IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-393

LOWER TRIBUNAL NO. CRC99-15522CFANO

KENNETH LOUIS DESSAURE,
Petitioner,
v.
WALTER McNEIL
Florida Department of Corrections,
Respondent,
and
STEVEN AKE,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without costs." This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Dessaure was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

REQUEST FOR ORAL ARGUMENT

Mr. Dessaure has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Dessaure.

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INTRODUCTION

On direct appeal, appellate counsel failed to raise and argue significant errors that occurred during Mr. Dessaure's trial and sentencing procedures. Moreover, some of the issues raised on direct appeal were ineffectively presented to this Court for appellate review.Appellate counsel's failure to raise and argue certain issues and failure to present effectively other issues, was clearly deficient and actually prejudiced Mr. Dessaure to the extent that the fairness and the correctness of the outcome were undermined.

JURISDICTION FOR PETITION AND HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See. Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Dessaure's death sentence. Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Dessaure's direct appeal. *see, e.g.*, *Smith v. State*, 400 So.2d 956, 960 (Fla. 1981) *See Wilson*, 474 So.2d at 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969); *cf. Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Dessaure to raise the claims presented herein. *See, e.g.*, *Way v. Dugger*, 568 So.2d 1263 (Fla. 1990); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Rilev v. Wainwright*, 517 So.2d 656 (Fla. 1987); *Wilson*, 474 So.2d at 1162.

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving fundamental constitutional error. *See Dallas v. Wainright*, 175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Dessaure's claims.

GROUNDS FOR HABEAS CORPUS

This is Mr. Dessaure's first petition for habeas corpus in this Court. Mr. Dessaure asserts in this petition for writ of habeas corpus that his capital conviction and death sentence were obtained in and then affirmed by this Court in violation of Mr. Dessaure's guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

GROUND ONE

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THAT THE JURY INSTRUCTION CONSTITUTED FUNDAMENTAL ERROR BY IMPORPERLY INSTRUCTING THE JURY ON FELONY MURDER AND CHARGES NOT CONTAINED IN THE GRAND JURY INDICTMENT

Prior to jury selection, the Lower Court read the charging document to the panel, stating "In Pinellas County Florida, on the 9th day of February, 1999, the Defendant, Kenneth Dessaure, did unlawfully, and with premeditaded design, effect the death of Cindy Riedwig". (ROA VOL I 51)

During the jury instruction phase of the trial, the lower court instructed the jury as follows:

> Kenneth Dessaure has been accused of the crime of first degree murder … if you find Cindy Riedwig was killed by Kenneth Dessaure, you will then consider the circumstances surrounding the killing was murder in the first degree, or murder in the second degree, Felony murder third degree or manslaughter or whether the killing was excusable or resulted in the justifiable use of deadly force. (ROA VOl 37 1784)
> There are two ways in which a person can be convicted of first degree murder. One is premeditated murder. The other is known as felony murder.
> Before you can find the Defendant guilty of first degree premeditated murder, the state must prove three elements beyond a re4asonable doubt.
> The first is that Cindy Riedweg is dead.
> The second is that the death was caused by the criminal act of Kenneth Dessaure.
> And the third element is that there was a premeditated killing of Cindy Riedweg.
> The other way with which the State can prove first degree murder is that of felony murder. Before you could find the defendant guilty of felony murder, the State must prove three elements beyond a reasonable doubt.
> The first element is that Cindy Riedweg is dead.
> The second element in the alternative is that the death occurred while the defendant was engaged in the commission of a burglary or
> The death occurred as a consequence of and while the defendant was escaping the immediate scene of a burglary.
> And the third element is the defendant is the person that actually killed Cindy Riedweg.
> In order to convict the defendant of first degree murder it is not necessary for the State to prove the defendant had a premeditated design or intent to kill.
> Notice in that instruction I alluded to the crime of burglary and that is the essence of the felony murder so you need to know then what is a burglary. So at this point, I'm going to tell you. And by explaining the crime of burglary to you I will explain the elements that are contained in that crime as if the defendant is accused of the crime of burglary. Of course, we know that he is not, but it is important that I explain it to you this way.
> Before you can find the defendant guilty of a burglary, the State must prove three elements beyond a reasonable doubt.
> The first is that Kenneth Dessaure entered or remained in a structure owned or in possession of Cindy Riedweg.
> The second element is that the defendant did not have the permission or consent of Cindy Riedweg or anyone authorized to act for her to enter or remain in the structure.

