IN THE SUPREME COURT OF FLORIDA

KENNETH LOUIS DESSAURE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC09-393
L.T. No. CRC99-15522 CFANO
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 0014087
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 APPELLEE

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PRELIMINARY STATEMENT

The record on direct appeal will be cited throughout this brief as “DAR” with the appropriate volume and page number (DAR V#:page#); the postconviction record will be cited as “PCR” with the appropriate volume and page number (PCR V#:page#).

STATEMENT OF THE CASE AND FACTS

Kenneth Dessaure was convicted for the 1999 murder of Cindy Riedweg and sentenced to death. Dessaure v. State, 891 So. 2d 455 (Fla. 2004). The facts of this case are set forth in this Court's opinion following Dessaure's direct appeal.

> 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).

On February 28, 2006, Appellant filed a Motion to Vacate Judgment of Conviction and Death Sentence pursuant to Florida Rule of Criminal Procedure 3.851, raising ten claims. (PCR V1:1-80). The trial court conducted an evidentiary hearing on March 10-11, 2008. At the evidentiary hearing, collateral counsel presented the testimony of Assistant Public Defender Barry Cobb, trial attorney Richard Watts, mitigation investigator Rita Bruno, forensic neuropsychologist Dr. Henry Dee, psychiatrist Dr. Michael Maher, licensed mental health counselor Heidi Hanlon, Dessaure's former cellmate, Shavar Sampson, and Appellant.

Assistant Public Defender Barry Cobb testified that during the Public Defender's Office's representation of Dessaure, there were two attorneys assigned to his case. He was primarily responsible for the penalty phase investigation, along with investigator Rita Bruno, and attorney Jill Menadier was primarily responsible for the guilt phase and she had the assistance of a guilt phase investigator. (PCR V8:132-35). Attorney Cobb attempted to detail his investigation into Dessaure's background, but he expressed his irritation with having not been allowed to adequately prepare for his testimony. Mr. Cobb explained that he had difficulty recalling specific events because collateral counsel had not contacted him or provided him with the file that he had given to attorneys Watts and Schwartzberg when they took over representation. (PCR V8:135-39).

Barry Cobb was able to recall that he was always afraid that Dessaure would become a "volunteer" for the death penalty if convicted, and he sought the family's assistance in attempting to talk Dessaure out of such a decision. (PCR V8:137-39). He recalled that Appellant did not want to spend the next 40-50 years in prison, that he would rather receive the death penalty. (PCR V8:138-39; 157-58). After having his recollection refreshed with a memorandum he prepared (PCR V5:77-80),[1] Cobb testified

[1] Cobb testified that he thought he prepared the memorandum after he moved to withdraw so that he could share his information with any newly-appointed attorney. The memorandum was dated March 27,

that he retained Dr. Michael Maher as a mental health expert and Dr. Maher did not express any concerns about Dessaure's competency. (PCR V8:155; 158-59). After his office withdrew from the case, Cobb and his mitigation investigator met with attorney Richard Watts for a couple hours and took a number of boxes with them containing their mitigation evidence. (PCR V7:74; V8:140).

Rita Bruno, the mitigation investigator employed by the Public Defender's Office, testified that she took a history from Dessaure, talked to family members, and obtained birth, school, and police records.[2] (PCR V7:73). Ms. Bruno testified that Dessaure vacillated regarding his desire to have mitigating evidence presented on his behalf if convicted. She testified that it was not unusual for a young defendant like Dessaure to want to waive the presentation of mitigating evidence because they cannot visualize spending the rest of their lives in prison. (PCR V7:75-76, 85-86; 90). During her investigation, Ms. Bruno obtained a police report indicating that Dessaure had placed a gun to his head and threatened suicide, and she was also aware that Dessaure claimed he had attempted suicide a couple other times. (PCR V7:78-81). Ms. Bruno testified that Dessaure

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2001, and his motion to withdraw was filed March 21, 2001. (DAR V20:3516).

[2] Ms. Bruno, like attorney Cobb, believed that the mitigation investigation was complete at the time they turned over the case to attorney Watts. (PCR V7:84).

suffered from depression, but he was always able to communicate appropriately with her. (PCR V7:86, 91).

