IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,705

ROY DWAYNE THOMASON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Roy Dwayne Thomason, was the defendant in the trial court and appellant on appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee on appeal. The parties will be referred to in this brief as "Defendant" and "the State." The symbol "R" will constitute a reference to the record on appeal. The symbol "SR" will constitute a reference to the supplemental record filed in the district court of appeal. The symbol "T" will constitute a reference to the trial transcript filed with the district court of appeal in case no. 90-2394, and adopted by previous order of that court as a part of the record in the present case.

STATEMENT OF THE CASE AND FACTS

On December 17, 1988, Defendant was charged by information in the Seventeenth Judicial Circuit of Florida with one count of armed kidnapping, two counts of armed sexual battery and one count of aggravated assault (R 15).

Trial began on March 5, 1990, at which time the State nolle prossed the aggravated assault count. The trial ended with the declaration of a mistrial over the objection of both Defendant and the State.

Subsequently, Defendant filed a Motion to Dismiss and for Discharge (R 46-56), asserting that there had existed no manifest necessity for the mistrial and that it would therefore constitute

double jeopardy to retry him. The State filed a written response to the motion (R 57-58).

At the hearing on the motion (SR 1-22),[1] the parties stipulated to the facts set forth in the motion and to the trial transcript (SR 4).

The stipulated facts from the motion were as follows:

> On March 5, 1990, trial commenced in this cause. Trial continued throughout March 6th and 7th and on the afternoon of March 7th, the State rested (Transcript, hereinafter referred to as "T", 460-461). Subsequently that afternoon, seven defense witnesses were called and testified. Six completed their testimony.
>
> At approximately 5:45 p.m. (T 612), while the seventh defense witness was testifying on direct examination, Defendant's attorney became very white and shaky and was physically supported by the prosecutor (T 612).
>
> As a result of Defendant's counsel's illness, the court adjourned the proceedings for the evening (T 603).
>
> The next morning, March 8th, when trial was scheduled to resume (T 603), Defendant's counsel collapsed in her office and, when this fact was made known to the court, the jury was excused for the day (T 612).
>
> On the following morning, March 9th, Defendant's counsel was present in court and indicated her readiness to proceed (T 608). She stated that upon completion of the testimony of the witness that was on the stand, the only other witness that might be called by the defense would be Defendant (T 609).
>
> Defendant personally indicated his confidence in his attorney's ability to proceed and the fact that he did desire to proceed (T 634-636).
>
> Despite these statements from Defendant and his attorney, the court expressed concern

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[1]The judge to whom this case was assigned and who presided at the trial was the Honorable Mel Grossman. The motion was heard and ruled on by the Honorable William P. Dimitrouleas, in light of an order entered by Judge Grossman removing himself from consideration of the motion. Defendant's plea was ultimately entered before the Honorable Leroy Moe.

over resuming the trial in light of Defendant's counsel's physical condition and the lack of any assurances from a doctor that Defendant's counsel was capable of proceeding (T 612-616, 636-641). The court referred to a phone call his secretary had received from the secretary of a doctor Defendant's counsel had known for years but who had not treated her during the prior few days to the effect that there ought to be a postponement to allow Defendant's counsel to attend to her personal medical needs (T 614).

With regard to assurances from doctors, Defendant's counsel told the court that she had discussed the court's desire for assurances with one of the doctors who had treated her the previous two days; that the doctor indicated that he felt that she was fine, and that he would not have released her otherwise; and that the doctor provided her with his phone number for the court to speak with him (T 642-643). She also indicated that she had attempted to reach the other doctor who had treated her, had been unable to do so, but would try to do so again if the court would give her 30 minutes or so (T 642-643).

Obviously concerned about the court's misgivings, the prosecutor repeatedly expressed the opinion that if the court ordered a mistrial, double jeopardy would preclude a retrial (T 616-619). The prosecutor asked that if the court was concerned with Defendant's counsel's health, it postpone the case rather than order a mistrial (T 617, 652). He also noted that the case would be over after the parties finished with the witness on the stand, Defendant, if he testified, and possibly one rebuttal witness (T 652).

Both the defense (T 643) and the prosecution (T 652) specifically objected to a mistrial.

The court then called as a witness Hilliard Moldof, an attorney. He testified that he had observed Defendant's counsel that morning and thought "perhaps" she was not realizing that "she was a bit inappropriate" for not having recognized that her client was in the courtroom, that his feeling was that she "might" have still been under some type of medication, that he had "some concerns" about the ability to go forward and that he would want to make sure that she felt capable of going forward (T 654-656).

> The comment on Defendant's presence was a reference to the fact that at one point during the hearing, counsel was unaware that Defendant was present (T 611). The events that led up to that occurrence, apparently unknown to Mr. Moldof, included the fact that prior to the hearing beginning, Defendant's counsel had noticed that Defendant was not present and had asked that he be brought immediately to the courtroom (T 611); the fact that Defendant's counsel left the courtroom after the request, engaging in what the court described as a "flurry of activity outside the courtroom (T 614)," in an effort to obtain the medical assurances the court wanted (T 611, 642-643); and the fact that Defendant's counsel came back into the courtroom when the case was called and therefore immediately begin addressing the court without looking to the box, which was behind her and which was where Defendant was located (T 611, 638, 655).
>
> The hearing ended when the court declared its belief that based "on the court's observations of and the appearance and demeanor of counsel during the course of the trial today," it had no other choice but to declare a mistrial (T 657-658).
>
> (R 46-49)

The trial court denied the Motion to Dismiss and for Discharge (R 59-61).

A Petition for Writ of Prohibition was then filed in the Fourth District Court of Appeal (case no. 90-2394). The petition asserted that the double jeopardy provisions of both the United States and Florida Constitutions barred Defendant's retrial and that the trial court should be prohibited from proceeding in the cause. After the filing of a response and a reply to the response, the petition was denied without opinion.

Following the denial of the petition, Defendant entered a plea of nolo contendere to the charge of armed kidnapping and to two counts of aggravated battery, as lesser included offenses of the armed sexual battery counts (R 3). Adjudication was withheld and

Defendant was placed on probation for five years, with credit for the time spent in custody prior to the entry of the plea (R 3). Defendant also specifically reserved his right to appeal and to have reviewed the denial of his Motion to Dismiss and for Discharge (R 3). Both sides agreed that the issue involved was dispositive of the case (R 7-8). The plea was accepted (R 11) and its terms were imposed by the court (R 11-12, 76-77).

Without opinion, and by a 2-1 vote, the Fourth District Court of Appeal affirmed the order placing Defendant on probation. Thomason v. State, 594 So.2d 310 (Fla. 4th DCA 1992). Judge Stone wrote a specially concurring opinion and Judge Farmer wrote a dissenting opinion. On rehearing, the court certified the following question as one of great public importance:

> UNDER WHAT CIRCUMSTANCES MAY A TRIAL JUDGE SUA SPONTE DECLARE A MISTRIAL, FREE OF DOUBLE JEOPARDY CONSEQUENCES, BASED ON HIS SUBJECTIVE IMPRESSION THAT DEFENSE COUNSEL IS NOT COMPETENT TO PROCEED?
>
> 594 So.2d at 318.

This proceeding follows.

POINT INVOLVED

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AND FOR DISCHARGE ON DOUBLE JEOPARDY GROUNDS, WHEN A MISTRIAL HAD BEEN DECLARED OVER THE OBJECTION OF BOTH DEFENDANT AND THE STATE IN A SITUATION IN WHICH (1) THE TRIAL COURT'S CONCLUSION THAT DEFENDANT'S COUNSEL WAS NOT CAPABLE OF PROCEEDING WAS CONTRADICTED BY COUNSEL'S PRESENCE IN THE COURTROOM, RESPONSIVENESS TO THE SITUATION AND ASSURANCES TO THE COURT AND BY THE FACT THAT A DOCTOR HAD ASSURED COUNSEL THAT SHE WAS CAPABLE OF PROCEEDING; (2) DEFENDANT PERSONALLY INDICATED A DESIRE TO PROCEED; (3) THE STATE'S ALREADY WEAK CASE HAD BEEN DEVASTATED BY THE ALLEGED VICTIM'S TESTIMONY THAT SHE IDENTIFIED THE ALLEGED WEAPON BY THE INITIALS PLACED ON IT BY A POLICE OFFICER SUBSEQUENT TO THE ALLEGED OFFENSES, AND; (4) THE TRIAL COURT FAILED TO CONSIDER OTHER ALTERNATIVES OR HOLD AN EVIDENTIARY HEARING?

SUMMARY OF ARGUMENT

Defendant contends that the trial court's proceeding further after the declaration of a mistrial over his objection and that of the State violated his right under the United States and Florida Constitutions not to be placed twice in jeopardy.

A mistrial declared under the circumstances of this case must be justified by objective factors and is proper only when no other alternative exists. The trial court here relied upon its own subjective impressions and not upon appropriate objective factors.

There simply existed no manifest necessity for the mistrial, as there must be in order for a defendant to be retried after a mistrial is declared over his objection.

The trial court here declared the mistrial because of its concern for the health of Defendant's counsel. This action was taken despite the fact that counsel was present in the courtroom; was responsive to the questions and comments of the court, the prosecutor and the witness; and assured the court that she was ready to proceed and that a doctor who was prepared to speak to the court by phone had told her that she was capable of proceeding.

