IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC02-1921
L.T. Case No. 4D00-2987

ALLISTER JONES,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the Appellant in the Fourth District Court of Appeal. Petitioner was the Prosecution and the Appellee, respectively, below.

In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used:

"R" = Record on Appeal Documents

"T" = Record on Appeal Transcripts

"SR" = Supplemental Record on Appeal

"A" = Petitioner's Appendix.

STATEMENT OF THE CASE

Respondent, Allister Jones, was charged by amended information filed in the Seventeenth Judicial Circuit with Count I, lewd assault; and Count II, false imprisonment of a child under 13 (R 24-25).

Respondent proceeded to trial by jury on June 22, 2000 and was found guilty as charged (R 46-47). He was so adjudicated (R 50-51). At sentencing on July 21, 2000, pursuant to the state's notice of intent to seek imposition of the mandatory sentence as a prison releasee reoffender (R 10-11), the court classified and sentenced Respondent as a prison releasee reoffender on Count I to fifteen (15) years in the Department of Corrections with a minimum mandatory term of fifteen (15) years and on Count II Respondent was sentenced under the sentencing guidelines to a concurrent term of 7.7 years in the Department of Corrections with credit for 786 days time served (R 55-60; T 226-227).

Respondent timely appealed (R 63).

Petitioner's convictions and sentences were reversed by the Fourth District Court of Appeal and the cause remanded for a new trial on April 17, 2002 (A 1-4). Petitioner timely requested rehearing, rehearing *en banc* and/or certification and a stay of mandate. The district court denied Petitioner's motion, but issued a substituted opinion on July 24, 2002 (A 1-4). *Jones v. State*, 821 So. 2d 473 (Fla. 4th DCA 2002).

Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction and on March 6, 2003, this Court issued its Order accepting jurisdiction, dispensing with oral argument and setting a briefing schedule. This brief follows.

STATEMENT OF THE FACTS

Shannon Rose, born May 5, 1988, testified that on May 19, 1998 she lived in a three-story apartment building in Sunrise (T 113-114, 122). When she got home from school she was going to the elevator and Respondent was coming down the stairs. Respondent lived on the second floor. He went to the elevator. They both got on. She pushed the button to the third floor and to the second floor so that he could get off. After the doors closed he asked if he could have a hug and she said yes. She knew him, she had seen him around and he knew her mom. After she told him yes, he hugged her by putting his arms around her with his arms on her back. He was still hugging her when he asked her for a kiss and she said no. After she said no, he kissed her on her nose and on her lips. Her mouth was closed. He tried to kiss her with his tongue. She was moving her face and trying to get away. He was holding on to her. This took a short period of time (T 114-118, 120). He asked her if she wanted to go to his apartment and she said no. When the door opened on the third floor, she pushed him away and ran home. When she got home she beeped her mom code 911. When she told her mom what happened her mom came home and called the police (T 119-120). Respondent never actually put his tongue into her mouth. She recalled him telling her that he hoped she was not offended (T 123-124).

Tara Rose, Shannon's mother, testified Shannon contacted her by paging her.

When she called her back she had a conversation with her (T 127). As a result of that conversation she went home where she found her in the kitchen crying, shaken, nervous and upset. Her other two kids were also there. Rose asked her what happened and when Shannon told her she called the police (T 128). When she learned that the incident involved Respondent, she went downstairs and knocked at his door but there was no answer (T 129). She did not give Respondent consent to be on the elevator with Shannon (T 132).

Diana Mancinelli, formerly a detective with the Sunrise Police Department, was the detective assigned to investigate the case. She met Ms. Rose and Shannon Rose on May 21and took a taped statement from Shannon (T 133-134). The tape-recorded statement was published to the jury: The statement reflected in pertinent part that on May 18 [sic] she went to get on the elevator and Respondent was on the elevator. She was in the corner and he asked if he could have a hug. Then he started kissing her and when it got to the second floor she said to go and then he pushed 3. He asked if she wanted to go to his apartment and she said no. Then the elevator opened and she pushed him and went home. She just came home from school and was getting on the elevator; he was already there. She pushed her floor and 2 for his floor so he could get off. He did not ask her to push it. When he asked her for a hug she said okay. She had never hugged him before and he had never asked her before (T 137-138).

