IN THE SUPREME COURT OF FLORIDA

CASE NO. SC:10-61

STEVEN HAZURI,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125
(305) 305.545.1928

ROBERT KALTER
Assistant Public Defender
Florida Bar No. 260711

Counsel for Petitioner

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INTRODUCTION

Petitioner, Steven Hazuri, was the appellant in the District Court of Appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the District Court of Appeal and prosecution in the Circuit Court. The symbols "R." and "T." refer to portions of the record on appeal and transcripts of the lower court proceedings, respectively.

STATEMENT OF THE CASE AND FACTS

The State of Florida filed an information charging defendant with armed robbery and aggravated battery with a weapon. (R. 1-4). Defendant's defense at trial was misidentification. The facts taken in the light most favorable to the state established that on December 27, 2003, Curtis Williams, a ten time convicted felon and an admitted crack addict, was walking home from a store when a black male approached him and hit him in the face with a firearm. (T. 158). The firearm discharged and a bullet entered the victim's face. (T. 158). The assailant then took some money from the victim and fled the area. (T. 159). The victim remained on the scene and spoke to Officer Kennedy. According to the officer the victim told him that an individual by the name of "Dirty" robbed him. (T. 213).[1] The victim described "Dirty" as a black male who was six feet tall and weighed approximately 200 pounds. (T. 216). The officer indicated that there were no other

[1]At the trial the victim identified defendant as the person who committed the robbery.

witnesses to the shooting. (T. 216). After receiving surgery the victim moved out of South Florida and no arrest was made in the case until three years later.

Three years later the victim was in a flea market when he saw an individual who he thought committed the robbery. (T. 173). The victim claimed that he went to the police station and when they refused to help he went back to the flea market and spoke to the security guard. (T. 174). The victim told the security guard that defendant, who was getting his haircut, was the individual who had robbed him three years earlier. (T. 175). According to the victim the defendant ran as soon as he saw the security guards and when he was detained defendant indicated that he should have killed the victim. (T. 176). Michael Maze and Damien Brown were two of the security guards who detained defendant and they indicated that after they surrounded defendant and told defendant he had to go upstairs defendant tried to flee the area. (T. 266).

Defendant testified that he was a seven-time convicted felon and that on the day of the robbery he was working as a lookout at a drug hole operated by a man named Rico. (T. 280-2). According to defendant at sometime during the evening, he lent his bike to Rico and that later that night Rico returned the bike and at approximately 12:30 a.m. defendant left work and went home. (T. 284). Defendant specifically testified that he never robbed or hit the victim and that when he was detained by the security guards he never said that he should have killed the victim. (T. 291).

(T. 158).

After deliberating for approximately two hours the jury sent a note to the court indicating that they could not reach a verdict. (T. 362). The parties agreed that rather than give an *Allen* charge the jury should be sent home for the night and continue deliberating in the morning. (T. 364). The following morning the jury continued its deliberations and after approximately one hour the jury sent a note asking if they could get transcripts of the trial. (T. 369). The state suggested that the court instruct the jury that they must rely on their own recollection of the testimony. Defense counsel made the following suggestion:

> My answer is you should inform the jury they are allowed to have whatever, you know, **portion of the transcript read back** to them if they have a question about some evidence, but to have a set of transcripts from the trial, absolutely not. (T. 369).

The court entered the following ruling:

> There are no trial transcripts of moment. Certainly portions of the record could be read, however, I do believe that the accurate and correct response is that they must rely on their own recollection of the evidence and will answer the question that way. (T. 369).

Defense counsel then inquired whether the court was going to at least tell the jury that they have a right to have the transcript read back and, the trial judge responded since it is in the court's discretion whether to re-read testimony, he was not going to tell the jury that they can request to have testimony re-read. (T. 370). Defense counsel specifically objected to the court's refusal to tell the jury that they do have the right to ask for testimony to be re-read. (T. 370).

After deliberating several more hours the jury sent back another note indicating

that they still could not reach a verdict and whether the court would allow them to eat lunch. After the court granted this request, the jury eventually reached a verdict wherein, they found defendant not guilty of robbery and guilty of aggravated battery. (R. 78-9). The court sentenced defendant to twenty-five years in state prison. (R. 81-3).

