IN THE

SUPREME COURT OF FLORIDA

ALAN OSTERHOUDT, JR., Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC16-303 Lower Tribunal No(s).: 5D13-4277 2012-CF-404

INITIAL BRIEF OF THE PETITIONER

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1. Statement of the Case and Course of Proceedings Below.

Alan Osterhoudt, Jr. (hereinafter "Petitioner Osterhoudt") was charged in Hernando County, Florida, with one count of second-degree murder. (R1-28).[1] The offense allegedly occurred on February 25, 2012.

At trial, Petitioner Osterhoudt was represented by Kenneth L. Foote, Esquire, and Roxanne J. Dean, Esquire. The State was represented by Assistant State Attorney William J. Catto. The Honorable Anthony Tatti presided over the trial.

The trial began on September 23, 2013, and concluded on September 26, 2013. During the trial, defense counsel moved for a mistrial after a law enforcement officer commented on Petitioner Osterhoudt's right to remain silent, but the trial court denied the motion for mistrial. At the conclusion of the trial, the jury found Petitioner Osterhoudt guilty of the lesser offense of manslaughter. (T7-1137; R2-230).

Petitioner Osterhoudt was sentenced on October 29, 2013. The trial court sentenced Petitioner Osterhoudt to thirty years' imprisonment. (T8-1175; R2-262).

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[1] References to the district court record on appeal will be made by the designation "R" followed by the appropriate volume number and page number. References to the trial transcripts will be made by the designation "T" followed by the appropriate volume number and page number. References to the supplemental records on appeal will be made by the designation "SR" followed by the appropriate page number.

On the judgment/Order Assessing Fees, Costs, and Fines, the trial court imposed a $300 "discretionary" fine pursuant to section 775.083(1), Florida Statutes – even though this fine was not individually announced during the sentencing hearing. (R2-275).

On direct appeal to the Fifth District Court of Appeal, Petitioner Osterhoudt raised two claims: (1) the trial court erred by denying Petitioner Osterhoudt's motion for mistrial after a law enforcement officer impermissibly commented on Petitioner Osterhoudt's exercise of his right to remain silent and (2) a claim involving sentencing errors, including the trial court's failure to individually announce the discretionary fine during the sentencing hearing. On October 16, 2015, the Fifth District affirmed Petitioner Osterhoudt's conviction and sentence (including the fine), stating:

> Alan Osterhoudt (the defendant) appeals his judgment and sentence, which were entered by the trial court after a jury found him guilty of committing the crime of manslaughter. . . . [W]e write to address the defendant's contention that the trial court erred in imposing certain fees, costs, and fines.
>
> Post-sentencing, the defendant filed a motion for sentencing relief pursuant to rule 3.800 of the Florida Rules of Criminal Procedure. Among other things, the motion alleged error in the imposition of certain fees, costs, and fines. The motion was denied. The defendant now contends that the trial court reversibly erred in imposing certain fees, discretionary fines, and costs. We conclude that these claims were not properly preserved for appellate review.
>
> Our court has held that a defendant waives his right to raise issues

> on direct appeal relating to a trial court's imposition of unpronounced conditions of probation if the defendant only raises "procedural and not substantive challenges" to those discretionary assessments in a rule 3.800 motion. *See Velez-Pizzini v. State*, 58 So. 3d 278, 279 (Fla. 5th DCA 2011) ("Because the appellant did not raise a substantive objection to [an] unpronounced, but otherwise unobjectionable special condition, it need not be stricken."); *Grubb v. State*, 922 So. 2d 1002 (Fla. 5th DCA 2006) (*en banc*) (holding that the defendant's due process rights regarding unpronounced special probation conditions were adequately protected by rule 3.800 and, thus, special conditions that were not orally pronounced during sentencing hearing, but were otherwise proper, were not required to be stricken from written probation order where defendant had notice of conditions in time to file a motion to correct sentence). The reasoning of these cases is equally applicable to alleged improper assessments imposed as fees, costs, and fines. As such, appellate review of the defendant's claims of error regarding his discretionary fees, costs, and fines were waived when he raised only procedural, and not substantive, claims in his 3.800 motion.

Osterhoudt v. State, 182 So. 3d 16, 17 (Fla. 5th DCA 2015). On July 8, 2016, the Court accepted jurisdiction of this case.

2. Statement of the Facts.

a. The State's Case in Chief.

Audra Taurozzi. Ms. Taurozzi, a 911 operator with the Hernando County Sheriff's Office, testified that on the evening of February 25, 2012, she received a 911 call from a man (Petitioner Osterhoudt) who stated that he had just shot his wife. (T3-376-78). During Ms. Taurozzi's testimony, the State played a recording of the 911 call. (T3-382-84).

Tony Aguiar. Mr. Aguiar, a detective with the Hernando County Sheriff's

Office, testified that he responded to the Osterhoudt residence on February 25, 2012. (T3-398-99). Detective Aguiar stated that when he arrived at the residence, he came into contact with Petitioner Osterhoudt and placed him in handcuffs. (T3-404-05).

Kenneth Carter. Mr. Carter, a deputy with the Hernando County Sheriff's Office, testified that he responded to the Osterhoudt residence on February 25, 2012. (T3-412). Deputy Carter stated that when he entered the residence, he found a female (Maria Osterhoudt) lying on the bathroom floor. (T3-418-19). Deputy Carter testified that he subsequently found a revolver in the bedroom (in one of the nightstand drawers). (T3-419). Deputy Carter stated that when he left the residence, he transported Petitioner Osterhoudt to the Hernando County Sheriff's Office. (T3-420).

