); Commonwealth v. Ferguson, 446 Pa. 24, 285 A.2d 189 (1971) (where mistrial was granted on motion of Commonwealth and other viable alternatives existed, reprosecution barred). *But see* Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573 (1975) (judge's illness during trial constituted manifest necessity allowing mistrial).

For an opinion on the application of manifest necessity to the facts of *Bartolomucci* contrary to that of the majority, see Judge Van der Voort's dissent in the superior court decision, 232 Pa. Super. Ct. at 565-66, 335 A.2d at 750-51. Neither Justice Nix nor Justice Pomeroy, the dissenters in the supreme court opinion, reached the merits of the issue of manifest necessity, since they felt Bartolomucci's double jeopardy claim was not properly before the court.

judge had not personally polled the jury, the necessity of the mistrial was doubtful; the Commonwealth had not met the manifest necessity test. Bartolomucci's right not to twice be put in jeopardy had been violated.[17]

Justice Nix dissented. He cited a spate of recent cases where constitutional claims were not considered on appeal because, under the procedural rule of *Clair,* they were waived at a particular stage in the trial process.[18] He argued that the majority had not presented any reasons for making an exception to the *Clair* waiver doctrine for double jeopardy claims.[19] He also emphasized that a defendant in Bartolomucci's position had an appropriate remedy: an ineffective assistance of counsel claim.[20] Justice Nix observed that the Pennsylvania Supreme Court's decision in *Commonwealth v. Bryant,*[21] which involved a double jeopardy allegation, was directly on point. The defendant there had failed to correctly and properly preserve for appeal a double jeopardy claim, and the supreme court had held the claim waived.[22]

In a separate dissent, Justice Pomeroy pointed to the uniform application of *Clair* since its inception, and the general desirability of following a consistent tack.[23] He believed the majority's decision was founded on a perceived conflict between *Clair* and double jeop-

17. Justice Manderino joined the majority of Justices Eagen, O'Brien, Roberts, and Chief Justice Jones, but filed a separate concurrence. In his view, a claim of double jeopardy, similar to a court's inquiry into its own subject matter jurisdiction, could be raised at any time since no court has jurisdiction to try a person twice. 362 A.2d at 240 (concurring opinion). To do so, in his view, would violate not only the Federal but the Pennsylvania Constitution as well. *Id.*

18. 362 A.2d at 240-41 (dissenting opinion).

19. *Id.* at 241.

20. *Id.* A claim of ineffective assistance of counsel is one basis for relief under the Pennsylvania Post Conviction Hearing Act. *See* PA. STAT. ANN. tit. 19, § 1180-3(c)(6) (Purdon Supp. 1977-1978). The standard used to judge an ineffective assistance of counsel claim was set forth in Commonwealth *ex rel.* Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967), where the Pennsylvania Supreme Court held that counsel's assistance is effective if there is some reasonable basis for his conduct. The court observed that the attorney's course chosen in a particular situation is to be examined in light of all available alternatives, but the outcome does not depend on whether the most reasonable alternative was taken. So long as there is some reasonable basis for counsel's actions, his assistance will be deemed "effective." *Id.* at 604-05, 235 A.2d at 352-53. *See generally* Comment, *Pennsylvania Waiver Doctrine in Criminal Proceedings: Its Application and Relationship to the Ineffective Assistance of Counsel Claim,* 15 DUQ. L. REV. 217, 250-56 (1977) [hereinafter cited as *Pennsylvania Waiver].*

21. 461 Pa. 309, 336 A.2d 300 (1975). *See* text accompanying notes 38 & 39 *infra.*

22. 461 Pa. at 313, 336 A.2d at 302.

