IN THE SUPREME COURT OF FLORIDA

MARK D. SIEVERS,	:	
Appellant,	:	
vs.	:	Case No. SC20-0225
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG,II
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This Court should reconsider its December 23, 2020, order denying Sievers' motion to relinquish jurisdiction for reconstruction of the record with a copy of a video known as the "Curtis Wright proffer video." The video was on a disc that was put into the record at trial by the defense for the purpose of this appeal. The judge intended for the video to be included with the appellate record. The judge's exclusion of this defense exhibit is the subject of Issue V.

The video is a large digital file--a recording of an interview--created by the prosecutor prior to the charges being filed against Sievers. The State was required to disclose it in discovery, see State v. Fernandez, 141 So. 3d 1211, 1214 (Fla. 2d DCA 2014), and the prosecutor did so after Sievers filed a motion to compel. R3380 On January 11, 2018, the prosecutor discussed the delay in providing it.

> It's a large file. It's available to the Defense. I think we're just waiting on some portable media to put it on. . . . There are also transcripts of Mr. Wright's interviews. There's audio and video of it and we just need portable media for them. They are large files.

R4513;see also R4962

After this appeal was initiated, the trial judge held a telephone

conference on April 8, 2020 to discuss the preparation of the appellate record. R4664(1stSupp1769) The Assistant Attorney General, Mr. Browne, informed the judge that the Tenth Circuit Public Defender was handling the appeal and he thought appellate counsel should be on the call. The judge acknowledged that the public defender was not noticed for the call but decided to go ahead anyway. The judge also indicated he would reschedule the conference but never did. R4669-4672

The judge addressed an issue with a disc in the record, which the clerk said was exhibit 4A and was "blank." The prosecutor suggested the disc needed to be "finalized." He remembered viewing it during the trial.

> THE CLERK: Exhibit Number 4A from December 3rd of 2019. Says it's a disk of a proffer from 2-19-2016. It was actually a blank CD.
>
> THE COURT: So if the parties want to resolve that issue and have a stipulation and resubmit a CD with the proffer on it, that would be acceptable. I believe that's one of the proffers that I had requested be made part of the record of Mr. Wright, if I remember correctly.
>
> * * *
>
> THE CLERK: It was not admitted, but it was taken for the record.

> MR. HUNTER: Yes, Your Honor. This is ASA Hunter. Would it be permissible -- I'm because I remember I thought I remembered watching that disk before -- or the disk being watched with witnesses before it was submitted, and I'm wondering if the disk maybe just needs to be finalized. Maybe Mr. Mummert's office can bring a computer in, put the disk in, confirm that there's content on the disk, and finalize the disk.
>
> THE COURT: I'll let you guys talk about that; and if you can do that and come to a stipulation –
>
> MR. HUNTER: Okay.
>
> THE COURT: -- that's fine by me. If not, we'll have to resolve it at a later date.
>
> MR. HUNTER: Okay.
>
> THE COURT: Notify my office if you guys can't resolve it through stipulation.

R4664-4676 The call ended with the judge saying the conference would be rescheduled, "making sure that we have . . . the Tenth Circuit Public Defender, but it looks like we're on track." R4675

The disc problem was not resolved and no other conference occurred before the original record was transmitted on April 22, 2020. The record was missing many hearings, motions, orders, and three trial exhibits (all videos), including the one discussed on the call, which had been excluded by the judge. Each video had been

received by the judge during trial specifically for inclusion in the appellate record. Two videos are relatively short and have since been copied and included in the record after Sievers filed his motion to supplement; the only one still not included is the Curtis Wright proffer video discussed on the phone conference.

Sievers' first motion to supplement, filed May 22, 2020, requested 33 hearings, approximately 260 documents, and the missing video exhibits. R4884-4899 The clerk had noted in the index to the record, "Defense Exhibits 0004 is unable to Reproduce and 004A CD is blank." R17, R2763 The April 8, 2020 phone conference had not been transcribed, and it was not clear then if that notation referenced the exhibit discussed at trial at T3897 and described by the ASA as a disc containing a recording of an interview with Mr. Wright while under police and State Attorney interrogation. The motion to supplement describes the confusion in the trial transcript as to the exhibit numbers assigned to the excluded videos. R4897-98,T3899,3925 The motion to supplement asked that the clerk attempt to locate the Wright proffer video:

Appellant requests that the clerk of the circuit court be directed

> to attempt to locate the exhibit, which is described at T3897 as disk containing a recording of an interview with Mr. Wright while under police and State Attorney interrogation, and if unsuccessful, to notify this Court so that relinquishment can be ordered for the purpose of reconstructing the record."

R4897-98 (Emphasis added). It was not clear then whether a relinquishment would be necessary.

After this court granted the motion to supplement without addressing relinquishment, R4882, the circuit court judge proceeded as though jurisdiction had been relinquished to the circuit court. On June 2, 2020, the judge entered an order directing trial counsel to submit working copies of discs to the clerk.

> The Clerk is not in possession of working copies of thumb drives or discs of any of these exhibits. At the hearing on the status of production of the appellate record, Mr. Mummert brought up an issue with court exhibit 4, the proffer of Mr. Wright on CD, being blank. The Court directed the parties to resolve that issue and stipulate to submit a valid CD. The parties have failed to do so.

The order said "the parties shall submit stipulated working copies of discs containing exhibits 3, 3-A, 4 and 4-A to the Appeals Clerk no later than June 5, 2020." The trial attorneys did not comply with this order, and the circuit court judge is probably unaware of that to this day. Undersigned counsel since learned that Sievers' trial

counsel thought the disc problem had been resolved. He was under the impression that ASA Hunter had undertaken to facilitate the copying of the proffer video by providing the clerk with portable media after the trial judge issued the June 2020 order.

The clerk filed the supplemental record on June 25, 2020. Two video exhibits, now labeled 4 and 4A were included, but the video of the full Curtis Wright proffer was not. Sievers then moved this Court to relinquish jurisdiction for the video to be obtained. See "Motion To Relinquish Jurisdiction To Trial Court For Reconstruction Of Record & Second Motion To Supplement The Record," filed July 7, 2020. The State objected, asserting that jurisdiction *had already been relinquished* and questioning *for the first time* whether the Curtis Wright proffer video should even be in the appellate record.

> This Court has already relinquished jurisdiction to resolve any issues with the defense exhibits . . . . The record does not clearly indicate that Appellant's counsel ever sought to admit the entire full-length interview of Curtis Wright. . . . Appellee does not contest that there was a long Curtis Wright video; rather, undersigned counsel questions whether that video was ever filed as a proposed defense exhibit. . . . If Appellant's counsel did not file the long Curtis Wright video as a proffered defense exhibit, it should not now be made part of the Appellate record.

¶¶3-8 The Attorney General's position set out in its objection filed in this Court contradicts the position of the trial judge and ASA Hunter on the phone conference to discuss preparation of the record. ASA Hunter never suggested to the trial judge that the full Curtis Wright proffer video was not entered into the record. In fact, the judge and the parties believed it was filed during the trial. The judge referred to it as a court exhibit. On the phone conference, ASA Hunter recalled that witnesses viewed the video and he indicated the disc problem might be a technical one that the defense attorney could resolve by "finalizing" the disc. The judge clearly anticipated that the issue with the disc would be resolved before the original record was transmitted.

In objecting to Siever's motion to relinquish, the State noted that the transcript of the video is in the record. That is true, as a transcript was filed by the State outside of the trial. However, the trial exhibit at issue is a video, which the judge took into evidence for the specific purpose of including in the appellate record. Sievers respectfully asks this Court to relinquish jurisdiction for enforcement of the trial judge's post-trial orders and reconstruction of the record with the missing video. See Fla. R. App. P. 9.200 ("No proceeding

shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given.").

STATEMENT OF THE CASE AND FACTS

Overview

This capital appeal involves the first-degree murder conviction of the Appellant, Mark Sievers, whose wife, Teresa Sievers, was murdered at their house in Bonita Springs in June 2015. Mark was in Connecticut with the couple's two daughters when the murder occurred. He was prosecuted as a principal under the theory that he asked his friend, Curtis Wright, to commit the murder. T2379,2395-96, 4095-98

Curtis Wright was the prosecution's star witness. The State's case was entirely dependent on the jury crediting the testimony of Wright, who confessed to murdering Teresa by attacking her in her home with a hammer. Wright brought an accomplice, Jimmy Rodgers, with him to the Sievers' home. E.g., T2720,4093,4099,4110 Wright testified, "Jimmy Rodgers and I physically did it, but Mark Sievers was also involved in the planning." T2720

Wright became the State's witness after the police gathered

extensive evidence against him and Rodgers. E.g., T3043-3100,3416-17,4114-17 Wright was arrested in Missouri in August 2015, brought to Florida, and booked into the Lee County jail in October 2015. T2890,3100-01 Several months later, on January 6, 2016, Wright met with prosecutors in a video-recorded session to gain a plea deal for himself by proffering testimony to implicate Sievers. T2729,2890-93 Wright changed his story throughout the meeting as to his participation in the murder, and at trial he testified that he lied about his involvement in the murder during the proffer. T2729-30,2899-2900 Nevertheless, the State Attorney offered Wright a plea bargain, which required him to testify truthfully against Sievers and Rodgers. In exchange, Wright would plead guilty to second-degree murder and receive a 25-year sentence (with no fine or probation). Under the agreement, Wright's sentencing would be put off until after he testified against Rodgers and Sievers. The State Attorney had the sole discretion to decide then if Wright fulfilled his end of the bargain and that decision was not reviewable by any court. The agreement was signed on February 19, 2016, in a video-recorded proffer session. T2722,2903-2909,2915;R2758-62

At trial, Sievers wanted to show the jury the full video of Wright's February 19, 2016, proffer session, and he intended to emphasize a short clip taken from the beginning of the session where the prosecutor discussed the involvement of Wright's wife. However, both the full video and the short clip were excluded by the court. T3895-3899 (Transcripts of Wright's sessions with the prosecutors were filed by the State outside of the trial. R1634-1883 (trans. of 2/19/16); R3991 (trans. of 1/06/16)).

Mark Sievers was arrested a week after Wright signed his plea agreement and eight months after the murder, on February 26, 2016. R66,71,834 He was charged initially by Information on March 11, 2016, with second degree murder and conspiracy to commit second degree murder. R68-69,834 He waived arraignment and filed a not guilty plea. R72

On May 4, 2016, the State filed a five-count Indictment charging Sievers in Counts I and III with first-degree murder and conspiracy to commit first-degree murder and charging Rodgers in the other counts with first-degree murder, conspiracy to commit first-degree murder, and burglary. R79-80,834 Rodgers eventually moved

to sever, and his trial occurred first in October 2019. R4567 Rodgers was found guilty of lessers, second-degree murder and trespass. He was found not guilty of conspiracy. He was later sentenced to life. R851,856; See 2D20-93 at R685-87.

Sievers trial began shortly after on November 12, 2019. He was found guilty as charged on December 4, 2019. R835,4071 A penalty phase occurred on December 10, 2019. R835,1200-1416 The prosecution relied entirely on the guilt-phase evidence for its two proposed aggravating factors, pecuniary gain and CCP (cold, calculated, and premeditated). R1218-1219 The proceeding began with the State's presentation of victim-impact evidence. R1266 Teresa Sievers' mother read a statement, and, over objection, the prosecutor played a video of Teresa Sievers introducing herself on her television program that never aired. R1235-1242,1244-52,1253-54.

Sievers asked that the jury be instructed on three mitigating factors: (1) no significant criminal history (which was conceded by the State), (2) minor participant, and (3) the catchall. He presented four mitigation witnesses: his mother, brother, stepsister, and stepmother. R1267,1291,1311,1316 A theme of the mitigating

evidence was Sievers' loving relationship with his two daughters. The trial judge excluded a portion of a letter that Sievers' eldest daughter had written to him after his arrest when he was in jail awaiting trial. R1258-1265 The jury received the letter with a portion blacked out where she asked if they could kill him and stated that she hoped not. R1286-87

In closing argument, the prosecutor conceded that Sievers had no prior criminal history. R1361 Nevertheless, he urged the jury to find that no mitigating circumstance had been established. The verdict form asked if "[o]ne or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence." The prosecutor urged the jury to check "No," to that question. T1364 And the jury did check the "No" box. R762,1374 The jury rejected the proposed pecuniary gain aggravator. It found only a single aggravator, CCP. R761 The jury checked a box to indicate a unanimous vote for death. R762

A sentencing hearing was conducted on January 2, 2020, at the end of which the judge sentenced Sievers to death for first-degree murder and thirty years for conspiracy. R991-1032 There was no

separate Spencer hearing, and the judge filed his eleven-page sentencing order on the same day as the sentencing hearing. At the hearing, the State produced a recent statement written by Sievers' daughter in which she requested a life sentence. R849,936,1010,1014,1016. Mark Sievers declared his innocence and asked the judge to spare his life so as not to compound his daughters' suffering. R1019-20 The defense attorney wanted leave to amend his sentencing memorandum, but the judge said he was imposing sentence that day. R1021

The judge found that Sievers had no criminal record and gave that factor little weight. R1026-28 Under the catchall mitigator, the judge found that Sievers had been a good hands-on devoted father who taught his children their faith. He had been a good family member, had taken care of sick relatives, helped people, and made charitable contributions. He had no disciplinary record in jail. R1027 The judge said, "I will note for the record that his children do not want the death penalty imposed as has been put on the record now with more than one item in evidence at this point." R1027 The judge gave great weight to the single aggravating factor, CCP, and found

that it outweighed the mitigation. R1028

The Trial: The Body is Discovered

Teresa returned home from a family vacation on June 28, 2015, the night of the murder. She planned to work the next morning, while Mark and their daughters had planned to stay in Connecticut for a few extra days. T3175 Teresa was a physician with a solo medical practice, "Restorative Heath and Healing Center." Mark worked with her and handled the billing. T3174 When Teresa failed to show up for work on June 29, her assistant contacted Mark. T3176-77 He contacted a family friend, Dr. Mark Petrites, and asked him to go to the house. T2983,2987 Petrites went to the house, entered through the garage, found Teresa's body on the kitchen floor, and called the police. T2991-2996

The cause of death was blunt head trauma. T3839 A bloody hammer was on the floor near the body. T2455,3012 She had multiple blunt impact injuries to her head, which appeared to be caused by the hammer. T3822-3830,3837,3841,3854 The medical examiner could not say whether more than one hammer was used nor whether more than one assailant was involved. T3853-54 No

forensic evidence revealed whether one or two hammers were used in the attack. T3417

Police Arrest Curtis Wright and Jimmy Rodgers

David Lebid was a sergeant in the homicide unit of the Lee County Sheriff's Office in 2015 and the supervisor over the case. T3357-58 Initially, there were no suspects. T3358 The Sievers' house contained valuables that were undisturbed, including cash totaling just under $50,000 in the bedroom closet and the office. T2552 A break in the case came on July 9, 2015, when a Chief Hamilton from a Port Authority in Illinois telephoned to say a witness had information. T3043,3358 Lebid and his partner, Michael Downs, went to Illinois and spoke to Rose Grunert, who gave them the name Curtis Wright and recounted a conversation between Angela Wright and her mother, where Angela was upset about her husband being out of town. T3044-45,3359,3375

Lebid and Downs then traveled to Missouri to find Curtis Wright. T3045,3359 Wright was a long-time friend of Mark Sievers. Wright was a computer expert, and he maintained the computers for Teresa Sievers' medical practice remotely from his home in Missouri.

