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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,705

ROY DWAYNE THOMASON,

Petitioner,

v.

STATE OF FLORIDA,



Respondent.

# RESPONDENT'S BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Roy Dwayne Thomason was the defendant below and will be referred to as "petitioner" in this brief. The State of Florida will be referred to as "respondent." References to the record will be preceded by "R." References to the trial transcript will be preceded by "T.

## STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with petitioner's statement of the case and facts, with the following additions, exceptions, and clarifications.

The jury selection process was not made part of the record (T 31). Defense counsel had appeared before the trial judge on previous occasions (T 40). The victim was thirteen years old at the time of the alleged sexual batteries and armed kidnapping. She testified that she knew the defendant (T 98). He had never been mean to her before this event (T 98). She was babysitting for a seven year old girl, C[redacted] F[redacted], at the time of the alleged attack. The defendant came into the room in which she was sleeping and began to shake her (T 103). He told her that he had killed C[redacted]'s mother (T 103). C[redacted] started crying and asked why he had killed her mother (T 104). The defendant told the victim that there were three bad men in the living room (T 105).

The victim testified that he put a knife to her neck and forced her to perform oral sex on him (T 121-23). He then raped her vaginally (T 125). She eventually escaped, ran to a nearby residence, and called the police (T 125-27).

After the testimony of the victim, defense counsel claimed that the state attorney had said that the defendant had the duty to produce certain witnesses (T 164). Defense counsel moved for a mistrial on that basis (T 164-65). The trial judge stated that the state attorney did not make such

a comment (T 164, 136). Defense counsel mistakenly called the victim "D[redacted]" (T 154).

R[redacted] E[redacted] the neighbor who the victim ran to, testified that the victim was wearing only a shirt that was not buttoned (T 276). It was a cold and windy December morning (T 277). She had never seen the victim before that day (T 273-74). She does not know the defendant (T 274). She testified that the victim told her a man was trying to kill her and had already killed someone (T 277). She was shaking and crying (T 279). R[redacted] testified that she heard the victim talking about the case with her mother (T 307). Defense counsel moved for another mistrial because of a comment by the victim that the defendant had changed his appearance from the time of the alleged rape (T 319). Defense counsel stated that the parents and child should be questioned although she would not believe a word they said (T 322).

During the incident in the hallway, the victim's father made reference to the victim being in therapy (T 330). For the third time, defense counsel moved for a mistrial on the basis that she had not been supplied notice of the therapy records (T 330-31).

The state attorney replied that he was shocked by defense counsel's conduct in the hall (T 331). He stated that he was afraid for her and tried to get her back in the courtroom because she would not stop talking (T 331). She

walked out in the hallway and told the victim's parents that their daughter was lying (T 331-32). The state attorney said that defense counsel would not stop talking (T 332). He was very nervous for her (T 332). He asked her if she were crazy and told her that she could get hurt by talking to the parents in that manner (T 332-32). He finally got the parents to leave (T 333). The state attorney said that he did not hear anyone threaten defense counsel (T 333, 335). He said that defense counsel made her remarks "out of the clear blue." (T 335).

C[redacted] F[redacted] did not testify and was not present at trial. The prosecutor asked, without objection, if there was anything in C[redacted]'s statement that contradicted the version of events given by the victim (T 414). Officer Perdue answered that nothing in the victim's statement was contradicted by C[redacted] (T 414). The trial judge reprimanded defense counsel for constantly trying to circumvent his rulings (T 425, 429-30). Defense counsel said that it was not intentional (T 430). Defense counsel apologized for doing something during cross examination (T 431). She later thought a witness had answered a question when he had not (T 441).

The state attorney objected to Detective Velenti testifying because it would be replete with hearsay of what D[redacted] F[redacted] told him (T 501). Defense counsel replied that the state attorney was "just afraid that he's gonna

testify he saw some of her private parts." (T 501).