23. 362 A.2d at 242 (dissenting opinion).

ardy which did not exist; neither did the tension between the two pose constitutional problems since the former was a procedural rule, the latter, substantive law.[24] He distinguished the Supreme Court's holding in *Dinitz* on the ground that there, the Supreme Court was referring to waiver not in the procedural sense of failing to preserve an issue for appeal, but in the substantive sense of a knowing and intelligent waiver of a constitutional right.[25] Although he would welcome a move away from the constraints which *Clair* had placed on the court in reviewing even fundamental trial errors, in Justice Pomeroy's view, *Clair* was controlling under the facts in this case and should therefore be followed.[26]

The central issue in *Bartolomucci* was whether the defendant had waived his right to invoke a double jeopardy defense by failing to object on that ground at the first trial. It has been recognized as a general rule of appellate procedure that questions not properly raised or preserved at trial will not be considered for the first time on appeal.[27] This rule is based on the rationale that lower courts would correct errors if they had the opportunity to do so, and that defendants should be deterred from withholding objections solely to assure a basis for a later appeal.[28] It promotes administrative efficiency, respect for the dignity of the trial courts, and finality of judgments.[29] In 1968, the Pennsylvania Supreme Court in *Commonwealth v. Williams*[30] created an exception to the rule by adopting the doctrine of basic and fundamental error. In special circum-

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24. *Id.* at 243.

25. *Id. Cf.* text accompanying notes 44-46 *infra.*

26. 362 A.2d at 243 (dissenting opinion).

27. *See, e.g.,* Commonwealth v. Agie, 449 Pa. 187, 296 A.2d 741 (1972) (failure to object to introduction of inflammatory photograph as evidence waived right to appeal on that ground); Commonwealth v. Delfino, 259 Pa. 272, 102 A. 949 (1918) (lack of objection to improper remark made by prosecutor waived right to raise the objection on appeal); Commonwealth v. Polichinus, 229 Pa. 311, 78 A. 382 (1910) (failure to object to district attorney's statement to defense witness waived right to subsequently appeal conviction on that ground).

28. *See* Commonwealth v. Razmus, 210 Pa. 609, 60 A. 264 (1905) *cited with approval in* Commonwealth v. Marlin, 452 Pa. 380, 305 A.2d 14 (1973); Commonwealth v. Danzy, 225 Pa. Super. Ct. 234, 310 A.2d 291 (1973) (party may not sit silent and later complain if decision is adverse).

29. *See* Comment, *Appeal of Errors in the Absence of Objection—Pennsylvania's "Fundamental Error" Doctrine,* 73 DICK. L. REV. 496 (1968); *Pennsylvania Supreme Court Review, 1974,* 48 TEMP. L.Q. 527, 712 (1975).

30. 432 Pa. 557, 248 A.2d 301 (1968). *Williams* held that where defendant's life or liberty is at stake, the general rule that an appellate court will not reverse on issues not properly preserved is inapplicable.

stances, the court could overlook a mistake or inadvertence of trial counsel and review, on its merits, an unpreserved error which had allegedly jeopardized the fairness of the defendant's trial.[31]

Six years after its decision in *Williams*, the Pennsylvania Supreme Court in *Commonwealth v. Clair*[32] eliminated the basic and fundamental error doctrine in criminal cases. One reason for its abrogation was the fact the doctrine had previously been eliminated in civil cases.[33] More fundamentally, it encouraged silence as a defense strategy, allowing defense counsel to withhold objections to assure a later ground for appeal.[34] Furthermore, while the fundamental error rule acknowledged that all potentially reversible error was not basic and fundamental, there was no readily apparent difference between that which was fundamental and that which was not;[35] this created uncertainty as to when the rule was properly invocable. Despite claims that one of *Clair*'s underlying premises—conserving judicial resources—was of questionable validity,[36]

31. The supreme court stated that due process guaranteed by the fourteenth amendment is denied "where there is basic and fundamental error which affects the merits or justice of the case, or . . . offends against the fundamentals of a fair and impartial trial . . . or deprives a defendant of 'that fundamental fairness essential to the very concept of justice.'" *Id.* at 563-64, 248 A.2d at 304.

32. 458 Pa. 418, 326 A.2d 272 (1974), *noted in* 13 DUQ. L. REV. 992 (1975).