Richard Watts, an extremely experienced capital attorney,[3] testified that he was primarily the penalty phase attorney, but he and co-counsel Michael Schwartzberg discussed all issues of the case. Watts met with Dessaure approximately 20-30 times after his appointment in April, 2001, for a total of approximately thirty hours. (PCR V8:166-71, 183). Watts recalled that Dessaure had some "deep running sadness" in his background related to abandonment issues and the death of his older brother. (PCR V8:183). Watts testified that Dessaure was "persistent" from the day he began representing him up until the Spencer[4] hearing, that he did not want to conduct a penalty phase proceeding "in any way, shape or form." (PCR V8:183-84). Despite Dessaure's consistent position that he did not want to present mitigation evidence, Watts fully investigated and prepared for the penalty phase and maintained hope that he would be able to change Dessaure's mind when the time came. (PCR V8:184-85).

Richard Watts continued to utilize Dr. Maher, who had been appointed when Dessaure was represented by the Public Defender's Office. Watts testified that he had conversations with Dr. Maher

[3] Watts testified that he handled approximately thirty to forty capital cases prior to representing Dessaure. (PCR V8:162-63).
[4] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

as the trial approached and he "probably" would have utilized Dr. Maher at the penalty phase proceeding, if they had one, but Watts acknowledged that he might not use mental mitigation testimony because it can backfire and be a disservice to the defense. (PCR V8:187-88). Watts was not enthusiastic about using Dr. Maher in this case because Dessaure had not cooperated or given much information to Dr. Maher. (PCR V8:191).

Regarding Dessaure's decision to waive the presentation of mitigating evidence to a jury, Watts testified that he thought he prepared the waiver at some point before the guilt phase verdict because he had to be prepared for that potentiality.[5] (PCR V8:196). Watts felt that Dessaure was competent to make that

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[5] Late in the evening on September 5, 2001, the jury returned their verdict finding Dessaure guilty of first degree murder. (DAR V37:1816-17). The next morning, trial counsel filed the Waiver of Right to Present Mitigation Evidence to the Jury in the Penalty Phase, on behalf of his client:

I, KENNETH LOUIS DESSAURE, the Defendant herein, do hereby waiver my right to present mitigation evidence to the jury, in the penalty phase of my trial. I am doing this against the advice of my attorneys. I understand I have the right to present mitigation evidence to the jury that would potentially lead to a life sentence. My attorneys have explained to me what they reasonably believe to be the mitigation evidence but I would rather not present it to the jury. My decision has been made freely and voluntarily.

> I, KENNETH LOUIS DESSAURE, the Defendant herein, wish to retain my counsel, and understanding that society has a significant interest in determining whether a convicted murderer deserves to die, and to preserve the ability for meaningful appellate review, I direct counsel to challenge the State's case and present mitigation on my behalf to the Court, in summary form, without calling witnesses.

(DAR V24:4310-11; PCR V5:70-72).

decision and he specifically recalled having discussed that issue with Dr. Maher, who also found Dessaure competent to make that waiver. (PCR V8:196-99; DAR V38:1912). In fact, trial counsel Watts never felt that there were any issues with Dessaure's competency during his representation. (PCR V8:199).

At a hearing on September 6, 2001, trial counsel filed the waiver of right to present mitigating evidence to the jury, and the trial court conducted a colloquy with Dessaure regarding his decision. (DAR V37:1828-32). The court continued the sentencing proceedings until Tuesday, September 11, 2001, so that the State could depose Dr. Maher on Monday, September 10, 2001. (DAR V37:1828-29). At the conclusion of the hearing, trial counsel Schwartzberg informed the court that his client did not want to be placed on suicide watch:

> [T]he Pinellas County Jail, in its infinite wisdom and policy, whenever a first degree murder conviction is returned, that individual is placed into a suicide watch and kept with nothing there. **My client indicates that he is not in any way, shape, or form suicidal and has no intentions whatsoever to do anything**."

(DAR V37:1837-38) (emphasis added).

On Tuesday, September 11, 2001, trial counsel filed a Waiver of Argument for Life Sentence that Dessaure had him prepare which stated: "The Defendant, KENNETH LOUIS DESSAURE, hereby waives argument by counsel in favor of a life sentence in this cause. Further, I join the State in seeking a death sentence." (DAR

V24:4313; PCR V8:200-03).[6] Attorney Watts testified that he did not have any concerns about Dessaure's competency when he filed this waiver, as it was consistent with Dessaure's position from the outset. (PCR V8:203, 205, 220-21). At the September 11, 2001 nonjury penalty phase hearing, trial counsel proffered all of the mitigation evidence for the Court. (DAR V38:1886-1905). After proffering the mitigating evidence, trial attorney Watts informed the court that he "did ask Dr. Maher if he felt that Mr. Dessaure was competent to make the decision that he was making and he found him to be so." (DAR V38:1912).

