IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	S.Ct. Case No. SC96588
vs.	)	
	)	
CHARLES HOGAN,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

CONTENTS **PAGE**

AUTHORITIES CITED

CASES **PAGE**

FLORIDA CONSTITUTION

PRELIMINARY STATEMENT

Respondent was the defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

R = Record on Appeal

T = Transcript on Appeal

PB = Petitioner's Brief.

CERTIFICATION OF TYPE FACE

In accordance with the Florida Supreme Court Administrative Order issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that has 10 characters per inch.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for the purposes of this appeal subject to the additions and clarifications set forth in the argument portion of this brief, which are necessary to resolve the legal issues presented on appeal.

SUMMARY OF THE ARGUMENT

The district court improperly certified conflict between its decision here and two decisions from the First District. The cases bear little legal or factual resemblance to the instant case.

The prosecutor improperly suggested Respondent should not be believed because he failed to call a potential witness. The prosecutor had made no showing that this potential witness was available to be called nor that the witness was “not equally available” to the state or had a “special relationship” with the Respondent. Generally such witnesses are persons with a close relationship with one side or the other. The Fourth District correctly applied that rule to this case and found the comment improper because there was no special relationship between Respondent and the witness, "Ted Hanson"; "Ted Hanson" was not particularly within Respondent's power to produce.

Furthermore, the state incorrectly suggested that the missing witness was more available to the Respondent because only the Respondent knew of Ted Hanson’s identity, location and expected testimony. However, record shows that the state had notice of appellant’s claim that he was given permission to stay in the house and the opportunity to seek Ted Hanson as a rebuttal witness if necessary.

Finally, contrary to the state’s arguments, this case does not involve the issue of commentary on silence and the Respondent did not open the door to the state’s comments.

The district court's decision must be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY REVERSED RESPONDENT'S CONVICTION BECAUSE THE PROSECUTOR'S COMMENTS ON RESPONDENT'S FAILURE TO CALL WITNESSES WERE COMPLETELY IMPROPER.

Jurisdiction

The district court has certified conflict between its decision here and two decisions from the First District, Highsmith v. State, 580 So. 2d 234 (Fla. 1st DCA), rev. denied, 589 So. 2d 291 (Fla. 1991), and McDonald v. State, 578 So. 2d 371 (Fla. 1st DCA), rev. denied 587 So. 2d 1328 (Fla. 1991). Hogan v. State,24 Fla. L. Weekly D2027 (Fla. 4th DCA Sep. 1, 1999).

The Florida Constitution grants this Court jurisdiction to review decisions which "expressly and directly conflict" with decisions from other district courts or which are "certified . . . to be in direct conflict . . . " Art. V, sec. 3(b)(3) and (4), Fla. Const. That grant of jurisdiction requires that there be an actual "direct conflict," regardless of certification of one, before any discretion can be exercised in favor of review. See Bailey v. Hough, 441 So. 2d 614 (Fla. 1983) (jurisdiction accepted based on certified conflict dismissed where case cited was receded from). This Court has defined direct conflict as limited to those decisions which speak to the same point of law in a factual context sufficiently similar to permit the inference that the result in

each case would have been different had the deciding court employed the reasoning of the other. See Mancini v. State, 312 So. 2d 732 (Fla. 1975); Dept. of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983). Despite the certification by the district court, neither Highsmith nor McDonald actually meet that definition for direct conflict. None exists.

First, McDonald bears little factual or legal resemblance to the instant case. There, a defendant forced his way into a woman's apartment and sexually battered her. Her young child was asleep somewhere in the apartment. The defense was consent. In closing, the defense, argued that the state failed to call the child, suggesting, contrary to evidence presented, that it was "entirely possible the child saw the whole thing." Only then did the state comment that the defense had equal subpoena power to call the child if the child would have been helpful. 578 So. 2d at 373. Clearly, McDonald involved an issue of fair reply, an issue which involves a different rule of law. 578 So. 2d at 374. In the instant case, the state argued in closing the jury could base its conclusions not on the evidence but on the inferences drawn from Respondent's failure to call a witness who gave him consent to be in the house. That comment was not a fair reply to anything, as defense counsel made no argument that the state had failed to call witnesses.

Because the facts in McDonald were significantly different from the facts here, the applicable rules are different; there is therefore no basis on which to conclude these cases are either irreconcilable or in direct conflict.