The third element is that at the time of entering or remaining in the structure the defendant had a fully formed conscious intent to commit the offense of first degree premeditated murder or sexual battery or attempted sexual battery or aggravated battery or aggravated assault or assault in the structure.
So, as you can see, in order for the state to prove beyond a reasonable doubt that the defendant is guilty under the theory of felony murder, it is necessary for the state to show and prove by the evidence that the felony was committed by the defendant. In this case their theory and the allegation is that of burglary.
And before you can find the defendant guilty of burglary, it must be proved beyond a reasonable doubt that he entered or remained in the structure of Cindy Riedweg with the intent to commit another crime. And I've alluded to about four or five of them. And it is, therefore, important that you understand what those crimes are all about, so I'm going to explain those to you by reading to you the elements that are contained in each of those other crimes.
With regard to the burglary, the intent with which the act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in the case. And as used in the crime of burglary, a structure means any building if any kind, either temporary or permanent, that has a roof over it and enclosed space around it.
An act is committed in the course of committing if it occurs in an attempt to commit the crime or if in flight after the attempt or commission of the crime.
As used in the instruction as it relates to burglary, a dwelling means a building or conveyance of any kind which has a roof over it and which is designed to be occupied by people lodging therein at night.
One of the crimes that we are talking about concerning the burglary is that of sexual battery.
Before you can find the defendant guilty of sexual battery, the State must prove three elements beyond a reasonable doubt.
The first is that Cindy Riedweg was 12 years of age or older.
The second element is that the defendant committed an act upon or with Cindy Riedwed in which the sexual organ of the defendant peneterated or had union with the anus or vagina of the victim, or
The defendant committed an act upon Cindy Riedweg in which the vagina of the victim was penetrated by an object.
The third element is an act committed without the consent of Cindy Riedweg.
Consent means an intelligent, knowing, and voluntary consent. It does not include coerced submission.
As used in this instruction, union means contact.
One of the other crimes that is alleged is that of an attempted sexual battery.

And before you can find the defendant guilty of the crime of attempt to commit sexual battery, the state must prove beyond a reasonable doubt that Kenneth Dessaure did some act that went towards committing the crime of sexual battery that went beyond just thinking about it.
And, secondly, that he would have committed the crime except that someone prevented him from committing the crime of sexual battery or he just failed.
One of the other crimes alleged as the crime to be committed during the burglary is that of aggravated battery.
Before you can find the defendant guilty of aggravated battery, the State must prove beyond a reasonable doubt that Kenneth Dessaure intentionally touched or struck Cindy Riedweg against her will or intentionally caused bodily harm to her.
The second element is that Kenneth Dessaure intentionally and/or knowingly caused great bodily harm or permanent disability or permanent disfigurement to Cindy Riedweg or that he used a deadly weapon.
As before, a deadly weapon is any weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm.
One of the underlying crimes of the burglary is that of aggravated assault.
And before you can find the defendant guilty of aggravated assault, the state must prove four elements beyond a reasonable doubt.
The first is that Kenneth Dessaure intentionally and unlawfully threatened either by word or act to do violence to Cindy Riedweg.
That at the time the defendant appeared to have the ability to carry out the threat.
Thirdly, that the act of the defendant created in the mind of Cindy Riedweg a well founded fear that violence was about to take place.
The fourth element is that the assault was made with a deadly weapon or the assault was made with a fully formed conscious intent to commit first degree murder or sexual battery or aggravated battery upon her.
In order for you to find the defendant guilty it is not necessary for the state to prove that the defendant had the intention to kill. That is, of course, guilty of felony murder.
The other two crimes with regard to the battery for you to consider are – excuse me – with regard to the burglary, are that one is that of battery.
And before you can find the defendant guilty of a battery, the State must prove beyond a reasonable doubt that the defendant intentionally touched or struck Cindy Riedweg against her will or intentionally caused some type of bodily harm to her.
The last is that of an assault.
Before you can find the defendant guilty of assault, the State must prove beyond a reasonable doubt that Kenneth Dessaure intentionally and unlawfully threatened either by word or act to do violence to Cindy Riedweg.
That at the time the defendant appeared to have the ability to carry out the threat.