Prior to the Spencer hearing, Dessaure changed his mind and allowed trial counsel to present certain mitigation. Watts testified that he did not recall specifically why he did not present Dr. Maher at the Spencer hearing but recalled that Dessaure was not enthusiastic about Dr. Maher and did not want to present his testimony. (PCR V8:207). The only reason Dessaure changed his mind and allowed any mitigating evidence to be presented at the Spencer hearing was because his girlfriend and mother of two of his children, Mary Parent, threatened to cut off all communication with him if he did not even attempt to obtain a life sentence. (PCR V8:221-23). Shortly after the Spencer hearing, Dessaure filed a Waiver of Presentation of Additional Mitigation and noted that the representations by his attorneys at

[6] At the time he filed the second waiver, the trial court again

the nonjury penalty phase did not constitute evidence that the trial court could consider at sentencing, and expressly waived the presentation of any additional mitigation evidence, including from witnesses that were discussed at the proffer. (DAR V24:4351-52).

At the postconviction evidentiary hearing, Dr. Maher testified that he met with Dessaure on two occasions prior to his trial and, after the initial meeting, found that "there does not appear to be strong support for mental mitigation," but noted that there were some limited references to suicidal episodes in the past. (PCR V8:104). After meeting with Dessaure on a second occasion and reviewing records obtained from the Public Defender's Office, Dr. Maher diagnosed Dessaure with post-traumatic stress disorder based on his childhood experiences. (PCR V8:105-07). Dr. Maher gave this information to defense counsel, but noted that trial counsel was concerned that Dr. Maher's opinion would open the door to argument that Dessaure had an antisocial personality. (PCR V8:108). Dessaure was not cooperative with Dr. Maher and was uninterested in the penalty phase proceeding. (PCR V8:111).

Dr. Maher was aware of Dessaure's trial and had been informed by trial counsel that he was to be available if needed. (PCR V8:118-19). Dr. Maher testified that he was unaware of the

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conducted a colloquy with Dessaure. (DAR V38:1843-49).

waivers Dessaure signed, and if he had been made aware of this information, he would have recommended that Dessaure be evaluated for competency. (PCR V8:120-21). On cross-examination, Dr. Maher recalled giving a deposition with the State and defense counsel Watts immediately after the guilt phase and being informed at that time that Dessaure was not likely to present mitigating evidence, but Dr. Maher did not recall having a conversation with attorney Watts wherein he indicated that Dessaure was competent to waive the presentation of mitigating evidence. (PCR V8:126-27).

At the evidentiary hearing, collateral counsel also presented testimony from two mental health experts retained during the postconviction process, Dr. Henry Dee and Heidi Hanlon.[7] Dr. Dee examined Dessaure and diagnosed him with depression and paranoid personality disorder. (PCR V7:16). Dr. Dee testified that Dessaure told him about his previous suicide attempts. (PCR V7:14, 27-28). Dr. Dee opined that Dessaure should have been examined for competency when he signed his waivers because, in his opinion, any defendant seeking to waive mitigation may not be competent because he would not be willing

[7] Heidi Hanlon testified that she diagnosed Dessaure with polysubstance dependence, and briefly alluded to his self-reported suicide attempts. (PCR V7:54-70). Dessaure, however, was not under the influence of any drugs at the time of the murder or during his trial proceedings, and was also not suicidal at the time he executed his waivers. (PCR V7:64-66; DAR V37:1837-38).

to assist his defense. (PCR V7:24-51).

After hearing all of the evidence and argument from counsel, the trial court entered a detailed order on February 5, 2009, denying all of Dessaure's postconviction claims. (PCR V3:1-30). The instant appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Dessaure's claim of ineffective assistance of penalty phase counsel based on trial counsel's failure to seek a competency determination when Dessaure waived the presentation of mitigating evidence to the jury. Trial counsel had previously had his expert examine Dessaure for competency and the expert informed trial counsel that Dessaure was competent to waive mitigation. Additionally, trial counsel had no reason to question Dessaure's competency because trial counsel had no issues in communicating with Dessaure, and Dessaure clearly understood the ramifications of his actions. Similarly, Appellant has failed to establish that the trial court erred in denying his claim that trial counsel was ineffective for failing to present available mitigation at the Spencer hearing. Because the lower court's factual findings are supported by competent, substantial evidence, and the legal principles were properly applied in denying relief, this Court should affirm the lower court's order.