After defense counsel collapsed, the trial judge told her to see a doctor that night (T 603). Trial was recessed and set to resume the following day (T 603). The following day the trial judge received a call indicating that defense counsel had collapsed in her office. The next day defense counsel returned to court (T 606). She stated that the doctors did not examine her in the areas she believed were causing her problems (T 606).

Defense counsel did not realize her client was in the courtroom (T 611). The trial judge stated that the defendant had been there for the "ten minutes plus" that defense counsel had been there (T 611). The trial judge recalled that two days earlier defense counsel had suffered an episode where she turned very white, was shaky and was supported by the state attorney (T 612). During the course of trial she talked about her recent history of seizures and tetracardia and appeared to be high strung (T 612). He stated that the previous morning he had sent the jury home after hearing that defense counsel had collapsed in her office (T 612, 625). The trial judge stated that he was concerned with defense counsel's health, the integrity of the trial system, and "to afford [defense counsel's] client to be represented by someone and not distracted by those kinds of concerns." (T 613). The judge told defense counsel the previous day that he would require detailed medical testimony that she was

capable of going forward (T 613, 640).

The judge noted that defense counsel was presently in an agitated state (T 614). The trial judge said that based on his observations nnd what had been relayed to him, he had some concerns about her client's right to a fair trial (T 615). He said that he was "loathing" granting a mistrial, but felt it was necessary to preserve the integrity of the system, to afford the defendant adequate protection and to protect defense counsel's health (T 615).

Defense counsel mentioned her tetracardia (T 621, 624). She stated that she was taking Dilantin (T 621). She wanted to stop taking it because she feels ill while taking it (T 621). Defense counsel and her doctor have been experimenting with different levels of the drug (T 621, 622). Defense counsel said her blood sugar level was low (T 625). She apparently had problems with her eyesight during trial (T 622, 625). A doctor had ordered an EKG the previous day (T 606). She was experiencing gynecological problems, which she believed was causing the dizziness (T 606-07). She was bleeding unexpectedly and there was a "small procedure" that she needed performed at the beginning of the week, but was not done (T 622).

The judge noted that during the course of the trial defense counsel had talked about her recent history of seizures and tetracardia (T 612). The judge said that it would be easy for him to simply continue the trial, but his

responsibility as a judge required him to do otherwise (T 615). When the state attorney suggested a continuance, the trial judge explained that he was not concerned only with continuing, but with how the trial had proceeded to that point (T 617).

Defense counsel explained that Dr. Israel has been both her friend and therapist for many years (T 620). When the Doctor told her that she was having seizure activity, she began to take Dilantin, which made her sick (T 621). She spoke with Doctor Israel right before trial (T 622). She stated that she would cue Dr. Israel if there were a mistrial (T 629).

The trial judge said that there were two possibilities (T 629). One was that defense counsel was not capable of performing competently as an attorney (T 629). The second was that her conduct from the first day of trial was designed to provide her client with a reversal for incompetency should he be convicted (T 629). He did not believe the latter to be the case (T 644). The trial judge stated that during the trial, defense counsel appeared preoccupied with her medical problems and seemed at times to get lost during cross examination and become disoriented in handling material (T 636). The judge noted that he had observed defense counsel that day (T 638). She displayed "an inappropriate affect" in her appearance in the courtroom (T 638). It took her over ten minutes to realize that her client was in the courtroom

(T 638). Her client was present when she entered the room (T 638). Because of his obligation to ensure that both sides receive a fair trial and that the defendant, especially with such serious charges, receive competent counsel, the trial judge felt he could not go forward (T 639). He reminded defense counsel that she was told the previous day that he required testimony from her treating physicians to assure her ability to proceed (T 640). He indicated that she had not provided that testimony (T 640-41). Defense counsel stated that she understood that she did not comply with the requirement (T 641).

The trial judge asked the state attorney to relate the incident that occurred in the hallway (T 646). He stated that he waited around for defense counsel before going out to the hall (T 646). Defense counsel was apparently having problems getting her papers together (T 646). When Ms. Morrison finally came out, she told the parents of the victim that she thought their daughter was lying (T 647). The state attorney regarded her actions as inappropriate (T 647). The child's mother began crying (T 648). The father responded that defense counsel was not paying for his daughter's therapy and had no idea what she was going through (T 648).