Moreover, at the time the mistrial was declared, Defendant personally indicated his satisfaction with his counsel and his desire to proceed, a desire that is more than understandable in light of the fact that the State's case, a weak one to begin with, was devastated by the alleged victim's testimony that she recognized the knife allegedly used by Defendant by the initials on its handle, initials placed on the knife hours after the alleged offenses by the police officer that impounded it.

Given the facts of this case, there existed insufficient evidence to conclude that a manifest necessity existed for a mistrial. The trial court's action denied Defendant his valued right to have his trial completed by a particular tribunal and was taken without the consideration of other alternatives that must be employed before it is appropriate to declare a mistrial over a defendant's objection and without conducting an evidentiary hearing.

Thus, the trial court erred in its declaration of a mistrial and further proceedings beyond that point constituted double jeopardy.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AND FOR DISCHARGE ON DOUBLE JEOPARDY GROUNDS, WHEN A MISTRIAL HAD BEEN DECLARED OVER THE OBJECTION OF BOTH DEFENDANT AND THE STATE IN A SITUATION IN WHICH (1) THE TRIAL COURT'S CONCLUSION THAT DEFENDANT'S COUNSEL WAS NOT CAPABLE OF PROCEEDING WAS CONTRADICTED BY COUNSEL'S PRESENCE IN THE COURTROOM, RESPONSIVENESS TO THE SITUATION AND ASSURANCES TO THE COURT AND BY THE FACT THAT A DOCTOR HAD ASSURED COUNSEL THAT SHE WAS CAPABLE OF PROCEEDING; (2) THE DEFENDANT PERSONALLY INDICATED A DESIRE TO PROCEED; (3) THE STATE'S ALREADY WEAK CASE HAD BEEN DEVASTATED BY THE ALLEGED VICTIM'S TESTIMONY THAT SHE IDENTIFIED THE ALLEGED WEAPON BY THE INITIALS PLACED ON IT BY A POLICE OFFICER SUBSEQUENT TO THE ALLEGED OFFENSES, AND; (4) THE TRIAL COURT FAILED TO CONSIDER OTHER ALTERNATIVES OR HOLD AN EVIDENTIARY HEARING.

A

OVERVIEW AND CERTIFIED QUESTION

On March 9, 1990, Defendant Roy Dwayne Thomason, who had been incarcerated for the previous 14 and a half months despite having never been convicted of a crime, was just a few hours away from an almost certain acquittal and freedom.

The State's case, an extraordinarily weak one to begin with, had fallen apart during trial. Defendant thus had an extremely strong interest in exercising his right to have his case decided by the impaneled jury.

Defendant was denied that right, however, by the trial court's sua sponte declaration of a mistrial over the objection of Defendant himself, Defendant's attorney and the prosecutor. The court's action was based on its own subjective impression that Defendant's counsel, who had become ill during the trial, was not

competent to proceed. The mistrial was declared despite the fact that Defendant's counsel was present in the courtroom, and was responsive to the questions and comments of the court, the prosecutor and the witness. It was declared despite the despite the fact that Defendant's counsel assured the court that she was ready to proceed. It was declared despite the fact that Defendant's counsel indicated to the court that a doctor who was prepared to speak to the court by telephone had told her that she was capable of proceeding.

The fact that the court disregarded these objective factors and relied on its own subjective impressions led to the certified question in this case:

> UNDER WHAT CIRCUMSTANCES MAY A TRIAL JUDGE SUA SPONTE DECLARE A MISTRIAL, FREE OF DOUBLE JEOPARDY CONSEQUENCES, BASED ON HIS SUBJECTIVE IMPRESSION THAT DEFENSE COUNSEL IS NOT COMPETENT TO PROCEED?

It does not appear that any Florida case has addressed this question on that any Florida case has even dealt with a double jeopardy issue arising from a mistrial declared due to the illness of defense counsel.

Nonetheless, consideration of the basic principles underlying the right not to be twice placed in jeopardy, cases from other jurisdictions and Florida cases dealing with illnesses of trial participants points to the answer expressed at the district court level, Thomason v. State, 594 So.2d 310, 317-318 (Fla. 4th DCA 1992), Farmer, J., dissenting, in the dissenting opinion of Judge Farmer.

> To put it directly, the correct legal principle is that a trial judge may not declare a mistrial-- free of double jeopardy consequences-- on the basis of an alleged incapacity of defendant's counsel so near the end of the case where defense counsel is present in the courtroom asserting the ability to proceed, and both the State and the defendant expressly agree on the record that counsel is capable and should proceed. The only exception should be where the record demonstrates without contradiction that the alleged incapacity is objectively verifiable. The alleged inability to proceed may not be based solely, or even substantially, on the subjective impressions of the trial judge, and it must be such that it cannot be cured or avoided by another alternative. The [United States v.] Perez [9 Wheat. 579, 6 L.Ed 165 (1824)] standard cannot properly be applied to abort a criminal trial over the collective objection of everyone, where the "disabled" lawyer is in the courtroom proclaiming the readiness to proceed and none of the alternatives to a mistrial were considered or tried.

Applying this standard to the present case compels the conclusion that the mistrial should not have been declared and that Defendant was entitled to discharge on double jeopardy grounds.

B

GENERAL CONSIDERATIONS

It is well settled that when a mistrial is declared over the objection of a defendant, it constitutes double jeopardy to retry that defendant unless there existed a "manifest necessity" for the mistrial. United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1975); United States v. Perez, 9 Wheat. 579, 6 L.Ed 165 (1824). The power to declare a mistrial under such circumstances "ought to be used with the greatest caution, under

urgent circumstances, and for very plain and obvious causes." Id., 9 Wheat. at 580, 6 L.Ed at 165.

This is because the constitutional protection against being twice placed in jeopardy embraces a defendant's valued right to have his trial completed by a particular tribunal. Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); United States v. Dinitz, supra; Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949).

When a mistrial is declared over a defendant's objection, the burden of showing that the mistrial was justified by manifest necessity is a heavy one. Parce v. Byrd, 533 So.2d 812 (Fla. 5th DCA 1988), rev. denied, 542 So.2d 988 (1989); State v. Collins, 436 So.2d 147 (Fla. 2d DCA 1983), rev. denied, 434 So.2d 889 (Fla. 1983); Spaziano v. State, 429 So.2d 1344 (Fla. 2d DCA 1983). Any doubt must be resolved "in favor of the liberty of the citizen." Downum v. United States, 372 U.S. 734, 738, 83 S.Ct. 1033, 1035, 10 L.Ed.2d 100, 104 (1963), quoting from United States v. Watson, 28 Fed.Cas. 499 (1868). A trial court's discretion is subject to the test of reasonableness which requires a determination of whether there is logic and justification for the result. Parce v. Byrd, 533 So.2d 812, 814 (Fla. 5th DCA 1988), rev. denied, 542 So.2d. 988 (Fla. 1989).

In the present case, the heavy burden of showing that a mistrial was justified cannot be met. This is true for a number of reasons.

C

DEFENDANT'S VALUED RIGHT TO HAVE HIS TRIAL COMPLETED BY A PARTICULAR TRIBUNAL

In the first place, it is clear that Defendant personally wanted the trial to proceed. Moreover, not only did he express complete satisfaction with his attorney's condition, but he also had a compelling reason for wanting the case to be decided by the impaneled tribunal. The alleged victim testified that she was able to identify the knife that was allegedly used by the initials that she observed on it (T 266-269). The initials about which she testified, however, had been placed on the knife hours after the alleged crime by the police officer who impounded it (T 512-513). Thus, the credibility of the State's key witness had been severely damaged and Defendant had a strong interest in having the case decided by the jury that heard the witness' testimony in this regard, testimony that would not likely be repeated in a subsequent trial.

Defendant's interest in this regard was accentuated by the fact that the State's case was far from strong. It depended on the credibility of the alleged victim. That credibility was undermined not only by her testimony regarding the knife, but also by the testimony of Doctor Sudha Doshi. Doctor Doshi, who examined the alleged victim on the day of the alleged offense at the Broward County Sexual Abuse Treatment Center (T 532-533), testified that the tears she found in the alleged victim's vagina were old tears, not tears that occurred on that day (T 534-535), that she found no sperm (T 540), that the alleged victim had no abrasions or bruises

in the area of her genitalia or her thighs (T 536) and that the scratch mark on the alleged victim's shoulder was four or five days old (T 536).

Moreover, the alleged victim's statement to the police that the Defendant ejaculated in her mouth and that she then spit into an article of clothing (T 562) was undermined by the fact that no seminal fluid was found on the clothing (T 459) or on the swabs from the alleged victim's throat (T 554).

Although the court's decision to grant a mistrial appears to have been based on a commendable concern for the welfare of Defendant's counsel and for the ensuring that Defendant received effective representation in the waning stages of the trial, the choice between a mistrial to deal with those concerns and the valued right to have a trial completed by a particular tribunal is one that Defendant, not the court, had a right to make. Under such circumstances, the important consideration for purposes of double jeopardy is that a defendant retain primary control over the course to be followed. Dinitz, supra, 424 U.S. at 609, 96 S.Ct. at 1080; 47 L.Ed.2d at 275. Defendant here was not given that control, even though he made his wishes very clear and even though he had an extraordinary reason for wanting to proceed.