ARGUMENT

ISSUE

THE LOWER COURT PROPERLY DENIED APPELLANT'S INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL CLAIM.

Appellant asserts in the instant appeal that his trial counsel was ineffective at the penalty phase when he (1) failed to move for a competency determination when Appellant waived the presentation of mitigation evidence to the jury, and (2) when counsel failed to present mitigation testimony from Dr. Maher at the Spencer hearing. Contrary to Appellant's assertions, the State submits that the lower court properly rejected these claims and found trial counsel provided effective assistance of counsel.

In order for a defendant to prevail on a claim of ineffective assistance of counsel claim pursuant to the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), a defendant must establish two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Strickland v. Washington, 466 U.S. 668 (1984); Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). When addressing the prejudice prong of a claim directed at penalty phase counsel's

performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but must review the trial court's ultimate conclusions on the deficiency and prejudice prong *de novo*. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the State submits that the trial court properly found that Appellant failed to carry his burden of establishing that trial counsel's representation was deficient. The testimony from the evidentiary hearing and the direct appeal record clearly establishes that trial counsel was not deficient for failing to move for a

competency hearing or for failing to present Dr. Maher's testimony at the Spencer hearing.

A. The trial court properly rejected Dessaure's claim that trial counsel was ineffective for failing to move for a competency hearing when Dessaure waived his right to present mitigation evidence before a jury.

As the lower court properly found, trial counsel was not ineffective for failing to move for a competency hearing when Dessaure waived the presentation of mitigating evidence to a jury. The testimony from the evidentiary hearing established that Dessaure had consistently maintained his position that he did not want to present mitigating evidence to the jury if he was convicted at the guilt phase. Prior counsel Barry Cobb, investigator Rita Bruno, and penalty phase counsel Richard Watts, all testified that Dessaure was likely going to waive the presentation of mitigation if convicted. Additionally, as noted by trial counsel at the time of the waiver, Dessaure's decision was against the advice of his three attorneys and was not something that had just "sprung up;" Dessaure had given considerable thought to this decision. (DAR V37:1827-28). Dr. Maher, defense counsel's mental health expert, had examined Dessaure to determine his competency and informed trial counsel that he was competent to make this decision. (V38:1912; PCR V8:196-99).

The morning after the jury's verdict finding Dessaure guilty of first degree murder, defense counsel filed a Waiver of Right to Present Mitigation Evidence to the Jury in the Penalty Phase on behalf of Dessaure. See footnote 5 and accompanying text, infra at 21-22. The trial court conducted a colloquy with Dessaure that clearly demonstrates that he understood the consequences of this decision. Trial counsel also informed the court at this time that Dessaure was not suicidal and requested that he not be placed on suicide watch in the county jail. (DAR V37:1828-38). Likewise, when Dessaure returned to court the following week for the nonjury penalty phase proceedings, trial counsel filed the second waiver he prepared at the behest of Dessaure which indicated that Dessaure did not want trial counsel to argue for a life sentence, and Dessaure "joined" the State in seeking a death sentence. (DAR V24:4313). The trial court again conducted another colloquy with Dessaure regarding his waiver. (DAR V38:1843-49).

Appellant erroneously argues in his brief that the two waivers signed by Dessaure constituted a complete abandonment by penalty phase counsel. As the record demonstrates, penalty phase counsel Watts started investigating mitigation by utilizing the investigation material obtained from the Public Defender's Office and counsel also conducted his own investigation. Trial counsel was aware of the available mitigation in this case, but his

client made the decision to waive the presentation of this evidence to the jury. The law is well established that a competent defendant may legally waive his right to present mitigating evidence to a jury. See Robinson v. State, 913 So. 2d 514 (Fla. 2005); Winkles v. State, 894 So. 2d 842 (Fla. 2005); Spann v. State, 857 So. 2d 845 (Fla. 2003); Griffin v. State, 820 So. 2d 906 (Fla. 2002).

