IN THE SUPREME COURT OF FLORIDA

KENNETH LOUIS DESSAURE,

Petitioner,
v.

WALTER A. McNEIL,
Secretary, Florida
Department of Corrections,

Respondent.
_____/

CASE NO. SC09-1551
L.T. No. CRC99-15522 CFANO
DEATH PENALTY CASE

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, WALTER A. McNEIL, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

FACTS AND PROCEDURAL HISTORY

Following a jury trial, Dessaure was found guilty of the 1999 first degree murder of Cindy Riedweg. Against the advice of his counsel, Dessaure waived his right to a penalty phase jury. After hearing victim impact testimony, a proffer of the mitigation evidence defense counsel would have presented had

Dessaure not waived it, and conducting a Spencer[1] hearing, the trial judge sentenced Dessaure to death. In doing so, the trial court found four aggravating circumstances: (1) crime committed while previously convicted of a felony (conspiracy to commit armed robbery) and under sentence of imprisonment (community control); (2) prior conviction of a felony involving the use or threat of violence (resisting arrest with violence); (3) heinous, atrocious, and cruel (HAC); and (4) crime committed during the course of a burglary. The court found five nonstatutory mitigating circumstances: (1) Dessaure was twenty-one years old (some weight); (2) Dessaure has the capacity and desire to be a loving parent (little weight); (3) Dessaure'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); (4) Dessaure has the capacity to form personal relationships (little weight); and (5) Dessaure was well behaved in court (little weight).

Dessaure appealed his convictions and sentences to this Court, raising seven issues:

> 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.

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

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

Initial Brief of Appellant, Florida Supreme Court Case No. SC02-286. This Court affirmed Dessaure's conviction and sentence on direct appeal. Dessaure v. State, 891 So. 2d 455 (Fla. 2004). The facts, as found by this Court, are:

> Dessaure was charged by indictment with the February 9, 1999, first-degree murder of Cindy Riedweg. Dessaure's trial began in the Circuit Court

in and for Pinellas County on August 28, 2001. On September 5, 2001, the jury found Dessaure guilty of first-degree murder.[FN1] Dessaure waived his right to a penalty phase jury. On October 26, 2001, the court sentenced Dessaure to death. The evidence presented at trial established the following:

> FN1. The jury, utilizing a general verdict form, found Dessaure guilty of first-degree murder as charged. It did not specify whether he was found guilty of premeditated first-degree murder, felony first-degree murder, or both. However, the jury was instructed as to both premeditated murder and felony murder.

Guilt Phase

Dessaure lived with Amy Cockrell and Tim Connole in apartment 1307 of the Villas at Countryside in Oldsmar, Florida. Riedweg moved into apartment 1308 next door to them a couple of weeks before the murder. Dessaure did not have a social relationship with Riedweg and had not been inside her apartment prior to the day of the murder.

On February 9, 1999, Cockrell left her apartment at 8 a.m. Dessaure, Connole, and Connole's friend, Ivan Hup, were there when she left. Connole and Hup went out for lunch around noon, leaving Dessaure alone in the apartment.

One of Riedweg's neighbors, John Hayes, left his apartment to go to work around 3:30 p.m. and encountered Dessaure in the parking lot. Dessaure told him that he thought there was someone dead or dying in Riedweg's apartment. When Hayes asked him how he knew that, Dessaure said he had gone to Riedweg's apartment for ice and looked in. Hayes testified that Dessaure seemed nervous and his left hand was balled up. Hayes did not want to become involved and told Dessaure to call 911.