Hilliard Moldof testified that he was a criminal defense attorney, practicing since 1976 (T 653). He has known defense counsel about three or four years (T 654). He has seen her in court on previous occasions (T 654). Based on

her conduct, he felt that she may be on medication (T 654-55). He thought it was a bit inappropriate that she did not realize her client was in the courtroom (T 655). He had some concerns about her ability to go forward (T 655). Her conduct seemed different than it had in the past (T 656). Defense counsel stated that she did not know what the witness was talking about, but perhaps he would explain later (T 656).

The trial judge stated that based on his observations, in the interest of justice he felt he had no choice but to grant a mistrial (T 658). He specifically found that there was a "manifest necessity" compelling him to grant the mistrial (T 658). He did so with a great deal of reluctance, but felt he had no choice if the defendant were to receive a fair trial (T 658). He ordered that defense counsel discontinue her representation of the defendant and appointed the public defender (T 658). Petitioner did not offer to represent himself.

## SUMMARY OF THE ARGUMENT

### I

The trial judge did not abuse his discretion in granting the mistrial. His actions were not abrupt or erratic. He heard from the parties and considered all alternatives before taking action. The judge was concerned not only with representation received and the health of defense counsel, but also with the integrity of the system (i.e., the public's interest in fair trials designed to end in just judgments).

## POINT I

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S MOTION TO DISMISS AND FOR DISCHARGE ON DOUBLE JEOPARDY GROUNDS.**

No mechanica1 rule exists for the determination of "manifest **necessity."** It is clear that the standard does not require that a mistrial be "necessary" **"[i]n** a strict literal sense." Arizona **v.** Washington, **434** U.S. **497, 98 S.Ct. 824, 830-31, 54** L.Ed.2d **717 (1978)** and United States v. Lynch, 467 F.Supp. *575, 578* (D.C. Dist.), affirmed, **598** F.2d 132 (D. **C.** Cir **1978),** cert. denied, **440** U.S. **939, 99** S.Ct. 1287, **59 L.Ed.2d 498 (1979).**

In Strawn v. State ex. rel. Anderberq, **332 So.2d** 601 (Fla. **1976),** the Fourth District found the defendant's double jeopardy claim meritorious. This Court reversed, stating:

> The constitution does not guarantee a defendant a perfect trial (which would be difficult if not virtually impossible), but it does guarantee **a** fair trial. The trial judge is the man on the ground in full view **of** the premises. In the conducting of a complicated criminal trial, he finds it necessary to rule many times and, like the **referee** in an athletic contest, must rule quickly. Generally speaking, he has neither the time, convenient library, nor a staff to research each legal question with which he is confronted in a fast moving trial. It is, therefore, necessary that he be given broad discretion in disposing of such matters.
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> . . . The New Jersey Supreme Court in an exhaustive treatise on the subject, said:--
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> > 'As we have noted above, the double jeopardy protection does not mean that once an accused has been put on trial regularly, the proceeding must run its ordinary course to judgment of conviction or acquittal. The rule does not operate so

> mechanistically. If some unexpected, untoward, and undesigned incident or circumstance arises which does not bespeak bad faith, inexcusable neglect or inadvertence or oppressive conduct on the part of the State, but which in the considered judgment of the trial court creates an urgent need to discontinue the trial in order to safeguard the defendant against real or apparent prejudice stemming therefrom, the Federal and State Constitutions do not stand in the way of declaration of a mistrial. And this is true even if the conscientious act of the trial judge may be characterized as the product of "extreme solicitude" or "overeager solicitude" for the accused. See, Gori v. United States, supra, 367 U.S. at p. 367, 81 S.Ct., at p. 1525. Moreover, if an incident or circumstance of that nature moves the court to order a mistrial not only to safeguard the right of the defendant to a full and fair trial, but also to protect the right of society to have its trial processes applied fully and fairly in the due administration of the criminal law, there is even less basis for a claim of trespass upon the privilege against double jeopardy. . . .' (emphasis supplied).

