IN THE SUPREME COURT OF FLORIDA

KENNETH LOUIS DESSAURE, :

Appellant, :

vs. : Case No. SC02-286

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On August 26, 1999, the Pinellas County Grand Jury indicted the appellant, Kenneth Louis Dessaure, Jr., for the first-degree premeditated murder of Cindy Riedweg on February 9, 1999. [V1 1-2][1] Dessaure was tried by jury before Circuit Judge Brandt C. Downey III on August 28 through September 5, 2001. [V25 1; V37 1716] Defense counsel moved to preclude the death penalty on the ground that the state did not allege aggravating circumstances in the indictment. The court denied the motion. [V25 29-35; SR 1-13] The jury found Dessaure guilty of first-degree murder as charged. [V23 4201; V37 1817] The court adjudicated him guilty. [V24 4366; V37 1819]

At a hearing on September 6, 2001, defense counsel filed Dessaure's signed, written waiver of his right to present mitigating evidence to the jury. [V24 4310-11; V37 1827] The court inquired to determine that the waiver was knowing, voluntary, and against advice of counsel. [V37 1829-32] The penalty phase trial was conducted without a jury on September 11, 2001. [V38 1840-1926] Dessaure filed a signed, written waiver of argument in favor of a life sentence during the penalty phase. [V24 4313; V38 1847-48] Defense counsel filed a motion for new trial on September 17, 2001. [V24 4408-09] Both parties presented evidence at a Spencer hearing[2]

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[1] References to the record on appeal are designated by V and the volume number followed by the page number(s). References to the supplemental record are designated by SR followed by the page number(s).

[2] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

conducted on October 15, 2001. [V24 4424-73] Both parties filed sentencing memoranda. [V24 4333-34, 4337-49] A presentence investigation report was prepared. [SR 14]

On October 26, 2001, the court sentenced Dessaure to death. [V24 4358-65, 4367-94] The court found four aggravating circumstances had been proven beyond a reasonable doubt: 1. The capital felony was committed by a person previously convicted of a felony, conspiracy to commit armed robbery, and placed on community control (some weight). [V24 4358-59] 2. The defendant was previously convicted of a felony involving the use or threat of violence, resisting arrest with violence (little weight). [V24 4359] 3. The capital felony was committed during the course of a burglary (great weight). [V24 4359-60] 4. The capital felony was especially heinous, atrocious, and cruel (very great weight). [V24 4360-61] The court found that five mitigating circumstances had been established: 1. The defendant was 21 years old (some weight). [V24 4362] 2. The defendant has the capacity and desire to be a loving parent (little weight). [V24 4362] 3. The defendant's family life was dysfunctional while he was growing up, his parents abandoned him to be raised by his grandmother, and his older brother died in a traffic accident (some weight). [V24 4362-63] 4. The defendant has the capacity to form personal relationships (little weight). [V24 4363] 5. The defendant was well behaved in court (little weight). [V24 4363]

Defense counsel filed a notice of appeal to the Second District Court of Appeal on December 17, 2001. [V24 4411] The trial court

denied the motion for new trial on December 19, 2001. [V24 4405] Defense counsel filed an amended notice of appeal to this Court on February 6, 2002 [V24 4422], and a second amended notice of appeal to this Court on February 11, 2001. [V24 4423]

STATEMENT OF THE FACTS

Opening Statement

During opening statement, the prosecutor said,

> In this particular case, as Kenneth Dessaure said himself, there is only two people that know exactly what occurred in that apartment. So, therefore, it is my job to take the physical evidence, the scientific evidence, the photographs, the witnesses' statements, experts, scientists, forensic technicians, and reconstruct what occurred for you.

[V27 350] Defense counsel objected and moved for a mistrial on the ground that the prosecutor had commented on Dessaure's right to remain silent, and Dessaure would not testify. [V27 350-51] The prosecutor responded that the evidence would show that Dessaure said, "there is only two people that know, her and me." The court denied the motion for mistrial. [V27 351]

The State's Case

Kenneth Dessaure lived with Amy Cockrell and Tim Connole in apartment 1307 of the Village at Countryside at 1307 Amanda Lane in Oldsmar in Pinellas County. [V27 414, 452; V28 489-91, 514-16] Cindy Riedweg moved into apartment 1308 next door to them on the weekend of Super Bowl Sunday in 1999. [V28 492, 518; V29 695, 705-06] Both Dessaure and Connole commented on how pretty Riedweg was.

[V28 493, 519] Sometimes she sunbathed on a chair in front of her apartment. [V28 494, 525] Neither Cockrell nor Connole was aware of Dessaure having any social relationship with Riedweg or of him having been inside her apartment. [V28 493-94, 520]

Riedweg was a CNA at the Harborside Nursing Home. [V29 759-60] She had a relationship with a boyfriend named Stuart Cole, who was married to another woman. [V29 702-04, 710] Riedweg's friend Doreen Cosenzino, Donald Cambensy, and workers sent by Cole helped her move in. [V29 700, 704-07; V30 893-94] Riedweg did not smoke and refused to allow Cole or Cosenzino's husband to smoke in her apartment. [V29 708-09]

On February 9, 1999, Cockrell left her apartment at 8:00 a.m. Dessaure, Connole, and Connole's friend Ivan Hup were there when she left. [V28 495-96, 522-24] Connole and Hup went out for lunch around noon, leaving Dessaure alone in the apartment. [V28 524-25] Before they left, Connole heard some guy ranting and raving on a cell phone outside his apartment. [V28 550] Connole did not hear what the man said. He did not see the man when they departed. [V28 551]

Steven Way lived in the apartment at 1309 Amanda Lane. Although he did not know Riedweg, he was aware that a girl had moved into the apartment next door a couple of weeks before. [V27 437-38] On the afternoon of February 9, 1999, Way went to the store for about 20 to 30 minutes. [V27 438] When he returned, he noticed a lawn chair and telephone on the sidewalk. Nobody was around and everyone's doors were closed. He went into his apartment, leaving the

door open. [V27 439-41] He did not hear any unusual noises. [V27 441]

John Hayes lived in the apartment at 1408 Amanda Lane on February 9, 1999. As he left his apartment to go to work around 3:30 p.m., he encountered a young, tall, thin African-American man in the parking lot. He had seen the man in the complex before. [V27 447-49] The man was wearing shorts, but no shirt. [V27 450, 461] Hayes first saw the man walking on the sidewalk in front of the last apartment in building 13. When they reached the middle of the parking lot, the man motioned him over. [V27 451] In court, Hayes identified a photo, State Exhibit 7 [V27 449], and Dessaure as the man he saw. [V27 452] Dessaure told him he thought there was someone dead or dying in the apartment. Hayes asked how he knew. Dessaure said he went there for ice and looked in. He acted nervous. His left hand was balled up. Hayes told him to call 911. [V27 452-53, 46] Dessaure went to the back side of the apartments. [V27 454]

Donna Biem, a 911 supervisor, received a call from 1308 Amanda Lane at 3:35 p.m. on February 9, 1999. [V27 464-66] Biem transferred the call to Antoinette Maglione, a 911 operator for the Sheriff's Office, at 3:37 p.m. [V27 468, 475-78] The Advanced Life Support unit arrived at the scene at 3:39 p.m. [V27 467]

A tape recording of the 911 call was played for the jury. [V27 472-74, 480-83] Dessaure reported that his next door neighbor was dead in apartment 1308 of the Village at Countryside at 1308 Amanda Lane in Oldsmar. [V27 472-74] He said he walked over to see if Cindy had some ice. She was sunbathing. Her phone was outside. He

opened the door. She was lying in the middle of her hallway naked. Dessaure said he asked a "home boy" to help, but he would not come over. Dessaure used her phone to call the police. [V27 473] The operator asked him to stay on the line while she transferred the call to the Sheriff's Office. [V27 474]

When the Sheriff's Office operator took over the call, Dessaure repeated that his next door neighbor was dead at 1308 Amanda Lane. The operator asked how, and he replied that he did not know. Dessaure then said, "Ow. Fuck." The operator asked what was going on. [V27 480] He replied that he just cut his finger while washing his dishes. In response to further questions, Dessaure said that he had not touched his neighbor, his name was Kenny, and he lived next door. He explained that he was cleaning his house and saw her outside sunbathing. He went next door to see if she had some ice. Her stuff was outside, so he figured she was in the bathroom. He knocked on the door, but did not receive an answer. The door was unlocked, so he went in. She was lying in the middle of the hallway. [V27 481] He did not know if she was breathing. [V27 481-82] He did not walk up to her. He just walked out of the house. He went to the boy who was standing outside. Dessaure just cut his finger. He had not seen anyone unusual. His neighbor's name was Cindy. [V27 482] He guessed that she was between 28 and 35 years old. [V27 482-83]

Paramedic Greg Newland was dispatched to 1308 Amanda Lane at 3:35 p.m. on February 9, 1999. [V27 376-79] He, Captain Robert Carman, and EMT Jill Manines arrived at 3:39 p.m. [V27 379] Newland

identified a photo of the apartment complex, State Exhibit 11, and a close-up photo of building 13, State Exhibit 9. [V27 381-82] The man shown in State Exhibit 7 (Dessaure) met them and led them to the apartment. The back of his shirt appeared to be wet. [V27 383-84, 408-09] Dessaure said he went over to borrow some ice and found his neighbor on the floor. He wasn't sure what was wrong with her. [V27 385] Newland saw a lounge chair outside the apartment and a telephone lying beside the chair. [V27 385-86]

Newland entered the living room of the apartment and found a woman lying on the floor in a pool of blood. Carman escorted Dessaure out of the apartment, while Newland and Manines went to check on the woman. [V27 387, 390] The woman was lying on her front with her arms tucked under her body. There were stab wounds to her upper back and shoulder. Newland found no pulse or breathing. The body was still warm. [V27 391] He placed EKG leads on her back and obtained a reading showing a pulseless electrical activity rate of 30, which indicated that the heart was still conducting electricity but was not pumping. [V27 392-94] That electrical activity was not sufficient to sustain life; she was already dead. [V27 407] Newland called a doctor on a portable radio. While he was talking to her, the electrical activity fell to flat line. The doctor told Newland to roll the body over. He then found that her throat had been slashed. [V27 395] He pronounced her dead at 3:41 p.m., two minutes after they arrived. [V27 402, 407-08]

Newland and Manines remained at the front door of the apartment to prevent anyone from entering. Carman cordoned off the area with

fire scene tape. [V27 403] Dessaure approached them several times, asking them if the woman was all right and what was wrong with her. He seemed anxious. Newland saw Dessaure go up to several apartments and talk to other people from the complex who gathered at the scene. [V27 404]

Sheri Rodrigues had borrowed John Hayes' car. [V 448-49] She drove up in the car about the same time that the paramedics arrived.[3] Hayes went to his car and sat down to put on his work boots. [V27 455, 457-58] Dessaure came up and asked him for a cigarette. Hayes told him he did not smoke. [V27 455] Afterwards, Hayes saw Dessaure smoking a cigarette in the parking lot. [V27 455-56] Hayes went to work. He returned around 10:00 p.m. and spoke to law enforcement officers. [V27 456] Hayes denied telling Deputy Hamilton that he saw Dessaure enter and leave Riedweg's apartment. [V27 461-62]

Steven Way came out of his apartment and found the paramedics there as they started to rope off the area. Way went back into his apartment. A strange black man came to the door and asked if he had seen anything. The man stuttered like he was nervous. [V27 441-42, 444] Way had never seen the man before and never saw him again. [V27 444, 446] He was skinny and taller than Way, who was 5 feet 7 inches tall. [V27 444] Way went out into the parking lot a few times that night. [V27 442, 446] Later on, detectives showed Way

[3] In a deposition, Hayes said that the ambulance arrived as he was driving out of the parking lot. [V27 458] During cross-examination, he also said he was leaving when the paramedics arrived. [V27 460]

some photographs to see if he could identify the man, but he did not recognize any of them. [V27 442-43, 445]

Tim Connole returned to his apartment between 4:00 and 4:30 p.m. [V28 526-27] Fire trucks and paramedics were there, but his apartment had not been sealed off. Connole went inside. [V28 527, 545-47] Dessaure was acting nervous. [V28 528] Dessaure said he had been trying to call Connole. Connole asked him what was going on and what was wrong with him. Dessaure said he didn't know, and there was a body. Connole tried asking the neighbors what was going on, but they did not know. [V28 529] Dessaure then said he went over for some ice. He knocked, but there was no answer. He felt that something was wrong. He opened the door and saw a dead body lying in the hallway between the kitchen and the bathroom. [V28 529-30, 550] Once he saw the body, he ran out, picked up the phone, and dialed 911. [V28 531] Dessaure said he saw a guy in the parking lot. He said he did not want to be blamed for it. [V28 532] After about two or three hours, Connole noticed blood on Dessaure's shirt and asked him about it. Dessaure said he cut his hand doing the dishes and showed him the cut. [V28 532-33]

Amy Cockrell returned to her apartment between 4:30 and 4:45 p.m. Connole and Hup were already there. The police were also there. [V28 499] Hup told her Dessaure went to Riedweg's apartment for ice. [V28 499-500] The next day, Cockrell looked in her own freezer and found a cup of ice but no ice tray. [V28 500-01, 510-11] In a prior statement, she told the prosecutor she found a tray of ice that was frozen solid. [V28 501-05, 512] Police technicians entered

her apartment to seize evidence on the night of February 9, 1999. One of the items seized was an ice tray. [V28 505]

Later on, Cockrell's mother hired a private detective to try to help Dessaure. Dessaure called Connole and asked whether he had found the man Dessaure had seen outside Riedweg's apartment. Dessaure was adamant that the man could corroborate that he had only been in the apartment for two seconds. [V27 5387-38] Connole testified that he could not get from the front door to the kitchen, then back to the front door in two seconds. [V28 539] Dessaure said he did not touch the body. [V28 539]

In March, the lease ran out on the apartment, so Connole and Cockrell moved. They packed a knife set. Later they noticed that one of the knives was missing. They had the knife set on February 9, 1999. [V28 508-09, 541-42, 544]

Karen Greule, a forensic science specialist for the Pinellas County Sheriff's Office, arrived at Riedweg's apartment at 4:53 p.m. on February 9, 1999. [V29 711-13, 742] She took photographs, including the exterior of Riedweg's apartment, the lawn chair, the exterior of Dessaure's apartment, Dessaure -- State Exhibit 7, the half-inch cut on Dessaure's hand, the interior of Riedweg's apartment, blood stains on the living room carpet, a vase on top of a television in the living room, and the waste basket in the kitchen. [V29 714-24, 726-27, 736, 741, 743, 756-57] She took samples of the blood stains on the carpet and a chair in the living room. [V29 725-30] Upon entering the apartment, she did not see the body in the hallway until she was near the chair. [V 755-56] She lifted 37

latent prints from the bedroom, laundry room, and living room, a mirror by the door, and the vase on the television. [V29 732-35, 745] She took a photo, State Exhibit 63, which showed either an imperfection in the print or cigarette ashes in the kitchen sink. [V29 738-40, 746, 752-54] She observed Dessaure smoking in the parking lot that evening. [V29 739]

