IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v.

ALLISTER JONES,

Respondent

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# PETITIONER'S BRIEF ON THE MERITS

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CASE NO. SCO2-1921
Lower Tribunal No. 4D00-2987

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CHARLES J. CRIST, Jr.
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Bureau Chief
West Palm Beach
Florida Bar No. 656879

KAREN FINKLE
Assistant Attorney General
Florida Bar No. 0191566
1515 N. Flagler Drive
9th Floor
West Palm Beach, FL 33401-3432
Telephone: (561) 837-5000
Counsel for Respondent

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# PRELIMINARY STATEMENT

The respondent, Allister Jones, was the defendant and the State of Florida was the prosecution in the trial court below, the Circuit Court for the Seventeenth Judicial Circuit in and for Broward County. The respondent appealed to the Fourth District Court of Appeal and the State then invoked the discretionary jurisdiction of this Court. In this brief, the parties will be referred to as Jones and the State respectively.

STATEMENT OF THE CASE AND FACTS

The respondent, Allister Jones ("Jones"), was convicted by a jury of lewd assault and false imprisonment of a child under thirteen: in this case, a ten-year old girl. Jones did not testify. In its closing argument at trial, the State remarked: "The State of Florida has proven this case beyond a 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." The trial court overruled Jones' objection to the comment. Jones appealed his conviction and sentence raising this issue, among others, on appeal.[1]

The District Court of Appeal, Fourth District, in a two to one majority decision rendered April 17, 2002, concluded that the statement was an impermissible comment on the defendant's right to remain silent. The dissent concluded just the opposite in a strongly worded opinion.

The State then filed a motion for re-hearing and/or certification which was denied. The majority issued a new opinion on July 24, 2002 replacing the opinion issued April 17. The majority held that, by referring to Jones as "sitting there" and requesting the jury to "tell him what he already knows," the State suggested that Jones

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[1] Facts taken from the opinion of the Fourth District rendered July 24, 2002: Jones v. State, 821 So. 2d 473 (Fla. 4th DCA 2002).

did not testify because he knew he was guilty. This second majority opinion responded more specifically to the minority opinion which had concluded that Harris v. State, 438 So. 2d 787 (Fla. 1983) controlled; the majority went to some lengths to distinguish the Harris case.

The State then invoked the discretionary jurisdiction of this Court on the basis that the decision of the Fourth District conflicted with Harris. This Court accepted jurisdiction by Order dated March 6, 2003.

## SUMMARY OF THE ARGUMENT

The prosecutor, in closing, remarked that "the State of Florida has proven this case beyond a 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." The State submits that the challenged comment is not "fairly susceptible" of being construed by the jury as a comment on Jones' right to silence because the jury could not have construed it as anything other than the prosecutor pointing out Jones' physical position in the courtroom.

## ARGUMENT

THE PROSECUTION, BY REFERRING TO JONES AS "SITTING THERE" AND REQUESTING THE JURY TO "TELL HIM WHAT HE ALREADY KNOWS,"MADE A PERMISSIBLE COMMENT ON JONES' PHYSICAL POSITION IN THE COURTROOM, NOT AN IMPERMISSIBLE COMMENT ON JONES' RIGHT TO SILENCE.

In Harris v. State, 438 So. 2d 787 (Fla. 1983), the prosecutor made the following statement: "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 Court found the statement to be a fair comment on the defendant's demeanor and not an impermissible comment on the defendant's right to remain silent.

This Court also made it very clear that the challenged statement had to be read in context:

> A full reading of the prosecutor's argument establishes without question that he was not referring to appellant's failure to testify at trial. The prosecutor, in fact, was addressing the critical issue of whether appellant's confession was voluntary and, in doing so, was commenting on appellant's demeanor at the time the confession was made. To understand the challenged statement, it is necessary to review the entire argument on this issue. ...

Id, at 794.

The State respectfully submits that, in the case at bar, the district court appears

to have taken the prosecutor's remarks out of context and subjected them to a level of scrutiny that is wholly unwarranted. The prosecutor merely remarked that "the State of Florida has proven this case beyond a 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." This was a comment on Jones' physical position in the courtroom; the prosecutor was simply pointing him out to the jury. As in Harris, it cannot be interpreted as a comment on Jones' right to silence when the entire statement is looked at in its proper context.