33. *Id.* at 423, 326 A.2d at 272-73. *See* Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974) (doctrine of fundamental error inappropriate in civil cases). The court in *Dilliplaine* reasoned that the doctrine discouraged alert and adequate lawyer preparation, penalized the opposing party, eliminated the trial court's opportunity to correct the error, voided the finality of trial court holdings, and encouraged specious appeals. *Id.* at 257-59, 322 A.2d at 116-17. Justice Pomeroy, joined by Justices Eagen and O'Brien, dissented in *Clair*. He opposed elimination of the fundamental error doctrine, arguing that it had evolved to insure a basically fair trial to every defendant, many of whom had no choice in the selection of their counsel. Because of the very nature of what is at stake—liberty as opposed to money—he contended that criminal rules should not parallel rules of civil procedure. 458 Pa. at 423-24, 326 A.2d at 275. (Pomeroy, Eagen, & O'Brien, JJ., dissenting). Justice Pomeroy also took issue with the majority's position that elimination of the doctrine of fundamental error was judicially economical. In his view, trial errors not reviewable on appeal would resurface in post-conviction proceedings, in the form of claims of ineffectiveness of counsel. *Id.* at 423-24, 326 A.2d at 275 (dissenting opinion). *See also* 13 DUQ. L. REV. 992, 997-98 (1975) (questioning the validity of applying the *Dilliplaine* rationale to *Clair*).

34. 458 Pa. at 421, 326 A.2d at 273.

35. *Id.*

36. *Clair* basically substitutes the claim of ineffectiveness of counsel for relief under the fundamental error doctrine. While *Clair* therefore reduced claims of error on direct appeal, the finality of a decision could still be attacked in collateral proceedings. Thus the cost of administration of justice was not significantly reduced; but merely shifted from appellate to trial courts and from one party, the state, to another, the defendant's counsel. *See Pennsyl-*

claims of error on direct appeal have been consistently dismissed when not properly preserved. Regardless of whether constitutional issues are involved, the court has uniformly refused to review trial errors notwithstanding the degree to which they affect the fairness of the defendant's conviction.[37]

Bartolomucci was not the Pennsylvania Supreme Court's first encounter with a claim of double jeopardy since its decision in *Clair*. In *Commonwealth v. Bryant*,[38] the defendant was convicted of murder in a second trial after a previous trial had resulted in a hung jury. In post-verdict motions, he alleged only that the evidence was insufficient to convict him. On appeal to the supreme court, the defendant again argued insufficiency but further contended that the second trial had violated his constitutional right not to be subjected to double jeopardy. The Pennsylvania Supreme Court unanimously agreed that the double jeopardy claim was not cognizable on appeal, citing *Clair*.[39] Surprisingly, the *Bartolomucci* majority made no reference to *Bryant*. If the cases are distinguishable at all, it is because *Bryant* involved a failure to preserve a double jeopardy issue for appeal, whereas *Bartolomucci* involved a failure to specifically object at trial. It is questionable, however, whether that distinction is of any significance. *Clair* has a preclusive effect in both instances,[40] since failing to object at trial forecloses raising the alleged error on appeal. In any event, it is disturbing that the majority did not consider *Bryant* in view of its apparent inconsistency with the result in *Bartolomucci*.

The majority's use of a functional analysis, a somewhat novel approach to the waiver of constitutional rights, purportedly explicates the majority's qualification of *Clair* and its apparent departure from *Bryant*. According to Justice Eagen, determining that Bartolomucci had waived his double jeopardy claim would have the same effect as finding that he had consented to the mistrial. Since consent is one basis upon which the state can re-try a defendant,[41]

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vania Waiver, supra note 20; 13 DUQ. L. REV. 992, 998-1002. *See also* 458 Pa. at 423-24, 326 A.2d at 275 (Pomeroy, J., dissenting).

37. *See* 362 A.2d at 240-41 (Nix, J., dissenting).

38. 461 Pa. 309, 336 A.2d 300 (1975).

39. *Id.* at 313, 336 A.2d at 302.

40. *Compare* Commonwealth v. Bryant, 461 Pa. 309, 336 A.2d 300 (1975) (waiver of alleged double jeopardy claim), *with* Commonwealth v. Jones, 460 Pa. 713, 334 A.2d 601 (1975) (waiver of alleged unconstitutionally obtained confession).

41. *See* Commonwealth v. Shaffer, 447 Pa. 91, 288 A.2d 727 (1972) (mistrial with defen-

Bartolomucci could then be re-tried without violating the double jeopardy clause. This approach is deceptively simple, and at first glance appears tenable. On closer analysis, however, the court's functional analysis is difficult to defend.