It should also be noted with regard to the trial court's possible motive that such a factor is accorded "little or no weight" in a double jeopardy analysis. Whitfield v. Warden of Maryland House of Connection, 486 F.2d 1118, 1123 (4th Cir. 1973), cert. denied, 419 U.S. 876, 95 S.Ct. 139, 42 L.Ed.2d 116 (1974). See also People v. Gardner, 37 Mich.App. 520, 195 N.W.2d 62, 68

(1972) ("It is not enough that a mistrial in the instant case was declared for the benefit of the defendant. We must, instead, look at the circumstances of the case to determine whether the trial judge correctly determined in a 'scrupulous exercise of judicial discretion,' that a manifest necessity prevented the ends of justice from being served by a continuation of the proceeding."). Moreover, the question of what "benefits" a defendant is frequently debatable and therefore must be determined by the defendant, not by the judge. See Lovinger v. Circuit Court of the 19th Judicial Circuit, 845 F.2d 739, 744 (7th Cir. 1988), cert. denied, 488 U.S. 851, 109 S.Ct. 136, 102 L.Ed.2d 108 (1988) ("We cannot presume that the defense deems itself hurt rather than helped...."); United States v. Sanders, 591 F.2d 1293, 1298 (9th Cir. 1979) ("The judge's reason for declaring the mistrial was to avoid 'prejudice as far as the defendant is concerned'.... Yet,... it is more likely that he would have benefitted rather than suffered....").

The court's declaration of a mistrial therefore denied Defendant his valued right to have his trial completed by a particular tribunal. Instead, the court made the decision that its subjective impression took precedence over Defendant's right in this regard and as a result Defendant was not allowed to have an attorney in whom he had confidence finish the trial of his case before a jury that he wanted to determine his fate.

D

INSUFFICIENT EVIDENCE

Additionally, Defendant maintains that there was not sufficient evidence before the court to justify the conclusion that counsel was not capable of proceeding.

Defendant's counsel was present in the courtroom. She was responsive to the questions and comments of the court, the prosecutor and the witness. She assured the court that she was ready to proceed and that a doctor who was prepared to speak to the court by phone had told her that she was capable of proceeding. It is also of significance that the trial was almost over and that whatever the physical condition of Defendant's counsel, there was not that much longer that she would have to function.

The court's reliance on its own subjective impressions, the highly equivocal observations of one witness and a phone call to the court's secretary from the secretary of a doctor who had not even treated Defendant's counsel during the time period in question simply is insufficient to justify the court's action. It is doubtful that the factors the court relied upon would satisfy even a preponderance of the evidence test, must less meet the heavy burden required to demonstrate manifest necessity for a mistrial. Parce v. Byrd, supra; State v. Collins, supra; Spaziano v. State, supra.

E

THE FAILURE TO CONSIDER OTHER ALTERNATIVES

Obviously, if there are reasonable alternatives to declaring a mistrial, there is not a manifest necessity for a mistrial. In the present case, whatever concerns the court had could have been accomplished by the use of the procedure suggested by the prosecutor, a postponement. This procedure also would have preserved Defendant's right to be tried by the impaneled jury. Additionally, in light of the presence of Defendant's counsel in the courtroom, the court could have simply resumed trial and observed whether Defendant's counsel was in fact functioning appropriately.

The principle that a court must consider all alternatives before declaring a mistrial is one that has been applied in Florida cases dealing with the illness of trial participants other than defense counsel.

In Bryant v. Stickley, 215 So.2d 786 (Fla. 2d DCA 1968), the court dealt with a situation in which a mistrial was declared without the defendant's consent when the prosecutor was hospitalized for bleeding ulcers. The appellate court found that retrying the defendant would have constituted double jeopardy in light of the fact that the trial court did not determine how long the prosecutor would be absent and whether that time period was sufficiently short that the trial could have continued after a brief delay. A similar conclusion was reached in Ostane v. Hickey, 385 So.2d 110 (Fla. 3d DCA 1980), when the trial court failed to

determine whether a recess would have alleviated the problem that resulted when an essential State witness was stabbed in front of the courthouse during the trial.

Certainly, the need to consider a postponement here was even greater than was the need in Bryant v. Stickley and Ostane v. Hickey. In each of those cases, the individual in question was hospitalized. Here, Defendant's counsel was present and able to answer any questions about her condition. Moreover, she had a phone number that the court could have used to call the doctor who treated her and who indicated that she could proceed. Additionally, she told the court that if she was given 30 minutes, she could attempt to locate the other doctor who treated her so that the court could also speak to him.

A conclusion similar to that of these Florida cases was reached in Dunkerley v. Hogan, 579 F.2d 141 (2d Cir. 1978), cert. denied, 439 U.S. 1090, 99 S.Ct. 872, 59 L.Ed.2d 56 (1979). In that case, on the third day of trial, the defendant was hospitalized with a 15% collapsed lung. Three doctors indicated that hospitalization would be required for a period of from seven to 10 days. The defendant's counsel suggested as one alternative suspending the trial for the seven to 10 day period, following which the trial could be resumed or the situation reviewed to determine whether a mistrial would be appropriate. The trial court rejected the defense position and on its own motion declared a mistrial. The federal appellate court concluded that since there was no reason apparent in the record why the requested continuance

would have been unfeasible or unfair, the defendant was entitled to habeas corpus relief on double jeopardy grounds.

It appears that only when a delay would be so extensive as to disrupt the truth finding process should a court declare a mistrial over objection rather than a continuance as the result of an illness of a trial participant. For instance, in United States v. Von Spivey, 895 F.2d 176 (4th Cir. 1990), the defendant's counsel failed to appear due to illness. After an adjournment of six days, the court declared a mistrial upon learning that the defendant's counsel was hospitalized and that it appeared unlikely that he would return in the foreseeable future. Likewise, in United States v. Wayman, 510 F.2d 1020 (5th Cir. 1975), cert. denied, 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67 (1975), the defense attorney was injured in an automobile wreck during the third week of trial. Five days later, a mistrial was declared when it was evident that the attorney, who was still in the hospital, would not recuperate.

The distinction between cases in which a reasonable delay can solve a problem and those in which a lengthy or indeterminable delay would be required is clear. The present case is certainly one in which whatever problems that might have existed could have been remedied by the postponement suggested by the prosecutor. Accordingly, the declaration of the mistrial was inappropriate.

F

THE FACT THAT DEFENDANT COULD HAVE PROCEEDED UNDER LESS FAVORABLE CIRCUMSTANCES DEMONSTRATES THE LACK OF A MANIFEST NECESSITY

At the time the issue regarding the physical condition of Defendant's counsel's arose, Defendant could have simply chosen to exercise his right under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), to represent himself. Under such circumstances, the trial would have proceeded. Clearly, Defendant would have been better served by proceeding while represented by his counsel, even if his counsel was not functioning at 100 percent, than he would have been by representing himself. Thus, if the situation in which he would have represented himself would not constitute a manifest necessity for a mistrial, as it clearly would not under Faretta, the conclusion is compelled that there was no manifest necessity for declaring a mistrial rather than allowing the trial to proceed with Defendant represented by his counsel.

G

THE TRIAL COURT'S FAILURE TO HOLD AN EVIDENTIARY HEARING

The lack of a manifest necessity and the appropriateness of a reversal of the judgment in this case is also demonstrated by the opinion in Kleinfeld v. State, 568 So.2d 937 (Fla. 4th DCA 1990), rev. denied, 581 So.2d 167 (Fla. 1991). That case dealt with a situation in which the defendant wished to represent himself. After first agreeing to such representation, the trial court

reversed its ruling and the defendant's request to represent himself was denied due to reasons of health. Although earlier proceedings had been concerned with the defendant's health, there was no evidence presented at the hearing at which the trial court determined that the defendant would be represented by counsel. On appeal from the subsequent conviction, the court reversed, holding that before a defendant's health can form the basis to preclude him from representing himself, an evidentiary hearing must be held.

The reasoning in Kleinfeld is directly analogous to the present case. The right to continued representation by an attorney and the right to have a trial decided by a particular tribunal are no less basic rights than the right to self-representation. The reasons for requiring an evidentiary hearing on the issue of health are equally valid when the health in question is that of a defendant seeking to represent himself or when it is that of an attorney who has already represented a defendant during three days of trial.

The decision of the trial court to rely on his own medical judgment in the face of assurances to the contrary, rather than to hold the evidentiary hearing contemplated by Kleinfeld, therefore also demonstrates the lack of a manifest necessity for mistrial.

H

THE ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND FOR DISCHARGE

The order denying Defendant's motion simply ignores some of the most significant facts relevant to the issue raised by the motion.

Perhaps most significantly, the order does not even mention the fact that Defendant's attorney, as an officer of the court, indicated to the court that she was ready to proceed, that one of the doctors who had treated her had indicated that she was fine, that doctor had provided her with his phone number for the court to speak with him and that she was willing to attempt to get in touch with the other doctor.

Additionally, the order denying the motion fails to take into account the fact that Defendant's counsel was responsive to the questions and comments of the court, the prosecutor and the witness. In fact, Defendant's counsel was lucid to the point that even the prosecutor repeatedly expressed the opinion that if the court ordered a mistrial, double jeopardy would preclude a retrial, another fact that order denying the motion did not consider.