William Hillman. Mr. Hillman, a detective with the Hernando County Sheriff's Office, testified that he responded to the Osterhoudt residence on February 25, 2012. (T3-429). Detective Hillman stated that after the paramedics arrived at the scene, they said that Maria Osterhoudt was dead. (T3-435).

Paul Smith. Mr. Smith, a deputy with the Hernando County Sheriff's Office, testified that he responded to the Osterhoudt residence on February 25, 2012. (T3-440). Deputy Smith stated that after he arrived at the residence, he took pictures of the scene. (T3-443-50).

Adam Harris. Mr. Harris, a deputy with the Hernando County Sheriff's Office, testified that he responded to the Osterhoudt residence on February 25, 2012. (T3-461). Deputy Harris stated that he came into contact with Petitioner Osterhoudt after Petitioner Osterhoudt was arrested, and Deputy Harris claimed that Petitioner Osterhoudt said "my life is over." (T3-463). On cross-examination, Deputy Harris acknowledged that Petitioner Osterhoudt "seemed distraught." (T3-465).

Clifton Gumbs. Mr. Gumbs, a friend of the Osterhoudts, stated that he called the Osterhoudt residence on the evening of February 25, 2012 (at approximately 9:15 p.m.) and he said that he talked to both Petitioner Osterhoudt and Maria Osterhoudt and both appeared to be fine (i.e., "friendly," "at ease," and "jovial"). (T3-469-70).

Cynthia Stockton. Ms. Stockton, a forensic specialist with the Hernando County Sheriff's Office, testified that on February 25, 2012, she went to the Hernando County Sheriff's Office to collect evidence from Petitioner Osterhoudt. (T3-480). Ms. Stockton stated that when she arrived at the sheriff's office, Petitioner Osterhoudt was located in "interview room B" and she proceeded to collect nail clippings and a buccal swab from Petitioner Osterhoudt (and during Ms. Stockton's testimony, a photograph of Petitioner Osterhoudt sitting in the "interview room" was introduced into evidence and provided to the jury). (T3-480-83/State's Exhibit 3). Ms. Stockton testified that after she left the sheriff's office, she responded to the

Osterhoudt residence and she videotaped the scene (and during Ms. Stockton's testimony, the video was played for the jury). (T3-487-92).

Angelique Lee. Ms. Lee, a forensic specialist with the Hernando County Sheriff's Office, testified that a couple of days after Maria Osterhoudt's autopsy, she responded to the medical examiner's office to collect some evidence (i.e., a projectile that was found in Mrs. Osterhoudt's body). (T3-510-14).

Kenneth Locke. Mr. Locke, a forensic specialist with the Hernando County Sheriff's Office, testified that he responded to the Osterhoudt residence on February 25, 2012, and he photographed the scene. (T4-526-27). During Mr. Foote's testimony, the prosecution introduced several photographs that were taken by Mr. Foote of the Osterhoudt residence and several items that were collected from the residence by law enforcement officials, including a Taurus 38 Special firearm (State's Exhibit 11) and a fired cartridge case (State's Exhibit 12). (T4-536-60).

Rosemary Jassoy. Ms. Jassoy, a firearms examiner with the Florida Department of Law Enforcement, testified that she examined State's Exhibit 11 (a Taurus 38 Special firearm) and State's Exhibit 12 (a fired cartridge case). (T4-597-604). Ms. Jassoy opined that State's Exhibit 12 was fired from State's Exhibit 11. (T4-605).

Wendy Lavezzi. Dr. Lavezzi, a medical examiner, testified that she conducted

the autopsy on Maria Osterhoudt. (T4-657). Dr. Lavezzi opined that the cause of Mrs. Osterhoudt's death was "a gunshot wound of the head." (T4-683).

Jill Morrell. Ms. Morrell, a detective with the Hernando County Sheriff's Office, testified that she executed a search warrant at the Osterhoudt residence during the early morning hours of February 26, 2012. (T5-725). Detective Morrell stated that during the search of the residence, she located a firearm (a Taurus 38 Special) in an open drawer in Petitioner Osterhoudt's bedroom. (T5-728). Detective Morrell testified that she observed Maria Osterhoudt's body lying on the bathroom floor and she saw a set of keys on the floor next to her right leg. (T5-729-30).

Melissa Lavigne. Ms. Lavigne, an analyst with the Florida Department of Law Enforcement, testified that she tested Maria Osterhoudt's fingernails for DNA and she stated that she "could not include or exclude Mr. Osterhoudt as a possible contributor" to foreign DNA that was found on Mrs. Osterhoudt's right fingernail clippings. (T5-811).

At the conclusion of Ms. Lavigne's testimony, the State rested. (T5-843).

b. Petitioner Osterhoudt's Case in Chief.

Petitioner Osterhoudt. Petitioner Osterhoudt, who was sixty-three years old at the time of his trial testimony, testified regarding the living arrangements in his house in 2012 (i.e., he and his wife slept in different bedrooms on different sides of

the house). (T5-855). Petitioner Osterhoudt explained that his wife normally used the bathroom that was close to her bedroom. (T5-862). Petitioner Osterhoudt stated that he and his wife would frequently drink, and he said that his wife would often take hydrocodone due to back pain. (T5-863-64).

