No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

AFELIX DESIR – PETITIONER

vs.

PAMELA JO BONDI and
STATE OF FLORIDA – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE 3rd DISTRICT COURT OF APPEALS

STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Afelix Desir
DC # M11364
Sumter Correctional Institution
9544 County Road 476-B
Bushnell, Florida 33513

QUESTION(S) PRESENTED

2013 Florida Statutes **§794.05(1)** unlawful sexual activity with a minor: makes it a criminal offense for a person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084. As used in this section, " sexual activity" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose. The question of great public importance is:

1) Does a trial court commit fundamental error when it instructs a jury regarding both "**Penile/Vaginal intercourse**" unlawful sexual activity with specific minor and "**Penetration or Union with mouth of victim**" unlawful sexual activity with specified minor when the information charged only one form of the crime and evidence was presented and argument was made regarding the alternative form?

2) Does the information, verdict form, and the jury instructions have to correlate to contain a lawful conviction?

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[6] These instructions were formulated by the Supreme Court of Florida regarding the criminal offense of Unlawful Sexual Activity with Specified Minor section 794.05 Florida Statutes (2013)

TABLE OF AUTHORITIES CITED

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PETITION FOR WRIT OF CERTIORARI

Afelix Desir, Pro se, inmate at the Sumter Correctional Institution of the Florida Department of Corrections, respectfully petitions for Writ of Certiorari to review the judgment of the 3rd District Court of Appeal for Florida

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OPINIONS BELOW

The panel opinion of the Third District of Appeal, Florida, is reported at **Desir v. State**, 2017 Fla.App. Lexis 14774 (Fla. 3rd DCA October 2017)(Appendix D)(attached). The unreported decision of the Third District Court of Appeal, Florida, Rehearing is reproduced in the Appendix at Appx.F.

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JURISDICTION

The order of the 3rd District Court of Appeals was entered on October 18, 2017. The order denying the Motion for Rehearing and Written Opinion was entered on December 29, 2017. Appendix F. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), 2018

CONSTITUTION AND STATUTORY PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

And the Fourteenth Amendment to the Unite States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes **§794.05(1)** provides in relevant part:

(1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. As used in this section, sexual activity means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

(2) The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under chapter 743.

(3) The victims prior sexual conduct is not a relevant issue in a prosecution under this section.

(4) If an offense under this section directly results in the victim giving birth to a child, paternity of that child shall be established as described in chapter 742. If it is determined that the offender is the father of the child, the offender must pay child support pursuant to the child support guidelines described in chapter 61.

STATEMENT OF THE CASE

On July 10, 2013, the State filed an Information against the Defendant (Appendix). And on January 12, 2015, the State filed an Amended Information, charging the Defendant with the following: **Count 1,** Human Trafficking, § 786.06(3)(G); **Count 2,** Procuring Person Under Age of 18 for Prostitution, § 796.03; **Count 3,** Deriving Support From the Proceeds of Prostitution, § 796.05; **Count 4,** Controlled Substance/Deliver to/Hire/Child Under 18, § 893.13(4)(A); **Count 5,** Unlawful Sexual Activity with Specified Minor on or between December 1, 2012 and December 14, 2012, § 794.05; **Count 6,** Unlawful Sexual Activity with Specified Minor on or between December 15, 2012 and December 31, 2012, § 794.05; **Count 7,** Unlawful Sexual Activity with Specified Minor on or between January 1, 2013 and January 14, 2013, § 794.05; **Count 8,** Unlawful Sexual Activity with Specified Minor on or between January 15, 2013 and January 31, 2013, § 794.05; **Count 9,** Unlawful Sexual Activity with Specified Minor on or between February 1, 2013 and February 14, 2013, § 794.05; **Count 10,** Unlawful Sexual Activity with Specified Minor on or between February 15, 2013 and February 28, 2013, 794.05; **Count 11,** Unlawful Sexual Activity with Specified Minor on or between March 1, 2013 and March 7, 2013, § 794.05; **Count 12,** Kidnapping/with a Weapon, Firearm or Aggravated Battery, §§ 787.01(1), 775.087; **Count 13,** Kidnapping/Weapon, Firearm or Aggravated Battery/Conspiracy, §§ 787.01(1), 775.087 and 777.04; **Count 14,** Robbery/Home

Invasion/Armed/Conspiracy, §§ 812.135(2) (A), 775.087 & 777/04(2); **Count 16,** Battery/Aggravated/Deadly Weapon/Firearm/Mask, §§ 784.045(1)(a)2 & 775.0845; **Count 17,** Unlawful Possession of a Firearm While Engaged in a Criminal Offense, 790.07(2); **Count 18,** Unlawful Possession of a Firearm/Weapon by a Violent Career Criminal, § 790.235; **Count 19,** Tampering With Victim, § 914.22(2)(D) and **Count 20,** Tampering With Victim, § 914.22(2)(D). A jury returned a verdict finding the Defendant not guilty of Counts 1-5, 9-17, 19-20 and the State announced a *nolle prosequi* on Count 18. A jury returned a verdict finding the Defendant guilty of Counts 6-8.

