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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1050

JAMES WARMINGTON,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, James Warmington, was the appellant in the District Court of Appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the District Court of Appeal and prosecution in the Circuit Court. The symbols "T". and "R". refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

The State of Florida filed an information charging Warmington with grand theft by misrepresenting to the victims that money they were lending to a third party was secured by a mortgage. (R. 14-7). Warmington's defense at trial was that the borrowers and lenders both knew that the loan was unsecure and, therefore, he did not misrepresent to them that the loan was secured by a mortgage as claimed by the state. The issue this court must resolve is whether the Third District Court of Appeal's majority opinion wrongfully concluded that the state did not improperly shift the burden of proof to Warmington when the state, over the objection of defense counsel, introduced evidence that when the lead detective went to Warmington's house he decided to arrest Warmington after Warmington was unable to produce documentation to establish his innocence. (T. 230-1).

The facts in the light most favorable to the State established that Christine Pistol, who had been a student in Warmington's real estate class, and her husband, Robert Pistol, approached Warmington, expressing a desire to invest in mortgages. (T. 247). Several months later Warmington responded that a friend, Rene Sardina, was interested in borrowing money, secured by a second mortgage on a piece of property he desired to purchase. According to Warmington, Sardina's credit was such that he could not qualify for a second mortgage loan in the marketplace and, therefore, was willing to pay a higher-than-market, nine-percent interest rate on the mortgage. Warmington functioned as the middleman for the transaction. (T. 255).

Sardina testified that in 2002 he was trying to buy a home but he was unable to obtain a mortgage from the bank. (T. 452). He indicated that Warmington told him he could get him a second mortgage in the amount of $150,000. (T. 452). Sardina claimed that he met the Pistols a week prior to the closing on the loan at the house he was attempting to buy. (T. 453). His account directly conflicted with the Pistol's assertion that they never met Sardina until the day of the signing of the loan documents. According to Sardina he was under the impression that the loan being made to him was going to be secured by a mortgage on his house despite the fact that on September 10, 2002, Sardina knew he no longer had the right to buy the house since the option to buy had already expired. (T. 485).

On September 10, 2002, the Pistols and Sardina met Warmington and his wife at the Warmingtons' house for the purpose of closing the transaction. (T. 256). The closing documents, including a promissory note and mortgage, were prepared by Warmington. The Pistols brought two $75,000 checks, representing the loan amount. (T. 264). After Sardina signed the promissory note and mortgage, all of the parties travelled together to Warmington's bank, where his wife deposited the two checks into the Warmingtons' personal bank account. (T. 269).

The Pistols received payments on the loan from October 2002 through 2005 in the amount of $59,309.71. (T. 276). These payments, according to the state's forensic accountant, were made from Warmington's bank account. (T. 532). When the Pistols stopped receiving payments, they contacted Sardina, who stated he never received the $150,000, and was told by Warmington the deal fell through. (T. 459). Eventually, after speaking to an attorney, the Pistols contacted the police.

Detective Abolsky was assigned as the lead detective to the criminal case, precipitated by the Pistols' complaint to the authorities after the payments to them ceased. After interviewing the Pistols and Sardina, Detective Abolsky approached Warmington and obtained an interview. Detective Abolsky testified:

> [Prosecutor]: When you interviewed Mr. Warmington, how far [sic] is it that it came about?
>
> [Detective]: Well, what I believed to be the complete case file, I went to his home to visit with him.

[Prosecutor]: What [wa]s the purpose of your visit?

[Detective]: The purpose of my visit was to allow him to dispel any alarms that I may have or concerns that he did anything wrong.

[Prosecutor]: And was he able to do that?

[Defense Counsel]: Objection. Burden shifting.

The Court: Sustained.

[Defense Counsel]: We have a motion to object, Judge.

The Court: Yes.

[Prosecutor]: When you went and spoke to him, what was the extent of your investigation?

[Detective]: I advised him of the nature of the investigation. We spoke outside his residence. I began explaining to him what the allegations were and I offered him an opportunity to --

[Defense Counsel]: Objection.

The Court: Sustained.

[Prosecutor]: Your Honor.

The Court: Continue on.

[Prosecutor]: And what was the result of that conversation?

[Detective]: Well, Mr. Warmington had indicated to me that a loan had been funded to Mr. Rene Sardina and that Mr. Sardina was no longer paying on the loan. The loan was comprised basically [of] a mortgage or something and as a result he had explained this to the Pistols and subsequently it was a matter he was trying to take care of.