Id. at 602-03, 604-05.

In Goodman v. State ex. rel. Furlong, 247 So.2d 47 (Fla. 1971), the district court found that retrial was barred by double jeopardy. The Florida Supreme Court reversed, stating:

> In Adkins v. Smith, 205 So.2d 530 (Fla. 1968), this Court held that, in determining what is a legally sufficient reason for granting a mistrial so as to permit a subsequent trial, the trial court must be armed with discretion since he is conducting the trial and familiar with circumstances, tensions and conditions which may be present in the courtroom.
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> As stated in Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (relied upon by this Court in Adkins v. Smith, supra), the Supreme Court of the United States said:
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> > "Since 1824 it has been settled law in this Court that the double jeopardy provision of the Fifth Amendment * * * does not mean that every time a

> defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.' * * * Where, for reasons deemed compelling to the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. * * * It is also clear that 'This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served * * *,' Brock v. State of North Carolina, 344 U.S. 424, 427, 73 S.Ct. 349, 97 L.Ed. 456, and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion. * * *
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> Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that it's necessary conseauence is to bar all retrial. . ..
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> * * *
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> In other words, the action of the trial court in declarins the mistrial should be held to be within his discretion and sustained unless the record clearly shows an abuse of discretion (emphasis supplied). Id. at 49.

See also Booker v. State, 514 So.2d 1079, 1085 (Fla. 1987) (defining what constitutes an abuse of discretion -- discretion is abused only where no reasonable man could take the view adopted by the trial court); United States v. Von Spivey, 895 F.2d 176 (4th Cir. 1990) (trial court correctly granted mistrial upon illness of defense counsel); United States v. Wayman, 510 F.2d 1020, 1028 (5th Cir.), cert. denied, Moore v. United States, 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 67 (1975) (same) and the cases cited in the trial court's order (R 59-60).

Here the trial court carefully weighed all the circumstances before granting the mistrial. He did not wish to do so, but felt that it was necessary to protect petitioner's rights, defense counsel and to protect the integrity of the system (T 613, 658).

Petitioner attacks the statement that the trial court "considered available alternatives (R 59-60)." The trial judge was obviously aware of the prosecutor's suggestion that the judge consider a continuance. However, the trial judge indicated that he was not only concerned with the remainder of the trial, but with the manner in which the trial had proceeded to that point (T 617). The latter could not be remedied by a continuance. Given defense counsel's bizarre behavior, juror bias was a real possibility.

As far as continuing the trial and seeing if problems arose, the trial judge was also concerned with defense counsel's health. Given her history, continuing the trial may have resulted in serious damage to defense counsel's health. See also Abdi v. State of Georgia, 744 F.2d 1500, 1503 (11th Cir. 1984), cert. denied, 471 U.S. 1006, 105 S.Ct. 1871, 85 L.Ed.2d 164 (1985) (manifest necessity can exist alongside less drastic alternatives so long as record shows that trial court considered alternatives) and Cherry v. Director, State Board of Corrections, 635 F.2d 414, 419-20 (5th Cir.), cert. denied, 454 U.S. 840, 102 S.Ct. 150, 70 L.Ed.2d 124 (1981) (a trial judge has acted within

his discretion in rejecting possible alternatives if reasonable judges could differ about the proper disposition, even where in a strict, literal sense, a mistrial is not necessary).

Petitioner also complains that manifest necessity has not been demonstrated because the trial judge did not hold an evidentiary hearing. As discussed above, the trial judge was present for the entire trial and able to observe defense counsel and the jury's reaction. The judge gave both sides an opportunity to present their positions. Testimony was received on the matter. Defense counsel was given an opportunity to present documentation from her doctors. She was told to present testimony of her doctor's, which she failed to do. It is clear the judge considered the alternatives (T 613-58). No abuse of discretion has been shown. Cf. Abdi, 744 F.2d at 1504 (trial judge did not abuse his discretion in granting mistrial even though decision was fast and he did not consult defense counsel). See also United States v. Cameron, 953 F.2d 240, 247 (6th Cir. 1992) (formal hearing not necessary to support finding of manifest necessity, citing Washinston, 434 U.S. at 516-17, 98 S.Ct. at 835-36).