Which is the subject of this certiorari.

COUNTS 6-8

The Respondent's charging Information for Counts 6-8, reads as following, as to Count 6, *"Unlawful Sexual Activity with Specified Minor on or between **December 15, 2012** and **December 31, 2012...**"*; Count 7, *"Unlawful Sexual Activity with Specified Minor on or between **January 1, 2013** and **January 14, 2013**"*; and Count 8, *"Unlawful Sexual Activity with Specified Minor on or between **January 15, 2013** and **January 31, 2013**"*....

AFTER THE VERDICT

After the verdict and before sentencing, Mr. Desir and his trial attorney, filed a Motion to Dismiss Counts 6-8 of the Respondent's charging Information, which was denied. At sentencing Mr. Desir received an enhanced penalty as a habitual

violent felony offender (*"HVFO"*) to thirty (30) years imprisonment with ten (10) years mandatory as a HVFO.

DIRECT APPEAL BRIEF

In the Direct Appeal Brief, Petitioner argued four substantive points of trial court errors, namely, **A, B, C** and **D**. e.g.:

A. THE EVIDENCE DOES NOT SUPPORT COUNTS 6-8.

B. THE COURT ERRED IN DENYING THE DEFENSE MOTION TO DISMISS COUNTS 6-8 BASED ON TRULY INCONSISTENT VERDICTS.

C. THE VERDICT FORM FAILS TO CORRELATE WITH THE INFORMATION RENDERING THE CONVICTIONS NULL AND VOID AND ALSO WHEN COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

D. THE JURY INSTRUCTIONS IMPROPERLY INSTRUCTED THAT A CONVICTION COULD BE REACHED BY A FINDING THAT DEFENDANT PENETRATED OR HAD UNION WITH THE MOUTH OF THE VICTIM WHEN THE INFORMATION CHARGED COMMITTING UNLAWFUL SEXUAL ACTIVITY BY PENILE/VAGINAL INTERCOURSE AND ALSO WHEN COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE AN OBJECTION.

(See: Appeal Brief at Appendix A)

In support of his four points of error in the Direct Appeal Brief, Mr. Desir cited this Court's ***" super precedent"*** case of ***Thornhill v. Alabama, 310 U.S. 88, 96 S. Ct. 736, 84 L. Ed. 1093 (1940)*** (conviction upon a charge not made would be [a] sheer denial of due process) He also stated that his trial attorney provided ineffective assistance. (See, Initial brief, Appendix A, at pg. 15)

ANSWER BRIEF BY RESPONDENT

In the Answer Brief, Respondent argued four points, contending that no errors occurred by the trial court, namely, **I, II, III** and **IV** e.g.:

I. THE STATE PRESENTED SUFFICIENT COMPETENT EVIDENCE OF UNLAWFUL SEXUAL ACTIVITY WITH MM.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS.

III. THE CONVICTIONS ARE NOT NULLIFIED. THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD NOT BE REVIEWED ON DIRECT APPEAL. EVEN IF IT COULD BE REVIEWED, DEFENSE COUNSEL WAS NOT INEFFECTIVE.

IV. THE JURY INSTRUCTIONS WERE PROPER. THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD NOT BE REVIEWED ON DIRECT APPEAL. EVEN IF IT COULD BE REVIEWED, DEFENSE COUNSEL WAS NOT INEFFECTIVE.

(See: Answer Brief at Appendix B)

The Answer Brief cited this court's *super precedent* case of ***Dunn v. United States, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932)*** (True inconsistent verdicts, which is an acquittal on one count, negates a necessary element of another count...) (See, Answer Brief, Appendix B, at pg. 19) the answer Brief also cited to this Court's opinion in ***Strickland v. Washington*** supra. (Answer Brief, at pg. 25).

