

No. \_\_\_\_\_

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IN THE

**SUPREME COURT OF THE UNITED STATES**

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ALAN OSTERHOUDT, JR.,  
*Petitioner,*

v.

RICKY D. DIXON,  
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,  
*Respondent.*

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**On Petition for Writ of Certiorari  
to the Eleventh Circuit Court of Appeals**

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**PETITION FOR WRIT OF CERTIORARI**

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## **A. QUESTION PRESENTED FOR REVIEW**

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that his Fifth Amendment right against self-incrimination was violated when law enforcement officers informed the jury that “we would have liked to have gotten a statement, but at that point we had not been able to get a statement from [the Petitioner].”

## **B. PARTIES INVOLVED**

The parties involved are identified in the style of the case.

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The Petitioner, ALAN OSTERHOUDT, JR., requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on September 5, 2023. (A-3).<sup>1</sup>

#### **D. CITATION TO ORDER BELOW**

The order below was not reported.

#### **E. BASIS FOR JURISDICTION**

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment/order of the Eleventh Circuit Court of Appeals.

#### **F. CONSTITUTIONAL PROVISION INVOLVED**

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”

#### **G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS**

##### **1. Statement of the Case.**

In 2012, the Petitioner was charged in Hernando County, Florida, with one count of second-degree murder. The incident that was the basis for the charge occurred

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<sup>1</sup> References to the appendix to this petition will be made by the designation “A” followed by the appropriate page number.

on February 25, 2012. The victim of the offense was the Petitioner's wife (Maria Osterhoudt).

The case proceeded to a jury trial in September of 2013. At trial, the Petitioner explained that he shot his wife by mistake – i.e., he shot who he believed was an intruder, not realizing that the person in question was actually his wife.<sup>2</sup>

During the trial, defense counsel moved for a mistrial after a law enforcement officer commented on the Petitioner's right to remain silent, but the state trial court denied the motion for mistrial. At the conclusion of the trial, the jury found the Petitioner guilty of the lesser offense of manslaughter.

The Petitioner was sentenced on October 29, 2013. The state trial court sentenced the Petitioner to thirty years' imprisonment.<sup>3</sup>

On direct appeal to the Florida Fifth District Court of Appeal, the Petitioner argued that the state trial court erred by denying his motion for mistrial after a law

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<sup>2</sup> At the time of this incident, the Petitioner and his wife had a strained relationship which resulted in them sleeping in separate wings of the home. On the night of the incident, the Petitioner was sleeping in the master bedroom when he was awoken to the sound of someone entering the master bathroom from the outside of the residence. Because neither the Petitioner nor his wife customarily used the outside entrance into the master bathroom, the Petitioner became alarmed and armed himself with a firearm. Upon entering the master bathroom, the Petitioner observed a figure in the dark and – upon raising his firearm – accidentally discharged with one shot. Upon turning on the lights in the bathroom, he realized it was his wife and he immediately called 911 to advise of the situation.

<sup>3</sup> Even though the jury found the Petitioner guilty of the lesser offense of manslaughter – an offense that normally carries a maximum sentence of fifteen years' imprisonment – the Petitioner's maximum sentence was increased to thirty years' imprisonment because the offense involved the use of a firearm (and the state trial court imposed the maximum sentence).

enforcement officer impermissibly commented on his exercise of his right to remain silent. On October 16, 2015, the Florida Fifth District affirmed the Petitioner's conviction and sentence. *See Osterhoudt v. State*, 182 So. 3d 16 (Fla. 5th DCA 2015).

The Petitioner subsequently filed a petition pursuant to 28 U.S.C. § 2254. In his § 2254 petition, the Petitioner argued the same claim that he previously presented on direct appeal (i.e., the state trial court erred by denying the Petitioner's motion for mistrial after a law enforcement officer impermissibly commented on his exercise of his right to remain silent). On November 30, 2022, the district court issued an order denying the Petitioner's § 2254 petition. (A-6). A separate judgment denying the § 2254 petition was also issued on November 30, 2022. (A-5).

The Petitioner appealed the denial of his § 2254 motion. On September 5, 2023, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 petition. (A-3).