Petitioner Osterhoudt testified that he owns a gun for personal protection, and he explained that he has a concealed weapons permit for his gun. (T5-864). Petitioner Osterhoudt stated that he kept his gun in the drawer in his bedroom. (T5-864-65).

Petitioner Osterhoudt testified that on February 25, 2012 (a Saturday), he and his wife were drinking throughout the day (he was drinking beer and she was drinking tequila). (T5-868-69). Petitioner Osterhoudt stated that earlier in the afternoon, he and his wife got into an argument, but the argument ended and Clifton Gumbs called their house (at approximately 9:15 p.m.). (T5-870-71). Petitioner Osterhoudt testified that after he talked to Mr. Gumbs, he gave the phone to his wife and he went into his bedroom to watch the television and he "dosed" off. (T5-873). Petitioner Osterhoudt stated that he was later awoken when their dog started barking. (T5-873). Petitioner Osterhoudt testified that he got out of bed to check on the dog and he subsequently heard a noise in his bathroom (a "bump" or "thump"). (T5-874). Petitioner Osterhoudt stated that the noise concerned him (i.e., he was worried there

may be an "intruder" in his bathroom) and therefore he obtained his gun and he went into the bathroom. (T5-874-75). Petitioner Osterhoudt explained that as he turned into the bathroom, he "got startled and the weapon discharged." (T5-875). Petitioner Osterhoudt testified that after the gun discharged, he realized that it was his wife who was in his bathroom. (T5-875).[2] Petitioner Osterhoudt stated that he bent down to render aid to his wife, but when he realized that she was not breathing, he called 911. (T5-878). Petitioner Osterhoudt clarified that when the shooting incident occurred, he was not having an argument with his wife (i.e., the argument ended before Mr. Gumbs called their house). (T5-883).

At the conclusion of Petitioner Osterhoudt's testimony, the defense rested. (T6-938). The State did not present any rebuttal witnesses.

c. Verdict.

The parties gave their closing arguments (T7-1010-1102) and the trial court instructed the jury. (T7-1102-27). The jury found Petitioner Osterhoudt guilty of the lesser offense of manslaughter. (T7-1137; R2-230).

[2] Petitioner Osterhoudt did not expect his wife to be in his bathroom because she normally used the bathroom next to her bedroom.

D. SUMMARY OF ARGUMENT

Petitioner Osterhoudt raises two claims in this brief. First, the trial court erred by failing to orally pronounce the discretionary fine during the sentencing hearing. As explained below, numerous decisions from other district courts have granted relief on this exact issue.

Second, the trial court erred by denying Petitioner Osterhoudt's motion for mistrial after a law enforcement officer impermissibly commented on Petitioner Osterhoudt's exercise of his right to remain silent. Detective Jill Morrell told the jury that "we [i.e., law enforcement officials] had not been able to get a statement from Alan." This testimony was "fairly susceptible" of being interpreted as a comment on Petitioner Osterhoudt's right to remain silent. "Comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial." *Kiner v. State*, 824 So. 2d 271, 272 (Fla. 4th DCA 2002) (citation omitted).

E. ARGUMENT AND CITATIONS OF AUTHORITY

1. Whether a trial court must individually announce a discretionary fine during a sentencing hearing.

a. Standard of Review.

"'Because a motion to correct a sentencing error involves a pure issue of law, our standard of review is *de novo*.'" *Salter v. State*, 77 So. 3d 760, 764 (Fla. 4th DCA 2011) (quoting *Kittles v. State*, 31 So. 3d 283, 284 (Fla. 4th DCA 2010)).

b. Argument.

i. Procedural background

During the sentencing hearing in this case, the trial court stated the following regarding the fine and costs:

> You will be sentenced to 30 years in the Department of Corrections, all [sic] be ordered to pay a fine and Court costs totaling –
>
> THE CLERK: Your Honor, approximately $956.
>
> THE COURT: One hundred dollars of that total will be payable to the State Attorney's Office as statutory cost of prosecution.
>
> I will order the additional payment of cost of prosecution in the amount of $440.98.
>
> I will order restitution on behalf of Raymond Carter payable to Crimes Compensation, the Crimes Compensation Trust Fund, claim number 2012-2298 in the amount of $5,000.

(T8-1175-76). On the judgment/Order Assessing Fees, Costs, and Fines, the trial court imposed a $300 "discretionary" fine pursuant to section 775.083(1), Florida

Statutes. (R2-275).[3]

Subsequently, Petitioner Osterhoudt challenged the discretionary fine (and the surcharge) in a Florida Rule of Criminal Procedure 3.800(b) motion. (SR-299). In the rule 3.800(b) motion, Petitioner Osterhoudt cited *Colson v. State*, 114 So. 3d 415 (Fla. 1st DCA 2013),[4] and argued that the discretionary fine should be stricken from the judgment because the discretionary fine was not individually/specifically pronounced during the sentencing hearing. The trial court failed to rule on Petitioner Osterhoudt's rule 3.800(b) motion within the sixty-day window afforded by rule 3.800(b) and therefore the motion was deemed denied. (SR-308, 321). Petitioner

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[3] The judgment/Order Assessing Fees, Costs, and Fines also imposes a $15 surcharge pursuant to section 938.04, Florida Statutes (a five-percent surcharge on the fine). (R2-275).