Dessaure called 911 at 3:35 p.m and spoke to Donna Biem, a 911 supervisor. Biem transferred the call to Antoinette Maglione, a 911 operator for the sheriff's office, at 3:37 p.m. A tape recording of Dessaure's conversations with Biem and Maglione was played for

the jury. Dessaure told Biem that his next-door neighbor was dead and said, “I walked over to see if Cindy had some ice and she was sun bathing and her phone and everything was outside so I opened up the door and she's laying in the middle of her f------ hallway naked.” Dessaure also said he asked a “home boy” to help, but he would not come over. After his call was transferred to Maglione, the following exchange occurred:

> COMMUNICATIONS CENTER: Okay. Sheriff's Office. What's your emergency?
>
> KENNETH DESSAURE: Yes, um, my next door neighbor's dead.
>
> COMMUNICATIONS CENTER: Is what?
>
> KENNETH DESSAURE: Dead. I think she's dead.
>
> COMMUNICATIONS CENTER: Okay. And what's her address?
>
> KENNETH DESSAURE: 1308 Amanda Lane. F---.
>
> COMMUNICATIONS CENTER: Any idea how?
>
> KENNETH DESSAURE: Um, I do not know.
>
> COMMUNICATIONS CENTER: Okay.
>
> KENNETH DESSAURE: Ow. F---.
>
> COMMUNICATIONS CENTER: Excuse me?
>
> KENNETH DESSAURE: Huh?
>
> COMMUNICATIONS CENTER: What's going on?
>
> KENNETH DESSAURE: I just cut my finger. I'm washing my dishes. I just came in to finish washing my damn dishes.
>
> COMMUNICATIONS CENTER: And, um, or are-have you seen her or been in there and touched her or anything?

KENNETH DESSAURE: I haven't touched her at all.

COMMUNICATIONS CENTER: Okay. So what's your name?

KENNETH DESSAURE: My name is Kenny.

COMMUNICATIONS CENTER: Kenny?

KENNETH DESSAURE: Yeah. I live next door.

COMMUNICATIONS CENTER: Tell me what happened.

KENNETH DESSAURE: Um, I was cleaning my house and f------ I seen her outside sunbathing and I went next door to see if she had some f------ ice and all her stuff was sitting outside, so I figured that she was in the bathroom or something. And then I go knock on the door and I didn't get no answer so I'm waiting for a response and the door was unlocked so I went in and she's laying in the middle of the f------ hallway.

COMMUNICATIONS CENTER: Okay. All right. Then she was not breathing?

KENNETH DESSAURE: Huh?

COMMUNICATIONS CENTER: She was not breathing?

KENNETH DESSAURE: I don't know. I didn't walk up to her. I just walked out of the house.

COMMUNICATIONS CENTER: Okay.

KENNETH DESSAURE: And I went to the boy that's standing outside and I just cut my f------ finger.

COMMUNICATIONS CENTER: Okay. All right, Kenny, we'll get somebody out there. You haven't seen anybody unusual or anything around?

Paramedic Greg Newland, Captain Robert Carman, and EMT Jill Manines arrived at the scene at 3:39 p.m. Dessaure met them and led them to Riedweg's apartment. Newland testified that the back of Dessaure's shirt appeared to be wet. Dessaure told them that he went to Riedweg's apartment to borrow some ice and found her on the floor. Newland entered the living room of the apartment and found Riedweg lying on the floor in a pool of blood. Riedweg was lying face down with her arms tucked under her body. There were stab wounds to her upper back and shoulders. Riedweg had no pulse and was not breathing, but her body was still warm. Newland rolled Riedweg over and discovered that her throat had been slashed. He pronounced her dead at 3:41 p.m.

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. Dessaure approached them several times, asking them if Riedweg was alright and what was wrong with her. He seemed anxious. Newland saw Dessaure walk up to several apartments and talk to other people from the complex who gathered at the scene.

Tim Connole returned to his apartment between 4 and 4:30 p.m. He testified that fire trucks and paramedics were there, but his apartment had not been sealed off. Dessaure was acting nervous and told Connole that he went to Riedweg's to get some ice and discovered the body. Two or three hours after he got there, Connole noticed blood on Dessaure's shirt and asked him about it. Dessaure said he cut his hand doing the dishes and showed Connole the cut.