[Prosecutor]: **Was the Warmington able to produce any documentation?**

[Defense Counsel]: Objection. Burden shifting. We reserve --

The Court: Overruled.

[Prosecution]: **Was there documentation that day with regards to this explanation he gave you?**

[Detective]: **No, in fact, he represented that his home was also his office. And when I asked for him to provide any documentation, he couldn't.**

[Defense Counsel]: Objection.

The Court [sic]: Same objection as previously noted. We reserve the motion.

The Court: Continued objection. Go ahead.

[Prosecution]: When you had that conversation with Mr. Warmington, what happened?

[Detective]: I placed him under arrest. (T. 230-1).

At the conclusion of Detective Abolsky's testimony, Warmington moved for a mistrial, arguing the State improperly shifted the burden of proof to Warmington. The trial judge denied the motion, finding the State did not shift the burden. (T. 239).

Warmington called numerous witnesses to support his defense that at the time the loan was completed, everybody knew that the loan was not going to be secured by a mortgage since Sardina no longer had the right to buy the house he was renting

because the option to buy had expired prior to September 10, 2002.[1] Pedro Fernandez, a real estate broker, was the listing agent for the house that Sardina wanted to buy. (T. 598). He testified that according to the agreement between the buyer and Sardina, the closing date on the sale of the house was suppose to be July 30, 2002 but was extended to August 15, 2002. (T. 599). Sardina, who had been renting the house, defaulted on his rent payments and on August 15, 2002, he no longer had an option to buy the house which he claimed was going to be the collateral on the loan from the Pistols. (T. 600).

Grace Warmington, Warmington's wife, testified that she met Ms. Pistol at the school Warmington taught at in June of 2002. (T. 635). In July, she met Mr. Pistol and Sardina at her house and they all discussed the fact that Sardina wanted to purchase a house and needed a second mortgage. (T. 636). Subsequently, Sardina learned that he could not qualify for the first mortgage and, therefore, the deal fell through. (T. 694). According to Ms. Warmington on September 10, 2002, the Pistols lent her husband and Sardina $150,000 which was meant to be a personal loan not secured by a mortgage since Sardina no longer was purchasing the house that was meant to secure the loan. (T. 647). Ms. Warmington testified that during the three

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[1] Warmington also called several witnesses who refuted the Pistols' allegation that they met Sardina for the first time on the day the loan documents were signed. Eduardo Lima, Margaret Gonzalez and Teddy Reyes all testified that prior to the signing of the loan documents, they had seen the Pistols and Sardina at Warmington's home. (T. 589, 607-8, 619).

years that her husband was paying back the loan she would give Sardina money from the loan. (T. 650). She specifically testified that she gave Sardina cashier checks and Jose Rodriguez checks to pay for Sardina's rent. (T. 651-8).

Warmington testified that in 2002 he was a real estate instructor and broker. (T. 690). He met Sardina in 1999 after Sardina and his partner had purchased distressed property that they intended to refinance and sell. (T. 690). Sardina and his partner were also involved in a development project in South Miami wherein Sardina was going to build duplexes and Warmington was going to be the broker. (T. 697).

In April 2002, Sardina informed Warmington that his landlord had started eviction proceedings against him and that he was negotiating to purchase the property. (T. 708). In June of 2002, Warmington met Mr. Pistol at the school Warmington was teaching at. (T. 714). Later that month Warmington met Pistol, Sardina, and Sardina's partner at Warmington's house where they discussed the Pistols giving Sardina a second mortgage on the house to pay for the down payment. (T. 716). All the parties knew that the closing on the house was suppose to be July 30, 2002. (T. 716-7). It was agreed that an appraisal would be done on the house and the Pistols would loan Sardina $75,000.00. (T. 725).

When it was learned that Sardina could not get the original loan for the first mortgage, the Pistols agreed to loan the Sardinas $150,000. (T. 728). When the deal on Sardina's house fell through Warmington called the Pistols and informed them that

Sardina was not going to buy the house. (T. 761). Warmington testified that once the Pistols were informed that the deal on the house had fallen through, they agreed to make a $150,000 personal loan to Warmington and Sardina. (T. 763).

On September 10, 2002, the Pistols came to Warmington's house and Warmington signed a promissory note. (T. 764). Warmington deposited the money in the bank and started to repay the loan. (T. 775) Warmington made 38 payments to the Pistols and after Warmington received a threatening letter from a lawyer, Warmington continued to offer to make payments. (T. 791). Warmington specifically denied ever attempting to steal money from the Pistols. (T. 795).