On direct appeal to the Third District Court of Appeal, the sole issue raised was whether the trial judge abused his discretion when he refused to inquire from the jury what portion of the transcript they wanted re-read prior to telling them that they could not have any testimony re-read. The majority opinion of the Third District Court of Appeal concluded that the trial judge's response to the jury question that they had to rely upon their own recollection of the evidence, did not violate Florida Rules of Criminal Procedure, 3.410 which allows the jury to request to have testimony re-read since the jury asked for **transcripts rather than have testimony read back**.

Judge Cope filed a dissenting opinion wherein, he argued that the majority opinion conflicted with several Fourth District Court of Appeal decisions that have held that, while the trial court has discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a read back is prohibited. Judge Cope went on to criticize the majority's opinion's conclusion that since the jury asked for "transcripts" rather than have testimony read back rule 3.410 did not apply:

> With all due respect, much of the majority opinion is niggling nitpicking. The majority opinion finds dispositive the fact that the jury note asked for transcripts. According to the majority, since no transcripts were in existence, it follows that the question could be answered with a simple

"no."

Judge Cope went on to recognize:

> The majority opinion overlooks the fact that jurors are composed of lay persons. If they knew the technical details of the law, then they would have written a better note. But the substance of the question was whether the jury could review the testimony. Defense counsel quite properly said that under rule 3.410, a jury may request to have "testimony read to them," and the court may so order.

(*See* appendix A).

A notice to invoke jurisdiction was timely filed and Petitioner filed a jurisdictional brief wherein, it was alleged that the Third District's opinion directly conflicted with the numerous cases from the Fourth District Court of Appeal which were cited in Judge Cope's dissent. Subsequent to the filing of the jurisdictional brief the Fourth District Court of Appeal in *Barrow v. State*, 27 So.3d 211 (Fla. 4th DCA 2010), entered a decision which directly conflicted with the Third District's conclusion that since the jury asked to have transcripts, rather than to have testimony read back, it was not error for the trial judge to tell the jury that they had to rely upon their recollection of the evidence. Petitioner filed an amended jurisdictional brief arguing that this Court should accept jurisdiction in this case since the Third District's opinion directly conflicted with the Fourth District's opinion in *Barrow v. State*, 27 So.3d 211 (Fla. 4th DCA 2010). This court accepted jurisdiction of this case.

SUMMARY OF ARGUMENT

Florida Rules of Criminal Procedure, Rule 3.410 gives the trial judge discretion as to whether to re-read testimony when requested by the jury. While the trial court has the discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a read back is prohibited. Therefore, based on this rule, it is error for a trial judge to automatically refuse to re-read testimony requested by the jury or leave the jury with the impression that the law does not allow the court to read back testimony.

In this case the jury after being unable to reach a verdict sent a note to the jury asking if transcripts were available. Rather than accept defense counsel's suggestion that the court should tell the jury that the court could read back certain portions of the testimony the court told the jury that they had to rely upon their own recollection of the evidence. The response given by the judge that they had to rely upon their own recollection of the evidence, over the objection of defense counsel, resulted in the jury in essence being told that they were not entitle to have any testimony read back to them, which was clearly a violation of Florida law.

Despite the fact that the law in Florida recognizes that it is error for a trial judge to automatically refuse to re-read testimony requested by the jury or leave the jury with the impression that the law does not allow the court to read back testimony the majority opinion of the Third District Court of Appeal concluded that since the jury asked if they could get "transcripts" rather than have testimony read back it was not error for the trial

judge to tell the jury that they had to rely upon there own recollection of the evidence without ever inquiring from the jury as to what testimony they wanted to review. This conclusion by the majority opinion was clearly wrong.

A review of Judge Cope's dissenting opinion and opinions from the Fourth and Fifth District Court of Appeals will clearly illustrate that the majority opinion of the Third District Court of Appeal erroneously concluded that since the jury asked for transcripts rather than have testimony read back there was nothing wrong with misleading the jury into believing that the jury was not entitled to have any testimony read back. The jury in this case obviously was having a hard time reaching a verdict and when they asked the court for transcripts their obvious intent was to request whether they had the right to review the testimony. The trial judge's instruction that the jury had to rely upon their own recollection of the evidence wrongfully gave the jury the impression that they could not ask to have testimony read back. Furthermore since the court never asked the jury what testimony they were interested in, the court failed to properly exercise his discretion as to whether he should allow the jury to have the testimony read back to them.