Amy Cockrell returned to her apartment between 4:30 and 4:45 p.m. Connole and Hup were already there. Hup told her that Dessaure went to Riedweg's apartment for ice. Cockrell testified at trial that the next day she looked in her freezer and found a cup of ice but no ice cube tray. However, Cockrell admitted on cross-examination that in a May 14, 1999, statement to the prosecutor, she stated that after Hup said Dessaure went to Riedweg's to get ice she got suspicious, walked into her apartment, and discovered a full ice cube tray in the freezer. In her prior statement she

said, “I found a tray of ice” and further stated that the ice in the tray was “hard and frozen.” She testified at trial that when she gave her original statement she meant “cup” when she said “tray.” On the night of the murder, police technicians seized items from Dessaure's apartment, including an ice cube tray which was full of frozen ice.

In March, the lease ran out on Cockrell and Connole's apartment and they moved. They packed a knife set and later noticed that one of the knives from the set was missing. They had bought the knife set prior to February 9, 1999, and it was in their apartment on the day of the murder.

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. Klein entered Riedweg's apartment and saw blood stains on the carpet in the living room. Once he reached the living room 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.

Dessaure took Klein and Craig Giovo of the Pinellas County Sheriff's Office Forensic Science Unit into his apartment to show them the knife with which he said he cut his hand while he was washing dishes. Giovo saw blood stains on the threshold and at the bottom of the door of Dessaure's apartment and later took samples. Dessaure showed them a knife lying on a dry sponge next to the kitchen sink. The knife had blood smeared on it. They opened the freezer door at 7:15 p.m. and saw blood stains on the bottom of the freezer and on the ice tray. There was frost on the ice tray, and the ice cubes were frozen solid. Giovo collected the ice tray and dumped the ice cubes in the sink. Dessaure told the detectives that 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. Klein asked Dessaure to accompany him to the Sheriff's Office to make a statement. Dessaure's taped statement was played for the jury.

In his statement to police, Dessaure said that after his roommates left, he turned on the radio and started to clean at around 2 or 2:30 p.m. He took the garbage out to the dumpster at around 2:45 p.m. and saw Riedweg sunbathing in a bikini with her eyes closed. When he returned from the dumpster, he did not notice whether Riedweg was still outside because he looked down while he walked. 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.

He finished drinking a cup of water and wanted another cup of cold water. The ice cube tray was empty, so he filled it and put it and a cup in the freezer. He went to Nathan Philips' apartment to get some ice, but Philips was not at home. 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. Her door was unlocked, so he opened it, called for her, and after receiving no answer entered the apartment. He did not see anyone, so he walked to the edge of the kitchen. He saw Riedweg lying on the floor with blood on her and left the apartment without touching anything. Dessaure saw Hayes in the parking lot, told him he thought a lady was dead, and asked him for help. Hayes told him to call the police and walked away.

Dessaure picked up Riedweg's phone, which was outside by her lawn chair, and called 911. While he was on the phone with the sheriff's department operator, he went back inside his apartment to look for a cigarette but could not find one, so he picked up the knife he had cut himself with earlier and began to clean it again. While still on the phone with the sheriff's department, he cut himself again in the same exact spot that he cut himself earlier. Dessaure said that every time he cuts himself it is always in that same spot.

Detective Pupke asked Dessaure about his earlier statement that he was using bleach to wash the dishes. Dessaure corrected himself and said it was not bleach; it was dish detergent. He admitted 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.

There was a lengthy discussion between the detectives and Dessaure concerning an argument that he had with his fiancee, Mary Parent. Parent called Dessaure sometime between noon and 2:30 p.m., and they began to argue. Dessaure accused Parent of cheating on him, and Parent accused Dessaure of cheating on her.

Detective Pupke asked if Riedweg was a good-looking woman. Dessaure answered, “yeah.” He said he had never gone to her apartment to ask her for anything other than ice on the day of the murder. She had never invited him into her apartment. He said he opened her door and entered her apartment because he was worried about her. Dessaure said that if he knows his friends are home, he knocks on their door and opens it. He specifically stated that he does it at Nathan Philips' house.

The detectives accused Dessaure of wanting sex from Riedweg and fighting with her when she resisted. He denied these allegations and denied killing Riedweg.

