IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC10-529

L.T. CASE NO. 4D07-3420

STATE OF FLORIDA,

Petitioner,

vs.

MARK BARROW,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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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 Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellee, and Respondent was the Appellant in the Fourth District Court of Appeal ("Fourth District").

The parties will be referenced as they appear before this Court. The Petitioner may also be referenced as the "State", and the Respondent may also be referenced as "Barrow".

References to the record on appeal will be by "R", followed by the page number(s) of the record.

References to the trial transcript will be by "T", followed by the page number(s) of the transcript.

STATEMENT OF THE CASE AND FACTS

"Mark Barrow was convicted of the first degree murder of Rae Michelle Tener, whose body was never found." Barrow v. State, 27 So. 3d 211, 213 (Fla. 4th DCA 2010). There were no witnesses to the murder, nor did any witness observe any violence between the Respondent and the victim on the night of her disappearance. Id.

In August of 2004, the victim lived in a trailer home with her teenaged son, Zachary. She worked as a housekeeper. The Respondent lived in the same trailer park as the victim. Before going to bed, Zachary saw the victim and the Respondent in the victim's trailer. The Respondent had not been in the trailer before. When Zachary awoke the next morning, his mother was gone. The Respondent was in his own trailer, lying down. Zachary saw the type of cigarettes that his mother smoked on the ground outside the Respondent's trailer. (T 429-451)

The victim was 39 years old at the time of her death. She was working for "Maid in the U.S.A." She was less than 5 feet tall and weighed about 100 to 105 pounds. She was reported missing on August 29, 2004. All of her belongings were still in her trailer. Her bedroom was in disarray, which was unusual. Her driver's license was found in some clothing she had worn. (T 454-464)

On the evening of August 24, 2004, some people were playing "quarters" (a drinking game) in the Respondent's trailer. Later, the only people who were remaining in the trailer were the

Respondent and the victim. After that night, no one saw the victim again. (T 471-478, 501-509)

The Respondent and the victim were last seen in the Respondent's trailer that night at about 11:00 P.M. They were part of a group that had been playing a drinking game and "doing weed." Both the Respondent and the victim appeared to be "buzzed." Id. at 214.

At trial, Peggy LaSalle, who knew the victim since the eighth grade, and who was the Respondent's girlfriend at the time, testified that the day after the victim's disappearance the Respondent was not acting "normal" and seemed to be angry. She also noticed that there was a stench in the Respondent's van which had not been there before. When LaSalle asked the Respondent what was wrong, he started to cry and punch the steering wheel. Id. (T 526-534)

Several days later, after detectives interviewed the Respondent about the victim, LaSalle found the victim's keys in the Respondent's van. Sometime later, she smelled the same stench that she had smelled earlier; it emanated from a brown paper bag which contained a pair of jeans which were covered with blood. LaSalle then confronted the Respondent with this discovery. Id.

Ultimately the Respondent told LaSalle that he had killed the victim. He told her that he physically threw the victim out of his trailer after she made a sexual advance towards him. The victim

hit her head and was bleeding. After she threatened to go to the police, the Respondent "snapped"; he picked up the victim and hit her head on a rock. He then put her body in a trash bag and put the bag on the passenger his van which he drove to some water. He then struck the victim with a sledge hammer, placed a "plastic thing" around her neck, put his foot on the victim's shoulder and broke her neck. He threw the victim's body into the water. On his way back home, the Respondent removed his clothes and threw them out the window. He wiped blood off the passenger seat of his van with a towel. Id. (T 534-540)

At trial, the State offered expert testimony that blood found in the Respondent's van, including blood found on the passenger's seat, had come from the victim. Id. at 215. (T 741-743, 762-774)

The Respondent provided two recorded statements to law enforcement which were both played at trial: in the first statement he told the detectives he did not like the victim and called her "a whore"; he said that on the night of the victim's disappearance, she had been in his trailer for two minutes looking for LaSalle; in his second statement he described the party at his trailer and said that the victim was not at the party but that she had come over to his trailer twice that evening after the party had broken up at about 1:30 A.M.; once the victim was there to get her son, and once she was there looking for LaSalle; she left after 2 minutes, after the Respondent told her LaSalle was in rehab; the Respondent denied

having a conversation with LaSalle about the victim. Id.

At trial, the Respondent rested his case without presenting evidence or testimony. (T 1076)

Shortly after deliberations began, the jury sent out a question asking for "all the transcripts of the witnesses' testimonies, Zack, Shannon, Peggy, Mark Jones, Mark Barrow." The trial court (Judge Labarga) then advised the parties that because there were no transcripts, his response to the question would be that "there are no transcripts." The prosecutor suggested that the trial judge could tell the jury they could request read backs, and the court responded that he does not do read backs. Id.

The trial court then advised the parties of case law which held that read backs were within the broad discretion of the trial court. He also held that read backs would be impractical in the instant case. The trial judge denied the Respondent's request to instruct the jury that they could request read backs and, instead, sent a response advising the jury that: "There are no transcripts available for your review. Please rely on the evidence presented during the proceedings." Id. at 216.

Hours later, the jury found the Respondent guilty of first degree murder. Id.