> And, thirdly, that the act of the defendant created a well founded fear that violence was about to take place.

ROA VOL 37 1784 – 1793

The jury instruction reveals that the jury was instructed on the elements of several crimes which were never charged in the indictment, namely Felony Murder, Burglary, Sexual battery, Attempted Sexual Battery, Aggravated Battery, Battery, Aggravated Assault, and Assault.

Mr. Dessaure was charged by Indictment with First Degree Murder by stabbing. The State was allowed to argue the theory of felony murder and the trial court instructed the jury on felony murder. This amounted to an unconstitutional constructive amendment of the Indictment., Federal law has long prohibited constructive amendment of Indictments as violative of the Fifth Amendment. The Fifth Amendment applies to the Sates through the Fourteenth Amendment.

The Fifth Amendment of the Constitution protects a defendant from being Convicted of an offense different from that which was included in the indictment returned by a grand jury. Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (citing Ex Parte Bain, 121 U.S. 1, 10, 7 S.Ct. 781, 30 L.Ed. 849 (1887) ("The Fifth Amendment, providing that no person shall be held to answer for a capital or otherwise infamous crime unless on . . . indictment of a grand jury, forbids the making of a change or amendment in the body of an indictment after it has been filed."), *overruled on other grounds*, United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed. 2d 860 (2002). An unconstitutional amendment of an indictment occurs when the charging terms are constructively altered, such as when the trial judge instructs the jury.

United States v. Helmsley, 941 F.2d 71, 89 (2d Cir. 1991) (citing United States v. Zingaro, 858 F.2d 94, 98-99 (2d Cir. 1988)). In contrast, a variance occurs when the charging terms are unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment. Id.

A constructive amendment to an indictment occurs when the terms of the indictment are in effect altered by the presentation of evidence and jury instruction which so modify essential elements of an offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in an indictment. A variance occurs when the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. A variance crosses the constructive amendment line, however, only when the variance creates a substantial likelihood that a defendant may have been convicted of an offense other than that charged by a grand jury. In order to obtain a reversal because of a variance between indictment and evidence at trial, a two-prong test must be satisfied: 1) the variance must be demonstrated, and 2) the variance must affect some substantial right of the defendant. A substantial right is affected only when a defendant proves prejudice either to his ability to defend himself or to the overall fairness of the trial.

Constructive amendments are per se violative of the Fifth Amendment, but variances are subject to the harmless error rule and thus are not grounds for reversal without a showing that the defendant has been prejudiced. Id.

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be held to answer for a capital crime, or otherwise infamous crime, unless on a presentment or indictment by a grand jury. . . The Fourteenth Amendment to

the United States Constitution provides in pertinent part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 15 of the Declaration of Rights to the Florida Constitution states that "No person shall be tried for a capital crime without presentment or indictment by a grand jury . . . " Florida Rule of Criminal Procedure 3.140 requires that all crimes punishable by death "shall be prosecuted by indictment."