**2. Statement of the Facts (i.e., the facts presented during the trial).**

**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 (the Petitioner) who stated that he had just shot his wife. During Ms. Taurozzi's testimony, the State played a recording of the 911 call.

**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. Detective Aguiar stated that when he arrived at the residence, he came into contact

with the Petitioner and placed him in handcuffs.

**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. Deputy Carter stated that when he entered the residence, he found a female (Maria Osterhoudt) lying on the bathroom floor. Deputy Carter testified that he subsequently found a revolver in the bedroom (in one of the nightstand drawers). Deputy Carter stated that when he left the residence, he transported the Petitioner to the Hernando County Sheriff's Office.

**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. Detective Hillman stated that after the paramedics arrived at the scene, they said that Maria Osterhoudt was dead.

**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. Deputy Smith stated that after he arrived at the residence, he took pictures of the scene.

**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. Deputy Harris stated that he came into contact with the Petitioner after the Petitioner was arrested, and Deputy Harris claimed that the Petitioner said "my life is over." On cross-examination, Deputy Harris acknowledged that the Petitioner "seemed distraught."

**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 the Petitioner and Maria Osterhoudt and both appeared to be fine (i.e., “friendly,” “at ease,” and “jovial”).

**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 the Petitioner. Ms. Stockton stated that when she arrived at the sheriff’s office, the Petitioner was located in “interview room B” and she proceeded to collect nail clippings and a buccal swab from the Petitioner (and during Ms. Stockton’s testimony, a photograph of the Petitioner sitting in the “interview room” was introduced into evidence and provided to the jury). 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).

**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).

**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. During Mr. Locke’s testimony, the prosecution introduced several photographs that were taken by Mr. Locke 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).

**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). Ms. Jassoy opined that State's Exhibit 12 was fired from State's Exhibit 11.

**Wendy Lavezzi.** Dr. Lavezzi, a medical examiner, testified that she conducted the autopsy on Maria Osterhoudt. Dr. Lavezzi opined that the cause of Mrs. Osterhoudt's death was "a gunshot wound of the head."

**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. Detective Morrell stated that during the search of the residence, she located a firearm (a Taurus 38 Special) in an open drawer in the Petitioner's bedroom. 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.

**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 the Petitioner as a possible contributor" to foreign DNA that was found on Mrs. Osterhoudt's right fingernail clippings.

At the conclusion of Ms. Lavigne's testimony, the State rested.

**b. The Petitioner's Case in Chief.**

**The Petitioner.** The Petitioner, 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). The Petitioner explained that his wife normally used the bathroom that was close to her bedroom. The Petitioner stated that he and his wife would frequently drink, and he said that his wife would often take hydrocodone due to back pain.

The Petitioner testified that he owns a gun for personal protection, and he explained that he has a concealed weapons permit for his gun. The Petitioner stated that he kept his gun in the drawer in his bedroom.

The Petitioner 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). The Petitioner 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.). The Petitioner 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. The Petitioner stated that he was later awoken when their dog started barking. The Petitioner 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”). The Petitioner 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. The Petitioner explained that as he turned into the bathroom, he “got startled and the

weapon discharged.” The Petitioner testified that after the gun discharged, he realized that it was his wife who was in his bathroom.<sup>4</sup> The Petitioner stated that he bent down to render aid to his wife, but when he realized that she was not breathing, he called 911. The Petitioner clarified that when the shooting incident occurred, he was not having an argument with his wife (i.e., the argument ended before Mr. Gums called their house).

At the conclusion of the Petitioner’s testimony, the defense rested. The State did not present any rebuttal witnesses.

**c. Verdict.**

The parties gave their closing arguments and the state trial court instructed the jury. The jury found the Petitioner guilty of the lesser offense of manslaughter.

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<sup>4</sup> The Petitioner did not expect his wife to be in his bathroom because she normally used the bathroom next to her bedroom.