After deliberations the jury found Warmington guilty of grand theft over $20,000 and under $100,000. (R. 908). The court sentenced Warmington to two years community control followed by ten years probation. (R. 942). On direct appeal one of the issues argued was that the trial judge erred in overruling defendant's objection based upon improper burden shifting. The majority opinion of the Third District Court of Appeal concluded that the state did not improperly shift the burden of proof to the defense since, there was nothing wrong with introducing evidence **at trial** that Warmington, **prior to trial**, failed to produce any documentation to establish his innocence. The court further held that since the comment on Warmington's failure to produce evidence prior to trial to establish his innocence was just an "historical fact," it was not improper burden shifting.

The dissenting opinion, written by Judge Ramirez, relying upon this court's opinion in *Hayes v. State*, 660 So.2d 257 (Fla. 1995), and District Court opinions in *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009) and in *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004), concluded that if commenting on a defendant's failure to produce documentation of his innocence immediately prior to his being arrested was not burden shifting he did not know what was.

A notice to invoke jurisdiction was filed on May 15, 2012. This Court accepted jurisdiction without oral argument. This brief follows.

POINT ON APPEAL

EVIDENCE AT TRIAL THAT WARMINGTON FAILED TO PRODUCE FOR THE POLICE DOCUMENTATION OF HIS INNOCENCE PRIOR TO HIS ARREST WAS IMPROPER BURDEN SHIFTING WHICH VIOLATED THE DUE PROCESS CLAUSE OF BOTH THE FLORIDA AND UNITED STATES CONSTITUTION AND, THEREFORE, THIS COURT SHOULD QUASH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL WHICH APPROVED THIS IMPERMISSIBLE BURDEN SHIFTING TESTIMONY.

SUMMARY OF ARGUMENT

Warmington was charged with grand theft. The issue the jury had to resolve was whether Warmington misrepresented to the victims that a loan, wherein he was the middleman was secured by a piece of property. The issue the Third District Court of Appeal had to decide was whether the trial judge abused his discretion in overruling defense counsel's objection to the state introducing evidence that prior to Warmington being arrested, he was unable to produce documentation to the police to establish his innocence. The majority opinion of the Third District Court of Appeal incorrectly concluded that since the evidence that Warmington failed to produce evidence of his innocence prior to his arrest was merely an "historical fact" the evidence was not improper burden shifting.

This case is directly controlled by this Court's decision in *Hayes v. State*, 660 So.2d 257 (Fla. 1995), wherein this Court held that it is improper burden shifting for the state to introduce evidence at trial that prior to trial, a defendant failed to produce evidence of his innocence. Numerous district court of appeals have also held that it is improper burden shifting to introduce evidence at trial that prior to trial the defendant failed to produce evidence to support his claim of innocence. *See Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009); *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004); *Cribbs v. State*, __So.3d__, 2013 WL 1715440 (Fla. 1st DCA 2013).

Since the Third District Court of Appeal wrongfully concluded that evidence at trial that a defendant failed to produce evidence of his innocence prior to trial was not improper burden shifting, this Court should vacate the decision of the Third District Court of Appeal. Furthermore, since it is impossible for the state to establish beyond a reasonable doubt that the improper burden shifting did not contribute to the jury verdict, this Court should order the Third District Court of Appeal to grant defendant a new trial.

ARGUMENT

EVIDENCE AT TRIAL THAT WARMINGTON FAILED TO PRODUCE FOR THE POLICE DOCUMENTATION OF HIS INNOCENCE PRIOR TO HIS ARREST WAS IMPROPER BURDEN SHIFTING WHICH VIOLATED THE DUE PROCESS CLAUSE OF BOTH THE FLORIDA AND UNITED STATES CONSTITUTION AND, THEREFORE, THIS COURT SHOULD QUASH THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL WHICH APPROVED THIS IMPERMISSIBLE BURDEN SHIFTING TESTIMONY.

The State claimed Warmington committed grand theft by misrepresenting to the victims that money they were lending to a third party was secured by a mortgage. (R. 14-7). Warmington's defense was the borrowers and lenders both knew the loan was unsecure and, therefore, he did not misrepresent to them that the loan was secured by a mortgage as claimed by the state.