Petitioner next complains of the portion of the order that states that the medical assurances that petitioner could continue were not forthcoming (R 58-60). He then argues that petitioner did assure the trial judge that her doctors said

she could continue. The trial judge told defense counsel the day before the mistrial that she would need to provide testimony from her doctors that she was fit to continue (T 641). Defense counsel agreed with that statement, but nonetheless failed to comply with the trial court's requirement (T 641).

Petitioner also complains of paragraph two of the order which states that defense counsel appeared in court in an agitated state, with a hospital band on her wrist, mistakenly called the Judge a doctor, said that there was no eacy way out, and did not notice that her client was in the courtroom (R 58-60). Her comment that there was "no easy way out" does not make much sense in light of the fact that she thought she was perfectly able to proceed. In such a case, the "easy way out" would be to continue with the trial. The trial judge found it significant that defense counsel walked right past her client and did not realize that he was present in the courtroom for at least ten minutes (T 611). A defense attorney, familiar with Ms. Morrison, also found her behavior to be odd (T 653-56). She walked past her client without noticing him (T 653-56).

It is uncontradicted that all the events recited in paragraph two occurred. Petitioner attempts to give possible explanations that might explain defense counsel's behavior. The trial judge was present at the time and observed petitioner's conduct. He is in the best position to judge

the behavior in its context. The judge properly concluded that the behavior mentioned in the order was not appropriate. Obviously, the written transcript cannot fully capture the conduct and appearance of defense counsel. An abuse of discretion has not been shown.

Paragraph three of the order states:

> 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 *58-60).*

The record indicates that Doctor Ginsburg did state defense counsel had been under a lot of stress (T 623). Defense counsel stated that her family had a history of heart problems. She stated that she and other members of her family suffered from tetracardia (T 621). Defense counsel spoke with Dr. Israel right before trial (T 622). She had been speaking with him over the last few weeks (T 628). Defense counsel apparently admitted that she saw Dr. Israel the day before the mistrial was granted or that she saw Dr. Jones and he did not believe she should return to trial (T 628). The trial judge received a phone call from Dr. Israel's office indicating that defense counsel should attend to her medical problems (T 614). The findings in the order are supported by the record. An abuse of discretion has not been shown.

Petitioner attacks paragraph four of the order which

states that the trial judge was concerned about defense counsel's health and the integrity of the system (R 58-60). The quality of the representation received by the defendant is directly related to defense counsel's health. Respondent does not agree with petitioner's statement that the integrity of the system should carry little weight in the trial judge's decision. See Strawn, 332 So.2d at 605 ("Moreover, if an incident or circumstance of that nature moves the court to order a mistrial not only to safeguard the right of the defendant to a full and fair trial, but also to protect the right of society to have its trial processes applied fully and fairly in the due administration of the criminal law, there is even less basis for a claim of trespass upon the privilege against double jeopardy. . ."); and Illinois v. Sommerville, 410 U.S. at 463, 35 L.Ed.2d at 430 (mistrial may be declared to protect public's interest in fair trials designed to end in just judgments).

Petitioner claims that the trial court's concerns with counsel's health, whether the mistrial benefitted the defendant and the integrity of the system are of little or no weight in a constitutional analysis. In reaching his conclusion, petitioner relies on Whitfield v. Warden of Maryland House of Corrections, 486 F.2d 1118, 1123 (4th Cir. 1973), cert. denied, 419 U.S. 876, 95 S.Ct. 139, 42 L.Ed.2d 116 (1974) and United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 556, 27 L.Ed.2d 543, 55 (1971) (plurality). Petitioner

misreads Whitfield. That case does not indicate that concern with defense counsel's health and the integrity of the system are to be given little weight. The case says nothing about concern for a lawyer's health. It indicates that concern for the integrity of the system (i.e., the ends of public justice) is extremely important. Id. at 1121. This was one of the trial judge's concerns here (T 613, 615). To the extent that the case holds that concern for the benefit of the defendant is of ïittle weight, the court in Whitfield misread Jorn.