Catherine Holloway, another forensic science specialist, collected the telephone found near the lawn chair [V29 762-63, 768-69], a bathing suit top found on the floor of Riedweg's bedroom [V29 770], a plastic mug and straw found on the counter of the kitchen sink [V29 771-73], a white hair barrette with blood [V29 777], a maroon hand towel found on the vanity in the bathroom [V29 778-80], some knives [V29 782-83], 19 samples of blood from the bathroom floor, walls, door, and toilet [V29 785-86], the bottom of the bathing suit [V29 787], the comforter from the bed [V29 787-88, 790], and 23 cigarette butts from the parking lot and the area around the exterior of Riedweg's apartment. [V29 798-99] She observed two knives and cigarette ashes in a measuring cup in the kitchen sink, as shown in State Exhibit 63. [V29 774-75] Another photo showed a black comforter on the bed and the bathing suit on the floor. [V29 775-76] She failed to observe a stain on the comforter until she reviewed a video later on. [V29 790-95] She observed an area of dampness on the kitchen floor in front of the sink. [V29 789]

Before jury selection, the court granted the prosecutor's motion to exclude evidence of two marijuana cigarettes found in Riedweg's apartment. [V25 23-24] After the State presented evi-

dence of cigarette ashes found in Riedweg's sink, defense counsel asked the court to reconsider its ruling and to allow him to present evidence that there was a strong smell of incense in the apartment, two marijuana cigarettes were found in the apartment, one of them was partially smoked, Stuart Cole smoked marijuana, and Cole was in the apartment earlier in the day before he played golf. This evidence would provide an alternative explanation for the presence of ashes in the kitchen sink. [V30 804-09] The court ruled that it would not allow the evidence. [V30 807]

Detective Thomas Klein and his partner Detective Tim Pupke arrived at Riedweg's apartment at 5:14 p.m. They expanded the crime scene to include Dessaure's apartment. [V34 1345-50] Klein entered Riedweg's apartment and saw blood stains on the carpet in the living room. Once he reached the chair, he could see Riedweg's body lying in the hallway. Klein found a scuff mark on the kitchen floor and a pool of water near the refrigerator and sink. [V34 1350-55]

Craig Giovo, a crime scene technician, arrived at Riedweg's apartment at 5:41 p.m. on February 9, 1999. [V28 554-56, 587] Giovo videotaped the exterior of the apartments. [V28 556] There was a lounge chair on the sidewalk in front of her apartment. [V 28 575-76] There was a cordless phone on the ground. [V28 576]

Robert Detwiler, a forensic science specialist, arrived at Riedweg's apartment at 6:42 p.m. on February 9, 1999. [V30 810-11] He noticed two men, one black and one white, standing in the parking lot. [V30 812] He made a videotape of the interior of the apartment which was played for the jury. The tape showed a stain on the

carpet, a white hair scrunchy, maroon towels, the arm of a chair, a wet spot on the kitchen floor, discarded paper towels, a pair of panties hanging on a door, a stain on the comforter on the bed, venetian blinds covering the bedroom window, a paper towel box, and the living room. [V30 812-21] Detwiler observed water on the floor of the kitchen near the sink and cabinets. [V30 823-24]

Upon leaving Riedweg's apartment, Klein saw Dessaure standing with Connole near the parking lot. [V34 1356] Dessaure was smoking a cigarette. [V34 1357] Dessaure complied with the officers' request to give them his blood stained shirt and his sandals. [V34 1357-58, 1389, 1392-93] Connole loaned Dessaure a pair of tennis shoes. [V28 540-41, 543, 1393]

Dessaure took Klein and Giovo inside his apartment to show them the knife with which he cut his hand while he was washing dishes. [V28 558; V34 1359, 1394-95] Giovo saw blood stains on the threshold and at the bottom of the door and later took samples. [V28 559, 574] Dessaure showed them a knife on a dry sponge next to the kitchen sink. [V28 561-62, 598; V34 1359] Giovo collected the knife and the sponge. [V28 576-78] The water in the sink appeared greasy, and there were dirty dishes in the sink. [V28 563-64, 590] There was smeared blood on the knife. Giovo saw a blood stain on the door of the freezer. [V28 565]

Giovo testified that he opened the freezer door at 7:15 p.m. and saw blood stains on the bottom of the freezer and on the ice tray. [V28 565, 567, 587] There was frost on the ice tray, and the ice cubes were frozen solid. He collected the ice tray. [V28 566,

598] There was also an empty plastic cup in the freezer. [V28 600] Giovo found and took samples of blood stains on the kitchen floor, the kitchen sink, the backsplash, and the faucet. [V28 575] There was a bottle of bleach underneath the kitchen sink. [V28 568-69] Giovo received Dessaure's sandals and shirt from Klein. [V 28 570]

Detective Klein testified that he asked Dessaure for permission to look in the freezer, then opened it at 7:15 and found the ice tray containing the ice cubes. [V34 1360, 1397] There was blood under the ice tray. [V34 1397] Dessaure told him the ice cubes were not quite frozen earlier in the afternoon when he wanted ice, and that was the reason he went to Riedweg's apartment. [V34 1360] Klein asked Dessaure to accompany him to the Sheriff's Office to make a statement. [V34 1360-61] Klein noticed that Dessaure is right handed. [V34 1360] Klein initially interviewed Dessaure as the complainant. During the course of the interview, the officers became suspicious of Dessaure and took a break. When they resumed the interview, they advised Dessaure of his Miranda rights. [V34 1361-63, 1398]

Prior to trial, the court denied defense counsel's motion in limine to exclude a portion of the tape recorded interview concerning an argument over the telephone on the day of the homicide between Dessaure and his girlfriend, Mary Parent, about Dessaure having a relationship with another woman, Renee Listopad. [V21 3821-22; SR 18-26] Defense counsel renewed his objection to this evidence at

trial [V34 1366] before the recorded interview was played for the jury. [V34 1369, 1-54][4]

The recording began at 8:20 p.m. on February 9, 1999. [V34 1] Dessaure was twenty-one years old. He was born in Yonkers, New York. [V34 2] He moved to Largo, Florida, to live with his grandmother, Louise Randall, his grandfather, and his two brothers when he was one year old. [V34 2-3] Dessaure attended several schools in Pinellas County, then moved to Tennessee when he was in the ninth grade. He attended the ninth grade for only two months and did not graduate from high school. [V34 3-4] He moved back to Pinellas County in 1995 and lived with his grandmother in Baskins for awhile. [V34 4] He had a former girlfriend named Renee Listopad, whom he dated for six or seven months. [V34 4-5] Mary Parent was his fiancee. She lived in South Carolina with his four or five month old son. [V34 6] Dessaure had two children with Melissa Madley, John Thomas Madley and Kayla Lynn Madley. They lived in Tarpon. He had another child, Brittany Renee Allison, who lived in Tennessee with her mother, Holly Deanna Allison Palmer. [V34 7-8]

Dessaure said he moved into the apartment at 1307 Amanda Lane a week before Christmas. He had known Tim Connole for eight to ten years. [V34 8-9] Dessaure lost two jobs while living there. [V34 9] Riedweg moved in next door about two weeks before the interview. Dessaure introduced himself to her while she was moving in and

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[4] The transcript of the recording follows page 1369 of volume 34 of the record, but the pages of the transcript are separately numbered from 1 to 54.

offered to help, but he did not know her that well. [V34 9-10]

Dessaure said he got up at a quarter to twelve that morning and smoked a cigarette. [V34 11] Amy left for school while he was sleeping. [V34 13] Tim and his friend Ivan left around twelve. Dessaure ate some spaghetti for lunch and played a video game. [V34 12-14] He turned on the radio and started to clean around 2:00 or 2:30. He took the garbage out to the dumpster around 2:45 and saw Riedweg sunbathing with her eyes closed. She was wearing an orange, multi-colored bikini. [V34 14-18] When he returned from the dumpster he did not notice whether Riedweg was still outside because he looked down while he walked. [V34 17-21] Dessaure put detergent and bleach in water in the sink and began washing a knife. The knife slipped and cut the palm of his hand. He put the knife down and ran water on the cut. [V34 21-24]

Dessaure said he finished drinking a cup of water and wanted another cup of cold water. The ice tray was empty, so he filled it and put it and a cup in the freezer. [V34 24] Dessaure went to Nathan's apartment to get some ice, but Nathan wasn't at home. Dessaure saw a black guy in the parking lot. He asked the man if he had seen Tim or Amy. The man said no, he did not know who they were. Dessaure asked if he knew Nathan, and he said no. [V34 24-27]

Dessaure went back into his apartment to get his cup, then he went next door to Riedweg's apartment. He knocked on the door and yelled for Cindy. He noticed that her stuff was still outside. He found that her door was unlocked, opened it, and called for her. Dessaure went inside. He did not see anyone, so he walked to the

kitchen. When he came back from the kitchen he saw her lying on the floor with blood on her. He left the apartment without touching anything. [V34 27-29] Dessaure waved to the man in the parking lot, told him he thought the lady was dead, and asked him for help. The man told him to call the police and walked away. [V34 28-29] Dessaure picked up Riedweg's phone, which was by her lawn chair, and called the police. While he was on the phone, he went back inside his apartment to look for a cigarette. [V34 29] He picked up the knife to clean it and cut himself again in the same spot. He yelled, the dispatcher asked what was wrong, and he told her he cut himself again. [V34 30-31]

Detective Pupke asked Dessaure about using bleach to wash the dishes. Dessaure said it wasn't bleach, it was dish detergent. There was bleach in the house, but he thought it was kept in the bathroom. The only time he used it was to clean an old refrigerator. [V34 31]

Dessaure said the dispatcher told him the police were on the way. He thanked her and hung up. He went outside. He threw the phone on the lawn chair, but it must have fallen off because he saw it on the ground later. [V34 31-32] The fire truck arrived first. Dessaure showed them where Riedweg was. Dessaure followed the first man into the apartment, but he was told not to touch anything and to leave. He went outside, paced on the sidewalk, then went to the middle of the parking lot. He saw the police arrive. Dessaure had never been in Riedweg's apartment before that day. [V34 32] Dessaure wore his gray and black "Z-shirt," which had blood on it

from his hand, and sandals. The tape was stopped for a break at 9:06 p.m. [V34 34]

The tape resumed at 10:18 p.m. Detective Pupke stated that he read Dessaure his Miranda warnings, and he waived his rights and agreed to speak to them. Dessaure said he woke up around 11:30. Amy had already gone to school. Dessaure smoked a cigarette and used the bathroom. [V34 35] Tim and Ivan left around twelve. Dessaure played a video game until about 2:30. [V34 36] While playing the game, Dessaure received calls from Tim, his fiancee, Renee, and two other people. [V34 37] He asked his fiancee, who was in South Carolina, if she was cheating on him. She had denied cheating on him a couple of weeks before. That was nothing new between them, they argue and yell. She wanted to come back to Florida, and he wanted her to come back. He had a dream about her cheating, and usually his dreams are true. [V34 37-38] He hung up on her. He had been trying to break up with Mary but wasn't sure whether he wanted to be with her or Renee. He had seen Renee the other day. [V34 39] Dessaure and Mary had been together for about two and a half years. He had messed around with Renee last year, and they slept together two days before the statement. He wasn't cheating with Renee because Mary told him they were broken up the day before that. [V34 40-41] During their argument on the day of the statement, Mary accused Dessaure of cheating on her, and he accused her of cheating on him. [V34 41, 43] Dessaure and Mary had been fighting ever since she had been gone. He fought with her before he slept with Renee. [V34 42] He fought with Mary the day of the statement and hung up on her. Tim

prank called him, then he called Mary back. [V34 42-43] Dessaure started cleaning after all of the calls. He did not look at the clock to see what time it was. [V34 43-44]

Detective Pupke asked if Riedweg was a good looking woman. Dessaure answered yeah. [V34 44] Dessaure had never gone to her apartment to ask her for anything other than ice. She was not home that much. She had never invited him into her apartment. He opened her door and went into the apartment because he was worried about her. The detectives said that made no sense. Dessaure replied that he did it to all his friends if he knows they are there; he knocks on their door and opens it. [V34 45-46] He called Cindy's name and felt that something was wrong because she did not answer. [V34 46, 48] He walked into the apartment without looking to his right. [V34 46-47] When he came back out from the kitchen, he looked to his left and saw her lying there. He did not know what caused her injury. [V34 47-48] Dessaure said the guy he saw in the parking lot could verify that he was not in the apart-ment more than a couple of minutes. [V34 47] Riedweg was bloody, had no clothes on, and was lying on her stomach. [V34 48-49]

Dessaure denied the detectives' allegations that he wanted sex from Riedweg and fought with her when she resisted. [V34 49-50] They accused him of planning it since she moved in. Dessaure said he had not been there to watch her, he had been working. They said he had not worked in two weeks. He said he had been looking for a job for a week. [V34 50] Pupke accused him of being "pissed off" because he argued with his girlfriend. Dessaure replied that he had

been arguing with his girlfriend for two months, and he did not take out things on other people. Pupke asked if Riedweg was in the bedroom when he first saw her. Dessaure said he had no clue what Pupke was talking about and denied being there. Dessaure said, "I did not, I didn't, I did not hurt this lady man, I did not hurt this lady." [V34 51]

Dessaure denied killing Riedweg and challenged the detectives to prove it. Klein said there was blood all over the sink. Dessaure said it was from his hand when he cut himself. Klein asked how he would explain it if tests showed it was her blood. Dessaure said if the test came back to her blood then they would arrest him. Klein asked how he would explain the blood on the back of his shirt. Dessaure said it was his. [V34 52] Dessaure said he cut himself every time in the same spot. Pupke said his roommate never saw him cut himself when he was cleaning. Dessaure told them to arrest him or he would not go on with the interview. He said they were not going to talk to him anymore until he had a lawyer because he did not kill that lady. Klein accused him of killing her, and Dessaure denied killing her. Dessaure said he was through with the conversation and asked the detectives to let him go home. [V34 53] The tape ended at 10:40 p.m. [V34 54]

After the interview, Klein arrested Dessaure on an unrelated matter. [V34 1380-81] When he told Dessaure he was under arrest, Dessaure said he was leaving and started fighting with the detectives, causing his hand to bleed. [V 34 1381, 1405] Klein took

Dessaure's shorts and green plaid boxer shorts. [V31 1010-12; V34 1374]

Greg Mason, a forensic science specialist, photographed Dessaure and took his fingerprints, footprints, and fingernail clippings on February 10, 1999. [V30 845-49] Klein obtained a blood sample from Dessaure pursuant to a warrant on June 9, 1999. [V34 1382-83] Dessaure was not arrested for the murder until August 26, 1999, after he was indicted. [V34 1383]

Klein interviewed and obtained a blood sample and prints from Stuart Cole. [V31 1012-13; V34 1375-76] Klein investigated to determine where Cole was at the time of the murder, interviewing Gerald Daniel, Kent Cavedra, and Dan Copeland. [V34 1377] Klein went to the Fox Hollow Golf Course near New Port Richey in Pasco County, 13.8 miles from Riedweg's apartment. [V34 1377-78] He reviewed a tee time starter sheet at the golf course and confirmed Cole's whereabouts for the hours of 1:50 p.m. to 6:00 p.m. [V34 1378-79] He determined that Cole had been at Riedweg's apartment earlier in the day. Cole made a cell phone call in front of her apartment at 11:20 a.m. and left the apartment around 1:00 p.m. [V34 1401, 1410] Connole saw Cole at his vehicle around 12:00. [V34 1411] Klein identified a copy of Cole's death certificate. He died in a traffic accident. [V34 1376-77]