T3178 He also traveled to Florida to work on the computers at the medical practice. T2740,2917

Wright maintained the software for the patient management system, which needed upgrades periodically because the procedure and billing codes changed constantly. T2739-40 Wright did the hardware updates and repairs, and just general maintenance. He had lots of tools for doing remote configuration and support. There were instances where he had to be physically at the Florida office, and every time that Wright had gone to Florida, the Sievers had paid his expenses. T2787-88 But otherwise his work was done remotely and on the phone. T2738-40

Sievers called him all the time for help with the computers at the medical practice. They needed to communicate securely because of HIPAA. T2892 Wright could control the office machines from his cell phone. T2739-42 “I had it set up on my phone where I could actually even take control of the machines from my cell phone. . . . I would usually like view the screen and then walk somebody through it on the phone with what to do, so they could do it their self.” T2741-42

Lebid first interviewed Curtis Wright on July 12, 2015. T3392 Wright said he had stayed home in bed all weekend when the murder occurred. T3392 He said he had not been to Florida and had not been involved in Teresa's death. Wright testified at trial that he lied to throw the deputies off track. T2727 Lebid believed that Wright was lying and told him so. T3392,3395 Lebid asked Wright if he would be willing to take a lie detector test. T3395 Lebid said that Wright gave several untruthful statements over the course of the investigation and no lie detector test was ever given. T3401-02 After speaking with Lebid, Wright manipulated four neighbors to sign affidavits falsely establishing that he was in Missouri when the murder occurred. T2935-36

Lebid confronted Wright with different themes that first time he spoke to him. One theme used was the possibility of a failing marriage between the Sievers and another theme was that something was done for life insurance. T3393-94,3397 Lebid explained, "I'm trying to help Mr. Wright look at all the possibilities in front of him, I went over different themes . . . meaning different reasons why things happen." T3394

A search warrant was executed on Wright's house on July 12, 2015, and the police took computers, wireless devices, tablets, and a multitude of cell phones. T3124 The Lee County Sheriff's digital forensics unit examined twenty-nine devices including ten phones, although no extraction was done of Wright's phone. T2665-66 Wright's cell phone records led to the second suspect, Missouri resident Jimmy Rodgers. T3046,3057 A search warrant was executed on Rodgers' house, and his live-in girlfriend, Taylor Shomaker, provided evidence against him. T3058,3067-68,3070-93 Law enforcement continued to gather evidence against Wright and Rodgers. T3100

Both Wright and Rodgers were arrested for the murder in August 2015. Lebid interviewed Wright when he was arrested. Lebid advanced a theory during that interview that Rodgers would be paid $10,000, and again advanced the theme that the Sievers were having marital issues. T2883-2885,3395-97 Wright told Lebid that Mark Sievers never said anything to him about having marital issues or problems. T3398 Wright denied that Mark Sievers had hired him to kill Teresa. T2885-87,3398 Wright was asked about this on cross:

Q. Detective Lebid told you: "I don't think it's fair that Mark Sievers is not in jail after he hired you."

And you denied that he hired you, didn't you?

A. Yes.

Q. Detective Lebid said that Teresa, she was going to take the kids away from him, and that was his world. Plus a bonus, there was gonna be money.

And you denied having any knowledge about that, didn't you?

A. Yes.

* * * *

Q. In fact, when Detective Lebid told you that the Sievers were having marital problems, you told them:

> "You're telling me that they had marital problems. I was close, and I've never heard that. He never talked to me about that."
>
> Do you recall saying that to Detective Lebid?

A. Yes.

T2883-85

Lebid and Downs drove Wright from Missouri to Florida in October 2015. T3100-3101 By then, they had accumulated extensive evidence showing that Wright and Rodgers had traveled in a rented

car from Missouri to Bonita Springs on the day of the murder, shopped at a Walmart, and had driven straight back to Missouri that night. E.g. R3060-61,3416-17

Wright Strikes A Deal With Prosecutors

After he was brought to Florida, Wright asked his attorney to explore what the prosecutors would agree to if he offered to help them. T2728 In January 2016, Wright's attorney arranged a meeting with prosecutors for Wright to make a proffer for the purpose of negotiating a plea agreement. T2729,R3990 At trial, the prosecutor questioned Wright on direct about that meeting attended by the two prosecutors, Mr. Hunter and Ms. Ross, and the two detectives, Lebid and Downs. T2729 Wright said the meeting was "for you [Mr. Hunter] to get an idea of what I had to offer, and for me to get an idea of what you had, too." T2729 Wright testified that he did not tell the truth in the beginning of the proffer. T2729 He lied about his participation because he struggled with his personal involvement in the murder. T2730, 2955 He told the prosecutors that Rodgers had done the murder alone and that he was not present when Rodgers did it. T2895-96,2955 But he testified at trial that after he was confronted

during the proffer and told he was not believed, he corrected his lies. T2729-2732,2900 He said that when they took a break, he talked to his lawyer, and ***he prayed***, and afterward, he decided to tell the truth. Sievers' objected to this testimony about him praying, and the judge overruled the objection. T2728-29 Wright said his attorneys explained to him that he had nothing to lose by being honest. T2956

The prosecutor questioned Wright on direct about the terms of his plea agreement, emphasizing that the 25-year prison sentence Wright expected was contingent on his telling the truth. T2720

> [Prosecutor] Q. And what is your understanding of the plea agreement to cooperate, sir?
>
> [Wright] A. That I'm to testify truthfully in exchange for a 25-year prison sentence.
>
> Q. So if you tell the truth, you go to prison for 25 years?
>
> A. Yes.
>
> * * * *
>
> Q. So if you don't tell the truth, you believe you might get more than 25 years?
>
> A. Yes.
>
> * * * *
>
> Q. All right. So do you understand that if you don't tell the truth

today, there are ramifications?

A. Yes.

T2729-3232 Wright had already entered his plea to second-degree murder, but he had not been sentenced. After Wright testified, the trial judge discussed moving up the scheduled hearing for Wright to receive the 25-year sentence. T3989-90 The judge said to the attorneys, “I figured absent a mistrial, [Wright’s] services are probably done as far as the State's concerned.” T3990

The police had no physical evidence showing who was inside the house when the murder occurred. T3399 Wright said during the proffer, “I was there, but I never went in the house when the actual murder occurred.” T3398 Wright changed his story during the proffer meeting to say he went in the house after the attack and grabbed another hammer and struck Teresa from behind. T2899 He told them he was not wearing a jumpsuit, but then changed his story again to say he was wearing a jumpsuit. T2900

Wright was asked by the prosecutor about a second meeting when he provided a sworn statement. He testified that he told the truth at the second meeting and that he understood that there were

ramifications if he did not "tell the truth today." T2732

Wright's Plea Agreement

Wright's written plea agreement was admitted into evidence by Sievers as defense exhibit #3. T3934-35 Under the agreement, the State Attorney had sole discretion to determine if Wright fulfilled the agreement and Wright could not appeal that decision. The prosecutor had sole discretion to decide if Wright violated the agreement by having any failure of his memory regardless of whether such failure was intentional or unintentional and one of commission or omission. A violation of the agreement meant that the guilty plea would stand, and Wright could be sentenced to the maximum and could be additionally prosecuted for first-degree murder and conspiracy, among other things. R2759-60

Of particular significance from the defense perspective was the requirement that Wright submit to polygraph examinations. Wright agreed to submit to polygraph examinations and waived any legal objections to the admissibility of any polygraph examination results. The results of any polygraph examination would be admissible against him in any prosecution. Four paragraphs in the agreement

address the polygraph requirements, paragraphs (9)(E), (10), (11), and (12).

> 9. The Defendant hereby agrees to the following:
>
> E. **Submit to polygraph examination or examinations, or examinations in the form specified by the State Attorney's Office, their Assistants or Investigators upon request. Failure of the Defendant to pass any confirmation polygraph examination or portion thereof, shall violate this Agreement at the sole discretion of the State Attorney's Office** whereupon the Defendant shall be sentenced by the Court in accordance with the maximum top range . . . . in addition to any other charges . . . . The Defendant expressly agrees that **upon the failure to pass a polygraph examination or examinations, the results of said examination(s) shall be admissible before the Court in any subsequent proceeding,** including but not limited to enforcement proceedings for this agreement and/or the trial of any crimes dealt with during the said polygraph examination(s).
>
> * * * *
>
> 10. . . . A violation of this Agreement, **including the failure to pass a polygraph examination** or other violation shall not permit the Defendant to withdraw his plea, but shall result in withdrawal of the proposed sentence and shall instead require the Defendant to be sentenced in accordance with the top maximum range . . . .
>
> 11. Failure on the part of the defendant to fulfill each and every term and condition of this Agreement shall subject Defendant to prosecution for any and all criminal offenses . . . . premised upon any information provided by the Defendant . . . **including information obtained during any proffer statement, polygraph examination and the results and**

failure to pass such polygraph examination(s).

12. The Defendant further . . . agrees by virtue of any non-compliance . . . the State of Florida will be allowed to utilize in any prosecution . . . any statements made of evidence provided from statements made by the Defendant **including, but not limited to any polygraph test interviews made by the Defendant and the results and failure to pass such polygraph examination(s)**, and any and all statements including but not limited to the Defendant's Statement of January 6, 2016.

R2758-2762 (emphasis added) Lebid acknowledged that the agreement required Wright to submit to a polygraph upon demand, and he testified that no polygraph was ever administered to Wright in this case. T3402 Wright also testified that he never took a polygraph and was not asked to take one. T2882

Sievers' attorney emphasized in his closing argument that the prosecutors elected to forego testing Wright with a polygraph examination despite having bargained for Wright to submit to one. T4154,4175,4178,4188 This part of the defense's closing argument drew objections by the State. T4175-4177,4189 After the judge sustained the State's final objection, the prosecutor urged the court to remedy the perceived offending argument by providing a special instruction to the jury. The judge obliged, and following Sievers'

closing argument, the judge instructed the jury: **"If Mr. Wright had actually taken a polygraph, those results, if they were – or he passed, would not have been admissible during this trial."** T4195

Background on Curtis Wright

Wright, 51-years-old, had four or five previous felony convictions. T2724 He had been married three times and had three children. T2723-24 He met Mark Sievers in high school. T2722,2732 Wright went to college for engineering and "got more into the computer side of it." T2722 He had been doing computer training most of his adult life and had been constantly getting his certifications upgraded and learning new computer languages. He worked in programming and software development. He had been disabled since 2005 but continued working by helping people fix viruses, computers, and phones. T2722-23,2741 His disability came about after a traffic accident, which resulted in traumatic brain injury. He was diagnosed with bipolar disorder. T2940-41

Wright had attended the Sievers' wedding and spent quite a bit of time with Mark Sievers and his children. They both have children the same age, so they would get together when Sievers would travel

to Missouri. T2732,2739 Wright received medical help from Teresa Sievers. T2743-44 Wright had been to the Sievers' house on several occasions including within the six months leading up to the murder. T2912

Wright's Story As To Sievers' Involvement

Wright married his third wife, Angela, in May 2015, and Sievers attended the wedding. T2744-46 Before leaving to go to Missouri for the wedding, Sievers sent Wright a text saying he hoped they would have some time to talk about something personal. T2758 Wright said that while in Missouri for the wedding, Sievers asked him to commit the murder. T2773,2809,2911

The day before the wedding, Sievers told Wright that he and Teresa were having marital problems. She was having an affair, and they were having financial problems and considering bankruptcy. Wright took Sievers' word for it, although he had no proof. They talked about options, and Sievers asked, hypothetically, if the kids were going to be taken away and put in danger, would Wright know someone that would be willing "to help," which Wright understood as helping to run the guy off. T2760-61

Wright's wedding was in a park, where they had a big cookout for 125 people. T2745-46 Wright borrowed tables and chairs from his church. T2761 In morning, while at the park setting up, Sievers told Wright that Teresa was leaving him and taking the children out of state with her. Sievers said the children would be in danger if she took them. He was serious, and Wright believed him. T2762-2763

They talked about him fighting for custody, which Sievers thought was not an option, as he was not financially able to do that. They talked about trying to save the marriage by seeking counseling, but Sievers said they tried counseling, and it did not work. He said the only option was for her to die. T2768 He asked Wright if he would kill her or take care of it. Wright asked what kind of time frame Sievers was looking at, and Sievers said ASAP. T2768 Wright asked what kind of money was available, and Sievers said they had a lot of insurance on her, and the kids would be well taken care of, and he had at least $100,000 to offer. Wright said he would see what he could do. T2773

Sievers was asking if Wright could make sure it got done. T2769-71 If it was not going to be Wright personally getting it done,

Sievers did not want to know who it was, and he did not want anyone else to know about him. T2779 Wright was going to get at least $100,000 for the killing and maybe subcontract out the job. T2773 They did not talk about the specifics of how he would be paid, and Wright did not know whether it would be all cash or some property. T2773-74 Wright had said in his pretrial proffer that "[t]his was about the kids for me, not the money," but at trial, Wright testified that his motive was money. He said, "money would have been good," and, "[i]t wasn't specifically for the girls for my own motive." T2776,2903

Sievers suggested that they use prepaid cell phones from Walmart. He was going to get one and wanted Wright to do the same. Sievers got his prepaid phone a couple of days after he got home. T2774-76 Wright delayed getting a phone because he was not sure what his involvement would be, but a couple of weeks after the wedding, he made the commitment to do it. T2776-78 Sievers and Wright agreed to use the term "other" in their text messages to mean they should talk on the prepaid phones. All the planning was done by talking on the prepaid phones. T2778

Wright thought Rodgers might want to be involved because Rodgers had let him know that he had been involved in other deaths. Wright knew that Rodgers would actually do it. T2775-76 Wright told Rodgers about a job, without telling him the specifics, and Rodgers was on board. T2778 Wright never told Sievers that he was talking to Rodgers. T2778-79 And Wright never told Rodgers that he had been talking to Sievers. T2777

Rodgers and his girlfriend, Taylor Shomaker, had attended Wright's wedding. Rodgers and Sievers had never met but probably knew who each other were based on conversations with Wright. T2747-48 Wright said, "I was an in-between person. So there was never any direct communication between the two of them." T2777 Wright would be the one paying Rodgers. T2779 Wright said he was going to split the money with Rodgers, but since the cash portion of the payment he was expecting was unknown, there was not a set amount he wanted to promise Rodgers. T2780 Wright said in his pretrial proffer that Jimmy hoped to get $10,000 from valuables in the house. T2903 Wright never told Sievers about his agreement with Rodgers. T2794

Wright got a prepaid cell phone on May 17. T2778 The police were able to determine through tower records that a TracFone was purchased at a Walmart in Naples, Florida, on May 7 with the number (858)336-2941, which pinged off the same towers as Sievers personal cell phone. T3519,3527-28 Sievers used his personal cell phone to text Wright at 3:45 on May 7 saying, "Since neither one of us are likely to carry both with us, whenever you want to use the other one, just text me other, quote, other, unquote. And then when I can, I will call." T3538