Analogizing waiver of other constitutional rights crystallizes this difficulty. For example, whereas a defendant waives a double jeopardy claim by consenting to a mistrial, an accused can relinquish a fifth amendment right against self-incrimination by knowingly and willingly waiving that right.[42] In the fifth amendment situation, the defendant might confess to a particular crime without making such a waiver, yet, if at trial his confession is introduced into evidence and he does not object to its introduction, that right is relinquished. This failure to object has exactly the same effect as if the accused had intelligently waived his fifth amendment right before making the confession: the right is extinguished. Yet in contrast to its refusal to apply *Clair* in a double jeopardy situation, the Pennsylvania Supreme Court has applied the *Clair* waiver doctrine to fifth amendment claims.[43] The *Bartolomucci* court may have focused *sub silentio* on the requirement that there be consent to a mistrial to vitiate a double jeopardy claim, as opposed to other rights which require a knowing waiver in order to be foreclosed. Arguably, however, requiring that a defendant consent to a mistrial has the same effect as requiring the defendant to waive any right to raise a double jeopardy claim at the second trial; thus the double jeopardy criterion and the test for waiver of other constitutional rights are at least theoretically identical. A true functional analysis of a double jeopardy situation therefore supports, rather than undermines, the view that this constitutional right should be treated no differently than any other.

The majority's other justifications for departing from *Clair* are also unpersuasive. The court's distinguishing of double jeopardy as

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dant's consent, or even without consent in extraordinary fact situations, will permit reprosecution).

42. Gardner v. Broderick, 392 U.S. 273, 276 (1968) (privilege against self-incrimination may be waived in appropriate circumstances if knowingly and voluntarily waived). The "knowing and intelligent" standard for waiver of constitutional rights was first enunciated in Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to counsel).

43. Commonwealth v. Tressler, 461 Pa. 240, 336 A.2d 265 (1975) (waiver of alleged violation of *Miranda* rights); Commonwealth v. Jones, 460 Pa. 713, 334 A.2d 601 (1975) (waiver of alleged unconstitutionally obtained confession).

distinct from the other constitutional claims to which *Clair* has been applied purportedly finds support in *United States v. Dinitz.*[44] There the United States Supreme Court held that the double jeopardy clause was not violated by the retrial of the defendant after his original trial had ended in a mistrial granted at his request.[45] As the *Bartolomucci* majority conceded, however, *Dinitz* involved double jeopardy in a different context than *Bartolomucci.* Whereas *Bartolomucci* involved a judicially imposed procedural rule and considered whether it could have preclusive effect, *Dinitz* turned on whether there had been a knowing and intelligent waiver of the defendant's double jeopardy right.[46] Furthermore, the Pennsylvania Supreme Court has recently reaffirmed that constitutional due process rights, rights which can affect the very fairness of a defendant's trial, can be waived in some circumstances if not raised at trial.[47] The majority's reliance on the fifth amendment's prohibition of sua sponte declarations of mistrials absent manifest necessity[48] also seems unsupportive of *Bartolomucci's* retrenchment from *Clair.* The Federal Constitution prohibits trying defendants without giving them an opportunity to confront witnesses, as well as denying persons equal protection of the laws. Yet those are just two examples of the variety of constitutional claims which the Pennsylvania Supreme Court has refused to review through invocation of the *Clair* doctrine.[49] The *Bartolomucci* court did not explain why one constitutional prohibition should be treated differently than others for purposes of waiver.

Since *Bartolomucci* is certain to create speculation as to whether the supreme court will further erode *Clair,* it may be significant that the court arguably had an alternative method of hearing Bartolomucci's double jeopardy claim. In *Commonwealth v. Fredericks,*[50]

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44. 424 U.S. 600 (1976).

45. *Id.* at 611-12.

46. *See* 362 A.2d at 243 (Pomeroy, J., dissenting).

47. *See* cases cited at 362 A.2d at 240-41 (Nix, J., dissenting); *id.* at 242 n.2 (Pomeroy, J., dissenting).

48. 362 A.2d at 238.