Kent Cavedra played golf with Stuart Cole twice a week on a regular basis. [V34 1428] Cole had an intense relationship with Riedweg and spent some of his days with her. [V34 1428-30] Cavedra, Cole, Dan Copeland, and Gerald Danling played golf at the Fox Hollow

Golf and Country Club on the afternoon of February 9, 1999. Cole arrived between 1:45 and 2:00 p.m. [V34 1430-31] They teed off at 2:13 and played until 6:00 or 6:30. [V34 1432-33]

Brandy Adams and Nathan Phillips lived in an apartment at the Villas of Countryside. Adams was home all day on February 9, 1999, with her windows and door open. Dessaure did not come to her apartment that day. Phillips came home around 3:00 or 3:30. They went to a restaurant about an hour later, before the paramedics came. Amy Cockrell came to their apartment after they came back. [V34 1414-25] Dessaure was not authorized to enter their apartment without knocking. [V34 1426]

Detwiler returned to the apartment on February 10 and made a sketch of the scene, which he displayed and described for the jury. The body was in the hallway between a closet and the bedroom. Upon entering the apartment, he reached the area of the chair in the living room before seeing the body. A maroon towel was on the vanity. [V30 825-28] Detwiler lifted several latent prints from the floor of the kitchen, including a ridge detail from a foot. [V30 830-34] He also observed blood smears on the bathtub and processed it for latent prints. [V30 835-38] None of the technicians smoked in the apartment. [V30 838-39]

Giovo returned to Dessaure's apartment on the afternoon of February 10 and conducted a luminal test of the carpet in the living room and the floor of the kitchen. The tests produced false positive and negative results. [V28 579-80] Later that evening, he obtained Riedweg's prints, including her palms and feet. [V28 580-81, 601]

On March 20, 2001, Giovo examined a comforter under a luma light, then sent it to FDLE. [V 28 585-86, 594] John Huff, a forensic science specialist, examined the comforter with a scan light, cut out pieces with visible stains, and sent the cuttings to the FDLE. [V30 884-88]

On February 10, 1999, John Mauro, a forensic science supervisor, specialist Robert Rast, and specialist Melissa Colbath went to the Medical Examiner's Office. [V30 910-12, 924-25] They photographed the body. [V30 912] Rast collected 21 blood samples from the body. [V30 923, 927] Rast received a known sample of Riedweg's blood from the medical examiner. [V30 925-27] Counsel stipulated that the deceased person found in the apartment and upon whom the autopsy was performed was Cindy Riedweg. [V30 891-92]

Dr. Laura Hair, an assistant medical examiner [V35 1465-68], observed Riedweg's body at the apartment on February 9, 1999, and performed the autopsy on February 10. [V35 1468-75, 1481] Riedweg was 5'6" tall and weighed 136 pounds. [V35 1476] She was 27 years old. [V35 1495] Hair found that she had suffered a total of 53 wounds, including three bruises, fifteen scrapes and pick marks, sixteen superficial cuts, fifteen deeper cuts, and four stab wounds. There were five defensive wounds to the hands, three wounds that penetrated the trachea, three that damaged and collapsed the lungs, two that cut the exterior jugular vein, one that cut the liver, one that struck a vertebra, and one that cut a spinal nerve. [V35 1476-77, 1483-1527] Riedweg could have remained conscious for four to six minutes after her lungs collapsed; she could have survived from four

to ten minutes. [V35 1528-29] Electrical activity could have continued for a few minutes more, perhaps ten to fifteen minutes. [V35 1530] Multiple stab wounds of the torso and neck were the cause of death. [V35 1535] All 53 wounds occurred around the same time. [V35 1535] Riedweg had not started her menstrual cycle. [V35 1539] The rape kit came back negative. [V35 1540]

David Brumfield, the coordinator of the crime scene technology program at St. Petersburg College and a blood spatter analyst, examined and photographed the blood stains in Riedweg's bathroom and hallway on February 9, 1999, before her body was removed, and continued his examination on February 10. He displayed and explained the photographs and his analysis for the jury. [V30 932- 93] The shower curtain had been pulled to the right away from the toilet. There were blood stains on the bottom right corner of the shower curtain. [V30 945] There was much less blood in the bathroom than in the hallway. [V30 946] There were blood stains across the top of the shower, behind the toilet, on the side of the toilet, and on the back wall. [V30 947, 955-56] The amount of blood in the bathroom indicated that she had been cut, but was not bleeding heavily enough for it to be life threatening. [V30 948] There were blood droplets which fell into the bathtub and onto the outside edge of the tub. [V30 949-54] There was a blood swipe on the outside of the tub. [V30 953] It appeared that she grabbed part of the tub. The droplets increased in size. [V30 954-55] Most of the blood was down low except at the back of the tub, where it was above the edge of the tub. [V30 955980-81] There were stains where Riedweg's legs,

stomach, and hand made contact with the tub. [V30 956-58] There was blood on the carpet. [V30 959] Smeared stains indicated that she went down and made contact with the floor, then moved. [V30 960-61]

The hallway was the main area where the bloodletting occurred. [V30 961] Riedweg was found lying halfway in the bathroom and halfway out in the hall. [V30 966] The highest blood stains in the hallway were 12 to 18 inches above the floor. [V30 968] Most of the blood spatter in the hallway was the result of downward motion. [V30 976-80] The highest point the blood could have originated from was 18 to 24 inches above the floor. [V30 980] The blood stains on Riedweg's face showed that she was lying face down on the right side of her face, then she moved so that the left side of her face was on the floor. [V30 985] Blood from her neck wounds did not run down her back, so she was down and leaning forward when the wounds started bleeding. [V30 986-87] There was a fine mist of blood on her back and buttocks and air bubbles in droplets of blood consistent with wounds penetrating her lungs. [V30 987-89, 995] Blood droplets running to each side, but not down, were consistent with her being down and rotating her body. [V30 988] There was no blood on the bottom of her feet, so she was down on her knees, or completely down during the time the injuries occurred; she did not step in any blood. [V30 992]

Brumfield believed that the initial cutting took place just outside the bathtub. Riedweg went into the bathtub face first. She grabbed a hold, pushed herself up, then dropped face forward away

from the tub. She came out a couple more steps to where the rest of the offense occurred. [V30 996]

Michelle Sherwood, a latent print examiner for the Pinellas County Sheriff's Office, identified a latent footprint found on Riedweg's kitchen floor as Kenneth Dessaure's right foot. [V30 853, 859-60] Sherwood also had known prints from Riedweg, Stuart Cole, Timothy Connole, Joann Cambensy, Doreen Chaluka, Lance Stutterman, Robert Denson, and Donald Cambensy. [V30 861-62] She received a total of 91 latent prints. [V30 862] She identified 28 of the prints as those of Cindy Riedweg, and seven of the prints from the kitchen table as those of Donald Cambensy.[5] [V30 896-97] Two other prints had sufficient ridge detail for comparison, one from a mirror at the entrance, and another from the vase on the television, but she was unable to identify them. The remaining latent print lifts were of no value for comparison. [V30 864-65, 877-79] Counsel stipulated that Richard Hohl, an FDLE fingerprint analyst, examined three knives found at the scene but found no latent fingerprints suitable for comparison. [V30 891]

John Wierzbowski, a former FDLE crime lab analyst, examined a silver gray T-shirt, a pair of black denim shorts, and a pair of flip-flop sandals to conduct a blood stain pattern analysis. [V30 899-900, 908] He found a transferred blood stain inside the right front pocket of the shorts, but he could not determine what object

[5] Sherwood initially testified that she identified only three prints: Dessaure's footprint, one print from Riedweg, and one print from Cambensy. [V30 863-64]

made the stain; it could have been any object covered with blood. [V30 901-04, 907-09] The other stains on the shorts were not sufficient for blood stain pattern analysis. [V30 905-06, 909] There were no stains of value for analysis on the sandals or shirt. [V30 905, 907]

Tina Delaroche, an FDLE forensic serologist [V31 1015-47, 1073-74] performed polymerase chain reaction (PCR) DNA analysis using manufactured test kits. [V31 1048-49] She examined Dessaure's black shorts and found six blood stains for analysis. [V31 1057-67] Stain 6A was from the right front pocket and was consistent with the DNA profile of Riedweg. [V31 1066] Stain 6C was also consistent with Riedweg. [V31 1066-68] Using the FBI database, the chances of a random match for each of those stains were 1 in 3,980 Caucasians, 1 in 2,550 African Americans, and 1 in 5,150 Southeastern Hispanics. [V31 1075-76] Stain 6B from the lower left leg of the shorts was consistent with Dessaure. [V31 1066] The chances of a random match for 6B were 1 in 193,000 Caucasians, 1 in 16,600 African Americans, and 1 in 87,700 Southeastern Hispanics. [V31 1077] Stain 6D from the bottom of the right leg of the shorts was a mixture in which Riedweg, Dessaure, and Stuart Cole could be included, but Donald Cambensy and Timothy Connole were excluded. [V31 1067-71] The chances of a random match for 6D were 1 in 12 Caucasians, 1 in 3 African Americans, and 1 in 11 Southeastern Hispanics. [V31 1077] Stain 6E from the center of the left leg of the shorts was a mixture in which Riedweg and Cole were included, Dessaure could not be excluded, and Cambensy and Connole were excluded. [V31 1071-72] The

chances of a random match for 6E were 1 in 22 Caucasians, 1 in 8 African Americans, and 1 in 21 Southeastern Hispanics. [V31 1077-78] Stain 6F from the back right pocket of the shorts was a mixture in which Riedweg, Dessaure, Cole, and Cambensy were included, and Connole could not be excluded. [V31 1072-73] The chances of a random match for 6F were 1 in 2 Caucasians, 1 in 2 African Americans, and 1 in 3 Southeastern Hispanics. [V31 1078]

Delaroche examined the sexual assault kit, including vaginal, oral, and rectal swabs from the autopsy of Riedweg, and found no semen were present. [V31 1080-81] She examined Dessaure's shirt and found a faint blood stain on the front and a stronger blood stain on back. Her tests showed that the DNA profile from the stronger stain was consistent with Dessaure. The chances for a random match were 1 in 193,000 Caucasians, 1 in 16,600 African Americans, and 1 in 87,700 Southeastern Hispanics. [V31 1081-83] She tested two faint stains from the shirt, but was unable to obtain DNA profiles for them. [V31 1083-84] She examined the towel from Riedweg's bathroom; a crusty white stain tested positive for semen. The DNA profile of the semen was consistent with Dessaure. The chances for a random match were the same as for the blood stain on the shirt. [V31 1084-87]

Delaroche tested samples taken from Riedweg's living room floor and chair and found that all were positive for blood. [V31 1088-89] Two samples from the chair were too small for DNA testing. [V31 1089] Samples from the living room floor were consistent with the DNA profile of Riedweg. [V31 1089-90] One sample from the chair was consistent with Stuart Cole. [V31 1090-91] Delaroche examined three

knives from Riedweg's apartment; all were negative for blood. [V31 1091-92] Samples from Riedweg's bathroom floor all tested positive for blood. [V31 1092-93] Sample 90A was a mixture. The stronger profile in the mixture was consistent with Riedweg. Cambensy and Connole were included in the minor component of the mixture, while Dessaure and Cole were excluded. [V31 1093-94] Samples 90B through I and K through T were consistent with Riedweg. Sample 90J was too small to obtain a complete profile. [V31 1095-97] Blood stains on the knife from Dessaure's kitchen were consistent with Dessaure. The chances of a random match were the same as for the blood stain on his shirt. [V31 1098-99]

Delaroche examined the cutting from Riedweg's comforter. The white stains tested positive for semen, and she observed sperm cells through a microscope. She submitted it for STR DNA testing. [V31 1099-1100] Riedweg's fingernail clippings tested positive for blood and were submitted for STR testing. [V31 1101-02] Dessaure's fingernail clippings tested positive for blood. The DNA profile was consistent with Dessaure. [V31 1104-05] Several swabs from Dessaure's hands tested positive for blood. The DNA profile was consistent with Dessaure. [V32 1134-36] Twenty-one swabs from Riedweg's body tested positive for blood, but no DNA testing was done on them. [V32 1136-37, 1140-41] Numerous swabs from Dessaure's apartment tested positive for blood, but none of them were consistent with Riedweg. [V32 1141-44] None of the tested blood samples from Riedweg's apartment were consistent with Dessaure. [V31 1147-48]

Robyn Ragsdale, an FDLE forensic serologist, conducted short tandem repeat (STR) DNA analysis. [V32 1194-1200] STR analysis is more discriminating than the PCR analysis done by Delaroche because it involves more loci, thirteen alleles instead of six, and there are more possible combinations at each of the loci. [V32 1206-09]

Ragsdale tested the blood stains from Dessaure's shorts. [V32 1211] She found that the DNA profile for stain 6A from the pocket matched Riedweg at all 13 loci and amylogenic (a determination of gender). [V32 1207, 1211-13] The frequency of this profile is 1 in 4.63 quadrillion Caucasians, 1 in 29.6 quadrillion African Americans, and 1 in 3.98 quadrillion Southeastern Hispanics. [V32 1213] These frequencies are based on an FBI database with about 200 people from each ethnic group. [V33 1261] The frequencies are an approximation with a factor of 10 margin of error -- the frequencies could be ten times larger or smaller. [V33 1259-60]

Stain 6C and the major component of the mixture from stain 6E matched Riedweg at 7 loci and amylogenic. There was only enough DNA to test 9 loci, and she did not obtain results for 2 of them. She could not determine who the other contributor to the mixture was. [V32 1215-18] The frequency of this profile is 1 in 39.1 million Caucasians, 1 in 112 million African Americans, and 1 in 32.4 million Southeastern Hispanics. [V32 1221]

Stain 6D was a mixture. Assuming that Dessaure was the contributor to the minor component, the major component matched Riedweg at 8 loci and amylogenic, with the result at 1 of the loci inconclusive. [V32 1218-19] The frequency of this profile is 1 in 171

billion Caucasians, 1 in 354 billion African Americans, and 1 in 159 billion Southeastern Hispanics. [V32 1222]

Stain 6F was a mixture. Ragsdale excluded Dessaure as the contributor of the minor component. The major component matched Riedweg at all 9 loci and amylogenic. [V32 1219-20; V33 3276] The frequency of this profile is 1 in 1.42 trillion Caucasians, 1 in 2.78 trillion African Americans, and 1 in 1.31 trillion Southeastern Hispanics. [V32 1222] Stuart Cole and Donald Cambensy were excluded as contributors to 6C, 6D, 6E, and 6F [V33 1274] The contributor to the minor component for 6F was unknown. [V33 1277]

The stain from Dessaure's shirt matched Dessaure at 9 of 13 loci, with the other loci inconclusive. The frequency for this profile is 1 in 234 billion Caucasians, 1 in 283 billion African Americans, and 1 in 1.93 trillion Southeastern Hispanics. [V32 1220-21] The stain on the maroon hand towel matched Dessaure at 12 of 13 loci and amylogenic with 1 of the loci inconclusive. The frequency for this profile is 1 in 27.9 quadrillion Caucasians, 1 in 114 quadrillion African Americans, and 1 in 125 quadrillion Southeastern Hispanics. [V32 1222-23]