Wright's prepaid phone, with the number (404)376-8649, was in Missouri on May 17 and was in Southwest Florida on the night of the murder in June. T3543 Sievers' prepaid phone and Wright's prepaid phone communicated with each other starting on May 17 and ending on June 25, with approximately 60 minutes of total time spent speaking together. Both phones showed a few calls to numbers other than to each other. T3544-45,3552,3564 The content of any texts and voice calls could not be discerned. T3565

According to Wright, Sievers' idea was the murder could occur in the parking lot at the medical office, and he had suggested that

Wright use a gun to shoot her when she left work. T2783,2891 Wright had been to the office to work on the computers. T2782-84 Wright rejected the suggestion because he was concerned that she would not be alone when she left the office, and he did not own a gun and did not want to travel with one because he and Rodgers were both convicted felons. T2791-92 Wright had studied an aerial photo of the office on Google maps. T2783-84

According to Wright, Sievers said that his family was going on a trip. T2788 Teresa would be returning home late Sunday night. Mark and the kids would be staying for three extra days. Sievers wanted the murder done either Sunday when Teresa got home or Monday or Tuesday when she left work. T2792 Sievers was leaving the side door of his house unlocked and gave Wright the code to open the garage door and turn off the alarm. He said the alarm would not be armed but gave him the code anyway. T2792

Wright was still working on the computers for the medical practice while the planning was being done. A major software upgrade needed to happen on the servers in the summer of 2015. T2787 It was a major mandatory upgrade involving all the medical

procedure codes for insurance and hospitals, and Wright needed to be at the office in person to do it. T2787-88 Wright had planned to make the trip to Florida that weekend to do the upgrade, but he had not firmed up that weekend with Mark to do it. T2789,2917 Wright told people in Missouri that he was going to Florida to do some work. The software upgrade needed to happen on a weekend when the office was closed. T2786-87 (Sievers' attorney suggested in the closing argument that maybe Wright did not know that he was going to Florida to murder Teresa, which is why he told people he was going to Florida. T4183)

Wright's Story on Committing the Murder

Wright and Rodgers left Missouri on Saturday morning in a rented white Elantra. T2794-95 They did not bring any weapons. T2795 Rodgers brought coveralls, which were from his job at a battery recycling plant, duct tape, and latex gloves. T2795-96 The duct tape was to put around their own wrists and ankles to make sure their hair did not fall out. T2796 They drove straight through, just stopping at rest areas and gas stations, arriving in Fort Myers on Sunday morning. T2797

They first went to the Sievers' house. T2798 Wright wanted to show Rodgers how the house was laid out. T2798 The only way to get to the side door was to go through a neighbor's yard and go over a fence, which Wright did not want to do. Wright used the garage door code, and they entered the house through the main garage door. They found the side door unlocked, but the alarm was not disarmed. T2805-07 They went inside the house. Rodgers was planning to take valuables from the house, and he was looking for things of value he could grab.

Wright did not want to spend much time in the house because they were not suited up. The Sievers had dogs and a cat, but the dogs had not reacted to Wright when he was there in the past. Wright knew that Mark Sievers' mother was coming over to take care of the dogs, so they did not disturb anything. Mark had said that his mother would be coming in twice a day, in the morning and afternoon. T2806, 2811,2919

They went out in the yard to check it out and decided that going over a fence was not an option because they would be too noticeable. They left through the backyard, using a gate on the privacy fence.

Wright left it unlatched thinking he could go in through the gate that night, but when he got back that night, the gate had been re-latched. T2812-13

Wright did not know Teresa's flight information, although he said that Sievers had given it to him. T2823 Sievers had told Wright that Teresa would be getting in at 11:25 p.m. T2822 Wright and Rodgers spent the day at the beach and roaming the area. They went to Walmart and bought things. T2815-18, 2821 (The State entered surveillance video of them shopping at Walmart. T3324-25 Wright said on cross that he previously had worked on Walmart security cameras and knew that he would be videotaped inside a Walmart. T2921)

Wright and Sievers had not established any plan for where or how the murder would occur. Wright said he and Rodgers did not make a plan until after they looked at both the house and Teresa's office, and then they ruled out the office. T2818-20 Wright and Rodgers returned to the house at 10:30 p.m. and parked in a nearby apartment complex. T2822 They entered the garage using the push button opener and closed it. The garage had a single door going into

the house and a side door to the yard. They went out the side door to the yard where they put on the coveralls and taped up the cuffs. T2829-2830 The side door was unlocked but Wright used a flat bar and pried it to make it look like someone broke in. T2832 They went back in the house, and Rodgers again looked around for something to grab. T2830

Wright said that at that point he had not decided how he was going to kill Teresa, but he had a few different ideas. Wright was an experienced martial arts competition fighter and had training in applying pressure to a person's neck to make them lose consciousness. T2834-35 His intention was to put her in a chokehold to cut off her blood so she would pass out. He wanted to render her unconscious and then he was going to stab her with a knife. T2832-36,2924 Wright thought there would be plenty of time to make it look like a burglary after the fact. T2835

Teresa arrived home a little before 11:25. Wright was standing in the middle of the garage admiring Mark's motorcycle when the garage door started to open and the light popped on. Wright dove behind a pile of boxes. T2837-38 He was not sure where Rodgers was

at that moment. They had planned for Rodgers to be in the house and Wright to be in the garage. That way, when she went in the house, Rodgers would be there, and Wright would be able to stop her from going back the way she came or getting to the alarm panel for the panic button. T2838

Teresa got out of the van and started to bring her luggage out. She left her luggage in front of the van and walked into the house. Wright said he panicked and followed her into the house, picking up a hammer that was laying on a freezer chest by the door. He said he still intended to use his hands but grabbed the hammer as a backup. T2842-43 As he followed her into the kitchen, he kicked a dog dish, sending it flying. Teresa jumped and turned toward him. He hit her on the head with the hammer. T2845 She put her hands up and tried to defend herself. He swung the hammer and hit her two more times. Then Rodgers came next to him and started blasting her over and over with another hammer from the garage. T2847-48 He kept hitting her after she was on the floor face down. Wright told Rodgers to stop. T2849 Wright dropped his hammer on the floor and started to leave the kitchen. Rodgers ran back and used the claw part of the hammer

to hit her again, and he was laughing about it. T2850 Wright did not know what Rodgers did with his hammer.

Wright went out and got undressed. He said the plan to steal stuff went out the door because of the way the murder happened. They went out the side door of the garage, took the suits off and put everything in Rodgers' backpack. They exited out the side gate of the yard and went back to the car. T2851-52 They drove straight back to Missouri.

They stopped and cleaned the car out at a rest stop just north of Lee County. Wright took his overalls out of the backpack and threw them away in a trash can. He thought that Rodgers threw everything away as well. T2854 When they got back to Missouri, he stopped to clean the car out again and then he destroyed his phone with the (404) Atlanta area code. T2856-57

Afterward, Mark Sievers' brother, Scott, called Angela Wright and told her about the murder. Curtis then sent Mark a text saying, "Scott told me what happened. I'm so sorry." T2947 Curtis and Angela Wright drove to Florida for the funeral and to help the Sievers family with arrangements. T2758,2947

Conflicting Evidence on Advance Payment

Wright said the Sievers paid him sporadically for the computer work, whenever was a good time, and sometimes they paid early, a hundred dollars a month with company checks that came through the mail. T2740-42 Sievers' attorney cross-examined Wright with text messages showing that Wright asked Sievers for money in March 2015 and Sievers texted back asking, "how many months do you need? Ideally, I want to send you $2K for ten months, but cannot send that much." T3971-72 The State introduced three Bank of America checks from the medical practice account that were made out to Wright, for $1000, $400, and $600. T2752-56 Wright said that the $1000 and the $400 were for computer work but the $600 was for Wright to make the trip to Florida to kill Teresa. T2752-53 Wright said he used $100 for the rental car and used the remaining $500 to pay for the trip down and back. T2754 Sievers argued that the money was all for computer work, representing $2000 for ten months, as indicated by the March text messages. T4137

Curtis Wright's Wife: Angela Wright

Angela Wright also had a long-term relationship with Mark

Sievers. T2947 The State asked Lebid about Angela, and specifically about the discussion pertaining to her that occurred during the proffer. T3370, 3373-3378 Lebid said that Angela was a primary figure in the investigation because of how often she would normally speak with Curtis. T3374-75.

When Lebid spoke to Angela on the day they served the search warrant at her house, her disposition appeared to be all over the place, and she did not seem to be forthcoming, which gave Lebid concern. He concluded she was either acting really emotional or was being deceptive. T3373-74 Lebid learned from other people that although Angela had complained about Curtis being gone during the time the murder was committed, she later tried to convince those people that she had never complained and did not say he was out of town. T3376 Lebid was suspicious, thought she was covering for him, and wanted her to stop interfering. T3376-77

During the time when Curtis was traveling to and from Florida, he left his regular cell phone in Angela's van in Missouri, so that it would be moving around. T2802-03 Angela had a prepaid phone that was activated at the time of the murder on June 28th, which was in

addition to her regular cell phone number. T3902,3968,4208 On June 28 and 29, 2015, Curtis Wright's prepaid phone called a (702) number, which the police determined was a prepaid phone they assigned to Angela. T3574, 3966. There were several calls to and from Wright's (404) number and the (702) number on June 28 and 29. At 11:36 p.m., Wright's prepaid (404) phone sent a text to the (702) number. T3558-3560,3573 Detective Lebid became aware of Angela's prepaid phone, but he never asked her about it. T3902-03

On the day of Wright's proffer, Curtis was concerned about Angela and wanted it clear that the murder was not committed by her. T3375 Lebid said there was no side deal with him regarding Angela. T3377 On February 19, 2016, the day Wright signed his plea agreement, he discussed with the prosecutor, Mr. Hunter, his concern that Angela could be charged. T2903-04

> Q. You had some concerns that Ms. Wright may be charged in some capacity for this; is that correct?
>
> A. I had concerns that she was going to get – yeah.
>
> Q. Yes.
>
> A. Yeah, I don't know about a charge, but yeah.

Q. And do you recall that Mr. Hunter said that Angie is a blip that will go away?

Do you recall Mr. Hunter saying that?

A. Yeah.

T2904 Referring to Angela as a blip, Hunter told Wright that some things happened that he could not discuss, but “that blip” got a little bigger and louder. T2962-63 Hunter said, “I'm not making you any promises about Angela Wright. She's not in this contract. Okay? What I want is for Ms. Wright, for that blip to go away.” Hunter said, "That's what I want. I want the blip to go away, to disappear. I don't want the blip on my radar screen." T2963

These statements by the prosecutor made Wright feel better about Angela. T2964 Wright loved his wife and wanted to protect her. He wanted to make sure she was insulated from prosecution. T2905,2964 Wright said that he voiced his concern and Mr. Hunter had responded to it. T2965

Kimberly Torres: The Neighbor’s Observations

Kimberly Torres was the second to last witness called by the prosecution, testifying just before the medical examiner. Torres had

lived next door to the Sievers for six years before the murder. They were not friends. The relationship was neighborly but nothing personal. T3777-78 Over Sievers' multiple objections, Torres testified about two observations she made in the months prior to the murder. She could not accurately put a date to either event. The first occurred four or five months prior to the murder, in February or March. T3788 Torres observed Mark Sievers on her property, on her lanai, in the back of her house. He was not invited to be there, and she did not know what he was doing. T3785 The prosecutor used this testimony to argue in closing that Sievers was gathering intel for the murder. T4102,R1350

The second observation concerned an argument between Teresa and Mark Sievers that occurred "maybe a month and a half" before the murder. T3793 Torres partially overheard it—she heard only the first few minutes of it—from her backyard, before the Sievers went inside. T3790-91 Torres did not hear what they were arguing about, but she heard Teresa loudly using profanity and saying she was "f'ing tired of this crap," and "I'm leaving," and Mark more quietly responding, "if that's what you want to do, fine, but we'll see about

that." T3792-93

Torres was interviewed by law enforcement in June 2015 and did not mention overhearing this. She first told the story of overhearing the argument for an article in Gulf Shore Life in April 2019. She gave approximately eight interviews to various news outlets. She did not like Mark Sievers and had called him a creep on Fox 4. T3795-99

SUMMARY OF THE ARGUMENT

Part One (Issues I through XI) address errors that impact the convictions. The State's case rested entirely on the credibility of Curtis Wright's testimony that Mark Sievers had solicited him to commit the murder. Multiple errors require reversal because individually and cumulatively they served to unfairly bolster Wright's testimony. Issues I and II involve the closing arguments. In Sievers' closing, he emphasized the prosecution's decision to forego giving Curtis Wright the polygraph examination that was a condition of his plea agreement. At the State's urging, the judge gave a judicial rebuttal to Sievers' argument, telling the jury that if Wright had passed a polygraph, the result would not have been admissible in the

trial. Then, in the State's rebuttal closing, the prosecutor suggested that Wright would be given a polygraph before he was sentenced, implying that he would be held accountable later if he had not been truthful.

Issues III and IV involve the judge overruling Sievers' objections when Detective Lebid testified that he could tell when Curtis Wright was lying and he did not need a polygraph to know when Wright was lying, and when Wright testified that *he prayed* before changing his story during the proffer and deciding to tell the truth. In both cases, the inadmissible testimony bolstered Wright's credibility.

Issues V and VI involve the exclusion of evidence and restriction of cross-examination. During Sievers' case, the judge prohibited him from introducing the video of Wright's proffer session with the prosecutors, which was relevant to show Wright's bias and was admissible because the State had opened the door. Sievers was prohibited during the State's case from cross-examining Wright about a sexual motive for committing the murder, a potential alternative to the motive that Wright claimed.

Issues VII and VIII involve the admission of irrelevant evidence

and inadmissible hearsay. The judge overruled objections to the testimony of Kimberly Torres, which was used to enhance Wright's credibility. He also overruled an objection to gruesome autopsy photos that were not probative of any disputed issue.

Sievers moved for judgment of acquittal on two grounds. The State failed to connect Sievers to the crime with competent substantial evidence where Wright's testimony was too unreliable to be considered competent evidence (Issue X), and the State failed to put forth a prima facie case for the conspiracy count because the indictment alleged that Sievers conspired *with Rodgers*, and Wright's testimony was clear that Sievers had not conspired with Rodgers (Issue XI).

Part Two, Issues XII through XVIII, involve the death sentence. The death penalty was not available because the prosecutor missed the statutory deadline for filing the State's notice of proposed aggravating factors (Issue XII). Even if death were available, a new trial is required because the prosecutor conceded a statutory mitigator (no criminal history) in the State's penalty closing argument but then instructed the jury to find that it was <u>not</u> established, which

the jury did (XIII). The judge erred by excluding mitigation, where he ordered redaction of a statement by Sievers' daughter that she hoped he could not be killed (XIV). The judge erred by permitting prejudicial victim impact evidence, including a video of Teresa Sievers speaking to the camera for a television program (Issue XV). The trial court committed fundamental error by not holding a mandatory Spencer hearing (Issue XVI). The death sentence is unconstitutional where the facts supporting both the conviction and single aggravator rest entirely on Wright's uncorroborated testimony, which conflicts with the statements he made before arranging his plea agreement (Issue XVII). Proportionality review is necessary to avoid an unconstitutional death sentence; Sievers' sentence should be reversed because death is not a proportional penalty in this case (Issue XVIII).

