IN THE SUPREME COURT OF FLORIDA,

STATE OF FLORIDA,

Appellant

v.

CHARLES HOGAN,

Appellee.

Case No. 96,588

****
**
ON PETITION FOR DISCRETIONARY REVIEW
BASED ON CONFLICT
****
**

REFILE OF INITIAL BRIEF OF PETITIONER ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellee certifies that the following persons or entities may have an interest in the outcome of this case:

1. Honorable JAMES I. COHN
   Circuit Court Judge, Seventeenth Judicial Circuit
   (trial judge)

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4. ABRAHAM FERRIS
   (Complainant/victim)

5. **CHARLES HOGAN**
   (defendant/respondent)

6. MAURY HALPERIN, Assistant Public Defender(s)
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   (trial counsel for defendant/respondent)

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Rule 32, Rules of the Federal Rules of Appellate Procedure (1999), the undersigned hereby certifies that the instant brief has been prepared with 12 point New Times Roman type per Word Perfect 6.0 program.

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Carol Cobourn Asbury

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PRELIMINARY STATEMENT

Petitioner was the prosecution and respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In this brief, the parties will be referred to as they appear before this Court, except that the Petitioner may also be referred to as "State" or "Prosecution."

The following symbols will be used;

T = Transcript of trial

R= Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with burglary of a dwelling (two counts) in violation of Section 810.02(1) and (3)(b)(1997), Fla. Stat.. R 6-7. The respondent proceeded to trial and was found guilty as charged and sentenced to eight years as a habitual offender in Florida State Prison (R 21-22,24-25,33-40; T 479-485).

The following is a summary of the trial testimony:

1. Abraham Ferris testified that he has owned the house at 1160 Northeast 4th Street in Pompano Beach for about 28 years. T/146. in the last year he has not occupied the house. T/146. On February 28, 1998 he found that his jealousies have been removed and the screen broken. T/147. Inside the house was a wreck with clothes thrown all over the place, windows broken, his coin collection taken (silver dollars, Buffalo head and Indian head coins, Kennedy half dollars), and the television was gone. T/152-154. Someone had been using the couch. T/166. Six blankets were all over the house as if some one was using them. T/167. Pots and pans were laying dirty in the kitchen and were burnt. T/168,169. An empty rice bag was on the counter near the sink. T/168. There was a Pepsi six-pack box in the kitchen that was not his. T/169. There was a hot plate on the stove that had been used. T/169-170. Mr. Ferris testified that he never gave any one permission to stay in his house or use his house or take care of his house. T/170. When he was in the house the last time, Mr. Ferris testified that he made sure the front

door was locked. T/174.

Mr. Ferris testified that the coins were kept in a can in a cabinet. T/175.

2. Emmett Collins testified that he lives across the street from Mr. Ferris' house. T/177. On February 28, 1998 he saw police at Mr. Ferris' house. T/177-178. He agreed to watch Mr. Ferris' house. T/179. The next day he saw the respondent enter Mr. Ferris' house. T/180. The respondent was not using crutches. T/186. He immediately called the police. T/180 The police responded within three minutes. T/181. The police surrounded the house. T/182. The police arrested the respondent, whom he saw go into Mr. Ferris' house. T/182-183. The respondent was not on crutches. T/186.

Before March 1st Mr. Collins only observed Mr. Ferris enter his house, no one else. T/187. IN fact, he saw Mr. Ferris enter his house about a week to four weeks before February 28, 1998. T/189-190.

3. Officer Wright testified that he answered the dispatch to Mr. Ferris' house. T/192. Mr. Ferris showed Officer Wright the back window of his house, where the jealousies were missing and the screen was broken. T/193. Inside the house some of the drawer in the rooms were open and clothing was thrown around the rooms. T/193.

The following day he responded to Mr. Collin's call. T/195. He observed the jealousies and the screen in the back had been moved from the position he observed them in the day before. T/195-196. Respondent came out of the bedroom area. T/196.

Respondent said something to the effect "Uh-ho, it's the cops." T/196. Officer Wright ordered respondent out through the window. T/196. Respondent crawled out through the window and the police patted him down T/197. When Officer Wright arrived he noticed that the front door was locked. T/197. Respondent was walking with crutches but he could walk without the crutches. T/198.