PETITIONER'S REPLY BRIEF

In his Reply Brief, Mr. Desir argued, *among other things*, two points regarding the initial four points raised in the Initial Brief, specifically, that:

A. THE EVIDENCE DOES NOT SUPPORT COUNTS 6-8.
(See Appendix C, at pg.1)

B. THE VERDICT FORM FAILS TO CORRELATE WITH THE INFORMATION RENDERING THE CONVICTIONS NULL AND VOID AND THE JURY INSTRUCTIONS IMPROPERLY

INSTRUCTED THAT A CONVICTION COULD BE REACHED BY A FINDING THAT DEFENDANT PENETRATED OR HAD UNION WITH THE MOUTH OF THE VICTIM WHEN THE INFORMATION CHARGED COMMITTING UNLAWFUL SEXUAL ACTIVITY BY PENILE/VAGINAL INTERCOURSE AND ALSO WHEN COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE AN OBJECTION [ARGUMENTS C-D WITHIN INITIAL BRIEF.

(Appendix C at pg. 4)

With these two points of error, Mr. Desir cited two additional precedent cases from this Court ***Cole v. Arkansas, 333 U.S. 196 (1948)*** (Due process prohibits an individual from being convicted of an uncharged crime) (Pg. 8, Appx. C, Reply Brief) ***Porter v. McCollum, 558 U.S. 30 (2009)*** (The Strickland standard does not require a finding that deficient conduct more likely than not altered the outcome, a Defendant need only establish a probability sufficient to undermine confidence in the outcome) **(Appendix C, at pg. 5, Reply Brief)** and he also cited ***Strickland v. Washington,*** supra.

However, in spite of the crystal clear federal denial of constitutional due process that appear on the face of the record, the Florida Third District Court of Appeal found no deficiencies in the denial of due process, or incompetency of trial counsel, and per curiam affirmed Mr. Afelix Desir's convictions and sentences, issuing an unwritten opinion at ***Desir v. State,*** *2017 Fla. App. Lexis 14774 (Fla. 3rd DCA October 2017)* **(Appendix D).**

MOTION FOR REHEARING

In his request for Rehearing, Rehearing En Banc, and Written Opinion, Mr. Desir (again represented by Thomas J. Butler, Esq.,) reiterated that his Federal Constitutional rights were clearly violated, by the 11th Judicial Circuit Court for Florida and, the 3rd District Court of Appeals refusal to offer a written explanation behind its per curiam affirmed decision; For example, all throughout the rehearing motion he cited a plethora of controlling state cases from all five of Florida's Appellate Courts. ***Eaton v. State,*** *908 So. 2d 1164 (Fla. 1st DCA 2005);* ***Dixon v. State,*** *823 So. 2d 792 (Fla. 2d DCA 2001);* ***Braggs v. State,*** *789 So. 2d 1151, 1153-54 (Fla. 3d DCA 2001);* ***Taylor v. State,*** *760 So. 2d 298 (Fla. 4th DCA 2000);* and ***Morgan v. State,*** *146 So. 3d 508 (Fla. 5th DCA 2014).*

And as stated by the above Florida Courts, it is per sé reversible error to instruct a jury on an uncharged crime, when, thereafter, due process prohibits an individual from being convicted of an uncharged criminal offense (citing ***Cole v. Arkansas,*** supra.) **(Motion for Rehearing, Appendix E, pgs. 3-4).** However, the Third District for Florida denied to rehear the case offer En Banc hearing or even to write an opinion. **(See order dated December 29, 2017, at Appendix F).**

On January 3, 2018, Mr. Desir's Appellate Attorney (by letter) advised that he had 90-days to petition (pro se) this Court for a Rule 13 Certiorari review to this Court. **(Appendix G).**

REASONS FOR GRANTING THE PETITION

The national importance of having this court decide the question involved would entitle the accused in similar situations to have the charges against him or her proven substantially as alleged in the indictment or information. The 11th Judicial Circuit Court for Florida violated Petitioner's federal Constitutional Rights, and it's decision directly conflicts with the 2nd District Court of Appeals decision in **State v. Weaver**, 957 So.2d 586 (Fla. 2007). Where the trial court fundamentally erred by instructing the jury on an uncharged alternate theory of the offense. The *Weaver* court certified a question asking if jury instructions constitute fundamental error when no evidence was presented or argument made on the uncharged theory of the offense. The Supreme Court quashed the Second Districts decision reversing Weavers conviction.