The hug lasted until they got off the elevator. When he asked her for a kiss, she told him no. He was hugging her when the elevator doors opened on the second floor. He stopped hugging because he had to reach out his hand to push 3 and she told him to go (T 139). He asked her for a kiss before the elevator went to the second floor. When she said no, he started kissing her. His arms were still around her back. He kissed her on her nose and on her lips. It was a little kiss. He tried to put his tongue in her mouth, but it did not go in (T 140). She was in the corner of the elevator on the wall. She didn't know if she could have gotten away if she wanted to. When the elevator door opened she pushed him away and got off. When she got off he said, "I hope you are not offended" (T 141). She said no because she didn't want to get hurt. She wasn't crying in the elevator; she cried when she got home. She beeped her mom 911 when she got home (T 142). After the taped statement concluded, Mancinelli testified that she believed it was the same day she tried to talk to Respondent but he was not home. She and Detective Marke contacted him on May 25 at his apartment to interview him (T 143). She read him his *Miranda*[1] rights and he agreed to speak to her off tape. She apprised him of the allegations and his basic response was that he was in bed all day and never left his apartment. Shortly after

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

that she placed him under arrest (T 144-146).

Detective Jimmy Patrizi conducted an interrogation of Respondent on May 25, 1998, at the police department. He took a tape-recorded statement after reading him his *Miranda* warnings and he signed a rights waiver form (T 150-151). Respondent initially denied being on the elevator. Later, although he admitted he was on the elevator, he denied ever speaking to the girl (T 153). Patrizi believed he said he was checking his mail before he got on the elevator. Respondent said there was a young girl on the elevator when he got on. He said they rode the elevator to the second or third floor and the girl got out (T 154). The part where he denied being on the elevator was not on tape; he only went on tape when Respondent gave him the other version (T 157).

The following transpired during the prosecutor's closing argument to the jury:

> STATE: The State of Florida has proven this case beyond and to the exclusion of all reasonable doubt and I ask you to go back in that jury room, apply your common sense to the true facts of this case and come back and tell the defendant what he knows sitting there today, that he is guilty of indecent assault.
>
> DEFENSE: Judge, objection.
>
> STATE: Guilty of false imprisonment.

DEFENSE: Judge, I object to that comment, what the defendant knows.

COURT: Come on up.

(Thereupon, a sidebar ensued).

DEFENSE: That's an improper comment on the defendant.

COURT: We talk about it, we don't make speeches on the way over.

DEFENSE: I was just surprised that it came out. My client knows what he's guilty of is an improper comment. I think it gives rise to a mistrial at this point.

COURT: I don't .

DEFENSE: Are you sustaining the objection?

COURT: Yes.

DEFENSE: Will you tell the jury to disregard it?

COURT: I will sustain the objection, tell them to disregard. What did he say?

DEFENSE: I think it's an improper comment. Judge, you're sustaining it?

STATE: I think it's a proper comment, Judge. I have said it all felony trials, not one person ever objected, not one Judge ever told me--

DEFENSE: To say what, the guy knows he's guilty, you

can say that, that the guy knows he's guilty?

COURT: Why not? He can't say that he didn't say anything.

STATE: I'm not commenting on the right to remain silent.

COURT: Overruled.

(Thereupon the sidebar was concluded.)

COURT: Objection's overruled.

STATE: I ask that you come back and tell the defendant what he already knows today that he's guilty of indecent assault and false imprisonment of a child under the age of thirteen. Thank you.

(T 191-192).

SUMMARY OF THE ARGUMENT

POINT I

This Honorable Court should reconsider its decision accepting jurisdiction of this cause and find that jurisdiction was improvidently granted.

POINT II

The Fourth District Court of Appeal reversed and remanded for a new trial, holding that the trial court erred in overruling Respondent's objections to the state's improper comment during closing argument commenting on Respondent's right to remain silent. In doing so, the district court applied existing law to the instant facts. This opinion, based upon sound and long-standing legal principles, does not conflict with this Court's holding in *Harris v. State*, 438 So. 2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963, 104 S. Ct. 2181, 80 L. Ed. 2d 563 (1984). Thus, this Honorable Court should affirm the instant decision of the fourth district.