Since it is impossible to know whether the trial judge's improper response to the jury's request for transcripts to help them break their deadlocked deliberations affected the jury's verdict a new trial is warranted.

ARGUMENT

WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION WHEN HE REFUSED TO INQUIRE WHAT PORTION OF THE TRANSCRIPT THE JURY WANTED RE-READ PRIOR TO TELLING THE JURY THAT THEY COULD NOT HAVE ANY TESTIMONY RE-READ BUT INSTEAD, HAD TO RELY UPON THEIR OWN RECOLLECTION OF THE EVIDENCE.

After deliberating for approximately two hours the jury sent a note to the court indicating that they could not reach a verdict. (T. 362). The parties agreed that rather than give an *Allen* charge, the jury should be sent home for the night and continue deliberating in the morning. (T. 364). The following morning the jury continued its deliberations and after approximately one hour the jury sent a note asking if they could get transcripts from the trial. (T. 369). The state suggested that the court instruct the jury that they must rely on their own recollection of the testimony. Defense counsel made the following suggestion:

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The court entered the following ruling:

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Defense counsel then inquired whether the court was going to at least tell the jury that they have a right to have the transcript read back and, the trial judge responded since

it is in the court's discretion whether to re-read testimony, he was not going to tell the jury that they can request to have testimony re-read. (T. 370). Defense counsel specifically objected to the court's refusal to tell the jury that they do have the right to ask for testimony to be re-read. (T. 370).

Fla.R.Cr.P. 3.410 provides:

> 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.

This rule gives the trial judge discretion as to whether to re-read testimony when requested by the jury. While the trial court has the discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a read back is prohibited. *See Huhn v. State*, 511 So.2d 583, 591 (Fla. 4th DCA 1987). Therefore, based on this rule, it is error for a trial judge to automatically refuse to re-read testimony requested by the jury or leave the jury with the impression that the law does not allow the court to read back testimony. *Davis v. State*, 760 So.2d 977, 978 (Fla. 3d DCA 2000)("This preemptive instruction by the trial judge was obviously intended to deter any requests to have testimony read back. While it is understandable that no trial judge wishes to encourage read-back requests, given the mandate of Rule 3.410, it is error to discourage them."); *Avila v. State*, 781 So.2d 413 (Fla. 4th DCA 2001)(trial court abused

its discretion in informing the jury that there were no transcripts and that the jury members should rely upon their collective recollection, without mentioning that a method of read back was available); *Rigdon v. State*, 621 So.2d 475 (Fla. 4th DCA 1993)(conviction reversed based upon jury instruction which may reasonably have conveyed to the jurors that to ask for re-reading of testimony would be futile or was prohibited, even though instruction contained indications that there remained a possibility of having testimony read back).

The majority opinion of the Third District Court of Appeal concluded that the trial judge's response to the jury question that they had to rely upon their own recollection of the evidence, did not violate Florida Rules of Criminal Procedure, 3.410 which allows the jury to request to have testimony re-read or any of the above cited cases since the jury asked for **transcripts** rather than have testimony read back when the court stated the following:

> Nowhere does the above-quoted rule contain a provision allowing the jury to receive transcripts of trial testimony in the jury room. See *Janson v. State*, 730 So.2d 734, 735 (Fla. 5th DCA 1999); cf. *Barnes v. State*, 970 So.2d 332, 339 (Fla.2007) (holding transcript of testimony at prior trial which was admitted in evidence could not be taken to jury room); *Young v. State*, 645 So.2d 965, 967 (Fla.1994) (holding videotaped witness testimony could not be taken back to jury room for unrestricted view during jury deliberations). Thus, the trial court was bound to refuse the jury's request, and its further answer that the jury "must rely on their own recollection" was true in relation to the question posed. Upon giving such an answer, the trial court was under no obligation-as defense counsel suggested-to inform the jurors that a "readback" of trial testimony may be available upon request.