Officer Wright told the respondent that the police were dispatched there because somebody had broken into the house. T/199. Respondent said that he had permission to go into the house from the owner. T/199. Respondent said he knew the person that lives there. T/218. Respondent gave Officer Wright a name but it was not Mr. Ferris' name. T/199,218. Officer Wright said that was not the owner of the house. T/201. Respondent did not say anything after that. T/201. Found in Respondent's fanny pack was mail addressed to the resident of Mr. Ferris' house. T/203. There was lot of other mail addressed to that address in the house in the house. T/227. Some of this mail was addressed to Mr. Ferris. T/227.

4. Monica Datz testified that she s an identification technician and latent prints examiner for the City of Pompano Beach Police Department. T/230. When she reached Mr. Ferris' house she noted that the window with jealousies had been removed and the screen was bent. T/231. Drawers were in the partially open position. Doors on cabinets were partially open. T/231. The front door was not tampered with nor any other window

in the house. T/234.

Datz lifted respondent's latent print from the exterior bottom side of the metal box which was on the floor in the northeast bedroom. T/236,274. Respondent's left middle finger and left ring finger were identified. T/275.

5. Respondent testified that he was homeless and got his meals at St. Lawrence Chapel. T/356. He met Ted Hanson at St. Lawrence Chapel. T/356. Respondent testified that Ted Hanson told him that he (Ted Hanson) had permission to be in the house at 1160 Northeast 4th Street in Pompano. T/357. Respondent went to the house by himself. T/357. The first time he went there was February 28th, the day he was arrested. T/357. The first time he went through the side door. T/357. The side door was not locked. T/358. The house was dirty with no running water and human waste in the toilet. T/358. Respondent testified that he did not see a television, a telephone or any coins. T/359. He did not steal anything out of the house. T/359. On the 28th he went in and out of the house three times. T/359. He spent the night of February 28th at Mr. Ferris' house with Ted Hanson. T/360. When he was arrested, respondent testified that he told the police that Ted Hanson gave him permission to be in the house. T/361.

On cross examination, respondent testified that he met Ted Hanson at St. Lawrence Chapel at Atlantic Boulevard. T/362. The following occurred:

State: Do you know where Ted Hanson is?

Defendant: No.

State: When is the last time you saw him?

Defendant: Sunday morning.

State: Sunday morning the 3rd -- the 1st?

Defendant: Yes.

State: Well, he wasn't there when you got arrested, was he?

Defendant: No.
State: Okay. So he left?

Defendant: Yes.

State: And you never saw him again?

Defendant: No. We both went to St. Lawrence Chapel together.

State: And Ted Hanson is not here to testify to ---

Defendant: No.

T/362-363. Respondent testified that Ted Hanson told him that Abraham Ferris gave him permission to be there and now he, Ted Hanson, was giving respondent permission to be there. T/364. That caused bells to go off in respondent's head. T/365. Ted Hanson did not give respondent a key to the house. T/366-367. So he went through the side door, which was open. T/367. Respondent did see that the jealousies had been removed. T/367. The envelope found in his fanny pack was given to respondent by Ted Hanson.

T/373.

Respondent testified that he had been convicted four times of a felony. T371. Respondent testified that he did not take any coins, microwave, television, clothes, nothing. T/374. The house did not appear to have been broken into or burglarized. T/374.

6. Defense attorney argued to the jury that the State could not prove the second element of burglary that requires the jury to find that respondent did not have permission or consent of Mr. Ferris or anyone authorized to act for him to enter or remain in the structure at the time. T/408. The reason is that respondent got permission from Ted Hanson. T/409,413,416. Defense attorney noted that Ted Hanson did not testify. T/416. Again, defense attorney told the jury that he had a good faith belief that he had lawful permission to enter into and remain at the house of 1160 Northeast 4th Street, Pompano Beach. T/416-417. Ted Hanson gave him permission to be there. T/418-419.

The prosecutor then argued to the jury:

> If he's supposedly got permission from this Ted Hanson, who I submit to you does not exist, is a ghost, is a figment the defendant's imagination, if he's just going there for shelter to sleep on the couch, what is he doing going into the bedroom into the can where the money was?