ARGUMENT

PART I: ERRORS IN THE CONVICTIONS

ISSUE I: THE TRIAL COURT ERRED BY SUSTAINING OBJECTIONS TO SIEVERS' CLOSING ARGUMENT AND GIVING A JUDICIAL REBUTTAL TO THAT ARGUMENT

At the end of Sievers' closing argument, the defense attorney asked jurors to question Wright's credibility: "When you weigh the

evidence and you look at all these facts, ultimately, the one question you all have to ask yourselves: Do you trust Curtis Wayne Wright? And would you feel different if a polygraph had been administered?" T4187-88 The jurors were sent out for a short break at the conclusion of the defense closing argument, and during the break, the State made an objection to Sievers' closing argument, which the judge sustained. T4188-4194 When the break was over, the judge instructed the jurors: "**If Mr. Wright had actually taken a polygraph, those results, if they were -- if he passed, would not have been admissible during this trial."** T4195 This judicial rebuttal to Sievers' closing argument requires reversal for a new trial.

During Sievers' closing argument, the prosecutor objected when the defense discussed Wright's plea agreement and its requirement that he take a polygraph exam. The defense attorney said: "[Y]ou can see in the agreement, Mr. Wright must subject himself to a polygraph upon request, and failure, failure to pass a polygraph removes the deal, removes his 25 years, removes the second-degree murder. Basically, if he doesn't pass that polygraph, he sits where Mark Sievers sits. So why not do it?" T4175 The State interrupted with an

objection, and the judge sustained it, telling the defense attorney to make it clear that the prosecutor never asked Wright to take a lie detector test.

> [Prosecutor]: Counsel started this with, why didn't *he choose to have a polygraph*? That plea agreement in evidence does not make it his choice. It is a requirement if he is asked to do it. This argument has been improper from the first moment it started, and it is continuing to be improper. It is not Mr. Wright's choice, and it's not that he declined a choice.
>
> [Defense Attorney]: Judge, I'm allowed to comment on the investigation. I'm allowed to comment on the prosecution. This is -- this goes directly to reasonable doubt. They said in that argument that it's in evidence, that it's in evidence that he must submit to a polygraph upon request. And the inference of never requesting a polygraph is reasonable doubt, Judge. They don't believe he's going to pass it.
>
> [Prosecutor]: No, but, Your Honor, *counsel said Mr. Wright chose not to have it*. That is not –
>
> THE COURT: You'll need to rephrase it and say --
>
> [Defense Attorney]: I'll rephrase it.
>
> THE COURT: -- that law enforcement didn't ask him. The objection is sustained as -- as it was stated.

T4175-77 This objection was sustained in error because the prosecutor misrepresented the defense counsel's argument. Sievers' attorney never said anything about Wright *not choosing* to take a

polygraph. His rhetorical question concerned *the prosecutor's decision* to forego the polygraph that was contemplated in the plea agreement.

After the defense attorney finished his closing and the jury was sent out for a break, the prosecutor raised another objection:

> [Prosecutor]: Your Honor, counsel spent quite a bit of time speaking about a polygraph. If Mr. Wright took a polygraph and passed it, it would be absolutely inadmissible, and the State could not present it to this jury.
>
> That's the argument about the polygraph was absolutely improper as it was phrased and presented, and I ask the court to instruct the jury that had Mr. Wright been given a polygraph and had he passed that polygraph, the State would not be permitted to introduce that evidence in trial. It is inadmissible and it --
>
> [Defense Attorney]: Your Honor, had he been offered a polygraph and passed the polygraph, I couldn't have made the argument.
>
> And so we're dealing with two levels of speculativeness; one, if he was given a polygraph, and, two, that he passed the polygraph.
>
> I simply spoke about the facts, and the facts were he was never administered a polygraph. That is a fact.

T4189-90 Granting the prosecutor's objection, the judge decided to "make a brief statement" to the jury on it, acknowledging the

defense's objection to that decision.

> THE COURT: ... Look. It's fair game to argue it from the defense, but I think it's fair to say it's not admissible if he had taken one, and they could give it whatever weight they think is appropriate. Would you like me to say that, or would you like to say it in your argument?
>
> [Prosecutor]: Pardon me for pausing, Your Honor. So you would say –
>
> THE COURT: It's the status of the law, it is not admissible if he had taken it, the results, so do you want to say it or me?
>
> [Prosecutor]: I'd like to you to say the status of the law, Your Honor.
>
> THE COURT: Okay. Acceptable?
>
> [Defense Attorney]: I'd prefer the State just to make it as argument. Again, Judge, this was something that I said in argument based upon facts that came out in evidence, just part of our argument.
>
> I made no statement as to the status of the law. I made no -- nothing about admissibility or inadmissibility. They can look at the agreement and determine the instances in which it would be admissible, and that would be in a trial against Mr. Wright.
>
> THE COURT: It's only in very limited circumstances, that's correct. Okay. I'll make a brief statement on it. And your objection is noted for the record.

T4193-94

> The defense closing argument was based on facts in evidence.

Lebid had testified that no polygraph exam was ever administered to Wright despite the terms of the plea agreement.

> Q. And you know that part of his sworn statement agreement, part of that agreement was he has to provide a polygraph upon demand; is that correct?
>
> [Lebid] A. That sounds right. There was a lot of details on it.
>
> Q. Was a polygraph ever administered to Mr. Wright in this case?
>
> A. No.

T3401-02

Wright's credibility was at the heart of the State's case, and the State was relying on the jury crediting it. From the start, the prosecutor emphasized that Wright's testimony was truthful. In opening statement, the prosecutor said that Wright "entered a plea to second degree murder *in exchange for providing truthful testimony*. And he'll be sentenced for his role in the crime at a later date." T2396 In closing, the prosecutor acknowledged the case turned on his testimony: "So the primary evidence of that contract to kill is Curtis Wright." T4097. Sievers' emphasized that the State was relying on Wright's testimony: "The only evidence that you actually have of an

actual conspiracy came from Curtis Wayne Wright. The only evidence you have of someone promising payment came from Curtis Wayne Wright." T4135 (Sievers' closing argument).

The plea agreement was central to the defense theory that Wright falsely implicated Sievers to obtain leniency for himself and the prosecution accepted Wright's lies to make its case. The State's role in inducing Wright's testimony was properly addressed by Sievers in his closing argument. "In due process terms, it is crucial to emphasize that the temptation to lie in cooperation agreement cases is not just a natural feature of the landscape but specifically is introduced or inflated by the government when it offers immunity or leniency in return for cooperation." Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 35 (1992).

Sievers had the right to comment on the evidence that the prosecutors had chosen not to administer a polygraph exam to Wright after he signed the plea agreement, which contemplated that one would be administered. "[A]n attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is

based on the evidence." Gonzalez v. State, 136 So. 3d 1125, 1143 (Fla. 2014) (quoting Miller v. State, 926 So. 2d 1243, 1254–55 (Fla. 2006)). A defendant is entitled to highlight the State's lack of evidence as reasonable doubt. Turner v. State, 279 So. 3d 340, 342 (Fla. 5th DCA 2019); Fla. Std. Jury Instr. (Crim.) 3.7 ("[a] reasonable doubt . . . may arise from . . . lack of evidence"). "No area is more deserving of 'wide latitude' than the defendant's ability in a criminal case to argue the 'credibility and biases of the witnesses who testified at trial." Williams v. State, 912 So. 2d 66, 68 (Fla. 4th DCA 2005) (quoting Goodrich v. State, 854 So. 2d 663, 665 (Fla. 3d DCA 2003)).

Sievers' defense was focused on attacking the credibility of Wright, which included questioning the prosecution's role in acquiring his testimony. The defense attorney said: "[T]he State's tried to sanitize testimony of Mr. Wright to make it palatable, the five-time, bipolar convicted felon who lied repeatedly, murdered Dr. Sievers, and manipulated his neighbors and only came clean after given the choice to cooperate or sit where Mark sits." T4184 The defense attorney pointed out discrepancies between what Wright said and what other evidence showed. For example, when Wright was

questioned on cross about texts that contradicted his assertion regarding a $600 advance, “his answer was: I don’t remember. I don’t remember,” and the defense attorney asked the jury to recall that under the plea agreement, “Mr. Wright is not allowed to forget. Failure of memory is an insufficient reason to allow Mr. Wright to retain his advantageous plea deal.” T4137 Referencing text messages that Wright had characterized as coded or fake messages, the defense attorney said, “And then Curtis got to cherry-pick which texts were the illegitimate texts. And, remember, Curtis has to tell the truth, and the truth is determined by the State of Florida.” The defense closed by asking the jurors if they trusted Wright, and asking, “would you feel different if a polygraph had been administered.” T4188

The State’s second objection to the defense attorney’s polygraph argument (as being “absolutely improper as it was phrased and presented” R4189) was frivolous. When the trial judge interjected his instruction following the defense attorney’s argument, he in effect informed the jury that the defense’s position was illegitimate because the results of a polygraph would not be “admissible.” The judge’s statement implied that the defense attorney had attempted to trick

the jurors with an illegitimate legal argument. The jury would likely not understand the legal significance of the inadmissibility of a polygraph test result and would likely be wondering why the defense attorney had talk about it if the results "would not have been admissible." In short, the judge's statement, coming when it did, served to undermine the defense attorney's credibility and served to detract from the defense attorney's highly relevant point of whether the prosecution had been trying to sanitize its disreputable star witness by foregoing the polygraph exam that was contemplated in the plea agreement.

The judge undermined Sievers' defense and violated long established Florida law that prohibits judicial comment on the evidence. "A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused." § 90.106, Fla. Stat. Violations of the statute have resulted in reversals. See, e.g., Jacques v. State, 883 So. 2d 902 (Fla. 4th DCA 2004); Thomas v. State, 838 So. 2d 1192 (Fla. 2d DCA 2003); Brown v. State, 678 So. 2d 910 (Fla. 4th DCA 1996).

In Raulerson v. State, 102 So. 2d 281, 285 (Fla. 1958), this

Court recognized the prohibition against judicial comment and noted that the judge's exalted position would lead the jury to give emphasis to his appraisal of the testimony:

> Certainly persons charged with a crime, no matter how heinous it may be, are entitled to a fair trial in accordance with law and with precedents established through the years. One of the oldest of these under our system is an inhibition against any comment by the judge on the evidence in the case.
>
> * * *
>
> [T]he facts are left to the independent and unbiased consideration of the jury and the judge should not enter their sphere of operation else the accused would be deprived of his right to trial by a jury. Because of the judge's exalted position his appraisal of testimony would likely give such emphasis to it as to influence the jury in their deliberation.

The judge's instruction was a comment to the jury on the weight to be given to the fact that no polygraph was ever given to Wright, and it was also an indirect comment on the credibility of Wright. It destroyed any semblance of the judge's impartiality. "A breach of the prohibition against judicial commentary on the evidence tends to destroy the impartiality of the trial to which a litigant or an accused is entitled." Brown v. State, 11 So. 3d 428, 433–34 (Fla. 2d DCA 2009), approved sub nom. Gutierrez v. State, 177 So. 3d 226 (Fla.

2015). It is fundamental to the right to a fair trial that the judge must not give the impression to the jury that the judge believes one version of the evidence and disbelieves or doubts another. U.S. v. Mazzilli, 848 F. 2d 384, 388 (2d Cir. 1988). The judge injected his view of the evidence by commenting on the central point in the defense's case, the fact that no polygraph exam had been given to Curtis Wright. The error was both invited by the prosecutor and extremely prejudicial.

Before making his remarks, the judge conferred with the prosecutor over whether the judge or the prosecutor should tell the jurors this "instruction." The judge gave the prosecutor the choice to make an argument or have the judge say the instruction. The prosecutor understandably wanted a judicial instruction, knowing the special effect the judge's disapproval of the defense's closing argument would have on the jury. "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." Starr v. United States, 153 U.S. 614, 626 (1894).

The timing of the judicial comment, coming just after the defense attorney concluded his closing argument, amplified the prejudice. See Herring v. New York, 422 U.S. 853, 862 (1975) ("In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.").

The error is compounded by the fact that the impromptu "instruction" was legally incorrect on the admissibility question. A favorable polygraph exam result would have been admissible if the defense attorney had questioned Wright or the detective about it. Any such testimony would not have been offered to prove the truth of the result, but instead would have shown whether Wright had complied with the terms of his plea bargain and whether the State had utilized the tool it bargained for. See U.S. v. Allard, 464 F.3d 529, 534 (5th Cir. 2006)("testimony concerning a polygraph examination is admissible where it is not offered to prove the truth of the polygraph result"); U.S. v. Thevis, 665 F.2d 616, 637 (5th Cir. 1982)(no abuse of discretion in admitting reference to cooperating

defendant's polygraph result as evidence was not admitted for its truth). Furthermore, the State would not have objected to the admissibility of the result **if** Wright **had taken** and **passed** a polygraph. Polygraph evidence can be admissible where the parties waive objection and agree to the admissibility. Delap v. State, 440 So. 2d 1242, 1247 (Fla. 1983); Gosciminski v. State, 132 So. 3d 678, 701 (Fla. 2013).

The judge's remarks undoubtably were viewed by the jury as a rebuke of the defense attorney's argument. This destroyed the defense's best chance to convince the jury of reasonable doubt. The defense attorney's argument was an indictment of the prosecution, and the instruction given by the judge was a rebuttal to the defense attorney's rhetorical question posed at the end of the closing argument. The judge took on the role of the prosecution's apologist, and in so doing, he led the jury to think that whether Wright had been administered a polygraph exam and in fact passed a polygraph exam was not a legitimate consideration. The jury would falsely perceive that the defense attorney was arguing something that could not have made any difference to the case. Or, worse, the jury

may have thought that Wright had indeed passed a polygraph and that fact was not admissible in this trial.

The State initially introduced testimony that bolstered Wright's credibility when it questioned him about the terms of his plea agreement requiring him to testify truthfully and the fact that Wright would lose his deal if he was not truthful. T2722 Improper bolstering "occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." Johnson v. State, 238 So. 3d 726, 739 (Fla. 2018) (quoting Spann v. State, 985 So.2d 1059, 1067 (Fla. 2008)). Sievers' argument that the State had bargained for the right to use a polygraph but then declined to give the test was a fair rebuttal to the State's use of the plea agreement to bolster Wright's credibility by emphasizing its requirement for truthfulness.

Sievers had a constitutional right to present his defense and ask the jury to decide if the prosecution had properly vetted Wright's veracity before cutting the deal with him. The judge infringed on Sievers' rights by interjecting with a legal proposition

that was not relevant to the issue raised by Sievers' closing argument. Whether any party could have admitted the results of a hypothetical polygraph exam was not at issue in the case. It detracted from Sievers' point that the prosecutors had chosen to forego their right to administer the polygraph test to Wright. Whether a polygraph exam result would be admissible had no bearing on whether Wright's story was properly vetted before it was presented as "the truth." The instruction had the effect of impressing upon jurors untrained in evidentiary law that the defense argument was wrong or deceptive. That violated Sievers' rights to due process, a fair trial, and effective assistance of counsel under the Sixth and Fourteenth Amendments. See Goodrich v. State, 854 So. 2d 663, 665 (Fla. 3d DCA 2003) (preventing counsel from arguing theory of case violated defendant's right to effective assistance of counsel and right to present a defense).

