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

REPLY BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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.

The State relies primarily on the same factual interpretations and conclusions set forth in the order denying Defendant's Motion to Dismiss and for Discharge. Since these interpretations and conclusions are addressed in Defendant's initial brief, most of them need not be discussed further here. Certain aspects of the State's argument, however, warrant comment.

A

THE LIMITATIONS ON THE TRIAL COURT'S DISCRETION

The State fails to discuss, or even mention, in its brief the only Florida cases that deal with mistrials that were declared over defense objection and that resulted from the illness or absence of a trial participant. Specifically, the State ignores Ostane v. Hickey, 385 So.2d 110 (Fla. 3d DCA 1980) and Bryant v. Stickley, 215 So.2d 786 (Fla. 2d DCA 1968), which establish that the discretion that a trial court has does not extend to declaring a mistrial when a participant in the trial is ill and when the court does not make inquiry as as to when that individual can be ready to proceed.

In this regard, it should also be noted that the rationale of Ostane v. Hickey and Bryant v. Stickley was recently applied in another case that is instructive here. In Cohens v. Elwell, 600 So.2d 1224 (Fla. 1st DCA 1992), a jury of six members and one alternate was sworn on Monday, August 5, 1991, for a trial scheduled to start on Friday, August 9. On Thursday, August 8, the court was advised that an essential state witness had been hospitalized with heart problems. The witness was scheduled to be discharged from the hospital on Friday, August 9, but was advised by his doctors to remain sedentary for at least two days. The State moved for a continuance until the following week. At that point, a deputy clerk testified that he had, pursuant to the court's instructions, called each of the jurors and asked whether they could serve if the trial were to be held on Friday, August 16. Two said it would be a hardship and four said there would be no problem. Both attorneys stated that they would be available to try the case on the following Thursday, August 15, or Friday, August 16. The court nonetheless set the case for Friday, August 16.

A second hearing was held on Tuesday, August 13. The court stated that two jurors advised him that they could not serve on Friday. One juror held non-refundable airline tickets for a family vacation. The second, a veterinarian, was scheduled to perform surgery on Friday without a backup. The jury was discharged when the defense would not agree to proceed with five jurors.

After the denial of a motion to dismiss, the First District Court of Appeal granted prohibition, concluding that the inconvenience to the jurors did not constitute a manifest necessity and that the trial court did not actively explore other options before discharging the jury.

The appellate court in Cohens v. Elwell relied upon People v. Michael, 394 N.E.2d 1134 (N. Y. 1979), a case similar to the present case in the sense that it involved the absence of defense counsel. There, a double jeopardy violation was found when counsel for the defendant was unable to attend trial after it had

commenced because his father had died unexpectedly during the night. The prosecutor suggested that the case be adjourned until the defendant's counsel could return, but the trial court declared a mistrial due to the fact that the court and several members of the jury had made vacation plans for the following week.

Clearly, if it was inappropriate to declare mistrials when trial participants were hospitalized in Ostane v. Hickey, Bryant v. Stickley and Cohens v. Elwell, the only Florida cases that deal with the absence of a trial participant, it was even more inappropriate here in light of Defendant's personally expressed desire to proceed, the lack of prejudice to the State by proceeding and the fact that Defendant's counsel was present in the courtroom, lucid, responsive and assuring the court that she felt fine and that she had received medical assurances to that effect. Likewise, if it was inappropriate to declare mistrials in Cohens v. Elwell and People v. Michael despite the considerable inconvenience that would have resulted to trial participants in those cases, the same conclusion is compelled here where there has been no showing that any participant would have been inconvenienced.

Rather than discuss the Florida law set forth in the above cases, the State engages in a general discussion of the limits of a trial court's discretion in declaring a mistrial. Plainly, the opinions in Ostane v. Hickey, Bryant v. Stickley and Cohens v. Elwell demonstrate that a trial court's discretion in this respect is far from unlimited and is significantly less broad than the State argues. As noted in Parce v. Byrd, 533 So.2d 812, 814 (Fla. 5th DCA 1988), rev. denied, 542 So.2d 988 (Fla. 1989):

> Without doubt, a trial judge in the exercise of sound judicial discretion, may declare a mistrial without the defendant's consent or even over his objection, where, for reasons deemed compelling by the trial judge, the ends of substantial justice cannot be attained without discontinuing the trial. Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); Goodman v. State ex rel. Furlong, 247 So.2d 47 (Fla. 1971). But the trial court's discretionary power is subject to the test of reasonableness, which requires a determination of whether there is logic and justification for the result. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

Moreover, a trial court's discretion is limited by the requirement that any doubt 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).