Jorn did not hold that whether the mistrial benefitted the defendant was not important issue. Obviously, the question of benefit to the defendant is an integral part of the trial judge's equation in attempting to preserve the integrity of the system. The plurality opinion in Jorn merely held that there could be no automatic rule that held that if the action as taken benefitted the defendant, the abuse of discretion standard of review was not applicable. 27 L.Ed.2d at 555.

Decisions of the United States Supreme Court issued after Whitfield make this clear. In Oreson v. Kennedy, 456 U.S. 667, 676, 102 S.Ct. 2083, 72 L.Ed.2d 416, 425, n. 7 (1982), the Court quoted with approval from Gori:

> Where for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be

retried consistently with the Fifth Amendment."

> It seems entirely reasonable to expect, therefore, that appellate judges will continue to defer to the judgment of trial judges who are "on the scene" in this area and that they will not inexorably reach the same conclusion on a cold record at the appellate stage that they might if any one of them had been sitting as a trial judge.

In Illinois v. Sommerville, 410 U.S. 458, 93 S.Ct. 1066, 1069, 35 L.Ed.2d 425 (1975), a mistrial was declared when the State realized the indictment was defective for not alleging that the defendant intended to permanently deprive the owner of his property. 410 U.S. at 459, 35 L.Ed.2d at 428. The Seventh Circuit, relying on Jorn, found that a declaration over the defendant's objection precluded mistrial. 410 U.S. at 460, 35 L.Ed.2d at 429. The United States Supreme Court reversed, holding:

> Our decision in Jorn, relied upon by the court below and respondent, does not support the opposite conclusion. While it is possible to excise various portions of the plurality opinion to support the result reached below, divorcing the language from the facts of the case serves only to distort its holdings. That opinion dealt with action by a trial judge that can fairly be described as erratic (emphasis supplied).
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> The Court emphasized that the absence of any manifest need for a mistrial had deprived the defendant of his right to proceed before the first jury, but did not hold that that right may never be forced to yield, as in this case, to 'the public's interest in fair trials designed to end in just judgments.' The Court's opinion in Jorn is replete with approving references to Wade v. Hunter, supra, which latter case stated:
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> * * *

> What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments. (emphasis in original).

410 U.S. 470, 35 L.Ed.2d 434.

Respondent notes that the facts of Jorn are very different from those in Gori and the present case. In Jorn, the defendant was charged with willfully preparing fraudulent income tax returns. Five of the government's witnesses were taxpayers whom the defendant had allegedly aided in preparing this returns. After the first of these witnesses was called, but prior to direct examination, defense counsel suggested that the witnesses be warned of their constitutional rights. The trial judge agreed and carefully explained the witnesses rights to them. The first witness expressed a willingness to testify, stating that he had been warned of his rights upon initial contact by the Internal Revenue Service. The trial judge refused to believe that the witness had been warned and refused to permit him to testify until he consulted an attorney. 400 U.S. at 473, 27 L.Ed.2d at 549.

The trial judge then asked the prosecuting attorney if the other four witnesses were similarly situated. The prosecutor said that those witnesses had also been warned of their rights upon initial contact with the Internal Revenue Service. The judge asked the prosecutor if he intended to try the case on a theory that would not incriminate the witnesses. When the prosecutor started to answer that he

did, the trial judge, expressing the view that any warnings that might have been given were probably inadequate, discharged the jury and aborted the trial so that the witnesses could consult with attorneys. 400 U.S. at 473, 487, 27 L.Ed.2d at 549-50, 557-58. The trial judge acted very abruptly, without giving either counsel a chance to object or request a continuance and gave no consideration to a continuance. 400 U.S. at 487, 27 L.Ed.2d at 558. The trial judge was also acting in the interest of witnesses, not the defendant. 400 U.S. at 483, 27 L.Ed.2d at 555. The Court found that:

> It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When on examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial. Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment.