This issue is preserved. The court was informed of Sievers' position when it sustained the State's objection. The defense's objection to the judge's "remedy" was clear. The judge was placed on notice that: (1) the closing argument was proper because the facts

showed that Wright was never administered a polygraph, and (2) the judge should not make a statement about admissibility. No "magic words" are required for an objection to be preserved as long as it was "sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." Murray v. State, 3 So. 3d 1108, 1117 (Fla. 2009); § 924.051(1)(b), Fla. Stat. (2015). The defense's position in opposition to the judge's comment to the jury was precise and the judge noted the defense objection for the record. See Williams v. State, 619 So. 2d 487, 492 (Fla. 1st DCA 1993)(rejecting State's preservation argument where trial court had acknowledged and noted the defendant's objection).

The error was not harmless. The judge's remarks surely could have affected the jury's assessment of the credibility of Curtis Wright—the State's star witness—and, therefore, the outcome of the trial, especially given the preeminent role of the judge and the timing of the remarks. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Brown v. State, 678 So. 2d at 911–12 ("[G]iven the preëminent role of the judge in the courtroom and the nature of the factual dispute given to the jury to resolve, it seems clear to us that his comment

might well have affected the outcome."). A persuasive summation in closing argument can "spell the difference, for the defendant, between liberty and unjust imprisonment." Herring, 422 U.S. at 863. And in this case, between life and death. Further, the error was compounded by the State's improper rebuttal closing, discussed in Issue II. This Court must reverse for a new trial.

ISSUE II: PROSECUTORIAL MISCONDUCT IN THE STATE'S REBUTTAL CLOSING, WHERE THE PROSECUTOR SUGGESTED THAT CURTIS WRIGHT WOULD BE POLYGRAPHED BEFORE HIS SENTENCING, VIOLATED SIEVERS' RIGHT TO A FAIR TRIAL

The jury knew that Curtis Wright had not been sentenced when the prosecutor said in the State's rebuttal closing:

> Touch on the plea agreement that was entered into by Mr. Wright. Please feel free to read it. And when you do, read Paragraph 9 (e).
>
> Mr. Wright is subject to a polygraph up to the day he is sentenced under this plea agreement, up to the day he is sentenced, and should he fail that polygraph up to the day he is sentenced, his agreement goes away.

T4210-11 By repeating three times the phrase, "up to the day he is sentenced," the prosecutor, who had just objected to the defense closing and asked the judge to comment on the defense argument, was using the plea agreement's polygraph provision to vouch for

Wright's credibility by suggesting a future polygraph exam would be given at some point before he was sentenced.

The prosecutor was suggesting that the State would hold Wright accountable by taking away his plea agreement. This was attorney misconduct at the level of fundamental error. The State was using the polygraph provision to suggest that Wright would not get away with lying, based on a polygraph exam that would probably never occur. This likely violated the rules of professional conduct. See Scala v. State, 213 So. 3d 1085, 1089-90 (Fla. 3d DCA 2017) (citing R. Regulating Fla. Bar 4-3.4(e); Murphy v. Intern. Robotic Sys., Inc., 766 So. 2d 1010, 1029 (Fla. 2000)).

The argument was an insidious form of vouching for Wright that deprived Sievers' of his right to a fair trial. See United States v. Brown, 720 F.2d 1059, 1073 (9th Cir. 1983) ("[I]t was improper for the court to allow the Government to argue . . . that the threat of exposure of any falsity by means of [a polygraph] assured the accuracy of the Government's key witnesses."); United States v. Carroll, 26 F.3d 1380, 1389 (6th Cir. 1994) (prosecutor's remarks were improper vouching and based on facts not in evidence where

they "implied that the Government would somehow be able to divine whether the [witnesses] were lying and would punish them accordingly."); United States v. Smith, 962 F.2d 923 (9th Cir. 1992) (plain error occurred when the prosecutor vouched for the codefendant, Brown, who testified pursuant to a plea agreement).

In Smith, the prosecutor told the jury, in part, "If any witness commits perjury on the stand it's my job to seek an indictment against him if I can prove it." Id. at 928. The comments assured the jury that the government would prosecute its witness, Brown, for perjury if he lied on the stand. The court noted that "the jury's acceptance of [the government witness's] testimony was of critical importance," and "it was essential that [the jury] have no reasonable doubts regarding the accuracy and reliability of Brown's account of the events." Id. at 935. The Smith court rejected the government's invited response argument. Id. at 934.

Here, as in Smith, Sievers did not invite the prosecutor's improper rebuttal argument by his legitimate attempt to cast doubt on the State witness who was testifying pursuant to a plea bargain. The prosecutor was similarly vouching for Wright's credibility by

suggesting that the State would administer a polygraph after the trial and take corrective action if Wright did not pass. This Court "cannot presume that those comments played only a minor role in a largely predictable calculus." Smith, 962 F. 2d at 935

The prosecutor's rebuttal closing argument compounded the preserved error described in Issue I. The cumulative effect of the improper rebuttal argument and the judicial remarks described in Issue I denied Sievers his right to due process and a fundamentally fair trial. Johnson v. State, 238 So. 3d 726, 740 (Fla. 2018) ("[T]his Court 'examine[s] 'the entire closing argument with specific attention to the objected-to … and the unobjected-to arguments' in order to determine 'whether the cumulative effect' of any impropriety deprived [the defendant] of a fair trial.") (quoting Braddy v. State, 111 So.3d 810, 837 (Fla. 2012)); Amends. V, VI, XIV, U.S Const.; Art. 1, §§, 2, 9, 16, Fla. Const.

ISSUE III: THE TRIAL COURT ERRED BY ALLOWING DETECTIVE LEBID TO OPINE ON HIS ABILITY TO TELL WHEN CURTIS WRIGHT WAS LYING

During the State's case, the defense attorney brought out on cross-examination of Detective Lebid that no polygraph exam was

ever administered to Curtis Wright, which prompted the prosecutor to question Lebid on redirect on his own natural ability to discern when Wright was being dishonest, with the implication that no polygraph was necessary to test Wright's assertions. Over objection, the prosecutor asked Lebid whether he could discern when Wright was lying without using "a lie detector machine," and Lebid repeatedly said that he could tell when Wright was lying. T3408-09

> Q. [By Prosecutor Hunter:] During your initial discussion with Mr. Wright on 7/12, did you need a lie detector machine to tell he was lying to you?
>
> A. No.
>
> Q. And on 8/27, did you need a lie detector machine to --
>
> [Defense Counsel]: Objection, Your Honor. May we approach?
>
> * * *
>
> [Defense Counsel at sidebar]: Yes, Your Honor. I object to this. Mr. Hunter is purporting, by saying "did you need a lie detector to know that he was lying," to conversely imply that when he is, quote, telling the truth, that Mr. Lebid also knows essentially giving Detective Lebid the ability to vouch for him, bolster the truthfulness of Mr. Wright's testimony when it is convenient.
>
> [Prosecutor Hunter]: Actually, I think the Detective said he was lying, and he didn't need a lie detector to tell that, the same inadmissible lie detector that counsel made repeated references

to during his cross-examination.

THE COURT: They're not admissible in court except in very rare circumstances, and we've heard all about it. I think it's fair game. Overruled.

(Sidebar conference concluded.)

[Prosecutor Hunter:] So on 8/27, when Mr. Wright lied to you, did you need a lie detector to tell he was lying?

A. No.

Q. Then during our proffer when Mr. Wright sat across the table from you and lied in the beginning part of that proffer, did you need a lie detector to tell you he was lying to you then?

A. No, I did not.

T3408-09

The judge erred by overruling the defense objection. By Lebid testifying that he could tell <u>when</u> Wright was lying, the obvious implication was that he could also tell <u>when</u> Wright was <u>not</u> lying, which was vouching for Wright's trial testimony. This was not "fair game," as the judge wrongly suggested. Lebid was the case detective who had the most interaction with Wright, and his assurance as to Wright's veracity was bound to be extremely important to the jury.

The prosecutor's questions and Lebid's responses invaded the province of the jury. Special harm is incurred when a police officer

gives his opinion of another witness's credibility. See Tumblin v. State, 29 So. 3d 1093 (Fla. 2010); Seibert v. State, 923 So. 2d 460, 472 (Fla. 2006). "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions . . . ." Tumblin, 29 So. 3d at 1101 (quoting Bowles v. State, 381 So. 2d 326, 328 (Fla. 5th DCA 1980)).

The State's case rested entirely on Wright's credibility, and there was no doubt that Wright was a liar. The prosecutor conceded in opening statement: "Initially, Wright even denied traveling to Fort Myers. He was protecting himself." T2396 The jury's task was determining which version, if any, of Wright's stories was truthful. From opening statement, the prosecutor was trying to convince the jury that Wright's testimony would be truthful, saying: "He has entered a plea to second degree murder in exchange for providing truthful testimony. And he'll be sentenced for his role in the crime at a later date." T2396

In Jennings v. State, 294 So. 3d 378, 381-82 (Fla. 4th DCA 2020), a police detective's improper bolstering of an informant's

credibility was not harmless because the "jury may have dismissed any potential misgivings about the informant's credibility based on the lead detective's opinion." In Calloway v. State, 210 So. 3d 1160, 1190 (Fla. 2017), this Court said that "[i]mproper bolstering can result in harmful error when the credibility of the bolstered witness is of critical importance to the State." Given the importance of Wright's credibility to the State's case, the error requires reversal for a new trial.

ISSUE IV: THE TRIAL COURT ERRED BY ALLOWING CURTIS WRIGHT'S TESTIMONY THAT HE PRAYED BEFORE CHANGING HIS STORY AND TELLING THE TRUTH

The prosecutor asked Curtis Wright on direct examination why he lied during his proffer meeting when he was seeking the plea deal. In response, to explain why he changed his story, Wright said that he prayed during a break. This testimony drew an objection by Sievers' attorney, which was overruled by the court.

Q.[by Prosecutor] And did you tell us the truth?

A. [by Wright] Not in the beginning.

Q. Started out with a lie?

A. Well, started out with the truth, but it -- it got off in the

middle, and then those lies were corrected. I told the truth before the end of that statement.

Q. Now, did you understand -- do you understand the gravity of a meeting between you and your attorneys and assistant state attorneys and law enforcement under those circumstances?

A. Yes.

Q. But you still told the lie.

A. Yes.

Q. Why?

A. I still struggled with my own personal involvement in it, the physical part of it, and that's where the -- that's where I got off.

I just couldn't quite let go of all of that. And I took a break. I talked to my attorney. **I prayed.**

MR. MUMMERT: Objection, Your Honor. May we approach?

* * * *

MR. MUMMERT: Your Honor, my objection's made pursuant to Florida Statute 90.611, religious beliefs. Your Honor, one cannot espouse religious belief to bolster the credibility of testimony.

And what's happening here is Mr. Curtis Wayne Wright has just said he went back and prayed. And we anticipate that he is going to use that as a mechanism to say that testimony he's about to give after that prayer is somehow imbued with divine truthfulness.

Your Honor, it's clearly being used to bolster testimony. I

know it's not a very frequently used objection; however, 90.611 is in our evidence code, and it's there for a reason.

MR. HUNTER: Well, Judge, **the witness was simply explaining the process he went through, by which he went from telling a lie to telling the truth, which involved talking to his lawyers and praying.**

That's a statement of fact. It's not bolstering his credibility. He's simply saying what he did. He met with his attorneys and prayed. And he was about to tell us that he made a decision to tell us the truth. It's not bolstering. He's simply explaining what he did.

THE COURT: Overruled. Noted for the record.

T2729-2732

The testimony allowed Wright to portray himself as a religious man, appealing to a religious bias to bolster his credibility. This is forbidden under the Florida Evidence Code. "Evidence of the beliefs or opinions of a witness on matters of religion is inadmissible to show that the witness's credibility is impaired or enhanced thereby." § 90.611, Fla. Stat.; see also United States v. Acosta, 924 F.3d 288, 306 (6th Cir. 2019) ("Under Federal Rule of Evidence 610, '[e]vidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.'"); United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980) ("The purpose of the rule is to guard

against the prejudice which may result from disclosure of a witness's faith.").

At the point when Wright said he prayed, the questioning was specific as to his conversion from lying to honesty during the proffer. The prosecutor was asking Wright why he decided to tell "the truth" when he did. Wright's answer that his decision to be truthful came after he prayed was direct evidence on matters of religion meant to enhance his credibility. The prosecutor's argument in response to the objection shows that to be the case.

After the judge let Wright's testimony about praying go unremedied, there were other references to Wright's church affiliation, reinforcing the "I prayed" remark by adding to the impression of Wright as a religious man. T2763 (Wright mentions borrowing chairs from "our church"); T3426 (witness says Wright was assistant youth director at his church). In a case where the determination of guilt rested entirely on Wright's credibility, the remark that he prayed before deciding to tell the truth to the prosecutors could easily have tilted the balance for the State. The error of overruling Sievers' objection requires reversal for a new trial.

ISSUE V: THE TRIAL COURT ERRED BY EXCLUDING THE VIDEO OF CURTIS WRIGHT'S PROFFER AND THE CLIP FROM THAT VIDEO WHERE THE PROSECUTOR DISCUSSED THE INVOLVEMENT OF WRIGHT'S WIFE

The prosecutor was able to keep the jury from seeing and hearing crucial defense evidence by successfully moving to exclude the Wright proffer video, and the short clip taken from the video, before Sievers could offer it into evidence in his case. The CD of the short excerpt is in the record at R4877(Defense exhibit #4A). The Preliminary Statement to this brief explains why the full video is not in the record, but should be, and asks this Court to relinquish for the trial judge to address that issue. In its response to Appellant's motion to relinquish of July 7, 2020, which this Court denied, the State pointed to the transcript of the full video in the record as a reason to deny the motion (paragraph 9 of State's response filed July 13, 2020). The State should not now complain when the transcript is utilized to show the video content.

The excluded video of the second meeting between Wright and the prosecution team was admissible under the Evidence Code to show Wright's bias. Further, it was admissible because the State

opened the door to allowing Sievers to admit it by raising questions about it in the State's case. Exclusion of the video and the excerpted short clip violated Sievers' right to present a full defense under the Due Process, Confrontation, and Compulsory Process clauses of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

Sievers called Officer Lebid to authenticate the video, but before Lebid took the stand, the prosecutor moved the court to exclude the video, arguing it was hearsay.

> MR. HUNTER (Prosecutor): Defense counsel has just shown us I'm guessing what's going to be an exhibit that they're going to proffer, which appears to be the disk containing the recording, the interview with Mr. Wright.
>
> The interview with Mr. Wright was completely under police and the State Attorney interrogation. It is testimonial. It is completely hearsay.

T3897 The defense attorney responded that the State opened the door and he wanted to lay the foundation for introducing it.

> MR. MUMMERT: Yes. Your Honor, we've already had testimony regarding the proffer, testimony that was initiated actually by the State. And the State asked several witnesses: was Mr. Wright untruthful during the proffer? Accordingly, Your Honor, they've opened the door. They have opened the door. And, Your Honor, all I'm simply doing is laying a foundation for admissibility of evidence that was -- that's crucial in this case.

T3897 The defense attorney further explained that the video was relevant evidence of Wright's bias.