A Grand Jury was convened in Mr. Dessaure's case. The Grand Jury returned an Indictment which charged Mr. Dessaure with first degree premeditated murder by stabbing with a knife. Florida courts have long allowed this type of constructive amendment. "When an indictment charges that the accused killed another from a premeditated design to effect his death, it is entirely proper to instruct the jury that the charge may be proved by evidence that the accused killed the other while perpetrating one of the designated felonies." Ables v. State, 338 So. 2d 1095, 1097 (Fla. 1976) (*citing* Sloan v. State, 70 Fla. 163, 69 So. 871 (Fla. 1915) and Knight v. State, 338 So. 2d 201 (Fla. 1976)). These decisions violate principles of federalism. While States may be free to include in their constitutions provisions which guarantee personal rights greater than those provided in the Federal Constitution, the protections afforded by the United States Constitution must be considered a floor, so that no State Constitution may be read to afford protections less potent than those contained in the Federal Constitution. Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980); *see also* Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873, 909 (1976).

Although Florida Courts have allowed the State to proceed under both premeditated and felony murder theories, it is a fundamental tenet of criminal law that the jury may not be instructed on offenses where there is insufficient evidence in the record to support a conviction. In this case there was insufficient evidence to support a conviction for sexual battery, the underlying offense for the alleged burglary/felony murder. The Lower Court in this case instructed the jury on the crime of sexual battery without sufficient evidence, which constitutes fundamental error and should have been raised by appellate counsel on Direct Appeal.

The Medical Examiner testified that there was no evidence that Mr. Dessaure had had sexual contact with the victim. (ROA VOL XI at 1540) A rape kit had been submitted which came back negative. (ROA VOL XI at 1540). Furthermore, oral, vaginal and anal swabs were taken which all came back negative for sperm or any other indication of sexual activity. (ROA VOL XI at 1540). Thus, the instructions concerning sexual battery, given by the court, was completely without any factual justification, and was in fact contrary to the express testimony of the Medical Examiner.

GROUND II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON THE RECORD INSTANCES OF PROSECUTORIAL MISCONDUCT IN THE CASE

In *Defreitas V. State*, 701 So.2d 593 (Fla. 4th DCA 1997), the court outlined the nature of fundamental error due to prosecutorial misconduct and stated "In Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984), we answered the same question presented in the instant appeal, the question being: "When does prosecutorial misconduct amount to fundamental error and thus becomes an exception to the contemporaneous objection and

motion for mistrial rule?" Our answer to this question has not changed and remains as follows: "When the prosecutorial argument taken as a whole is 'of such a character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be granted, regardless of the lack of objection or exception.'" Id. at 1091 (quoting Peterson v. State, 376 So. 2d 1230, 1234 (Fla. 4th DCA 1979)). We defined fundamental error, which can be considered on appeal even without a proper objection or preservation in the lower court, as error which goes to the foundation of the case or goes to the merits of the cause of action. Ryan, 457 So. 2d at 1091." (*See also* Henderson v. State, 727 So. 2d 284 (Fla. 2d DCA 1999) (prosecutor's remarks that defendant "would not know truth if it hit him up side the head," that acquittal would mean that witnesses were "all a pack of liars" and that defendant had invented a "fairy tale" did not **constitute** fundamental error and thus defendant waived review by failing to object); Ross v. State, 726 So. 2d 317 (Fla. 2d DCA 1998) (without objection, court hesitates to find reversible error**;** court nonetheless found as fundamental error repeated comments of prosecutor belittling defense witnesses and defendant with terms such as "pathetic," "insulting," "preposterous," "nonsense," and "bologna."); Bell v. State, 723 So. 2d 896 (Fla. 2d DCA 1998) (prosecutor's vouching of officer's testimony, telling jury to send a message, argument of matters not in evidence, and comment on defendant's exercise of his right to a jury trial did not constitute fundamental error; Judge Altenbernd, in his concurrence, however, emphasized the need for a continuing education videotape for prosecutors and defense attorneys demonstrating improper closing arguments and that they are against the rules and should never be made); Freeman v. State, 717 So. 2d 105 (Fla. 5th DCA 1998) (improper bolstering of police officer testimony and mention of an officer's funeral in