The court went on to hold:

> The assertion by the defense that the trial courts legally accurate answer created a misimpression in the minds of the jury that any further request for a "readback" also would be rejected is unpersuasive. It is true that "while the trial court has the discretion to deny a jurys request to read back testimony, it may not mislead the jury into thinking that a readback is prohibited." *Avila v. State*, 781 So.2d 413, 415 (Fla. 4th DCA 2001). However, in this case, nowhere in the colloquy between counsel and the court can there be found any statement that the court would disobey Rule 3.410 and deny a "readback" if requested. In fact, the trial judge expressly stated to the contrary. Because no transcripts were to be forthcoming, it was entirely correct to instruct the jury they "must rely on their own recollection of the evidence...." See *Coleman v. State*, 610 So.2d 1283, 1286 (Fla.1992) (approving instruction to jurors that they must "rely on their recollection of the evidence" in response to jury question pertaining to testimonial fact evidence); *Infantes v. State*, 941 So.2d 432, 434 (Fla. 3d DCA 2006) ("We find no abuse of discretion in the trial courts refusal to reread the first officers testimony and instructing the jury to rely on its collective memory.").

Judge Cope filed a dissenting opinion wherein, he argued that the majority opinion conflicted with several Fourth District Court of Appeal decisions that have held that, "While the trial court has discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a read back is prohibited." *See Avila v. State*, 781 So.2d 413, 415 (Fla. 4th DCA 2001); *Huhn v. State*, 511 So.2d 583 (Fla. 4th DCA 1987); *Biscardi v. State*, 511 So.2d 575 (Fla. 4th DCA 1987). Judge Cope went on to state the following concerning the majority's opinion's conclusion that the jury failed to ask for testimony to be re-read when they asked if transcripts were available and therefore, no error occurred:

> With all due respect, much of the majority opinion is niggling nitpicking.

> The majority opinion finds dispositive the fact that the jury note asked for transcripts. According to the majority, since no transcripts were in existence, it follows that the question could be answered with a simple "no."
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> Judge Cope went on to recognize:
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> The majority opinion overlooks the fact that jurors are composed of lay persons. If they knew the technical details of the law, then they would have written a better note. But the substance of the question was whether the jury could review the testimony. Defense counsel quite properly said that under rule 3.410, a jury may request to have "testimony read to them," and the court may so order.

Judge Cope's dissenting opinion is consistent with opinions from both the Fourth and Fifth District Court of Appeals which have also recognized that when a jury asks to have transcripts or to see testimony, a trial judge can not simply tell the jury that they must rely upon their own recollection of the testimony since this instruction wrongfully leads the jury to the conclusion that a jury is not allowed to request testimony be read back to them. Both appellate courts reached this conclusion despite the fact that the jury asked to have transcripts or to see testimony rather than ask to have testimony read back.

In *Roper v. State*, 608 So.2d 533 (Fla. 5th DCA 1992), the case involved sexual abuse of a minor. The deliberating jury "asked to 'see' the victim's cross-examination testimony." *Id*. at 533. After conferring with the attorneys, the trial judge told the jury that no transcript was available to them, so there was no way that the jury could "see" the victim's cross-examination. *Id*. at 533-34. The judge told the jury to "rely upon your collective recollections and remembrances as to what each of the witnesses testified to in

order to render your verdict." *Id*. at 534.

On appeal, the state argued "that if the jury does not ask that the testimony be read back, but only requests to see a transcript, the court does not abuse its discretion by simply instructing the jury to rely upon their recollections." *Id*. at 535. The Fifth District rejected this argument, writing that the judge's response to the jury's question "may well have led the jury to conclude that their only recourse was to rely upon their 'collective recollections and remembrances' as to the cross-examination of the minor." In analysis equally applicable to this case, the Fifth District concluded in *Roper* that:

> We cannot agree with the state. We believe the trial judge's response to the jury's question may well have led the jury to conclude that their only recourse was to rely upon their "collective recollections and remembrances" as to the cross-examination of the minor. Rather than weighing the pros and cons of having the cross-examination read back to the jury, as did the trial judge in Simmons, **the trial judge here narrowly focused upon the word "see" (as distinguished from "hear") in the jury's request and deftly side-stepped the problem. As we see it, he employed a semantic shell game effectively negating an option allowed the jury under Rule 3.410. At the very least, the trial judge should have apprised the jury that a method was available to have the cross-examination, or specific portions of it, read to them. Then, if the jury requested it, the trial court could have weighed that request in light of any applicable considerations.**