The state during the testimony of the lead detective was allowed to introduce testimony, over the objection of defense counsel, that prior to Warmington's arrest the police spoke to Warmington and when he was unable to give the lead detective any documents that would have established his innocence he was arrested.[1] This is evidenced by the following:

> Q. When you interviewed Mr. Warmington, how far is it that it came about?
>
> A. Well, what I believed to be the complete case file, I went to his home to visit with him.

[1]Warmington's motion for mistrial based upon improper burden shifting was denied. (T. 239).

Q. What is the purpose of your visit?

A. The purpose of my visit was to allow him to dispel any alarms that I may have or concerns that he did anything wrong.

Q. And was he able to do this?

MR. PONT: Objection. Burden shifting.

THE COURT: Sustained.

MR. PONT: We have a motion to object, Judge.

THE COURT: Yes.

Q. When you went and spoke to him, what was the extent of your investigation?

A. I advised him of the nature of the investigation. We spoke outside his residence. I began explaining to him what the allegations were and I offered him an opportunity to –

MR. KRYPEL: Objection.

THE COURT: Sustained.
MS. BAILEY: Your Honor.

THE COURT: Continue on.

BY MS. BAILEY

Q. And what was the result of that conversation?

A. Well, Mr. Warmington had indicated to me that a loan had been funded to Mr. Rene Sardina and that Mr. Sardina was no longer paying on the loan. The loan was comprised basically a mortgage or something and as a result he had explained this to the Pistols and subsequently it was a matter he was trying to take care of.

Q. Was the defendant able to produce any documentation?

MR. PONT: Objection. Burden shifting. We reserve - -

THE COURT: Overruled.

BY MS. BAILEY

Q. Was there documentation that day with regards to this explanation he gave you?

A. No, in fact, he represented that his home was also his office. And when I asked for him to provide documentation, he couldn't.

MR. PONT: Objection.

THE COURT: Same objection as previously noted. We reserve the motion.

THE COURT: Continued objection.
Go ahead.

[PROSECUTION]: When you had that conversation with Mr. Warmington, what happened?

[DETECTIVE]: I placed him under arrest.

(T. 230-1).

As a matter of due process, the State is required to prove all elements of a crime beyond a reasonable doubt. A defendant is not obligated to produce evidence to establish his innocence. *Hayes v. State*, 660 So.2d 257, 265 (Fla.1995) (citation omitted). Therefore, it is error for a prosecutor to make comments, or introduce evidence that "shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable

doubt." *Gore v. State*, 719 So.2d 1197, 1200 (Fla.1998). *Hayes v. State,* 660 So.2d 257, 265 (Fla.1995) (citation omitted). Although the State has the right to comment on testimony produced by the defense, such commentary is improper if it implies an obligation on the part of the defense to refute the State's evidence. *See Ealy v. State*, 915 So.2d 1288, 1291 (Fla. 2d DCA 2005). That type of implication constitutes improper burden-shifting. *Id.*

This Court in *Jackson v. State*, 575 So.2d 181, 188 (Fla.1991), recognized that since a fundamental protection accorded an accused under the Due Process Clause is the requirement that the State establish guilt beyond and to the exclusion of a reasonable doubt, "the state 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." *Jackson v. State*, *see also Hill v. State*, 980 So.2d 1195 (Fla. 3d DCA 2008). The only exception to this rule is when a defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self defense, defense of others or relying upon facts that could be elicited only from a witness who is not equally available to the state.[2]

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[2] This Court found in *Jackson* that the trial court had improperly allowed the State to make comments in its closing argument concerning the fact that *Jackson* did not call his mother to testify because the narrow exception to the general rule against such comments were inapplicable. Based on the fact that Jackson had not voluntarily assumed any burden of proof, the Court ruled that "the witness's special relationship to *Jackson* was irrelevant, and the trial court erred by allowing the state to bring the witness's absence into issue in its closing argument."

Id See also Whittaker v. State, 770 So. 2d 737 (Fla. 4th DCA 2000); *Jackson v. State*, 690 So.2d 714 (Fla. 4th DCA 1997); *White v. State*, 757 So. 2d 542 (Fla. 4th DCA 2000); *Hayes v. State*, 660 So.2d 257 (Fla. 1995); *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009).