Second, the Fourth District's decision sub judice repeats the general rule that the state may comment on a missing defense witness whom the defense claims could exonerate him when, because of the witness's relationship to the defendant, it is particularly within a defendant's power to produce that witness. Hogan v. State, Fla. L. Weekly at D2027. This conclusion presupposes that the potential witness is fact available, i.e., could be found. Romero v. State, 435 So. 2d 318 (Fla. 4th DCA 1983). Although Highsmith applied this same rule, it came to the opposite conclusion because the facts were different; there the witnesses were particularly within the defendant's power to produce; i.e.,had a special relationship with the defendant. They were his cousin and friend. The same can hardly be said for "Ted Hanson," a person Respondent only met the day before his arrest at a place where the homeless take their meals. Additionally, Respondent testified that he did not know of Hanson's whereabouts since had not seen him since the day of his [Respondent's]arrest. These facts are simply not sufficiently similar so as to permit any inference about how either

court might have decided the other case. Despite the certification, the state has failed to show an actual direct conflict exists between the First and Fourth Districts. No jurisdiction exists to review the instant case; review must therefore be denied.

Merits

In the instant case, Respondent testified that he was given permission by Ted Hanson, a man he met the day before his arrest, to be in the house he was charged with burglarizing. (T 356-357, 360-362). At the time, Respondent was homeless and had been sleeping in a bus when he met Ted Hanson at a Chapel where he gets his meals. (T 356-357). Ted Hanson did not testify and the Respondent testified that he did not know where Ted Hanson was as he had not seen him since the day of his arrest. (T 363). During closing, Respondent's counsel argued 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 the owner (Mr. Ferris) or anyone authorized to act for him to enter or remain in the structure. (T 416-417). This is because Respondent had a good faith belief that he had permission to be there from Ted Hanson. (T 416-417)

In rebuttal and during cross examination, the prosecutor made

numerous improper comments on Respondent's failure to produce Hanson as a witness. (T 363, 424, 428, 434, 439). During the cross examination the state commented, over defense objection, that "Ted Hanson was not here to testify". (T 363). The state made the following comments during closing:

(1) "If he supposedly got permission from this Ted Hanson, who I submit to you does not exist, is a ghost, is a figment of the defendant's imagination, . . . "(T 424, Lines 22-25).

(2) "We have someone who is telling you 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, Lines 3-7).

(3) "Mr. Ferris, did you ever give permission to Mr. Hogan or to anyone, to Ted Hanson or Ted Danson, the ghost, did you ever give him permission to enter the house?" (T 434, Lines 21-24).

(4) "We have this, you know, figment of his imagination, Ted Hanson, ..." (T 439, Lines 14-15).

The law is well settled that it is never the duty of a defendant to establish his innocence. Davis v. State, 90 So. 2d 629 (Fla. 1956); Jackson v. State, 575 So. 2d 181 (Fla. 1991)(Due Process requires the state to prove all elements of the crime and the defendant has no obligation to present witnesses; Romero v.

State, 435 So. 2d 318 (Fla. 4th DCA 1983); Crowley v. State, 558 So. 2d 529 (Fla. 4th DCA 1990).

> When a prosecutor refers to a defendant's failure to call witnesses, it may mislead the jury to believe that the defendant has the burden of introducing evidence.

Lawyer v. State, 627 So. 2d 564 (Fla. 4th DCA 1993)citing Jackson v. State, 575 So. 2d at 188.

This Court in Jackson v. State, has applied a narrow exception to permit comment

> "when the defendant voluntarily assumes some burden of proof by asserting the defense of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state. A witness is not equally available when there is a special relationship between the defendant and the witness."

Jackson, 575 So. 2d at 188.

The Fourth District Court of Appeals interpreted this language in Jackson "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." Thomas v. State, 24 Fla. L. Weekly D351 (Fla. 4th DCA Feb. 3, 1999, on motion for rehearing)citing Lawyer v. State, 627 So. 2d 564, 567 (Fla. 4th DCA 1993).

