IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. RICHARD LEON LOWRY, Respondent.	)	CASE NO. 67,308

INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the Fourth District Court of Appeal and the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for Okeechobee County, Florida; the Respondent was the Appellant and Defendant, respectively in those lower courts. In this brief the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will be used to denote the record on appeal. The symbol "A" will be used to denote the appendix attached hereto. The opinion of the Fourth District shall be referred to as it appears in Southern Reporter. All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Respondent was charged by information with Count One a lewd and lascivious act and Count Two a lewd and lascivious act in the presence of a child, on September 1, 1983 (R. 193). Respondent was tried by jury on December 7 and 8, 1983 (R. 5-155). While the record is unclear, it appears the respondent was tried on Count One only, as the state presented only the testimony of [redacted] the victim, and her mother (R. 9), and the trial court instructed the jury only as to Count One (R. 16).

On December 8, 1983, the jury found the respondent guilty of a lewd and lascivious act (R. 203, 155). On February 9, 1984, respondent was adjudicated guilty and sentenced as a mentally disordered sex offender to ten years in the department of corrections (R. 190, 207-210). This sentence constituted a departure from the guidelines and the trial court entered an order stating his reasons for deviation from the guidelines on February 15, 1984, nunc pro tunc, February 9, 1984 (R. 212-213). Respondent timely appealed.

The Fourth District reversed, Lowry v. State, 468 So.2d 298 (Fla. 4th DCA 1985). The petitioner moved for rehearing, (A. 1-4); said motion was denied (A. 5). The state timely sought this Court's exercise of its discretionary jurisdiction (A. 6) and this appeal follows.

STATEMENT OF THE FACTS

Respondent's jury trial began on December 7, 1983 (R. 5). Prior to the testimony of [redacted] the victim, defense counsel requested the court to determine the witness' competency outside the presence of the jury. Petitioner opposed this motion (R. 3). The trial court denied the respondent's motion stating that either lawyer could ask questions regarding the witness' competency in front of the jury anyway (R. 31).

[redacted] the victim, testified first. She stated that her mother is [redacted] and that she (the victim) is six years old (R. 35). She was examined by the court regarding whether she understood that the oath was a promise to tell the truth, whether she believed in God and whether she would be punished for lying (R. 37-39). The victim stated that she knew she could be punished for not telling the truth (R. 39). She identified the respondent and stated that she called him Rick (R. 40). She testified she was in the bedroom with the respondent, that he got on top of her on all of the beds in all of the bedrooms except [redacted]'s (R. 41). She testified that the respondent had his clothes off, that she had her clothes off, although she could not remember who took them off; she testified that the respondent touched her between the legs, that he put his hands between her legs and rubbed it and that he put "his thing" into her, although she did not remember whether it hurt (R. 42-43). The victim then stated that it did hurt, that she cried, that she asked the respondent

to stop, that he put his clothes back on and she put her clothes back on and the respondent went to bed (R. 44). She testified that her mother was at work and that the incident occurred at the home where she, her mother and Rick lived (R. 44). She testified that she didn't recall whether it was day or night, that she went to bed and to sleep afterwards, saw her mother the next morning, that she told her mother what happened but didn't remember when (R. 45). She testified that she talked with her mother about Rick did, that she talked with the police, she stated she had not seen the respondent since it had happened (R. 46). She testified that she liked the respondent before this happened, that she sometimes called him daddy, she testified that the respondent sometimes spanked her if she did something wrong (R. 46-47). She testified that she remembered telling the judge that she would tell the truth, that the incident really happened, that her mother did not tell her to lie (R. 47-48). On cross-examination she stated that she did not remember whether [redacted] stayed with her that night, she testified that [redacted] was watching TV along with [redacted] and that [redacted] was not there (R. 50). She testified that God and Jesus were in the room with her when Rick got on top of her (R. 51). She testified that she recalled talking with a policeman named Ike and with a blond haired deputy named Kate (R. 52); she did not remember who showed her the doll but that it was not Kate (R. 53). She remembered Dr. Brown, who examined her at