[4] In *Colson*, the First District Court of Appeal stated the following:

> We also strike portions of the judgment for fines, costs, fees, and surcharges. The trial court orally pronounced "costs and fines" of $1522.50 without delineating the specific costs and fines included in this amount. The written judgment and sentence included a discretionary fine of $1050 pursuant to section 775.083, Florida Statutes, and an associated five-percent surcharge pursuant to section 938.04, Florida Statutes. As the fine was discretionary, it was error of the trial court to impose the fine without specifically pronouncing it at sentencing. Because the fine was erroneously imposed, the surcharge under section 938.04, which is based on the amount of the fine, must also be reversed. *See Nix v. State*, 84 So. 3d 424, 426 (Fla. 1st DCA 2012).

Colson, 114 So. 3d at 417 (footnotes omitted).

Osterhoudt then presented this claim to the Fifth District Court of Appeal in his direct appeal briefs.

ii. The Fifth District Court of Appeal's decision.

In the decision below, the Fifth District Court of Appeal rejected Petitioner Osterhoudt's claim and held:

> Our court has held that a defendant waives his right to raise issues on direct appeal relating to a trial court's imposition of unpronounced conditions of probation if the defendant only raises "procedural and not substantive challenges" to those discretionary assessments in a rule 3.800 motion. *See Velez-Pizzini v. State*, 58 So. 3d 278, 279 (Fla. 5th DCA 2011) ("Because the appellant did not raise a substantive objection to [an] unpronounced, but otherwise unobjectionable special condition, it need not be stricken."); *Grubb v. State*, 922 So. 2d 1002 (Fla. 5th DCA 2006) (*en banc*) (holding that the defendant's due process rights regarding unpronounced special probation conditions were adequately protected by rule 3.800 and, thus, special conditions that were not orally pronounced during sentencing hearing, but were otherwise proper, were not required to be stricken from written probation order where defendant had notice of conditions in time to file a motion to correct sentence).[5]

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[5] In *Grubb*, the *en banc* Fifth District addressed a Florida Rule of Criminal Procedure 3.800(b) claim challenging an unannounced *condition of probation* and the Fifth District held:

> In the instant case, Grubb's counsel filed a timely rule 3.800(b) motion seeking to strike the unpronounced, but otherwise proper, conditions of probation contained in Grubb's probation order. When the trial court failed to rule on the motion within the requisite sixty days, the motion was deemed denied. Grubb asserts no substantive objections to the unpronounced probation conditions. *Grubb's only objection to the conditions of probation was the purported violation of procedural due process resulting from the failure to pronounce them at sentencing.*
>
> Because we find Grubb's procedural due process rights were

> The reasoning of these cases is equally applicable to alleged improper assessments imposed as fees, costs, and fines. As such, appellate review of the defendant's claims of error regarding his discretionary fees, costs, and fines were waived when he raised only procedural, and not substantive, claims in his 3.800 motion.

Osterhoudt v. State, 182 So. 3d 16, 17 (Fla. 5th DCA 2015) (footnote added).

iii. The lead Florida case on this issue: *Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995) (*en banc*)

The lead case on the issue of whether discretionary fines must be individually announced at a sentencing hearing is the Second District Court of Appeal's *en banc* decision in *Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995).[6] Writing for the entire Second District, Judge Altenbernd explained the reason for requiring trial courts to individually announce discretionary fines during sentencing hearings:

> So long as the statutes establish a complex system of mandatory and discretionary costs, coupled with fines and restitution to various victims, *all discretionary costs must be individually announced by the trial judge at sentencing to give the defendant an opportunity to object to the specific imposition*. Written cost orders must assess both mandatory and discretionary costs with adequate disclosure of the

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> adequately protected when she raised her concerns in her timely 3.800(b) motion, we affirm. In doing so, we recede from [our] cases holding that unpronounced, but otherwise unobjectionable, conditions of probation contained in probation orders must be stricken and cannot be reimposed.

Grubb, 922 So. 2d at 1004 (emphasis added) (footnote omitted).

[6] *Superseded by statute on other grounds*, § 938.15, Fla. Stat.

statutory authority supporting the assessment so that the defendant, the appellate court, and those responsible for collecting and remitting payments of costs and restitution will be able to identify the basis for the assessment.

. . . .

It is not uncommon for a criminal defendant to have caused injury that far exceeds his or her ability to pay. This is not a problem that should invoke much sympathy for the defendant. On the other hand, an order that imposes costs and restitution well beyond the defendant's ability to pay may have two undesirable results. First, a discretionary cost may have statutory priority over a victim's opportunity to collect restitution. Second, an overwhelming burden of costs and restitution may directly or indirectly cause a defendant on probation to commit acts that result in a violation of probation. If there is actually a chance that a defendant can be rehabilitated through probation, then there is reason for society to forgive some costs. *These policy concerns have caused the legislature to enact many discretionary costs that can only be imposed after case-specific consideration. Accordingly, this court has insisted that trial courts orally announce discretionary costs at sentencing hearings not only to avoid possible problems with due process, but also for other valid policy reasons.*

. . . .

Statutory costs that are "discretionary" are costs that the trial court may decide to impose or not to impose, depending upon the defendant's ability to pay and other circumstances involved in the case. The statutes place the defendant on notice that these costs are a possibility, but not a certainty. As such, the trial court must give the defendant notice of these costs at sentencing. Discretionary costs must be individually announced in a manner sufficient for the defendant to know the legal basis for the cost imposed. If the statute does not specify a dollar amount for the discretionary cost, the trial court must make certain that the defendant is on notice of the dollar amount assessed. The defendant must have an opportunity in open court to object to the imposition of these discretionary costs. If these costs are not separately

> identified in the cost order, the clerk of court cannot determine where to deposit payments as they are collected.