ARGUMENT

POINT I [RENUMBERED]

THIS HONORABLE COURT SHOULD FIND THAT DISCRETIONARY JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(B)(3) OF THE *FLORIDA CONSTITUTION* WAS IMPROVIDENTLY GRANTED.

Respondent respectfully suggests that this Honorable Court should reconsider its decision to utilize its discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the *Florida Constitution* to review the instant decision which Petitioner claims conflicts with this Court's holding in *Harris v. State*, 438 So. 2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963, 104 S. Ct. 2181, 80 L. Ed. 2d 563 (1984), based on the following grounds.

In *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980), wherein this Court examined at length the effect of the 1980 constitutional amendment on its conflict jurisdiction, this Court recognized:

> 'We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay

> in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute. To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.[Citations omitted].'

Id. at 1357-1358, quoting *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). Further, in *Lake v. Lake*, 103 So. 2d 639, 641-642 (Fla. 1958), this Court addressed the limits placed on its jurisdiction even then to prevent the intermediate appellate courts from "becoming way stations on the road to the Supreme Court." This Court wrote:

> *They [district courts of appeal] are and were meant to be courts of final, appellate jurisdiction.* (emphasis in original) (citations omitted). If they are not considered and maintained as such the system will fail. Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own *powers* by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.

Lake, 103 So. 2d at 642.

As can be readily seen from the argument set forth in Point II, *infra*, this case does not provide a basis for the exercise of this Court's discretionary jurisdiction as there is *no* express and direct conflict on the same question of law between the instant cause and *Harris v. State*, 438 So. 2d 787. It is well-settled that conflict between decisions must be express and direct; the conflict must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

As the majority of the district court specifically found, the instant case is factually distinguishable from *Harris v. State*. *See, Jones v. State*, 821 So. 2d 473, 474 (Fla. 4th DCA 2002).

Therefore, based on the foregoing and the argument set forth in Point II, the decision of the fourth district in the case at bar is **not** in express and direct conflict with *Harris v. State* on the same question of law.

Further, this Court should find that review was improvidently granted as not only is the decision below fully consistent with established law, review would merely be an unnecessary exercise of judicial resources and would have the effect of rendering the district court a mere way station on the road to this Court. *See Lake v. Lake*, 103 So. 2d at 641-642. There is no genuine issue with respect to the propriety

of the decision or the outcome of the appeal below.

Discretionary jurisdiction entails a judicial power to review a case, not an obligation to do so. In light of the policy considerations expressed herein as well as the reasons set forth above, Respondent respectfully requests that this Honorable Court reconsider its decision and find that discretionary jurisdiction was improvidently granted.

POINT II

THE FOURTH DISTRICT COURT PROPERLY RULED THAT THE PROSECUTION'S IMPERMISSIBLE COMMENT DURING CLOSING ARGUMENT ON RESPONDENT'S RIGHT TO REMAIN SILENT CONSTITUTED HARMFUL AND REVERSIBLE ERROR UNDER THE FACTS PRESENTED [RENUMBERED AND RESTATED].

Assuming *arguendo* that this Honorable Court does not reconsider its acceptance of jurisdiction herein (*see* Point I), Respondent contends that there is *no* express and direct conflict on the same question of law between the instant cause and *Harris v. State*, 438 So. 2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963, 104 S. Ct. 2181, 80 L. Ed. 2d 563 (1984), as the instant cause is factually distinguishable from *Harris v. State* as the majority of the district court specifically and correctly determined.