A comment is only impermissible if it is "fairly susceptible" of being construed by the jury as a comment on the defendant's right to silence. Hoggins v. State, 718 So. 2d 761, 769 (Fla. 1998). This Court has noted that this is a "very liberal rule" for determining whether a comment constitutes a comment on silence. Jackson v. State, 522 So. 2d 802, 807 (Fla. 1998). It is hard to see how any jury could take the challenged comments in the case at bar as anything other than the prosecutor pointing out Jones to the jury.

The challenged comment is simply not of the same order or magnitude as those that have been held to be an impermissible comment on a defendant's right to silence. For example, in Hoggins v. State, 718 So. 2d 761 (Fla. 1998), the prosecutor, on

cross-examination, asked the defendant why he didn't tell the police the "story" that he had just told the jury today and kept asking questions about this particular point. Further, in closing argument the prosecutor again pointed out that the defendant had failed to tell his version of events to police on the night of his arrest. This was held to be impermissible. Similarly, in Heath v. State, 648 So. 2d 660 (Fla. 1995) and Dailey v. State, 594 So. 2d 254 (Fla. 1992), the prosecutor's comments that defendant was the "only" person who knew what happened made an impermissible reference to the defendant's right to silence.[2] The State respectfully submits that, in these cases, the jury could not have failed to notice that the prosecution was attempting to draw a negative inference from the defendant's "failure" to testify or to say anything to the police. The same cannot be said of the challenged comment in the case at bar.

The challenged comment in the case at bar was only about Jones' physical position in the courtroom and, possibly, his demeanor. Comments about a defendant's demeanor, whether at trial or at some other point after the crime, have always been permissible. Harris v. State, 438 So. 2d 787 (Fla. 1983) is such an example. Jackson v. State, 522 So. 2d 802, 807 (Fla. 1998), is another. In Jackson, a detective when questioned about the defendant's demeanor at the time of his arrest, commented that the defendant "appeared very calm." This was held to be a

[2] Note, however, that this Court found the errors to be harmless.

permissible comment.

On the other hand, where the defendant's demeanor and physical position had been described as "sitting over here quietly", the comment was held to be impermissible. Hall v. State, 364 So. 2d 866 (Fla. 1st DCA 1978). It was impermissible, because, the State submits, a jury might have construed "quiet" as a negative inference on the right to silence. However, the challenged comment does not fall within this category. There was no reference to Jones being "quiet", only that he was "sitting there". The challenged comment was permissible.

Finally, the State further submits that, by taking the statement out of context and scrutinizing it under a microscope, the district court has overlooked the ramifications of its approach on State prosecutors. There is now no guidance whatsoever as to what is permissible and what is not when a prosecutor attempts to single out a defendant and force the jury to focus on him or her. The challenged comments were simply a reference to Jones, nothing more or less. Any other interpretation would leave a prosecutor without a valuable rhetorical tool.

## CONCLUSION

In cases where this Court has decided that the defendant's right to silence was infringed, the State respectfully submits that the impermissible comments may have allowed a jury to draw a negative inference from the defendant's "failure" to testify or

to say anything to the police. Such was not the nature of the challenged comment in the case at bar. The challenged comment was not "fairly susceptible" of being construed by the jury as a comment on Jones' right to silence because the jury could not have construed it as anything other than the prosecutor pointing out Jones' physical position in the courtroom and, possibly, his demeanor at trial.

In light of the foregoing, the State would respectfully request that this Court QUASH the decision of the Fourth District.

Respectfully submitted,
CHARLES J. CRIST, Jr.
Attorney General
Tallahassee, Florida

______________________________
CELIA TERENZIO
Bureau Chief
West Palm Beach
Florida Bar No. 656879

______________________________
KAREN FINKLE
Assistant Attorney General
Florida Bar No. 0191566
1515 N. Flagler Drive, 9th Floor
West Palm Beach, FL 33401-3432
(561) 837-5000/(561) 837-5099 (Fax)

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier, this ___ day of March, 2003, to:

Assistant Public Defender
Susan D. Cline
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Fl 33401.

_______________________________
Of Counsel

## CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this document, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, has been prepared with 14 Point Times New Roman.

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Of Counsel