Moreover, the order denying the motion gives little weight to a factor of great significance, Defendant's personally expressed desire to proceed with his attorney before the jury that had been impaneled to try his case. Indeed, the order does not even address the factor that the Supreme Court of the United States recognized as being the most important consideration in issues of this nature,

the right of a defendant to retain primary control over the course to be followed. See Section C of this argument.

The order makes the conclusory statement that the trial court "considered available alternatives (R 60)." This conclusion is wholly unsupported by the record. As detailed in Section E of this argument, the trial court could have telephoned the doctor that was available to speak with him, could have had Defendant's counsel locate the other doctor, could have, as the prosecutor requested, postponed the case or could have, particularly in light of the fact that the trial was in its waning stages, resumed the trial and revisited the issue if problems arose. There is no reason apparent from the record, argued by the prosecution or evident from the court's order why one or more of these alternatives could not have been utilized. Indeed, the order even recognizes another court may have exercised its discretion by postponing the case (R 60). Under the authorities discussed in Section E of this argument, the existence of these alternatives demonstrates the lack of manifest necessity and the merit of Defendant's motion, factors that cannot be negated by an order with a simple conclusory sentence, unsupported by the record.

Rather than consider the factors discussed above, the order relied upon the court's conclusions and interpretations of various portions of the transcript. Even accepting these conclusions and interpretations at face value, they cannot outweigh the previously discussed considerations that are not addressed in the order and that compel the conclusion that it would constitute double jeopardy to retry Defendant.

Defendant further maintains that the conclusions and interpretations set forth in the order should not be accepted at face value, as many of these matters cannot be supported by the record, are taken out of context or are irrelevant. An analysis of the portions of the order that set forth such conclusions and interpretations demonstrates this fact.

Paragraph one of the order states that the trial court requested medical assurances that Defendant's counsel would be able to continue with the trial, and concludes that "[t]hose assurances did not come (R 59)."

In fact, the assurances did come. Counsel informed the court that such assurances had been given by one of the two doctors and even told the court that she had the telephone number for the court to use to speak with the doctor if the court desired (T 642-643). Counsel further indicated that she would attempt to also reach the second doctor if the court desired (T 642-643). Clearly, therefore, the assurances requested by the court were provided. Indeed, the fact that the trial court did not call the doctor and the fact that the trial court in stating its reasons for declaring the mistrial (T 657-658) did not refer to a lack of assurances but only to courtroom observations makes it clear that the trial court felt that its request for assurances was in fact complied with.

Paragraph two of the order reads as follows:

> On March 9, 1990, Ms. Morrison [Defendant's attorney] appeared in court in an agitated state with a hospital band on her wrist. (T 614). She mistakenly called the Judge a doctor and said that she was mistaking her judges and her doctors. (T 605). She mentioned that there was no easy way out, (T

> 609), and she did not notice that her client was in the courtroom during her initial ten minute presentation to the Court. (T 611).
>
> (R 59)

These events must be placed in the context of the stipulated facts set forth in the motion, facts which are not referred to in the order and which include:

> . . . the fact that prior to the hearing beginning, Defendant's counsel had noticed that Defendant was not present and had asked that he be brought immediately to the courtroom (T 611); the fact that Defendant's counsel left the courtroom after the request, engaging in what the court described as a "flurry of activity outside the courtroom (T 614)," in an effort to obtain the medical assurances the court wanted (T 611, 642-643); and the fact that Defendant's counsel came back into the courtroom when the case was called and therefore immediately began addressing the court without looking to the box, which was behind her and which was where Defendant was located (T 611, 638, 655).
>
> (R 49)

Given this context, several things become clear. First, having come directly from several telephone calls to and about doctors and having begun addressing the court immediately upon entering the courtroom, little, if any, significance can be given to a slip of the tongue in referring to the court as a doctor. Any doubt in this regard is put to rest by the fact that the mistake was not repeated and the context of counsel's statements throughout the hearing plainly reflected that she realized she was speaking to a judge. These same factors demonstrate that the reference to confusing her judges and her doctors, made immediately after the doctor reference, was merely a humorous aside and not a statement of medical condition, as the order seems to imply.

It is also clear that in light of the fact that counsel had to immediately address the court upon her entrance to the courtroom, it was not unreasonable for her not to notice Defendant's presence, particularly since Defendant had not been present when she was last in the courtroom and since Defendant was located behind her in the courtroom. Indeed, the fact that when she had been in the courtroom earlier that morning, she had noted Defendant's absence and asked that he be brought to the courtroom demonstrates a full awareness of the circumstances surrounding her.

The statement that there was no easy way out was made in opposition to the declaration of a mistrial and was an absolutely accurate statement. Under the facts of this case, the "easy way out," the declaration of a mistrial, was not available due to double jeopardy considerations. Unfortunately, the trial court did not listen to this warning and declared the mistrial that has led to this proceeding.

The fact that counsel had the hospital band on her wrist demonstrates little more than the fact that she had been to the hospital the day before and had not gotten around to removing it, hardly unreasonable in light of the need to consult with Defendant and to prepare for the anticipated resumption of trial.

The reference to counsel being in an agitated state is a mere conclusion that is made without any facts offered in support.

Paragraph three of the order reads as follows:

> The Judge was presented information from Dr. Ginsburg that Ms. Morrison was under stress and had a history of heart problems. (T 623). Dr. Israel was quoted as saying that

she needed to attend to her medical problems. (T 638).

(R 59)

The record reflects that Defendant's counsel informed the court that Doctor Ginsburg had indicated that she had been under a lot of stress (T 623), but not that she had a history of heart problems. Rather, counsel followed up the comment regarding stress by explaining its source, the fact that her mother needed heart surgery and the fact that her father had died from such a condition (T 623-624).

The interpretation in the order of the transcript reference to Doctor Israel cannot withstand scrutiny either. The order refers to a portion of the transcript in which the trial court stated, "This Court this morning had contact from the office of one Doctor Israel which office indicated that they thought that she needed to attend to her medical needs at this time (T 637-638)."

This statement must be interpreted in light of the stipulated facts set forth in the motion, which noted that the contact the court had had with Doctor Israel's office was a phone call the court's secretary had received from the secretary of Doctor Israel, who had known Defendant's counsel for years, but who had not treated her during the few days prior to the hearing (R 47). Indeed, Doctor Israel had been in California at the time and was not due back until the following Monday (T 628). Plainly, such a communication has little weight when compared with assurances from a doctor that had treated Defendant's counsel the day before.

Paragraph four of the order finds that the trial court was concerned about Defendant's counsel's health, the integrity of the system and the effect of the stress of a trial on Defendant's counsel.

These concerns are indeed commendable, but are of "little or no weight" in a constitutional analysis. Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118, 1123 (4th Cir. 1973), cert. denied, 419 U.S. 876, 95 S.Ct. 139, 42 L.Ed.2d 116 (1974). After all, the impact on a defendant is the same regardless of the reason why a mistrial is declared. "Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action." United States v. Jorn, 400 U.S. 470, 483, 91 S.Ct. 547, 556, 27 L.Ed.2d 543, 555 (1971). Moreover, with regard to the impact of the stress of a trial, most of that stress had already impacted, as the trial was nearly over. Certainly, counsel would be exposed to a greater amount of stress in a complete retrial than she would have been by completing the final stages of the initial trial.

Paragraph five of the order reads as follows:

> During the March 9, 1990, hearing, Ms. Morrison threatened to sue her doctor (T 629) and otherwise exhibited an inappropriate affect in the courtroom. (T 639). Witness and attorney, Hilliard Moldof, testified that her behavior was somewhat inappropriate (T 654).
>
> (R 59)

The statement about suing the doctor was made in the context of noting that she had been unable to see or speak with Doctor Israel and expressing her displeasure with Doctor Israel's

secretary for, as previously discussed, communicating with the court under such circumstances (T 628-629). The very fact that the order under review relies on that inappropriate communication demonstrates that counsel was fully justified in being displeased with the actions of Doctor Israel's office. Her displeasure in this regard, however, in no way demonstrates an inability to proceed. Instead, it reflects the ability to recognize the nature of one of the factors the court was discussing.

The reference to counsel otherwise exhibiting an "inappropriate affect" in the courtroom is another conclusion that is not supported by reference to any facts.

The reference to Mr. Moldof testifying that counsel's behavior "was somewhat inappropriate" is taken out of context. Mr. Moldof's actual statement was that "I thought that perhaps Ms. Morrison was not realizing that she was a bit inappropriate in the sense of not recognizing the client was in the courtroom making an appearance in front of the Court (T 655; emphasis added).

First of all in this regard, Mr. Moldof's testimony, as demonstrated by the underlined portions of the preceding quote, was significantly less definite than the characterization contained in the order. Second, it referred only to the fact that Defendant's counsel did not realize Defendant was present, a fact that has been previously explained in this brief in light of circumstances apparently unknown to Mr. Moldof.

With regard to Mr. Moldof's testimony, it should also be noted that counsel represented to the court that persons from Defendant's counsel's office who were present in the courtroom felt that

counsel was competent to go forward (T 629). For whatever reason, the court, who, after a recess and without any notice, called Mr. Moldof as a court's witness, chose not to also call the witnesses that had been represented to the court as believing that counsel was competent to proceed.