his office, that her mother and Kate were there also, and that Kate took her there (R. 54). She did not remember how many times she talked with Ike but she stated that [redacted] was not with her the first time (R. 54). She stated [redacted] was there one time with Ike and Kate but she did not remember what Ike asked nor did she remember [redacted] telling Ike things the respondent had done (R. 55). She testified that the respondent had gotten on top of her on all the beds in the house except for [redacted]s. On that night she stated they were on her bed; she did not remember her mother coming to her and asking her about the incident (R. 56). She did not remember [redacted] telling her to tell Ike so that the respondent could go to jail (R. 57). She testified that both her mother and Rick put calamine lotion on her and took care of her when she had the chickenpox, but that she did not have the red dots all over her body (R. 57). She testified that she did not know whether Rick had gotten on top of her before or after her birthday in June but that it was after she had gone back to school (R. 57-59).

[redacted], mother of the victim, testified that she first met the respondent on Good Friday in 1982 (R. 61). She testified that she met the respondent at Good Spirits, where she worked, that she had met him before, around November of 1981, but that their first date was Good Friday (R. 61-62). She stated they began living together

in May of 1982, and that they lived together for about a month and then in June the respondent went to jail (R. 63). The respondent then moved for a mistrial. The trial court apparently offered a curative instruction which the respondent refused (R. 63).

[redacted] testified that she was again living with the respondent in May of 1983 and that she first became aware of the incident that Monday (August 8, 1983) (R. 64). She learned of the incident through her son[redacted] so she called the respondent at work and asked whether there was any truth to [redacted]s statements and the respondent could not answer (R. 65). She told the respondent that the children had told her things that were unbelieveable and shocking and told him what they had told her and asked whether there was any truth and that the respondent was silent. Whereupon she asked him couldn't he say anything and realized that it must be true (R. 64-65). Finally the respondent told her he did not know what she was talking about but she asked him to leave and she called the sheriff (R. 65). She testified they separated that Monday and that she called the sheriff that same day (R. 65-67). She stated that she worked Friday night at Good Spirits, that she went to work approximately 6:30 p.m., was usually there until 12:20 and home by 12:30 (R. 67). She testified that everyone was asleep when she got home Friday night but that when she left the respondent,

[redacted], [redacted], and [redacted] were there and that she was not aware that anyone was going to spend the night out (R. 67-68). She testified she later found out that some children spent the night out (R. 68).

On cross-examination [redacted] testified that she never argued with the respondent's mother nor did she remember saying to her the only way she could get rid of Rick was to have him put in jail (R. 71). She further testified that she did not recall saying she would keep the respondent around until she got all she needed from him and would then get rid of him (R. 71). She never saw any sexual contact between the respondent and her daughter nor did she ever suspect any (R. 71). She stated that [redacted] first told her about the incident and, while he was not there on that particular night, he had been there when it had occurred before (R. 71-72).

The respondent moved for a mistrial on the basis of [redacted]'s statement that these events had occurred before. The court apparently suggested to defense counsel that he had invited the answer (R. 72). The rest of the bench conference is not recorded but apparently the trial court denied the motion for the mistrial (R. 73). [redacted] went on to testify that she talked with the sheriff's deputies on Monday the 8th and said they took a taped statement from her and that they talked with [redacted] on the 8th, the 10th and the 12th (R. 73). She stated that they had had problems

getting [redacted] to talk, she did not recall Willingham describing sexual activities to [redacted] (R. 74). She stated that she had not talked to [redacted] about the incident very often, she told [redacted] that [redacted] had to talk to get the respondent help; she never mentioned jail and she did not because she did not want the children to look at that the rest of their lives (R. 74). She testified that [redacted] could have been at home on August 5th when the incident occurred, that it could have occurred before he left to spend the night out but she did not know as she had never asked [redacted] when he left to spend the night (R. 75). She tried not to talk with the children at all about the incident so as not to sway them, she wanted them to tell the truth in court (R. 75-76). She testified she had never told the victim what to say to anyone except to tell the truth; she stated the victim was reluctant to talk with authorities regarding this event and would not talk at all the first time she was questioned by the police, rather the victim pretended she couldn't hear (R. 76-77).