Reyes, 655 So. 2d at 114-16 (emphasis added) (footnotes omitted). For all of the reasons articulated in Judge Altenbernd's well-reasoned opinion in *Reyes*, the trial court in the instant case erred by failing to individually announce the discretionary fine that was ultimately imposed.

However, in the decision below, the Fifth District denied relief because the court distinguished between "procedural" and "substantive" challenges to discretionary fines. While this distinction may be valid in the context of unpronounced *conditions of probation*, *see Grubb v. State*, 922 So. 2d 1002 (Fla. 5th DCA 2006) (*en banc*), this distinction is not valid in the context of unpronounced *discretionary fines* – for all of the reasons articulated by Judge Altenbernd in *Reyes*.[7] A discretionary fine must be individually announced by the trial court at sentencing

[7] If the trial court fails to orally impose a condition of probation at the original sentencing hearing, double jeopardy principles *preclude* the trial court from subsequently imposing the condition in question. *See Snow v. State*, 157 So. 3d 559, 562 (Fla. 1st DCA 2015) ("Those conditions not orally pronounced at sentencing must be stricken because double jeopardy principles prevent them from being imposed at resentencing.") (citations omitted). In contrast, when the trial court fails to individually announce a discretionary fine, *the discretionary fine can be reimposed* at a resentencing hearing if the trial court follows the procedure set forth in *Reyes*. *See Ford v. State*, 167 So. 3d 518, 518 (Fla. 1st DCA 2015) ("On remand, the court may reimpose the discretionary fine and surcharge after following the appropriate procedures.") (citations omitted).

in order to give the defendant an opportunity to object to the specific imposition. Depending upon the defendant's ability to pay and other circumstances involved in the case, the trial court can decide to impose *or not to impose* the discretionary fine (and if a fine is imposed, how much to impose). By individually announcing the intention to impose a discretionary fine in open court, the defendant is afforded an opportunity to object to the imposition of the discretionary fine (or argue for a lower fine).

Thus, when a trial court fails to comply with *Reyes*, the appropriate vehicle to raise the claim is a rule 3.800(b) motion (which is exactly what Petitioner Osterhoudt did in the instant case). Upon the error being raised, the improperly assessed fine should be stricken and the matter should be remanded to the trial court to conduct a new sentencing hearing, where the trial court can consider – in open court in the presence of the defendant – the factors discussed in *Reyes*, and then the trial court can ultimately decide whether a fine should be imposed (and if a fine is imposed, the appropriate amount). *See Nix v. State*, 84 So. 3d 424, 426 (Fla. 1st DCA 2012) ("On remand, the trial court may reimpose the fine and surcharge after providing notice to Appellant and following the proper procedure.").

There are numerous decisions from other district courts that have granted relief on this exact issue – and none of those courts have distinguished between

procedural/substantive challenges to the monetary assessments in question. *See, e.g., Odom v. State*, 187 So. 3d 324 (Fla. 1st DCA 2016); *Aguirre v. State*, 159 So. 3d 1033 (Fla. 1st DCA 2015); *Talbot v. State*, 159 So. 3d 365 (Fla. 1st DCA 2015); *Boyington v. State*, 125 So. 3d 327 (Fla. 1st DCA 2013); *Colson v. State*, 114 So. 3d 415 (Fla. 1st DCA 2013); *Gant v. State*, 682 So. 2d 1137 (Fla. 2d DCA 1996); *Milhouse v. State*, 673 So. 2d 911 (Fla. 2d DCA 1996).[8]

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[8] Notably, in *Strong v. State*, 140 So. 3d 680, 681-82 (Fla. 5th DCA 2014), the Fifth District stated the following regarding the requirement that discretionary costs and fines be orally pronounced during a sentencing hearing:

> Jeremy Strong raises four claims, of which only the first has merit. We deny the petition as to claims two, three, and four without discussion. In his first claim, Strong argues that his appellate counsel was ineffective for failing to file a Florida Rule of Criminal Procedure 3.800(b)(2) motion to challenge his fees because the trial court imposed fees under repealed and renumbered statutes and *because Strong was not informed of his right to challenge the discretionary public defender fee*. We agree, grant the petition in part, and remand for the lower court to strike the fees and public defender fee without prejudice for the court to re-impose the fees after following the correct procedure.
>
> In November 2009, Strong was sentenced to fifteen years in prison after pleading *nolo contendere* to possession of a firearm by a felon, pursuant to a negotiated plea agreement. In the plea agreement, Strong agreed to pay fines and costs, but the agreement did not delineate specific fees or amounts. At sentencing, the trial court pronounced Strong's sentence by stating:
>
> > Be a two hundred and fifty dollar fine, plus costs assessed by the Clerk's Office, made a lien of record. Hundred dollars cost of prosecution, made a lien of record. Fifty dollars a day, cost of incarceration, made a lien of record. Seven hundred and fifty dollars for the Public Defender

Most recently, earlier this year, the Second District stated the following in *Williams v. State*, 41 Fla. L. Weekly D533, D533-34 (Fla. 2d DCA Mar. 2, 2016):