Brief comment is also warranted as to the two federal cases cited by the State, neither of which dealt with the illness of counsel, regarding the extent of a trial court's discretion. The State cites Abdi v. Georgia, 744 F.2d 1500, 1503 (11th Cir. 1984), reh. en banc denied, 749 F.2d 733 (11th Cir. 1984), cert. denied, 471 U.S. 1006, 105 S.Ct. 1871, 85 L.Ed.2d 164 (1985) for the principle that a manifest necessity can exist alongside other less drastic alternatives as long as the record shows that the trial court considered the alternatives. The State fails to note that the court in Abdi cited to the decision in Grandberry v. Bonner, 653 F.2d 1010, 1014 (5th Cir. 1981) for this principle. Review of Grandberry v. Bonner demonstrates that the principle cited by the State is merely a shorthand version of a significantly stricter standard which requires that the trial court "carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner." Id., at 1014 (emphasis added).

The State also cites Cherry v. Director, State Board of Corrections, 635 F.2d 414, 418-419 (5th Cir. 1981) (en banc), cert. denied, 454 U.S. 840, 102 S.Ct. 150, 70 L.Ed.2d 124 (1981), for the principle that a mistrial may be appropriate when reasonable judges could differ. In the subsequent decision in Grandberry, however, the Fifth Circuit Court of Appeals limited this principle with the same language noted above with regard to consideration of alternatives. 653 F.2d at 1014. Thus, only when the record shows that a trial court carefully considered the alternatives and that the trial court did not act in an abrupt, erratic or precipitate manner does the principle cited by the State come into play.

Clearly, the trial court here did not carefully consider the alternatives. Rather, the trial court acted in just the abrupt, erratic and precipitate manner

discussed in Grandberry. The cases cited by the State thus not only do not support the State's position, but they demonstrate that Defendant's position is correct.

It should also be noted that the decision in Grandberry is of significance to the present case, not just, as discussed above, with regard to the principle it sets forth, but also with regard to the manner in which it applies that principle. The case dealt with a juror who became ill during deliberations, but who told the court that he would be "okay" during an overnight sequestration if someone would bring him his high blood pressure pills from his home. Id., at 1012. Out of concern for the juror's health, the court declared a mistrial, which was objected to by the defense.

Finding that the case looked very little like Cherry, upon which the State relies in the present case, the Fifth Circuit concluded that the circumstances surrounding the decision to grant a mistrial "revealed that no careful thought could have been given to the alternatives." The same is not only true in the present case, but Defendant's argument is even stronger than that of the defendant in Grandberry, in light of counsel's assurances to the court, the availability to the court of the doctors, Defendant's personally expressed desire to proceed and his strong reasons for wishing to proceed.

Although, for the reasons already noted, the decision in Cherry does not further the State's position, it is instructive in one respect. It notes that the court there was merely deciding the federal constitutional aspect of the double jeopardy issue in question, as the case arose by means of federal habeas corpus. The court went on to point out that a state constitutional requirement can be stricter. 635 F.2d at 419-420, n. 8.

In this respect, it should be remembered that Defendant asserted that his rights under both the federal and state constitutions had been violated (R 46, 55). Although much of the Florida caselaw cited by Defendant does not distinguish between the rights guaranteed by the two constitutions, it seems clear that under

the Florida caselaw, Defendant is entitled to relief. Thus, if it is held that the standard discussed in the federal cases cited by the State calls for a different result, it can only be concluded that the Florida courts have adopted a stricter standard under the Florida Constitution and that Defendant's right to be free from double jeopardy under the Florida Constitution has been violated.

B

DEFENDANT'S STRONG REASON FOR WANTING HIS FATE TO BE DECIDED BY THE EMPANELED JURY

As pointed out in Defendant's initial brief, the State's case was devastated by the fact that 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), initials which were placed on the knife after the alleged crime by the police officer who impounded it (T 512-513).