The petitioner then rested (R. 77).

Defense counsel renewed his motion for mistrial and the court reserved ruling as he felt there was a significant question of invited error; the court stated it would read the cases and preserve ruling until that time (R. 78). The respondent moved for a judgment of acquittal due to the insufficiency of the evidence (R. 79). Respondent asserted

that there was no testimony regarding when the incident actually occurred, that is, on August 5, 1983; respondent also asserted there was a total lack of evidence as to a lewd and lascivious act by the respondent on the victim (R. 79). The petitioner asserted that all the testimony and inquiry had been regarding August 5, and that the evidence was uncontradicted as to that date (R. 80). The trial court ruled that there was sufficient evidence for a prima facie case and that a jury question had been raised, thus the trial court denied respondent's motion for judgment of acquittal (R. 82).

Respondent put on the testimony of his mother who testified that she knew [redacted] from when she and the respondent lived together (R. 87). She stated that she had not had any trouble with [redacted] and that [redacted] told her that when she had gotton all the money out of the respondent she could, she was going to kick him out and think of a way to send him to jail (R. 87). Mrs. Lowry testified that she and [redacted] were not fighting at the time and that she did not think [redacted] was kidding; she believed the comment was made in May while she and [redacted] were talking about marriage (R. 88). Mrs. Lowry testified that only [redacted] was present at the time and that she believed [redacted] but that she did not tell the respondent because he would not believe her, although she did tell the respondent's brother (R. 89).

The respondent testified that he had known [redacted] since March of 1982 and that he moved in with her about a week and a half after they first dated, in August of 1982 (R. 92-93). He testified that he did not know what [redacted] had said to his mother until after he had been arrested (R. 93). He testified that [redacted] had been in a car accident and was off and on work because her wrist was bothering her and did not go back to work until August 5, 1983 (R. 93-94). He testified that he kept the children when [redacted] worked at night (R. 95). He testified that [redacted] spent the night at the [redacted] home and that [redacted] spent the night at their house and that [redacted] was eight years old (R. 96). The respondent stated that when [redacted] called that evening he told her about [redacted] he stated he never did what [redacted] said he did to her (R. 96). He testified that he had doctored [redacted] through the chickenpox and had put lotion on all three children and that they had their clothes off for this (R. 97). He stated that to his knowledge he had never done anything indecent to the children when they had their clothes off; he had given [redacted] baths with [redacted] in the house, and had never had a problem with the kids complaining regarding the baths or the lotion (R. 97). He stated that he played with the kids on August 5th, that [redacted] and [redacted] went to bed in [redacted]s bed and that [redacted] came and laid down with Rick; no one went to sleep and the lights were off for five minutes

and then back on (R. 98-99). The respondent stated he was wearing cutoffs and no shirt; that [redacted] and [redacted] and [redacted] were in their underwear which was not uncommon (R. 99). He testified that he first learned of the accusations on August 9 (Tuesday), while he was at work (R. 99). He stated that he argued with [redacted] in the morning of August 9th over whether [redacted] could go to work with him anymore (R. 100). He stated that [redacted] was angry with him when she left him at work but that she did not mention the accusations; he had no indication of problems on Sunday or Monday night or Tuesday morning (R. 101). He testified that [redacted] called Tuesday at noontime and that he told her he did not know anything about it; he did not recall the specific question but that [redacted] was angry and yelling and sounded like she had been crying (R. 101-102). He stated that there was no pause between [redacted] s questions and his answer that he did not know anything about it (R. 102). He testified that [redacted] said she guessed it was over and then she changed her mind, saying perhaps they could work it out; the respondent refused; he was arrested on August 10 (R. 102). He stated that he went to the home on August 9, that he got the key from next door, and [redacted] was not home (R. 103). He got his clothes and he left and did not see [redacted] prior to the time he was arrested nor did he talk with her (R. 103). He testified that he had argued with [redacted] about bullying his sister but that they got along

