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 REPLY 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".

STATEMENT OF THE CASE AND FACTS

The Petitioner relies upon the Statement of the Case and Facts as contained in its Initial Brief 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.

The Respondent has not cited any decisions form this Court which directly support his argument in support of the decision of the Fourth District finding that Judge Labarga abused his discretion, nor is there any authority.

The remaining arguments raised by the Respondent are unrelated to the certified conflict and should not be considered by this Court.

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 his Amended Answer Brief on the Merits, the Respondent makes three arguments: 1. that the decision of the Fourth District correctly held that the trial court abused his discretion by declining the jury's request for transcripts without informing them about the potential for read backs of witness testimony; 2. that the trial court's adoption of an *ad hoc* rule prohibiting read backs amounted to a failure to exercise discretion; and 3. that the decision of the Fourth District incorrectly held that corpus delecti was proved in this case. The Petitioner will address each of these arguments in turn. However, it is the Petitioner's position that the second and third arguments are beyond the scope of the certified conflict and should not be addressed by this Court. See, Shenfeld v. State, 44 So.3d 96, 101 (Fla. 2010); Thompson v. State, 990 So.2d 482, 487 FN1 (Fla. 2008).

The Trial Court Did Not Abuse Its Discretion

In the instant case, the jury requested to see transcripts of a number of witnesses. The trial court ultimately instructed the jury that: "There are no transcripts available for your review.

Please rely on the evidence presented during the proceedings." Barrow v. State, 27 So.3d 211, 215-216 (Fla. 4th DCA 2010). Although the instruction was factually accurate - - and, as the Petitioner has shown, entirely within the discretion of the trial court - - the Fourth District reversed and certified conflict with the decision of the Third District in Hazuri v. State, 23 So.3d 857 (Fla. 3d DCA 2009).

In his Answer Brief, the Respondent argues that the trial court abused his discretion in his response to the jury's request to see transcripts since the trial court did not advise the jury that they had the option of requesting read backs of witnesses' testimony. The Respondent cites decisions of other district courts and of the Fourth District to support his argument. He also discusses some out-of-state cases; however, he is apparently unable to find direct support for his argument in any decision of this Court. He quotes general language from the nearly 60-year old decision in Sutton v. State, 51 So.2d 725 (Fla. 1951), yet he does not directly address this Court's relatively recent decision in Francis v. State, 808 So.2d 110 (Fla. 2001), where this Court recognizes 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 130 (emphasis added). Francis cites McKee v. State, 712 So.2d 837, 838 (Fla. 2d DCA 1998), where the Court found that the trial court's refusal to

read back requested testimony, and advising the jury to "rely upon your own memory regarding the testimony of the witnesses", was not an abuse of the trial court's "broad discretion in not rereading the requested testimony."

The Respondent cites Roper v. State, 608 So.2d 533 (Fla. 5th DCA 1992) and Avila v. State, 781 So.2d 413 (Fla. 4th DCA 2001) in his support of the instant decision, and, indeed, these cases are cited in Barrow. 27 So.3d at 217-218. In its initial brief on the merits, the Petitioner distinguished both Roper and Avila from the case at bar. Further elaboration would not appear to be necessary; in both of these cases the trial courts were presented with different jury requests than the one presented to Judge Labarga in the instant case. Again, the trial court in this case answered the jury's question in an accurate and straightforward manner.

The out-of-state cases argued by the Respondent are readily distinguishable from the instant case. In State v. Hebert, 455 A.2d 925, 929-933 (Me. 1983), the Court found that refusing the jury's request for a read back of the defendant's cross examination was an abuse of discretion. In the instant case, the jury did not request a read back of a single witness, but, rather, requested nonexistent transcripts of a number of witness. Furthermore, in Herbert the jury's request was made after two and a half hours of deliberation. Id. at 929. In the instant case, the request for transcripts was made after only ten minutes of deliberation, a fact specifically

recognized by Judge Labarga. Barrow, 27 So.3d at 215-216.

In State v. Spaulding, 296 N.W.2d 870, 878 (Minn. 1980), the trial court - - unlike Judge Labarga - - informed the jury **before** deliberations that no testimony would be read to them, and again informed the jury that testimony would not be read even after nine hours of deliberation and after receiving a note that the jury was in disagreement over the defendant's testimony. This was found to be an abuse of discretion.

People v. Butler, 47 Cal.App.3d 273 (Cal. App. 1975), would appear to be somewhat closer to the facts of the instant case, but is also distinguishable. In that case, the jury, after about two and a half hours of deliberation, requested read backs of the testimony of a number of witnesses. Id. at 277-280. The trial court refused the request, and asked the jury to "arrive at a verdict *based on the information that you have*." Id. at 279 (emphasis in original). The crucial difference between Butler and the instant case is that in Butler the foreperson of the jury advised the trial court that read backs were requested because the jury was actually unable to hear a portion of the testimony because "[s]ome of it was so faint". Id. at 278. In the instant case, there was absolutely no indication that the jury had any trouble hearing any of the witnesses' testimony. Consequently, all of the out-of-state cases cited by the Respondent are readily distinguishable.