The State asserts at pages 27-28 of its brief that the alleged victim did not state that she had observed the initials at the time of the alleged crime and that it is not clear that the scratched portion of the knife she referred to was was caused by the initials. The State is mistaken. The alleged victim testified:

> Q. Is there any way you would know to identify that knife from any other switchblade knife?
> A. Yes, ma'am.
> Q. I'm sorry, what was that?
> A. Yes, ma'am.
> Q. How can you identify that knife as opposed to any other?
> A. Because--somewhere on--I don't remember where, but there's some initials on it.
> Q. What was that, I'm sorry?
> A. There's some initials somewhere on the knife and if I recall, it was J.K. or K.J. I don't remember where, but--I remember there's some initials somewhere.
> Q. I should be a little bit careful of this, as long as the witness has brought it up, you mean the initials that are down here on this knife?
> A. Yes, ma'am.
> Q. That's how you know it's the knife that--that Dwayne used?
> A. Yes, ma'am.

(T 266-267)

It is thus clear that the credibility of the key State witness in the case severely, and probably fatally, damaged, essentially destroying a State case

that was a weak one to begin with[1] and demonstrating a strong reason for Defendant to want the trial to continue.[2]

C

THE STATE'S FAILURE TO DISCUSS THE MOST IMPORTANT DOUBLE JEOPARDY CONSIDERATIONS

As discussed in Defendant's initial brief, the constitutional protection against being twice placed in jeopardy embraces a defendant's right to have his trial completed by a particular tribunal and the important consideration for purposes of double jeopardy is that a defendant retain primary control over the course to be followed. Thus, Defendant's personally expressed desire to proceed with the trial, especially in light of the extremely strong reason for doing so, must be given more weight than any other consideration.

Despite this fact, neither the State's brief nor the order denying Defendant's Motion to Dismiss and for Discharge, even mentions Defendant's clearly expressed

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[1]The State's case depended on the testimony of the alleged victim, whose credibility was also undermined by the testimony of Doctor Sudha Doshi, who examined the alleged victim on the date of the alleged offense at the Broward County Sexual Abuse Treatment Center (T 532-533). Doctor Doshi testified that the tears she found in the alleged victim's vagina were old tears, not tears that occurred 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 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).

[2]It is not likely that the alleged victim would give the same testimony at a second trial. In all probability, the State would choose not to introduce the knife at all. Any effort by the defense to cross examine on the subject would likely draw objections as being beyond the scope of direct examination. Assuming some cross was allowed, efforts to bring out the prior testimony would likely be objected to as impeachment on a collateral matter. Finally, even if the defense was allowed to bring out the prior testimony, the alleged victim would likely claim confusion or mistake and, while the impeachment testimony might be of some benefit to the defense, it would not have even a significant percentage of the impact of the testimony in the first trial.

desire.[3] Likewise, neither the State's brief nor the order under review addresses the fact that Defendant's counsel, 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 the doctor had provided her with his phone number for the court to speak with him, that she was willing to attempt to get in touch with the other doctor and that she was responsive to the questions and comments of the court, the prosecutor and the witness.

The failure of the State to address these considerations will not make them go away. They exist and they plainly outweigh the factual interpretations and conclusions relied upon by the State and the trial court, even assuming that those interpretations and conclusions are accepted at face value.[4] The lack of argument in the State's brief as to these matters perhaps proves this fact better than any argument Defendant could make. The State's silence speaks loudly.

D

THE STATE'S INSINUATIONS AS TO AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Most of the points the State does make deal with events that occurred prior to the time Defendant's attorney received medical attention. The State asserts on pages 26-27 of is brief that these matters are relevant because they would assist a future ineffective assistance of counsel claim. This argument ignores several factors.

First, for the reasons discussed previously in this brief and in Defendant's initial brief, it is extremely likely that Defendant would have been acquitted had the case gone to the jury.

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[3]Despite setting forth a lengthy recitation of facts, the State's brief completely ignores Defendant's testimony (T 634-636) regarding the matter.

[4]This is certainly not the case. See the discussion in Section H of the argument portion of Defendant's initial brief.

Second, the fact that the trial court did not declare a mistrial when the prior events occurred demonstrates that they were not the basis for the mistrial. Clearly, the mistrial was based on the trial court's subjective evaluation of counsel's physical condition, an evaluation that was contradicted by all the objective circumstances.