Despite the fact that Warmington did not assert an affirmative defense, the majority opinion of the Third District Court of Appeal concluded that the state did not improperly shift the burden of proof to the defense since introducing evidence **at trial** that Warmington, **prior to trial**, failed to produce any documentation to establish his innocence was not improper burden shifting. The court further concluded that since the comment on Warmington's failure to produce evidence prior to trial to establish his innocence was just an "historical fact," it was not improper burden shifting. Both of these conclusions were error.

The law in Florida recognizes that it is improper burden shifting to introduce evidence at trial that defendant failed to produce evidence of his innocence prior to trial.

This case is directly controlled by this Court's decision in *Hayes v. State*, 660 So.2d 257 (Fla. 1995), wherein this Court recognized that improper burden shifting occurs when the state introduces evidence at trial that prior to trial defendant failed to attempt to produce evidence of his innocence. In *Hayes, supra*, the State called as a witness an employee of the Broward County Sheriff's Office crime lab who testified concerning various pieces of physical evidence found at the scene of the murder,

including clothing stained with blood. On cross-examination, the defense brought out the fact that the State had never requested a test of the blood stains. The apparent goal of this line of questioning was to cast doubt on the thoroughness of the State's investigation and to imply, that a test of the blood could have eliminated *Hayes* as a suspect. Then, on redirect, the trial judge overruled a defense objection and allowed the State to inquire whether the defense had requested any testing of the blood stains **prior to trial**. The witness replied that the defense had not asked the crime lab to test the blood stains and added that the lab had complied with such requests in the past for other defense attorneys. Similar comments were made by the prosecutor in closing argument concerning the failure of the defense to test hairs found at the scene of the murder prior to trial. On appeal this Court recognized that the state improperly shifted the burden of proof to the defendant by arguing that the defense should have had the blood stains tested prior to trial when the court held:

> The prosecutor's questions and statements in the instant case may have led the jury to believe that Hayes had an obligation to test the evidence found at the scene of the murder and to prove that the hair and blood samples did not match his own. Clearly, Hayes had no such obligation.

Just as Hayes had no obligation to test evidence prior to trial to establish his innocence, Warmington in this case had no obligation to produce documentation to establish his innocence prior to his arrest. In both cases the state improperly shifted the burden of proof to the defendant by introducing evidence that prior to trial

defendant failed to do something to establish his innocence.

Numerous cases from the district court of appeals are consistent with this Court's holding in *Hayes*. In *Miele v. State*, 875 So.2d 812 (Fla. 2d DCA 2004), the defendant was charged with burglary of a dwelling. The state claimed that defendant entered the victim's house and stole a two dollar bill from a five gallon water jug owned by the victim. The defendant's sister testified that defendant used to use two dollar bills and that they were taken from their father's jug. During cross examination the state, over the objection of defense counsel, was allowed to attempt to shift the burden of proof to the defense by asking defendant's sister if she had taken a picture of her father's jug prior to trial. The Second District concluded that the evidence that defendant's sister failed to take a picture prior to trial of her father's jug to support her claim of defendant's innocence was improper burden shifting.

In *Ramirez v. State*, 1 So.3d 383 (Fla. 4th DCA 2009), the defendant was charged with battery on a law enforcement officer. Defendant's defense at trial was that the police hit her. On cross-examination the state, over the objection of defense counsel, was allowed to ask the defendant if she had requested that someone from the jail take a close-up picture of her to show her injury. The Fourth District Court of Appeal concluded, similar to this Court and the Second District Court of Appeal, that it was improper burden shifting to introduce evidence at trial that defendant failed to produce or obtain evidence of his innocence prior to trial. *See also Cribbs v. State*, __

So.3d __, 2013 WL 1715440 (Fla. 1st DCA 2013)(Prosecutor's comments during closing argument at battery trial, in which he criticized a defense investigator's failure to take certain investigative steps, constituted improper burden-shifting, and thus trial court should not have overruled defendant's objection to the comments).

The majority opinion attempted to distinguish *Hayes*, *supra*, *Ramirez, supra* and *Miele, supra,* on the grounds that in those cases the improper burden shifting referred to defendant's failure to produce documents **at trial** rather than **prior to trial**. As the dissenting opinion recognized this conclusion was factually incorrect. In all three of the above cited cases, similar to this case, the state introduced testimony at trial that the defendant failed to produce or obtain evidence prior to trial. In *Hayes* the impermissible evidence at trial was that defendant failed to get clothes tested **prior** to trial. In *Ramirez* some of the impermissible evidence at trial was that defendant failed to have someone at the jail take pictures of her injury **prior** to trial. In *Miele* some of the impermissible evidence at trial was that Miele's sister failed to take a photograph **prior** to trial of the jug owned by her father.[3]

