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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

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REPLY BRIEF OF THE PETITIONER

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C. ARGUMENT AND CITATIONS OF AUTHORITY

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

As explained in the Initial Brief, the trial court in this case failed to individually announce the discretionary fine during the sentencing hearing. (T8-1175-76). In its Answer Brief, the State concedes that "[d]iscretionary costs or fines must be orally pronounced at sentencing in order to comport with due process requirements." Answer Brief at 11 (citing *Strong v. State*, 140 So. 3d 680, 681 (Fla. 5th DCA 2014)). Because the trial court in the instant case failed to orally/individually pronounce the discretionary fine during the sentencing hearing, Petitioner Osterhoudt filed a Florida Rule of Criminal Procedure 3.800(b) motion raising the error. As explained in the Initial Brief, *there are numerous decisions from other district courts that have granted relief on this exact issue after defendants have challenged the error in this exact manner*. *See, e.g., Odom v. State*, 187 So. 3d 324 (Fla. 1st DCA 2016); *Talbot v. State*, 159 So. 3d 365 (Fla. 1st DCA 2015); *Colson v. State*, 114 So. 3d 415 (Fla. 1st DCA 2013); *Nix v. State*, 84 So. 3d 424 (Fla. 1st DCA 2012). Most recently, earlier this year, the Second District stated the following in *Williams v. State*, 198 So. 3d 778, 778-79 (Fla. 2d DCA 2016):

> Jeffrey Williams appeals his jury conviction for aggravated abuse 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 stricken because the trial court neglected to specify it in its oral pronouncement. *In its Answer Brief, the State completely fails to acknowledge or distinguish Williams or any of the other cases cited above*.

In its Answer Brief, the State – as did the Fifth District below – attempts to distinguish between "procedural" and "substantive" challenges to discretionary fines. *See* Answer Brief at 13-15. As explained in the Initial Brief, 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*[1] – for all of the reasons articulated

[1] 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 properly announces the fine and puts the defendant on notice. *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

by Judge Altenbernd in *Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995).[2] Moreover, *none of the cases cited in the previous paragraph distinguished between procedural/substantive challenges to the monetary assessments in question* (i.e., in every single case, the unpronounced monetary assessment was challenged pursuant to rule 3.800(b), and in every single case, the court struck the monetary assessment).

Accordingly, for the reasons set forth above and contained in the Initial Brief – and consistent with all of the cases cited above – Petitioner Osterhoudt requests the Court to confirm that a trial court must individually announce a discretionary fine

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following the appropriate procedures.") (citations omitted).

[2] As explained 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).

In its Answer Brief, the State argues that *Reyes* was decided before the promulgation of rule 3.800(b) and then the State cites *Cook v. State*, 896 So. 2d 870 (Fla. 2d DCA 2005), for the proposition that "*Reyes* did not create common law regarding costs in criminal cases." Answer Brief at 14-15. But even in *Cook* – a case involving a challenge to a $100 county drug fund assessment and a $100 public defender fee – the Second District said that "Mr. Cook preserved the sentencing errors by filing a timely motion to correct sentencing error pursuant to Florida Rule of Criminal Procedure 3.800(b)(2)." *Cook*, 896 So. 2d at 871 n.2. And pursuant to the Second District's opinion in *Williams* from earlier this year (cited above), it is clear that the Second District is still applying Judge Altenbernd's rationale in *Reyes* to discretionary fines.

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.

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.

Petitioner Osterhoudt continues to rely on the arguments set forth in his Initial Brief in support of this claim. In its Answer Brief, the State asserts that "Detective Morrell's response did not indicate that police were unable to obtain a statement from Osterhoudt because he exercised his right to remain silent." Answer Brief at 20. Contrary to the State's assertion, 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"[3] 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

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[3] As explained by the Second District Court of Appeal in *Parker v. State*, 124 So. 3d 1023, 1025 (Fla. 2d DCA 2013):

> 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.

(Citation omitted).

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. The Fifth Amendment to the United States Constitution *prohibits* a jury from considering a criminal defendant's post-arrest silence when deciding whether the defendant is innocent guilty.

Next, the State asserts that Petitioner Osterhoudt is not entitled to relief because defense counsel declined the trial court's offer of a curative instruction. *See* Answer Brief at 21-22. In *Ayalavillamizar v. State*, 134 So. 3d 492, 498 (Fla. 4th DCA 2014), the Fourth District Court of Appeal held that a motion for mistrial is sufficient to preserve a claim for appeal – even if defense counsel declines a trial court's offer for a curative instruction:

> Here, appellant objected to the prosecutor's demonstration with the hammer and moved for a mistrial. This was sufficient to preserve the issue for appellate review. *Although the state cites cases finding a waiver of the issue where the defendant declined a trial court's offer of a curative instruction, in those cases there was no indication that defense counsel ever moved for a mistrial*. *See Diaz v. State*, 513 So. 2d

> 1045, 1049 (Fla. 1987); *Jean v. State*, 638 So. 2d 995, 997 (Fla. 4th DCA 1994); *Dormezil v. State*, 754 So. 2d 168, 170 (Fla. 5th DCA 2000). *If defense counsel believes that a curative instruction would be insufficient and requests a mistrial instead, the issue should be considered preserved*. *Cf. Henderson v. State*, 789 So. 2d 1016, 1018 (Fla. 2d DCA 2000) ("When any curative instruction would be insufficient, the trial court should grant a mistrial.").

(Emphasis added). In the instant case, defense counsel specifically stated "that is why I made the motion [for mistrial], because I don't think – anything that we do further from here would do more damage as far as a curative would be concerned." (T5-761). Pursuant to *Ayalavillamizar,* defense counsel's motion for mistrial sufficiently preserved this issue for appeal.[4]

The State also asserts that "defense counsel invited Detective Morrell's response." Answer Brief at 22. Contrary to the State's assertion, defense counsel did not "invite" Detective Morrell to comment on Petitioner Osterhoudt's right to remain silent – Detective Morrell should have known not to mention anything in front of the jury that could be construed as a comment on Petitioner Osterhoudt's right to remain silent. *See, e.g., Ventura v. State*, 973 So. 2d 634, 637 (Fla. 3d DCA 2008)[5] ("The lead detective is as much a member of the prosecution team as the [prosecutor].").

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[4] Notably, immediately after the trial court extended the offer to give a curative instruction, the trial court stated that a curative instruction is "going to create more of a problem than it will solve." (T5-761).

[5] *Rev'd on other grounds*, 29 So. 3d 1086 (Fla. 2010).

Finally, the State contends that "there is no reasonable possibility that Detective Morrell's comment contributed to the guilty verdict." Answer Brief at 23. Petitioner Osterhoudt disagrees. The only issue for the jury to decide in this case was whether the shooting was an accident or a criminal act. Detective Morrell's improper comment on Petitioner Osterhoudt's right to remain silent was highly improper and prejudicial. As recognized by the Fourth District Court of Appeal in *Kiner v. State*, 824 So. 2d 271, 272 (Fla. 4th DCA 2002), "[c]omments on silence are high risk errors because there is a *substantial likelihood* that meaningful comments will vitiate the right to a fair trial." (emphasis added) (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 in a case involving an officer's improper comment on the defendant's exercise of his privilege against self-incrimination, the question is not whether the 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 the reasons set forth above and contained in the Initial Brief, 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.

D. 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.

E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief has been furnished to:

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Respectfully submitted,

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F. CERTIFICATE OF COMPLIANCE

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

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