> Jeffrey Williams appeals his jury conviction for aggravated abuse
>
> ---
>
> made a lien of record.
>
> On the form used to delineate Strong's fees, many of the listed charges either fail to cite to statutory authority or cite to either incorrect, renumbered, or repealed statutory provisions. We strike the court's imposition of fees and costs and remand for the trial court to cite the correct statutory authority. *See Harrison v. State*, – So. 3d –, –, 39 Fla. L. Weekly D381, 2014 WL 594352, *2 (Fla. 1st DCA Feb. 17, 2014) (striking a fee for cost of prosecution and remanding for the court to cite statutory authority); *V.D. v. State*, 922 So. 2d 1037, 1038 (Fla. 5th DCA 2006) ("A trial court must provide a statutory basis for every cost imposed.").
>
> Furthermore, "[w]hile statutorily-mandated costs may be imposed without notice (and thus, need not be individually announced at sentencing), *discretionary costs or fines must be orally pronounced at sentencing in order to comport with due process requirements." Boyington v. State*, 125 So. 3d 327, 327-28 (Fla. 1st DCA 2013) (citations omitted). *The trial court must also advise the defendant of his right to contest the discretionary fee when it is orally imposed*. *Kirkland v. State*, 106 So. 3d 4, 5 (Fla. 1st DCA 2013) ("[T]he Public Defender fee should be struck because the trial court did not advise Appellant of his right to contest the fee when it was orally imposed." (citing § 938.29(5), Fla. Stat.; Fla. R. Crim. P. 3.720(d)(1))).
>
> Petition GRANTED in part; REMANDED with instructions.

(Emphasis added). Thus, in the instant case, Petitioner Osterhoudt did the *very thing* that the Fifth District in *Strong* concluded appellate counsel was ineffective for failing to do – he filed a rule 3.800(b) motion challenging his discretionary fine because he was not informed of his right to challenge the discretionary fine. Yet, the defendant in *Strong* was granted relief and the Fifth District in the instant case denied relief to Petitioner Osterhoudt.

of a disabled adult and the imposition of a $333 discretionary fine and 5 percent surcharge. *We reverse in part and remand with instructions for the circuit court to strike the discretionary fine pursuant to section 775.083, Florida Statutes (2011), and the five percent surcharge pursuant to section 938.04, Florida Statutes (2011), totaling $333. We do so because the circuit court failed to orally pronounce this discretionary statutory fine and surcharge at the sentencing hearing*. We affirm all other issues raised by Williams without comment.

On April 21, 2014, Williams was adjudicated guilty of aggravated abuse of a disabled adult and sentenced to seven years' imprisonment. At sentencing the circuit court orally pronounced the imposition of an aggregate fine of $1002. It is unclear, however, precisely how the circuit court derived that aggregate amount. *Importantly, though, the circuit court made no mention of the discretionary statutory fine and surcharge being challenged here*. A few weeks later, the circuit court entered the written Judgment for Fines and Costs, where it then became clear that the $1002 aggregate fine was, in part, made up of a discretionary fine and 5 percent surcharge, totaling $333.

Williams thereafter properly preserved a challenge to the imposition of that $333 fine and 5 percent surcharge by filing a motion to correct sentencing error, arguing in that motion, as he does here, that the discretionary statutory fine and surcharge should be struck because the circuit court neglected to specify them in its oral pronouncement. *Dadds v. State*, 946 So. 2d 1129, 1130 (Fla. 2d DCA 2006) (citing Fla. R. Crim. P. 3.800(b)(2)). Although the State agreed with the merits of the motion, the circuit court nonetheless denied Williams's request to correct that error.

A fine imposed pursuant to section 775.083 is discretionary *and must be orally pronounced*. *Dadds*, 946 So. 2d at 1130; *see also Lamoreaux v. State*, 88 So. 3d 379, 381 (Fla. 1st DCA 2012) ("A discretionary fine imposed and the statutory surcharge on the fine must be stricken if the discretionary fine was not orally pronounced at sentencing." (citing *Pullam v. State*, 55 So. 3d 674, 675 (Fla. 1st DCA 2011))). *Because the trial court did not make that oral pronouncement at the sentencing hearing, the discretionary fine and 5 percent surcharge totaling $333 cannot stand*. We thus reverse the $333 fine and surcharge and remand with directions that they be stricken. *Dadds*,

946 So. 2d at 1130.

Affirmed in part, reversed in part, remanded with directions to strike the $333 discretionary fine and 5 percent surcharge.

(Emphasis added). Petitioner Osterhoudt's case is indistinguishable from *Williams*. As in *Williams*, in Petitioner Osterhoudt's case, the trial court failed to orally pronounce the discretionary fine at the sentencing hearing. And as in *Williams*, Petitioner Osterhoudt filed a rule 3.800(b) motion arguing that the discretionary fine should be struck because the trial court neglected to specify it in its oral pronouncement (and in the words of the Fifth District, this was a "procedural" claim). Yet, the Fifth District below denied relief, but the Second District in *Williams* granted relief (and in granting relief, the Second District did *not* distinguish between procedural/substantive rule 3.800(b) challenges to the fine).[9]