In addition to the rule in Jackson, it still stands that the "an inference adverse to the defendant is permitted only when it is shown that the witnesses are peculiarly within the defendant's power to produce **and the testimony of the witnesses would elucidate the transaction, that is, that the witnesses are both available and competent.**" Kindell v. State, 413 So. 2d 1283, 1288 (Fla. 3d DCA 1982) (Pearson, J. concurring)(emphasis added) disapproved on other grounds, Reynolds v. State, 452 So. 2d 1018 (Fla. 3d DCA 1984). The flip-side of the rule is that no inference can be drawn from either party's failure to call witnesses who are equally available to both parties. Haliburton v. State, 561 So. 2d 248 (Fla. 1990), citing Martinez v. State, 478 So. 2d 871 (Fla. 3d DCA 1985), rev. denied 488 So. 2d 830 (Fla. 1986). "[W]hether a person is to be regarded as peculiarly within the control of one party may depend as much as on his relationship to that party as on his **physical availability**." Martinez, 478 So. 2d at 872 citing United States v. Blakemore, 489 F. 2d 193, 195 (6th Cir. 1973). [Emphasis added].

Petitioner first asserts that Ted Hanson was not equally available to the State since Respondent had a special relationship with Ted Hanson. This is plainly not so.

As the Hogan court recognized, Ted Hanson did not have a

"special relationship" to Respondent because it was not a relationship where Hanson would have been expected to testify favorably for Respondent. Here, the day before his arrest for burglary Respondent met a homeless person named Ted Hanson at a church where respondent gets his meals. (T 356-357). Ted Hanson told respondent that he was staying at an unoccupied house which he had permission to be in, and that Respondent could stay there as well. (T 357). Respondent went to the house, entered and stayed overnight. (T 357-358). He was found there the next day by the police who had been alerted by a neighbor. (T 360). Respondent testified that he had not seen Ted Hanson since the day of his arrest. (T 363).

A witness in a "special relationship" with the defendant or "not equally available" to the state has been construed to mean witnesses who were in relationships with the defendant so that they would have been expected to testify favorably for him. In Buckrem v. State, 355 So. 2d 111, 112 (Fla. 1984), the defendant had an alibi defense and stated that at the time of the crime (murder) he was with his wife at a friend's house. The Court found the State did not err in commenting on the defendant's failure to call the friend and his wife to support his alibi defense.

Likewise, in Michaels v. State, 454 So. 2d 560 (Fla. 1994),

the defendant claimed self-defense and defense of others but did not call his daughter, "who had been at the center of the dispute and was critical to the asserted theories of defense," as a witness. The Court held that the State was allowed to comment on the defendant's failure to produce the daughter as a witness. The daughter "was not equally available" to the State because the parent-child relationship would normally bias her toward supporting her father's defenses. [Emphasis added]. See also, Romero, 435 So. at 319 (Fla. 4th DCA 1983)(comment allowed when defense failed to call his girlfriend's family); Jenkins v. State, 317 So. 2d 90, 91 (Fla. 1st DCA 1975)(comment allowed where defense failed to call common law wife).

At bar, the Fourth District followed this line of cases and stated:

> "Thus, in all of the supreme court cases, Michaels, Buckrem and Jackson, the witnesses were in relationships with the defendant so that they would have been expected to testify favorably for him. We conclude that this is a necessary requirement, in order for the state to comment, . . . ".

Hogan v. State, 24 Fla. L. Weekly at D2027. Unlike in Buckrem and Michaels, and Jackson, where the missing witness was the defendant's mother, Ted Hanson was neither a family member nor a friend of Respondent. See also, Highsmith v. State, 580 So. 2d 234

(Fla. 1st DCA 1991)(failure to call friend and cousin).

Respondent's "relationship" to Ted Hanson is more like that in Lawyer v. State, supra and Thomas v. State, supra. In Lawyer, the defendant was charged with a robbery. At trial he testified that he had been working at a restaurant until 2:30 A.M. and was given a ride home by the manager. The trial court, over defense objection, permitted the state to comment that the defendant had not produced any witnesses to support his alibi. The Fourth District Court of Appeal reversed for a new trial, concluding that the manager of defendant's former place of employment was not in a special relationship with the defendant so as to permit the state to comment.

Likewise, in Thomas, the defendant was convicted of tampering with evidence by swallowing a substance that appeared to be rock cocaine. The car defendant was driving was stopped in the middle of the road with its lights off and engine running in an area known for drug activity. The sole witness for the defendant, his girlfriend, testified that they were in the area because a busboy she worked with, whose name she did not know, asked her for a ride home. The whereabouts of the busboy was unknown at the time of the trial. Over defense objection, the prosecutor was permitted to comment on defendant's failure to call the busboy as a witness.