A swabbing from Riedweg's bathroom floor matched Riedweg at all 13 loci and amylogenic. The frequency for this profile is 1 in 4.63 quadrillion Caucasians, 1 in 29.6 quadrillion African Americans, and 1 in 3.98 quadrillion Southeastern Hispanics. [V32 1224] The stain from the knife in Dessaure's apartment matched Dessaure at 10 of 13 loci and amylogenic, with the other loci inconclusive. The frequency for this profile is 1 in 5.9 trillion Caucasians, 1 in 14.8 trillion

African Americans, and 1 in 66.1 trillion Southeastern Hispanics. [V32 1226-27]

The swabbing from Dessaure's right hand matched Dessaure at all nine tested loci and amylogenic. The swabbing from Dessaure's fingernails also matched Dessaure at all nine tested loci and amylogenic. The frequency for this profile is 1 in 46 trillion Caucasians, 1 in 18.3 trillion African Americans, and 1 in 65.1 trillion Southeastern Hispanics. [V32 1227-28]

The stain from the living room chair did not match Riedweg or Dessaure. It matched Stuart Cole at 8 of 9 loci and amylogenic. [V32 1228-29] The parties stipulated that Riedweg's white sofa and chair had been in her prior apartments in Fort Meyers and the Tampa Bay area and that Stuart Cole had been in those apartments while the furniture was there. [V34 1344-45]

Ragsdale obtained incomplete profiles from Riedweg's fingernails which were consistent with Riedweg. [V32 1229-30] The stain from the comforter matched Dessaure at 12 loci and amylogenic. The frequency for this profile is 1 in 27.9 quadrillion Caucasians, 1 in 114 quadrillion African Americans, and 1 in 125 quadrillion Southeastern Hispanics. [V32 1230-31] A sample from the strap of the left sample matched Connole at 11 of 13 loci and amylogenic. Riedweg, Dessaure, Cole, and Cambensy were excluded. [V33 1274-75]

Valdez Hardy, a former prison inmate with nine or ten felony convictions, was in the same cell pod in the Pinellas County Jail as Kenneth Dessaure beginning in September, 1999. [V28 620-26] Hardy had been a paid drug informant in 1997 and 1998. [V28 652] He was

charged with burglary as a career criminal. [V28 645-47] When he obtained information about the present case, Hardy called someone in the vice and narcotics squad hoping to obtain help. Homicide detectives came to talk to him. [V 653-54] When he first spoke to the prosecutor, he asked if she could do something for him, but she told him no. [V28 654-55] Hardy gave a sworn statement to the prosecutor on November 4, 1999. [V28 640] He pled to a trespass charge. No one from the State Attorney's Office spoke on his behalf when he was sentenced in April, 2000. He went to prison for 26 months for violating probation. [V28 648-51] Hardy was deposed by the defense on November 9, 2000. [V28 641] Assistant State Attorney Brian Daniels testified that he was not aware of Hardy being a potential witness in a homicide case before the resolution of Hardy's cases. [V29 682, 685, 690]

Hardy claimed that one afternoon Dessaure said he was concerned about a washrag that might have his semen on it. [V28 629-30] Dessaure said he came home one morning and saw the young lady sunbathing in a lawn chair. He went upstairs,[6] then came back down to take out the trash. He winked at her when he walked by. He went back upstairs. When he came back down, she was gone. [V28 631, 659] She left her phone and a cup by her chair. He went to the door and found that it was open. He went inside. She saw him and "started tripping." Hardy thought he meant that she was screaming or getting

[6] During closing argument defense counsel pointed out that these were not two story apartments. [V37 1746] See State Exhibits 9 and 11.

nervous. [V28 631] Dessaure said the washrag was "the only thing that can really prove that." They already knew he was there because he called 911. When he was leaving the apartment a guy saw him. He told the man that a girl was in there dead. The man told him to call the police. Dessaure said he went outside, picked up her phone, and called 911. Hardy asked if there was a lot of blood, and Dessaure answered, yeah. A few days later he said she was naked on the floor. [V28 632]

Dessaure said the paramedics came first. He was outside smoking a cigarette, and he was nervous. They asked where the body was, he walked inside and motioned with his head, and they saw her. The detectives questioned him and asked where he got the cut on his arm. He said he cut himself on a knife. They took him to his house, and he showed them the knife. They saw blood on his underwear. [V28 633] Dessaure said that when he went to the police station, he asked the police why he called 911 if he killed her. They told him he was facing the death penalty. When he got up like he was going to leave, one of the detectives grabbed him, slammed him against the wall, and arrested him. [V28 661] Dessaure said they took his roommate's shoes because he had changed shoes. He had been wearing flip-flops. He said his main concern was the washcloth. [V28 634] He said something about a foot or a scuff mark in the kitchen. [V28 635] According to Hardy, Dessaure said that "can't nobody say he killed her. Don't nobody know what happened but him and her." [V28 635]

Dessaure said he had seen her a few times, and she had just moved there. [V28 635, 637-38] Hardy told Dessaure to say that he

had been seeing her and had oral sex with her in order to explain why his semen was on the washrag. [V28 636-37] Hardy suggested saying he had seen her that night, but Dessaure said she worked at night. [V28 637] Dessaure was not going to say that he dated her, just that they were seeing each other, he was talking to her, and they got together now and then. [V28 638]

Hardy denied that this conversation occurred on October 1, 1999, after a corrections officer left a newspaper with an article about Dessaure's case in the cell pod. [V28 655] He denied that he read the article, which stated that semen matching Dessaure's DNA profile was found on a towel in Riedweg's bathroom. [V28 656, 660, 665] After reading the article in court, Hardy said there was nothing in it about taking out the trash, scuff marks on the kitchen floor, leaving her naked on the kitchen floor, having an immaculate house, a phone by the chair, his roommate's shoes, paramedics arriving first, her working nights, flip-flops, the detectives slamming him to the floor, seeing a guy as he was leaving, telling the guy she was dead, the guy telling him to call the police, nor that he cut himself. [V28 662-64] Hardy also denied seeing or reading any police reports or depositions in Dessaure's case. [V28 639-40]

Nineteen year old Shavar Sampson was serving nineteen years in prison for seven felonies committed when he was seventeen. [V35 1441-42] On December 3, 1999, Sampson turned eighteen and was put in pod 4F9 of the Pinellas County Jail with Valdez Hardy, Kenneth Dessaure, and Carl Bercher. [V35 1442-45]

Sampson testified that Dessaure told him about his case. Dessaure said he saw the woman outside sunbathing. He wanted to talk to her, but she did not want to have a conversation with him. The next day Dessaure went inside her apartment while she was outside sunbathing because he wanted to surprise her. When she came inside, he tried to talk to her, but she did not want to talk. She punched him. He punched her back and knocked her unconscious. He took off her two piece bathing suit and began to have sex with her. [V35 1448, 1462-63] The woman regained consciousness and began fighting to get him off of her. [V35 1449, 1462-64] Dessaure had a knife and stabbed her a lot of times. He removed his clothing and put on something he brought from home. He called 911 to summon an ambulance. [V35 1449] Dessaure said his sperm went inside her while they were having sex. [V35 1449, 1458-60] Her period started, blood got on his underwear, and he had to change underwear. [V35 1449, 1462] Dessaure said the state had a weak case; they had no witnesses and could not win. [V35 1450]

In February, 2000, Sampson was in pod 2F7. Dessaure came in, saw Sampson, then filled out a form requesting a transfer to another pod. [V35 1450-51, 1545-49] Sampson was sentenced in March, 2000. [V35 1451] In December, 2000, the State Attorney's Office had Sampson transferred back to Pinellas County, and he spoke to them about Dessaure's statements for the first time. [V35 1452] Sampson had not asked the state for help and nothing had been done to help him. [V35 1454-55] The week before trial, Rodney Stafford called him a snitch. [V35 1453]

The Defense

Susan Pullar, a forensic scientist who examined photos and a video of the crime scene and police reports [V33 1279-82], testified that she would expect the assailant in this case to have impact blood spatter on his body, or at least his arms, because of the force used in inflicting the stab wounds. [V33 1283-89, 1311-12] Some of the blood on Riedweg's body was not coming directly from a wound and could have come from the assailant, someone else bleeding, or from the knife. This blood should have been collected and analyzed to determine whose blood it was. [V33 1291-93, 1303, 1315] If the assailant was bleeding from a hand wound, you could find blood in the crime scene other than on the body. [V33 1316] She did not see aspirated blood mixed with air on the body, but there was some spatter less than a millimeter that might be aspirated. [V33 1294-96, 1302] There was no clear pattern to the contact blood stain in Dessaure's shorts pocket to show what the source of the blood was. [V33 1296-97]

Pullar said it appeared that there had been a struggle in the bathroom. It was possible that the bloodletting came from the tub out to where Riedweg was lying. [V33 1304-05] She was never standing after the two wounds to her back. She may have been up on her hands or elbows, but not for very long. [V33 1306-11, 1313] It is possible that a fingerprint or ridge detail which is insufficient for comparison could be sufficient to eliminate someone. [V33 1328] Pullar had some early training with latent prints, but she had never worked as a latent fingerprint examiner. [V33 1329]

Dr. Edward Willey, a forensic pathologist and former medical examiner [V35 1558], examined a photo of the cut on Dessaure's hand and police reports and concluded that the cut would have bled. Opening and closing the hand would disrupt the cut and cause additional bleeding. [V35 1559-60] There may have been two cuts, but he was not certain. [V 35 1561-62] There was no evidence of scar tissue from prior cuts. [V 35 1563]

Diane Strahan, the manager of the Villas of Countryside, was in the parking lot near apartments 1307 and 1308 during the evening of February 9, 1999, after dark while the police were there. She saw and spoke to Riedweg's boyfriend. She saw him again several days later in her apartment. [V35 1565-70]

Deputy Christopher Hamilton spoke to John Hayes on February 9, 1999. Hayes said he had seen Dessaure go into and come out of Riedweg's apartment. Dessaure waived him over and said there was a dead lady in the apartment. Hayes told Dessaure to call 911 and went on his way. [V35 1571-74]

Daniel Copeland was Stuart Cole's friend and business partner. They played golf at Fox Hollow on February 9, 1999, from about 2:00 p.m. until just after dark. There was nothing unusual about Cole's demeanor. [V35 1578, 1580-82] Around 11:00 p.m. that evening Cole called, and Copeland turned on the television news. Copeland saw Riedweg's car being moved and told Cole about it. [V35 1579]

Defense counsel proffered Copeland's testimony that Cole was prone to smoke marijuana while they played golf. Copeland did not know whether Cole smoked marijuana before they played golf on Febru-

ary 9 and did not recall Cole smoking it at the golf course that day. [V35 1583-85] Defense counsel argued that the Court should permit him to present evidence of Cole's marijuana usage and the marijuana cigarettes found in Riedweg's apartment to provide an alternative explanation for the ashes found in her sink. [V35 1586-88] The court excluded the evidence. [V35 1588] The court cautioned the State about its use of the evidence of the ashes in the sink but did not rule on whether the State could comment about it. [V35 1588-89]

Amy Cockrell testified that when she returned home on February 9, Connole and Dessaure were confined in a small area. She provided Connole with a cigarette by handing the pack to an officer. She found Hup sitting across the parking lot and sat down to talk to him. She did not get into her apartment that evening. [V35 1590] She went to Nate and Brandy's apartment. [V35 1593] Cockrell was allowed back into her apartment on February 10. She noticed that "the dishes were in the process of being done." Dessaure did most of the cleaning, including the dishes. [V35 1591-92] Cockrell did not recall her prior statement on May 14, 1999, that she found an ice tray in the freezer. [V35 1594-96, 1598, 1600] She saw a purple cup in the freezer. [V35 1600, 1602]

William Birchard, a prison inmate, was in pod 4F9 of the Pinellas County Jail with Dessaure and Valdez Hardy in the fall of 1999. [V36 1607] Hardy showed Birchard a newspaper article about Dessaure. [V36 1609] Hardy tried to talk to Dessaure about his case, but Dessaure did not respond. [V36 1610-11] Birchard asked Hardy why he was concerned about Dessaure's case. Hardy said he was

trying to get information so he could make a deal on his own case. [V36 1611-12] Hardy had no information about Dessaure's case except what was in the newspaper. [V36 1612]

Birchard had been convicted of five felonies in Pinellas County. The prosecutor's co-workers prosecuted him for each of the felonies. [V36 1613] The prosecutor asked, "And we are currently responsible for you serving a life sentence right now?" [V36 1613-14] Defense counsel objected and moved for a mistrial on the ground that inquiring about the length of the sentence was impermissible impeachment. The court denied the motion for mistrial. [V36 1614] The prosecutor then asked if he was serving a mandatory life sentence and if her office was responsible for the imposition of the sentence. Birchard answered yes to both questions. [V36 1615]

The prosecutor asked Birchard to read the newspaper article, then elicited his testimony that the article did not contain numerous specific facts about Dessaure's case. [V36 1615-19] The article did contain a reference to semen on a hand towel, which is what Hardy asked Dessaure about each time he tried to pump him for information. [V36 1619] Birchard did not know if Hardy had any other sources of information. [V36 1619-20] Dessaure did not keep paperwork or police reports in his cell. [V36 1620-21]

Rodney Stafford, a prison inmate with four felony convictions, was in pod 4F9 in the Pinellas County Jail in the fall of 1999 with Dessaure, Hardy, and Birchard. [V36 1621-22] As soon as Stafford arrived in the pod someone told him Hardy was a snitch so he should not talk about his case in the pod. Dessaure and Birchard were aware

of this. [V36 1623-24] Shavar Sampson was also in the pod. [V36 1624] Stafford had seen Sampson in the jail recently and asked him what was going on. [V36 1624-25] Sampson and Hardy were friends. [V36 1625]

Stafford did not know, but did not contest the prosecutor's assertion that he did not come into pod 4F9 until December 13, 1999, nor that Hardy gave a statement to the State Attorney's Office on November 4, 1999. [V36 1626] The prosecutor asked if Stafford was currently serving a mandatory life sentence curtesy of her office, and Stafford answered yes. The court overruled defense counsel's objection. [V36 1627] The prosecutor then asserted that there was nothing Stafford could do to hurt himself or to help himself because it was a mandatory life sentence, and Stafford agreed. He denied having any hard feelings against her office. He said Dessaure was his friend. [V36 1628]

Stafford denied telling the prosecutor that he wanted to stay real to the hood. He agreed that he would stay loyal to his friend. Dessaure did not tell him what happened. [V36 1629] Stafford denied telling the prosecutor that he doesn't help the police or cooperate with the state. He denied telling her that he did not know who Sampson was. Stafford was in prison with Sampson's brother and went to school with Sampson. [V 36 1630-31] When Stafford arrived at the jail the week before trial, he encountered Sampson at the telephones and asked him to call his brother. [V36 1631] Stafford denied telling someone on the phone that he was back as a witness for his home boy who killed a white girl. [V36 1632]

Mary Parent was Dessaure's fiancee. They had a baby, Tyler, born in September, 1998. In November, 1998, Parent took the baby and went to South Carolina with her mother. She planned to return to Florida by Valentine's day to marry Dessaure. While she was gone, they talked on the telephone every day. [V36 1633-35, 1643, 1645] On February 9, 1999, Parent called Dessaure during her lunch break. They argued about cheating on each other, and Dessaure hung up. She called him back, they said they loved each other, then she returned to work. [V36 3635-42] It was normal for them to argue about cheating on each other. [V36 1639-70] Dessaure liked to fill up his cup with ice when he drank water, juice, or soda. [V36 3637]

State's Rebuttal Evidence

Counsel stipulated that Rodney Stafford entered pod 4F9 at the Pinellas County Jail on December 13, 1999, and remained there until February 10, 2000; Dessaure entered pod 4F9 on September 22, 1999, and remained there until December 4; Dessaure returned to pod 4F9 on December 13, 1999, and stayed there until December 24; Valdez Hardy was in pod 4F9 from May 25, 1999, through February 7, 2000. [V36 1657-58]

When Shavar Sampson was returned to the Pinellas County Jail from prison within two weeks prior to his appearance at trial, he saw paperwork stating that he was to be kept separate from Rodney Stafford. [V36 1658-59] While Sampson was talking to his father on the telephone, Stafford was standing next to him talking on another phone. Stafford said he was there to testify for his home boy who killed a white girl. Afterwards, they were watching television when

Stafford noticed Sampson's identification arm band. Stafford asked if he was a Sampson, and said he was housed with Robert Sampson. [V36 1660] Stafford did not know who Sampson was. [V36 1660-61] When they were in the same school, Stafford was a senior, and Sampson was a freshman. Sampson denied being in the same pod with Stafford, Hardy, Birchard, and Dessaure. [V36 1662]

Closing Argument

Prior to closing argument, defense counsel moved in limine to preclude the state from arguing that the ashes in the sink were in any way related to Dessaure. [V36 1684] The court overruled defense counsel's objection and allowed the argument. [V36 1685]

During closing argument, the prosecutor argued that Dessaure "left his ashes behind." [V36 1693] She said,

> The water jug on her counter, [Riedweg] had filled her cup up with water some time that day while laying out. She was a neat freak. If those ashes were there before she was murdered or before [Dessaure] entered the apartment, they would have been washed down that sink. She filled up her water cup and those ashes would have gone down the sink and they are not. They are right there. And we all know who was smoking that day. Who told the cops around noon, one o'clock, he had a cigarette, who was seen smoking by John Hayes, who the paramedics had seen smoking, who the detectives had seen smoking, Kenneth Dessaure. Footprint out of place, ashes out of place, that towel with semen in it out of place.