Again, it is the Petitioner's position that Judge Labarga's instruction to the jury after transcripts were requested was both factually accurate (the Respondent does not seem to argue otherwise) and well within the discretion vested in our trial courts. The Petitioner respectfully submits that the decision of the Fourth District places a burden upon trial courts to advise juries that they may ask for read backs when no such obligation appears in Rule 3.410, Fla. R. Crim. P., the rule that addresses jury read back requests. Accordingly, the Petitioner requests that the decision of the Fourth District on this point be quashed and conflict resolved in favor of the decision of the Third District in Hazuri.

The Trial Court Did Not Refuse to Exercise Discretion

Next, the Respondent argues that the trial court adopted an *ad hoc* rule prohibiting read backs and requests that this Court affirm the decision of the trial court on this basis. However, as the Petitioner has argued above, this point was not a basis for certified conflict with Hazuri and should therefore not be considered by this Court.

In support of this argument, the Respondent has seized upon the trial court's comment that "I don't do read backs" (Amended Answer Brief, page 24). See also, Barrow, 27 So.3d at 215. However, nothing in the record shows that the trial court failed to

exercise his discretion. In fact, while addressing the question of read backs, the trial court cited several decisions, all of which recognize a trial court's broad discretion regarding read backs. Id. at 216 FN1. See, Francis; McKee; Miller v. State, 605 So.2d 492 (Fla. 3d DCA 1992); DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978). Therefore the trial court was abundantly aware that the decision to allow read backs was at his discretion. Again, it should be repeated, the trial court was never asked for a read back of testimony; the jury requested transcripts which were not available. They was advised accordingly by the trial court.

The State Established Corpus Delecti

Finally, the Respondent argues that there was insufficient proof of corpus delecti because the victim's body was never found; he asks that he be "forever discharged from further answer to this cause" (Amended Answer Brief, page 31). Again, since this issue is beyond the scope of certified conflict, it should not be considered by this Court. See, Shenfeld, 44 So.3d at 101; Thompson, 990 So.2d at 487 FN1. In any event, the Fourth District properly found that corpus delecti was established in this case, and that portion of the instant decision should not be disturbed.

Quoting this Court's decision in Meyers v. State, 704 So.2d 1368, 1369-70 (Fla. 1997), the Fourth District stated that: "In order to prove corpus delecti in a homicide case, the state must

establish: (1) the fact of death; (2) the criminal agency of another person as the cause thereof; and (3) the identity of the deceased person." Barrow, 27 So.3d at 220. Relying in part on this Court's decision in Crain v. State, 894 So.2d 59, 72 (Fla. 2004), and the decision of the Fifth District Court of Appeal in State v. Lindsey, 738 So.2d 974, 977 (Fla. 5th DCA 1999), the Fourth District held that corpus delecti was established because:

> In this case, the victim had not taken any of her belongings with her, including her identification and money. Three years had elapsed from the time the victim was last seen to the time of trial. She was last seen with [Respondent], and her blood was found in his van. Barrow's story changed, and it was contradicted by the testimony of witnesses. Such evidence was sufficient to establish corpus delecti. Even though this is a weaker case than *Lindsey* and *Crain*, in that the victim had a history of disappearing for periods of time, corpus delicti need not be proved beyond a reasonable doubt. *See Davis v. State*, 582 So.2d 695, 700 (Fla. 1st DCA 1991)("[T]he foundational evidence necessary to prove corpus delicti need not eliminate possible noncriminal explanations of a victim's disappearance.")

Barrow, 27 So.3d at 220.

Although the Fourth District characterized the instant case as "weaker" than Crain and Lindsey, those cases have striking similarities to the instant case. The victims in Lindsey, like the victim in the instant case, disappeared without contacting family or friends and left their belongings in their residences, indicating that absences were neither voluntary nor planned.

Barrow, 27 So.3d at 220. The victim in Crain, like the victim in the instant case, was last seen alive in the defendant's presence and her blood was found on the defendant's clothing; in the instant case the victim's blood was found in the Respondent's van. Like the defendant in Crain, the Respondent exhibited unusual behavior the day after the victim's disappearance. Barrow, 27 So.3d at 214, 220. Crain, Lindsey, and other decisions cited in the opinion support the holding of the Fourth District on this point. See also, Meyers, 704 So.2d at 1369 (corpus delecti proven despite the fact that the victim's body was never found); Mackerly v. State, 754 So.2d 132, 135-136 (Fla. 4th DCA 2000), reversed on other grounds, 777 So.2d 969 (Fla. 2001)("the state presented evidence which suggested that Black's unannounced and unanticipated disappearance most likely meant that he was dead and that his death stemmed from the criminal agency of another"). Therefore, in the instant case, the Fourth District correctly concluded that the State was able to establish corpus delecti, and that part of the opinion should not be disturbed.

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 certified 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 November 8, 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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