The district court recognized that like the manager in Lawyer, the busboy had no special relationship to the defendant and found that the state's comment was impermissible. However, the conviction was affirmed because immediately following the State's comment, the trial court gave a curative instruction. No curative instruction was offered at bar. See also, Davis v. State, 24 Fla. L. Weekly D2278, (Fla. 5th DCA Oct. 1, 1999)(state's questions and comments during cross examination of defendant regarding her failure to call manager, who employed her, to support alibi defense was held to be reversible error).

Additionally, Petitioner did not show and the record does not support that Ted Hanson was available to be called by Respondent. The prosecution's comments below were improper because and an adverse inference is forbidden because, in addition to failing to show that Ted Hanson had a "special relationship" with Respondent, the Petitioner failed to show that Ted Hanson was available to be called by Respondent. Kindell, supra; Romero, supra.

In the remainder of its brief on the merits brief, the Petitioner, apparently lacking confidence in its initial position, raises for the first time a number of additional arguments that were not presented to the district court below: 1) comment or adverse inference should be permitted unless it is a comment on

silence; 2) comment should be permitted because knowledge of existence of Ted Hanson was first divulged at trial and only Respondent knew of his identity, location and expected testimony; 3) comment should be permitted because the missing witness was more likely known to Respondent than the prosecution; 4) comment permissible where Respondent failed to contradict the factual nature of the state's case and failed to support his own factual theories with witnesses; and 5) Respondent opened the door to the improper comments. Petitioner's arguments are unpersuasive.

First, Petitioner claims that a number of other jurisdictions permit the prosecutor 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 charged. (PB 11). Comment is forbidden only when the defendant's own privilege against compulsory self-incrimination is implicated. (PB 11). Specifically, the Petitioner urges the Court to permit comment or an adverse inference, where the comment is "not manifestly intended to call attention to the defendant's failure to testify." See United States v. Bagley, 772 F. 2d 482, 494 (9th Cir. 1985), cert denied, 475 U.S. 1023, 106 S.Ct. 1215 (1986). Primarily, whether or not the state's comments were a comment on silence is of no concern here. The Respondent testified below in

the trial court so the state cannot be said to have been commenting on the defendant's failure to testify. Even if the state was commenting on the defendant's failure to testify, in Florida, the standard for review when "commentary on silence" is at issue is entirely different from what Petitioner proposes to be the law.

The manifestly intended test, upon which the state relies and urges this court to adopt has been rejected as a standard in Florida. In Kinchen v. State, 490 So. 2d 21 (Fla. 1986), this Court adopted the "fairly susceptible" test in determining what constitutes a comment on silence. There, the court declined to follow the federal courts' "manifestly intended" test, which provides far less protection for defendants. See also Thornton v. State, 491 So. 2d 1143 (Fla. 1986). It is well settled that this Court has the power to construe our Florida Constitution differently from even the way the United States Supreme Court has construed a similar provision in the federal constitution. Rose v. Dugger, 508 So. 2d 321, 322 (Fla. 1987).

The Petitioner relies on numerous cases from other jurisdictions to support its argument that an adverse inference should be permitted except when the comment relates to the defendant's failure to testify. Primarily, these case are not controlling and upon closer examination either are factually

distinguishable or depend on the same reasoning for permitting comment as this Court's cases allow. Jackson, supra., Michaels, supra., Buckrem, supra. Petitioner's reliance upon Taylor v. Illinois, 484 U.S. 400, (1987), is misplaced. This case involved the exclusion of two defense witnesses that were not revealed to the prosecution until the second day of trial. The decision a discovery violation on the pin Taylor, on the second day of trial, defense counsel made an oral motion to amend his "Answer to Discovery" to include two more witnesses. Id. at 402. Counsel represented that during the direct testimony of a State's witness, he had just been informed about them and that they had probably seen the whole incident. Id. Upon questioning by the trial court, defense counsel acknowledged that he was told about one of the witnesses but was unable to locate him. Id. at 404. Later, it was learned that defense counsel had met with the witness, at the witness' home, the Wednesday before trial. Id. at 405. As a sanction, the trial court excluded the testimony of the witness. Id. 405. The majority affirmed the ruling. However, the dissent, in taking the position that exclusion was too harsh a remedy, agreed with the argument in the petitioner's brief that an alternative remedy was to allow comment on the failure to disclose the identity of the witness until trial. Id. at 430. Taylor did

not involve comment about anyone's failure to call witnesses.