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[9] As explained in footnote 5, the decision below adopted the alleged distinction between procedural and substantive rule 3.800(b) challenges from its earlier decision in *Grubb* – a case that concerned a rule 3.800(b) claim challenging an unannounced *condition of probation*. While the procedural/substantive distinction may be valid in the context of unpronounced *conditions of probation*, *see Grubb*, the distinction is not valid in the context of unpronounced *discretionary fines* – for all of the reasons articulated by Judge Altenbernd in *Reyes*. A discretionary fine must be individually announced by the trial court at sentencing in order to give the defendant an opportunity to object to the specific imposition. Depending upon the defendant's ability to pay and other circumstances involved in the case, the trial court can decide to impose *or not to impose* the discretionary fine (and if a fine is imposed, how much to impose). By individually announcing the intention to impose a discretionary fine in open court, the defendant is afforded an opportunity to object to the imposition of the discretionary fine (or argue for a lower fine). Hence, when a trial court fails to comply with *Reyes*, the appropriate vehicle to raise the claim is a rule 3.800(b) motion (which is exactly what Petitioner Osterhoudt did in the instant case). Upon the error

Accordingly, for all of the reasons set forth above, Petitioner Osterhoudt requests the Court to confirm that a trial court must individually announce a discretionary fine during a sentencing hearing – thereby giving the defendant notice of the intent to impose the discretionary fine and the opportunity to object to the discretionary fine. The decision below should be quashed. The $300 fine and the $15 surcharge must be stricken from the judgment because the discretionary fine was not individually/specifically pronounced during the sentencing hearing.

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being raised, the improperly assessed fine should be stricken and the matter should be remanded to the trial court to conduct a new sentencing hearing, where the trial court can consider – in open court in the presence of the defendant – the factors discussed in *Reyes*, and then the trial court can ultimately decide whether a fine should be imposed (and if a fine is imposed, the appropriate amount). *See Nix*, 84 So. 3d at 426 ("On remand, the trial court may reimpose the fine and surcharge after providing notice to Appellant and following the proper procedure.").

2. The trial court erred by denying Petitioner Osterhoudt's motion for mistrial after a law enforcement officer impermissibly commented on Petitioner Osterhoudt's exercise of his right to remain silent.

a. The Court has discretion to consider this claim.

Although this issue is not the one on which jurisdiction is based, the Court can and should address this issue under the Court's discretionary authority, as this issue was the most important issue of the trial.[10] *See Savoie v. State,* 422 So. 2d 308, 310 (Fla. 1982) ("[O]nce we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court.").

b. Standard of Review.

"A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review." *Fleurimond v. State*, 10 So. 3d 1140, 1149 (Fla. 3d DCA 2009).

c. Argument.

The record establishes that law enforcement officials transported Petitioner Osterhoudt from his residence to the Hernando County Sheriff's Office. (T3-420).

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[10] In the opinion below, the district court stated the following about this claim: "The defendant's contention that the trial court erred by denying his motion for mistrial is without merit." *Osterhoudt v. State*, 182 So. 3d 16, 17 (Fla. 5th DCA 2015).

During the State's case in chief, the State presented the testimony of Cynthia Stockton, a forensic specialist with the Hernando County Sheriff's Office, who testified that on February 25, 2012, she went to the Hernando County Sheriff's Office to collect evidence from Petitioner Osterhoudt. (T3-480). Ms. Stockton stated that when she arrived at the sheriff's office, Petitioner Osterhoudt was located in "interview room B" and she proceeded to collect nail clippings and a buccal swab from Petitioner Osterhoudt (*and during Ms. Stockton's testimony, a photograph of Petitioner Osterhoudt sitting in the "interview room" was introduced into evidence and provided to the jury*). (T3-480-83/State's Exhibit 3). Finally, the record establishes that Petitioner Osterhoudt was transported from the sheriff's office to the Hernando County Jail. (T5-745).

During its case in chief, the State also presented Detective Jill Morrell as a witness. During defense counsel's cross-examination of Detective Morrell, defense counsel was questioning Detective Morrell as to whether law enforcement officials had decided to charge Petitioner Osterhoudt with murder prior to conducting an investigation in this case (i.e., whether law enforcement officials prematurely made up their minds that the incident was a murder rather than an accident) and the following occurred:

> Q. Did you have any knowledge as to the whereabouts of Mr. Osterhoudt when you came back to the crime scene with the search

warrant?

A. Yes, I did.

Q. And where was he at?

A. He was at the Hernando County jail.

Q. Had he been formally charged with anything at that time, to your knowledge?

A. The paperwork had not been completed yet –

Q. Okay.

A. – because we were serving the search warrant.

Q. I understand. And who was the person that actually formally charged him from the law enforcement office of the Hernando county sheriff's office?

A. That was me.

Q. So, you actually, at some point later, actually formally charged him?

A. I drafted the arrest affidavit and sent – had taken it to the jail, yes.

Q. He, in fact, was under arrest at that time?

A. Yes.

Q. Prior to you doing the arrest warrant, he had already been arrested?

A. Yes.

Q. And what were the charges before you drafted up the charges?

A. It was second degree murder.

Q. So, he's already charged before you drafted up the papers charging him with second degree murder?

A. Based on the 911 call and based on the initial statements that I had from the deputies, yes.

Q. So, you said you only had the 911 tape. So, had you already made a decision this was a second degree murder case?

A. After speaking with the deputies and they determined what was in the house based on the 911 call, yes.

Q. Well, you didn't get into the house with the search warrant until about 3:30; right?

A. The deputies had been in the house and had visually seen the gun where he had said he put it.

Q. Okay. So, the initial ones, Deputy Smith and a couple of the ones that cleared –

A. Deputy May.

Q. – that cleared the house –

A. Correct.

Q. – and took the initial photographs, okay, pretty much their purpose of going through the house is not to search for anything or touch anything; right?