> There's a portion of the video that goes to that goes to the defendant's bias; that goes to the Jury instructions, whether he was offered something. And further, Your Honor, when Your Honor reads the jury instruction, "was the witness offered anything, including money or beneficial treatment" -- and I'm paraphrasing -- this goes directly to that. And, Your Honor, I'm simply trying to provide the Jury with a greater scope of understanding as to how the investigation unfolded.

T3898-99

The judge asked how long the video was, and the defense attorney explained it was quite lengthy and that he had a short excerpt that was cut from it, so it would be a two-part exhibit.

> THE COURT: This video is how long?
>
> MR. MUMMERT: The video itself is quite lengthy. we did -- however, we cut out a portion of it that's going to be 3 and 3-A. And 3-A is substantially shorter, it's just a couple minutes. And it goes to when they're going through the proffer and talking about the proffer agreement and speaking about whether Ms. Wright was a blip and had any involvement.

T3899 The prosecutor continued to protest that the video was hearsay and cumulative because "all of those issues were brought out not only on direct examination and on redirect examination, but also brought out on cross-examination, so it's cumulative." T3900

The defense countered, “I simply was not afforded the opportunity to introduce evidence during the State's case in chief.” T3900 The judge sustained the State’s objection, saying, “When would this ever come in under any exception? I mean, it's a statement that could be used for impeachment purposes. I don't see where this would come in, in really any circumstance. Sustained.” T3900-01.

The judge also excluded a third video, depicting Taylor Shomaker, and allowed the defense attorney to put the three excluded videos in the record for appellate purposes. T3924-25

> THE COURT: Okay. As to this video at hand, I'm going to sustain the State's objection. Would you like that made a part of the record –
>
> MR. MUMMERT: Yes, Your Honor.
>
> THE COURT: -- for appellate purposes? And it's identified as Number 4?
>
> MR. MUMMERT: Yes, that's Defense 4.
>
> (Defense Exhibit No. 4 (VOL XIV), Thumb Drive - video walk through with Taylor Shomaker in Missouri, Marked for Identification.)
>
> THE COURT: Okay. And the other one, the proffer, if you'd like that as part of the record, you can give that to the clerk, as well. That was numbered what, one?

MR. MUMMERT: That was Number 2
.

THE COURT: It was an A and a B to it, right?

MR. MUMMERT: Yes.

THE COURT: Okay. If you'd like to give that to the clerk for appellate purposes, you can, as well.

T3925, see also 3926-27 The judge allowed the defense to put the three excluded videos into the record for appellate purposes, indicating that the exclusion of the videos was preserved for appellate purposes. The judge did not watch the Wright proffer video during the trial before he made his ruling; however, he clearly understood what he was excluding, as the prosecutor had previously admitted the complete transcript of Curtis Wright's February 19, 2016, proffer at a hearing before Judge Kyle on April 21, 2016. Hearing transcript at R4590, 4629-30 (Supp1/1695,1734-35), transcript of Wright Interview at R1634 (and copy at R4156). The judge had been presiding over the case for several years and had presided over the trial of Jimmy Rodgers the prior month, which is probably why the judge chose not to watch the video before ruling (contrast that with the Taylor Shomaker video that the judge did want to watch before he

excluded it).

In the excluded short video except of the full proffer, Curtis Wright and Mr. Hunter, the prosecutor, discussed the possibility of Angela Wright being charged in connection with the case. This discussion was related by Lebid and Wright in the State's case. Hunter says that Angela was trying to walk back some witnesses on their statements, but then says, "we found out some other stuff that I can't talk about." R4178 Hunter says that Angela "popped up as a blip on our radar screen," as she had been talking to witnesses, and then some other things happened that he could not discuss but, "that blip got a little bigger and a little louder." R4175 The prosecutor appears to be giving an instruction to Wright about Angela that he and his attorney should pass on to her. See R4174-4179 (transcript at 1Supp-1279 to 1284) The prosecutor acknowledges speaking "covertly" about things that Angela had done and in what he was trying to say about making the blip go away. R4178(1Supp1283) He says that there are some investigative details that he is not at liberty to give. R4178 He threatens to tear up the plea agreement twice during the discussion. R1652-1657,4176,4179

Sievers had an absolute right to show this excerpt (as well as the entire video) to the jury. It ties in with Lebid's testimony that he never asked Angela about her prepaid phone after the police discovered the calls from Wright's prepaid phone. If Wright's wife was involved and he was lying about it, then it is reasonable to ask what else he was lying about. The segment suggests an unwritten implied agreement concerning Angela if Wright will make the blip go away. The discussion shows that Wright is in a compromising position with an additional incentive to make the prosecutors happy.

The judge's ruling excluding the video was an "erroneous interpretation" of the rules of evidence, which this Court reviews de novo. See Bearden v. State, 161 So. 3d 1257, 1263 (Fla. 2015) (quoting Pantoja v. State, 59 So. 3d 1092, 1095 (Fla. 2011) . It was also a violation of Sievers' Constitutional rights under the Fifth, Sixth, and Fourteenth Amendments, which is reviewed de novo. E.g., McWatters v. State, 36 So. 3d 613, 637 (Fla. 2010).

The video was relevant to show Wright's bias and it was relevant to impeach Wright and Lebid's testimony about Angela's involvement with the case. It was relevant to impeach Wright for things that

conflicted with or were omitted from his testimony in the State's case. Wright's credibility at trial was enhanced by the State Attorney's judgment that the final story Wright told was, indeed, truthful. The prosecutors' judgment in crediting Wright's story as truthful was a relevant subject of inquiry for the defense after the State opened that door. The defense had the right to inform the jury of the entire situation in assessing Wright's credibility. See Livingston v. State, 678 So. 2d 895, 897 (Fla. 4th DCA 1996).

Section 90.608(2), Florida Statutes, allows a party to attack the credibility of a witness by showing bias. A defendant has a strong interest in discrediting a crucial state witness by showing bias, an interest in the outcome, or a possible ulterior motive for his in-court testimony. Phillips v. State, 572 So.2d 16 (Fla. 4th DCA 1990). Extrinsic evidence is admissible for impeachment to show a witness's bias. "[W]hen cross-examination alone is not sufficient to expose the possibility of improper motives in a witness, a defendant may present other impeachment testimony to demonstrate bias." Smith v. State, 98 So. 3d 632, 637 (Fla. 4th DCA 2012) (quoting Hair v. State, 428 So.2d 760, 762 (Fla. 3d DCA 1983)); see also Alvarado-Contreras v.

State, 305 So. 3d 842, 845 (Fla. 2d DCA 2020); Correia v. State, 654 So.2d 952, 954 (Fla. 4th DCA 1995); Dempsey v. Shell Oil Co., 589 So.2d 373, 377 (Fla. 4th DCA 1991); United States v. Harvey, 547 F.2d 720 (2d Cir. 1976) ("[B]ias is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely.").

The video was not hearsay because it was not being offered for the truth of the matter asserted. Antoine v. State, 138 So. 3d 1064, 1076 (Fla. 4th DCA 2014) (error to exclude video of witness and his attorney's statements during recorded police interview because "what the attorney said to Slade was not hearsay since the statements were not offered for their truth, but to show their impact on Slade's state of mind and to expose potential bias."); Chatman v. State, 687 So. 2d 860, 862 (Fla. 1st DCA 1997) (statements made by the detective and the FBI agent to cooperating codefendant were not hearsay and were admissible to show state of mind and motive to falsely implicate Appellant). The traditional rationale for excluding hearsay, reliability of the statements, was not applicable since the video was created by the prosecutors.

The prosecution opened the door to admission of the video through its questioning of state witnesses about the proffer. See Jackson v. State, 25 So. 3d 518, 530 (Fla. 2009) (counsel opened door to a subject that was not generally a material issue by questioning witness's motives); Smith, 98 So. 3d at 638 ("We have held that when the state 'opens the door' to misleading testimony or has made specific factual assertions, the opposing party has the right to correct that information in order that the jury not be misled.") (quoting Campbell v. State, 2 So.3d 291, 295 (Fla. 4th DCA 2007)). The prosecutor brought up Wright's proffer and questioned him in detail about it. T2729-2732 The prosecutor questioned Detective Lebid about Wright's proffer, including asking if he needed a lie detector to tell that Wright was lying during the proffer. T3374,3376-77,3407,3409 The defense attorney cross-examined Wright about the proffer. T2890-2903,2906 Lebid was also cross-examined by the defense on it. T3398,3404 The jury was entitled to see the video to correct the impressions given by the State witnesses.

Excluding the video statements of Wright at his proffer was an impermissible limit to Sievers' right of cross-examination. See Garcia

v. State, 816 So. 2d 554, 563 (Fla. 2002) (exclusion of the videotaped statements by state's key witness in eight-hour police interview impermissibly limited defendant's right to cross-examine the key witness against him); U.S. Const. amend VI; art. 1, § 16(a), Fla. Const.

Excluding the evidence deprived Sievers of his constitutional right to present a complete defense. See Holmes v. South Carolina, 547 U.S. 319, 324-325 (2006)("'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'")(quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)); see also Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."). In Crane, a state court ruling foreclosed a defendant's efforts to challenge his prior confession by preventing the defense from introducing testimony bearing on the circumstances under

which the confession was obtained. In concluding that the exclusion of the testimony violated the Sixth and Fourteenth Amendments, the Court recognized that the defendant's case turned on "his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." Crane, 476 U.S. 698. The present situation is analogous. Sievers' defense turned on his ability to casts doubt on Wright's credibility, and key to casting that doubt was showing the manner in which the State obtained Wright's trial testimony.

The judge seemed to have made up his mind to exclude the video before Sievers had the opportunity to present his case. During the State's case, Wright testified that he wanted to be as helpful to the jury as possible in describing the crime scene, which prompted defense counsel to ask if it would be helpful for the jury to see the recording of his proffer. The prosecutor objected and the judge admonished defense counsel, saying, "Don't ask things you know we can't do." T2950

The error was not harmless. Wright was in jail charged with the murder when his attorney arranged for his proffer with the State

Attorney. Wright had previously denied to Officer Lebid that Sievers was involved and changed his testimony after he established a relationship with the prosecutors. The video is a stark depiction of Wright's bias and need to please the prosecutors in a deal that would eventually free him from prison despite his culpability. This Court should reverse for a new trial.

<u>ISSUE VI</u>: THE TRIAL COURT ERRED BY PROHIBITING CROSS-EXAMINATION OF CURTIS WRIGHT ON A POSSIBLE SEXUAL MOTIVE FOR THE MURDER

In the State's opening statement, the prosecutor said that Curtis Wright would be "providing the why for a brutal murder where nothing was taken," and where there was "no apparent benefit to those who committed it." T2395-96 In Sievers' opening statement, his attorney discussed the investigation and specifically the themes and questions posed by Detective Lebid when he was confronting Wright. Sievers' attorney said: "On August 27th, Detective Lebid interviews Curtis again, who denied any involvement. Detective Lebid advances a theory that Teresa is leaving Mark . . . and he is fixated on whether or not Curtis is bisexual and has a sexual relationship with Mr. Sievers." T2406 Lebid explained in his testimony that he was "trying

to help Mr. Wright look at all the possibilities in front of him, I went over different themes . . . meaning different reasons why things happen." T3394

During Sievers' cross-examination of Curtis Wright, the prosecutor objected to relevance when the defense attorney asked whether Lebid had questioned Wright as to his sexual preference. Wright acknowledged that Lebid had asked him about it. T2887 The prosecutor objected again when Sievers asked whether Detective Lebid wanted to know whether Wright had a sexual relationship with Mark Sievers. T2888 The defense attorney told the judge:

> this was a part of the investigation, and Detective Lebid spent a significant amount of time talking about this.
>
> Further, there are some questionable text messages that corroborated this theory. And so it is relevant in that it could potentially lead to an alternative motive for the murder.

T2889 Wright testified that he and Sievers had a very close relationship. Text messages in evidence showed that the men were close, i.e., a text saying "what should I wear to your wedding? No, not Angie's panties again." And another saying, "You know we sleep all natural." T3972-73

When the judge sustained the State's relevancy objection to the question about Detective Lebid wanting to know if Wright had a sexual relationship with Mark Sievers, he said:

> I don't see any relevance to this other than that it was de minimis at best, to the point it's miniscule. It's not relevant at this time, unless someone is going to get up and say they had a relationship. I haven't heard it, so I don't see how it's even relevant, and I'm going to sustain the objection.
>
> In your case in chief, if you've got someone who's getting up there who says they have a relationship, well then it might become relevant. At this point I don't see it. Sustained.

T2890 This ruling violated Sievers' confrontation rights and it was an erroneous interpretation of the rules of evidence. This is an issue that this Court reviews de novo. See Pantoja, 59 So. 3d at 1095.

Sievers was entitled to wide latitude to explore Wright's possible motives to commit the murder. "It is fundamental that '[a]ll witnesses are subject to cross-examination for the purpose of discrediting them by showing bias, prejudice or interest . . . . This is especially so where the key state witness is being cross-examined.'" Cox v. State, 441 So.2d 1169 1169-70 (Fla. 4th DCA 1983) (quoting Jones v. State, 385 So. 2d 132, 133 (Fla. 4th DCA 1980). A criminal defendant must be afforded wide latitude to develop the motive behind a witness'

testimony, "to show that the witness has colored his testimony to suit a plea agreement or other considerations from the state." Pomeranz v. State, 634 So.2d 1145, 1146 (Fla. 4th DCA 1994).

The judge's ruling that Sievers had to produce a witness to say that he had a sexual relationship with Wright before being able to ask Wright on cross-examination about that aspect of the investigation was not a valid condition to justify restricting cross-examination. Any motive that Wright had to commit the murder other than the motive he claimed at trial would impeach his testimony, and Sievers should have been allowed to explore it through cross-examination. See § 90.608(2), Fla. Stat.; Mouery v. State, 884 So. 2d 1029 (Fla. 4th DCA 2004) (error to restrict cross-examination where evidence could show that state witness had motive to falsely accuse defendant); Pomeranz, 634 So. 2d at 1146 (error in not allowing defense counsel to pursue a line of questioning designed to show bias); Taylor v. State, 623 So. 2d 832, 833–34 (Fla. 4th DCA 1993) (restricting cross-examination of key state witness on his potential motive to testify falsely was not harmless error); Chatman v. State, 687 So. 2d 860, 863 (Fla. 1st DCA 1997) ("we hold that it was error to preclude appellant from

questioning his former co-defendant regarding statements made by the detective and the FBI agent who interrogated the co-defendant, in an effort to establish that the co-defendant had a motive falsely to implicate appellant in the robbery"); Jones, 385 So. 2d at 133 (proposed cross-examination of State's key witness was proper and its refusal was prejudicial); Williams v. State, 912 So. 2d 66, 68 (Fla. 4th DCA 2005) ("Matters that demonstrate bias include . . . any motivation for a witness to testify untruthfully").

Restriction of cross-examination on this topic was a violation of Sievers' constitutional rights under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. The Sixth Amendment right to confront witnesses is a fundamental right, made obligatory to the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). A defendant has a right under the Confrontation Clause and under the Florida Constitution to expose the jury to facts from which jurors could draw inferences related to the reliability of witnesses. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986); Davis v. Alaska, 415 U.S. 308, 316 (1974); art. I, § 16(a), Fla. Const.

