

**STATE OF LOUISIANA**

\*

**NO. 2008-KA-0217**

**VERSUS**

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**COURT OF APPEAL**

**DWAYNE HARVEY**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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**TOBIAS, J., CONCURS IN PART AND DISSENTS IN PART.**

I respectfully concur in the result reached by the majority. The decision of the trial court is properly affirmed.

However, I respectfully dissent from the majority's holding that the "state exceeded the bounds of proper argument and the district court abused its discretion by overruling the defense's objection [during the prosecution's rebuttal]." The prosecution's statement that witnesses who were not called to testify were available to both the state and the defendant is merely a statement of fact and within the parameters of *State v. Clark*, 01-2087 (La. App. 4 Cir. 9/25/02), 828 So. 2d 1173, and its progeny. Thus, I find no abuse of discretion or error of the part of the trial judge, and the majority errors in finding that the statement was harmless error. No error occurred, harmless or otherwise.