In this case introducing evidence at trial that Warmington failed to produce any documentation prior to trial to establish his innocence was no different than arguing that the defendant in *Hayes* should have had the blood stains tested prior to trial or

[3] In *Ramirez* and *Miele,* the state also commented on defendant's failure to produce evidence at trial but, the court referenced both the failure to produce evidence prior to and at trial.

that the defendant's in *Ramirez* and *Miele* should have taken photographs prior to trial. In all of these situations the jury is wrongfully left with the impression that a defendant had an obligation to establish his innocence prior to trial. Therefore, as the dissenting opinion concluded, this case is factually indistinguishable from *Hayes, Ramirez,* and *Miele, supra*, and, therefore, it was error for the majority opinion to conclude that there was not improper burden shifting in this case.

There is no historical fact exception to improper burden shifting

The majority opinion held that since commenting on defendant's failure to produce documentation of his innocence prior to trial was just an "historical fact," it should not be considered improper burden shifting. In reaching this conclusion the court relied upon the four arguments, none of which support the conclusion that a statement by a police officer at trial that a defendant's failure to produce documentation of his innocence prior to trial was not improper burden shifting:

1. **A police officer has the right to testify to what they saw, observed or discovered during their investigation.**

The majority opinion stated the following:

> "**An investigating officer's testimony concerning what he saw, observed, or discovered during the course of his investigation does not shift the burden of proof.** It is evidence. In this case, the investigating officer discovered that Warmington did not have copies of certain mortgage documents signed by Sardina at the closing of the transaction at his home. The testimony may or may not have been significant; one might argue that Warmington, who, after all, merely was the middleman in the transaction, would have no need to have a set of the mortgage documents. On the other hand, the fact certainly was material

for the jury to hear.

There is no question that a police officer has the right to testify to what he saw, observed or discovered during the course of his investigation as long as these observations **are admissible at trial**. There are numerous examples of information or observations that a police officer may discover during his investigation which are not admissible at trial. The fact that an officer discovers during his investigation that a suspect is a convicted felon does not mean that this "historical fact" is admissible at trial. Similarly, the fact that a defendant refuses to speak or to give an exculpatory statement to the police prior to trial does not make this "historical fact" admissible at trial. Art. I, § 9, Fla. Const. (prohibiting a defendant from being compelled to be a witness against himself); *State v. Hoggins*, 718 So.2d 761 (Fla.1998)(Prosecutor's comments on defendant's pre- *Miranda* silence at time of arrest and on defendant's post- *Miranda* silence required new trial); *Robbins v. State,* 891 So.2d 1102 (Fla. 5th DCA 2004)(Prosecutor's comment during closing arguments in second-degree murder prosecution, indicating that defendant never mentioned to police that victim had attacked him with a knife, improperly commented on defendant's post-arrest silence in violation of state constitution.) and *Weiss v. State*, 341 So.2d 528 (Fla. 3d DCA 1977)(improper for prosecution, in its case in chief, to put on evidence of defendant's failure to come forward to explain himself prior to his arrest when he knew he was under investigation).

A comparison can be made to a defendant who is arrested for loitering and prowling. The loitering and prowling statute requires that when a police officer investigates an individual for loitering and prowling, the officer is required to give the defendant a chance to explain what he is doing in the area. Despite the fact that the officer is required to give defendant the right to explain his presence, the law recognizes that if a defendant fails to give an explanation to the police this "historical fact" is not admissible at trial since the testimony would violate defendant's right not to incriminate himself. *See State v. Ecker*, 311 So.2d 104 (Fla.1975)(defendant can not be required to explain his presence or conduct); *Smith v. State*, 695 So.2d 864 (Fla. 4th DCA 1997(State's repeated references to defendant's failure to explain his presence and conduct to police constituted reversible error in prosecution for loitering and prowling; such references could have led jury to believe that defendant was required to provide such explanation, and would have been impermissible comment on defendant's right to remain silent.); *Charton v. State*, 716 So.2d 803 (Fla. 4th DCA 1998)(prosecution cannot comment in its case in chief that a defendant remained silent during a *Terry* stop).