Nearly all of Petitioner's other cases involve witnesses that had a "special relationship," such as a friend or relative, to the defendant. See also PB at 11,in State v. Dudley, 809 S.W.2d 40, 43 Mo.App., Western Dist. 1991, comment was allowed where defendant failed to call his mother who rendered assistance to the victim because the close family relationship between mother and son would make the mother more available to the defendant as a witness. See also PB at 11, People v. Durden, 211 A.D.2d 568 (N.Y.App.Div.,1st Dept.1995)(failure to call friends who could corroborate claim of innocence); PB at 12, People v. Najera, 88 Cal.App.2d 930, 934-935 (CA.App.,2nd Dist., Div.5 1979) (where defendant asserts alibi defense, comment proper upon failure to call a cousin, cousin's girlfriend (Juanita), and friend's girlfriend to corroborate appellant's story of his whereabouts); PB at 12, People v. Smith, 246 A.D.2d 852 (N.Y. App.Div. , 1st Dept. 1990)(where defendant's defense was that he was visiting a friend in the building, failure to call the witness was properly placed before the jury). Essentially, before the state is permitted to comment certain threshold requirements such as availability and special relationship must still be met. See PB at 17, United States v. Sblendorio, 830 F.2d 1382, 1391(7th Cir. 1987)(adverse inference

permitted unless prosecutor indirectly invites an inference based on the defendant's own silence; **but, the evidence must be available, for otherwise there is no support for the inference**)(Emphasis added). Contrary to what Petitioner suggests, the other jurisdictions are not willing to allow the state to forgo its constitutionally mandated burden of proof unless certain threshold requirements, similar to those required by this Court, are met.

Second, Petitioner asserts that Ted Hanson was not equally available to the state or had a special relationship with the Respondent because knowledge of his existence is first divulged by the Respondent at trial and only the defense had knowledge of the existence, identity, location and expected testimony of the Ted Hanson. In other words, Ted Hanson was particularly within Respondent's power to produce. Petitioner is wrong.

To support its theory that only the Respondent knew about Ted Hanson, the Petitioner relies in large part on Judge Hersey's dissent in Lawyer which suggests that the manager was not equally available to the state because only the defense knew about her and her expected testimony. Lawyer, 627 So. 2d at 568. That Ted Hanson and his expected testimony was first divulged at trial is not supported by the record. Respondent testified that he told the

arresting officer, that he was given permission to be in the house by Ted Hanson. (T 361). The arresting officer testified that Respondent told him he was given permission to go into the house by the person that lived there. (T 199, 218). Respondent gave him a name, but it was not the owner, Mr. Ferris. (T 199-200). The arresting officer failed to write down the name and could not remember it. (T 200, 218). Additionally, the trial testimony reveals that the arresting officer, during a pre-trial deposition, testified that he was told by Respondent that he was given permission to enter the home. (T 217-218). Petitioner cannot now claim that it was not aware of the deposition and statements of the arresting officer, concerning the witness (Ted Hanson). Clearly, the state through the arresting officer and the pre-trial deposition was on actual notice that Respondent denied burglarizing the home and claimed to have been given permission to enter. Consequently, even if the dissent's version could be considered the facts of the case in Lawyer, the facts of the instant case make it impossible for Judge Hersey's dissent to benefit the Petitioner.

Third, the Petitioner takes a more specious position, by arguing that comment should be permitted where the missing witness is more likely to be known to the defendant than to the prosecution. (PB 12). This is even weaker than the position taken

by Judge Hersey in the dissent in Lawyer. Judge Hersey, would at least require that the defendant know of the identity, location, and expected testimony of the missing witness. The state suggests no such requirements here. As illustrated, the missing witness was not more likely known to the Respondent, since the arresting officer acknowledged that Petitioner told him about the witness. The missing witness cannot even be said to be equally available to both parties. Ted Hanson was more likely not available at all, as he did not appear as a witness and Respondent testified that he did not know of his whereabouts. Before comment can be permitted, the state must show not only a "special relationship," which it failed to do, but must also show the witness was available. Kindell, supra.