Paragraph six of the order reads as follows:

> At that hearing, Judge Grossman found that she had been lost and somewhat disoriented during the trial. (T 636). One incident of an out-burst in the hall during a recess in the trial was noted where Ms. Morrison told an alleged rape victim's mother that the victim was a liar. (T 647). Additionally, Judge Grossman expressed concerns that the record might support a claim of ineffective assistance of counsel. (T 629).
>
> (R 59)

The concerns expressed in this paragraph all deal with matters that occurred prior to the time that counsel encountered her physical problems. They are therefore of no relevance. The issue was whether counsel was, at the time of the hearing on March 9, 1990, physically capable of proceeding, not whether she had rendered effective representation prior to that point. The transcript references in the order fail to give any indication that any problems that might have existed with regard to these matters were in any way likely to continue had the trial resumed following the medical treatment counsel had received.

Nonetheless, to whatever extent the concerns expressed in paragraph six of the order are relevant, several factors should be noted. First of all, the trial court stated only that counsel "seemed at times during her questioning and particular cross

examination of witnesses to get lost and become somewhat disoriented in handling of material (T 636; emphasis added)," not, as indicated in the order, that she had been lost and somewhat disoriented during trial. Again, the comment amounts to no more than a conclusory statement, supported by no specifics. Additionally, there is not even a conclusory statement that counsel was affected in any substantive way, but only in how she handled her material.

The incident regarding the mother of the alleged victim occurred after the second day of trial. The last witness of the day, R[redacted] E[redacted] had indicated under oath that the State's key witness, the alleged victim, [redacted], had, during the trial, been talking to both R[redacted] E[redacted] and to [redacted]'s mother, a possible witness, about the case (T 306-315). After legal argument (T 318-327), the court directed Defendant's counsel and the prosecutor to make inquiry of each witness regarding the matter and stated that he would entertain any appropriate motions the following morning (T 327).

The following morning, Defendant's attorney and the prosecutor had different versions of what had occurred the preceding evening (T 330-346). Defendant's counsel indicated that she asked [redacted] whether she spoke to any of the witness and that she responded in the negative (T 337). Counsel indicated that she asked again and received the same answer (T 337). Counsel then told the prosecutor that based on that answer, she wanted [redacted] in court the following morning, because they all knew that her response was not true and that she had in fact spoken to other

witness (T 338). At that point, the witness indicated that she had only talked about a couple of issues (T 338). She then said that she had only talked to her mother (T 338). She then admitted to one of the conversations that R[redacted] E[redacted] had testified about (T 338). During this conversation, [redacted]s parents were making hissing noises and comments. After awhile, counsel responded to the comments by saying that she was sorry, but that she didn't believe their daughter (T 339).

The prosecutor offered a different version of the events, indicating that Defendant's counsel told the parents that there were serious credibility problems and that nobody believed their daughter (T 332) and that the parents became upset and said that if you're saying that my daughter is lying, you tell that to her therapist (T 334).[2]

The conflicting versions of the events were never resolved by the court, but the court did not rebuke or take any action against Defendant's counsel, so it is apparent that the matter was not of great concern to the court at the time it happened. In examining the record, it seems apparent that this was a situation in which the parties simply took a different view of the nature of comments made in an appropriate, and, indeed, court ordered, setting. It was not, as the order implies, a situation in which counsel

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[2]The comment about the therapist led to a legal issue regarding the State's knowledge of that fact and the question of whether psychological records should have been provided in discovery (T 341-346), an issue that is itself irrelevant to the present proceeding. The fact that Defendant's counsel recognized and raised the issue, however, demonstrates her awareness and ability to function appropriately at a time that was apparently deemed significant by the court in its denial of Defendant's motion.

gratuitously directed inflammatory comments to the mother of the witness. The question of whether counsel may or may not have expressed herself in stronger language than was needed is an issue totally independent of the question of whether there existed a manifest necessity for a mistrial. The reference to this matter in the order is therefore both irrelevant and taken out of context.

The trial judge's comment regarding a claim of ineffective assistance of counsel is another example of a conclusory comment with no effort to support it by reference to any specific facts. In order for a claim of ineffective assistance of counsel to prevail, there must be a showing of a specific act or omission of counsel which constituted a substantial and serious deficiency measurably below that of competent counsel and a reasonable probability of a different result had the omission or act not occurred. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Middleton v. State, 465 So.2d 1218 (Fla. 1985). There is not even a hint that either of these two criteria can be established here, so the comment regarding ineffective assistance of counsel, even assuming it had anything to do with counsel's physical condition on March 9, 1990, should be given no weight whatsoever. Indeed, if the trial had ended at the time Defendant's counsel needed medical attention, and Defendant had been convicted, a subsequent ineffective assistance of counsel claim, based solely on the facts set forth in the trial court's order, would not even warrant an evidentiary hearing.

Moreover, it is inappropriate for a trial court to interfere with a defendant's rights based on that court's own subjective

belief that counsel is ineffective. This principe is demonstrated by the decision in Finkelstein v. State, 574 So.2d 1164 (Fla. 4th DCA 1991).

In Finkelstein, the Defendant's attorney, a Chief Assistant Public Defender, asked the trial court to delay a suppression hearing until after the court determined a pending motion to determine the defendant's competency to proceed. When the court declined to do so, the attorney took the position that he could not properly proceed until final determination of the defendant's competency.

The trial court then ordered that the attorney be removed from the case and, over the defendant's personal objection, appointed another attorney to represent the defendant. The trial court entered an order which stated that the initial attorney's refusal to proceed denied the defendant his Sixth Amendment right to counsel. The order went on to state, "The Court has the obligation to insure that an accused has a right to competent counsel. Where counsel's performance falls below that standard the Court has the inherent authority and the duty to remove that counsel and to appoint competent substitute counsel." Id., at 1167.

The appellate court granted certiorari in Finkelstein, concluding that the order removing the initial attorney was a departure from the essential requirements of law.

The decision in Finkelstein is directly analogous to the present case. If it is inappropriate for a trial court to rely on it subjective belief that an attorney is providing ineffective representation as a basis for removing that attorney from a case

over a defendant's objection, it is equally inappropriate for a trial court to rely on that factor in declaring a mistrial over a defendant's objection. Further, this reasoning is particularly applicable to the present case, because the trial court here not only declared a mistrial, but also ordered that counsel, who had been appointed, be removed from the case and that the Public Defender handle the matter (T 658).

See also Cross v. State, 813 P.2d 691, 696 (Alaska App. 1991) (Manifest necessity did not "arise from the mere possibility that Cross might, at some later point, claim ineffective assistance of counsel.").

It is therefore clear that the factual conclusions and interpretations relied upon in the order, which, as previously discussed, are insufficient on their face to outweigh the facts detailed in this motion and ignored in the order, are themselves severely flawed. When viewed in context, they provide little support for the finding that a manifest necessity existed for the declaration of a mistrial and they in now way undermine the arguments set forth in this motion.

Discussion of one other aspect of the order is also called for. The order cites to State ex rel. Williams v. Grayson, 90 So.2d 710 (Fla. 1956) and Reyes v. Kelly, 204 So.2d 534 (Fla. 2d DCA 1967) for the principle that "[o]ne example of a manifest necessity would be the illness of a judge, accused or juror (A 39)." Those cases, however, both specifically limit the example cited in the order to "the illness of the judge, the accused, or a juror requiring the absence of any of them from the court." State

ex rel. Williams v. Grayson, supra, 90 So.2d at 713; Reyes v. Kelly, supra, 204 So.2d at 537 (emphasis added). Here, as detailed previously, at time the mistrial was declared, counsel was present and prepared to proceed. The decisions in State ex rel. Williams v. Grayson and Reyes v. Kelly are thus inapplicable to the present case. Further, the reasoning of those cases is specifically limited to the judge, the accused or a juror and does not extend to defense counsel. When defense counsel is ill, any prejudice that might occur by proceeding would attach solely to a defendant and he or she should therefore be entitled to weigh that prejudice against the benefit of proceeding. With the situations discussed in the cases cited in the order, even the absence of the defendant in situations such as one in which the prosecution wants a witness to make an identification, prejudice could attach to either the defendant or the prosecution and therefore other considerations must be taken into account. Finally, with regard to the cases cited in the order, it should be remembered that they do not change the requirement discussed previously in this brief that the court consider other alternatives, including delaying the proceedings, a requirement that was not met here.

I

CONCLUSION

The foregoing argument and authorities demonstrate clearly that when a defense counsel becomes ill, the factors to be considered in deciding when a trial court may sua sponte declare a mistrial, free of double jeopardy consequences, are objective, rather than subjective in nature. It is, as stated in the dissenting opinion of Judge Farmer in the appellate court, only when counsel's alleged incapacity is objectively verifiable and when no other alternative is available that a mistrial may be properly declared. See also United States v. Bates, 917 F.2d 388, 395 (9th Cir. 1991)("Determining that a mistrial was proper and retrial permissible because reversal was certain is an objective, not subjective, inquiry to be based on the record as it existed at the time of the mistrial.").

In the present case, the trial court relied on its own subjective impression, rather than the factors discussed in the authorities cited in this brief. Under the double jeopardy provisions of both the Untied States and Florida Constitutions, proceeding after the declaration of a mistrial constituted double jeopardy. There was plainly no manifest necessity for the declaration of the mistrial and Defendant was deprived of his right to have his trial completed by the tribunal chosen to decide the case, a right that was particularly important under the facts of this case. Further, there was no consideration of clearly viable alternatives to a mistrial. It was therefore error for the trial

court to deny Defendant's Motion to Dismiss and for Discharge. The affirmance of the judgment by the Fourth District Court of Appeal was thus also erroneous and this court should reverse the decision of the appellate court and remand this matter with directions that Defendant be discharged.