The record in [Petitioner's] case clearly shows that evidence was presented and argument was made on the uncharged alternate theory (oral intercourse).(See appendix B pg.6) The 11th Judicial Circuit Court decision is wrong and is contrary to this court's decision in **Thornhill v. Alabama**, **Dejonge v. Oregon**, and **Cole v. Arkansas**. As well as similar case law from Florida: Where A) The evidence does not support counts 6-8; B) The State's trial court erred in denying the defense's motion to dismiss counts 6-8 based

on "Truly Inconsistent" verdicts; C) The State's verdict form failed to correlate with the Governments charging information rendering convictions for counts 6-8 null and void, and also, when trial counsel provided incompetent assistance for failing to make an appropriate objection. And D) The jury instructions improperly instructed that a conviction could by reached by finding that "[Petitioner] penetrated or **union with the mouth of the victim**" When the government charging complaint charged that "[Petitioner] committed unlawful sexual activity by **Penile/Vaginal intercourse**" and counsel was incompetent for failing to make proper objection. This court's review of the question(s) presented as well as reason A, B, C, and D: is plainly warranted.

REASONS

A. THE EVIDENCE DOES NOT SUPPORT COUNTS 6-8

M.M. stated she and the Petitioner were engaged in sexual contact every day about three weeks to a month after she met the Petitioner at the end of October or the beginning of November 2012.

As noted, the State charged the Petitioner in multiple counts under **§794.05** Florida Statutes, Unlawful Sexual Activity with Specific Minor, for the following dates: Count 6, on or between **December 15, 2012**, and **December 31, 2012**; Count 7, on or between **January 1, 2013** and **January 14, 2013**; Count 8, on or between **January 15, 2013** and **January 31, 2013**.

Clearly, the evidence does not support counts 6-8 for purported Unlawful Sexual Activity with a Minor for the dates on or between **December 15, 2013** and **January 31, 2013** when M.M.'s testimony only indicated she had sexual activity with the Petitioner about three weeks to a month after the meet, which was at the end of **October**, or the beginning of **November 2012**.

B. THE COURT ERRED IN DENYING THE DEFENSE MOTION TO DISMISS COUNTS 6-8 BASED ON TRULY INCONSISTENT VERDICTS.

As noted, the evidence only consisted of M.M. testifying that the Petitioner were engaged in sexual contact (either oral or penile-vaginal sex) everyday about three weeks to a moth after they met. M.M. also provided she met the Petitioner at the end of October or the beginning of November 2012. Importantly, the jury reached inconsistent verdicts. See e.g., **Dunn v. United States**, 284 U.S. 390, 52 S.Ct. 189, 76 L. Ed. 356 (1932).

Here, it is impossible to reconcile how the jury could find the Petitioner not-guilty of count 5 (See statement of the case, count 5.) On or between **December 1, 2012** and **December 14, 2012** when M.M.'s only testimony indicated she was engaged in sexual activity with the Petitioner up to either the end of **October** or the beginning of **November 2012**, when the remaining counts charged the Petitioner after that date, Count 6, on or between **December 15, 2012**, and **December 31, 2012**; Count 7, on or between **January 1, 2013** and **January 14, 2013**; Count 8, on or between **January 15, 2013** and **January 31, 2013**.

Note also, the jury reached verdicts findings the Petitioner not-guilty of count 9, (See statement of the case)(on or between **February 1,2013** and **February 14, 2013**);

Count 10, (on or between **February 15, 2013** and **February 28, 2013**) and Count 11, (on or between **March 1, 2013** and **March 7, 2013**) (see statement of the case, count 11).

C. THE VERDICT FORM FAILS TO CORRELATE WITH THE INFORMATION RENDERING THE CONVICTION NULL AND VOID AND ALSO WHEN COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE AN OBJECTION.

The information charged that Mr. Desir had "**Penile/Vaginal intercourse**" with M.M. (See, Information, Appx. H). Because the Stae specifically alleged that Mr. Desir had penile to vaginal intercourse with M.M., then the verdict forms (Apenndix J) should have reflected the same. The verdict form incorrectly read in pertinent part:

We, The Jury, find as follow as to the Information Charging **AFELIX DESIR of UNLAWFUL SEXUAL ACTIVITY WITH A MINOR (M.M.)**

1. __X__ **The Defendant is Guilty of Unlawful Sexual Activity with a Minor (M.M.)**
2. _____ **The Defendant Not Guilty**.

The above verdict form clearly omits the required words **penile** and **vaginal**.

Therefore, based on the foregoing, Mr. Desir's conviction should be reversed because the verdict form failed to correlate with the information, which alleged Mr. Desir

had **penile** to **vagina intercourse** with M.M. and when the verdict form erroneously permitted the jury to convict Mr. Desir wit sexual activity wit M.M. he was clearly denied due process of law. See **Moore v. State**, 496 So.2d (Fla. Dist. Ct. App. 1986).