In *Harris v. State*, 438 So. 2d 787, the defendant, who was charged with murder in addition to other crimes, gave an oral and written confession in which he confessed to the commission of the crimes charged. During direct, the prosecutor asked the interrogating officer to describe Harris' demeanor during the interrogation which had elicited the confession and the officer responded that Harris was "totally calm" and "nothing seemed to bother him." *Id.* at 790. As Harris didn't testify, defense counsel's strategy was to attempt to convince the jury that the confession

was involuntary and thus should not be believed. *Id.* at 792. In closing arguments the prosecutor commented, "'I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial.'" *Id.* at 794. The Harris Court rejected the defense argument that these comments were improper:

> A full reading of the prosecutor's argument establishes without question that he was not referring to [Harris'] failure to testify at trial. The prosecutor, in fact, was addressing the critical issue of whether [Harris'] confession was voluntary and, in doing so, was commenting on [Harris'] demeanor at the time the confession was made. To understand the challenged statement, it is necessary to review the entire argument on this issue. In the transcript, the argument of the prosecutor reads as follows:
>
> > You have got to be concerned about the voluntariness of the statement; whether it was freely and voluntarily made in order to rely on the statement.
> >
> > Again, you have other evidence to work with, but we are looking exclusively at the statement here.
> >
> > There is nothing in the statement that indicates that it is not freely and voluntarily given. You can look at the photographs that have been introduced of [Harris] immediately after post-statement taking and you can see that the photographs indicate a man who looks exactly the same except for, perhaps, some minor change in the combing of his hair. There are no injuries on Mr. Harris there. They didn't beat him or threaten him.
> >
> > If they had beat or threatened him, the

> statement that he would have given would have tracked exactly what Parmenter wanted him to say, but it didn't.
>
> How can you say the statement wasn't voluntary when the man goes through the statement and he initials every page of the statement and he makes certain corrections on the statement. He says certain things in the statement which indicate that he is expressing himself in a narrative sort of way and he is asked questions such as: What was your purpose of going into the house or what were your activities inside the house, and certainly those are broad and general enough questions for [Harris] to be able to respond to. These are his words.
>
> I submit to you this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial.
>
> This is the type of person he is. This is the type of individual that could do something like he did in this case to Essie Daniels.
>
> …
>
> … There is nothing in this statement which would indicate that statement was anything but freely and voluntarily given.

(Emphasis added.) It is obvious that the prosecutor was describing to the jury [Harris'] demeanor during his interrogation by comparing it to [Harris'] demeanor as he appeared before them at the trial. We find that this comment does not violate [Harris'] fifth amendment rights nor does it violate the case law or the rules of procedure of this state.

Harris v. State, 438 So. 2d at 794-796.

By contrast, the Fourth District in *Jones v. State* considered a situation with clearly distinguishable circumstances. Respondent did not testify at trial and there was no issue concerning the voluntariness of a statement given to the police wherein he denied ever speaking to Shannon Rose. During closing arguments, the prosecutor commented,

> The State of Florida has proven this case beyond and to the exclusion of all reasonable doubt and I ask you to go back in that jury room, apply your common sense to the true facts of this case and come back and tell the defendant what he knows sitting there today, that he is guilty of indecent assault.

(T 191). As pointed out by the district court, this Court in *Harris* held that the challenged comment did not refer to Harris' failure to testify at trial, but *instead* addressed the critical issue of whether Harris' *confession* to police had been voluntary, and in doing so, the prosecutor was commenting on Harris' "**demeanor at the time the confession was made.** *Id.* (emphasis added)." *Jones v. State*, 821 So. 2d at 475, *citing Harris*, 438 So. 2d at 794. The fourth district noted, that as this Court had ruled, "In doing so, the prosecutor was [merely] describing to the jury the defendant's demeanor during his interrogation by comparing it to his demeanor as he appeared before them at trial." *Jones*, 821 So. 2d at 475, *citing Harris*, 438 So. 2d at 795. There was no such comparison in the instant cause, where it was clear that the

prosecutor was commenting on Respondent's failure to testify at trial, as he had made no out-of-court admission.