A. Correct.

Q. The purpose of them going in the house is to determine – to clear the house, make sure it's safe and check on anyone to see if they're alive or dead, or give any medical aid; right?

A. Correct.

Q. Okay. They had done that part?

A. Yes.

Q. And then they're instructed to immediately leave that house and sit and wait for you to get a search warrant?

A. They already had the information from the 911 tape and having – going through the house and searching it, the drawer in the master bedroom was open and the firearm was in plain sight where he said he had left it.

Q. So, pretty much the 911 tape dictated what charges would occur later on?

A. *Obviously, we would have liked to have gotten a statement, but at that point we had not been able to get a statement from Alan* so we had to go (indiscernible).

(T5-746-49) (emphasis added). After Detective Morrell improperly commented on Petitioner Osterhoudt's right to remain silent, defense counsel immediately moved for a mistrial (T5-749), but the trial court denied the motion. (T5-749-61). For the reasons set expressed below, the trial court erred by denying defense counsel's motion for mistrial after Detective Morrell impermissibly commented on Petitioner Osterhoudt's exercise of his right to remain silent.

A criminal defendant has a constitutional right against self-incrimination. *See* U.S. Const. amend. V; art. I, § 9, Fla. Const. Florida caselaw is clear that "[a]ny comment that is 'fairly susceptible' to interpretation as a comment on the defendant's

right to remain silent will be treated as such." *Mack v. State*, 58 So. 3d 354, 356 (Fla. 1st DCA 2011).

In *Parker v. State*, 124 So. 3d 1023, 1025 (Fla. 2d DCA 2013), the Second District Court of Appeal held:

> The due process clause of the Florida Constitution . . . guards against prosecutorial comments on a defendant's post-arrest silence. The standard for determining what constitutes a comment on post-arrest silence is fairly liberal. If the comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence. Thus, evidence or argument that is fairly susceptible of being deemed a comment on the right of silence should be excluded.

(Citation omitted).

Detective Morrell's testimony that "we would have liked to have gotten a statement, but at that point we had not been able to get a statement from Alan" was "fairly susceptible" of being interpreted as a comment on Petitioner Osterhoudt's right to remain silent. Notably, the "at that point" referenced by Detective Morrell was *after* the jury had already seen a picture (State's Exhibit 3) of Petitioner Osterhoudt in "interview room B." Thus, the jury was aware that Petitioner Osterhoudt had been in the "interview room" of the sheriff's office, and Detective Morrell proceeded to tell the jury that Petitioner Osterhoudt did *not* talk to law enforcement officials while he was in the "interview room" – even though, in her words, she "would have liked to have gotten a statement" from him. Based on

Detective Morrell's testimony, the jury likely wondered – improperly so – that if Petitioner Osterhoudt was innocent and the shooting was an accident, then he should have given a statement to law enforcement officials and told his side of the story when he was in the "interview room." Ultimately Detective Morrell's improper testimony vitiated Petitioner Osterhoudt's right to a fair trial.

This error was not harmless. The only issue for the jury to decide in this case was whether the shooting was an accident or a criminal act. This was a close case, as demonstrated by the fact that the jury did *not* find Petitioner Osterhoudt guilty as charged of second-degree murder. Petitioner Osterhoudt testified at trial and gave a compelling explanation that the shooting in this case was accidental.[11] Petitioner Osterhoudt's credibility was a key issue in this case, but – as explained above – because of Detective Morrell's prejudicial testimony, the jurors likely wondered why Petitioner Osterhoudt did not explain what happened when he was in the "interview room" at the sheriff's office. As recognized by the Fourth District in *Kiner v. State*, 824 So. 2d 271, 272 (Fla. 4th DCA 2002), "[c]omments on silence are high risk errors

[11] At trial, Petitioner Osterhoudt explained that he fired his gun after he was "startled" upon encountering what he believed was an intruder in his house. The evidence in this case supported Petitioner Osterhoudt's explanation. The last person to talk to the Osterhoudts (Clifton Gumbs) said that they both appeared to be fine (i.e., "friendly," "at ease," and "jovial"). Moreover, there was no DNA found underneath Mrs. Osterhoudt's fingernails, there was only one shot fired, and the trajectory of the bullet was consistent with Petitioner Osterhoudt's version of events.

because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial." (Citation omitted). Thus, the State cannot meet its burden of demonstrating that there is no reasonable possibility that the error contributed to the conviction. *See Ventura v. State*, 29 So. 3d 1086 (Fla. 2010) (holding that the test for determining whether officer's improper comment on defendant's exercise of his privilege against self-incrimination was harmless error was not whether defendant's guilt was otherwise demonstrated by overwhelming evidence, but whether there was no reasonable possibility that the error contributed to the conviction).

Accordingly, for all of the reasons set forth above, the trial court erred by denying defense counsel's motion for mistrial after Detective Morrell impermissibly commented on Petitioner Osterhoudt's exercise of his right to remain silent. The bell of Detective Morrell's improper testimony could not be "unrung." Petitioner Osterhoudt is entitled to a new and fair trial.

F. CONCLUSION

The appropriate remedy for claim 1 is to quash the district court's decision and to remand this case with directions that the erroneously imposed fine and surcharge be vacated. The appropriate remedy for claim 2 is to quash the district court's decision and to remand this case for a new trial.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief and the appendix have been furnished to:

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of the Petitioner complies with the type-font limitation.

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