IN THE SUPREME COURT OF FLORIDA

CASE NO. SC:10-61

STEVEN HAZURI,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

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

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REPLY 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

Appellant in its initial brief argued:

(1) The law in Florida prohibits a trial judge from giving a jury instruction which misleads the jury into concluding that they did not have the right to request to have testimony read back. *See Avila v. State*, 781 So.2d 413, 415 (Fla. 4th DCA 2001). (since court may have confused the jury as to whether a readback of testimony was permissible a new trial was required); *Huhn v. State*, 511 So.2d 583, 591 (Fla. 4th DCA 1987) (error to instruct the jury that there was no provision to have any testimony read back); *Biscardi v. State,* 511 So.2d 575, 580-81 (Fla. 4th DCA 1987).

(2) The Third District Court of Appeals majority opinion which attempted to distinguish the above cited cases since the jury asked for transcripts rather than specifically utter the magic words that they wanted testimony read back was wrong. To support this argument appellant relied upon cases from both the Fourth District Court of Appeal and Fifth District Court of Appeal which both supported Judge Cope's dissent in this case. *See Barrow v. State*, 27 So.3d 211(Fla. 4th DCA 2010) and *Roper v. State*, 608 So.2d 533 (Fla. 5th DCA 1992).

(3) The trial judge's improper response to the jury's request for transcripts requires a

new trial since the error was per se reversible error or in the alternative, if this Court were to apply the harmless error test a new trial was still warranted since the state can not establish beyond a reasonable doubt that the error did not contribute to the jury verdict.

The state in its brief argued the following:

(1) The trial judge's response to the jury question was correct since the law prohibits the judge from sending transcripts into the jury room during deliberations.

(2) Since the jury asked for transcripts rather than request that testimony be read back the trial judge did not have to advise the jury that they have the right to have testimony read back.

(3) Imposing a duty on the trial judge to inform the jury that it could request a read back is contrary to rule 3.410 and would strip the trial court of its discretion which is conferred by rule 3.410.

(4) Since the judge's response to the jurors question is not part of the record, this issue has been waived.

(6) Even if the trial court erred the error was harmless.

A brief analysis of all of these arguments will reveal that none of them have merit.

The trial judge's response to the jury question was correct since the law prohibits the judge from sending transcripts into the jury room during deliberations.

The state initially argues that since the law prohibits the trial judge from sending transcripts back into the jury room during deliberations, the trial judge's refusal to ask the jury what testimony they wanted to reconsider was not error. There is no question nor was there any dispute at trial that the jury was not entitled to have copies of the trial transcripts.

The record establishes that when the jury asked for transcripts the trial judge requested input from both the state and the defense. The state argued that the court should just tell the jury to merely rely upon their own recollection of the evidence. (T. 369). Defense counsel agreed that the jury was not entitled to have copies of the transcripts but instead, the court should inform the jury that they are allowed to request to have portions of the transcripts read back. (T. 369). After the trial court indicated that he was going to tell the jury that they must rely upon their own recollection of the evidence, defense counsel once again requested that the court instruct the jury that they could request to have testimony read back. (T. 369). The trial judge concluded that since the jury does not have the right to have testimony read back and that it was in the court's discretion as to whether to allow testimony read back, he was not going to tell the jury that they could request to have testimony read back. (T. 370).

Since it has never been defendant's position that the jury should have been given copies of the trial transcripts, the lines of cases relied upon the state which stand for the proposition that it was error to send transcripts into the juror room during deliberations have no relevance to the issue before the court. *See Janson v. State*, 730 So.2d 734 (Fla. 5th DCA 1999)(court concluded that it has harmless error to send transcript back to the jury during deliberations since the proper procedure would have been to reread requested testimony.); *Barnes v. State*, 970 So.2d 332 (Fla. 2007)(Written transcript of defendant's prior testimony which was introduced into evidence was not allowed to be given to jury during jury deliberations); *Young v. State*, 645 So.2d 965 (Fla. 1994)(error to allow videotape of out of court interviews with child abuse victims into jury room during deliberations).

Since the jury asked for transcripts rather than read back of testimony, the trial judge did not have to advise the jury that they have the right to have testimony read back.

The state in its brief next argues that since the jury asked for transcripts rather than ask to be allowed to review testimony, there was no reason for the trial judge to tell the jury they had the right to have portions of the testimony read back. To support this conclusion the state attempts to distinguish cases from the Fourth and Fifth District Courts of Appeal which have concluded it is error for a trial judge to respond to a jury's question concerning reviewing transcripts by telling the jury that they have to rely upon their own recollection of the evidence without informing them they have

the right to request that certain testimony be read back to them. *Barrow v. State*, 27 So.3d 211(Fla. 4th DCA 2010) and *Roper v. State*, 608 So.2d 533 (Fla. 5th DCA 1992).

Despite the fact that the Fourth District Court of Appeal specifically recognized that its holding in *Barrow*, supra, and the Fifth Districts's holding in *Roper*, directly conflicts with the Third District's majority opinion in this case, the state takes the position that this case is somehow distinguishable from *Barrow* and *Roper*. The state attempts to distinguish *Roper* because in *Roper* the jury's request pertained to only one witness' cross-examination and the judge's response that, "there is no way that you can see the victim's cross examination," clearly led the jury to believe that read backs were prohibited. The state attempts to distinguish *Barrow* on the grounds that in *Barrow*, the parties agreed that the trial judge should instruct the jury that they have the right to request testimony read back to them and the judge refused to give the jury this instruction since "he does not do read backs."