[V36 1694]

Penalty Phase

The court questioned Dessaure to determine that he understood that he had the right to have defense counsel present mitigating

circumstances to the jury and to have the jury make a recommendation to the court. [V38 1846] Dessaure did not want defense counsel to present mitigating evidence to a jury. [V38 1846-47] No one forced or advised him to make this choice. He was doing it against his attorneys' advice. He understood that his decision could not be revoked. [V38 1847-48]

The prosecutor argued that the first aggravating circumstance was that the defendant was on community control. Defense counsel stipulated that Dessaure was on community control at the time of the offense. [V38 1853] The prosecutor said the second aggravator was that the defendant had been convicted of resisting arrest with violence. Defense counsel acknowledged that the judgment, sentence, and fingerprints to be submitted by the state were Dessaure's. [V38 1854] The prosecutor said that the third aggravator was that the defendant was engaged in a burglary, and the fourth was that the crime was heinous, atrocious, or cruel based on the infliction of 53 wounds, including defensive wounds, and the medical examiner's testimony that it would take four to six minutes for the person to lose consciousness. [V38 1854-57]

The second prosecutor introduced the judgment and sentence for resisting an officer with violence and the judgment, sentence, change of plea form, probation order, probation violation, and community control order for conspiracy to commit armed robbery. [V38 1858] The community control was revoked because of the resisting arrest, and Dessaure was sentenced to 30 months in prison. He had not been pardoned. [V38 1865-68] The prosecutor displayed photos of

Riedweg's injuries introduced at trial and argued that the murder was heinous, atrocious, and cruel. [V38 1858-62] She presented an exhibit pertaining to Riedweg's character put together by her coworkers as victim impact evidence. [V38 1862-64] She presented victim impact testimony by Rebecca Pierce, Riedweg's supervisor [V38 1870, 1876-78], and Doreen Cosenzino, Riedweg's friend. [V38 1878-81] The victim advocate read victim impact statements by Brenda Smith, Riedweg's sister, and Riedweg's mother. [V38 1882-86]

Defense counsel proffered, by oral summary, the mitigating evidence he would have presented if Dessaure had not waived it, including the testimony of Dessaure's delinquency case manager and counselor, his mother, half-brother, older brother, half-sister, "surrogate mother," grandmother, Mary Parent, Amy Cockrell, and Dr. Maher, a psychiatrist. [V38 1888-1905] Dessaure waived the testimony of each proposed witness. [V 38 1891, 1895, 1897, 1899, 1900-03, 1905] Dessaure waived the presentation of any legal argument by his counsel against the aggravating circumstances. [V38 1906]

The prosecutor proffered rebuttal evidence concerning the mitigating circumstances. [V38 1907-12] Defense counsel asserted that Dr. Maher found Dessaure competent to decide to waive mitigation and asked the court to consider Dessaure's demeanor throughout the proceedings as a mitigating circumstance. [V38 1912] The court granted the prosecutor's request to order a presentence investigation. [V38 1915-20]

Spencer Hearing

Mary Parent testified that she and Dessaure had a son, Tyler, born September 10, 1998. During the two and a half months they were all together, Dessaure was a caring father who rocked Tyler to sleep, changed him, fed him, and gave him baths. [V24 4426-29] While Parent was pregnant, Dessaure's son, John Thomas (JT) lived with them for three months. Dessaure taught him how to read and count. [V24 4432] JT and Dessaure's daughter, Kayla, would also visit on week-ends. Dessaure had two other daughters, Brittany, who lived out of state, and Sierra. V24 4433] On the night she went into labor, Parent panicked and smacked Dessaure, resulting in his grandmother telling him to pack his things and leave her house. [V24 4430-31] Parent left the state on Thanksgiving weekend, because her family offered to help her for a few months. She planned to return before Dessaure's birthday, January 28, but she was delayed and then hoped to return by Valentine's Day. [V 24 4430-32]

Louise Randall, Dessaure's grandmother, testified that Dessaure and his brothers came to live with her when he was 13 months old because they were malnourished and the state of New York was threat-ening to take them away. She moved to Largo, Florida, with the boys in 1980. Dessaure stayed with her until he was 13 or 14 years old [V24 4434-37] Dessaure's father had no contact with them after moving to Florida and did not provide any support. Dessaure's mother did not help to support her sons. [V24 4437] Dessaure's older brother Adolf was killed in 1994. After his death, Dessaure acted like he did not care whether he lived or died. [V24 4438-39] They lived in a bad neighborhood, with a lot of drug activity. [V24 4439-

40] Mrs. Randall said she asked Dessaure to leave her house not long before February, 1999, because some of his friends were no longer welcome in her home. She denied that it was because of a domestic dispute. [V24 4441-42]

Kenneth Dessaure testified that at the end of the February 9, 1999, police interview he tried to leave, Detective Klein grabbed his left wrist and told him he was going to arrest him for violating house arrest. Detective Pupke grabbed his right wrist and pulled his arm. The door came open. One of the officers yelled for help. [V24 4443-44] Other officers came running to the door. Dessaure yelled that he was not fighting. They tripped and fell to the floor. The officers handcuffed him and threw him into a chair. Dessaure told one of the officers he would sue them, and the officer told him to shut up and hit him in the eye. Dessaure sat there and fell asleep. [V24 4445] He accepted a plea deal that included the resisting arrest charge just to get it over with. [V24 4445-46] Dessaure earlier requested the death penalty because he was angry about being charged with and convicted of the murder. He changed his mind and requested a life sentence. [V24 4446-47, 4454]

Being a father was important to Dessaure because he never had a father. He was 23 years old. [V24 4447] His daughter Sierra was three years old. They took her to hamburger restaurants, the park, and the beach so he could talk to her and play with her. [V24 4448] His daughter Brittany lives in Tennessee. He moved to Tennessee with them when he was fourteen. He got her a jacket and shoes. He moved back to Florida and could no longer find them. [V24 4448-49] He had

frequent contact with JT and Kayla, but their mother used them as pawns to try to get him to marry her. [V24 44450] Sierra was born on October 21, 1993, when Dessaure was fifteen. Brittany was born on June or July 21, 1994, when he was sixteen. She was seven at the time of the hearing. Dessaure last saw her when she was one. He wasn't there when she was born because he came down to Florida when his brother was killed. John Thomas was born April 16, 1995, when he was seventeen. Kayla was born May 14, 1996, when he was eighteen. He did not see her for seven months because he was in jail. Tyler was born September 10, 1998, when he was twenty. [V24 4450-52, 4454, 4456] He was court ordered to pay child support for JT, Kayla, and Brittany. [V24 4455-57]

Dessaure admitted that he was convicted of resisting arrest with violence and conspiracy to commit armed robbery and that he was on community control on the day of the murder. [V24 4452] He violated his community control. [V24 4453]

Defense counsel asked the court to consider in mitigation that Dessaure's courtroom demeanor was exemplary, and that he had just turned twenty-one at the time of the offense. [V24 4459]

Detective Thomas Kline testified that Dessaure said he was leaving at the end of the interview. The officers told him to sit down because he was being charged with violation of house arrest. Dessaure put his hand on the door knob to leave. Klein tried to get him from the door and was afraid that Dessaure would try to go for his gun. [V24 4463-64] Dessaure resisted their efforts to arrest him by trying to push them away, moving, and squirming. The officers

moved Dessaure away from the door. Dessaure went to the floor, and the officers secured him. Klein denied that anyone punched Dessaure. [V24 4465] Dessaure's hand started bleeding again. None of the officers was injured. [V24 4466-67]

SUMMARY OF THE ARGUMENT

ISSUE I During her opening statement, the prosecutor remarked that Dessaure said only two people knew what happened in Riedweg's apartment, so she had to reconstruct what happened with scientific and other evidence. These remarks were fairly susceptible of being interpreted by the jury as a comment on Dessaure's failure to testify. The remarks violated Dessaure's constitutional right to remain silent. The trial court abused its discretion by denying defense counsel's motion for mistrial.

ISSUE II The State presented evidence that ashes were found in Riedweg's sink, Riedweg did not smoke, and did not allow others to smoke in her apartment. The trial court excluded defense evidence that Riedweg's boyfriend Stuart Cole smoked marijuana, he was in her apartment on the day of the homicide, and police found a partially smoked marijuana cigarette in the apartment. The court allowed the prosecutor to argue, over defense counsel's objection, that the ashes were evidence of Dessaure's identity as the killer. The court's rulings violated Dessaure's constitutional right to present his defense and deprived him of a fair trial.

ISSUE III The trial court abused its discretion by overruling defense counsel's objections, denying his motion for mistrial, and allowing the State to impeach two defense witnesses by cross-examining them about their mandatory life sentences for unrelated crimes. So long as the witnesses answered truthfully, the State was only permitted to ask how many times they had been convicted of felonies. Information about their sentences was improper impeachment not relevant to their bias or credibility. Because the defense witnesses were called to impeach State witness Valdez Hardy, the improper impeachment unfairly influenced the jury's evaluation of the witnesses' credibility. Informing the jury of the defense witnesses' mandatory life sentences invited them to consider the seriousness of their crimes and created the danger that the jury would consider guilt by association.

ISSUE IV The trial court denied defense counsel's motion to exclude the part of Dessaure's statement to police concerning his telephone argument with his fiancee about cheating on each other before he found Riedweg's body and called 911. The argument was not relevant to his state of mind as claimed by the state. The evidence was unfairly prejudicial because it showed his bad character in regard to matters not connected to the alleged murder.

ISSUE V Under the provisions of the Florida death penalty statute, case law, and the Sixth and Eighth Amendments, Dessaure had the right to have the jury determine whether the State proved sufficient aggravating circumstances to justify the imposition of the death penalty. Dessaure was never told about and never waived this

right. He waived only the right to present mitigating evidence and argument to the jury. Because the record does not show a valid waiver of the right to have the jury determine whether sufficient aggravating circumstances were proven, the trial court erred by conducting the penalty phase trial without a jury.

ISSUE VI The Sixth and Fourteenth Amendments require aggravating circumstances necessary for imposition of the death sentence to be found by the jury. The Florida death penalty statute is unconstitutional on its face because it requires aggravating circumstances to be found by the sentencing judge and not by the jury. Reliance upon a facially invalid statute to impose a death sentence is fundamental error.

ISSUE VII The trial court's denial of Dessaure's motion to preclude the death sentence because aggravating circumstances were not alleged in the indictment, and the subsequent imposition of the death sentence, violated Dessaure's constitutional right to particularized notice of the nature and cause of the accusation.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR COMMENTED ON HIS RIGHT TO SILENCE IN HER OPENING STATEMENT.

During opening statement, the prosecutor said,

> In this particular case, as Kenneth Dessaure said himself, there is only two people that

> know exactly what occurred in that apartment. So, therefore, it is my job to take the physical evidence, the scientific evidence, the photographs, the witnesses' statements, experts, scientists, forensic technicians, and reconstruct what occurred for you.

[V27 350] Defense counsel immediately objected and asked to approach the bench. He argued that the prosecutor had commented on Dessaure's right to remain silent, and Dessaure would not testify. He moved for a mistrial. [V27 350-51] The prosecutor responded that the evidence would show that Dessaure said, "there is only two people that know, her and me." The court found that the comment was not an inference on the right to remain silent and denied the motion for mistrial. [V27 351]

The State later presented testimony by Valdez Hardy, a former prison inmate who had been in the same cell pod with Dessaure in the Pinellas County Jail in September, 1999. [V28 620-26] According to Hardy, Dessaure said that "can't nobody say he killed her. Don't nobody know what happened but him and her." [V28 635]

"[M]otions for mistrial are addressed to the trial court's discretion and should be granted only when necessary to ensure that a defendant receives a fair trial." Keen v. State, 775 So. 2d 263, 277 (Fla. 2000) (quoting Terry v. State, 668 So.2d 954, 962 (Fla. 1996)). The trial court abused its discretion in denying defense counsel's motion for mistrial because the prosecutor's remark violated Dessaure's right to remain silent guaranteed by the Fifth Amendment and Article I, section 9, Florida Constitution and deprived him of his right to a fair trial.

The Fifth Amendment to the United States Constitution provides, "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" Article I, section 9, Florida Constitution provides, "No person shall . . . be compelled in any criminal matter to be a witness against oneself." These prohibitions of compelled self-incrimination guarantee that a criminal defendant has the right to remain silent and decline to testify at trial.

The United States Supreme Court has ruled that a prosecutor's comments on the defendant's failure to testify in a state criminal trial violate the self-incrimination clause of the Fifth Amendment, which is made applicable to the states through the Fourteenth Amendment. Griffin v. California, 380 U.S. 609 (1965). The Court explained that

> comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," . . . which the Fifth Amendment outlaws. It is a penalty imposed . . . for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. [Citation and footnote omitted.]

Id., at 614.

Similarly, this Court has long forbidden prosecutors from commenting upon the defendant's failure to testify at trial. "[A]ny comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." Rodriguez v. State, 753 So. 2d 29, 37 (Fla.) (quoting State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985)), cert. denied, 531 U.S. 859 (2000). Florida Rule of Criminal Procedure 3.250 also incorporates this constitutional principle and prohibits

prosecutors from commenting on the defendant's failure to testify. Id.

