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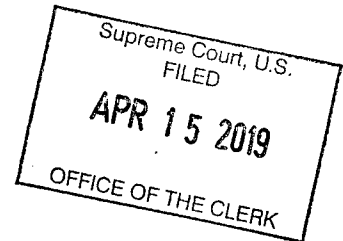
IN THE SUPREME COURT OF THE UNITED STATES

No: 18-11473-C

Matthew A. Castro,
Petitioner

Vs.

State of Florida,
Respondent.



ON PETITION FOR WRIT OF CERTIORARI TO ELEVENTH CIRCUIT
UNITED STATES COURT OF APPEAL, AND ORLANDO DIVISION
MIDDLE DISTRICT OF FLORIDA – UNITED STATES DISTRICT COURT.

PETITION FOR WRIT OF CERTIORARI

Matthew A. Castro
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Petitioner
In propia persona

QUESTION PRESENTED

In denying a certificate of appealability, the United States Court of Appeals for the Eleventh Circuit published a twenty-one (21) page opinion.

One of the issues – IV (f), at p. 14 (“Failure to Object to Prosecutor’s Allusions to Mr. Castro’s Silence”) – involves a violation of the due process clause that was underscored as a result of a violation of the right to effective assistance of counsel. See: *Castro v. Sec’y Dept. of Corrections*, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

A second issue – V (a), at p. 16 (“Exclusion of Post-Arrest Statements of Remorse”) – also involves a violation of due process, to the extent that, the omission of the remorseful statements affected the fundamental fairness of the trial. See: *Castro v. Sec’y Dept. of Corrections*, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

The United States Court of Appeal for the Eleventh Circuit, as to the first issue, unreasonably determined the facts of record and, as to the second issue, failed to substantiate a mere speculative conclusion with any clearly established case law.

Consequently, this case presents the following two questions:

1). Whether the United States Court of Appeal for the Eleventh Circuit erred by unreasonably determining the facts based on a misreading of the state records and, by failing to substantiate their opinion with decisional law?

2). Whether Castro's Constitutional rights, under the 5th and 6th Amendments, to due process of law and effective assistance of counsel were violated.

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TABLE OF AUTHORITIES

Castro v. Sec'y, Dep't of Corrections, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed. 2d 542 (2000).

Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034, 154 L. Ed. 2d 931 (2003),

Branch v. Sec'y, Fla. Dep't of Corr., 638 F.3d 1353, 1354 (11th Cir. 2011)

Doyle v. Ohio, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91 (1976))

Fugate v. Head, 261 F.3d 1206, 1223 (11th Cir. 2001)

Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634 (1986)

Fields v. Leapley, 30 F.3d 986 (8th Cir. 1994)

South Dakota v. Neville, 459 U.S. 553, 565, 74 L. Ed. 2d 748, 103 S. Ct. 916 (1983)

United States v. Belfast, 611 F.3d 783, 817 (11th Cir. 2010)).

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT**

Petitioner, Matthew A. Castro (“Castro”), respectfully suggests that a Writ of Certiorari should be granted to review the opinion of the United States Court of Appeal for the Eleventh Circuit, which denied a certificate of appealability on September 27, 2018. See: Castro v. Sec’y, Dep’t of Corrections, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

OPINION BELOW

The United States Court of Appeal for the Eleventh Circuit through a twenty-one (21) page opinion denied a certificate of appealability in Case No. 18-11473 (Appx. – “A”). The decision adopted the District Court’s (Middle District of Florida) opinion that “jurist of reason would not debate whether the District Court properly resolved Mr. Castro’s habeas petition.” See: Castro v. Sec’y, Dep’t of Corrections, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254, and Supreme Court Rule 10 (b), 10 (c) and 13 (3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Statutory and Constitutional provisions are involved in this

case.

UNITED STATES CONSTITUTIONAL AMENDMENT – V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTIONAL AMENDMENT – VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTIONAL AMENDMENT – XIV

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

Mr. Castro was part of a drug deal gone wrong. Later that same day, he took a gun and went to a hotel where he believed the other party to the deal was staying. He began knocking on doors. Lance Ulland opened one a few doors in. Mr. Castro asked Mr. Ulland if he had been in the parking lot earlier. Mr. Ulland said yes. Mr. Castro then put his gun to Mr. Ulland's head and shot him.