Appellant's argument that trial counsel performed deficiently by failing to move for a competency determination is without merit and was properly rejected by the lower court. As the trial court noted, it was not necessary to seek a competency determination because (1) Dessaure had previously been examined for competency and found to be competent; (2) at the time of the waiver, trial counsel represented that he had spoken with his mental health expert Dr. Maher, and the doctor concluded that Dessaure was competent to make this decision; and (3) trial counsel testified that he had no reason to question the competency of his own client. (PCR V3:17).

Appellant argues that the prior determination of competency should not have been relied upon by the lower court because Dr. Maher evaluated Appellant in March, 2001, and Appellant did not waive his penalty phase jury until September, 2001. Appellant further argues that the lower court erred by citing to Boyd v. State, 910 So. 2d 167, 188-89 (Fla. 2005), because Boyd is

distinguishable from the instant case. Appellant correctly notes that in Boyd, the defendant had been found judicially competent, while in the instant case, the court was never asked to determine Dessaure's competency.

Of course, a defendant is presumed competent, and in this case, there was never any bona fide question as to Dessaure's competency. See Fla. R. Crim. P. 3.210 (stating that if the court or counsel have reasonable ground to believe that the defendant may not be competent, the court should conduct a competency hearing). Trial counsel's confidential expert, Dr. Maher, had been retained by Dessaure's attorneys to determine, among other things, Dessaure's competency. Trial counsel Watts testified that, throughout his representation, Dessaure consistently maintained the position that he did not want to present any mitigating evidence. At the evidentiary hearing, trial counsel could not specifically recall when he spoke to Dr. Maher regarding Dessaure's competency to waive mitigation. The direct appeal record establishes that the State (and Watts) deposed Dr. Maher on September 10, 2001, a few days after Dessaure had waived the penalty phase jury and the day before he signed his second waiver. (DAR V37:1828-29; PCR V8:126).[8] When

[8] Dr. Maher testified at the evidentiary hearing that he did not recall being informed of Dessaure's waivers, and had he been informed at the time, he would have recommended that Dessaure be evaluated for competency. (PCR V8:120-21). However, on cross-examination, he acknowledged that he was deposed by the State and

Dessaure filed his second waiver on September 11, 2001, trial counsel Watts informed the court that he "did ask Dr. Maher if he felt that Mr. Dessaure was competent to make the decision that he was making and he found him to be so." (V38:1912).

The record clearly supports the trial court's finding that trial counsel was not ineffective for failing to move for a competency determination as there was no reason to question Dessaure's competency at the time he waived the presentation of mitigation. Appellant places great weight on the second waiver filed by Dessaure at the outset of the nonjury penalty phase proceeding indicating his desire to join the State in seeking the death penalty and seems to equate this to an instant suicidal thought. However, as the State noted when questioning Dr. Dee at the postconviction evidentiary hearing, the fact that a defendant signs a waiver of the penalty phase jury and "joins" the State in seeking a death sentence does not equate to a suicidal tendency. (PCR V7:47). Rather, the record supports that it is not uncommon, especially for younger defendants, to waive mitigation and seek the death penalty because it is difficult for them to visualize spending the rest of their lives in prison. (PCR V7:75-76, 85-86; 90); see also Ocha v. State, 826 So. 2d 956

Watts and informed at that time that it was likely that his services would not be needed because Dessaure was waiving the presentation of mitigation. (PCR V8:126). He could not recall whether he informed Watts at that time that Dessaure was competent. (PCR V8:126-27).

(Fla. 2002); Robinson v. State, 684 So. 2d 175 (Fla. 1996); Farr v. State, 621 So. 2d 1368 (Fla. 1993); Hamblen v. State, 527 So. 2d 800 (Fla. 1988).

In the above cited cases, the defendants pled guilty, waived their right to present mitigating evidence, and asserted their desire to be sentenced to death. In Farr, this Court stated:

> [M]itigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. **That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.**

621 So. 2d at 1369 (emphasis added). In cases where a defendant waives the presentation of mitigating evidence, as in the instant case, defense counsel must comply with the procedure set out in Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993):

> [1] [C]ounsel must inform the court on the record of the defendant's decision. [2] Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. [3] The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Robinson, 684 So. 2d at 177. In Muhammad v. State, 782 So. 2d 343 (Fla. 2001), this Court extended the procedure to include the requirement that a trial judge order and consider a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence.