This Court "adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is 'fairly susceptible' of being interpreted as a comment on silence will be treated as such." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). Under this test, the prosecutor's actual intent in making the comment is irrelevant. What matters is whether the comment could reasonably be construed by jurors as referring to the defendant's failure to testify. Thus, the fact that the prosecutor was referring to testimony which she expected to elicit from Valdez Hardy is unimportant. Reasonable jurors hearing her remarks could have interpreted them to mean that only Riedweg and Dessaure were present when Riedweg was killed. Since Riedweg was dead, she could not testify. Since Dessaure was the defendant and had the right not to testify, the jury could not expect him to tell them what happened. Therefore, the prosecutor had to try to reconstruct what happened from physical, scientific, and other evidence. The prosecutor's remarks were "fairly susceptible" of being interpreted by the jury as a comment on Dessaure's exercise of his right to remain silent.

Similar remarks in the prosecutor's opening statement were found to impermissibly highlight the defendant's decision not to testify in Heath v. State, 648 So. 2d 660, 663 (Fla. 1994), cert. denied, 515 U.S. 1162 (1995). In Ronald Heath's case, the prosecutor said:

> You're going to hear testimony, ladies and gentlemen, from the only person who can tell you about what Kenny and Ronnie did. Michael Sheridan's dead; he can't tell you what happened. Kenny Heath is going to come before you and tell you how Michael Sheridan died.

However, this Court found the comment on failure to testify in Heath to be harmless without explanation. Id.

Because the prosecutor's remarks in this case were fairly susceptible of being interpreted as a comment on Dessaure's failure to testify, the remarks violated Dessaure's constitutional right to remain silent, and the trial court erred by denying defense counsel's motion for mistrial. Such violations of the right to silence are subject to review under the harmless error test for constitutional error set forth in Chapman v. California, 386 U.S. 18, 24 (1967), which this Court adopted in State v. DiGuilio, 491 So. 2d at 1134-35.

Although the state's permissible evidence of Dessaure's guilt was strong, that is not the test for harmless error. The Chapman/DiGuilio test

> places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.... Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. [Emphasis added.]

Id., at 1135.

> The test is not a sufficiency-of-the-evidence ... or even an overwhelming evidence test.... The question is whether there is a reasonable possibility that the error affected the verdict.... If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id., at 1139.

There is a reasonable possibility that the prosecutor's unconstitutional comment on Dessaure's failure to testify during her opening statement contributed to, influenced, or affected the guilty verdict by predisposing the jury to consider Dessaure's silence in the face of the State's evidence. The prosecutor invited the jury to conclude that Dessaure must be guilty because he did not take the stand to explain why his foot print was on Riedweg's kitchen floor, how blood consistent with Riedweg's DNA profile got on his shorts, how semen consistent with Dessaure's DNA profile got on Riedweg's comforter and towel, why Valdez Hardy testified Dessaure talked to him about explaining the semen on the towel, and why Shavar Sampson testified Dessaure told him he raped and stabbed Riedweg (especially in light of the medical examiner's testimony that the rape kit test results were negative). The prosecutor punished Dessaure for exercising his constitutional right to remain silent by making his failure to testify extremely costly. Under these circumstances, the trial court abused its discretion when it denied the motion for mistrial. The conviction and death sentence for first-degree murder must be reversed, and this case must be remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY EXCLUDING DEFENSE EVIDENCE THAT ASHES FOUND IN RIEDWEG'S SINK MAY HAVE BEEN LEFT THERE BY STUART COLE AND BY ALLOWING THE PROSECUTOR TO ARGUE THAT THE ASHES WERE EVIDENCE OF APPELLANT'S IDENTITY AS THE PERPETRATOR OF THE HOMICIDE.

The trial court violated Dessaure's constitutional right to present his defense by refusing to allow him to counter the State's evidence about ashes found in Riedweg's sink with evidence that Riedweg's boyfriend Stuart Cole may have left the ashes because he smoked marijuana, was in Riedweg's apartment on the day of the homicide prior to Riedweg's death, and police found a partly smoked marijuana cigarette in the apartment. Dessaure was prejudiced by the exclusion of this evidence because the court allowed the prosecutor, over defense counsel's objection, to argue to the jury that the ashes in the sink were evidence of Dessaure's identity as the perpetrator of the homicide.

Generally, the trial court has discretion to determine the relevance and admissibility of trial evidence. White v. State, 817 So. 2d 799, 805 (Fla.), cert. denied, 123 S.Ct. 699 (2002). However, that discretion is constitutionally limited when an accused seeks to introduce evidence in support of his defense to criminal charges.

The defendant's right to present a defense, the right to present his version of the facts so the jury may decide where the truth lies, is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19 (1967); see U.S. Const. amend. XIV;

Art. I, § 9, Fla. Const. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Collins v. State, 839 So. 2d 862, 864 (Fla. 4th DCA 2003); see U.S. Const. amend. VI; Art. I, § 16(a), Fla. Const. "[T]rial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life." Guzman v. State, 644 So. 2d 996, 1000 (Fla. 1994). The unjustified exclusion of available defenses and witnesses in support of those defenses violates due process under both the federal and state constitutions. Morgan v. State, 453 So. 2d 394, 397 (Fla. 1984).

Before jury selection, the State moved to exclude evidence of two marijuana cigarettes found in Riedweg's apartment. Defense counsel said he did not intend to bring that up because he wanted to exclude evidence that Dessaure and his roommates may have taken recreational drugs. The court granted the motion. [V25 23-24]

The State presented testimony by Riedweg's friend Doreen Cosenzino that Riedweg dated Stuart Cole [V29 700, 702], Riedweg did not smoke cigarettes [V29 708], Cosenzino's husband and Cole both smoked cigarettes, but Riedweg did not allow them to do so in her apartment. [V29 708-09] Forensic specialist Greule testified that Riedweg's apartment was extremely neat and tidy; she was a meticulous housekeeper. [V29 711, 737-38] Greule took a photo, State Exhibit 63, which showed either an imperfection in the print or cigarette ashes in the kitchen sink. [V29 738-40, 746, 752-54] She observed

Dessaure smoking in the parking lot that evening. [V29 739] Forensic specialist Holloway collected a plastic mug and straw found on the counter of the kitchen sink [V29 762-63, 771-73] and 23 cigarette butts from the parking lot and the area around the exterior of Riedweg's apartment. [V29 798-99] She observed cigarette ashes in a measuring cup in the kitchen sink, as shown in State Exhibit 63. [V29 774-75]

Defense counsel asked the court to reconsider its ruling on the State's motion in limine and to allow him to present evidence that there was a strong smell of incense in the apartment, two marijuana cigarettes were found in the apartment, one of them was partially smoked, Stuart Cole smoked marijuana, and Cole was in the apartment earlier in the day before he played golf. This evidence would provide an alternative explanation for the presence of ashes in the kitchen sink. [V30 804-09] The prosecutor opposed admission of the evidence because the cigarettes were not tested for marijuana, the toxicology tests showed no illegal substance in Riedweg's system, and there was no evidence that marijuana was used in the apartment on the day of the homicide. [V30 805-807] The court ruled that it would not allow the evidence. [V30 807] It should be noted that the State presented no evidence that the ashes were tested to determine that they were tobacco and not marijuana. Moreover, the ashes were the only evidence that anyone smoked anything inside the apartment on the day of the homicide. The absence of any illegal substance in Riedweg's system was irrelevant to the defense claim that Cole smoked marijuana.

Defense counsel proffered Daniel Copeland's testimony that Cole was prone to smoke marijuana while they played golf. Copeland did not know whether Cole smoked marijuana before they played golf on February 9 and did not recall Cole smoking it at the golf course that day. [V35 1583-85] Defense counsel argued that the Court should permit him to present evidence of Cole's marijuana usage and the marijuana cigarettes found in Riedweg's apartment to provide an alternative explanation for the ashes found in her sink. [V35 1586-88] The prosecutor argued that the evidence was not relevant because there was no evidence that Cole smoked marijuana on February 9. [V35 1587] The court excluded the evidence on the grounds that there was no evidence to tie Cole to the marijuana found in the apartment, and Cole's use of marijuana while golfing was inadmissible evidence of a character flaw. [V35 1588] The court cautioned the State about its use of the evidence of the ashes in the sink but did not rule on whether the State could comment about it. [V35 1588-89]

Prior to closing argument, defense counsel moved in limine to preclude the State from arguing that the ashes in the sink were in any way related to Dessaure because there was no evidence connecting those ashes with Dessaure, so the argument would be speculative and unduly prejudicial. [V36 1684] The prosecutor responded that Dessaure's footprint was "up there," it was not unreasonable to think that he had a cigarette in his hand and flicked the ashes, and if the ashes had been there before Riedweg died, she would have washed them down the sink. The court overruled defense counsel's objection and allowed the argument. [V36 1685]

During closing argument, the prosecutor argued that Dessaure "left his ashes behind." [V36 1693] She said,

> The water jug on her counter, [Riedweg] had filled her cup up with water some time that day while laying out. She was a neat freak. If those ashes were there before she was murdered or before [Dessaure] entered the apartment, they would have been washed down that sink. She filled up her water cup and those ashes would have gone down the sink and they are not. They are right there. And we all know who was smoking that day. Who told the cops around noon, one o'clock, he had a cigarette, who was seen smoking by John Hayes, who the paramedics had seen smoking, who the detectives had seen smoking, Kenneth Dessaure. Footprint out of place, ashes out of place, that towel with semen in it out of place.

[V36 1694]

Section 90.402, Florida Statutes (1997), provides, "All relevant evidence is admissible, except as provided by law." Section 90.401, Florida Statutes (1997), defines relevant evidence as "evidence tending to prove a material fact in issue." In Williams v. State, 110 So. 2d 654, 659 (Fla.), cert. denied, 361 U.S. 847 (1959), this Court declared:

> Our initial premise is the general cannon of evidence that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion.

Accord White v. State, 817 So. 2d at 805 (quoting Zack v. State, 753 So. 2d 9, 16 (Fla.), cert. denied, 531 U.S. 858 (2000)). Relevant evidence will not be excluded merely because it relates to facts that point to the commission of a separate crime, but the relevancy of this type of evidence should be cautiously scrutinized before it is

determined to be admissible. White, at 805; Zack, at 16; Williams, at 662.

However, the reason for caution in admitting State evidence of other crimes committed by the defendant is the danger that the jury will take such evidence of criminal propensity as evidence of the defendant's guilt of the crime charged. Peek v. State, 488 So. 2d 52, 56 (Fla. 1986); Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). That concern ought not to apply when the defendant seeks to present evidence of other crimes or bad acts committed by other people in an effort to establish his own innocence.

In Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990), and State v. Savino, 567 So. 2d 892, 893 (Fla. 1990), this Court held that a defendant may introduce similar fact evidence of other crimes or "reverse Williams rule evidence" for exculpatory purposes if it is relevant. In Rivera, at 539, this Court agreed that "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." The admissibility of the evidence depends upon its relevance. Id.; Savino, at 893. "If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense." Id. In both Rivera, at 540, and Savino, at 893, this Court found that the collateral crime evidence offered by the defendant was not sufficiently similar to the charged offense to be relevant.

Unlike Rivera and Savino, the evidence of Cole's marijuana usage and the partially smoked marijuana cigarette was not similar fact evidence and was not offered to show that Cole killed Riedweg. Instead, the evidence was offered to rebut the State's claim that the ashes in the sink were evidence of Dessaure's identity as the perpetrator of the homicide. It was relevant to Dessaure's defense that he was not the killer. When dissimilar fact evidence of another crime or bad act is relevant for any purpose other than to show bad character or propensity, it is admissible under section 90.402, Florida Statutes (1997), unless its probative value is outweighed by the danger of unfair prejudice to the opposing party. See White v. State, 817 So. 2d at 805-06; Zack v. State, 753 So. 2d at 16; § 90.403, Fla. Stat. (1997).

The defense evidence about Cole's marijuana usage and the partially smoked marijuana cigarette found in the apartment was not unfairly prejudicial to the State. The proper role of the prosecutor in a criminal trial is not to seek conviction of the defendant under any circumstances, but to seek justice. When the presence of an object at a crime scene is subject to two possible explanations, one consistent with guilt and the other consistent with innocence, it is patently unjust to admit the evidence consistent with guilt and exclude the evidence consistent with innocence. Both sides of the evidence must be presented so the jury may determine where the truth lies.

The court abused its discretion when it barred the presentation of defense evidence providing an explanation for the ashes found in

Riedweg's sink consistent with Dessaure's innocence and then permitted the State, over defense counsel's objection, to argue that the ashes were evidence of Dessaure's guilt. The court violated Dessaure's constitutional right to present evidence relevant to his defense, then allowed the State to take unfair advantage of that error in closing argument. These errors were not harmless under Chapman v. California, 386 U.S. 18, 24 (1967), and State v. DiGuilio, 491 So. 2d 1129, 1135, 1139 (Fla. 1986), because there is a reasonable possibility that the jury considered the prosecutor's argument about Dessaure leaving the ashes in the sink along with the State's other evidence in deciding that Dessaure was guilty of the murder. Dessaure's conviction and sentence must be reversed for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO IMPEACH DEFENSE WITNESSES WITH EVIDENCE THAT THEY WERE SERVING MANDATORY LIFE PRISON SENTENCES.

The trial court erred by allowing the prosecutor, over defense counsel's objections, to impeach two defense witnesses by cross-examining them about their mandatory life sentences. So long as the witness answers truthfully, cross-examination about unrelated prior convictions is limited to the number of convictions. Information about the witnesses' sentences was neither relevant nor permissible. It improperly diminished the witnesses' credibility and created the

danger that the jury considered guilt by association in reaching its verdict.

William Birchard was a defense witness called to impeach State witness Valdez Hardy by testifying that Hardy tried to talk to Dessaure about his case, but Dessaure did not respond. [V36 1610-11] Birchard asked Hardy why he was concerned about Dessaure's case. Hardy said he was trying to get information so he could make a deal on his own case. [V36 1611-12] Hardy had no information about Dessaure's case except what was in the newspaper. [V36 1612]

In turn, the prosecutor sought to impeach Birchard by eliciting his testimony that he had been convicted of five felonies in Pinellas County. The prosecutor's co-workers prosecuted him for each of the felonies. [V36 1613] The prosecutor asked, "And we are currently responsible for you serving a life sentence right now?" [V36 1613-14] Defense counsel objected and moved for a mistrial on the ground that inquiring about the length of the sentence was impermissible impeachment. He argued that the only question that could be asked was how many felonies he had. The prosecutor argued that the maximum mandatory sentence was relevant because there was nothing her office could do if he perjured himself. The court denied the motion for mistrial. [V36 1614] The prosecutor then asked if he was serving a mandatory life sentence and if her office was responsible for the imposition of the sentence. Birchard answered yes to both questions. [V36 1615]

Another defense witness, Rodney Stafford, was also called to impeach Hardy by testifying that Dessaure and Birchard knew Hardy was

a snitch. [V36 1623-24] The prosecutor asked if Stafford was currently serving a mandatory life sentence curtesy of her office, and Stafford answered yes. The court overruled defense counsel's objection. [V36 1627] The prosecutor then asserted that there was nothing Stafford could do to hurt himself or to help himself because it was a mandatory life sentence, and Stafford agreed. He denied having any hard feelings against her office. [V36 1628]

All witnesses are subject to cross-examination concerning their credibility; the trial court has "wide discretion to impose reasonable limits on cross-examination." Geralds v. State, 674 So. 2d 96, 100 (Fla.), cert. denied, 519 U.S. 891 (1996). "[M]otions for mistrial are addressed to the trial court's discretion and should be granted only when necessary to ensure that a defendant receives a fair trial." Keen v. State, 775 So. 2d 263, 277 (Fla. 2000) (quoting Terry v. State, 668 So.2d 954, 962 (Fla. 1996)). In this case, the trial court abused its discretion when it overruled defense counsel's improper impeachment objections and denied his motion for mistrial because the prosecutor overstepped the legal limits on impeachment of witnesses by proof of prior convictions.