Respectively submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was forwarded to: JAMES J. CARNEY, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, on this 23rd day of June, 1992.

ANTHONY C. MUSTO

B:\THOMAS\N.BRF
June 23, 1992

APPENDIX

A joint project of the
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and the University of Florida

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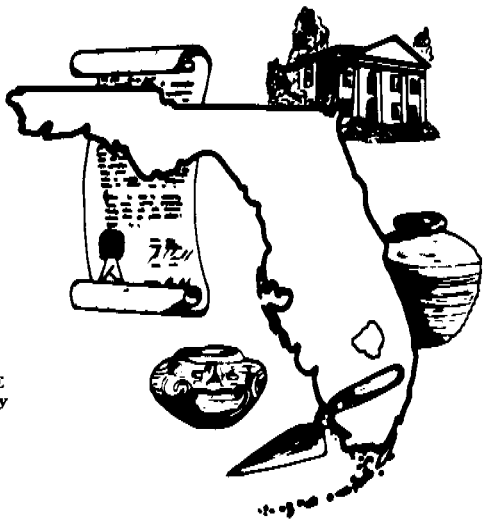
DEPARTMENT OF STATE
Division of Archives, History
and Records Management



IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,705

ROY DWAYNE THOMASON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

APPENDIX

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ORIGINAL

it out. The record here provides a reliable basis for determining that intent.

I would also certify the issue as one of great public importance. If, as the parties assert, the practice of providing photocopies in lieu of multiple originals is widespread, we should have certainty with respect to the ability of a testatrix to revoke a will by destroying the photocopy. The caselaw is unclear, one case holding that destruction of a carbon copy is effective, and another case holding that destruction of a conformed copy is not. *See In re Holmberg's Estate*, 400 Ill. 366, 81 N.E.2d 188 (1948) and *In re Wehr's*, cited in the majority opinion, respectively. The parties have provided us with no Florida decisions concerning similar facts.

OPINION ON REHEARING

PER CURIAM.

We deny the motion for rehearing and rehearing en banc, as well as the motion to strike those motions. However, we agree with appellee that the issue we have decided is one of great public importance, and, accordingly, in order to give the parties an opportunity to seek further review of this issue, we certify the following question to the Florida Supreme Court:

> May a codicil to a will be revoked by destroying a photographic copy if the testator believed that by such act he was destroying the original and the testator intended to revoke the codicil?

ANSTEAD and GUNTHER, JJ., concur.

STONE, J., dissents as to certification but concurs in denial of all post-decision motions.

1. Record page references are omitted.

Roy Dwayne THOMASON, Appellant,

v.

STATE of Florida, Appellee.

No. 90-2796.

District Court of Appeal of Florida, Fourth District.

Jan. 15, 1992.

On Motion for Rehearing March 11, 1992.

Appeal from the Circuit Court for Broward County; Leroy H. Moe, Judge.

Anthony C. Musto, Musto, Zaremba and Rosenthal, Coral Gables, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and James J. Carney, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

WALDEN, JAMES H., Senior Judge, concurs.

STONE, J., concurs specially with opinion.

FARMER, J., dissents with opinion.

STONE, Judge, concurring specially.

I concur in affirming appellant's conviction and sentence. The appellant contends that the trial court's failure to dismiss the charges against him on the grounds of double jeopardy constitutes an abuse of discretion.

The double jeopardy claim arises because of a mistrial declared during an earlier trial on the same charge. The judge declaring the mistrial subsequently entered a recusal order and a second judge, relying on the record, entered the following order [1]:

> 1. Trial commenced on Monday, March 5, 1990. On Wednesday, March 7, 1990, Laura Morrison, defense counsel, collapsed during the trial. She was told to seek medical treatment. The case was reset until 9:30 A.M. on March 8, 1990. On March 8, 1990, Judge Grossman sent

the jury home when he was under the impression that Ms. Morrison again had collapsed both in her office and at the hospital. He requested that he receive assurances from doctors that she would be able to continue with the trial. Those assurances did not come.

2. On March 9, 1990, Ms. Morrison appeared in court in an agitated state with a hospital band on her wrist. She mistakenly called the Judge a doctor and said that she was mistaking her judges and her doctors. She mentioned that there was no easy way out, and she did not notice that her client was in the courtroom during her initial ten minute presentation to the Court.

3. The Judge was presented information from Dr. Ginsburg that Ms. Morrison was under stress and had a history of heart problems. Dr. Israel was quoted as saying that she needed to attend to her medical problems.

4. Judge Grossman was concerned about both Ms. Morrison's personal health and the integrity of the system. The effect of the stress of a trial on Ms. Morrison also concerned the Court.

5. During the March 9, 1990, hearing, Ms. Morrison threatened to sue her doctor and otherwise exhibited an inappropriate affect in the courtroom. Witness and attorney, Hilliard Moldof, testified that her behavior was somewhat inappropriate.

6. At that hearing, Judge Grossman found that she had been lost and somewhat disoriented during the trial. One incident of an outburst in the hall during a recess in the trial was noted where Ms. Morrison told an alleged rape victim's mother that the victim was a liar. Additionally, Judge Grossman expressed concerns that the record might support a claim of ineffective assistance of counsel.

7. After the Defendant expressed confidence in Ms. Morrison, the State asked for a two-week postponement in the trial.

8. The Judge granted a mistrial based upon manifest necessity. There never was a request for self-representation presented to Judge Grossman, and it may have been inappropriate to grant it. *See, U.S. v. Von Spivey*, 895 F.2d 176 (4th Cir.1990).

9. The court has discretion to grant a mistrial over the Defendant's objections, but must use that discretion with greatest caution, under urgent circumstances and for very plain and obvious causes. *U.S. v. Perez*, 9 Wheat, 22 U.S. 579, 6 L.Ed 165 (1824) and *Gori v. U.S.*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed 2d 901 (1961).

10. One example of manifest necessity warranting a mistrial would be the illness of a judge, accused or juror. *Florida ex rel Williams v. Grayson*, 90 So.2d 710 (Fla.1956) and *Reyes v. Kelly*, 204 So.2d 534 (Fla. 2d DCA 1967). Here, the illness of defense counsel should similarly be considered to be compelling. *See, U.S. v. Wayman*, 510 F.2d 1020 (5 Cir.1975). This is particularly so where the Court took testimony and conducted a lengthy hearing concerning the effect of counsel's illness on the trial. *See, U.S. v. Williams*, 411 F.Supp. 854 (S.D.N.Y.1976)....

11. Here, Judge Grossman scrupulously exercised his judicial discretion and was led to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. *U.S. v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L. ed. 2d 543 (1971) and *Raszka v. Burk*, 436 So.2d 255 (Fla. 4th DCA 1983). There is no evidence that Judge Grossman's decision to declare a mistrial was for an improper reason, such as to allow the State to be in a better position on a re-trial of the case.

12. Although any doubt should be resolved in favor of the liberty of the citizen, *see, Downum v. U.S.*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), and although another court may have exercised it's [sic] discretion by granting the State's request for a two-week postponement, particularly in light of the Defendant's statement that he was satisfied with counsel, *See e.g. Dunkerley v. Hogan*, 579 F.2d 141 (2 Cir. [1978] 1987), it can not [sic] be held that Judge Gross-

man, having presided over the trial and having scrupulously and patiently conducted a lengthy hearing on March 9, 1990, abused his discretion by granting a mistrial. *See, U.S. v. Klein*, 582 F.2d 186 (2d Cir.1978) and *Arizona v. Washington*, 434 U.S. [497 at] 508, 98 S.Ct. 824 at 833 [54 L.Ed.2d 717] (1978). Judge Grossman consulted counsel before declaring a mistrail, [sic] considered available alternatives and did not make a precipitate decision. *See, Lovinger v. Circuit Court*, 845 F.2d 739 (7th Cir. 1988).

Although Judge Farmer's dissenting opinion is certainly well-reasoned, I do not agree that *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), is inconsistent with our upholding the discretion of the trial court to grant a mistrial in this case. Although a heavy burden must be met before a trial court may *sua sponte* order a mistrial in the interest of justice, we should be cautious in reversing such a decision where it is founded on such compelling, and undisputed, facts.

The court was confronted initially with a defense counsel shaking so badly that she required the prosecutor's assistance to stand. The next day she collapsed twice. A doctor's office advised the trial court that a postponement was necessary. Appellant's counsel reappeared in court in a noticeably agitated, disoriented, and confused state, still wearing her hospital admission bracelet and even threatening to sue her doctor for revealing her condition to the court. She also seemed to be under the influence of medication and did not appear to recognize the inappropriate nature of her behavior. Further basis for the mistrial decision is detailed in the above order and is reflected in the record.

In sum, the record supports a trial court decision that it had sufficient reason to conclude that justice could not be served without ordering a mistrial. *Cf. Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901, *reh'g. denied*, 368 U.S. 870, 82 S.Ct. 25, 7 L.Ed.2d 70 (1961); *United States v. Perez*, 9 Wheat 579, 22 U.S. 579, 6 L.Ed. 165 (1824); *Goodman v. State ex rel. Furlong*, 247 So.2d 47 (1971).