T/424. Later the prosecutor told the jury, "WE have someone who is telling you that there is an imaginary Ted Hanson. There is no Ted Hanson. And if there is, it is a Ted

Hanson who knows nothing about 1160 Northeast 4th Street in Pompano." T/428. Two other times the prosecutor referred to Ted Hanson as a ghost. T/434,439.

On rebuttal, defense attorney again reminded the jury that respondent had a good faith belief that he had lawful permission to enter into the house, therefore, he cannot be guilty of burglary. T/444.

7. The Fourth District Court of Appeal held that these comments by the prosecutor impermissively shift the burden of proof: We agree and reverse because the comments could have caused the jury to erroneously believe that the appellant had the burden of proving his innocence."

Judge Stone concurred but stated that he would agree with Judge Hersey's dissent in Lawyer and would follow Highsmith, "particularly where the defendant has raised for the first time in trial a theory of defense supportable only by a phantom witness and the state's comments are directed at the absent witness and not directly asserting the defendant has a burden of proof."

The Fourth District Court certified conflict with Highsmith v. State, 580 So. 2d 234 (Fla. 1st DCA 1991) and McDonald v. State 578 So. 2d 371 (Fla. 1st DCA 1991).

SUMMARY ARGUMENT

Respondent testified at trial that Ted Hanson gave him permission to enter and stay in Mr. Ferris' house; thus, presenting, for the first time at trial, exculpatory evidence to refute an element of the crime of burglary. The prosecutors comments during cross-examination and closing arguments that Ted Hanson is a "ghost" or a figment of respondent's imagination is not a comment which would lead the jury to believe that the defendant carried the burden of introducing evidence. Rather it if a comment on the state of the evidence or on respondent's failure to support his own factual theories with witnesses. Moreover, the challenged statement, when considered in context, would not have been understood by a reasonable jury as anything more than an argument that the jury need not believe uncorroborated defense theories.

Furthermore, Ted Hanson is not equally accessible to the State as he was to the respondent. Respondent first mentioned Ted Hanson's name at trial. Only the respondent had knowledge of the existence, identity, location, and expected testimony of Ted Hanson. A witness can only be "equally available" if both parties are equally aware that the individual has witnessed some fact or event relevant to the issues in the case and of the possibility that the defense may bring this to the attention of the fact-finder. Since Ted Hanson was not equally available to the State, the prosecutor did not impermissibly comment on respondent's failure to call a witness.

ARGUMENT

THE PROSECUTOR IS PERMITTED TO COMMENT ON THE DEFENDANT'S FAILURE TO PRODUCE EVIDENCE TO REFUTE AN ELEMENT OF THE CRIME WHERE AN EXCULPATORY DEFENSE HAS BEEN ASSERTED FOR THE FIRST TIME AT TRIAL BY THE DEFENDANT

Respondent testified on his own behalf and asserted the defense of consent to the charge of burglary. Specifically respondent testified that a man he ate breakfast with at St. Lawrence Chapel gave him permission to enter and remain in the dwelling belonging to Mr. Ferris. T/356-357. On cross examination, respondent testified that he met Ted Hanson at St. Lawrence Chapel at Atlantic Boulevard. T/362. The following occurred:

State: Do you know where Ted Hanson is?

Defendant: No.

State: When is the last time you saw him?

Defendant: Sunday morning.

State: Sunday morning the 3rd -- the 1st?

Defendant: Yes.

State: Well, he wasn't there when you got arrested, was he?

Defendant: No.

State: Okay. So he left?

Defendant: Yes.

State: And you never saw him again?

Defendant: No. We both went to St. Lawrence Chapel together.

State: And Ted Hanson is not here to testify to ---

Defendant: No.

T/362-363.

During closing argument, Defense attorney argued to the jury that the State could not prove the second element of burglary that requires the jury to find that respondent did not have permission or consent of Mr. Ferris or anyone authorized to act for him to enter or remain in the structure at the time. T/408. The reason is that respondent received permission from Ted Hanson. T/409,413,416. Defense attorney noted that Ted Hanson did not testify. T/416.

In rebuttal, the prosecutor argued to the jury on the state of the evidence as represented by respondent's testimony:

> If he's supposedly got permission from this Ted Hanson, who I submit to you does not exist, is a ghost, is a figment the defendant's imagination, if he's just going there for shelter to sleep on the couch, what is he doing going into the bedroom into the can where the money was?