On appeal, the Fourth District Court of Appeal ("Fourth District") reversed for a new trial, finding that "the trial judge abused his discretion by responding to the jury's question about

the availability of transcripts in the negative, without advising the jury about the potential for read backs of witnesses' testimony, ignoring the request of both the state and defense." Id. at 213.

The Fourth District acknowledged that in Francis v. State, 808 So. 2d 110, 113 (Fla. 2001), this Court recognized that "courts have found no abuse of discretion even where the trial judge has, without much consideration, entirely rejected the jury's request for a read back." Id. at 216. However, citing the Fifth District's decision in Roper v. State, 608 So. 2d 533 (Fla. 5th DCA 1992), in addition to other decisions, the Fourth District noted that "several Florida cases have found an abuse of judicial discretion when a trial court responds to a jury question about trial testimony or transcripts *without* letting the jurors know that they may ask for testimony to be read back to them." Id. at 216-217.

Following Roper, as well as its decision in Avila v. State, 781 So. 2d 413 (Fla. 4th DCA 2001), the Fourth District held that the trial judge - - by telling the jury that transcripts were not available, and to rely on the evidence - - effectively negated Rule 3.410 which addresses a jury's request for read backs and allows a trial court to order read backs. Id. at 217-218.

The Fourth District also held that the error in this case was not harmless. Id. at 219.

However, the Fourth District acknowledged that the Third

District reached a different result in Hazuri v. State, 23 So. 3d 857 (Fla. 3d DCA 2009), and certified conflict with that decision. Barrow, 27 So. 3d at 218.

On a remaining issue, the Fourth District found that the State had properly established corpus delicti so that LaSalle's testimony of the Respondent's confession was properly admitted in to evidence. Id. at 219-220.

The Petitioner then timely invoked the discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(vi), Fla. R. App. P., and Article V, Section 3(b)(4) of the Constitution of the State of Florida.

This Court accepted jurisdiction, postponed a decision on oral argument, and ordered briefs on the merits.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the Fourth District granting a new trial, and resolve conflict in favor of the decision of the Third District in Hazuri v. State. When the jury asked to see transcripts of several witnesses' testimony, the trial court properly responded by advising the jury that transcripts were not available and that they should rely upon the evidence. Rule 3.410 does not impose a burden upon trial courts to inform a jury that read backs may be requested. Furthermore, as this Court has held, such requests may be denied at the discretion of the trial court without much consideration.

ARGUMENT

THE FOURTH DISTRICT ERRONEOUSLY IMPOSED A BURDEN ON TRIAL COURTS TO INFORM JURIES THAT THEY MAY REQUEST READ BACKS OF TESTIMONY (ALTHOUGH A TRIAL COURT MAY DENY SUCH REQUESTS WITHOUT MUCH CONSIDERATION); THE DECISION OF THE FOURTH DISTRICT SHOULD BE REVERSED; CONFLICT SHOULD BE RESOLVED IN FAVOR OF THE THIRD DISTRICT'S DECISION IN HAZURI

In the instant case, the Fourth District concluded that the trial court abused his discretion by advising the jury that transcripts were not available, without also informing them that they could request read backs of the witnesses' testimony. Barrow, 27 So. 3d at 213. The Fourth District correctly certified conflict with the Third District's decision in Hazuri. Barrow, 27 So. 3d at 218. It is the Petitioner's position that the instant decision is in error. In this case, the trial court's statement to the jury that transcripts were not available was both factually correct and in accordance with Rule 3.410, Fla. R. Crim. P. This Rule, by its plain language, imposes no obligation upon a trial court to inform a jury that they may request read backs:

> **Rule 3.410 Jury Request to Review Evidence or for Additional Instructions**
>
> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

However, in the instant decision, the Fourth District has – in effect - imposed such an obligation. According to this decision, accurately informing a jury that transcripts are unavailable is insufficient; they must now also be informed that read backs may be requested. Barrow, 27 So. 3d at 213, 216-217. The Petitioner respectfully submits that this holding is erroneous.

In Hazuri, the trial court was faced with an essentially identical situation as the trial court in the instant case. The Hazuri jury, like the jury in this case, requested trial transcripts. Id. at 858. After the trial court advised the parties that he was going to inform the jury that transcripts were not available, and that they should rely on their collective recollection, defense counsel asked the trial court to inform the jury that they were allowed to have a portion of the trial read back to them. Id. The trial court declined and, in response to counsel's suggestion that the jury had a "right" to have part of transcripts read to them, the trial court noted that the jury has no such "right". Id. Defense counsel placed an objection on the record. Id.

The Hazuri jury, like the jury in the instant case, never requested a read back. Id. The Hazuri Court concluded that the trial court did not abuse its discretion by declining to inform the jury that they could request read backs. Id. at 857. Since

transcripts were not available, and the jury did not have a right to transcripts, the trial court properly advised the jury that must rely on their recollection of the evidence. Id. at 859.