Three people, all-staying in Mr. Ulland's hotel room, witnessed the shooting. Steve Smith, Mr. Ulland's cousin, heard a knock on the door and saw Mr. Castro shoot her cousin when he opened it. Beau Smith, Steve's sister and Mr. Ulland's other cousin, heard and saw the same things. Kayce Heinmiller, Mr. Smith's girlfriend, was asleep when Mr. Castro knocked. She awoke to the sound of the gunshot and saw Mr. Castro standing in the doorway. Another person staying in the room, Shawn Hall, was just outside when the shooting happened.

Officers arrived on scene and arrested Mr. Castro. One, Officer Dane, asked Mr. Castro where to find the gun. Mr. Castro initially balked but eventually revealed its location. In a post-arrest interview, Mr. Castro expressed remorse about the shooting before invoking his right to remain silent.

The State charged Mr. Castro with first-degree murder, which requires premeditation. Fla. Stat. § 782.04(1) (a) (1). The case proceeded to trial. All three

eyewitnesses testified, and all three identified Mr. Castro as the shooter. A medical examiner testified Mr. Ulland had a contact gunshot wound to the head, consistent with someone putting a gun to Mr. Ulland's head.

The defense did not deny Mr. Castro shot Mr. Ulland., Instead, it advanced a theory that the shooting was accidental, the result of a muscle twitch in Mr. Castro's hand. It called a ballistics expert, Emanuel Kapelsohn, who testified to that effect. Mr. Castro took the stand in his own defense and testified that someone bumped him, causing his hand to twitch. The defense sought to elicit testimony about Mr. Castro's post-arrest statements expressing remorse, but the trial court excluded them as hearsay. The defense moved for a judgment of acquittal at the close of evidence. The court concluded there was enough evidence for a reasonable jury to find Mr. Castro premeditated the killing.

In closing argument, on top of summarizing the evidence, the prosecution used the gun and an autopsy photograph of Mr. Ulland's face to demonstrate how Mr. Castro would have shot Mr. Ulland. The defense objection was overruled.

The jury convicted Mr. Castro of first-degree murder. The trial judge imposed a life sentence. Fla. Stat. § 775.082(1) (a). On appeal, the Fifth District Court of Appeal affirmed without opinion. *Castro v. State*, 22 So. 3d 89 (Fla. 5th DCA 2009) (per curiam) (table).

PROCEDURAL BACKGROUND

Mr. Castro applied for postconviction relief in state court under Florida Rule of Criminal Procedure 3.850. He raised six claims.

The trial court ordered an evidentiary hearing on the third claim and denied the others. After the evidentiary hearing, the trial court also denied the third claim. The Fifth District Court of Appeals affirmed the denial without opinion. *Castro v. State*, 138 So. 3d 465 (Fla. 5th DCA 2014) (table).

After exhausting the state postconviction process, Mr. Castro filed a petition for habeas corpus in federal District Court under 28 U.S.C. § 2254, raising the same six ineffective assistance of counsel claims. He also raised three claims he exhausted on direct appeal.

As had the state courts; the District Court denied all of them. The United States Court of Appeal for the Eleventh Circuit also denied a certificate of appealability.

Mr. Castro now moves this Honorable Supreme Court for a writ of certiorari.

STANDARD OF REVIEW

The Supreme Court has said a certificate of appealability should issue if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529

U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed. 2d 542 (2000).

Castro respectfully suggests that he has made a substantial showing of the denial of a constitutional right sufficient to entitle him to the issuance of a certificate of appealability, at least with respect to two (" IV. f. Failure to Object to Prosecutor's Allusions to Mr. Castro's Silence", and " V. a. Exclusion of Post-Arrest Statements of Remorse") of his claims that were addressed by the United States Court of Appeal for the Eleventh Circuit. See: Castro v. Sec'y Dept. of Corrections, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

Castro respectfully posits that, he has demonstrated that jurists of reason could disagree with the United States Court of Appeal for the Eleventh Circuit's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further with respect to Claims: " IV. f. Failure to Object to Prosecutor's Allusions to Mr. Castro's Silence", and " V. a. Exclusion of Post-Arrest Statements of Remorse". See: *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034, 154 L. Ed. 2d 931 (2003), Vis-a-Vis, Castro v. Sec'y Dept. of Corrections, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeal for the Eleventh Circuit erred by denying a certificate of appealability on claims: " IV. f. Failure to Object to Prosecutor's Allusions to Mr. Castro's Silence", and " V. a. Exclusion of Post-Arrest Statements of Remorse".