The majority opinion in footnote 1 takes the position that a comparison to cases prohibiting comments on defendant's pre-arrest silence is not valid since commenting on pre-arrest silence is a violation of the Fifth Amendment and improper burden shifting is not protected by the Fifth Amendment. There is no dispute that

improper burden shifting is a violation of the due process clause while a comment on pre-arrest silence is a violation of the Fifth Amendment. However, this does not change the fact that just as it is improper to introduce evidence that defendant failed to give an exculpatory statement prior to trial, it is also improper to introduce evidence that defendant failed to produce documentation of his innocence prior to his arrest. In both situations the state is introducing evidence of an "historical fact" which is prohibited by different portions of the constitution and, therefore, inadmissible.

2. Since the state has the right to introduce evidence that a defendant fails to produce a registration during an investigatory stop the state also has the right to introduce evidence that defendant failed to produce documentation of his innocence during a police investigation of a grand theft allegation.

In footnote 1 the majority wrote:

> The inquiry made in this case is no different than an officer's testimony of the inability of a defendant to produce his registration during the course of an investigatory stop.

The majority opinion correctly concludes that if a defendant fails to produce identification during an investigatory stop, the state can introduce this fact in evidence. The reason this testimony is admissible is because the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), concluded it is a minimal intrusion to ask someone for identification during an investigatory stop. ("A brief stop of a suspicious individual, in order to determine his

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.") See *Harper v. State*, 532 So.2d 1091 (Fla. 3 DCA 1988)(it is widely held that a request, even a persistent or intrusive one, that a detained suspect produce identification papers is an appropriate and authorized aspect of a *Terry* seizure) and *Charton v. State,* 716 So.2d 803 (Fla. 4th DCA 1998)(evidence that defendant failed to produce identification during lawful investigatory stop admissible at trial). The same rational that allows the state to introduce evidence that a defendant failed to produce identification during an investigatory stop does not apply to a comment on a defendant's failure to produce documentation to establish his innocence during a police investigation since the due process clause of both the United States Constitution and the Florida Constitution prevent the state from requiring a defendant to prove their innocence.

In *Charton v. State,* 716 So.2d 803 (Fla. 4th DCA 1998), the district court specifically recognized that there is a distinction between a defendant failing to produce identification during an investigatory stop and a defendant failing to making a statement exonerating himself. In *Charton,* the issue was whether the police could introduce evidence of defendant's silence during a *Terry* stop. At the trial the prosecution brought out the fact that defendant failed to produce identification and failed to explain his presence to the officer during the investigatory stop. The court

concluded that it was proper to introduce evidence that defendant failed to produce identification since the law required that defendant produce identification during a *Terry* stop. However, the court concluded it was improper to introduce evidence that defendant failed to explain his presence to the police officer since the court recognized that it was a violation of the Fifth Amendment to introduce evidence that defendant failed to give a statement to exonerate himself.

Therefore, the fact that the state can introduce evidence that a defendant failed to produce a registration or identification during an investigatory stop has no relevance to the issue of whether the state can introduce evidence that a defendant failed to produce documentation of his innocence during a police investigation of a grand theft case.

3. Since the police could have obtained a search warrant for defendant's house there is nothing wrong with introducing evidence that defendant failed to produce documentation of his innocence prior to his arrest.

The majority opinion concluded that since the police could have obtained a search warrant to search defendant's office and introduced the results of that search at trial, there is nothing wrong with the state introducing evidence that defendant failed to produce documents of his innocence. The majority opinion stated:

> The historical fact that Warmington did not have a set of the documents could as well come through a search pursuant to a warrant. We are unable to find any legal misstep in the trial court permitting the same result through admission into evidence of a voluntarily made statement by the defendant.

The reasoning of the majority opinion completely ignores one of the cornerstones of our criminal justice system which is that a defendant has **no burden to produce evidence of his innocence.** There is a big difference between an officer testifying that he was unable to find any documentation to support Warmington's claim of innocence pursuant to a search warrant, as compared to the testimony in this case where a police officer testifies that Warmington was arrested after he **failed to produce** documentation of his innocence. There is no question that the state had the right to try to obtain a search warrant of Warmington's house and introduce the results of that search at trial. However, that is not what occurred in this case. Instead, what the state did was shift the burden of proof to Warmington by introducing evidence that after Warmington failed to introduce documentation of his innocence he was arrested. As the dissenting opinion properly recognized "if this is not improper burden shifting it is hard to imagine what is."

4. Since all defendants are arrested at some point, and the fact of arrest regularly makes its way into testimony at trial evidence that immediately prior to defendant being arrested he failed to produce documentation of his innocence was not improper burden shifting.