In *Avila v. State*, 781 So.2d 413, 414 (Fla. 4th DCA 2001), the jury sent the court a note during deliberations indicating "that it needed to review the timing of specific events set forth by the testimonies of four named alibi witnesses." The trial judge told the jury that although the court reporter took "down the trial in shorthand notes," there were "no printed transcripts" to "submit back to you." *Id*. at 415. The Fourth District concluded

that the trial judge abused his discretion by failing to tell the jury about the potential availability of a read back:

> While the trial court has the discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a readback is prohibited. In this case, the jury clearly sought a readback of specific testimony. The trial court, however, without mentioning that a method of readback was available, informed the jury that there were no transcripts and that the jury members should rely upon their collective recollection. Because such a statement may have confused the jury as to whether a readback of testimony was permissible, we conclude that the trial court abused its discretion.

Id. at 415-16.

Finally, in *Barrow v. State*, 27 So.3d 211 (4th DCA 2010), ten minutes into its deliberations, the jury sent out a question asking for "all the transcripts of the witnesses' testimonies, Zack, Shannon, Peggy, Mark Jones, Mark Barrow." 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." Defense counsel joined in the request to tell the jury that they had the right to ask to have testimony read back. Despite both parties' position, the trial judge told the jury that they had to rely upon their own recollection of the evidence. The Fourth District Court of Appeal relying upon its opinion in *Avila*, *supra* and the Fifth District's decision in *Roper* reversed defendant's conviction and held the following:

> This case falls within the ambit of *Roper* and *Avila*. The jury requested to see "transcripts." Both the prosecutor and the defense attorney asked that the trial judge tell the jury that it could request read backs. The trial judge refused and told the jury that no transcripts were available for their review. As in Roper, the judge's instruction "effectively negat[ed] an option allowed the jury under Rule 3.410." 608 So.2d at 535. Especially when asked to do so by both the state and the defense, the court should have apprised the jury that a method of read back was available. Id.; Avila, 781 So.2d at 415.

In reaching its conclusion the Fourth District recognized that its opinion directly conflicted with the Third District's opinion in this case. However, the court concluded that the rationale in both *Roper* and *Avila* are more consistent with opinions from this Court which encourages juries to make a considered, careful reevaluation of detailed evidence when the court stated the following:

> We certify conflict with *Hazuri*. We believe that Roper and Avila are more in harmony with Florida's view of a jury's role in a criminal trial. Florida law encourages a jury to make a considered, careful evaluation of detailed evidence. As the Supreme Court has written, the "jury has a perfect right to return to the court room at any time and ask questions that are calculated to shed light on the controversy or that will in any way assist it or the court in developing the truth of the controversy." Sutton v. State, 51 So.2d 725, 726 (Fla.1951). Part of a trial judge's role is to forthrightly make the jury aware of those tools available under the rules of criminal procedure that will assist the jury in arriving at its decision. The judge's role is to facilitate careful deliberation. Deference should be accorded to a jury's request to more closely examine the trial testimony. See *LaMonte v. State*, 145 So.2d 889, 892 (Fla. 2d DCA 1962).

Both Judge Cope's dissenting opinion in this case and the Fourth District's Court of Appeals' decision in *Barrow*, properly recognized that the majority opinion of the Third District in this case clearly placed form over substance. The Fourth District also

properly recognized that the Third District's opinion which concluded that it was not error to lead the jury to believe that they did not have the right to have testimony read back directly contravenes the long standing policy of this court which encourages careful considerate jury deliberations.