In finding that the instant comment was an impermissible comment on Respondent's right to remain silent and rejecting the position expressed in the minority opinion, the district court concluded,

> **We find the comment in the instant case is of an entirely different order. Unlike *Harris*, the prosecutor was referring to what Jones's knew as he was "sitting there," i.e., at trial, and not how he may have acted, or what he may have said, at another time**...We decline to adopt the dissent's position, that the instant comment was a permissible comment made while arguing the state had met its burden of proof. **Phrasing an otherwise impermissible comment as an attempt by the state to argue it has met its burden of proof does not vitiate that comment of its impermissible nature. In short, the state may not argue it has met its burden of proof by referring to the fact the defendant, "sitting there," knows he is guilty, yet has chosen not to testify. We find the complained-of comment certainly was "fairly susceptible" of being interpreted by the jury as a comment on Jones's exercise of his right to remain silent, and where the state's case rested almost entirely on the testimony of a minor, reversal is required.**

Jones, 821 So. 2d at 475 (emphasis supplied).

Thus, as the district court found, Respondent contends that the facts in *Harris* are clearly distinguishable from those upon which the instant decision is

predicated and therefore the decision of the fourth district in the case at bar is **not** in express and direct conflict with *Harris v. State* on the same question of law.

The prosecutor's comments violated Respondent's rights under the Fifth Amendment to the *United States Constitution* and Article I, Section 9 of the *Florida Constitution*, since they constituted comments on Respondent's right to remain silent and referred to his failure to testify. In addition to these constitutional violations, the comments violated Florida Rule of Criminal Procedure 3.250, which prohibits a prosecutor from commenting on a defendant's failure to testify. Respondent thus submits that the fourth district properly reversed for a new trial.

This Honorable Court has adopted a "very liberal rule" for determining whether a comment constitutes a comment on silence: any comment which is "fairly susceptible" of being interpreted as a comment on silence will be treated as such. *See State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986); *Dailey v. State*, 594 So. 2d 254 (Fla. 1991); *State v. Smith*, 573 So. 2d 306, 317 (Fla. 1990)("Our cases have made clear that courts must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the right of silence."); *State v. Kinchen*, 490 So. 2d 21 (Fla. 1985).

As this Court recognized in *State v. DiGuilio*, 491 So. 2d at 1135-1136, when determining that harmless error analysis must be applied to comments which are fairly

susceptible of being interpreted as a comment on silence:

> In Florida, we have adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is "fairly susceptible" of being interpreted as a comment on silence will be treated as such. [footnotes omitted]. One authority has said that "[c]omments or arguments which can be construed as relating to the defendant's failure to testify are, obviously, of almost unlimited variety." [FN11][2] The "fairly susceptible" test treats this variety of arguable comments as comments on silence. We are no longer only dealing with clear-cut violations where the prosecutor directly comments on the accused's silence and hammers the point home… Comments on silence are lumped together in an amorphous mass where no distinction is drawn between the direct or indirect, the advertent from the inadvertent, the emphasized from the casual, the clear from the ambiguous, and, most importantly, the harmful from the harmless. In short, no bright line can be drawn around or within the almost unlimited variety of comments that will place all of the harmful errors on one side and the harmless errors on the other, unless the circumstances of the trial are considered. We must apply harmless error analysis to the "fairly susceptible" comment in order to obtain the requisite discriminatory capacity.

Further, this Court has characterized a comment on a defendant's silence as a "high risk" error which has a "substantial likelihood" of requiring a new trial. *DiGuilio*, 491 So. 2d at 1136.

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[2] [FN 11. Annotation, *Comment or Argument by Court or Counsel that Prosecution Evidence is Uncontradicted as Amounting to Improper Reference to Accused's Failure to Testify*, 14 A.L.R.3d 723, 726-27.]

The prosecutor's comments herein were unduly prejudicial because they impinged upon two related constitutional rights: the right to remain silent and the presumption of innocence. By referring to Respondent as "sitting there," the prosecutor highlighted the fact that Respondent did not testify at trial. Respondent had a right to "sit there," to remain silent and to be presumed innocent throughout his trial. *See Romero v. State*, 435 So. 2d 318 (Fla. 4th DCA 1983). Since the prosecutor's comments were more than fairly susceptible of being interpreted as a comment on silence, the district court properly reversed and remanded for a new trial after determining that the error was harmful under the circumstances herein.