49. Commonwealth v. Stoltzfus, 462 Pa. 55, 337 A.2d 873 (1975) (right to confront witness); Commonwealth v. Piper, 458 Pa. 307, 328 A.2d 845 (1974) (equal protection claim).

50. 235 Pa. Super. Ct. 78, 340 A.2d 498 (1975). In *Fredericks,* the defendant was convicted of burglary in a second trial and contended his double jeopardy rights were violated. The superior court focused on the issue of whether the appellant could raise the bar of double jeopardy at his second trial when he did not object to the court's sua sponte declaration of a

the Pennsylvania Superior Court, in deciding a burglary case, held it is not the unnecessary declaration of the mistrial which offends a defendant's constitutional rights, but rather his subsequent prosecution for the same offense.[51] There is always the possibility that upon declaring a mistrial the state will choose not to reprosecute the defendant and drop the charges.[52] It therefore may be somewhat harsh to require a defendant to object at the time of the declaration of a mistrial when a subsequent trial may not occur. Under a *Fredericks* approach, the second trial and not the aborted first trial would be the proper place to raise a double jeopardy objection. In *Bartolomucci,* counsel did object to the retrial on double jeopardy grounds in both post-trial motions and on direct appeal;[53] therefore, the supreme court could have found this objection sufficient to preserve the defendant's double jeopardy claim.[54] It is not certain whether the majority simply never considered this possibility or instead ignored it, seeing *Bartolomucci* as an opportunity to make an initial inroad into *Clair.*

Examining waiver in terms of the substantive law of the right assertedly waived, rather than the procedural aspect of the waiver rule, represents a radical departure from the past approaches to appellate review and has a potentially disruptive effect on a hereto-

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mistrial at his first trial. In the court's view, he could. The *Bartolomucci* majority cited *Fredericks* as being in accord with its result, yet disposed of *Bartolomucci* on an entirely different ground. *See* text accompanying notes 51-53 *infra.*

51. 235 Pa. Super. Ct. at 85, 340 A.2d at 502. *See also* Commonwealth v. Coleman, 235 Pa. Super Ct. 379, 382, 341 A.2d 528, 530 (1975) (proper manner to preserve claim of improper granting of mistrial is to object prior to the commencement of the second trial); Note, *Mistrial and Double Jeopardy,* 49 N.Y.U.L. REV. 937, 948-49 (1974).

52. The court in *Fredericks* observed:

> [I]t is well known that the Commonwealth, having once been stymied at a jury trial, frequently will not reprosecute when a relatively minor felony is involved. If the Commonwealth may wish to make a second effort at a conviction, it is the Commonwealth which should insure that the court does not declare a mistrial unless manifest necessity requires it. For, it is the Commonwealth which in fact has lost the case if the court erroneously grants a mistrial.

235 Pa. Super. Ct. at 85-86, 340 A.2d at 502.

53. Bartolomucci's counsel first raised a double jeopardy objection to the retrial in his post-trial briefs at the second trial. 362 A.2d at 237.

54. The Pennsylvania Supreme Court has now resolved this issue. In Commonwealth v. Peters, 373 A.2d 1055 (Pa. 1977), the court held that failure to raise a double jeopardy claim prior to commencement of the second trial constitutes a waiver of that right. In deciding *Peters,* the supreme court preserved *Bartolomucci;* a defendant's failure to object when the trial court declares a mistrial sua sponte will not amount to a waiver of his right not to twice be put in jeopardy.

fore certain judicial rule of procedure.[55] If the *Bartolomucci* court intended to set aside *Clair* only in the limited area of double jeopardy, their explanation as to why double jeopardy is more "substantive" than other constitutional claims seems unpersuasive. Any tension existing between the substantive law of double jeopardy and the procedural rule of *Clair* also exists for other constitutional issues. It will remain for future court decisions to determine whether double jeopardy really involves unique considerations or whether *Bartolomucci* suggests a rethinking by the Pennsylvania Supreme Court of both the scope and impact of *Clair*.

Margaret L. McArdle

55. Justice Pomeroy lamented the "state of unavoidable uncertainty" into which *Bartolomucci* will plunge Pennsylvania's appellate courts. 362 A.2d at 244 (dissenting opinion).