T/424. Later the prosecutor told the jury, "We have someone who is telling you that there is an imaginary Ted Hanson. There is no Ted Hanson. And if there is, it is a Ted

Hanson who knows nothing about 1160 Northeast 4th Street in Pompano." T/428. Two other times the prosecutor referred to Ted Hanson as a ghost. T/434,439.

In Respondent's rebuttal argument to the jury, defense counsel again told the jury that the respondent had a good faith belief that he had lawful permission to enter into the house, therefore, he cannot be guilty of burglary. T/444.

Generally, it is true that the State prosecutor cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence. However, this Court has applied some exceptions to this rule where the defendant has assumed some burden of proof. Those exceptions in Florida have been limited to those instances where the defendant asserts the defense of (1) alibi, (2) self-defense, (3) defense of others, or (4) relies on facts that could be elicited only from a witness who is not equally available to the State. Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991); *See also,* Buckrem v. State, 355 So. 2d 111 (Fla. 1978) (alibi); State v. Michaels, 454 So. 2d 560 (Fla 1984) (self-defense and defense of others). In the instant case, the Fourth District Court held that the trial court erred in allowing the state to comment on the fact that a person who allegedly gave respondent permission to be in the dwelling was not called to testify. The State first maintains

that, under the *Jackson* analogy, the respondent was relying on facts that could be elicited

only from a witness who was not equally available to the State. A witness is not equally available to the State when that witness is first mentioned at trial by the defense and only the defense has knowledge of the existance, identity, location, and expect testimony of a defense witness, which allegedly exonerates the defendant. Ted Hanson, *sub judice,* was not equally available to the State. Secondly, the State contends that the prosecutor did not impermissibly comment on the respondent's failure to call a witness. *Sub judice,* the prosecutor was commenting on the state of the evidence and on the respondent's failure to support his own factual theory with the witness respondent **first** mentioned at trial; especially, where respondent argues to the jury that Ted Hanson's permission refutes an element of the crime charged.

Under Jackson, this Court has held improper for a prosecutor to comment on a criminal defendant's failure to call a witness unless the prosecutor shows that the witness is an alibi witness or that he is not equally available to both parties. The Fourth District Court in Thomas interpreted Jackson to mean:

> We concluded in *Lawyer,* that *Jackson* recognized "that the rule in this state is that the prosecution can comment on a defendant's failure to produce a witness only if: (1) the defense puts on evidence of defenses such as alibi or self-defense which reflects the existence of a witness who could give relevant testimony and, (2) that witness has a special relationship with the defendant." *Lawyer* at 567. We then interpreted the *Jackson* language "as eliminating any arguable distinction between a witness classified as 'not equally

> available' to the defendant and a witness who has a 'special relationship' with the defendant. They are simply different ways of saying the same thing." *Id.*

The Fourth District Court expounded further in the instant case by holding that "not equally available" not only means that there is a special relationship between the defendant and the witness but also that the witness would have been expected to testify favorably for the defendant. In other words, if the relationship of the witness to the defendant would reasonably lead one to expect the witness to testify in favor of the defendant, the court cannot hold the witness equally available. In a number of other jurisdictions, a prosecutor is allowed to invite the jury to draw an adverse inference from the failure to call available defense witnesses who could corroborate defendant's testimony relating to the offense charge, unless the prosecutor's comment uses defendant's privilege against compulsory self-incrimination as evidence against him. State v. Dudley, 809 S.W. 2d 40 (MO.App., Western Dist. 1991) (If the facts make clear that the witness' testimony would favor the defendant, the court may justifiably find the witness one "peculiarly available" to the defendant, thus giving rise to the adverse inference.); United States v. Bubar, 567 F.2d 192, 199 (2d Cir.), cert. denied, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977); People v. Durden, 211 A.D. 2d 568, 621 N.Y.S.2d 611 (N.Y.App.Div., 1st Dept. 1995)(Prosecutor was entitled to comment in summation in robbery prosecution on defendant's failure to call witnesses who, according

to defendant's testimony, were friends of his who could corroborate his claim of innocent presence at the scene.); People v. Najera, 88 Cal.App.3d 930, 152 Cal.Rptr. 124 (CA.App., 2nd Dist., Div.5 1979) (In prosecution for burglary, it was proper for prosecutor to comment upon defendant's failure to call witnesses who could have corroborated defendant's alibi testimony -- a cousin, cousin's girlfriend, and an acquaintance); People v. Smith, 166 A.D.2d 385, 561 N.Y.S.2d 189 (N.Y. App.Div., 1st Dept. 1990) (Upon burglary defendant's election to introduce affirmative exculpatory evidence to effect that he was innocently visiting friend in building, defendant's failure to call that material witness was properly placed before the jury.)