After the interview, Klein arrested Dessaure on an unrelated matter. [FN2] When Klein told Dessaure he was under arrest, Dessaure said he was leaving and started fighting with the detectives, causing his hand to bleed. Dessaure was not arrested for the murder until August 26, 1999, after he was indicted.

> [FN2] At the time of the murder, Dessaure was on community control for a conspiracy to commit armed robbery. He was arrested for violating his community control.

Klein interviewed and obtained a blood sample and prints from Stuart Cole, Riedweg's married boyfriend, and confirmed Cole's whereabouts for the hours of 1:50 p.m. to 6 p.m. 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 p.m. Cole died in

a traffic accident a few months after Riedweg's murder and did not testify at Dessaure's trial.

Brandy Adams and Nathan Phillips lived near Riedweg in an apartment at the Villas of Countryside. Adams was home all day on February 9, 1999, with her windows and door open. She said that Dessaure did not come to her apartment that day. When asked about Dessaure's statement that he would knock on their door, open it, and walk in without them answering the door, both Adams and Philips said that he was not authorized to do so.

Dr. Laura Hair, an assistant medical examiner, performed an autopsy on Riedweg's body on February 10, 1999. Hair found that Riedweg had suffered a total of fifty-three 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. Hair testified that Riedweg could have remained conscious for four to six minutes after her lungs collapsed, and she could have survived from four to ten minutes. Electrical activity could have continued for a few minutes more, perhaps ten to fifteen minutes. Multiple stab wounds of the torso and neck were the cause of death. Riedweg had not started her menstrual cycle and the rape kit came back negative.

Michelle Sherwood, a latent print examiner for the Pinellas County Sheriff's Office, identified a latent footprint found on Riedweg's kitchen floor as matching Dessaure's right foot.

John Wierzbowski, a former Florida Department of Law Enforcement (FDLE) crime lab analyst, examined Dessaure's silver-gray T-shirt, a pair of black denim shorts, and a pair of flip-flop sandals to conduct a blood stain pattern analysis. He found a transferred blood stain inside the right front pocket of the shorts, but he could not determine what object made the stain; it could have been any object covered with

blood. There were no stains of value for analysis on the sandals or shirt.

Tina Delaroche, an FDLE forensic serologist, examined Dessaure's black shorts and found six blood stains for analysis. Several of the stains matched Riedweg's DNA profile. Other stains may have come from Riedweg, but testing was not conclusive. She examined Dessaure's shirt and found a faint blood stain on the front and a stronger blood stain on the back. Her tests showed that the DNA profile from the stronger stain was consistent with Dessaure. Blood stains on the knife from Dessaure's kitchen were also consistent with Dessaure. She also examined a towel found in Riedweg's bathroom and a piece of fabric from Riedweg's bedroom comforter. White stains on the towel and comforter tested positive for semen. The DNA profile of the semen was consistent with Dessaure. Swabs from Dessaure's apartment tested positive for blood, but none of them were consistent with Riedweg. None of the tested blood samples from Riedweg's apartment were consistent with Dessaure.

Valdez Hardy, a former prison inmate who was in the same cell pod in the Pinellas County Jail as Dessaure, gave a sworn statement on November 4, 1999. Hardy testified that Dessaure told him he was concerned about a washrag that might have his semen on it. Dessaure said he came home one morning and saw Riedweg sunbathing in a lawn chair. He went upstairs, then came back down to take out the trash. He winked at her when he walked by and went back upstairs. When he came back down, she was gone. She had left her phone and a cup by her chair. He went to her door, found that it was open, and went inside. She saw him and “started tripping.” Hardy thought that meant that she was screaming or getting nervous. Dessaure said the washrag was “the only thing that can really prove that.” They already knew he was there because he called 911 and 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 that Riedweg was naked on the floor. Hardy said

Dessaure told him the paramedics came first. He was outside smoking a cigarette, and he was nervous. The detectives questioned him and asked how 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. Dessaure said that when he went to the police station, he asked the police why he would have called 911 if he had killed her. They told him he was facing the death penalty. When he got up to leave, one of the detectives grabbed him, slammed him against the wall, and arrested him. Dessaure said they took his roommate's shoes because he had changed shoes. He had been wearing flip-flops. He said something about a foot or a scuff mark in the kitchen. According to Hardy, Dessaure said that "can't nobody say he killed her. Don't nobody know what happened but him and her."