fairly well (R. 103-104). He did not believe [redacted] had ever seen him have sex with [redacted] (R. 104). Respondent testified he got along with [redacted] fairly well (R. 104). He testified he had never laid in bed with [redacted] without his clothes on, that she was never in the room with him when he was undressed and that he had no idea why people would say these things (R. 104-105). The respondent admitted having been twice convicted of a crime (R. 110). He stated that despite [redacted]s testimony that these events occurred after school started that he was not around them then as he had been in jail since August 10 (R. 111).

The respondent rested (R. 113).

The respondent then renewed its motion for judgment of acquittal as no date had been proved and that [redacted] had said the incident occurred after school started (R. 116). The trial court stated that there was a true conflict as to the evidence but that it was not so irreconcilable as to require a directed verdict; the trial court found the petitioner had proved a prima facie case and denied the motion for judgment of acquittal (R. 117). The trial court continued to reserve its ruling on the motion for mistrial until post trial in the event the respondent had an adverse verdict and until after the court had researched the issue (R. 117).

In closing argument defense counsel attempted to discredit [redacted]s testimony, asserting that she had lied (R. 131-132). He argued that the state had failed to

call numerous witnesses, Ike Willingham, Detective Don Fisher, Deputy Kaye Browning, [redacted] and Dr. Brown (R. 132-138). Defense counsel also argued that the victim was not credible either and that her testimony was a product of things other people had put into her mind (R. 135).

On rebuttal the prosecutor argued that the defendant's assertions were not based on the evidence presented but rather on evidence not presented (R. 140). The prosecutor asserted that defense counsel had asserted that this absent evidence would have been harmful but that that was not true (R. 140). He stated that until the defendant testified in court he had no idea what the defendant was going to say but that the defendant knew exactly what each of the state witnesses were going to say before he testified (R. 141). Defense counsel then moved for a mistrial stating that the prosecutor's comment was an improper comment on the defendant's right to remain silent (R. 141). The court denied the motion for a mistrial (R. 141-142).

The jury returned a verdict of guilty against the respondent of committing a lewd and lascivious act (R. 203).

On January 5, 1984 defense counsel renewed its motion for mistrial regarding the comments that [redacted] had seen the respondent commit these acts before and also [redacted]s statement that the respondent was in jail (R. 155-158). Defense counsel admitted that he had no cases in his

favor and asserted a curative instruction would have been improper as it only would draw attention to the comment (R. 157-158). The trial court denied this motion (R. 163-164).

As the respondent did not raise any issue as to sentencing, the petitioner will not summarize the sentencing proceedings herein.

The respondent timely appealed his conviction to the Fourth District Court of Appeal raising three issues: whether the respondent's motions for judgment of acquittal were properly denied; whether the respondent's motions for mistrial were properly denied, and whether the trial court properly denied the respondent's motion to determine the competency of the victim to testify, outside the presence of the jury and properly allowed the victim to testify.

The Fourth District held that one issue required reversal; the Court found that one comment by the prosecutor in his closing argument, while in response to defense counsel's closing arguments and directed at respondent's credibility, the remark was also susceptible of construction as a comment on respondent's right to remain silent, and thus "reversible without resort to the harmless error doctrine." Lowry v. State, 468 So.2d 298 (Fla. 4th DCA 1985). From this holding the state appeals.

POINTS ON APPEAL

POINT I

WHETHER THE HARMLESS ERROR DOCTRINE SHOULD BE APPLIED TO CASES IN WHICH A PROSECUTOR HAS VIOLATED A DEFENDANT'S FIFTH AMENDMENT RIGHTS UNDER GRIFFIN v. CALIFORNIA, 380 U.S. 609 (1965)?