The majority opinion held the following:

> Finally, we are not moved by the fact Warmington was arrested immediately after he told Detective Abolsky he did not have a copy of the mortgage documents. **This again is a matter of historical fact.** The testimony, taken as a whole, was prejudicial to Warmington. However, all defendants are arrested at some point, and the fact of arrest regularly makes its way into testimony at trial. The State at all times had the burden to prove the case against Warmington beyond a reasonable doubt.

> We do not believe this burden was lessened by Detective Abolsky's testimony.

There is no doubt nor is it being contested that the state had the right to introduce evidence that Warmington was arrested. However, the mere fact that the state had the right to introduce this "historical fact" did not mean that the state could shift the burden of proof to Warmington and introduce evidence that the reason Warmington was arrested was because he failed to produce documentation of his innocence.

Therefore, the fact that evidence that Warmington failed to produce documentation of his innocence prior to his arrest was an "historical fact" does not change the conclusion, as the dissenting opinion recognized, that the outcome of this case is directly controlled by this Court's opinion in *Hayes v. State*, *supra*, which established that evidence that a defendant failed to produce evidence of his innocence prior to trial is improper burden shifting, that is a violation of the due process clauses of both the Florida and United States Constitutions.

Harmless error

In *Jackson v. State,* __ So.3d __, 2012 WL 5514937 (Fla. November 15, 2012), this Court once again reiterated that it is the State's burden to demonstrate the error is harmless beyond a reasonable doubt. *See also State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986). As beneficiary of the error, the State must prove there is "no

reasonable possibility that the error contributed to" defendant's conviction. Application of the harmless error test requires a close examination of the entire record, "including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition, an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *DiGuilio*, 491 So.2d at 1135.

This was an extremely complicated case wherein, both sides introduced numerous documents at trial to support their positions. Over the objection of defense counsel, the state was allowed to introduce improper testimony that immediately after Warmington failed to produce documentation to the police to support his claim of innocence, he was placed under arrest. (T. 230-1). By overruling defense counsel's objection to this improper testimony, the trial judge clearly left the jury with the impression that Warmington had an obligation to produce evidence of his innocence prior to his arrest which could have contributed to the jury verdict in this case.

The state on direct appeal argued that since the trial judge's general jury instructions explained to the jury that the state had the burden of proof, the impermissible burden shifting in this case did not require a new trial. In *Cribbs v. State,* __So.3d__, 2013 WL 1715440 (Fla. 1st DCA 2013), the prosecutor commented on the failure of the defendant's investigator to conduct an adequate pre-trial investigation. In *Cribbs* as in this case, the trial court appeared to endorse the

prosecutor's comment by specifically overruling the objection and failing to admonish the jury to disregard the improper comment. In concluding that the improper burden shifting argument was not harmless error the court held:

> While the reminder of the burden of proof may have been of some benefit, it is not likely to have removed the confusion caused by the prosecutor's focus on the defense's lack of investigation. In the context of this trial, the comment invited the jury to compare investigations rather than hold the State to its burden to establish the elements of the offense beyond a reasonable doubt, and the trial court did not dispel the notion that a comparison of investigations would be proper. Unable to conclude that the improper comment was harmless beyond a reasonable doubt, we reverse and remand for a new trial.

Similarly in this case, it is impossible for the state to establish beyond a reasonable doubt that the jury was not confused about whether Warmington had an obligation to produce documentation of his innocence prior to trial. Since this confusion could have contributed to the jury verdict, this Court should quash the opinion of the Third District Court of Appeal with instructions that the court grant defendant a new trial. *See Johnson v. State*, 949 So.2d 329 (Fla. 1st DCA 2007)(Reversal and remand for new trial based on errors in officer's testimony, which was fairly susceptible of being understood by jury as a comment on defendant's right to remain silent and served to improperly shift burden of proof to defendant since the state failed to prove beyond a reasonable doubt that those errors did not contribute to jury's verdict.). *See also Hayes v. State*, supra, *Miele v. State*, supra and *Ramirez v. State*, *supra* (all cases where court held improper burden shifting not harmless error).

CONCLUSION

Based upon the foregoing, this Honorable Court is respectfully requested to quash the opinion of the Third District Court of Appeal and grant Mr. Warmington a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically CrimAppMIA@MyFloridaLegal.com to the Office of the Attorney General, Criminal Division, on this 11th day of June, 2013.

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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