As an application of this doctrine, the courts have held in a number of cases that counsel for the state may properly comment on the failure of the accused to adduce testimony of witnesses other than himself who are more likely to be known to him than to the prosecution. For example, in People v. Melton, 232 Ill.App.3d 858, 596 N.E. 2d 1246, 173 Ill.Dec. 367 (Ill. 4th DCA 1992) the

State could properly comment on failure of burglary defendant to produce as witness person from whom defendant claimed he bought the stolen goods. The Melton court held that the state did not have equal opportunity to call the witness, as only defendant knew details of his possible whereabouts. In United States v. Dahdah, 864 F.2d 55 (7th Cir. 1988) the defendant did not identify two witnesses, whom she said would give

exculpatory testimony that would corroborate the defendant's testimony; thus, the government could not have produced the witnesses. The Court in Dahdah held that the witnesses were not "peculiarly within the power" of the government to produce, therefore, there was no error in the trial court reading the "missing witness" instruction. *See also,* Ex parte McMorris, 394 So. 2d 404 (Ala. 1989) (defendant possessed peculiar knowledge of existence, identity, location, and expected testimony of witness whose relationship with defendant, by his own admission, was more than mere friendship.). Finally, the dissent by Judge Hersey in Lawyer eloquently illustrates the point that a witness is not equally available to the State if knowledge of the witness is first divulged by the defendant at trial:

> Not until the defendant/appellant took the stand and testified was it evident that he would rely on the fact that certain of his coworkers and manager of his place of employment could testify that he was not at the scene of the crime. As far as can be determined from this record, the State had no advanced notice that appellant's manager allegedly gave him a ride home. That being so, how can it possibly be said that the manager was a witness 'equally available to both parties."?
>
> Appellant could as well have said without any prior warning that he was at a church supper in the presence of members of the clergy who could testify as to his whereabouts at the time the crime was being committed. Or that he was visiting a sick friend in the presence of a physician and several special-duty nurses. Are all these people "equally available" as witnesses for the prosecutor who is totally unaware of their involvement in the case? Sufficient hyperbole ... the suggested answer is that an individual can be

> equally available to both parties only where both parties are equally aware that the individual has witnessed some fact or event relevant to the issues in the case and of the possibility that the defense may bring this to the attention of the fact-finder. Failing that test, the prosecutor should be entitled to comment under the rationale of *Jackson* and related cases. If not, then the defense has a license to commit perjury and the search for truth in the judicial process is frustrated by default.

Lawyer v. State, 627 So. 2d at 568.

The instant case, illustrates Judge Hershey's obvious logic. Here the respondent testifies for the first time at trial that a man by the name of Ted Hanson, whom he knew from St. Lawrence Chapel, gave him permission to stay at Mr. Ferris' house. On cross examination, the respondent testified that the last time he saw Ted Hanson was the day he was arrest. T/362-363. Since consent is a material element of the crime of burglary, Ted Hanson's testimony would have shed light on an ultimate question in the case; as well as, corroborated respondent's testimony. Ted Hanson was not equally available to the State since Ted Hanson was never identified by the respondent until respondent testified at trial. Only the respondent had knowledge of the existence, identity, location, and expected testimony of Ted Hanson. Therefore, Ted Hanson was only available to the respondent,

not the State.

