IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-61

STEVEN HAZURI,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

AMENDED BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

This is a petition for discretionary review of the decision of the Third District Court of Appeal in *Hazuri v. State*, 34 Fla. L. Weekly D2590 (Fla. 3d DCA December 16, 2009, on the grounds of express and direct conflict of decisions. In this brief of petitioner on jurisdiction, all references are to the attached appendix paginated separately and identified as "A" followed by the page number.

STATEMENT OF THE CASE STATEMENT AND FACTS

Steven Hazuri was tried for armed robbery and aggravated battery with a weapon. The jury found defendant guilty of aggravated battery and not guilty of robbery. After a couple hours of deliberation, the jury sent a note to the court stating the jurors were unable to reach a verdict. The parties agreed the jury should be sent home for the evening and return the next day to continue its deliberations. The next morning, after an hour of deliberations, the jury sent a note to the court requesting whether they could get trial transcripts. The following transpired:

> THE COURT: Back on the record. Note for the record the presence of the defendant, his attorney, the assistant state attorney. Counsel, we have a note from the jury. Could they get transcripts from the trial. State, suggestions.
>
> [ASSISTANT STATE ATTORNEY]: My only suggestion is that we tell them they must rely on their own recollection of the testimony.
>
> THE COURT: [Defense counsel].
>
> [DEFENSE COUNSEL]: My answer is you should inform the jury that 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.

THE COURT: 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 collective recollection of the evidence and we will answer the question that way.

[DEFENSE COUNSEL]: You are not going to advise them that they have a right to have the transcript read back?

THE COURT: They don't have a right. It is within my discretion.

[DEFENSE COUNSEL]: Would you note my objection for the record.

THE COURT: I will note your objection, counselor. I will note it for the record.

[DEFENSE COUNSEL]: You are just going to send the note back?

THE COURT: Yeah. Okay. Okay. There you go. Okay.

On 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. (See Appendix A).

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."
>
> 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. This petition follows.

SUMMARY OF ARGUMENT

After being deadlocked and sent home for the night, the jury returned in the morning and asked the court if transcripts were available. Rather than adopt defense counsel's position that the court should tell the jury that they were entitled to ask for testimony read back the trial judge, over the objection of defense counsel, told the jury that they had to rely upon their own recollection of the evidence. The trial judge's response to the jury question which left the jury with the impression that they were not entitled to ask to have testimony read back, directly conflicts with cases from the Fourth and Fifth District Courts of Appeal which have held that it is error for a trial judge to tell a jury that they do not have the right to have testimony read back. Specifically, the opinion directly conflicts with a recent Fourth District Court of Appeal decision in *Barrow v. State*, __So.2d_- 2010 WL 445388 (Fla. 4th DCA 2010), wherein the court reversed a defendant's conviction on a case exactly the same as this case and the court certified conflict with the Third District's opinion in this case. Therefore, this Court should accept jurisdiction in this case.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S MAJORITY OPINION WHICH UPHOLDS A TRIAL JUDGE'S RESPONSE TO JURY QUESTION CONCERNING THE AVAILABILITY OF TRANSCRIPTS TO HELP BREAK A JURY DEADLOCK THAT LED THEM TO BELIEVE THAT READ BACK OF TESTIMONY WAS PROHIBITED DIRECTLY CONFLICTS WITH NUMEROUS CASES FROM THE FOURTH AND FIFTH DISTRICT COURTS OF APPEAL.

The jury in this case, after sending a note to the judge that they were deadlocked, were sent home for the night. The following morning the jury sent a note to the judge asking if they could get transcripts from the trial. The court asked the parties for their suggestions. The state argued that the court should tell the jury to rely upon their own recollection. Defense counsel argued that the court should tell the jury that they are allowed to have portions of the testimony re-read but that they are not entitled to a complete set of trial transcripts which is consistent with the requirements of Florida Rules of Criminal Procedure Rule 3.410.[1] Over the objection of defense counsel the trial judge told the jury that they must rely upon their

[1]Florida Rule of Criminal Procedure 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 such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

own recollection of the evidence without ever telling the jury that they were entitled to have testimony re-read.