In *Thomas v. State*, 748 So.2d 970 (Fla.1999), this Court recognized "jury deliberations in a criminal case are perhaps the most critical and sacred parts of a trial, and care should be taken to ensure that those deliberations are conducted in such a way that there is no question of their reliability." This Court in *Sutton v. State*, 51 So.2d 725, 726 (Fla. 1951), recognized how important fair jury deliberations are to a fair trial and how important it is to answer jury=s questions concerning the applicable law in the case. In *Sutton*, after the jury deliberated two hours without reaching a verdict, it returned to the court room and requested the court to advise it as to what punishment would be imposed if the defendant was found guilty. The trial judge refused to answer the jurors' question and told them to go back to their deliberations. In concluding that the trial judge's failure to respond to the jurors question required a new trial, this Court held:

> . . . In our system of jurisprudence, the jury is of ancient and constitutional sanction, Sections 3 and 11, Declaration of Rights, Constitution of Florida, F. S. A. and by the same token it is accorded a function on the horizontal with that of the trial judge. It is in no sense a menial to be ordered hither and yon by the court, it performs an extremely important duty and neither its duty nor that performed by the court can be done properly in the absence of mutual aid and assistance. It resolves controversies of fact about which the judge cannot speak or apply the rule of law till the jury announces its judgment. The law applied by the court arises from the factual truth adduced by the jury. In reality the trial of a

> case like this is nothing more than a realistic search for the truth by court and jury. The jury has a perfect right to return to the court room at any time and ask questions that are calculated to shed light on the controversy or that will in any way assist it or the court in developing the truth of the controversy. The question propounded by the jury in this case was well within the allowable ambit and we think it was entitled to a courteous, helpful answer. The law contemplates such questions. Sections 918.10 and 919.05, F. S. A. The writer of this opinion speaks from personal experience as a juror in holding that the court room behavior of the trial judge is the most potent factor in guiding the trial of any cause to a righteous verdict. To inspire public confidence in the method employed it is more important than all other factors combined.

Sutton, 51 So.2d at 726.

In this case the jury indicated on several occasions that they were having difficulty reaching a verdict. In an attempt to help the deliberations the jury asked the judge if they could get transcripts from the trial. Rather than ask the juror what portion of the trial they were interested in so that the court could properly exercise his discretion as to whether to read back the testimony the trial judge overruled defense counsel's request and merely told the jury they had to rely upon their own recollection of the evidence.

The state on direct appeal adopted the trial judge's rational that since the court had discretion as to whether to read back testimony the trial judge's refusal to inquire as to what testimony the jury was concerned with was not error. However, a blanket instruction to a jury that the jury must rely upon its own recollection of the testimony without inquiring as to what testimony the jury wants to review, cannot be considered a proper exercise of judicial discretion. As the *Barrow* court recognized "it is an abuse of

discretion for a trial judge to refuse to exercise discretion, to rely on an inflexible rule for a decision that the law places in the judge's discretion." Furthermore as Justice Thompson wrote 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." *See Massey v. State*, 50 Fla. 109, 112, 39 So. 790 (Fla.1905) (refusal to exercise discretion, "without any good reason for so doing," deprives party of a substantial right); *Boykin v. Garrison*, 658 So.2d 1090, 1090 (Fla. 4th DCA 1995) (where the court wrote that "[t]he law is well settled that a trial court must exercise its discretion where discretion has been provided; a refusal to so exercise is error."); *see also Albert v. Miami Transit Co.*, 154 Fla. 186, 17 So.2d 89, 90 (1944) (discussing the limits of judicial discretion); FN3 *Fla. Fire & Cas. Ins. Co. v. Hart*, 73 Fla. 970, 975-77, 75 So. 528 (Fla.1917) (trial court deprives a party of a substantial right when it refuses to exercise its discretion on motion for new trial); *Steinmann v. State*, 839 So.2d 832 (Fla. 4th DCA 2003) (where court wrote that "[i]t is error for the trial court to refuse or fail to exercise its discretion." (citations omitted)).

Therefore, in order for a trial judge to properly exercise his discretion as to whether to read back testimony to a jury, it is necessary that the trial judge inquire from the jury what testimony they are interested in reviewing so that the court can determine whether it is practical to meet the juror's request. It is for this reason that the law in this

state has consistently recognized that it is error to give the jury an instruction which leaves them with the impression that they can never have testimony read back since the only way a judge can properly exercise his discretion under rule 3.410 is by considering the exact testimony the jury is interested in rehearing.