Moreover, it is well established that the rule prohibiting comment on defendant's failure to testify does not extend to comments on the state of the evidence or on his

failure to support his own factual theories with witnesses. U.S. v. Phillips, 91 F. 3d 136, (4th Cir, 1996); United States v. McDermott, 918 F.2d 319, 328 (2d Cir.1990), cert. denied, 500 U.S. 904, 111 S.Ct. 1681, 114 L.Ed.2d 76 (1991); United States v. Gotchis, 803 F.2d 74, 81 (2d Cir.1986). Furthermore, a prosecutor is entitled to comment on a defendant's failure to call witnesses to contradict the factual character of the government's case, as well as his failure to support his own factual theories with witnesses. United States v. Bautista, 23 F. 3d 726 (2nd Cir. 1994); United States v. Bubar, 567 F.2d 192, 199 (2d Cir.), cert. denied, 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 151 (1977); *See also*, United States v. Gotchis, 803 F.2d 74, 81 (2d Cir.1986). "Additionally, where the defendant opens the door to an argument, it is 'fair advocacy' for the prosecution to enter." United States v. Falsia, 724 F.2d 1339, 1342 (9th Cir.1983). "A prosecutor may properly reply to the arguments made by defense counsel, so long as the comment is not manifestly intended to call attention to the defendant's failure to testify." United States v. Bagley, 772 F.2d 482, 494 (9th Cir.1985), cert. denied, 475 U.S. 1023, 106 S.Ct. 1215, 89 L.Ed.2d 326 (1986). Consequently, where an exculpatory defense is asserted by the defendant, a prosecutor's comment on a defendant's failure to call a material witness does not impermissibly shift the burden of proof or reflect on the defendant's right not to incriminate himself.

The United States Supreme Court has noted that persons who are not identified

as defense witnesses until trial are not as trustworthy as other categories of persons. Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798, (1988). The Supreme Court noted that it was not improper for the trial court to allow the prosecutor to comment on the defense's failure to disclose the identity of the witness until trial. *Id.* The Supreme Court held that the proper method for addressing the concern about reliability is for the prosecutor to inform the jury about the circumstances casting doubt on the testimony, thus allowing the jury to determine the credit and weight it wants to attach to such testimony. Consequently, a prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story as long as it does not constitute a comment on defendant's silence. *See,* People v. Smith, 668 N.Y.S. 2d 281 (App.Div.3d Dep't 1998) (Prosecutor's comment during summation concerning defendant's failure to produce witness was not reversible error, inasmuch as defendant testified on his own behalf, and the People thus were entitled to bring to juror's attention defendant's failure to call material witness who might be expect to testify favorably on his behalf.); State v. Burrus, 344 N.C. 79, 472 S.E. 2d 867 (1996) (A prosecutor may comment on a defendant's failure to produce exculpatory evidence to contradict or refute evidence present by the State.); People v. Durden, (1995, 1st Dept) 211 AD2d 568, 621 NYS2d 611, app den 85 NY2d 937, 627 NYS2d 999, 651 NE2d 924 (Prosecutor was entitled to comment in summation on robbery defendant's failure to call

witnesses who, according to defendant's testimony, were friends of his who could corroborate his claim of innocent presence at scene of crime.); People v. Smith, 166 A.D.2d 385, 561 N.Y.S.2d 189 (N.Y. App.Div., 1st Dept 1990) (defendant's election to introduce affirmative exculpatory evidence to effect that he was innocently visiting friend in building, defendant's failure to call that material witness was properly placed before the jury.) Such comment is permitted under the principle that the nonproduction of exculpatory evidence may give rise to the inference that it would have been adverse to the defendant who could have produced it. Hence, a general statement by a prosecuting attorney as to why certain testimony or evidence was not produced by the defendant, or why certain facts were not disproved, is not improper.

In Florida, these general principles are exemplified in Highsmith v. State, 580 So. 2d 234 (Fla. 2nd DCA 1991) and McDonald v. State, 578 So. 2d 371 (Fla. 1st DCA 1991). In Highsmith the defendant testified on his own behalf. He stated that, on the night of his arrest, he had driven to the restaurant with his cousin, and a friend. Once there the officers harassed them without apparent reason. Defendant conceded that the pistol was concealed under his car seat but testified that it was not his, that he did not put it there, and did not know if it belonged to his cousin or his friend. Neither of these individuals were called to testified by the defense and their absence was noted by the prosecution over defense objection.