440 U.S. at 487, 27 L.Ed.2d at 558.

The plurality opinion did not abolish the abuse of discretion standard. It simply declined to accept the government's argument that the abuse of discretion standard should be limited based on the government's claim that the mistrial "benefitted" the defendant. 400 U.S. at 482-83, 27

L.Ed.2d at 555.

As noted in Whitfield, 486 F.2d at 1121-22, the United States Supreme Court has repeatedly held that each case must turn on its facts. See also Smith v. State of Mississippi, 478 F.2d 88, 95-96 (5th Cir.), cert. denied, 414 U.S. 1113, 94 S.Ct. 844, 38 L.Ed.2d 740 (1973) (distinguishing Jorn); Escobar v. O'Leary, 943 F.2d 711, 718 (7th Cir. 1991) (trial judge's actions could not fairly be described as erratic, as is typically the case when appellate court finds mistrial cannot be supported by manifest necessity); Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1947) (earlier case holding that defendant's right to have trial completed by a particular tribunal must sometimes be subordinated to the public interest in a fair trial designed to end in just judgments and cited with approval in Sommerville, 410 U.S. at 470, 93 S.Ct. at 1073) and United States v. Bradley, 905 F.2d 1482, 1489 (11th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 969, 112 L.Ed.2d 1055 (1991) (recognizing Jorn, but emphasizing fact that the trial judge acted solely for the benefit of the defendant). Strawn, a case decided after Jorn and Sommerville, also strongly supports respondent's position (see pp. 11, 18). Goodman, another Florida Supreme Court was also decided after Jorn (see p. 12).

Paragraph five of the order reads:

> 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).

This finding is supported by the record. Ms. Morrison did announce to the courtroom that she planned to sue her longtime friend and therapist (T 620) if the mistrial were granted (T 629). Judge Grossman did state that his decision was based in part on defense counsel's appearance throughout the trial (T 639). Hilliard Moldof testified that he was a criminal defense attorney, practicing since 1976 (T 653). He had known defense counsel about three or four years (T 654). He has seen her in court on previous occasions (T 654). Based on her conduct, he felt that she may be on medication (T 654- 55). He thought it was inappropriate that she did not realize her client was in the courtroom (T 655). He had some concerns about her ability to go forward (T 655). Her conduct seemed different than it had in the past (T 656). Defense counsel stated that she did not know what the witness was talking about, but perhaps he would explain later (T 656). No abuse of discretion has been chown.

Paragraph six of the order states:

> At the 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 58-60).

Petitioner first argues that these matters are not relevant because the issue did not involve whether defense counsel had rendered proper representation to that point, but whether she was capable of continuing. Respondent disagrees. The issue of the quality of the representation to that point was very important. This was part of the reason the trial judge declined to grant a continuance (T 617). Judge Grossman did find that defense counsel seemed at times lost and somewhat disorientated at trial (T 636). Obviously the record is not capable of showing all the possible instances of this. For example, if defense counsel were to stare off into space for varying periods of time or make bizarre expressions, this would not necessarily be apparent in the record. The trial judge said he based his decision on her appearance and performance during trial (T 636).

Additionally, the jury selection portion of the proceeding was not made part of the record, making it impossible for this Court to conclude that the trial judge abused his discretion. See Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979) (petitioner has burden of submitting complete record to demonstrate reversible error). There are, however, several examples of questionable conduct discernable from the record, in addition to those mentioned in the order. The trial judge reprimanded defense counsel for constantly trying to circumvent his rulings (T 425, 429-30). Defense counsel said that it was

not intentional (T 430). Defense counsel apologized for doing something during cross examination (T 431). She later thought a witness had answered a question when he had not (T 441).