On cross-examination, Hardy denied that his conversation with Dessaure occurred on October 1, 1999, after a corrections officer left a newspaper with an article about Dessaure's case in the cell pod. 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. The State had Hardy read the article in court and pointed out that there was nothing in it about Dessaure taking out the trash, scuff marks on the kitchen floor, leaving Riedweg naked on the floor, her having an immaculate house, a phone by her lawn chair, his roommate's shoes, paramedics arriving first, 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, and that he cut himself. Hardy also denied seeing or reading any police reports or depositions in Dessaure's case.

Shavar Sampson, another fellow inmate of Dessaure's, also testified that Dessaure told him about his case. According to Sampson, Dessaure saw Riedweg 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. She regained consciousness and began fighting to get him off her. Dessaure had a knife and stabbed her many times. He removed his clothing and put on something he brought from home. He called 911 to summon an ambulance. Dessaure said his sperm went inside her while they were having sex. Her period started, blood got on his underwear, and he had to change underwear.

The defense presented the testimony of Susan Pullar, a forensic scientist who examined photos and a video of the crime scene and police reports. She 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. 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. She said that this blood should have been collected and analyzed to determine whose blood it was. If the assailant was bleeding from a hand wound, you could find blood in the crime scene other than on the body. She did not see aspirated blood mixed with air on the body, but there was some splatter less than a millimeter wide that might be aspirated. There was no clear pattern to the contact blood stain in Dessaure's shorts pocket to show what the source of the blood was.

Dr. Edward Willey, a forensic pathologist and former medical examiner, examined a photo of the cut on Dessaure's hand and examined police reports and concluded that the cut would have bled. Opening and closing the hand would disrupt the cut and cause additional bleeding. There may have been two cuts to the hand, but he was not certain. There was no evidence of scar tissue from prior cuts.

Amy Cockrell testified that when she returned home on February 9, Connole and Dessaure were confined in a small area. She testified that she did not go into her apartment that evening because it was blocked off with crime scene tape. She went to the apartment of Nate Philips and Brandy Adams. When she finally entered her apartment on February 10, she noticed that “the dishes were in the process of being done.” She said that

Dessaure did most of the cleaning, including the dishes. Cockrell did not recall her prior statement on May 14, 1999, that she found an ice tray in the freezer. Instead, she said she saw a purple cup in the freezer.

William Birchard and Rodney Stafford, inmates who were housed with Dessaure and Valdez Hardy, testified that Hardy was a snitch and was trying to get information from Dessaure so he could cut a deal with prosecutors. They said the only information Hardy had was what he learned from newspapers.

Dessaure's fiancee, Mary Parent, admitted that she had an argument with Dessaure on February 9, 1999, but stated that the argument ended cordially. She also stated that Dessaure liked to fill up his cup with ice when he drank water, juice, or soda.

On rebuttal, the State presented testimony from Shavar Sampson, who was returned to the Pinellas County Jail from prison within two weeks prior to his appearance at trial. He said that while he 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.

Penalty Phase

Against the advice of his attorneys, Dessaure waived his right to a penalty phase jury. The court questioned Dessaure to determine whether 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. Dessaure did not want defense counsel to present mitigating evidence to a jury. He testified that he was acting against his attorneys' advice and that no one forced or advised him to make this choice. He understood that his decision could not be revoked.

The State presented victim impact testimony by Rebecca Pierce, Riedweg's supervisor, and Doreen Cosenzino, Riedweg's friend, and statements from Riedweg's sister and Riedweg's mother were read.