It is appellant's position that *Roper* and *Barrow* are indistinguishable from the facts in this case. In all three cases the jury indicated that they wanted to review some of the trial testimony and asked the court for the right to see transcripts rather than specifically ask to have the court read back testimony. In all three cases rather than tell the jury they were entitled to request to have testimony read back, the trial judge improperly left the jury with the impression that they were not entitled to ask to have testimony read back when the court told the jury they had to rely upon their own

recollection of the evidence. Therefore, *Barrow* and *Roper* are indistinguishable from this case.

The state also relies upon a North Carolina Supreme Court case that is not binding on this Court and also distinguishable from this case. In *State v. Abraham*, 451 S.E. 2d 131, 152 (N.C. 1994), the jury during deliberations asked for **copies** of the entire trial transcripts. The North Carolina Supreme Court concluded that since the law did not allow the trial judge to give the jury copies of the trial transcripts, the trial judge properly denied the jury's specific request for copies of the transcripts when the court told the jury to rely upon their own recollection of the evidence. In reaching this conclusion the court distinguished several prior North Carolina Supreme Court cases which had held that it was error to refuse to inform the jury that they had the right to have testimony read back after the jury had requested portions of the transcripts since the jury in *Abraham* specifically requested copies of the transcripts. This is evidenced by the following holding of the North Carolina Supreme Court:

> Defendant relies on three Supreme Court cases for the proposition that it was error for the trial court not to honor the jury's request. *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S.Ct. 983, 122 L.Ed.2d 136, reh'g denied, 507 U.S. 967, 113 S.Ct. 1404, 122 L.Ed.2d 776 (1993); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985); *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980). These are distinguishable. In all three cases the juries returned requests to review portions of the transcript. This Court found error in all three cases on the ground that the trial courts violated N.C.G.S. § 15A-1233 by informing the juries that the transcripts were unavailable without exercising discretion in determining whether to have those portions of the testimony read to the jury. In the instant case, the jury

> requested copies of the entire transcript for use during deliberation in the jury room. The trial court properly denied the request.

Similar to the court in *Barrow* and *Roper*, the North Carolina Supreme Court has recognized that when a jury requests the opportunity to review trial transcripts, the trial judge has an obligation to inform the jury that they could have testimony read back so that the trial judge has the opportunity to exercise his discretion as to whether to read back the requested testimony. *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, 506 U.S. 1055, 113 S.Ct. 983, 122 L.Ed.2d 136, reh'g denied, 507 U.S. 967, 113 S.Ct. 1404, 122 L.Ed.2d 776 (1993); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985); *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980).

Therefore, appellant would suggest that this Court adopt the holdings of both the Fourth District in *Barrow* and the Fifth District in *Roper*, along with the rationale of Judge Cope's dissent in this case which is that the mere fact that a jury fails to use the proper terminology when requesting the opportunity to review testimony does not give the trial judge the authority to improperly leave the jury with the impression that they are not entitled to have testimony read back.

> **Imposing a duty on the trial judge to inform the jury that it could request a read back is contrary to rule 3.410 and would strip the trial court of its discretion which is conferred by rule 3.410.**

The state argues that if this Court were to hold that when a jury asks to review transcripts, the proper response is to tell the jury that they do not have the right to have transcripts but they do have the right to request to have certain testimony read back,

the court would strip the trial court of its discretion as to when to allow read backs of testimony. There is no dispute that the trial judge has the discretion as to when to allow read backs. The issue in this case, however, is whether a trial judge abuses his discretion when he informs the jury that read backs are never an option. As the Fourth District Court of Appeal in *Barrow* properly recognized, a trial judge can not be deemed to have properly exercised his discretion as to when to allow read backs without ever even considering what testimony the jury wants to have read back.

Since the judge's response to the jurors question is not part of the record this issue has been waived.

The state argues that since the judge's response to the jury's question is not contained in the record this issue has been waived. As Judge Cope properly recognized in his dissent there is no dispute in this case as to what the jury asked nor is there any dispute in this case how the judge responded to the jury's request. The record in this case establishes that the jury wanted to know if they could get transcripts. After hearing legal argument from both the state and the defense the trial judge rejected defense counsel's request to tell the jury they were entitle to request to have portions of the transcripts read back and instead the judge told the parties that he was going to tell the jury they had to rely upon their own recollection of the evidence. There is nothing in this record to even remotely suggest that this was not the response that was given by the trial judge to the jury's request for transcripts and, therefore, the issue as to whether the trial judge's response denied defendant a fair trial has not been

waived.

Even if the trial court erred the error was harmless.

Finally, the state argues that even if the trial judge erred in improperly leaving the jury with the impression that they are not allowed to ask to have testimony read back, this Court should conclude that the error was harmless. This Court has recently recognized in *Johnson v. State* (case number SC09-966 2010), that when a trial judge improperly gives the jury an instruction which leaves them with the impression that read back of testimony is not available, the error is per se reversible error since there is no way to determine what effect the trial judge's improper instruction may have had on the jury.

In this case the jury, after indicating that they were hung, asked if they could get transcripts. Since it is impossible to determine how the trial judge's improper response, which lead the jury to believe that read back of testimony was not available, may have affected the jury's deliberations, the trial judge's improper response was per se reversible error which requires the granting of a new trial to defendant.

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,

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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 October, 2010.

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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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