Third, in order to "assist" an ineffective assistance of counsel claim, there must be a basis for such a claim in the first place. As noted in Defendant's initial brief, there is not even a hint that the criteria that must be established in order to prevail on such a claim, 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 had the act or omission not occurred, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), can be shown to exist here.[5]

Fourth, 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 principle is demonstrated by the decision in Finkelstein v. State, 574 So.2d 1164 (Fla. 4th DCA 1991). There, 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 his client'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

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[5]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 of counsel claim based solely on the facts relied upon in the State's brief would not even warrant a hearing. For the reasons set forth in Defendant's initial brief, it is clear that counsel's actions were not "a serious deficiency measurably below that of competent counsel" and there is not even a suggestion that Defendant was in any way even prejudiced, much less that there exists "a reasonable probability of a different result."

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 disagreed with the trial court's decision and granted certiorari, 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 its 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 facts here because the trial court in the present case 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).

E

CASES CITED BY THE STATE DEALING
WITH THE ILLNESS OF COUNSEL

In an apparent effort to avoid the effect of the Florida cases that directly apply here, the State relies on two federal cases, United States v. Von Spivey, 895 F.2d 176 (4th Cir. 1990) and 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), as the only cases it cites involving the illness of a trial participant. These cases are easily distinguishable from the present proceeding.

In Von Spivey, the trial of four codefendants began on October 24, 1988. On November 1, Von Spivey's counsel failed to appear in court due to illness. The

matter was adjourned until November 7, six days later, at which time it was learned that Von Spivey's counsel had been hospitalized and that it appeared unlikely that he would return in the foreseeable future. 895 F.2d at 177. This is obviously a far cry from the facts of the present case. In addition, Von Spivey's codefendants moved for a severance, a factor that is not present here.

The facts in Wayman are even more removed from the present case. There, the attorney was injured in an automobile wreck occurring on the Thursday of the third week of trial. A mistrial was declared the following Tuesday when it was evident that the attorney, who was still in the hospital, would not recuperate. 510 F.2d at 1028, n. 9.

Thus, these cases involve very different facts than the present case and are plainly inapplicable here.

F

THE IRRELEVANCE OF THE TRIAL COURT'S MOTIVATIONS

The State cites Strawn v. State ex rel. Anderberg, 332 So.2d 601 (Fla. 1976) in arguing that a trial court's motivations should be considered in reviewing the unilateral declaration of a mistrial. The opinion in Strawn, however, as well as that in Goodman v. State ex rel. Furlong, 247 So.2d 47 (Fla. 1971), the other Florida case cited by the State in this regard, both rely on the opinion in Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961), a case in which the Court took into account the fact that the mistrial had been granted in the sole interest of the defendant.

Subsequently, however, the Court, in Jorn v. United States, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), made it clear that the portion of Gori noted above and relied on in the cases cited by the State is no longer good law.

The Jorn Court stated, 400 U.S. at 483, 91 S.Ct. at 556, 27 L.Ed.2d at 555:

> Further, we think that a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited 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.[6]

The opinion in Jorn thus undermines the basis for the authorities relied upon by the State in asserting the relevance of the trial court's motivations. See also 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) ("Although a trial judge's beneficent motive was considered significant in Gori v. United States, . . . it can now be accorded little or no weight. United States v. Jorn, ..."); People v. Gardner, 37 Mich.App. 520, 195 N.W.2d 62, 68 (1972) ("In light of the Jorn decision, then, we are no longer constrained to follow Gori. It is not enough that a mistrial in the instant case was declared for the benefit of 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 public justice from being served by a continuation of the proceeding.").

Additionally, it should be realized that Gori dealt with a situation in which it was undisputed that the mistrial resulted in a benefit to the defendant. Here, that fact is strongly disputed and the Gori reasoning, even if still deemed valid, would not be applicable. Another reason why such reasoning is inapplicable to the present case is the fact that Defendant personally expressed his desire to go forward. Since, as discussed in Defendant's initial brief, the most important factor is that a defendant retain primary control over the course to be followed, Defendant's desire would plainly outweigh whatever weight would be given to the trial court's motivation.

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[6]The strain in the present case is of particular significance since Defendant spent over six months in custody after the mistrial and prior to the entry of the nolo contendere plea that resulted in his immediate release on probation.

G

OTHER MATTERS NOTED BY THE STATE

A few other matters noted by the State should be commented on briefly. The State claims on page 15 of its brief that there was no need for an evidentiary hearing because the trial court was present for the entire trial and gave both sides an opportunity to present their positions. The State ignores the fact that, after hearing both sides positions, the trial court without notice called a court witness to testify and never gave either side the opportunity to call their own witnesses thereafter (T 653-658). Thus, individuals from Defendant's counsel's office, who were present in the courtroom and who felt that counsel was capable of going forward (T 629), did not have an opportunity to testify.