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. Dessaure waived the testimony of each proposed witness. Dessaure also waived the presentation of any legal argument by his counsel against the aggravating circumstances. 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. The prosecutor proffered rebuttal evidence concerning the mitigating circumstances.

The court granted the prosecutor's request to order a presentence investigation. At the Spencer [FN3] hearing, the defense presented testimony from Dessaure's fiancee, Mary Parent, and Louise Randall, Dessaure's grandmother.

> [FN3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The trial court found four aggravators: (1) crime committed while previously convicted of a felony (conspiracy to commit armed robbery) and under sentence of imprisonment (community control); (2) prior conviction of a felony involving the use or threat of violence (resisting arrest with violence); (3) heinous, atrocious, and cruel (HAC); and (4) crime committed during the course of a burglary. The court found no statutory mitigating circumstances and five nonstatutory mitigating circumstances. [FN4]

> [FN4] The nonstatutory mitigators are: (1) Dessaure was twenty-one years old (some weight); (2) Dessaure has the capacity and desire to be a loving parent (little weight); (3) Dessaure'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); (4) Dessaure has the capacity to form personal

> relationships (little weight); and (5) Dessaure was well behaved in court (little weight).

Dessaure v. State, 891 So. 2d 455, 460-64 (Fla. 2004).

Dessaure's conviction and sentence became final on December 22, 2004, when the mandate issued. Dessaure did not seek certiorari from the United States Supreme Court following direct appeal. Dessaure pursued postconviction relief in state court and was granted an evidentiary hearing on his postconviction claims. The lower court denied postconviction relief on February 5, 2009. The appeal from the denial of postconviction relief is currently pending before this Court. Dessaure v. State, SC09-393.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's arguments are based on appellate counsel's alleged failure to raise a number of issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Petitioner's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise

meritless issues is not ineffective assistance of appellate counsel). No extraordinary relief is warranted because Petitioner's current arguments were not preserved for appellate review and, even if preserved, no reversible error could be demonstrated. See Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). As noted above, to obtain relief it must be shown that appellate counsel's performance was both deficient and prejudicial. The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding issues that would have been found to be procedurally barred had they been raised on direct appeal. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (stating that although habeas petitions are a proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion).

The United States Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The

failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." Valle, 837 So. 2d at 908.

ARGUMENT

GROUND I

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

Petitioner argues in his first issue that his appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred in instructing the jury on first degree felony murder and the underlying felony of burglary. In instructing the jury on felony murder with the underlying felony of burglary, the court instructed the jury that the State needed to prove that Petitioner committed the murder while engaged in the commission of a burglary and defined burglary as entering, or remaining, in a structure owned by the victim with the intent to commit certain offenses, including sexual battery or attempted sexual battery. (DAR V37:1784-93). Petitioner now asserts that appellate counsel was ineffective for failing to argue on direct appeal that the court erred in instructing the jury on felony murder and that there was no evidence to support an instruction on sexual battery.

Initially, Petitioner properly concedes that Florida courts have long held that a trial court properly instructs a jury on first degree felony murder when the indictment charges first

degree premeditated murder. See Habeas Petition at 15 and cases cited therein. In this case, when discussing the proposed jury instructions, Petitioner's trial counsel acknowledged that the trial court could properly instruct the jury on first degree felony murder and did not raise any objections to the court instructing on the underlying felony of burglary with the intent to commit first degree murder, sexual battery, attempted sexual battery, aggravated battery or aggravated assault. (DAR V36:1666-81).

The fact that appellate counsel chose not to raise an unpreserved, meritless issue in his initial brief does not equate to a finding of deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). This Court has held that claims which could have been raised on direct appeal, but were not, are procedurally barred from review. See Rutherford v. Moore, 774 So. 2d 637, 646 (Fla. 2000) ("Because this issue was not preserved for review, if it had been raised on direct appeal, it would have warranted reversal only if it constituted fundamental error, which has been defined as an error that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged

error.'") (quoting Urbin v. State, 714 So. 2d 411, 418 n.8 (1988)). A state habeas petition should not be utilized as a second appeal. Id. (stating that although habeas petitions are a proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion).