POINT II

WHETHER THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTION FOR MISTRIAL SINCE THE PROSECUTOR'S REMARKS AMOUNTED TO NOTHING MORE THAN A COMMENT ON THE EVIDENCE AS IT EXISTED BEFORE THE JURY?

SUMMARY OF ARGUMENT

POINT I

The state respectfully submits that the harmless error doctrine is and should be applicable to situations such as that alleged sub judice, involving claims of improper comment on an accused's exercise of his right to remain silent. Accordingly, this Court should reject application of a per se error rule and should reverse the Fourth District's application of a per se reversible rule.

POINT II

The prosecutor's comment during closing argument was not an improper comment on the respondent's assertion of his right to remain silent. Rather, the comment was in response to those of defense counsel and a comment on the evidence as it existed before the jury, thus was entirely proper.

ARGUMENT

POINT I

THE HARMLESS ERROR DOCTRINE SHOULD BE APPLIED TO CASES IN WHICH A PROSECUTOR HAS VIOLATED A DEFENDANT'S FIFTH AMENDMENT RIGHTS UNDER GRIFFIN v. CALIFORNIA, 380 U.S. 609 (1965).

In Griffin v. California, 380 U.S. 609 (1965), the United States Supreme Court held that any comment on a defendant's failure to testify violates his Fifth Amendment privilege against self-incrimination. Soon after Griffin, however, the Supreme Court in Chapman v. California, 386 U.S. 18 (1967) declined to apply a per se rule requiring reversal in all cases where Griffin errors were alleged to have occurred and instead held that a conviction could be affirmed if the reviewing court concluded that, on the whole record, the error was harmless beyond a reasonable doubt. The harmless error principles announced by the Court in Chapman, supra, were reaffirmed by the United States Supreme Court in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), the Supreme Court made it clear that notwithstanding the protections afforded by the Fifth Amendment of the federal constitution a prosecutor's comment upon the failure of the defendant to testify (i.e., upon the exercise of his right to remain silent) is not per se reversible error such that a reviewing court must, before reversing upon this basis, review the appellate record to

determine if the error was harmless beyond a reasonable doubt, i.e., if the evidence of guilt presented at trial was overwhelming. The Hasting court noted that it had previously rejected the per se reversal rule in Chapman v. California, supra, and reiterated its holding therein that the harmless error governs even constitutional violations under certain circumstances. In reaching its conclusion, the court recalled the Chapman court's acknowledgment that certain constitutional errors involved "rights so basic to a fair trial that their infraction can never be treated as harmless error," but clearly determined that an improper comment on the exercise of a defendant's Fifth Amendment right to remain silent was not one of these "basic" rights triggering that extraordinary protection. 103 S.Ct. at 1980, n. 6.

In State v. Murray, 443 So.2d 955, 956 (Fla. 1984). this Court adopted the reasoning of the United States Supreme Court in United States v. Hasting, supra. In holding that improper prosecutorial argument could and did in that instance constitute mere harmless error:

> ...Nevertheless, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth

> in Chapman v. California, 386 U.S. 18, S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations. The opinion here contains no indication that the district court applied the harmless error rule. The analysis if focused entirely on the prosecutor's conduct; there is no recitation of the factual evidence on which the state relied, or any conclusion as to whether this evidence was or was not dispositive.
>
> We have reviewed the record and find the error harmless. The evidence against the defendant was overwhelming...