today's newspaper together with other improper comments cumulatively rose to the level of fundamental error); DeFreitas v. State, 701 So. 2d 593 (Fla. 4th DCA 1997) (new trial required where numerous acts of prosecutorial misconduct were of such a nature and character that the cumulative and collective effect rose to the level of fundamental error); Knight v. State, 672 So. 2d 590 (Fla. 4th DCA 1996) (combination of personal attacks on defense counsel, arguing facts not in evidence, and bolstering of police officer testimony in closing argument rose to level of fundamental error destroying defendant's right to a fair trial); State v. Fritz, 652 So. 2d 1243 (Fla. 5th DCA 1995) (outside of the exceptional circumstance where the error rises to the level of being fundamental**,** in order to preserve a claim of improper prosecutorial misconduct, objection must be made and if the objection is sustained defendant must then request a curative instruction or mistrial; he cannot await the outcome of the trial to seek the relief of a new trial); Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984), pet. for rev. den., 462 So. 2d 1108 (Fla. 1985) (when the jury is walking a thin line between a verdict of guilt and innocence, the prosecutor cannot be allowed to push the jury to the side of guilt with improper comments).

In Mr. Dessaure's case, there are numerous instances of prosecutorial misconduct which amount to fundamental error. First of all, the prosecutor stated as follows in closing argument:

> And when we started this trial he had a presumption of innocence and he only enjoyed that presumption at the start of the trial. Once the first witness was called, once the evidence began to be presented, the State chipped and chipped away at that cloak, that shield he can hide behind. And as you sit here no, he no longer enjoys that presumption because we have proven our case.

ROA VOL 36, at 1715

The above statement is clearly an attack on the presumption of innocence, which in fact stays with the defendant all the way until jury deliberations.

Additional evidence of prosecutorial misconduct involved the knowing presentation of false testimony by the two jail house snitches, both of whom testified in direct contradiction to the known physical evidence in the case. Specifically, Valdez Hardy stated that Mr. Dessaure had blood on his underwear. (ROA VOl 28 at 634). No blood was found on Mr. Dessaure's underwear. He also stated that Mr. Dessaure told him he went "upstairs", when in fact there was no upstairs to the apartment. (ROA VOL 28 at 634).

Snitch Shavar Sampson testified that Mr. Dessaure told him he had sex with the victim and came inside her. (ROA VOl 35 at 1449). This directly contradicts the Medical Examiner who stated no sperm or body fluids were found after vaginal, anal, and oral swabs taken from the victim. (ROA VOl XI at 1540). Mr. Sampson also stated that Mr. Dessaure told him that the victim was having her period when the sex took place. (ROA VOl 35 at 1449) This testimony is directly refuted by the Medical Examiner, who stated the victim was not having her period. (ROA VOL XI at 1540).

It is clear that the prosecutorial misconduct in this case was designed to give some evidence of sexual contact between Mr. Dessaure and the victim, in order to use sexual battery as the underlying felony for a felony murder conviction. However, the State crossed the line by putting forth demonstrably false testimony of sexual battery, using snitches in direct contradiction to the testimony of the Medical Examiner. Such actions amount to prosecutorial

misconduct and fundamental error. Thus, appellate counsel was ineffective in not raising these issues on direct appeal, as there is a reasonable probability the outcome would have been different, and Mr. Dessaure would have received a new trial.

CONCLUSION

This Court should grant relief requested in this Petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this Court to do justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail on August 20, 2009, to: Steven Ake, Assistant Assistant Attorney General, Office of the Attorney General, Concourse Center 4, Ste 200, 3507 E. Frontage Road, Tampa, Florida 33607-7013 and Kristen J. Howatt, Assistant State Attorney, State Attorney's Office, P.O. Box 5028, Clearwater, Florida 33758 and Bill McCollum, Secretary, Florida Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399.

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