D. THE JURY INSTRUCTION IMPROPERLY INSTRUCTED THAT A CONVICTION COULD BE REACHED BY A FINDING THAT PETITIONER PENETRATED OR HAD UNION WITH THE MOUTH OF THE VICTIM WHEN THE INFORMATION CHARGED COMMITTING UNLAWFUL SEXUAL ACTIVITY BY PENILE/VAGINAL INTERCOURSE AND ALSO WHEN COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE OBJECTION.

Counts 6-8, of the amended information charged Mr. Desir with unlawful sexual activity (**Penile/Vaginal intercourse**) under **§794.05(1)** Florida Statute. (**Appendix H**). However, the Court improperly instructed the jury that it could convict Mr. Desir if it determined that he "**Penetrated or had union with the vagina and/or mouth of M.M.**, a minor". (**See Jury Instruction, Appendix I**).

The trial State Attorneys reliance on the charging information references sexual activity as well as intercourse is misplaced see (**Appendix B**) pg 31. The government charging information charged **penile/vaginal intercourse** and the jury should have been instructed to none other. See also (**Appendix B**) pg 32. Where trial State Attorney alleged

that just because Petitioner was charged under section 794.05 for unlawful sexual activity which included vaginal, as well as oral intercourse allows the jury to be instructed on and uncharged alternative theory no where charged in the information.

The trial State Attorney reliance on this doctrine is wrong. See, **State v. Weaver**, 957 So.2d 586 (Fla. 2007).

The trial State Attorney fails to distinguish **Eaton v. State**, 908 So.2d 1164 (Fla 1st DCA 2005) in its answer brief see (**Appendix B**) pg 29. Like **Eaton**, **§794.05(1)** can be accomplished alternatively, either by anal, penile/vaginal penetration or by oral penetration by mouth. In **Eaton**, the issue was "**penetration**" versus "**union**" and in Petitioner's case, the issue is between "**oral**" and "**vagina**" intercourse which are all alternative ways to charge the crime of unlawful sexual activity.

Eaton court concluded that the circuit court committed fundamental error by instructing the jury on an alternative theory (sexual union) not charged in the first count of the information. Where an offense may be committed in various ways, the evidence must establish it to have been committed in the manner charged in the indictment or information. **Vega v. State**, 900 So2d 572 (Fla. 2d DCA 2004); **Dixon v. State**, 823 So.2d 792 (Fla. 2nd DCA 2001); **Taylor v. State**, 760 So.2d 298 (Fla. 4th DCA 2000). In

Braggs v. State, 789 So.2d 1151-54 (Fla.3d DCA 2001). The Third District Court held, that, that it is well settled that a trial court commits fundamental error by convicting a defendant on crime not charged. See also **Morgan v. State**, 146 So.3d 508(Fla. 5th DCA 2014).

There is a denial of Due Process when there is a conviction on a charge not made in the information or indictment .See **Thornhill v. Alabama,** 310 U.S. 88, 96 S.Ct. 736, 84 L. ED. 1093 (1940); **Dejonge v. Oregon**, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278(1937); and **Cole v. Arkansas,** 333 U.S. 196, 201, 68 S.Ct. 92 L.Ed. 64 (1948); (conviction upon a charge not made would be sheer denial of due process).

Further, Mr. Desir through his Appellate attorney argued that his trial counsel rendered ineffective assistance of counsel by not objecting to the instructions, and ineffectiveness is apparent from the face of the record. **Strickland v. Washington**, 466 US 668, 80 L Ed 2d 674 (1984); The *Strickland* standard does not require a finding that deficient conduct more likely than not altered the outcome, the Petitioner need only establish a probability sufficient to undermine confidence in the outcome. See **Porter v. McCollum**, 558 U.S. 30,44,130 S.Ct. 447, 175 L.Ed. 2d 398 (2009).

Therefore, based on the foregoing, Mr. Desir's convictions should be reviewed by this Court, the United States Supreme Court, because the Florida Circuit Court denied Mr. Desir's Constitutional due process, when it instructed the jury on an alterative theory nowhere mentioned or charged in the information; and as a result, the government obtained unconstitutional convictions for counts 6-8 of the charging information.

CONCLUSION

The Petition for Writ of Certiorari should be granted, based on the four (4) above reasons: A, B, C, and D. And vacate the judgment and remand in light of a violation of *Thornhill, Cole, Porter, And Strickland,* supra.

Date: 5-31-18

Respectfully Submitted

Gelix Desir