This Court's opinion in State v. Murray, supra, clearly embraces the Hasting and Chapman opinions and rationale and similarly determines that prosecutorial misconduct through improper comment does not involve any error "so basic to a fair trial" that it can never be treated as harmless. 443 So.2d at 956. Subsequently in State v. Rowell, 476 So.2d 149 (Fla. 1985); State v. Marshall, 476 So.2d 150 (Fla. 1985) and State v. Diguilio, 10 F.L.W. 430 (Fla. August 29, 1985), this Court affirmed its approval of application of the harmless error doctrine to cases involving comments on a defendant's

exercise of his right to remain silent. Given this Court's acceptance of the Hasting decision and rationale in Murray, it has been made clear that an improper comment by a prosecutor - including an improper comment on the exercise by a defendant of his Fifth Amendment right of silence does not mandate, per se, reversal of a conviction by an appellate court in its supervisory power, but that rather the error must first be evaluated in light of the evidence presented to determine if the offensive conduct was in fact harmless. Accordingly, the per se reversal rule reiterated in Harris v. State, 438 So.2d 943 (Fla. 1979), David v. State, 369 So.2d 943 (Fla. 1979), Bennet v. State, 316 So.2d 41 (Fla. 1975), and similar decisions,[1] have lost their import due to this Court's embracing of the Supreme Court's clear pronouncement that the harmless error doctrine is applicable to appellate review in the context of the Fifth Amendment rights and an alleged comment on a defendant's exercise of his right to remain silent.

Before the district court, the respondent argued that any comment on accused's failure to testify constituted per se reversible error without regard to the harmless error

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[1] Clark v. State, 363 So.2d 331 (Fla. 1978); Trafficante v. State, 92 So.2d 811 (Fla. 1957); Brazil v. State, 429 So.2d 1339 (Fla. 4th DCA 1983); Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978); Willinsky v. State, 360 So.2d 760 (Fla. 1978); Shannon v. State, 335 So.2d 5 (Fla. 1976); see also State v. Burwick, 442 So.2d 944 (Fla. 1983).

doctrine under Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978), and Bolton v. State, 383 So.2d 924 (Fla. 2nd DCA 1980). Respondent's emphasis on this Court's determination that the harmless error doctrine is inapplicable in such improper comment cases is understandable in the present context for if such error as alleged did occur at the trial below - which petitioner submits it did not (see Point II herein) - this case would be an obvious one for applying the harmless error rule in light of the overwhelming evidence of respondent's guilt. Indeed, Chief Justice Anstead, in his special concurring opinion in the instant case, notes that under a different standard he would find the comment to be harmless error. Lowry v. State, 468 So.2d 298, 299 (Fla. 4th DCA 1985).

Below, the evidence revealed that the six year old victim was assaulted by the respondent (R. 35, 41, 44). The victim testified that the respondent had all his clothes off, that her clothes were off, that the respondent touched her and rubbed her between her legs, that he put his "thing" into her, that it hurt, that she cried and that after she asked the defendant to stop, he put his clothes back on and went to bed (R. 42-44). Additionally the victim's mother testified that when she first learned of the incident through her son [redacted], she phoned the respondent and confronted him with the children's allegations (R. 64-65). She asked the respondent whether there was any truth to the allegations and

the respondent was silent; she asked him whether he could say anything and when he failed to reply, she realized that it must be true (R. 64-65). She further testified that her son [redacted] had also told her that there had been prior incidents (R. 71-72). In light of the victim and her mother's testimony, the petitioner asserts that the comment at issue here, even if it constituted error, clearly had no affect whatsoever on the jury's verdict given the overwhelming evidence of respondent's guilt.

Accordingly, the state respectfully submits that the harmless error doctrine is and should be applicable to situations such as that alleged sub judice, involving claims of improper comment or testimony on an accused's exercise of his right to remain silent. Indeed, is it not preposterous to reverse a defendant's conviction where evidence of guilt is overwhelming merely because of a prosecutor's careless comment on the defendant's right to remain silent? Where is the great prejudice that justifies this extraordinary prophylactic rule that each year dooms many otherwise proper convictions based on overwhelming evidence of guilt to reversal and retrial, if possible, at great expense in time and money, when the United States Supreme Court (the sole interpreter and protector of federal constitutional rights) specifically held that such protection is unnecessary, and the Florida legislature has likewise specifically decreed that no criminal conviction should be reversed if the error alleged is harmless?