The trial judge, as factfinder, was entitled to believe the prosecutor's version of what occurred in the hallway. Although the prosecutor did not want to get involved in the matter of defense counsel's conduct (T 646), he stated that he waited around for defense counsel before going out to the hall (T 646). Defense counsel was apparently having problems getting her papers together (T 646). When Ms. Morrison finally came out, she told the parents of the victim that their daughter was lying (T 647). The state attorney regarded her actions as inappropriate (T 647). He was very nervous for her (T 332). He asked her if she were crazy and told her that she could get hurt by talking to the parents in that manner (T 332-33). He finally got the parents to leave (T 333). The state attorney said that he did not hear anyone threaten defense counsel (T 333, 335). He said that defense counsel made her remarks "out of the clear blue" (T 335). The child's mother began crying (T 648). The father responded that defense counsel was not paying for his daughter's therapy and had no idea what she was going through (T 648). Defense counsel admitted calling the girl a liar (T 650).

Had trial continued and petitioner been convicted,

defense counsel's conduct and appearance would greatly assist the ineffective assistance claim that petitioner would inevitably file. See Walker v. Lockhart, 620 F.2d 683, 688 (8th Cir. 1980), cert. denied, 449 U.S. 1085, 101 S.Ct. 874, 66 L.Ed.2d 811 (1981) (district court found in habeas proceeding that trial court should have ordered a mistrial even over the objection of petitioner). In United States v. Williams, 411 F.Supp. 854 (S.D.N.Y. 1976), the court found that double jeopardy did not prevent retrial when the trial judge declared a mistrial based on apparent deficiencies of counsel. Id. at 857. The court found that it was not an abuse of discretion to grant a mistrial rather than a continuance, stating, "It would be inconceivable to require a trial judge to rely on the chance that a cold record will shock the conscience of an appellate court when an incipient miscarriage of justice is growing before his eyes. . . and it is immaterial that with flawless hindsight a less drastic means may appear to have been sufficient to cure the defect." Id. at 857-58.

The trial judge here was concerned with giving petitioner competent representation. There is no indication of an ulterior motive for his actions. He was present at the trial and was best able to observe the situation. An abuse of discretion has not been shown.

Respondent does not agree with petitioner's contention that the victim's credibility was severely damaged. Contrary

to petitioner's brief, the victim did not state that she observed initials on the knife at the time of alleged rape (T 266-69). She was asked how she knew the knife was the one that was used that day. She said that she knew that because she saw the knife (T 266). She said that she could identify the knife from other knives because it had initials on it (T 266). She did not say she noticed the initials on the day of the incident, but did notice it was scratched (T 267). She stated that the knife was scratched and that area was a different color than the rest of the knife (T 267-68). It is not clear from the record that the light area of the knife she was referring to was caused solely by the initials (T 266-69).

Respondent also notes that after this supposedly surprising and devastating information came out, petitioner's attorney twice moved for a mistrial, indicating either that she did not believe this information was devastating to the State's case or that she was making irrational and ineffective decisions (T 319, 331). Petitioner points to no occurrences in the record after the motions for mistrial, which would change his "sincere" motions for a mistrial made earlier (T 331). This indicates that defense counsel may have been playing double jeopardy games with the trial judge, by strenuously opposing a mistrial when it became apparent that the trial judge was actually inclined to grant one. Cf. Jorn, 400 U.S. at 486, 27 L.Ed.2d at 557 (the trial judge

must bear in mind the potential risks of abuse by the defendant of society's unwillingness to unnecessarily subject him to repeated prosecutions) and State v. Belien, 379 So.2d 446, 447 (Fla. 3d DCA 1980) (courts will not allow "gotcha!" maneuvers to succeed in criminal proceedings).

## CONCLUSION

All facts and inferences should be resolved in favor of the trial judge's actions. He was present and able to observe defense counsel's condition. His actions were motivated solely out of the desire to give petitioner the fairest trial possible, protect defense counsel's health and the public's interest in a fair trial resulting in a just judgement. This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to Anthony Musto, P.O. Box 16-2032, Miami, FL 33116-2032 this 8 day of September 1992.

Of Counsel