The court held in Highsmith that a criminal defendant may bring his own credibility into issue by taking the stand and testifying. In so doing, if the defendant makes it appear that a potential witness could exonerate him, then to that extent, the prosecuting attorney has the right to comment. Citing to Romero v. State, 434 So. 2d 318, 320 (Fla. 4th DCA 1983) for authority. In Highsmith the court noted that the defendant took the stand and testified that the events on the night of the arrest took place in the presence of two individuals, testified to unprovoked police harassment, and that he did not place anything under the seat. While the defendant did not explicitly state that these witnesses would support his story, *Romero* requires only that the defendant make it appear that potential witnesses could exonerate him.

In McDonald, during defense counsel's closing argument, defense counsel pointed out that the State had not called the victim's young child as a witness. Defense counsel posited that it was "entirely possible that the child saw the whole thing," and yet the State had not brought the child in for whatever information might be gained. The State responded in its closing argument that the public defender had subpoena powers equal to the state's, and that "if the child would help the defense case, [the child] would have been here." The court held that the State's remark in its closing argument was not reversible. The court in McDonald stated that where the defense counsel comments on the State's failure to call a witness that is equally available to both parties, the prosecuting attorney's

reply that the defense has the same ability to put on the witness does not prejudice the defendant's right to a fair trial.

The reasoning behind McDonald is fairly summarized in United States v. Sblendorio, 830 F. 2d 1382, 1393 (7th Cir. 1987):

> The reasons leading to the conclusion that a prosecutor may comment on the unrebutted nature of the evidence show that it is appropriate to discuss missing evidence. It is not worse to say "both sides can call a witness, so don't hold the absence against us" than to say "the defendant has not produced a witness to undermine this testimony, so you should believe the live witness". These two arguments are so closely related that it is impossible to imagine permitting the latter but forbidding the former. We therefore overrule *Pollard* and *Wheeler* to the extent they forbid the prosecutor to observe that the defense could produce a witness if it wishes. (We do not disturb any other feature of those cases.) The comment does not alter the burden of proof or penalize the exercise of a constitutional right. Unless the prosecutor indirectly invites an inference based on the defendant's own silence, *see Williams v. Lane*, 826 F.2d at 665, he may pursue evidentiary inferences for what they are worth. We reaffirm *Bastone*, *Mahone*, *Greschner*, *Thomas*, *Keplinger*, and *Adkins*. The prosecutor's response is not "invited error" (as *Wheeler* characterized it), *cf. United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), but is an accurate piece of information combined with a legitimate argument. The jury is entitled to know that the defendant may compel people to testify; the legitimately affects the jury's assessment of the strategy and evidence.

In the instant case, the respondent testified at trial. For the first time, he testified that a man by the name of Ted Hanson gave him permission to be in Mr. Ferris' house;

thus, refuting one element of the crime of burglary. Respondent testified that he went to St. Lawrence Chapel where he ate breakfast with Ted Hanson. Respondent testified he and Ted Hanson went to St. Lawrence Chapel together. T/362-363. Respondent saw Ted Hanson for the last time on the day he was arrested and, therefore, Ted Hanson was not there to testify. T/363. The identity and the whereabouts of Ted Hanson were peculiarly within the power and knowledge of the respondent. Defense counsel in his closing remarks noted that the respondent's testimony regarding Ted Hanson totally refutes the State's case regarding the element of consent. This is a clear comment on the State's failure to call Ted Hanson to refute the claim of the respondent. The State response that Ted Hanson was a ghost or a figment of the respondent's imagination is permissible where the defendant had himself come forward with affirmative evidence that would exonerate him. The challenged statements, when considered in context would not have been understood by a reasonable jury as anything more than an argument that the jury need not believe uncorroborated defense theories. In other words, the prosecutor, *sub judice,* was merely commenting on the state of the evidence, and reasonable inferences derived therefrom, in "fair reply" to the respondent's "open door" argument to the jury. United States v. Bautista, 23 F. 3d 726 (2d Cir. 1994); Highsmith, McDonald. *See also,* Lawyer v. State, 627 So. 2d 564 (Fla. 4th DCA 1993); Thomas v. State, 726 So. 2d 369, 370 (Fla. 4th DCA 1999) (Comments on the defendant's failure to call witnesses have

also been held not to be reversible error where the defense has indicated or implied that a witness will be called or, if called, that witness would testify in a manner which is favorable to the defendant's theory.); Love v. State, 569 So. 2d 807 (Fla. 1st DCA 1990) (Where the principle issue was defendant's sanity, defense counsel solicited testimony on cross examination from which jury might infer that other independent psychiatrist would disagree with the opinion of state experts that defendant was sane. In light of the fact that the defense interjected the previous opinion of the other psychiatrist, they cannot now complain about the prosecutor's comment on the doctors' failure to testify concerning the defendant's current sanity.)