Regardless, the cases Petitioner cites to suggest that comment should be permitted if the witness is more likely known to the Respondent do not assist Petitioner. The cases cited illustrate that the those defendants had a "special relationship," with the missing witness, as defined by Hogan and Jackson. See PB at 12, People v. Melton, 232 Ill.App.3d 8585, 596 N.E.2d 1246, 173 Ill.Dec. 367 (Ill. 4th DCA 1992)(failure to call mother and man who sold him stolen items who he met once at his mother's house and a few days later to complete the sale); PB at 12, United States v.

Dahdah, 864 F. 2d 55 (7th Cir. 1988)(failure to call family members); PB at 12, McMorris v. State, 394 So. 2d 392 (Ala. 1980)(failure to call witness who was "more than just friend"). It appears that "more likely known" is another way of saying "special relationship". Either way, the Petitioner's claim is without merit.

Fourth, the Petitioner argues that the prosecutor is entitled to comment on a defendant's failure to contradict the factual nature of the state's case as well as a defendant's failure to support his own factual theories with witnesses. Respondent agrees with the state's claim only in part. It is true that the state is permitted to comment on the defendant's failure to contradict the factual nature of the state's case. However, at bar, the state's case was contradicted. Specifically, the state's comments concerned the issue of consent and the defendant testified that he had permission to enter the house, contradicting the state's claim that he did not. What Petitioner wants placed before the jury is the adverse inference that Respondent's testimony should not be believed because he did not call any witnesses to support. But, this Court permits this adverse inference only under limited circumstances and as demonstrated those circumstances do not exist here. Even in other jurisdictions, the adverse inference is

allowed only when the witness is available and the defendant fails to call a witness who might be expected to testify favorably on his behalf. The state's comments that Ted Hanson, was a "figment of his [Respondent's] imagination and that he was a "ghost" or "imaginary" were not comments directed at the factual nature of the state's case. Like those condemned in Jackson, the state's comments improperly shifted the burden of proof to Respondent.

Fifth, although Respondent referred to Ted Hanson, he never implied he was going to be called and in fact testified that he had no idea where Ted Hanson was. Petitioner cannot discard its constitutionally required burden to prove the case against Respondent by simply claiming the Respondent opened the door to the improper comments. This flies in the face of the law in Jackson, since it was not shown that Ted Hanson had a special relationship with Respondent.

Petitioner also relies on Highsmith, supra. and McDonald, supra. As noted above(see Jurisdiction section), these cases are distinguishable. McDonald involved the issue of fair reply to a comment on failure to call an equally available witness. In McDonald, the witness was equally available to both parties and when the defense commented on the state's failure to call the witness, it was a "fair reply" when the prosecuted commented that

the defense had equal subpoena power and that if the witness would have assisted the defense case, the witness would have been called by the defense. There, the state's comment was not error. No issue of "fair reply" existed at bar, as the state was not responding to any failure on its part to call a witness and the Petitioner has not demonstrated that Ted Hanson was equally available, in fact, Petitioner has argued the opposite.

In Highsmith, the defendant made it appear that the potential witnesses, his cousin and friend, could exonerate him. The prosecution was permitted to comment on the defendant's failure to call them as witnesses. Although the Highsmith court did not so state, the witnesses clearly had a "special relationship" to the defendant. Notably the Highsmith court, relies on Romero, 435 So. at 320, for support. The Romero case involved a defendant's failure to call his girlfriend's family and in addition, the Romero court makes it clear that the witnesses must be "competent and available" before comment will be permitted. Id. at 319-320. Ted Hanson has not been shown to be available or in a special relationship with Respondent.

The prohibited comments by the state throughout closing argument and during cross examination, misled and prejudiced the jury against the appellant by suggesting that Respondent had the

burden of demonstrating his innocence. The Petitioner/state failed to meet the threshold requirements that would have permitted comment. No adverse inference can be permitted where Ted Hanson had no special relationship to Respondent and was also not available. The state is obligated to come forward with evidence to prove the defendant guilty beyond a reasonable doubt. Any argument that directs the jury to convict based on some standard other than that the State has proved its case beyond a reasonable doubt is improper and should not be allowed. Gore v. State, 719 So. 2d 1197 (Fla. 1998)(Prosecutor's argument enunciated an erroneous and misleading statement of the state's burden of proof because it improperly asked the jury to determine whether Gore was lying as the sole test for determining the issue of his guilt). The state's comments were impermissible and the district court's decision in Respondent's case must be affirmed.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court affirm the decision of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Carol Coburn Asbury, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida, 33401-2299 by courier this 9th day of November, 2000.

Attorney for Charles Hogan