Section 90.610(1), Florida Statutes (1997), provides:

> (1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, ...

It is well-established under Florida case law that a witness can be impeached by evidence of a prior conviction, but this Court has placed strict limitations on the admissibility of information about the prior conviction. In Fulton v. State, 335 So. 2d 280 (Fla. 1976), this Court reversed the defendant's conviction for second-degree murder because the trial court improperly allowed the State to cross-examine a defense witness about a pending charge of second-degree murder which did not arise out of the same episode as the charge against the defendant. The State offered the evidence of the pending charge to show his bias. This Court ruled, "A defense witness' supposed bias, attributable to charges concerning a totally distinct offense, is not a proper subject for impeachment." Id., at 284. This Court further ruled that "evidence of particular acts of misconduct cannot be introduced to impeach the credibility of a witness." Id. This Court explained the permissible limits for impeachment by evidence of prior convictions:

> When there has been a prior conviction, only the fact of the conviction can be brought out, unless the witness denies the conviction.... If the witness denies ever having been convicted, or misstates the number of previous convictions, counsel may impeach the witness by producing a record of past conviction. Even if a witness denies a prior conviction, the specific offense is identified only incidentally when the record of the conviction is entered into evidence.... If the witness admits the conviction, "the inquiry by his adversary may not be pursued to the point of naming the crime for which he was convicted." [Citations and footnote omitted.]

Id.

This Court found that the error in cross-examining the defense witness about the pending but unrelated murder charge in Fulton was not harmless. First, the witness's testimony went to the heart of Fulton's claim of self-defense because it concerned the alleged victim's reputation for violence. Second, this Court found the possibility of a spill-over effect:

> The jury's perception of the defendant might have been colored by the knowledge of a friend's involvement in a collateral matter. The danger of "guilt by association" is a real one, which ought to be minimized whenever possible. The fact that the defendant and the witness were each charged with second degree murder, although the crimes were unrelated, enhances the danger of a possible "spill-over" effect.

Id., at 285. Thus, this Court concluded that the verdict might reasonably have been affected by the improper discrediting of the defense witness's testimony. Id.

While a defense witness may be impeached by cross-examination about the fact of his prior conviction, he cannot be impeached by questioning him about his incarceration for the conviction. In Reeves v. State, 711 So. 2d 561, 562 (Fla. 2d DCA 1997), the Second District Court of Appeal found that the trial court committed reversible error because it allowed the prosecutor to cross-examine the defendant's brother, the sole witness for the defense, about his incarceration for a traffic offense:

> Allowing the prosecutor to inform the jury about the brother's incarceration on a traffic offense served only to embarrass the only defense witness and discredit him. The brother's incarceration after an arrest for a traffic

> offense was merely a collateral matter which did not tend to affect his credibility.

The Second District rejected the State's argument that the cross-examination was proper impeachment to show bias. Id.

In Roper v. State, 763 So. 2d 487 (Fla. 4th DCA 2000), the Fourth District found reversible error because the trial court allowed the prosecutor to cross-examine a defense witness about the fact that he was incarcerated at the South Florida Reception Center at the time of his testimony. The Fourth District found that the cross-examination was not proper to show the witness's prior conviction pursuant to section 90.610, Florida Statutes (1997). Id., at 489. The court rejected the State's argument that the cross-examination was permissible to show the witness's bias under section 90.608, Florida Statutes (1997), stating, "Mere incarceration without more does not support the state's claim of bias." Id., at 489-90. The court followed Reeves in holding that the witness's incarceration was a collateral matter that did not affect his credibility. Id., at 490. The court found that the error was not harmless because there was a conflict between the testimony of a police officer State witness and the testimony of the defense witness; damaging the defense witness's credibility may have weighed in favor of the officer's credibility and prejudiced the defendant. Id., at 490-91.

In the present case, the trial court erred by allowing the State to go beyond asking the defense witnesses how many times they had been convicted of felonies. Unless the State could prove that they answered falsely, section 90.610(1), Florida Statutes (1997),

did not permit any further questioning about their prior convictions to impeach their credibility. Fulton v. State, 335 So. 2d at 284. The fact that they were serving mandatory life sentences for unrelated offenses at the time of their trial testimony was improper impeachment which was not relevant to their credibility. See Id.; Roper v. State, 763 So. 2d at 490; Reeves v. State, 711 So. 2d at 562.

The court's error in allowing the improper impeachment was not harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The jury had to decide whether to believe State witness Hardy or defense witnesses Birchard and Stafford. Allowing the State to improperly impeach the defense witnesses tipped the balance in favor of the credibility of Hardy, thereby contributing to, influencing, or affecting the verdict of guilt. See Roper v. State, 763 So. 2d at 490-91.

Furthermore, the improper impeachment created the danger of a spill-over effect. To have received mandatory life sentences, Birchard and Stafford must have committed very serious crimes. Their crimes were unrelated to the murder charge for which Dessaure was being tried, but admitting evidence of their mandatory life sentences invited the jury to speculate about their crimes and to improperly consider guilt by association. See Fulton v. State, 335 So. 2d at 285. Dessaure's conviction and sentence must be reversed, and this case must be remanded for a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT EVIDENCE THAT APPELLANT QUARRELLED WITH HIS FIANCEE DURING A TELEPHONE CALL A FEW HOURS BEFORE RIEDWEG WAS KILLED.

The trial court abused its discretion by denying defense counsel's motion in limine and admitting Dessaure's taped statement to the detectives concerning his telephone argument with his fiancee about cheating on each other. The evidence was not relevant to any material fact in issue and prejudiced Dessaure by showing his bad character.

Generally, the trial court has discretion to determine the relevance and admissibility of trial evidence. White v. State, 817 So. 2d 799, 805 (Fla.), cert. denied, 123 S.Ct. 699 (2002). However, the admission of evidence relevant solely to the defendant's bad character is prohibited unless the defendant has placed his character in issue. Robertson v. State, 829 So. 2d 901, 912 (Fla. 2002); Coler v. State, 418 So. 2d 238, 239 (Fla. 1982).

Defense counsel filed a motion in limine to exclude evidence of Dessaure's argument with his fiance on the day of the homicide. [V21 3821-22] At a pretrial hearing on the motion, defense counsel argued that the court should exclude a portion of the detectives' tape recorded interview of Dessaure which concerned an argument over the telephone on the day of the homicide between Dessaure and his fiancee, Mary Parent, about Dessaure having a relationship with another woman, Renee Listopad, on the ground that it was not relevant to the

issues in the case. [SR 20-26] The prosecutor asserted that the argument was relevant to show that Dessaure was angry; it was "part and parcel of what set him off." [SR 24-25] She also asserted that Dessaure's reaction to the questioning and the change in his tone of voice was relevant. [SR 26] The court denied the motion. [SR 25-26] Defense counsel renewed his objection to this evidence at trial. [V34 1366]

The recorded interview was played for the jury. [V34 1369, 1-54] Dessaure said he received calls from Tim, his fiancee (Mary Parent), Renee (Listopad), and two other people. [V34 37] He asked Parent, who was in South Carolina, if she was cheating on him. She had denied cheating on him a couple of weeks before. That was nothing new between them, they argue and yell. She wanted to come back to Florida, and he wanted her to come back. He had a dream about her cheating, and usually his dreams are true. [V34 37-38] He hung up on her. Dessaure denied cheating on Mary. He had been trying to break up with Mary but wasn't sure whether he wanted to be with her or Renee. He had seen Renee the other day. [V34 39] Dessaure and Mary had been together for about two years. He had messed around with Renee last year, and they slept together two days before the statement. He wasn't cheating with Renee because Mary told him they were broken up the day before. [V34 40-41] During their argument on the day of the statement, Mary accused Dessaure of cheating on her, and he accused her of cheating on him. [V34 41, 43] Dessaure and Mary had been fighting ever since she had been gone. He fought with her before he slept with Renee. [V34 42] He fought with

Mary the day of the statement and hung up on her. Tim prank called him, then he called Mary back. [V34 42-43] Later in the taped interview, Detective Pupke accused Dessaure of being "pissed off" because he argued with his girlfriend. Dessaure replied that he had been arguing with his girlfriend for two months, and he did not take out things on other people. [V34 51]

Evidence of a defendant's prior bad act which is not similar to the charged offense is admissible if it is relevant to a material issue other than the defendant's bad character or propensity to commit crime, unless the danger of unfair prejudice outweighs the probative value of the evidence. White v. State, 817 So. 2d at 805-06; Zack v. State, 753 So. 2d 9, 16 (Fla.), cert. denied, 531 U.S. 858 (2000); see § 90.402, Fla. Stat. (1997); § 90.403, Fla. Stat. (1997).

Dessaure's argument with his fiancee was not relevant to any material issue in the case. The prosecutor's assertions that it was relevant to show that Dessaure was angry and that the telephone argument with his fiancee was what "set him off," appears to be an argument that the evidence was relevant to Dessaure's motive or state of mind at the time of the homicide. While evidence of a motive to commit a murder would be relevant, the prosecutor's claim was speculative at best. The State presented no other evidence to establish that Dessaure's anger about the argument with Mary Parent motivated him to go next door and kill Riedweg. Even if there was some marginal relevance to state of mind, it was outweighed by the danger of unfair prejudice to Dessaure.

During closing argument, neither of the two prosecutors argued to the jury that Dessaure's argument with Parent and resulting anger was his motive for the murder. [V36 1689-1715; V37 1759-83] The only mention of the argument in the State's closing occurred when the prosecutor was asserting that Parent was trying to help Dessaure:

> You heard from his fiancee who comes in and says, oh, yes, you know, she kind of laughs about it [Dessaure wanting ice for his water]. Look, she is trying to help him out. She is doing her best to help out her fiancee, who they were arguing about just prior to this because she said the defendant thought she was cheating on him. And we know during the course of this, he talks about -- and that it was an ongoing thing and we know during the course of this he concedes, yes, maybe he wasn't faithful as he should be.

[V37 1775] Thus, the State did not use the evidence about the argument except to show Dessaure's bad character -- he was not faithful to his fiancee.

Because the State failed to show that evidence of Dessaure's argument with Parent was relevant to any material issue in the case other than Dessaure's bad character, the trial court erred by admitting it. Because the State used the evidence solely to show Dessaure's bad character, the court's error was prejudicial to the defense. There is at least a reasonable possibility that the jury considered Dessaure's bad character along with the State's other evidence in reaching its verdict of guilt, so the error was not harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The conviction and sentence for first-degree murder must be reversed, and this case must be remanded for a new trial.

ISSUE V

APPELLANT'S WAIVER OF HIS RIGHT TO A JURY FOR THE PENALTY PHASE TRIAL WAS INVALID BECAUSE THE RECORD DOES NOT SHOW HE KNEW THAT HE HAD THE RIGHT TO HAVE THE JURORS DETERMINE WHETHER THE STATE PROVED SUFFICIENT AGGRAVATING CIRCUMSTANCES TO JUSTIFY IMPOSITION OF THE DEATH SENTENCE.

The trial court accepted Dessaure's waiver of his right to present mitigating evidence to the jury [V24 4310-11; V37 1827, 1830-32] and waiver of argument for life sentence [V24 4313; V38 1846-48] as a waiver of his right to a jury in the penalty phase of his trial. The question presented is whether this was a constitutionally valid waiver of his right to have the jury determine whether the State had proven sufficient aggravating circumstances to impose a death sentence. This is a mixed question of constitutional law and fact. This Court must accept the trial court's factual findings to the extent they are supported by competent substantial evidence, but the trial court's legal conclusion is subject to the de novo standard of review. State v. Glatzmayer, 789 So. 2d 297, 301 n. 7 (Fla. 2001).

Under the Florida death penalty statute, the jury's role involves more than hearing evidence of mitigating circumstances. Section 921.141(2), Florida Statutes (1997), provides:

> ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Thus, the jury must hear evidence of both aggravating and mitigating circumstances. The jury must then determine: first, whether there are sufficient statutory aggravating circumstances to support the imposition of a death penalty; second, whether there are sufficient mitigating circumstances to outweigh the aggravating circumstances; and third, whether the defendant should be sentenced to life or death. The jury's ultimate decision is then presented to the sentencing judge in the form of a recommendation to sentence the defendant to life or death.

The jury's role in Florida's death sentencing process is constitutionally significant. Under Florida case law, the sentencing judge must give great weight to the jury's recommendation, regardless of whether the jury recommends life or death. See Grossman v. State, 525 So. 2d 833, 839 n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). As a result, the United States Supreme Court has determined that the jury functions as a co-sentencer with the sentencing judge: "Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." Espinosa v. Florida, 505 U.S. 1079,

1082 (1992). The Court held that under the Eighth Amendment, "neither actor [jury or judge] must be permitted to weigh invalid aggravating circumstances." Id.

Therefore, under section 921.141(2), Florida Statutes (1997), Florida case law, the Espinosa decision, and the Eighth Amendment, Dessaure had more than a right to present evidence of mitigating circumstances to the jury, he had the right to have the jury determine whether the State had proven sufficient aggravating circumstances to justify the imposition of a death sentence. Moreover, the Sixth Amendment also gave Dessaure the right to have the jury determine whether the aggravating circumstances had been proven. Ring v. Arizona, 536 U.S. 584, 609 (2002).

In Griffin v. State, 820 So. 2d 906, 913 (Fla. 2002), this Court ruled that a defendant who waives his right to a jury for the penalty phase of his capital murder trial must move to withdraw the waiver in the trial court to preserve the issue of whether the waiver was voluntary. Griffin was wrongly decided.

Because Dessaure has a constitutional right to a jury determination of the existence of aggravating circumstances under the Sixth and Eighth Amendments, the validity of his waiver of that right is governed by federal law, not Florida case law. In Brookhart v. Janis, 384 U.S. 1, 4 (1966), the United States Supreme Court ruled:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, ... and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment

> or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461.

Under this rule, for Dessaure's waiver of his right to a jury for the penalty phase of his trial to be valid, the record must clearly establish that he knew he had the right for the jury to determine whether sufficient aggravating circumstances were proven to justify the imposition of the death penalty and that he intentionally relinquished that right.