Other district courts of appeal have held comparable prosecutorial comments to be comments on silence. *See, e.g., Andres v. State*, 468 So. 2d 1084 (Fla. 3d DCA 1985)("The prosecutor's closing argument statement: 'There is no testimony at this point in the evidence to indicate that he ever intended to withdraw [from the conspiracy],' was, beyond any dispute, susceptible of being interpreted by the jury as referring to the defendant's failure to testify…"); *Brock v. State*, 446 So. 2d 1170, 1170-1171 (Fla. 5th DCA 1984)(Where Brock chose not to testify at his jury trial and during closing argument the prosecutor told the jury that: "Today is the day he has to stand up and, 'fess to what happened and pay for what he did," the appellate court found this comment "was fairly susceptible of being interpreted by the jury as referring

to Brock's failure to testify."); *Hall v. State*, 364 So. 2d 866 (Fla. 1st DCA 1978).

In *Hall v. State*, 364 So. 2d 866, Hall presented no evidence or testimony at his trial although his counsel subjected the state witnesses to cross-examination which revealed some discrepancies between the various accounts of the offense. In closing argument, the prosecutor walked over to Hall, pointed at him, and made the following comment:

> Oh, Mr. Stokes ([Hall's] counsel), he's putting the spotlight on Lucille asking questions about whether or not she had ever sold a beer to a minor before. It has nothing whatsoever to do with this case not at all. But, you know, that's a favorite defense tactic, because this man is sitting over here quietly. Mr. Stokes gets on to Lucille, and gets on to Dennis, and gets on to the other witnesses. You know why? Because he doesn't want you to look at his defendant during the course of this trial. He wants to take the spotlight off of this defendant, James Hall. But let me remind you that James Hall is the one on trial today. No one else.

The *Hall* court held that:

> On this record, we cannot agree that the statement was anything but a comment on [Hall's] failure to present testimony on his own behalf. The comment by its very terms contrasts the state's presentation of a case with [Hall's] failure to make such a presentation. Furthermore, it appears obvious to us that the word "quietly" refers to [Hall's] silence during the cross- examination portion of the testimony rather than during the closing argument.

Id. at 867.

Indeed, the distinction between the *Harris* comment, which was found not to be a comment on silence by this Court, and the *Hall* comment on silence, which is comparable to the comment on silence in the instant cause, has even been recognized in Florida Jurisprudence 2d, as follows:

> Comments or arguments during closing argument which can be construed as relating to defendant's failure to testify can include comments regarding defendant's demeanor at trial. For example, a statement made by the prosecutor in his closing argument that defendant was "sitting over there quietly," and that defense counsel did not want the jury to look at defendant during the course of the trial but wanted to take the spotlight off him constituted an improper comment on defendant's right to silence. [FN1: *Hall v. State*, 364 So. 2d 866 (Fla. Dist. Ct. App. 1st Dist. 1978).] However, it is not improper for the prosecutor to say, regarding the defendant, that "this was a voluntary statement taken after a considerable period of time in which he sat there and remained the same immobile, unemotional self as he has this entire trial," where a full reading of the argument shows that the prosecutor was addressing the critical issue of whether Respondent's confession was voluntary and, in doing so, was commenting on Respondent's demeanor at the time the confession was made; obviously, the prosecutor was describing to the jury the Respondent's demeanor during his interrogation by comparing it to his demeanor as he appeared before them at the trial. [FN2: *Harris v. State*, 438 So. 2d 787 (Fla. 1983)...].

15 Fla. Jur. 2d *Criminal Law* § 1813 (2003).

The harm is readily apparent at bar where the criminal case was solely based on the credibility of the child's testimony as Respondent exercised his fundamental right

to remain silent and not testify at trial. The state's error in focusing the jury's attention on his silence, thereby also suggesting that Respondent had some burden to present evidence, only served to prejudice Respondent and bolster Shannon Rose's credibility.

Thus, Respondent requests that this Honorable Court **affirm** the instant decision of the Fourth District Court of Appeal.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, Respondent respectfully requests this Honorable Court to either reconsider its decision accepting jurisdiction and find that jurisdiction was improvidently granted or **affirm** the decision of the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Assistant Attorneys General Celia Terenzio and Karen Finkle, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida, 33401-3432 by courier this 21st day of April, 2003.

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Attorney for Allister Jones

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type.

_____

Attorney for Allister Jones