On direct appeal the majority opinion of the Third District Court of Appeal concluded that the trial judge's response to the jury, which instructed them that they had to rely upon their own recollection of the evidence, was not error. This conclusion directly conflicts with cases from the Fourth and Fifth District Court of Appeals which hold that if a judge improperly leads a jury to believe that they have no right to ask to have testimony re-read a new trial is warranted.

In *Barrow v. State*, __So.2d__ 2010 WL 445388 (Fla. 4th DCA 2010), the jury asked to have transcripts of several witnesses. Similar to this case the defense attorney requested that the judge tell the jury they are entitle to ask to have testimony read back. The trial judge refused and told the jury that there are no transcripts available for their review and they should rely on the evidence presented during the proceedings. In reversing the defendant's conviction the court concluded that even though the jury only asked for transcripts, the trial judge's improper instruction effectively negated an option available under Rule 3.410 which allows a jury to ask for testimony to be read back. In reaching this conclusion the Fourth District certified that their opinion directly conflicts with the opinion in this case.

The opinion of the Third District also directly conflicts with *Avila v. State*, 781 So.2d 413 (Fla. 4th DCA 2001), wherein during jury deliberation, the jury handed the trial

court a note indicating that it was interested in reviewing the timetable presented by the testimonies of five specific alibi witnesses. After the trial court asked the jury for clarification, the jury sent back another note wherein, it stated that it needed to review the timing of specific events set forth by the testimonies of four named alibi witnesses. Although it was evident that the jury sought a read back of only the portion of the witnesses' testimonies that defined the timeline, the trial court believed it was prohibited from providing a partial read back. The trial judge in *Avila*, gave the jury the following response to their question:

> First of all, in terms of factual issues, I cannot answer any factual questions for you. Facts are exclusively within the province of the jury [and] are not within the province of the Court. And so in terms of an answer to those questions, I cannot give you any timing. **The second issue, the court reporter which you have seen here, takes down the trial in shorthand notes. We do not print transcripts, we have no such transcripts, there are no printed transcripts. We have no transcripts to submit back to you at this point of the shorthand notes of the court reporter. You should attempt to rely on the collective recollection of the six of you in determining what the various factual questions that you have.**

In ruling that the trial judge's response that the jury had to rely upon their own recollection of the evidence improperly lead the jury to believe that read back of testimony was prohibited, the Fourth District Court of Appeal held the following:

> We further hold that the trial court improperly responded to the jury's request to review the timing of events set forth by Avila's alibi witnesses. **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.** See *Huhn v. State*, 511

> So.2d 583, 591 (Fla. 4th DCA 1987). 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. See *Biscardi v. State*, 511 So.2d 575, 580-81 (Fla. 4th DCA 1987).

The Third District's majority decision also directly conflicts with the Fifth District Court of appeals decision in *Roper v. State*, 608 So.2d 533 (Fla. 5th DCA 1992). In *Roper* the jury asked to **see** the victim's cross examination testimony. The judge told the jury no transcripts were available and therefore they had to rely upon their own recollection. On appeal the state argued that since the state asked to see the transcripts rather than have testimony read back the court did not abuse his discretion by instructing the jury to rely upon their own recollection of the testimony. 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." Id. In analysis equally applicable to this case, the fifth district concluded in Roper that

> 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 this case the majority opinion's conclusion that the trial judge did not err in telling the jury they had to rely upon their own recollection of the evidence since the jury asked for the transcripts rather than have testimony read back directly conflicts with the fifth district's opinion in *Roper*.

In conclusion since the opinion in this case directly conflicts with cases from both the Fourth and Fifth District Court of Appeals coupled with the fact that the fourth district has recently entered an opinion that certified conflict with the third district's opinion in this case this court should accept jurisdiction to resolve the conflict that exists between the different District Court of Appeals.

Since the majority opinion's decision which upholds a trial judge's instruction to a jury that lead them to believe that read back of testimony was prohibited, directly conflicts with numerous cases from the Fourth District Court of Appeal, this Court should accept jurisdiction of this case to resolve the conflict.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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BY:_____
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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 February, 2010.

_____
ROBERT KALTER
Assistant Public Defender

CERTIFICATE OF FONT

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

_____
ROBERT KALTER
Assistant Public Defender

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