IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

MARK BARROW,
Respondent.
_____/

CASE NO.: SC10-529

L.T. CASE NO. 4D07-3420

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent accepts petitioner's preliminary statement.

STATEMENT OF THE CASE AND FACTS

"Mark Barrow was convicted of first degree murder of Rae Michelle Tener, whose body was never found." Mark Barrow v. State of Florida, Case #4D07-3420, 35 Fla. L. Weekly D328 (Fla 4th DCA 2/10/2010). Slip Opinion, p. 1. There were no witnesses to the murder, nor did any witness observe any violence between Respondent/Mark Barrow and Ms. Tener on the night she was last seen. Following the evidentiary portion of the trial, which consisted of many witnesses, etc., who provided confusing and/or conflicting evidence, with little forensic evidence, and no body of a victim, the jury began its deliberations.

Ten minutes into deliberations - ten minutes! - the jury sent out a question asking for "all the transcripts of the witnesses' testimonies, Zack, Shannon, Peggy, Mark Jones, Mark Barrow". Slip Opinion, p. 4.

"The trial judge told the lawyers that he received that question in every trial. The trial judge observed that because there were no transcripts, his response would be that "there are no transcripts." The prosecutor suggested that the trial judge tell the jury that they could request read backs. Instead, the trial judge responded, "No, I don't do read backs."" Slip Opinion, p. 4.

Instead the trial judge sent the jury a note saying, "There are no transcripts available for your review. Please rely on the evidence presented during the proceedings." Slip Opinion, p. 5.

Hours later, the jury found appellant guilty of first degree murder. Slip Opinion, p. 5.

On appeal, the Fourth District Court of Appeal reversed for a new trial, premised on two findings. The first reason, certified to be in conflict with Hazuri v. State, 23 So. 3d 857 (Fla. 3rd DCA 2009) was based on the trial judge's abuse of his discretion in responding to the jury's question without advising the jury of the potential availability of a read back of the witnesses' testimony, and particularly where he was asked to do so by the State and the Defense. The trial judge abused his discretion by demeaning the importance of the jury's role, and

by failing to advise them of tools available to them in reaching their decision.

The second reason for the Fourth's reversal of this conviction, and an additional reason why this Supreme Court should decline petitioner's request to invoke its discretionary jurisdiction and review the Fourth's decision, is that the Fourth District Court of Appeal further found that the trial judge abused his discretion by refusing to exercise his discretion. Instead, the trial judge relied on an inflexible rule - "I don't do read backs" - Slip Opinion, p.9, for a decision that the law places in the judge's discretion. The jury was willfully denied the opportunity to know of opportunities for closer examination of the conflicting evidence in this case; possibly affecting the verdict.

From that decision of the Fourth District Court of Appeal, petitioner State invoked the discretionary jurisdiction of the Supreme Court, filed its brief on jurisdiction, to which Respondent herein makes his timely Answer Brief on Jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should decline petitioner's request to invoke the discretionary jurisdiction of this Court, and/or should accept jurisdiction but decline review. This is not a case appropriate for discretionary review. Although the Fourth District Court of Appeal did certify conflict with Hazuri, Hazuri v. State, 23 So.3d 857 (Fla. 3rd DCA 2009), it also provided further, fully supportable bases for its decision. Also, as to the issue upon which conflict is certified, the adoption of new Florida Standard Jury Instruction in Criminal Cases 4.4 should significantly decrease the number of times such an issue will reoccur.

ARGUMENT

Respondent, Mark Barrow, first respectfully acknowledges that his case does provide a basis for this Court's exercise of discretionary jurisdiction, in that the Fourth District Court of Appeal expressly certified conflict with Hazuri. Hazuri v. State, 23 So.3d 857, 34 Fla. L. Weekly 25 90 (Fla. 3rd DCA 2009).

However, while this Court has the power to review the decision of the Fourth District Court of Appeal, respondent further respectfully asserts that this Court should exercise its discretion and decline such review. The Order of the Fourth in this case was not one of great public importance; it will not

have a great effect on the administration of justice; and the issue presented by petitioner does not require immediate resolution by the Supreme Court. Furthermore, and significantly, the stated second reason for the decision of the Fourth in its opinion, Slip Opinion, p. 9, i.e. exercise the trial judge's refusal to exercise his discretion, obviates any need to reach petitioner's presenting reason for this Court's invocation of its discretionary jurisdiction.

Petitioner has not suggested that this case is one of great public importance, nor that it requires immediate resolution by this Court, nor that it will have a great effect on the administration of justice.