Even if this Court addressed the merits of Petitioner's claim, appellate counsel cannot be found ineffective for failing to raise an issue which lacks merit and was not fundamental error. This Court has repeatedly held that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated or felony murder theories. See Anderson v. State, 841 So. 2d 390, 404 (Fla. 2003); Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995); Knight v. State, 338 So. 2d 201 (Fla. 1976); Everett v. State, 97 So. 2d 241 (Fla. 1957). Where an issue has been repeatedly rejected by the reviewing courts, appellate counsel is not ineffective in declining to raise the same issue. See Floyd v. State, 808 So. 2d 175, 185 (Fla. 2002) (recognizing appellate counsel not ineffective for failing to raise issue repeatedly rejected by reviewing court); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995) (same).

This Court addressed this exact same claim in Mansfield v. State, 911 So. 2d 1160, 1178-79 (Fla. 2005). In rejecting this claim, this Court stated:

> Mansfield first claims that appellate counsel was ineffective for failing to challenge the jury instructions that allowed the jury to find him guilty of first-degree murder if he was found guilty of either felony or premeditated murder. This Court and the United States Supreme Court have repeatedly rejected relief on this issue. In Schad v. Arizona, 501 U.S. 624, 645, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), the Supreme Court held that the United States Constitution did not require the jury to come to a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder were not required. "It is well established that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories." Parker v. State, 904 So. 2d 370 (Fla. 2005). Furthermore "[b]ecause the State has no obligation to charge felony murder in the indictment, it similarly has no obligation to give notice of the underlying felonies that it will rely upon to prove felony murder." Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995). Mansfield's appellate counsel was not ineffective for failing to raise a claim which we have repeatedly rejected. Floyd v. State, 808 So. 2d 175, 185 (Fla. 2002). To the extent that Mansfield raises a substantive claim on this issue, this claim is without merit under this prior case law.

Because Petitioner's instant claim lacks merit and has been repeatedly rejected by this Court, Petitioner is unable to establish ineffective assistance of appellate counsel for failing to raise this issue.

Furthermore, this Court must reject Petitioner's argument that the facts are insufficient to support a jury instruction on

felony murder based on burglary with the intent to commit sexual battery. This unpreserved claim is not properly raised in the instant habeas petition. Mansfield, 911 So. 2d 1179. Additionally, even if this Court were to review the facts, the evidence clearly supports the court's instruction as the State presented evidence that Petitioner's semen was found near the victim's partially nude body on both her bedroom comforter and on a towel in her bathroom. Furthermore, a State witness testified that Petitioner told him he had sexual intercourse with the victim after punching her and knocking her unconscious. Petitioner's argument that appellate counsel was ineffective for failing to raise this unpreserved, meritless issue in his direct appeal brief is without merit. Accordingly, this Court should reject the instant claim.

GROUND II

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

Petitioner urges this Court to find that his appellate counsel rendered ineffective assistance of counsel in failing to raise two unpreserved issues stemming from allegedly improper conduct by the State: (1) allegedly improper comments made by the prosecutor during the guilt phase closing argument regarding the presumption of innocence, and (2) the State allegedly presenting false testimony from two jailhouse witnesses. Petitioner acknowledges that these incidents were not objected to and are therefore unpreserved, but asserts that the State's conduct constitutes fundamental error. Respondent submits that the instant claim is not properly raised in his habeas petition. Even if properly raised, Petitioner has failed to establish deficient performance and prejudice.

Respondent first submits that the instant issue is improperly presented in a habeas petition. As this Court has previously stated, "claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). The instant claim could have and should have been raised in

prior proceedings and is not properly raised in the instant habeas petition camouflaged as an ineffective assistance of appellate counsel claim. See Robinson v, Moore, 773 So. 2d 1 (Fla. 2000) (denying ineffective assistance of counsel claim based on failure to allege prosecutorial misconduct during closing argument of penalty phase because issue was not properly preserved at trial so that appellate counsel could raise claim). This issue is a thinly veiled attempt to have an appeal on the merits, which is clearly not the purpose of a habeas petition. Freeman v. State, 761 So. 2d 1055, 1069-70 (Fla. 2000).