FARMER, Judge, dissenting.

Just as the last of seven defense witnesses had taken the stand to testify, and over the firmly-stated objections of the prosecutor and the defendant and his lawyer, the trial judge declared a mistrial because of doubts about defense counsel's ability to continue trying the case. When the State proceeded to bring him to trial again, defendant understandably pointed to the first trial and requested that he be discharged, which a new judge denied. He now appeals[2] from his conviction and sentence and argues that the double jeopardy clause of both constitutions precluded a new trial after the first had been declared a mistrial over his objection. I cannot disagree with him.

The trial judge recused himself after granting the mistrial. Defendant's motion to dismiss and for discharge was heard by

2. Defendant previously filed a petition for a writ of prohibition in this court after the mistrial was granted. *Thomason v. Grossman*, case no. 90-2394. We denied the petition without an opinion. The State argues that the denial of prohibition, as the law of the case, requires an affirmance of the denial of the motion for dismissal and discharge. I thoroughly disagree.

It is fundamental that prohibition is an extraordinary *prerogative* writ. *Public Employees Relations Commission v. District School Board*, 374 So.2d 1005 (Fla. 2d DCA 1979). That is simply a fancy way of saying that an appellate court does not have to grant the writ even if a traditional case for prohibition has been shown. There may have been good reasons having nothing to do with the underlying merits of defendant's position for denying the writ, and it would be sheer speculation on our part to try now to divine them. *PERC*, 374 So.2d at 1010. Moreover, the writ was sought on an emergency basis shortly before the start of a second trial—hence without a record, such as we have now. *Fyman v. State*, 450 So.2d 1250 (Fla. 2d DCA 1984).

In *Obanion v. State*, 496 So.2d 977 (Fla. 3d DCA 1986), the Third District refused to bar a constitutional defense (speedy trial) because of a prior petition for prohibition denied without opinion, but the court announced that henceforth summary denials of prohibition would be deemed on the merits unless the denial says otherwise. This court has never adopted such a rule, and I hope it never does—at least as long as prohibition is deemed a matter of mere grace.

a new judge. At the hearing on the motion, the parties stipulated to the following facts:

On March 5, 1990, trial commenced in this cause. Trial continued throughout March 6th and 7th and on the afternoon of March 7th, the State rested. Subsequently that afternoon, seven defense witnesses were called and testified. Six completed their testimony.

At approximately 5:45 P.M., while the seventh defense witness was testifying on direct examination, Defendant's attorney became very white and shaky and was physically supported by the prosecutor. As a result of Defendant's counsel's illness, the court adjourned the proceedings for the evening. The next morning, March 8th, when trial was scheduled to resume, Defendant's counsel collapsed in her office and, when this fact was made known to the court, the jury was excused for the day.

On the following morning, March 9th, Defendant's counsel was present in court and indicated her readiness to proceed. She stated that upon completion of the testimony of the witness that was on the stand, the only other witness that might be called by the defense would be the Defendant. Defendant personally indicated his confidence in his attorney's ability to proceed and the fact that he did desire to proceed.

Despite these statements from Defendant and his attorney, the court expressed concern over resuming the trial in light of Defendant's counsel's physical condition and the lack of any assurances from a doctor that Defendant's counsel was capable of proceeding. The court referred to a phone call his secretary had received from the secretary of a doctor Defendant's counsel had known for years but who had not treated her during the prior few days to the effect that there ought to be a postponement to allow Defendant's counsel to attend to her personal medical needs.

With regard to assurances from doctors, Defendant's counsel told the court that she had discussed the court's desire for assurances with one of the doctors who had treated her the previous two days; that the doctor indicated that he felt that she was fine, and that he would not have released her otherwise; and that the doctor provided her with his phone number for the court to speak to him. She also indicated that she had attempted to reach the other doctor who had treated her, had been unable to do so, but would try to do so again if the court would give her 30 minutes or so.

Obviously concerned about the court's misgivings, the prosecutor repeatedly expressed the opinion that if the court ordered a mistrial, double jeopardy would preclude a retrial. The prosecutor asked that if the court was concerned with Defendant's counsel's health, it postpone the case rather than order a mistrial. He also noted that the case would be over after the parties finished with the witness on the stand, Defendant, if he testified, and possibly one rebuttal witness.

Both the defense and prosecution specifically objected to a mistrial.

The court then called Hilliard Moldof, an attorney. He testified that he had observed Defendant's counsel that morning and thought "perhaps" she was not realizing that "she was a bit inappropriate" for not having recognized that her client was in the courtroom, that his feeling was that she "might" have still been under some type of medication, that he had "some concerns" about the ability to go forward and that he would want to make sure that she felt capable of going forward.

The comment on the defendant's presence was a reference to the fact that at one point during the hearing, counsel was unaware that Defendant was present. The events that led up to that occurrence, apparently unknown to Mr. Moldof, included the fact that prior to the hearing beginning, Defendant's counsel had noticed that Defendant was not present and had asked that he be brought immediately to the courtroom; the fact that Defendant's counsel left the courtroom after the request, engaging in what the court described as a "flurry of

activity outside the courtroom," in an effort to obtain the medical assurances the court wanted; and the fact that Defendant's counsel came back into the courtroom when the case was called and therefore immediately began addressing the court without looking to the box, which was behind her and which was where Defendant was located.

The hearing ended when the court declared its belief that based "on the court's observations of and the appearance and demeanor of counsel during the course of the trial today," it had no other choice but to declare a mistrial.

Both the new prosecutor and new defense counsel agreed that the motion could be considered on the above stipulated facts. When the judge inquired whether he should read the transcript of the first trial, the State responded:

MR. GIUFFREDDA: I don't think that would be necessary, initially. You may have to go through parts of it. I think, basically, the facts really aren't in dispute. That's the way it happened.
* * *

The prosecutor relied solely on *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961), to support his argument that double jeopardy did not bar the retrial.

In his written order denying the motion, the new judge referred to other incidents at trial, not included in the written stipulation. Among other things, he pointed to the facts that defense counsel appeared in court on March 9th with a hospital band on her wrist, that she mistakenly called the judge "doctor", that on March 8th the judge "was presented with information" from a doctor that defense counsel had a history of heart problems, that defense counsel threatened to sue her doctor, that she had "otherwise exhibited an inappropriate affect in the courtroom," that the trial judge had remarked that she had been "lost and somewhat disoriented" during the first trial, and that in a hallway outside the courtroom she had told the mother of the victim that her daughter was a liar. The new judge also placed some emphasis on the original judge's comment to the effect that "the record might support a claim of ineffective assistance of counsel."

I am troubled by the trial judge's reliance on facts other than those stated in the stipulation, to which the State of course agreed. It is one thing for the original judge to have pointed to these additional "facts"; it is quite another for a successor judge to assess the double jeopardy consequences by a consideration of them, when neither the State nor the defense thought them relevant or material.

Even if it were proper for the second judge to consider them, I think they are all insignificant and certainly no basis for a mistrial over a collective objection. The business about the hospital band and calling the judge "doctor" border on the frivolous. The State has agreed in the stipulation that counsel's failure to notice that her client was now in the courtroom was both explainable and understandable. The "history of heart problems" was unsubstantiated hearsay, and the threat to sue the doctor might reasonably be taken as evidence of competence, rather than an inability to complete the current trial. And if we are suddenly going to allow mistrials over defense objection on the basis of an "inappropriate affect" or defense counsel calling witnesses liars or the record supporting a later claim of ineffective assistance of counsel, then the double jeopardy clause will cease to have any meaning.

The recognition that the constitutional ban against double jeopardy allows some second trials when the first has not ended in judgment is fairly old. In *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824), the court said:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances,

which would render it proper to interfere. To be sure, *the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes;* and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. [e.s.]

9 Wheat. at 580. The *Perez* standard has been used by the United States Supreme Court down to the present time to define the right at issue. In *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961), however, the Court seemed to relent a little on the *Perez* standard by adding a new wrinkle based on a finding as to which party was the perceived beneficiary from the mistrial ruling.

Unfortunately for the State's reliance on *Gori*, the Court later fled from its new formulation in *United States v. Jorn*, 400 U.S. 470, 483, 91 S.Ct. 547, 556, 27 L.Ed.2d 543, 546 (1971). It there characterized its *Gori* holding as an application of *Perez* modified by the notion that there is no abuse of discretion in the circumstances of declaring a mistrial on the court's own motion when the trial judge was acting "in the sole interest of the defendant." *Gori*, 367 U.S. at 369, 81 S.Ct. at 1527; *Jorn*, 400 U.S. at 482, 91 S.Ct. at 556. The court proceeded, however, to abandon its *Gori* modification, saying:

> Further, we think that a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefitted from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision. Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action.

Jorn, 400 U.S. at 483, 91 S.Ct. at 556.

The court ultimately explained the essential policy underlying its double jeopardy holdings in the following summation:

> For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of the "valued right to have his trial completed by a particular tribunal." [e.o.]

Jorn, 400 U.S. at 484, 91 S.Ct. at 557. Distinguishing from a mistrial motion by a defendant where there is no suggestion of prosecutorial *or judicial* overreaching, the court went on to say that:

> In the absence of such a motion, the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

Jorn, 400 U.S. at 485, 91 S.Ct. at 557.