Indeed, this is what Judge Labarga did in the instant case; he accurately advised the jury that: "There are no transcripts for your review. Please rely on the evidence presented during the proceedings." Barrow, 27 So. 3d at 216. The trial court also advised the parties that he did not do read backs. Id. at 215. However, this statement does change the analysis. Rule 3.410 imposes no obligation upon a trial court to provide read backs, or even to consider requests for read backs. As this Court has recognized: "it is well established that trial judges have broad discretion in deciding whether to read back testimony . . . Additionally, courts have found no abuse of discretion even where the trial judge has, without much consideration, entirely rejected the jury's request for a read back . . ." Francis v. State, 808 So. 2d 110, 130 (Fla. 2001)(internal citations omitted). A number of other decisions have recognized a trial court's broad discretion on the question of allowing read backs. See e.g., State v. Riechmann, 777 So. 2d 342 (Fla. 2000); Henry v. State, 649 So. 2d 1361 (Fla. 1994); Coleman v. State, 610 So. 2d 1283 (Fla. 1992); McKee v. State, 712 So. 2d 837 (Fla. 2d DCA 1998); Miller v. State, 605 So. 2d 492 (Fla. 3d DCA 1992); DeCastro v. State, 360 So. 2d 474 (Fla. 3d DCA 1978). Judge Labarga was well aware of this discretion and,

in fact, cited these decisions in open court (T 1244-1245). See also, Hendricks v. State, 34 So. 3d 819, 828-829 (Fla. 1st DCA 2009).

The Fourth District in the instant decision has recognized this wide discretion. Barrow, 27 So. 3d at 216. However, relying on cases which are readily distinguishable from the instant case, the Fourth District found an abuse of discretion because of the trial court's failure to advise the jury that they could request read backs. Id. at 217.

In Roper v. State, 608 So. 2d 533 (Fla. 5th DCA 1992), the jury asked the "see" the cross-examination of the victim. In response, the trial court told the jury that it would not be possible for them to see this testimony because the court reporter transcribed the trial using symbols which could not be read. Id. at 534. The Fifth District concluded that this response was "a semantic shell game" which would have lead the jury to conclude that they were unable to request a read back under Rule 3.410. Id. at 535.

In Avila v. State, 781 So. 2d 413 (Fla. 4th DCA 2001), the Fourth District concluded that the trial court's response to the jury's request to review a timetable of events presented through the testimony of several witnesses was an abuse of discretion because the response mislead the jury as to the possibility of a read back. Id. at 414-416. The trial court informed the jury that there were "no printed transcripts" and that they should rely on

their own recollection. Id. at 415.

Unlike the trial court in Roper, Judge Labarga did not engage in "a semantic shell game" with the jury. The jury asked a direct question, and they received a direct (and accurate) answer by the court. Avila is somewhat closer, but still quite different from the instant case.

Here, Judge Labarga did nothing to indicate that the jury was **prohibited** from requesting transcripts; although under this Court's Francis decision and other decisions cited by the trial court, such a request could be denied with little consideration. The distinction between Avila and the instant case is that the instant jury specifically requested transcripts, which were, of course, unavailable. In Avila, it was "evident" that the jury was seeking read back of testimony. Id. at 414. Consequently, it could be argued that the Avila judge's response that "we have no such transcripts" – when transcripts were not specifically requested – could have mislead the jury into believing that a read back was prohibited. Id. at 415. C.f., Hendricks, 34 So. 3d at 829 ("The basis of the *Hazuri* court's distinction of *Avila* was that in *Avila* the jury had requested a read-back, while in *Hazuri*, it had requested to view the transcripts . . .").

The jury was not similarly mislead in the instant case. Again, they specifically requested "transcripts"; the precise request was: "Can we get all the transcripts of the witnesses'

testimonies, Zack, Shannon, Peggy, Mark Jones, Mark Barrow." (T 1243) They asked for transcripts and were correctly advised that that none were available. Judge Labarga said nothing to the jury which would have mislead them into believing that they were unable to actually request "read backs" if that is what they wanted.

Based on Judge Labarga's comments, it appears that any such request would have been denied as impractical (T 1245-1246). However, it is of utmost significance that the Respondent would have been completely unable to demonstrate under Francis (and the other authority cited above) that a refusal to read back testimony, if asked, would have constituted an abuse of discretion. The refusal of any such request should have been affirmed as within the sound of the discretion of the trial court. The non-existent transcripts which the jury requested accounted for a large amount of the trial testimony (T 143, 1245).

In the instant decision, the Fourth District has reversed the Respondent's conviction for first degree murder based upon a response from the trial court which was completely accurate. Since Rule 3.410 clearly imposes no burden upon the trial court to inform the jury that they may request a read back, reversal on that basis was likewise erroneous. For the reasons argued above, the decision of the Fourth District reversing and remanding for a new trial should be quashed by this Court and conflict resolved in favor of the Third District's decision in Hazuri.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court reverse the instant decision of the Fourth District granting a new trial and resolve conflict in favor of the Third District's decision in Hazuri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Petitioner's Initial Brief on the Merits" has been furnished by U.S. Mail on July 22, 2010 to Frederick R. Susaneck, Esq., Levine & Susaneck, P.A., 324 Datura Street, Suite 145, West Palm Beach, Fl 33401.

_____
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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

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DANIEL P. HYNDMAN