Petitioner first asserts that the prosecutor's comments during closing argument constituted fundamental error. At the conclusion of the State's closing argument, the prosecutor stated:

> 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 and chipped away at that cloak, that shield he can hide behind. And as you sit here now, he no longer enjoys that presumption because we have proven our case.

(DAR V36:1715). Trial counsel did not object to the prosecutor's comments, and thus, the instant claim was unpreserved for appellate review. Appellate counsel cannot be deemed ineffective for failing to raise this issue on direct appeal when it was unpreserved.

In Spencer v. State, 842 So. 2d 52 (Fla. 2002), the defendant claimed that appellate counsel was ineffective for failing to raise several instances of prosecutorial misconduct even though no objection was raised at trial. This Court reiterated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. Id. at 74; see also Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper comments by the prosecutor which were not preserved for appeal by objection). This Court noted that as a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review. The sole exception to this general rule is where the unpreserved comments rise to the level of fundamental error. Spencer, 842 So. 2d at 74. This Court further stated:

> In order for an error to be fundamental and justify reversal in the absence of a timely objection, 'the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' In order for improper comments made in the closing arguments of a penalty phase to constitute fundamental error, they must be so prejudicial as to taint the jury's recommended sentence.

Id. (citations omitted). This Court ultimately concluded that the instances of alleged prosecutorial misconduct cited by the defendant did not constitute fundamental error and thus appellate counsel did not render ineffective assistance in failing to raise the claims on direct appeal. Id. at 74-75.

In sum, the comments Petitioner claims were error were not preserved for appellate review. Petitioner has further failed to demonstrate that the comments constituted fundamental error. The trial judge instructed the jury that the attorneys' comments during closing argument were not evidence and the judge properly instructed the jury on the applicable law. Given the trial judge's actions in curing any alleged error by properly instructing the jury on the applicable law, Respondent submits that any alleged prosecutorial misconduct was harmless and did not constitute fundamental error. See Freeman v. State, 761 So. 2d 1055, 1069-70 (Fla. 2000) (holding that any prejudice created by the prosecutor's remarks was cured when the trial judge instructed the jury that the prosecutor's arguments were not the law).

Petitioner also briefly claims that the State knowingly presented false testimony from two jailhouse "snitches," Valdez Hardy and Shavar Sampson, presumably in violation of Giglio v. United States, 405 U.S. 150 (1972). Although Petitioner raised

a Brady/Giglio claim in his state postconviction motion regarding a number of State witnesses including Valdez and Sampson, he did not allege ***any*** of the instant facts and merely made a vague, one-sentence, conclusory statement that "[t]o the extent that the State did provide consideration to any State witness and failed to correct the statements the witnesses made to the jury to the contrary, this was a violation of Giglio and Napue." (PCR V1:56). Clearly, Petitioner may not use the instant habeas petition to present claims that could have and should have been raised in his state postconviction motion.

In addition to failing to raise this claim in the proper manner, Petitioner has also failed to establish that Valdez and Sampson presented "false" testimony. Petitioner's trial counsel impeached these witnesses at trial and pointed out the differences between the physical evidence and the witnesses' testimony regarding Petitioner's statements. (DAR V28:650-60; V35:1456-63). Petitioner, however, has never established that these witnesses' testimony, regarding statements made by Petitioner while in jail, were false. Because Petitioner's claim is without merit, this Court should deny his petition for writ of habeas corpus.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Eric C. Pinkard, Esquire, Robbins Equitas, 2639 Dr. MLK Jr. Street North, St. Petersburg, Florida 33704, this 20th day of November, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

/s/ Stephen D. Ake_____
STEPHEN D. AKE
Assistant Attorney General
Fla. Bar No. 14087
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
stephen.ake@myfloridalegal.com

COUNSEL FOR RESPONDENT