At a hearing on September 6, 2001, defense counsel filed a written "Waiver of Right to Present Mitigation Evidence to the Jury in Penalty Phase" signed by Dessaure. [V24 4310-11; V37 1827] The written waiver stated that Dessaure was acting against the advice of his attorneys, he understood he had the right to present mitigation evidence to the jury that would potentially lead to a life sentence, his attorneys had explained what they believed the mitigation evidence to be, Dessaure would rather not present it to the jury, his decision was made freely and voluntarily, and he directed counsel to challenge the State's case and present mitigation to the court in summary form without calling witnesses. [V24 4310] The written waiver said nothing about the right to have the jury determine whether sufficient aggravating circumstances were proven to justify imposition of the death penalty. [V24 4310-11]

The court placed Dessaure under oath and questioned him to determine that the signature on the waiver was his, he made the decision against the advice of his attorneys, it was his decision, no one forced him to do it, the decision was irrevocable, he could not

later change his mind, and he stood by his decision. [V24 1830-31] The court found that Dessaure had waived his right to present mitigating evidence and testimony to a jury. [V 24 1832] The court made no inquiry to determine whether Dessaure knew he had the right to have the jury determine whether sufficient aggravating circumstances were proven, nor whether he voluntarily waived that right. [V24 1830-32]

The penalty phase trial was conducted on September 11, 2001, without a jury. [V38 1840-1926] Defense counsel explained to the court that he intended to proffer the mitigation found by the defense with the understanding that "we are not presenting any evidence whatsoever." [V38 1844] The court explained that a similar proffer was made in one of his prior cases, and the Florida Supreme Court ruled that he did not have to consider the proffer because it was not evidence. [V38 1844-45] The court placed Dessaure under oath and questioned him to determine that he understood he had the right to have his attorneys present mitigating circumstances to the jury and to have the jury make a sentencing recommendation, Dessaure did not want his attorneys to present any testimony or evidence to a jury for their recommendation, no one forced him to do this, he was acting against his attorneys' advice, no one else was advising him to do this, it was his decision, and the decision was irrevocable. [V38 1046-48] The court did not inquire about Dessaure's knowledge of and voluntary waiver of the right to have the jury determine whether sufficient aggravating circumstances were proven. [V38 1046-48] Dessaure signed a written "Waiver of Argument for Life Sentence,"

which stated he waived argument by counsel in favor of a life sentence and joined the State in seeking a death sentence. [V24 4313; V38 1847] The written waiver said nothing about the right to have the jury determine whether sufficient aggravating circumstances were proven. [V24 4313]

Because no one ever told Dessaure that he had the right to have the jury determine whether sufficient aggravating circumstances were proven, and no one ever asked if he was willing to waive that right, the record does not establish a valid waiver of that right. Since Dessaure never waived the right to have the jury determine whether the State proved sufficient aggravating circumstances to justify imposition of a death sentence, the trial court erred by conducting the penalty phase trial without a jury. Violation of the right to a jury trial is structural error which can never be found harmless. Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993). The death sentence must be vacated, and this case must be remanded to the trial court with directions to conduct a new penalty phase trial before a jury.

ISSUE VI

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO HAVE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY.

The trial judge sentenced Dessaure to death upon finding that four statutory aggravating circumstances were proven beyond a reasonable doubt and outweighed five mitigating circumstances. [V24 4358-65, 4367-94] The question presented by this appeal is whether the Florida death penalty statute, section 921.141, Florida Statutes (1997), is unconstitutional on its face because it violates the Sixth Amendment as interpreted by the United States Supreme Court in Ring v Arizona, 536 U.S. 584, 609 (2002), to require that aggravating circumstances necessary to the imposition of a death sentence must be found by a jury. This is a pure question of law, so the standard of review is de novo. State v. Glatzmayer, 789 So. 2d 297, 301 n. 7 (Fla. 2001); Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

This Court has repeatedly rejected arguments that the Florida death penalty procedure is unconstitutional under the requirements of Ring v. Arizona. E.g., Duest v. State, 2003 WL 2147248 (Fla. June 26, 2003). Appellant respectfully requests this Court to reconsider this issue.

The Sixth Amendment guarantee of the right to a jury trial is made applicable to the States by the Fourteenth Amendment. Ring v. Arizona, 536 U.S. 584, 597 (2002). In Ring, the United States Supreme Court held that the Sixth Amendment requires a jury to find

aggravating circumstances necessary for imposition of the death penalty. Id., at 609.

Pursuant to section 921.141(3), Florida Statutes (1997), the sentencing judge cannot impose a death sentence unless he or she finds the existence of sufficient aggravating circumstances as enumerated in section 921.141(5), Florida Statutes (1997). No death sentence can be imposed unless the sentencing judge finds at least one valid statutory aggravating circumstance. Hamilton v. State, 678 So. 2d 1228, 1232 (Fla. 1996); Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994). Because the existence of statutory aggravating circumstances is necessary for the imposition of a death sentence under the Florida death penalty statute, the Sixth Amendment requires that the aggravating circumstances must be found by a jury. Ring v. Arizona, 536 U.S. at 609. Because the Florida death penalty statute requires that the aggravating circumstances must be found by the sentencing judge rather than the jury, the statute is unconstitutional on its face.

As argued in Issue V, supra, Dessaure waived his right to present mitigating evidence to the jury, but he did not waive his right to have the jury determine whether the State proved sufficient aggravating circumstances to justify imposition of the death penalty. Therefore, he did not waive his right to argue on appeal that the Florida death penalty statute is unconstitutional on its face because it requires findings of aggravating circumstances by the judge rather than the jury.

In Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983), this Court ruled that the facial constitutional validity of the statute under which the defendant was convicted can be raised for the first time on appeal because the arguments surrounding the statute's validity raised a fundamental error. In State v. Johnson, 616 So. 2d 1, 3-4 (1993), this Court ruled that the facial constitutional validity of amendments to the habitual offender statute was a matter of fundamental error which could be raised for the first time on appeal because the amendments involved fundamental liberty due process interests.

In Maddox v. State, 760 So. 2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b) as amended in 1999 (to allow defendants to raise sentencing errors in the trial court after their notices of appeal were filed) were entitled to argue fundamental sentencing errors for the first time on appeal. In order to qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious, for example, a sentencing error which affects the length of the sentence. Id., at 99-100. Defendants appealing death sentences do not have the benefit of using Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1026 (1999).

The facial constitutional validity of the death penalty statute, section 921.141, Florida Statutes (1997), is a matter of funda-

mental error. The error is apparent from the record, and it is certainly serious, since it concerns the due process and right to jury trial requirements for the imposition of the death penalty. Imposition of the death penalty goes beyond the liberty interests involved in sentencing enhancement statutes, like the habitual offender statute in Johnson, to reach the defendant's due process interest in sustaining his life.

Moreover, the use of a facially invalid death penalty statute to impose a death sentence could never be harmless error. A death sentence is always and necessarily adversely affected by reliance upon an unconstitutional death penalty statute, especially when the statute violates the defendant's right to have the jury decide essential facts. See Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993) (violation of right to jury trial on essential facts is always harmful structural error).

Because the death penalty statute is unconstitutional on its face, there is no lawful authority for the State of Florida to sentence any defendant to death. This Court must vacate the death sentence and remand this case for imposition of a life sentence.

ISSUE VII

THE DEATH SENTENCE MUST BE VACATED BECAUSE APPELLANT'S CONSTITUTIONAL RIGHT TO NOTICE OF THE NATURE AND CAUSE OF THE ACCUSATION WAS VIOLATED BY FAILURE TO ALLEGE THE AGGRAVATING CIRCUMSTANCES IN THE INDICTMENT.

Dessaure was indicted for first-degree premeditated murder. The indictment did not allege any of the aggravating circumstances set forth in section 921.141(5), Florida Statutes (1997). [V1 1-2] Defense counsel moved to preclude the death penalty on the ground that the State did not allege aggravating circumstances in the indictment. [SR 1-13] The trial court erred by denying this motion [V25 29-35] and sentencing Dessaure to death. [V24 4358-65, 4367-94]

Pursuant to section 921.141(3), Florida Statutes (1997), the sentencing judge cannot impose a death sentence unless he or she finds the existence of sufficient aggravating circumstances as enumerated in section 921.141(5), Florida Statutes (1997). No death sentence can be imposed unless the sentencing judge finds at least one valid statutory aggravating circumstance. Hamilton v. State, 678 So. 2d 1228, 1232 (Fla. 1996); Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994).

The question presented by this case is whether the aggravating circumstances must be alleged in the indictment because the accused is entitled to notice of the nature and cause of the accusation against him. This is a pure question of law, so the standard of review is de novo. State v. Glatzmayer, 789 So. 2d 297, 301 n. 7 (Fla. 2001); Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

This Court has ruled that aggravating circumstances need not be alleged in the indictment. Blackwelder v. State, 2003 WL 21511317 (Fla. July 3, 2003); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003). This Court has also ruled that the accused is not entitled to notice of the aggravating circumstances. Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003). Appellant respectfully requests this Court to reconsider those rulings in light of the following argument.

In Jones v. United States, 526 U.S. 227, 243 n. 6 (1999), the United States Supreme Court ruled:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

In Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), the Court quoted the Jones rule and said, "The Fourteenth Amendment commands the same answer in this case involving a state statute." The Court succinctly stated its holding in Apprendi: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., at 490. In a footnote, the Court explained:

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. He relies entirely on the fact that the "due process of law" that the Fourteenth Amendment requires the States to provide to persons accused of crime encompasses the right to a trial by jury, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d

> 491 (1968), and the right to have every element of the offense proved beyond a reasonable doubt, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). That Amendment has not, however, been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" . . . . We thus do not address the indictment question separately today.

Apprendi, 530 U.S. at 477 n. 3. Thus, the Court left open the question of whether a State is required to allege a fact that would increase the maximum penalty for a crime in the charging document.

In Ring v. Arizona, 536 U.S. 584, 609 (2002), the Court applied the Apprendi rule to capital cases and held that when aggravating circumstances are necessary for imposition of the death penalty, the Sixth Amendment requires them to be found by a jury and not by the sentencing judge. The Court again left open the question of whether the aggravating circumstances must be alleged in an indictment:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Finally, Ring does not contend that his indictment was constitutionally defective. See Apprendi, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Four-teenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Ring, 536 U.S. at 597 n. 4.

While the Court has made clear that it has not applied the Fifth Amendment right to a grand jury indictment to the States through the Fourteenth Amendment, the Florida Constitution requires capital crimes to be charged in an indictment: "No person shall be

tried for capital crime without presentment or indictment by a grand jury[.]" Art. I, § 15(a), Fla. Const.

Moreover, the right to be informed of the nature and cause of the accusation is guaranteed by both the Sixth Amendment and the Florida Constitution: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" U.S. Const. amend VI. "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges[.]" Art. I, § 16(a), Fla. Const.

Furthermore, the right to due process of law is guaranteed by both the Fourteenth Amendment and the Florida Constitution: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. "No person shall be deprived of life, liberty or property without due process of law[.]" Art. I, § 9, Fla. Const.

It has long been established that "notice" is a basic component of the right to due process of law:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 1 Wall. 223, 233, 17 L.Ed. 531. . . . It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62.

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

In criminal cases, the due process right to notice requires notice of the specific charge:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948). To comply with the requirements of due process, notice "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" Application of Gault, 387 U.S. 1, 33 (1967). "It is the 'law of the land' that no man's life, liberty or property be forfeited as punishment until there has been a charge fairly made and fairly tried in a public tribunal." In re Oliver, 333 U.S. 257, 278 (1948).

More recently, the Court has recognized that the Sixth Amendment right "to be informed of the nature and cause of the accusation" is part of the due process of law guaranteed by the Fourteenth Amendment. Faretta v. California, 422 U.S. 806, 818 (1975); Herring v. New York, 422 U.S. 853, 856-57 (1975). This is a right to "notice" which is "now considered fundamental to the fair administration of American justice[.]" Faretta, 422 U.S. at 818.

One of the four aggravating circumstances found by the trial judge in this case was that Dessaure was previously convicted of a felony involving the use or threat of violence, resisting arrest with violence. [V24 4359] While the United States Supreme Court made an

exception allowing the sentencing judge, rather than the jury, to find the existence of prior convictions in Jones, Apprendi, and Ring, there is no logical reason to exclude a prior conviction aggravating circumstance from the notice requirement of the Sixth and Fourteenth Amendments and the relevant provisions of the Florida Constitution. Regardless of whether the sentencing judge or the jury has the responsibility of finding an aggravating circumstance in a capital case, the accused has the right to notice of all of the specific aggravating circumstances against which he must defend during the course of the proceedings. When no aggravating circumstances are alleged in an indictment, as in this case, the accused has not been given the constitutionally required notice that he is facing the possibility that a death sentence may be imposed if he is convicted.

The Sixth and Fourteenth Amendments and Article I, sections 9 and 16(a), Florida Constitution guarantee Dessaure's right to specific and particularized notice of the nature and cause of the accusation against him before he may be deprived of his life. Also, Article I, section 15(a), Florida Constitution requires that capital crimes must be charged in indictments returned by grand juries. Therefore, Dessaure had the right to have the aggravating circumstances necessary for imposition of the death penalty charged in the indictment. Because no aggravating circumstances were alleged in the indictment, the trial court erred by denying his motion to preclude the death penalty. Denial of this motion and the subsequent imposition of the death sentence violated Dessaure's constitutional rights.

The unconstitutional imposition of the death sentence in this case was not harmless error. Because the State violated Dessaure's constitutional right to notice of the specific aggravating circumstances he had to defend against by failing to allege them in the indictment, there were no aggravating circumstances that the trial judge could constitutionally consider and find in its sentencing order. In the absence of any valid findings of aggravating circumstances, the only sentence that could legally be imposed was life. Hamilton v. State, 678 So. 2d at 1232; Elam v. State, 636 So. 2d at 1314. Thus, the State's failure to allege aggravating circumstances in the indictment, and the trial judge's error in denying Dessaure's motion to preclude the death penalty necessarily affected the constitutional validity of the death sentence. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (error is harmless only if reviewing court finds beyond reasonable doubt that the error did not affect or contribute to the result).

Even if this Court rejects appellant's argument that the prior violent felony aggravating circumstance must be alleged in the indictment, a valid finding of that aggravator would not render the invalid findings of the other three aggravating circumstances harmless. The trial judge gave little weight to the prior violent felony aggravator. [V24 4359] On the other hand, the trial judge gave very great weight to the heinous, atrocious, or cruel aggravator [V24 4360-61], great weight to the felony murder aggravator [V24 4359-60], and some weight to the community control aggravator. [V24 4358-59] The court found that five mitigating circumstances had been estab-

lished: 1. The defendant was 21 years old (some weight). [V24 4362] 2. The defendant has the capacity and desire to be a loving parent (little weight). [V24 4362] 3. The defendant's family life was dysfunctional while he was growing up, his parents abandoned him to be raised by his grandmother, and his older brother died in a traffic accident (some weight). [V24 4362-63] 4. The defendant has the capacity to form personal relationships (little weight). [V24 4363] 5. The defendant was well behaved in court (little weight). [V24 4363] Because the trial judge gave some weight to two mitigating circumstances and little weight to three others, this Court cannot be certain that the judge would have imposed a death sentence based solely on the prior conviction aggravator to which the judge assigned little weight. It cannot be said beyond a reasonable doubt that the invalid findings of the HAC, felony murder, and community control aggravators did not affect or contribute to the death sentence.

The death sentence must be vacated, and this case must be remanded with directions to resentence Dessaure to life in prison.

CONCLUSION

Appellant respectfully requests this Court to reverse his first-degree murder conviction and death sentence and remand this case to the trial court with directions to conduct a new trial (Issues I-IV), or in the alternative, to conduct a new penalty phase proceeding (Issue V), or to resentence him to life (Issues VI and VII).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Stephen Ake, Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this _____ day of August, 2003.

CERTIFICATION OF FONT SIZE

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