The modern trend in discovery is to broaden access to material facts to reduce last minute surprises upon the prosecution and the possibility of fraudulent claims at trial, which prevent the prosecution from making a full and thorough investigation of the merits of the defense. The Court in Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed. 2d 446 (1970), which dealt with the validity of notice-of-alibi statutes, recognized that the introduction of a factual claim for the first time at trial is readily fabricated, thus, it should be received with caution, carefully scanned for the purpose of determining its truth or falsity, and weighed and determined like any other evidence. In Williams the Court reasoned that the defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction; that when he presents

his witnesses, he must reveal their identity and submit them to cross-examination, which in itself may prove incriminating or which may furnish the state with leads to incriminating rebuttal evidence; and that his facing of such dilemma, which demands a choice between complete silence and presenting a defense, has never been thought an invasion of the privilege against compelled self-incrimination, nor a violation of due process rights.

Alibi, self-defense and defense of others are known as affirmative defenses because the defendant admits the doing of the act charged, but seeks to justify, excuse or mitigate it. Thus, the defendant assumes some burden of proof. The same is true where the defendant, as in this case, presents a defense, which defendant says will exonerate him, by introducing a factual claim that can be corroborated only by defense witnesses known by the defendant and first disclosed at trial. Such exculpatory defenses are affirmative defenses in that they refute a material element of the crime charged -- i.e., consent. Where, as in the present case, the defendant presents exculpatory evidence for the first time at trial, the proper method for addressing the concern about reliability is for the prosecutor to be able to inform the jury about the circumstances casting doubt on the testimony, thus, allowing the jury to determine the credit and weight it wants to attach to such testimony. See, Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798, (1988). Otherwise, there is no protection against false and fraudulent claims, as Judge

Hersey points out in his dissent in Lawyer.

The State maintains that the rule forbidding any reference to a defendant's failure to call a material witness does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses where the defendant has come forward with affirmative evidence which the defendant himself says will exonerate him or where the defense relies on that "evidence" to rebut the State's proof, i.e. the defendant has assumed some burden of proof. A witness is not equally accessible to the State where only the defendant has knowledge of the existance, identity, location, and expect testimony of a defense witness, whose identity is first disclosed to the State at trial. Consequently, a prosecutor may properly comment on the defendant's failure to present exculpatory evidence or testimony which would substantiate defendant's story as long as it does not constitute a comment on defendant's silence. Thus, remarks by the prosecutor, *sub judice,* that "Ted Hanson is not here to testify" or that Ted Hanson is a "ghost" or "a figment of defendant's imagination" were proper since they did not refer indirectly or otherwise to Respodent's failure to testify nor did they improperly suggest that Resondent had a burden of proof that he failed to carry. *Sub judice,* Respondent testified, brought forth exculpatory affirmative evidence that could be corroborated by a defense witness, who was only accessible to the Respondent. The challenged statements, when considered in context, would not have been understood

by a reasonable jury as anything more than an argument that the jury need not believe uncorroborated defense theories. Accordingly, the Fourth District Court's Opinion must be reversed and the Respondent's conviction and sentence re-instated.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Petitioner/State respectfully requests this honorable Court to reverse the Fourth District Court's Opinion and hold that hold that where an exculpatory defense is asserted by the defendant, a prosecutor's comment on a defendant's failure to call a material witness does not impermissibly shift the burden of proof or reflect on the defendant's right not to incriminate himself.

WHEREFORE based on the foregoing arguments and authorities cited herein, the Petitioner/State respectfully requests the Honorable Court to hold that a witness is not equally available to the State if the State first learns about the witness at trial.

WHEREFORE, based on the foregoing arguments and authorites cited herein, the Petitioner/State respectfully request this Honorable Court to reverse the Fourth District Court's opinion and re-instate the Respondent's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished to MAXINE WILLIAMS , Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on December 1, 1999.

_____
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Counsel for Appellee

APPENDIX