## H. REASON FOR GRANTING THE WRIT

**The question presented is important.**

The issue in this case is whether the Petitioner’s Fifth Amendment right against self-incrimination was violated when law enforcement officers informed the jury that “we would have liked to have gotten a statement, but at that point we had not been able to get a statement from [the Petitioner].” The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” The Petitioner contends that the Eleventh Circuit erred by denying him a certificate of appealability on his Fifth Amendment claim. As explained below, the Petitioner has made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

The record establishes that law enforcement officials transported the Petitioner from his residence to the Hernando County Sheriff’s Office. 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 the Petitioner. Ms. Stockton stated that when she arrived at the sheriff’s office, the Petitioner was located in “interview room B” and she proceeded to collect nail clippings and a buccal swab from the Petitioner (*and during Ms. Stockton’s testimony, a photograph of the Petitioner sitting in the “interview room” was introduced into evidence and provided to the jury*). Finally, the record establishes that the Petitioner was transported from the

sheriff's office to the Hernando County Jail.

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 the Petitioner 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).*

(A-20-23) (emphasis added). After Detective Morrell improperly commented on the Petitioner's right to remain silent, defense counsel immediately moved for a mistrial, but the state trial court denied the motion.

A criminal defendant has a constitutional right against self-incrimination. *See* U.S. Const. amend. V. "Any 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).

Once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised. *See Griffin v. California*, 380 U.S. 609 (1965). “[T]he use . . . of [a defendant’s] silence, at the time of arrest and after receiving *Miranda*<sup>5</sup> warnings, violate[s] the Due Process Clause” of the Constitution. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (footnote added).

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 [the Petitioner]” amounted to a comment on the Petitioner’s right to remain silent. Notably, the “at that point” referenced by Detective Morrell was *after* the jury had already seen a picture of the Petitioner in “interview room B.” Thus, the jury was aware that the Petitioner had been in the “interview room” of the sheriff’s office, and Detective Morrell proceeded to tell the jury that the Petitioner 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 the Petitioner 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 the Petitioner’s right to a fair trial.

The only issue for the jury to decide in this case was whether the shooting was

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<sup>5</sup> *Miranda v. Arizona*, 384 US. 436 (1966).

an accident or a criminal act. This was a close case, as demonstrated by the fact that the jury did *not* find the Petitioner guilty as charged of second-degree murder. The Petitioner testified at trial and gave a compelling explanation that the shooting in this case was accidental.<sup>6</sup> The Petitioner’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 the Petitioner did not explain what happened when he was in the “interview room” at the sheriff’s office. “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). Hence, the state trial court erred by denying defense counsel’s motion for mistrial after Detective Morrell impermissibly commented on the Petitioner’s exercise of his right to remain silent. The bell of Detective Morrell’s improper testimony could not be “unrung.”

The state courts’ rulings in this case were contrary to and an unreasonable application of the Petitioner’s Fifth Amendment rights. Additionally, the state courts’ rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

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<sup>6</sup> At trial, the Petitioner 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 the Petitioner’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 the Petitioner’s version of events.

In its order denying this claim, the district court cited the “fairly susceptible” language from *Mack* and stated:

[T]he “fairly susceptible” standard is inapplicable in this federal action because a federal court does not enforce state law.

(A-17). Contrary to the district court’s assertion, “[i]t is blackletter law that a trial counsel may not comment on the accused’s exercise of his constitutionally protected rights, including his right to remain silent.” *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). *See also United States v. Elkins*, 774 F.2d 530, 538 (1st Cir. 1985) (holding that the Government could not comment on the accused’s silence and concluding that it was plain error where the Government witness testified as to the defendant’s lack of surprise at the time of his arrest).<sup>7</sup>

For all of these reasons, the Petitioner submits that he has made “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The Petitioner’s claim is a matter debatable among jurists of reason. Therefore, the Eleventh Circuit should have granted a certificate of appealability for this claim (i.e., whether the Petitioner’s Fifth Amendment right against self-incrimination was violated when law enforcement officers informed the jury that “we would have liked to have gotten a statement, but at that point we had not been able to get a statement from [the Petitioner].”).

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<sup>7</sup> In *Elkins*, the First Circuit Court of Appeals interpreted the testimony and the prosecutor’s subsequent use of the evidence as an impermissible comment on the defendant’s constitutional right to remain silent, and not as permissible “descriptive demeanor evidence.” *Elkins*, 774 F.2d at 538-539.

To be entitled to a certificate of appealability, the Petitioner needed to show only “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court’s conclusion. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

## **I. CONCLUSION**

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

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