IV. f. Failure to Object to Prosecutor's Allusions to Mr. Castro's Silence:

In denying a certificate of appealability the Eleventh Circuit Court acknowledged that, "the United States Supreme Court has clearly established that impeaching a defendant who has received Miranda warnings with the defendant's silence violates due process. *Branch v. Sec'y, Fla. Dep't of Corr.*, 638 F.3d 1353, 1354 (11th Cir. 2011) (citing *Doyle v. Ohio*, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91 (1976)); see *Fugate v. Head*, 261 F.3d 1206, 1223 (11th Cir. 2001). "

However, erroneously determined that: "*There was no error here because the prosecutor was not commenting on Mr. Castro's silence*". Contrary to the Court's rationale, the record reveals that, this is exactly what the prosecutor was doing. The record shows, as follows: On cross-examination, the prosecutor asked, "[A]nd it's correct that you never told anybody, anybody until today, that somebody bumped into your left side, which caused you to lose which caused the gun to go down, lose your balance, hit your right side on the door frame, and shoot Lance Ulland?" Mr. Castro responded, "*I told that to my attorney.*" The prosecutor

said, "Okay, I mean any police." Mr. Castro said, "No, ma'am, I did not." See: Castro v. Sec'y Dept. of Corrections, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

In closing argument, the prosecutor noted that Mr. Castro sat with police for over an hour on the scene and never said anything about it. Mr. Castro's counsel did not object to the question or to the closing. As such, this failure was ineffective under the Florida and United States Constitutions. See: *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634 (1986), (United States Supreme Court affirmed. In an opinion by Stevens, J., in which Brennan, White, Marshall, Blackmun, Powell, and O'Connor, JJ., joined, it was held that the use of the accuser's silence after receiving Miranda warnings as evidence of his sanity **violated the due process clause of the Fourteenth Amendment**). See Also: *Fields v. Leapley*, 30 F.3d 986 (8th Cir. 1994), explaining that: the prosecutor twice violated *Doyle* in his closing argument. In *Doyle*, the Supreme Court held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violates the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. This rule rests on "the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield*, 474 U.S. 284, 291, 88 L. Ed. 2d 623, 106 S. Ct.

634 (1986) (quoting *South Dakota v. Neville*, 459 U.S. 553, 565, 74 L. Ed. 2d 748, 103 S. Ct. 916 (1983)).

Accordingly, the Eleventh Circuit Court erred in denying a certificate of appealability.

V. a. Exclusion of Post-Arrest Statements of Remorse:

In denying a certificate of appealability on the spontaneous utterance statements or excited utterances the Eleventh Circuit Court made an **unsubstantiated finding**, stating that: " *Mr. Castro made his statements some two hours after the shooting, when, the trial court concluded, Mr. Castro was no longer under the stress of excitement*". See: *Castro v. Sec'y Dept. of Corrections*, 2018 U.S. App. LEXIS 27676 (11th Cir. 2018).

However, this is patently contrary to the established case law. See: *U.S. v. DeLeon*, 287 F. Supp. 3d 1187; 2018 US Dist LEXIS 36992 2018 U.S. Dist. LEXIS 36992, stating: "**There is no precise amount of time between the event and the statement beyond which the statement cannot qualify as an excited utterance. Admissibility hinges on a statement's contemporaneousness with the excitement a startling event causes, not the event itself. There is no hard time limit that must be met under Rule 803; what is relevant is whether the declarant is still under the excitement of the startling event.**"

"An excited utterance is a statement "relating to a startling event or

condition, made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2). **The statement need not be made at the precise time of the startling event to qualify as a present sense impression;** rather, courts consider the totality of the circumstances in determining whether the declarant was still experiencing stress or excitement caused by the startling event at the time the statement was made". See Holmes, 498 F. App'x at 924-24 (citing *United States v. Belfast*, 611 F.3d 783, 817 (11th Cir. 2010)).

Accordingly, the Eleventh Circuit Court erred in denying a certificate of appealability.

CONCLUSION

WHEREFORE, Castro respectfully suggests that a writ of certiorari may issue.

Respectfully Submitted,



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