The State further asserts on page 17 of its brief that counsel saw either Doctor Israel or Doctor Jones the day before the mistrial was declared and that Doctor Jones did not believe that she should return to trial. The State has simply misread the record. Doctor Israel was in California at the time and Doctor Jones never talked to counsel (T 629).

The State additionally contends on pages 16-17 of its brief that the trial judge, having been present at the time, was in the best position to judge Defendant's counsel's behavior in context. Defendant vehemently disagrees. Defendant was also present. In addition, Defendant had spoken with his counsel for 40 or 50 minutes the night before the mistrial was declared (T 608). Since it was Defendant's rights that were involved, not those of the court, and since he had even more opportunity to observe and interact with counsel than did the court, he was the person in the best position to judge counsel's behavior in context. He did so and clearly expressed his desire to exercise his constitutional right to proceed to a verdict before the chosen tribunal. This desire, for the reasons set forth in Defendant's initial brief, is the primary consideration in a double jeopardy analysis and cannot be overriden by the mere subjective impressions of the judge.

The State notes that the jury selection portion of the trial was not made part of the record. The State makes no assertion as to how or why this portion would be in any relevant, so it is hard to understand why the State made the point. Nonetheless, it should be noted that the parties in the trial court stipulated that the matter be determined on the facts set forth in Defendant's motion and in the transcript of the trial itself (SR 4-5). Indeed, the prosecutor even indicated that the facts were not in dispute and, in apparent recognition of the irrelevance of actions occurring prior to counsel's illness, that he didn't know if it was necessary for the successor judge who decided the motion to read the transcript (SR 4-5). Thus, the fact that the transcript of the jury selection process is not in the record is of no significance whatsoever.

The State also points out that Defendant's counsel twice moved for a mistrial prior to opposing the court's unilateral declaration of a mistrial. Any effort to attach any legal significance to this fact ignores the realities of a criminal trial. The shifting sands of such a proceeding frequently result in situations in which parties no longer want a mistrial that they might have previously desired and vice versa. The only issue in this case is whether the mistrial was justified at the time it was declared, when it was opposed by Defendant's counsel, Defendant himself and the prosecutor. That question must clearly be answered in the negative.[7]

H

THE CERTIFIED QUESTION

For some reason, the State does not even mention and has chosen not to attempt to answer the certified question in this case. That question, of course, deals with the circumstances under which a trial court can rely on its own subjective impressions as to counsel's competence to proceed in declaring a mistrial over defense objection. As a result of the State's failure to even discuss the matter, Defendant

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[7]The State's contention that Defendant's counsel twice moved for a mistrial is incorrect. On one of the occasions cited by the State, counsel merely stated that if there were psychiatric records of the alleged victim, the defense would be entitled to a mistrial(T 331). This statement was made just after the exchange between the alleged victim's family and counsel that the State claims demonstrates incompetence. In the context of counsel's recognition of the legal issue, it shows the opposite.

can only conclude that the State agrees with him that the answer is the one expressed by Judge Farmer in his dissenting opinion in the appellate court. "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." Thomason v. State, 594 So.2d 310, 317 (Fla. 4th DCA 1992), Farmer, J., dissenting. Applying this standard here means that the subjective factors relied on by the State must be disregarded and the conclusion that the mistrial here was not proper must be reached.

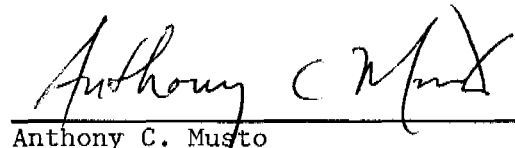
I

CONCLUSION

The State's brief is most notable for what it does not say. It does not address the Florida cases dealing with the illness of a trial participant. It does not address Defendant's effort to personally exercise his right to have his trial completed by a chosen tribunal. It does not address counsel's assurances to the court. It does not address the certified question. Rather, it relies on conclusions and interpretations drawn from the facts that are insufficient to outweigh the factors relied on by Defendant and that are in many instances unsupported by the record, taken out of context or irrelevant. Reversal is mandated. In Defendant's original brief

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to James J. Carney, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Fl. 33401, this 3rd day of December, 1992.

Respectfully submitted,



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