In the case at bar, trial counsel and the lower court properly complied with Florida law in dealing with Dessaure's waiver of the presentation of mitigating evidence before the jury. As this Court noted in Dessaure v. State, 891 So. 2d 455, 463-64 (Fla. 2004) (emphasis added):

> 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.
>
> . . .
>
> 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.

As the direct appeal and postconviction record makes clear, trial counsel fully investigated the potential mitigating evidence present in this case and summarized it for the trial court below. After trial counsel summarized each individual

witness' testimony, the trial court inquired of Dessaure regarding his desire to waive this witness' testimony. (DAR V38:1886-1906). Thus, Appellant's reliance on State v. Pearce, 994 So. 2d 1094 (Fla. 2008), is misplaced as Pearce involved a finding that the defendant's waiver of the presentation of mitigation was the result of trial counsel's failure to fully investigate available mitigating evidence.

In the instant case, trial counsel fully investigated the applicable mitigating evidence and presented it pursuant to his client's instructions. Because Dessaure was competent to make this decision, and there was no bona fide reason to question his competency, the trial court properly rejected Appellant's claim that trial counsel was ineffective for failing to move for a competency determination.

B. Trial counsel was not ineffective for failing to present Dr. Maher at the Spencer hearing.

Appellant argues in his second subclaim that the lower court erred in denying his claim that penalty phase counsel was ineffective for failing to present the testimony of Dr. Maher at the Spencer hearing. The lower court noted that Dessaure could have presented testimony from Dr. Maher, but he chose to waive this opportunity. (PCR V3:23-24, 26-30). Because Appellant cannot establish either deficient performance or prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984), this

Court should affirm the lower court's ruling.

As previously noted, Dessaure waived his right to present mitigation evidence to a jury. Instead, his trial attorneys summarized the mitigating evidence and proffered the testimony of witnesses, including Dr. Maher, at the nonjury penalty phase proceeding. The trial court conducted a colloquy with Dessaure to verify that he understood these decisions. (DAR V38:1886-1906). Dessaure specifically waived the presentation of testimony from Dr. Maher. (DAR V38:1903-05).

At the Spencer hearing, Dessaure changed his mind and instructed trial counsel to argue in favor of a life sentence and present limited mitigation evidence. Trial counsel testified at the evidentiary hearing that Dessaure changed his mind because his girlfriend threatened to end communication with him if he did not at least attempt to obtain a life sentence. (PCR V8:221-23). Pursuant to Dessaure's direction, trial counsel presented mitigating evidence from three witnesses: Dessaure's girlfriend, Mary Parent, his grandmother, and Dessaure. (DAR V24:4424-58). Shortly after the Spencer hearing, Dessaure filed a Waiver of Presentation of Additional Mitigation acknowledging that he was knowingly waiving the presentation of the previously-proffered mitigating evidence. (DAR V24:4351-52).

Appellant's current argument that penalty phase counsel was ineffective for failing to present the testimony of Dr. Maher at

the Spencer hearing is without merit as Appellant specifically waived the presentation of this evidence. The law is well established that a competent defendant is the "captain of his ship" and can control decisions pertaining to his defense, including the presentation of mitigation evidence. See Boyd v. State, 910 So. 2d 167, 189-90 (Fla. 2005); Grim v. State, 841 So. 2d 455, 461-62 (Fla. 2003); Farr v. State, 621 So. 2d 1368 (Fla. 1993); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). In the instant case, trial counsel proffered the testimony of Dr. Maher at the nonjury penalty phase proceeding and informed the court that Dr. Maher had limited involvement with Dessaure and that Dessaure was not very cooperative with Dr. Maher. Nevertheless, Dr. Maher would have testified that Dessaure had post-traumatic stress disorder arising from childhood trauma. (DAR V38:1903). Dessaure was aware of this testimony and knowingly waived the presentation of this evidence, both at the time of the proffer and again after the Spencer hearing:

> 1. That I have been advised and I understand that there exists additional mitigating evidence which I could present to the Court as evidence to weigh in consideration of my sentence of capital life in prison, or the death penalty.
> 2. That I understand that the mitigating circumstances that were proffered to the Court, by way of representations of counsel is not evidence to be considered by the trial court at sentencing.
> 3. My lawyers have advised me that the Court would likely allow me to present this evidence, and that they would be glad to call in the witnesses that

> they listed, and the evidence that they proffered, at an additional future proceeding, so that the Court may consider all that mitigation in rendering its sentencing decision.
>
> 4. Having been advised of the above, and understanding, I hereby waive presentation of additional mitigation and rely on the record as it stands, for the Court's consideration of my sentence.