The trial court's response to the jury's request for transcripts which left the jury with the wrong impression that they cannot have testimony read back requires the granting of a new trial in this case. In *Johnson v. State*, (case number SC 09-966), a case pending before this court, the issue the court has to decide is whether a trial judge's instruction to the jury prior to the beginning of deliberations that no read back of testimony is available is per se reversible error since this type of instruction will always adversely affect jury deliberations. It is petitioner's position that, when the jury requests to have testimony read back like in this case and a trial judge erroneously tells the jury that they have to rely upon their own recollection of the evidence the error should be considered per se reversible error.

In *State v. Diguilio*, 491 So.2d 1129 (Fla. 1986), this Court was asked to reconsider the issue of whether an improper comment on a defendant's right to remain silent was per se reversible error. In reaching the conclusion that an improper comment on silence should not be considered per se reversible error, the court set out the following test to determine whether an error is per se reversible error:

> Per se reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as harmless error."

> Chapman, 386 U.S. at 23, 87 S.Ct. at 827-28. In other words, those errors which are always harmful. The test of whether a given type of error can be properly categorized as per se reversible is the harmless error test itself. **If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible.** If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible. If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless.

Diguilio, 491 at 1135.

Therefore, in order to determine whether the type of error committed in this case should be considered per se reversible error, this Court must attempt to apply the harmless error doctrine to the error and if the result will always be that the error was harmful, then the error must be considered per se reversible error. When a jury asks to have testimony read back to aid their deliberations and a trial judge wrongfully refuses to even consider what testimony the jury was interested in rehearing it will always be impossible to conclude beyond a reasonable doubt that the improper instruction by the trial judge telling the jury that they had to rely upon their own recollection of the evidence did not contribute to the jury verdict and, therefore, this court should conclude that this type of error is per se reversible error. *See Biscardi v. State*, 511 So.2d 575 (Fla. 4th DCA 1987), (court rejected state's argument that harmless error test should apply to a judge's improper instruction concerning read back testimony since it is impossible to determine the

prejudice of the improper instruction).

However, even if this Court were to hold that the harmless error doctrine should be applied to the error in this case, a new trial is still warranted. In order for any error to be considered harmless the state must establish beyond a reasonable doubt that the error did not contribute to the jury verdict. *See State v. Diguilio,* 491 So.2d 1129 (Fla. 1986). It is impossible for the state to meet this burden in this case. After deliberating for several hours and informing the court that they could not reach a verdict the jury was sent home for the night. The following day the jury asked if transcripts were available. Without requesting what testimony the jury was interested in reviewing the trial judge wrongfully told the jury to rely upon their own recollection of the evidence. The jury once again began deliberations and was unable to reach a verdict. Eventually, the jury reached a compromise verdict wherein they found defendant not guilty of armed robbery and guilty of battery. Obviously, the jury was having a hard time reaching a verdict. The jury expressed an interest in reviewing some of the testimony. Since it is impossible for the state to establish beyond a reasonable doubt that the inability of the jury to more closely examine the evidence did not affect its verdict, the trial judge's improper instruction cannnot be deemed harmless error. *See Barrow v. State*, 27 So.3d 211 (4th DCA 2010); *Roper v. State*, 608 So.2d 533 (Fla. 5th DCA 1992).

Since the trial judge's improper jury instruction telling the jury that they had to rely upon their own recollection of the evidence without ever inquiring from the jury as to

what evidence they wanted to review denied defendant a fair trial this court should reverse the majority decision of the Third District Court of Appeal in this case and order a new trial for Petitioner.

CONCLUSION

Based upon the foregoing, this Honorable Court is respectfully requested to quash the opinion of the Third District Court of Appeal and grant Mr. Hazuri a new trial.

Respectfully submitted,

Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125

BY:_____
ROBERT KALTER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this ____ day of July, 2010.

_____

ROBERT KALTER
Assistant Public Defender
Florida Bar No. 260711

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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ROBERT KALTER
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC:10-61

STEVEN HAZURI,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

APPENDIX

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Respectfully submitted,

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Public Defender
Eleventh Judicial Circuit
of Florida
1320 NW 14th Street
Miami, Florida 33125

BY:_____
ROBERT KALTER
Assistant Public Defender