Petitioner asserts only that conflict was certified, and that the presenting issue is likely to reoccur. However, the presenting issue; i.e. the trial judge's abuse of his discretion by failing to tell the jury about the potential availability of a read-back of witnesses' testimony, and particularly as the trial judge was asked to do so by both the state and the defense; is one whose reoccurence should lessen over time, Hazuri not withstanding. After respondent Mark Barrow was found guilty of first degree murder at this trial during the summer of 2007, a new standard jury instruction was adopted, Florida

Standard Jury Instructions in Criminal Cases 4.4 Read-back of Testimony, which is as follows:

1. Read-Back granted as requested

Members of the jury, you have asked that the following testimony be read back to you: (describe testimony)

The court reporter will now read the testimony which you have requested.

OR

2. Read-Back Deferred

Members of the jury, I have discussed with the attorneys your request to have certain testimony read back to you. It will take approximately (amount of time) to have the court reporter prepare and read back the requested testimony.

I now direct you to return to the jury room and discuss your request further. If you are not able to resolve your question about the requested testimony by relying on your collective memory, then you should write down as specific a description as possible of the part of the witness(es)' testimony which you want to hear again. Make your request for reading back testimony as specific as possible.

3. Read-Back Denied

Members of the jury, you have asked that the following testimony be read back to you: (describe testimony).

I am not able to grant your request.

NOTE ON USE

Any read back of testimony should take place in open court. Transcripts or tapes of testimony should not be sent back to the jury room.

As judges and lawyers become habituated to and familiar with this new standard jury instruction, and with Florida Standard Jury Instructions in Criminal Cases 4.3, Answers to Juror Inquiries During Deliberations, fewer judges - and the fact is that they are few already - will be hypertechnical, particularly as and where it demeans the highly important role of the jury. Respondent asserts that there is no obligation for this Court to review the decision of the Fourth District Court of Appeal, which reversed this first degree murder conviction. The Fourth District specifically and expressly held that they could not find the trial court's abuse of discretion by failing to tell the jury about the potential availability of a read back to be harmless given that the trial level decision in this case turned on the details, including the fact that there was no body, and that their most significant witnesses' testimony contained conflicts. The trial judge in this case failed to facilitate careful deliberation by the jury and failed to forthrightly make the jury aware of those tools available to assist them in arriving at their decision. Slip Opinion, p.8. This sort of error is not so prevalent that this request for review should be accepted. There will be no great effect on the administration of justice should this Court decline review, and

should the well-detailed reasoning of the Fourth District Court of Appeal be allowed to stand.

Petitioner's request to invoke the discretionary jurisdiction of this Supreme Court should be denied, other than to decline review.

Moreover, the second basis upon which the Fourth District Court of Appeal reversed the decision of the trial court, and respondent's conviction for first degree murder, in an opinion in which the Fourth held that the State's main witness "was not a strong witness", Slip Opinion, p. 10, is a stand alone reason, and renders this invocation to the Supreme Court not one which needs be, or ought to be, accepted.

The Fourth District Court of Appeal in its opinion additionally held that the trial judge abused his discretion at the trial of this cause by refusing to exercise his discretion. Slip Opinion, p. 9. The Fourth found that the trial judge relied on an inflexible rule - "I don't do read backs" - for a decision that the law places in the judge's discretion. The Fourth District Court of Appeal further cited to Justice Thompson in his concurrence to Barber v. State, 5 Fla. 199, 206 (Fla. 1853), the trial court's

> discretion is not an arbitrary exercise of the will and pleasure of the Judge, but it

is a sound legal discretion, to be exercised according to the exigency of the case, upon a consideration of the attending circumstances.

An inflexible rule by a trial judge to refuse to exercise his discretion is error. Boykin v. Garrison, 658 So.2d 1090 (Fla. 4th DCA 1995). Given the facts and circumstances of this trial case, the Fourth District Court of Appeal soundly decided that the error was not harmless. Denying the jury the ability to examine the conflicting evidence in this case more closely may have affected the verdict. It would not have been difficult, nor onerous, for this trial judge to have exercised his discretion and considered the issue of read backs, rather than inflexibly stating, "I don't do read backs." Slip Opinion, p. 9.

Respondent respectfully asserts that this Supreme Court should decline to accept petitioner's request for discretionary review, and let stand the decision of the Fourth District Court of Appeal.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Court decline petitioner's request to invoke the discretionary jurisdiction of this Court, or that it accept jurisdiction but decline review.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Celia Terenzio, A.A.G., 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401; and Daniel P. Hyndman, A.A.G., 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 on this day of March 2010.

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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.

Fredrick R. Susaneck, Esquire