(DAR V24:4351).

The postconviction court properly rejected Appellant's argument that penalty phase counsel was ineffective for failing to call Dr. Maher at the Spencer hearing based on Appellant's numerous waivers of this evidence. See Cummings-El v. State, 863 So. 2d 246, 252 (Fla. 2003) (counsel was not ineffective in limiting his mitigation investigation where defendant was adamant about not wanting his family to beg for his life and defendant understood the consequences of his decision not to present mitigating evidence); Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988) ("[I]n the final analysis, all competent defendants have a right to control their own destinies."). Appellant received exactly the penalty phase and Spencer hearing he desired. He cannot fault counsel for failing to present evidence which he himself directed counsel not to present. Accordingly, this Court should affirm the lower court's ruling.

Although not required to consider the prejudice prong of Strickland because Appellant has failed to establish deficient performance, the State would note that Appellant is also unable

to establish that he was prejudiced as a result of Appellant's decision to waive the presentation of Dr. Maher's testimony. See Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) ("When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong."). Dr. Maher had two brief meetings with Dessaure and Dessaure was not cooperative or forthcoming in these interviews. Initially, Dr. Maher did not find any "strong support for mental health mitigation," but after reviewing records obtained from the Public Defender's Office and meeting with Dessaure for a second time, Dr. Maher diagnosed Dessaure with post-traumatic stress disorder based on childhood trauma. (PCR V8:104-07, 114-15). Prior trial counsel Barry Cobb summarized Dr. Maher's diagnosis in a memo prepared for Richard Watts, and Cobb recognized the potential that the State would argue that Dessaure had anti-social personality based on Dr. Maher's opinion. (PCR V5:76-80).

Even if trial counsel had presented the testimony of Dr. Maher at the Spencer hearing, it would not have affected the trial court's sentence. In order to prevail on the prejudice prong of an ineffective assistance of penalty phase counsel claim, a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and

mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). In this case, the trial court found four aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a crime, conspiracy to commit armed robbery, and was placed on community control (some weight); (2) Appellant was previously convicted of a felony involving the use or threat of violence (little weight); (3) the capital felony was committed during the course of a burglary (great weight); and (4) the capital felony was especially heinous, atrocious, and cruel (very great weight). (DAR V24:4358-63). In mitigation, the court found: (1) Appellant's age of 21 (some weight); (2) Appellant's quality of being a caring parent (little weight); (3) Appellant's family background (some weight); (4) the capacity of Appellant to form personal relationships (little weight); and (5) Appellant's behavior in court (little weight). After weighing the aggravating circumstances against the mitigating circumstances, the trial court found that the aggravating factors far outweighed the mitigation. (DAR V24:4358-63).

Even if Dr. Maher had testified regarding his diagnosis of post-traumatic stress disorder, it would not have affected the trial court's sentence. See Willacy v. State, 967 So. 2d 131, 144 (Fla. 2007) (finding that no prejudice was shown because presenting mental mitigation that may include a finding that

Willacy was a sociopath would likely have been more harmful than helpful); Freeman v. State, 852 So. 2d 216, 224 (Fla. 2003) (noting that anti-social personality disorder is a trait most jurors look disfavorably upon). As Dr. Maher noted, Dessaure's original trial counsel was concerned that Dr. Maher's testimony would open the door to argument from the State that Dessaure had an anti-social personality. (PCR V8:108). Even assuming that Dr. Maher could have neutralized any argument by the State concerning anti-social personality, his diagnosis of post-traumatic stress disorder would not have affected the trial court's sentence given Dessaure's criminal history,[9] behavior, and circumstances of the crime. See Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (no reasonable probability of different outcome had mental health expert testified, in light of strong aggravating factors). As Appellant has failed to establish any errors in the lower court's denial of his postconviction motion, this Court should affirm the lower court's order denying postconviction relief.

[9] As the trial court noted in its sentencing order, Dessaure, who was 21 at the time of the murder, "has been arrested no less than 10 times, not counting the murder, since the birth of his first child." (DAR V24:4362).

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, this Court should AFFIRM the lower court's order denying Appellant's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular 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 APPELLEE