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 BRIEF ON JURISDICTION

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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".

STATEMENT OF THE CASE AND FACTS

"Mark Barrow was convicted of the first degree murder of Rae Meichelle Tener, whose body was never found." Mark Barrow v. State of Florida, Case # 4D07-3420, 35 Fla. L. Weekly D328 (Fla. 4th DCA Feb. 10, 2010). Slip Opinion, page 1. 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. Slip Opinion, page 1.

The Respondent and the victim were last seen in the Respondent's trailer at about 11:00 P.M. The victim's son (Zach) testified that they were a part of a group that had been playing a drinking game and "doing weed." Both the Respondent and the victim appeared to be "buzzed." Slip Opinion, pages 2-3.

At trial, Peggy LaSalle, who knew the victim since the eighth

grade, 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. Slip Opinion, page 2.

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. Slip Opinion, page 2.

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. Slip opinion, pages 2-3.

At trial, the State offered expert testimony that blood found in the Respondent's van had come from the victim. Slip Opinion, page 3.

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 Zach, 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. Slip Opinion, pages 3-4.

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 judge responded that he does not do read backs. Slip Opinion, page 4.

The trial judge 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." Slip Opinion, pages 4-5.

Hours later, the jury found the Respondent guilty of first degree murder. Slip Opinion, page 5.

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." Slip Opinion, page 1.

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." Slip Opinion, page 6. 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." Slip Opinion, page 6 (emphasis in original).

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. Slip Opinion, pages 5-7.

The Fourth District also held that the error in this case was not harmless. Slip Opinion, pages 9-10.

However, the Fourth District acknowledged that the Third District reached a different result in Hazuri v. State, 23 So. 3d 857, 34 Fla. L. Weekly D2590 (Fla. 3d DCA Dec. 16, 2009), and certified conflict with that decision. Slip Opinion, page 8.

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. Slip Opinion, pages 10-11.

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.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction. The decision of the Fourth District has been certified to be in conflict with the decision of the Third District in Hazuri v. State. This Court should resolve the conflict because the issue presented in the instant case will likely be reoccurring.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION SINCE THE DECISION OF THE FOURTH DISTRICT IS CERTIFIED TO BE IN CONFLICT WITH THE DECISION OF THE THIRD DISTRICT IN HAZURI V. STATE, 23 So. 3d 857, 34 Fla. L. Weekly D2590 (Fla. 3d DCA Dec. 16, 2009)

This Court has clear authority to accept discretionary review 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 since the instant decision is certified to be in conflict with the decision of the Third District in Hazuri. See generally, State v. Vickery, 961 So. 2d 309, 311 (Fla. 2007)("a certification of conflict provides us with jurisdiction per se"). The Petitioner submits that this Court should accept review so that this conflict

may be resolved.

The Fourth District properly certified conflict since the instant decision and Hazuri are clearly in direct conflict. In Hazuri, when the jury requested trial transcripts the trial court apparently advised the jury that they should rely on their recollection of the evidence; the trial court - - over the defendant's objection - - did not tell the jury that they could have a read back. 23 So. 3d at 857-858. The Third District found no abuse of discretion. Id. at 858.

In the instant case, when the jury requested transcripts, the trial judge provided substantially the same answer: he correctly advised the jury that there were no transcripts available, and he asked the jury rely upon the evidence presented. Slip Opinion, page 5.

Under the majority opinion in Hazuri, the decision of the trial court - - and the Respondent's conviction for first degree murder - - would have been affirmed. Since the decisions are in direct conflict, there would be a basis for discretionary review even if the Fourth District had not actually certified conflict. C.f., Hardee v. State, 534 So. 2d 706 (Fla. 1988)(when there is a fair implication of conflict, there is a basis for conflict jurisdiction). However, conflict has been certified and this Court has jurisdiction as a result of that certification. See, Vickery. See also, Article V, Section 3(b)(4), Constitution of the State of

Florida.

Furthermore, jurisdiction should be accepted since the issue presented in the instant case is likely to reoccur. In fact, as the Fourth District noted in the instant decision, after the jury requested transcripts, the trial judge advised the parties that he received that question in every trial. Slip opinion, page 4. It is entirely reasonable to conclude that what occurred in the trial courtroom below will occur elsewhere in courtrooms throughout the State. Therefore, the instant decision presents a conflict which should be resolved by this Court.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court accept discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Petitioner's Brief on Jurisdiction" has been furnished by mail on March 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