So, unavoidably, we come back to the words of Justice Story written nearly a century and three-quarters ago: "manifest necessity" and a power that "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." "Manifest" means crystal clear, immediately apparent to any reasonable mind; in folk wisdom "as plain as the nose on your face;" or in the words of Justice Story himself "plain and obvious". "Necessity" means the utter absence of options or alternatives, a consequence that is unavoidable and inevitable.

In determining whether the cause was "manifest", it is inconceivable to me that we should depend on the trial judge's internal thought processes; it should be immediately apparent upon a glance at the record. Surely that cannot be said here. Defense counsel was not prostrate, unconscious or incapable of moving or talking, thinking or reasoning. Indeed she was in court forcefully declaring her ability to proceed. To justify a mistrial caused by a sudden incapacity of defense counsel, the constitution-

al standard of *Perez* requires at a minimum—if the words "manifest necessity" and "urgent circumstances" are to have any meaning—an obvious physical inability to carry on in any way, preferably demonstrated by the absence of the lawyer from the courtroom. It certainly cannot be used where counsel is, in the colorful words of John Mortimer in many of his Rumpole stories, "up on his hind legs putting an impertinent question or two to the prosecution."

The circumstances here were far from urgent. The reason to abort so near the end was at best fuzzy and all woolly, not plain and distinct. What was there about these events that made it manifest or urgent to do something right then on that morning, as opposed to continuing with the last witness or witnesses and holding closing argument? The answer must be, as a matter of law, there really was no reason not to have proceeded. No cataclysmic event had just occurred which indisputably precluded going further: counsel was not unconscious or paralyzed; she was present in court, and although she lacked a written statement from her doctor, she proffered his oral statement and his availability to speak directly to the court by telephone.

"Manifest necessity" means to me that no alternative even theoretically exists. Here there were at least three obvious ones which the court ignored: a recess for another day; direct consultation with the lawyer's doctor, who was apparently really standing by, if the court so desired; and an actual resumption of the trial for the judge to see for himself whether counsel was truly impaired by the effects of some illness. Because none of these were tried, it is sheer speculation to say that none of them would have worked.

As might be expected in light of *Perez*, the burden of showing that a mistrial was justified by manifest necessity is a heavy one. *Parce v. Byrd*, 533 So.2d 812 (Fla. 5th DCA), *rev. denied*, 542 So.2d 988 (Fla. 1988); *State v. Collins*, 436 So.2d 147 (Fla. 2d DCA), *rev. denied*, 434 So.2d 889 (Fla. 1983). In this case, the burden on the State was made insurmountable by the trial judge's unwillingness to try these other measures, rather than take defendant's option to go to this jury away from him.

The proper application of the *Perez* standard is illustrated by two cases in which the courts rejected double jeopardy defenses after previous mistrials caused by the illness of defense counsel. In *United States v. Von Spivey*, 895 F.2d 176 (4th Cir.1990), counsel's illness occurred after one week of trial, at the first notice of which the trial judge recessed for the day. On the next day, when it became apparent that the illness was severe, the court then recessed for an entire week. When that week was up, the court learned that counsel would be hospitalized indefinitely. The judge then considered numerous alternative resolutions, including the immediate appointment of substitute counsel, and the defendant acting pro se. In the end the court severed the defendant from three co-defendants whose cases were being tried at the same time and declared a mistrial only as to that defendant. On appeal the court concluded that no alternatives less drastic than ending the trial were available to the trial court.

In *United States v. Wayman*, 510 F.2d 1020 (5th Cir.), *cert. denied*, 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67 (1975), defense counsel was injured in an automobile wreck and was unable to continue with the trial. In that case, as in *Von Spivey*, the attorney was completely incapacitated, with no possibility of returning to the courtroom in the foreseeable future. In contrast, here defense counsel actually stood before the court and proclaimed her readiness to proceed. Her client agreed that she could proceed, the prosecutor agreed that she could proceed, and there was evidence that her doctor agreed that she could proceed.

Two Florida decisions also illuminate the standard. In *Ostane v. Hickey*, 385 So.2d 110 (Fla. 3d DCA 1980), a trial judge declared a mistrial over the defendant's objection because an essential state witness was stabbed in front of the courthouse. On a petition for prohibition, the district court found a double jeopardy violation in a second trial, citing *Jorn* and the failure to

consider lesser alternatives, such as a recess. Similarly, in *Bryant v. Stickley*, 215 So.2d 786 (Fla. 2d DCA 1968), where the mistrial was based on the prosecuting attorney being suddenly hospitalized for bleeding ulcers, the court expressly found that the failure to explore other alternatives, with testimony if required, was fatal to a retrial.

The State now attempts to justify this judge's action by saying that it was an incident of judicial discretion to which we must bow. I profoundly disagree. The nature of the *Perez* standard is such that no reasonable judge must be able to find an alternative to a mistrial. In contrast, the abuse of discretion test relied on by the State is that the trial judge's decision must stand unless no reasonable judge would have done as he did.

Apart from my reading of *Perez*, I simply do not believe that the subject of judicial discretion is even implicated here. Judicial discretion has never been confused with the raw power to choose between alternatives, such as to go or not to go. Nor is judicial discretion unreviewable simply because the trial judge chose an alternative that was theoretically available to him. As he did with so many complex ideas, Justice Cardozo distilled the essence of the thought in a few words:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, at 141. Cardozo's insight was applied by the court in *Parce:*

> [Judicial discretion] is not a naked right to choose between alternatives. There must be a sound and logically valid reason for the choice made. If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, and there is no valid reason to support the choice made, then the choice made may just as well have been decided by the toss of a coin. In such case there would be no certainty in the law and no guidance to bench or bar.

533 So.2d at 814. *See also State ex rel. Mitchell v. Walker*, 294 So.2d 124, 126 (Fla. 2d DCA 1974).

We must take care to avoid a mechanical application of the abuse of discretion test to shrink from reviewing the incorrect application of clear legal standards or the application of the wrong standard—all in the name of deferring to the superior vantage point of the trial judge. To do so is to have the rule absorb the whole of judicial review—to have the branch assimilate the tree. It is vital to the preservation of fundamental constitutional principles, such as the core provisions of the Bill of Rights, not to let the discretion test conceal the failure to vindicate a right as important as the double jeopardy clause. I fear that is exactly what has been done here.

To put it directly, the correct legal principle is that a trial judge may not declare a mistrial—free of double jeopardy consequences—on the basis of an alleged incapacity of defendant's counsel so near the end of the case where defense counsel is present in the courtroom asserting the ability to proceed, and both the State and the defendant expressly agree on the record that counsel is capable and should proceed. The only exception should be where the record demonstrates without contradiction that the alleged incapacity is objectively verifiable. The alleged inability to proceed may not be based solely, or even substantially, on the subjective impressions of the trial judge, and it must be such that it cannot be cured or avoided by another alternative. The *Perez* standard cannot properly be applied to abort a criminal trial over the collective objection of everyone, where the "disabled" lawyer is in the court-

room proclaiming the readiness to proceed and none of the alternatives to a mistrial were considered or tried.

I am left with no choice but to dissent.

ON MOTION FOR REHEARING

PER CURIAM.

We grant appellant's motion for rehearing only to certify to the Florida Supreme Court the following question of great public importance:

UNDER WHAT CIRCUMSTANCES MAY A TRIAL JUDGE SUA SPONTE DECLARE A MISTRIAL, FREE OF DOUBLE JEOPARDY CONSEQUENCES, BASED ON HIS SUBJECTIVE IMPRESSION THAT DEFENSE COUNSEL IS NOT COMPETENT TO PROCEED?

In all other respects, we deny the motion for rehearing and motion for rehearing en banc.

REHEARING GRANTED IN PART AND QUESTION CERTIFIED.

STONE and FARMER, JJ., and WALDEN, Senior Judge, concur.

ATLANTIS ENTERPRISES REALTY COMPANY, INC., Appellant,

v.

Michael STEVENS and Laraine Stevens, his wife, Appellees.

No. 91–0009.

District Court of Appeal of Florida, Fourth District.

Jan. 22, 1992.

Reconsideration Denied Feb. 18, 1992.

Appeal from the Circuit Court for Palm Beach County; Edward A. Garrison, Judge.

Alan R. Seaman of Varner, Stafford, Cole & Seaman, P.A., Lake Worth, for appellant.

Lynn G. Waxman of Lynn G. Waxman, P.A., West Palm Beach, for appellees.

PER CURIAM.

AFFIRMED.

GLICKSTEIN, C.J., and FARMER, J., concur.

STONE, J., concurs in part and dissents in part with opinion.

STONE, Judge, concurring in part and dissenting in part.

I concur in affirming on the merits, but dissent as to the award of attorney's fees on appeal.

Jose Ricardo RODRIGUEZ, Appellant,

v.

The STATE of Florida, Appellee.

No. 88–1789.

District Court of Appeal of Florida, Third District.

Feb. 11, 1992.

Rehearing Denied March 17, 1992.

Defendant was convicted in the Circuit Court, Dade County, Ursula Ungaro-Benages, J., of aggravated battery. Defendant appealed. The District Court of Appeal, Schwartz, C.J., held that defendant's act of pointing pistol at victim to secure acquiescence in his acts of simple battery by nonconsensually touching her intimate areas, involved "use" of deadly weapon in commission of battery within aggravated battery statute.

Affirmed as modified.