The State argued in closing that Wright should be believed because he could have no other possible motive to commit the murder other than acting at Sievers' behest: "why would Mr. Wright drive all the way down to Florida overnight with Jimmy Rodgers to kill Dr. Sievers? Why would he do that?" T4099 If the jury had known that Detective Lebid had suggested or explored a sexual motive and if the defense had been allowed to explore that potential motive with Wright through cross-examination, the jury may have concluded the answer to the prosecutor's rhetorical question was not clear cut.

Wright's testimony about Sievers' marital problems aligned with a theme suggested to him by Detective Lebid. Wright had previously denied to Lebid that he knew of any marital problems, and the State produced no evidence of marital problems to back that theory. The inadmissible hearsay of a neighbor, Kimberly Torres, does not count because she could put no context to the snippet of an argument she overheard between Teresa and Mark. Wright adopted the theme suggested to him by Lebid when he sought the plea deal. It was relevant to ask what other motive had been suggested to him by Lebid, particularly if that other motive did not implicate Sievers.

Wright was the only witness to speak to whether Mark Sievers had any involvement with the murder so any limitation on his cross-examination must be strictly scrutinized. See Cox v. State, 441 So.2d 1169, 1170 (Fla. 4th DCA 1983). Precluding any questioning of Wright on a potential sexual motive deprived Sievers of his constitutional right to cross-examine the State's key witness against him on the question of that witness' bias and motive. The error requires reversal for a new trial.

ISSUE VII: THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF KIMBERLY TORRES, SIEVERS' NEIGHBOR

Kimberly Torres was an incompetent witness, having no knowledge of material facts. The State used her inadmissible testimony in the guilt and penalty phases as corroboration for Curtis Wright, to bolster his credibility. The trial court erred by overruling Sievers' objections to her testimony.

1. Irrelevant Evidence: Sievers on the Lanai

Over a relevancy objection, the State elicited testimony from Torres regarding an incident in February or March of 2015 where she saw Mark Sievers in her backyard standing on her lanai. The

prosecutor used this incident in closing to argue that Sievers had been gathering intel for the murder. The prosecutor also used it in the penalty phase to claim that this incident was evidence of CCP, the sole aggravator.

The defense attorney objected when the prosecutor started to question Torres because he thought that the prosecutor intended to ask about an incident involving Mark Sievers showing up at her house with Chinese food. But the prosecutor said that was not his intention. T3779-80 The prosecutor informed the court that he intended to ask Torres about Sievers being in the back of her house in the months "immediately" prior to the murder. He said the testimony would substantiate Wright's testimony that Sievers had given him intelligence information about the backyard of the home. "And this witness is going to say that in the months immediately prior to her death, Mr. Sievers inexplicably appeared in her backyard and on her back lanai and had no business back there." The defense attorney responded that "there's nothing that she can testify to, other than innuendo or circumstance, that is going to tie his presence in their backyard to any –- ." The judge interrupted and asked the

prosecutor, “what does her backyard have to do with the Sievers’ backyard?” T3781 The prosecutor said, “[A]ccording to Mr. Wright, Mr. Sievers was giving information specifically about the back of the house and about the area behind the apartment complex behind the home. . . . That’s why it’s relevant.” T3781-82 The judge overruled the objection.

Torres testified the backyards were divided by a privacy fence and she saw Sievers on her lanai in her backyard when he was not invited to be there. She said the date this occurred was “towards the end of February maybe, or March. I really don't know. I don't know the exact date.” T3788

The only reason offered by the State for Torres’s testimony was to corroborate Wright’s testimony. But Torres did not have information that would corroborate Wright, and the information she conveyed was merely bad character evidence. The fact of Sievers standing on her lanai did not corroborate anything that Wright said. It would require a stacking of many inferences to connect what Torres saw to anything that Wright said. There was no materiality or legal relevance to the testimony about Sievers standing on Torres’s

lanai in February or March, and the trial judge abused his discretion in allowing it.

> To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) and must not be excluded for other countervailing reasons.

Sims v. Brown, 574 So. 2d 131, 134 (Fla. 1991).

Any possible relevance was significantly outweighed by the danger of unfair prejudice and confusion of issues. "[E]vidence that requires an extended chain of inferences to be relevant or that suggests an improper basis for the jury's verdict should be excluded" under section 90.403. Green v. State, 27 So. 3d 731, 738 (Fla. 2d DCA 2010). In Green, the State was unable to connect firearms to charged offenses but "argued that the firearms were relevant to corroborate the codefendants' testimony." 27 So. 3d 737 Here, the State similarly used Torres' testimony in closing arguments in the guilt phase to assert that it was corroboration for Curtis Wright's testimony. T4102 And it used the testimony in the penalty phase to argue that it was evidence of CCP. In the penalty phase closing, the prosecutor said:

> When we talk about the heightened period, the heightened level of premeditation, you heard from the neighbor who says -- Ms. Torres -- the recon mission. Remember that? The recon mission to her house. She finds Mr. Sievers out on her lanai. Right here.
>
> * * *
>
> That happened in January or February of 2015.
>
> And the State submits to you that every act, everything Mr. Sievers did to make this crime happen was part of that heightened period of premeditation. Okay?

R1350 Torres's testimony about Mark Sievers standing on her lanai lacked probative value as to whether Sievers conspired with Wright. Yet that testimony was used improperly by the State to assert corroboration for Wright and heightened premeditation for Sievers.

2. Inadmissible Hearsay Overheard by Torres

The prosecutor told the judge at sidebar that he also intended to ask Torres about words between Teresa and Mark Sievers that Torres overheard from her backyard.

> [PROSECUTOR at sidebar]: Apparently, she overheard an argument between the Sievers family. She was in her home in her lanai. She overheard them arguing over in their yard. Dr. Sievers said something to the effect of: I'm sick of this f'ing S. I'm leaving, or I'm leaving you.
>
> And Mr. Sievers responded: Go ahead and leave, we'll see about that.

And, again, this was in the weeks immediately prior to the murder.

T3783 The defense attorney objected, asserting the testimony was hearsay which would not fall under an exception.

[DEFENSE ATTORNEY]: Your Honor, one, that's hearsay.

And I anticipate, and perhaps erroneously so, that they're going to say this is an excited utterance.

Before it can be an excited utterance, they have to prove that the hearsay statement was made at or under the time the person was experiencing whatever situation was causing that.

And she can't lay that foundation. She doesn't know what the argument was about. She doesn't know whether or not that statement, which purports to be an excited utterance, was made during the -- during or immediately after whatever event caused that, that startled or heightened emotional state.

And, Your Honor, this is clearly something that's well outside 803, specifically 803(2) which is the excited utterance.

This is not -- this isn't something that's a recorded recollection. This is an event, is an existing statement of state of mind.

Your Honor, this does not fall under a salient hearsay [exception], if we actually examine the wording of the statute.

T3783-84 The prosecutor argued it was an excited utterance and an admission. T3784 He said, “She doesn't remember the exact date,

but it was in the weeks prior to the murder." T3785 The trial judge reserved ruling to see if the State "could lay the predicate for either of the exceptions." T3785 He then overruled Sievers' objection.

> Q. [by PROSECUTOR] In the months prior to her murder or in the weeks prior to her murder, did you have an opportunity to be at your house and to hear Mr. Sievers and Mrs. -- Dr. Sievers' voices at their house?
>
> A. [by TORRES] Yes, I did. I could hear them.
>
> Q. What were you doing at your house when you overheard their voices?
>
> A. I had invited some family over for a cookout, and we were on the back lanai by the pool and I just overheard them arguing.
>
> I didn't want to hear them arguing, but, you know, that's their business, but I heard them arguing.
>
> I think they were probably either in the backyard or lanai. Because our houses are just so close together, you could really -- I could even hear the girls playing in the pool sometimes.
>
> Q. And when you overheard them arguing, was it a continuous argument or was it an argument that stopped and started, stopped and started?
>
> A. It pretty much stopped and started. I think they maybe took it back inside, because I could no longer hear it after the first few minutes.
>
> * * *
>
> Q. Prior to them going inside, was the argument continuous then or did it stop and start, stop and start?

A. That was the only thing that I had overheard was just for a few minutes. I tried not to pay too much attention.

Actually, I was kind of embarrassed because I had family over for dinner, you know, and that's not what I, you know –

* * *

Q. Was that argument continuous before they went inside, or did it stop and start, stop and start and then they went inside?

A. It was continuous, and then right after that we went inside and had dinner.

* * *

Q. And during that argument, did you hear Dr. Sievers say anything to Mr. Sievers?

A. Yes.

[DEFENSE ATTORNEY]: Objection, Your Honor.

THE COURT: Overruled.

BY [PROSECUTOR]:

Q. Did you hear Dr. Sievers say anything to Mr. Sievers?

A. Yes.

Q. What did she say?

A. She -- there was some profanity, but she says: I'm tired of this crap. I'm leaving.

Q. Did she use the word "crap" –

A. Yes.

Q. -- or some other word?

* * *

A. I'm f'ing tired of this, so ...

Q. And she said she's leaving.

A. Yes.

Q. And did you hear Mark Sievers' voice respond to that?

A. Yes. He wasn't as loud. She was more loud.

He says, "If that's what you want to do, fine, but we'll see about that."

Q. And then after that happened, that's when the argument went inside and you couldn't hear it anymore?

A. Well, our dinner was almost ready about that time. So I'm trying not to pay too much attention and get my family inside so we could have dinner. I don't want to hear the next-door neighbor's argument.

Q. So you went inside.

A. Yes.

Q. And how long before Dr. Sievers was killed did you hear this argument?

A. Maybe a month and a half.

T3789-3793 Torres, at first, said, it "would have been April," but when the prosecutor prompted her that the murder occurred on June 28th, she said, "May or – yeah, like May." T3794

Torres never mentioned this argument when she was interviewed by Detective Nolen on June 29, 2015. She also gave interviews to eight different news outlets, including WINK News on June 30, 2015, NBC-2, ABC-7, and FOX 4. She first recounted the story about the Sievers' argument four years later in an interview published in Gulf Shore Life in April 2019. T3795-97

The trial court abused its discretion by allowing the State to elicit the hearsay from Torres. The only relevance would be to show that Teresa was planning "to leave" *the marriage*. But Torres could not put any context to the snippet of conversation she overheard, and her testimony bolstered Wright's credibility without a legitimate basis for doing so. The only possible relevance to the statements was to show the truth of the matters asserted by the participants. "When the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to

clothe such hearsay under a nonhearsay label." Keen v. State, 775 So. 2d 263, 274 (Fla. 2000) (citing § 90.801(1)(c), Fla. Stat. (1999); Wright v. State, 586 So. 2d 1024 (Fla. 1991)).

Torres did not know whether Teresa Sievers was planning to leave *her marriage* or if she was talking about something else. Even *if* one could draw a reliable conclusion on that issue, Teresa's state of mind at the time the statements were made was not an issue in this case. Teresa's statements could not be used to show Mark's state of mind. See Woods v. State, 733 So. 2d 980, 987 (Fla. 1999) ("Under the state of mind exception, the out-of-court statements by the declarant may not be used to prove the state of mind or motive of the defendant.").

The State had no evidence to substantiate Wright's testimony that Teresa wanted a divorce and was planning to move with the children. The hearsay admitted through Torres was intended to support Wright's story about Teresa wanting a divorce. The risk is great that the jury gave the inadmissible hearsay significance in evaluating Wright's credibility. This may well have tipped the scale for the jury to credit Wright's claim as to Sievers' motive, which

enhanced Wright's credibility.

Admission of Torres's testimony created a dilemma for the defense because Sievers had to show that Torres harbored an extreme bias against him in the attempt to impeach her. Torres admitted she did not like him, was not close with the Sievers' family, and was not familiar with their family dynamics. She had done numerous media interviews after the murder and had referred to Mark Sievers as "a creep" on Fox. The trial gave her another public forum for expressing her dislike of him. This should have been avoided because the judge should have excluded Torres's testimony on the basis that it was hearsay, not relevant, and overly prejudicial. The error requires reversal for a new trial.

ISSUE VIII: THE TRIAL COURT ERRED BY ADMITTING GRUESOME AUTOPSY PHOTOS THAT WERE NOT RELEVANT TO ANY ISSUE IN DISPUTE

The trial judge abused his discretion when he overruled Sievers' objection to gruesome autopsy photos. Sievers objected when the prosecutor moved to introduce exhibits 115-A through K. T3817-21 The photos depict Teresa's head on the autopsy table. R2646-2656 (Motion to transmit color copies pending). Exhibits 115B-F show

wounds on her shaved head. Exhibit 115G shows part of her brain through an open wound in her skull. Exhibit 115-K, is a particularly shocking photo of her bloody skull with the brain removed. R2656

In order to be relevant and admissible, "a photo of a deceased victim must be probative of an issue that is in dispute." Almeida v. State, 748 So.2d 922, 929 (Fla.1999)(emphasis in original); see also, e.g., Seibert v. State, 64 So. 3d 67, 88 (Fla. 2010); Smith v. State, 28 So. 3d 838, 861 (Fla. 2009).

Sievers' asserted that the photos were not relevant where, under the State's theory, he was not physically involved in the murder, and any probative value was outweighed by prejudice. T3817

> MR. MUMMERT: Your Honor, this is a 403 objection. The prejudicial value substantially outweighs the probative value.
>
> Again, the State's entire case is that my client conspired with two others to have his wife murdered, not that he had any physical involvement himself.
>
> This does not further the State's case of proving or disproving whether or not Mr. Sievers had any involvement in the conspiracy.
>
> These are simply very gruesome photos that are going to inflame the passions of the jury.
>
> Accordingly, Your Honor, we object based on 403.

The judge overruled the objection, saying it was, "noted for the record." T3817-3820

This court has cautioned trial judges against admitting gruesome autopsy photos that can detract from a fair and impassioned consideration of the evidence. See Almeida, 748 So.2d at 929 (admission of autopsy photo depicting gutted body cavity was "gratuitous" where nature of injuries was not in dispute); Marshall v. State, 604 So.2d 799, 804 (Fla.1992)("[W]e caution judges to scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point"); Czubak v. State, 570 So.2d 925, 928 (Fla.1990) (gruesome photographs of victim's body should not have been shown to the jury).

The medical examiner was the State's last witness, and by the time he testified, the jury had already seen photos of the body on the floor in a pool of blood at the scene (R1921,1927), a professional headshot photo of Teresa (R1905), and heard Wright's detailed account of the killing. The shaved head and bloody skull autopsy

photos were shocking, gratuitous, and overly prejudicial where Sievers was not disputing anything that the medical examiner could say about the cause of death. The jury was bound to have an emotional reaction when contrasting the beautiful photo of Teresa's face (St. Exh 1) with the gruesome autopsy photos that served no relevant purpose.

The State cannot show that the admission of the gruesome photos was harmless beyond a reasonable doubt where the evidence of guilt rested tenuously on Wright's self-serving testimony and the autopsy photos served no purpose other than to evoke anger toward the only person on trial for the murder. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986). The photos created an unacceptable risk of influencing the jury's decision on the only contested issue, whether Sievers had solicited Wright to commit the murder. This Court should reverse for a new trial.