The harmless error doctrine should be applied to the prosecutor's remarks below and the respondent's convictions and sentences reinstated.

POINT II

THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTION FOR MISTRIAL SINCE THE PROSECUTOR'S REMARKS AMOUNTED TO NOTHING MORE THAN A COMMENT ON THE EVIDENCE AS IT EXISTED BEFORE THE JURY.

A motion for mistrial is addressed to the sound discretion of the trial court. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Jackson v. State, 419 So.2d 394 (Fla. 4th DCA 1982). The power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity. Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885; Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982). A mistrial is a device used to halt the proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile. Ferguson, supra, at 641. Even if the comment is objectionable on some obvious ground, the proper procedure is to request an instruction from the court that the jury disregard the remarks. Id at 641.

The crux of defendant's closing argument was that the state's case was not credible. He stated that the victim's mother lied (R. 131-132), and that the victim's testimony was a product of information told to her by other people (R. 135). He further argued that the state's failure to call the detective, HRS worker, examining doctor, the

victim's neighbor or her brother, indicated that their testimony (R. 131-138). Defense counsel even raised the defendant's credibility himself stating:

> ...the State Attorney would have you believe that anyone who sits over there is going to lie to you. There is nothing I can do to negate the fact that my client sits here and when he gets up there he has an interest but that doesn't mean that everyone lies when he comes up here (R. 131).

Clearly, the prosecutor's argument, when placed in context (R. 140-141), is a comment on the defendant's credibility, and fair reply to the defendant's closing argument.

In Bolton v. State, 383 So.2d 924, 927-928 (Fla. 2nd DCA 1980), the court held:

> It has long been held by the courts of this state that the state has a right in a criminal trial to direct the attention of the jury to the posture of the case before the jury. No error is committed as long as it does not comment directly or covertly upon the failure of the accused to testify. Woodside v. State, 206 So.2d 426 (Fla. 3d DCA 1968)
>
> The federal courts have clearly supported the right of the prosecutor to comment on the failure of the defense, as opposed to the defendant, to explain testimony. For example, in United States v. White, 444 F.2d 1274 (5th Cir.), cert. denied, 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971), the court held:
>
> > It has long been the law in federal courts that remarks about the defendant's failure to testify constitute reversible error. Such statements infringe on the defendant's presumption

> of innocence and violate his Fifth Amendment right against self-incrimination by converting silence to evidence of guilt. 18 U.S.C.A. § 3481; Wilson v. United States, 149 U.S. 60 13 S.Ct. 765, 37 L.Ed.2d 650 (1893); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).
>
> The test in determining whether such a transgression has occurred is whether the remark was manifestly intended or was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." Samuels v. United States, 398 F.2d 964 (5th Cir. 1968), cert. den. 393 U.S. 1021, 89 S.Ct. 630, 21 L.Ed.2d 566 (1969).

Discretion is given trial judges in granting mistrials. Salvatore v. State, 366 So.2d 745 (Fla. 1979). One reason why such discretion is given to trial judges is that the trial judge is present when the objected to statements are made. "They observe what has taken place, hear the inflections and mannerisms of counsel and are able to make an immediate determination of the effect of the comments on the jury." Bolton, supra at 927.

The state submits that the prosecutor's comment when viewed in its context clearly shows it was nothing more than an argument which directed the attention of the jury to the posture of the case before them, State v. Bolton, supra, at 927, and was a comment upon the credibility and unbelievability of the

respondent's testimony. Maberry v. State, 303 So.2d 369, 370 (Fla. 3rd DCA 1974). As such, the comments were not improper and the trial court did not err in denying respondent's motion for mistrial.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits was furnished by mail to: LESTER W. JENNINGS, ESQUIRE, P. O. Box 237, Okeechobee, Florida 33472, this 2nd day of January 1986.

Sarah B Mayer

Of Counsel