ISSUE IX: THE CUMULATIVE EFFECT OF THE TRIAL ERRORS REQUIRES REVERSAL FOR A NEW TRIAL

Each of the errors raised in Issues I through VIII requires reversal for a new trial. However, this Court should also consider the

errors in the aggregate. "Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because 'even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.'" McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007)(quoting Brooks v. State, 918 So.2d 181, 202 (Fla.2005)).

The jury was rightly focused on Curtis Wright's testimony, even sending a judge a note during deliberations asking for transcripts of his testimony (which was not given). R3979, 3977 Wright's testimony was tenuous from the start because he was an admitted liar who made contradictory statements throughout the investigation. His story that implicated Sievers was induced by the State's concessions to him in a generous plea offer. Wright's credibility was unfairly enhanced by each of the errors identified in Issues I though VIII: the judicial rebuttal to Sievers' closing argument, the prosecutor's improper rebuttal closing, allowing Lebid to opine on Wright's

honesty, Wright's testimony about praying, the exclusion of evidence for Sievers' defense (Wright's proffer video and the clip taken from that video), the prohibition of cross-examination of Wright regarding a sexual motive, allowing Kimberly Torres' inadmissible testimony, and admission of the gruesome autopsy photos. When viewed cumulatively, the State cannot establish these errors were harmless beyond a reasonable doubt because they all contributed to bolstering, vouching for, and sanitizing the testimony of the State's key witness. See DiGuilio, 491 So.2d at 1139; McDuffie. This Court should reverse for a new trial.

ISSUE X: THE TRIAL COURT ERRED BY DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL WHERE WRIGHT'S TESTIMONY WAS INHERENTLY UNRELIABLE AND NOT COMPETENT EVIDENCE TO SUPPORT SIEVERS' CONVICTIONS

The trial court erred in denying Sievers' motion for judgment of acquittal on the asserted ground that the State's case was entirely dependent on the credibility of Curtis Wright, who was an inherently unreliable witness.

> The only, the only evidence, the only direct evidence that we have that there was any conspiracy and that Mr. Sievers was in any way or shape or manner involved came from Curtis Wayne Wright. Mr. Wright, a five-time convicted felon, who was offered

> an advantageous plea deal, who has had multiple inconsistent statements, and he himself got up there and said that he lied on several occasions in this case, is of no value, Your Honor. This person is making self-serving statements at best. There is insufficient substantial competent evidence to convict Mr. Sievers of either the conspiracy to commit a first degree murder or, in fact, the first degree murder itself.

T3860-61 The State failed to adduce competent substantial evidence where Wright only implicated Sievers when he had the opportunity to negotiate a plea deal that would save him from facing a possible death sentence. The uncorroborated testimony conflicted with Wright's prior statements. Under these circumstances, the judge erred by submitting the case to the jury because the likelihood is too high that the plea-induced testimony was false.

Wright's testimony cannot meet any standard of reliability that will assure Sievers' right to due process. See In re Winship, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt"). It has long been recognized that testimony like Wright's is not of the same quality as that of other witnesses. See, e.g., Crawford v. United States, 212 U.S. 183, 204 (1909)(Testimony of confessed accomplice who turned state's evidence "is not to be taken as that of an ordinary

witness of good character . . . . On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.").

Every fact that the State used as supposed corroboration for Wright was a fact that was also susceptible of an innocent explanation and only became incriminating after Wright fit it into his story. Relying on the uncorroborated testimony of Wright to sustain the convictions poses the unique danger that the jury accepted his story as true with little scrutiny because he admitted the crime.

> [A]n accomplice claims to have participated in the intricacies of the crime alleged. Thus he portrays himself as having firsthand knowledge of the illegal act as well as being the witness most capable of relating the details of the criminal activity to the jury. This claim to "inside knowledge," coupled with the fact that his testimony is usually the most damaging evidence against the defendant, allows the accomplice to deviate from the truth without arousing the jury's suspicion. Since the accomplice alone knows about the pattern of criminal events, he can manipulate the details of those events without blatant discrepancies. In effect, then, little room remains to question the veracity of his testimony. Thus, his testimony proposes a unique danger: the increased probability that a jury will, unquestioningly and with little scrutiny, accept his story as true because of its inherent "believability."

Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 Yale L.J. 785, 786–87 (1990).

The circumstances surrounding Wright's attainment of his plea agreement and the terms of that agreement render the State's case so unreliable that the conviction and death sentence will not pass constitutional muster. Wright lied repeatedly in the proffer. He changed his story in response to the prosecution's prompting. Wright's sentencing was "deferred due to the . . . related prosecution(s) of any codefendant(s)." R2758 The prosecutor had total discretion to terminate any benefit without explanation throughout the time Wright was testifying and afterward (as the prosecutor reminded the jury in her rebuttal closing). Wright would have no judicial recourse for the State's unilateral determination that he breached the agreement and he would lose the right to the reduced sentence for even an unintentional failure of memory. He would not be allowed to withdraw his guilty plea and could be prosecuted for other crimes including first degree murder. See ¶¶8,10 of Agreement, R2759

Courts and legal commentators have long expressed concern over reliance on testimony induced by "contingent" plea agreements.

> Under contingent agreements, the witness aims not to exculpate himself, but to incriminate the defendant. Jurors likely have more difficulty quantifying the force of this motivation. Moreover, agreements contingent upon the prosecution's satisfaction or the outcome of the case pressure witnesses in an unpredictable manner. . . . Neither judge nor jury can assess accurately the subjective nature of the impact and ascertain the extent to which the terms of the agreement have altered the content of the testimony.

Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800, 820–22 (1987); see also *An Offer You Can't Refuse? United States v. Singleton and the Effects of Witness/Prosecutorial Agreements*, 9 B.U. Pub. Int. L.J. 433, 450 (2000) ("A trial that is arranged in a manner allowing the government to entice false testimony from a defendant and aims to rely on a jury to sift through the lies to obtain the truth cannot be within the confines of constitutionally required due process."); United States v. Waterman, 732 F.2d 1527, 1528 (8th Cir.1984) (a witness agreement contingent upon the outcome of the case "hampered the truth-finding function of the jury to a degree which cannot be reconciled with the fair procedures guaranteed by the due process clause"), vacated en

banc, id. at 1533. Because Wright's promised 25-year sentence was conditioned upon the prosecutor's satisfaction with his testimony, the same problem arises as with an explicitly contingent agreement. The likelihood that Wright lied to satisfy the prosecutors is so great that his testimony fails to be reliable such that a conviction based on his uncorroborated testimony violates Sievers' constitutional rights. Amends. V, XIV, U.S. Const.; Art. 1, § 9, Fla. Const. The convictions should be reversed.

ISSUE XI: THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL ON THE CONSPIRACY COUNT WHERE THE STATE FAILED TO PROVE THAT SIEVERS CONSPIRED WITH RODGERS

Sievers moved for judgment of acquittal on the conspiracy count on the ground that the Information specifically charged him with conspiring with Rodgers in addition to Wright and there was no evidence that Sievers had conspired with Rodgers. T3857-60 Wright testified that Sievers had no connection with Rodgers. The trial court erred in denying the JOA motion on the conspiracy count because the evidence did not support the charge as it was alleged in the Indictment. See Webster v. State, 646 So. 2d 752, 753 (Fla. 2d DCA

1994) (holding evidence insufficient for conspiracy charge where record failed to establish any particular arrangement between defendant and nonpolice person). Conspiracy requires two parties agreeing and acting together, with each being a necessary party to the act. O'Connor v. State, 590 So.2d 1018, 1020 (Fla. 5th DCA 1991). "A person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy." §777.04, Fla. Stat. "The crime of conspiracy is comprised of the mere express or implied agreement of two or more persons to commit a criminal offense; both the agreement and an intention to commit an offense are essential elements." Jimenez v. State, 715 So. 2d 1038, 1040 (Fla. 3d DCA 1998).

The allegation in the Indictment required proof that Sievers conspired with Rodgers; the wording of the Indictment was not surplusage. See Marra v. State, 970 So. 2d 475, 476 (Fla. 5th DCA 2007). The State is bound by the allegations in the indictment. See Aaron v. State, 284 So. 2d 673, 677 (Fla. 1973) ("The right of persons accused of serious offenses to know, before trial, the specific nature

and detail of crimes they are charged with committing is a basic right guaranteed by our Federal and State Constitutions."); Long v. State, 92 So. 2d 259, 260 (Fla. 1957) ("The general rule is 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."); Demus v. State, 281 So. 3d 505, 508 (Fla. 4th DCA 2019)(quoting Long); Lewis v. State, 53 So. 2d 707, 708 (Fla. 1951) ("No principle of criminal law is better settled than that the State must prove the allegations set up in the information or the indictment.").

The variance between the proof and the allegation is analogous to a rimless "hub and spoke" conspiracy in which the various spokes are conspiring only with the hub. De la Osa v. State, 158 So. 3d 712 (Fla. 4th DCA 2015). Even under the State's own hypothesis, Sievers and Rodgers were separate spokes to Wright's hub. By Wright's admission, he was in a conspiracy with Rodgers (although Rodgers was acquitted of the conspiracy count). But that was a separate conspiracy from what Wright described as the arrangement between himself and Sievers. The trial judge erred in denying the motion for JOA. This Court should reverse the conspiracy count.

PART TWO, SENTENCING ERRORS

ISSUE XII: THE STATE WAS STATUTORILY PRECLUDED FROM SEEKING DEATH WHERE THE PROSECUTOR FAILED TO GIVE NOTICE OF ANY AGGRAVATING FACTOR WITHIN 45 DAYS OF ARRAIGNMENT

The death penalty was not available as a possible penalty because the prosecutor did not serve Sievers with the statutorily mandated notice of the aggravating factors the state intended to prove within forty-five days of arraignment. When Sievers' raised this issue, the trial court erred by refusing to enforce the clear and unambiguous predicate requirement of the newly-enacted murder statute. The trial judge should not have allowed the prosecution to go forward as a death case. This error must be remedied by reversing the death sentence.

On **June 22, 2016**, the State Attorney filed a "Notice of Intent to Seek Death," which cited only a discovery provision, **Rule 3.202**, and said nothing about an aggravating circumstance.

> COMES NOW the STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, **and pursuant to Rule 3.202, Florida Rules of Criminal Procedure**, hereby serves Notice of Intent to seek the Death Penalty in this cause.
>
> **Pursuant to Rule 3.202, the defendant must now**

> **provide** the State, not less than twenty days before trial of this cause, **written notice of intent to present testimony of a mental health professional in order to establish a statutory or nonstatutory mental mitigating circumstance** or circumstances.

R91 (emphasis added).

Sievers filed a "Motion to Strike Notice of Intent to Seek Death Penalty" on **June 27, 2016**, asserting the "State fails to include any aggravating factors, it fails to properly put the Defendant on notice within the allotted forty-five (45) days of arraignment and is, therefore, tantamount to having filed no Notice of Intent to Seek Death Penalty." R98-100 Later the same day, the State filed its "Amended Notice of Intent to Seek Death Penalty/Notice of Aggravating Factors," which again cited Rule 3.202 and, <u>for the first time</u>, section 782.04(1)(b), Florida Statute (2016). That notice listed two aggravators, pecuniary gain and CCP. R102

Sievers filed an Amended Motion to Strike Notice of Intent to Seek Death Penalty, asserting that the prosecutor failed to comply with section 782.04(1)(b), Florida Statutes, by failing to give notice of the aggravating factors the state intends to prove within 45 days after arraignment. R115-122 He asserted that the waiver of arraignment

filed on May 5 triggered the commencement of the 45-day period, and the State failed to put Sievers on notice of any aggravating factors within the allotted 45 days. R115-117 Both the State and Sievers filed written arguments involving this motion. R123-132, 133-144 The motion was heard on October 11, 2016, R1065, and denied in a written order. R153-156

The murder occurred in June 2015. In January 2016, the U.S. Supreme Court issued Hurst v. Florida, 136 S.Ct. 616 (2016), striking down Florida's death penalty statute. The Florida Legislature responded by enacting Chapter 2016-13 (H.B. 7101), Laws of Florida ("the Act"), which amended sections 782.04 and 921.141, Florida Statutes, effective March 7, 2016. The Act requires the prosecutor to give notice of aggravating factors within 45 days after arraignment when the prosecutor intends to seek a death sentence.

> (b) . . . If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

(Emphasis added). The Indictment charging Sievers with first-degree

murder was filed on May 4, 2016, two months after the Act took effect. R79

The prosecutor lost the ability to seek death because he never filed the required notice until after Sievers' attorney filed a motion and brought the issue to the attention of the court, which was too late to meet the statutory deadline. The clock started on **May 5, 2016**, when Sievers filed and served the State Attorney with a "WAIVER OF ARRAIGNMENT," which states: "To the Clerk of Court, CRIMINAL Division and all parties to this action, will please note the Defendant hereby pleads 'NOT GUILTY' and waives arraignment currently set on May 9, 2016 at 8:30 am." R83 On **May 9, 2016**, Sievers' attorney was not present in court when the prosecutor wrongly indicated that Sievers' attorney had <u>not</u> entered a written plea. "MR. HUNTER: Your Honor, I don't know that the waiver of arraignment [filed by Sievers' attorney] contained a plea." R129 The judge continued the hearing to the afternoon for Mr. Mummert, Sievers' attorney, to be summoned to appear. At 9:12 a.m., Hunter sent an email to Mummert, saying: "I advised the court [this morning] that you had filed a written waiver of arraignment, but I was not sure

whether it contained a plea (I did not have the waiver in hand). I see now that it contains a plea." R144 Mummert appeared that afternoon and told the judge, "I filed a written plea of not guilty on May 5th with the Clerk of Courts waiving the arraignment." R130 He reasserted the previously entered written plea of not guilty. R130

The 45-day window opened on May 5, 2016, when Sievers filed his waiver of arraignment and entered a written not guilty plea. The 45th day fell on Sunday, so the State had until Monday, June 20, to file the notice. Even if one were to say generously, but incorrectly, that the day to start counting was on May 9, 2016, the window closed on June 23. The first time the State noticed Sievers with the aggravating factors was on June 27, 2016, so in either case the notice was untimely.

The State argued that its discovery notice filed on June 22, 2016, was timely compliance with the statutory requirement. The judge cited this date in his Amended Sentencing Order as the date that the State filed a timely notice of intent to seek the death penalty. R922

But there are two problems with using June 22 to establish a

timely notice of aggravating factors. First, the notice filed on that day did not list any aggravating factors and it only cited the discovery rule. A rule 3.202 notice cannot be deemed a substitute notice of aggravating factors. The rule 3.202 notice was a demand for disclosure of expert testimony of mental mitigation during penalty phase of capital trial.

The document filed on June 22, 2016, will not operate under a relation-back doctrine to satisfy the Act's notice requirement where that document referred only to the discovery rule. Cf., Kopel v. Kopel, 229 So. 3d 812, 815 (Fla. 2017)(recognizing cases holding that an amended pleading does not relate back to satisfy a statute of limitations if it states a new, different, or distinct cause of action from the original pleading); cf., Bybee v. State, 295 So. 3d 1229, 1232 (Fla. 2d DCA 2020)(defendant's challenge to sufficiency of evidence raised in a motion for arrest of judgment was not preserved because it was "not a substitute for a motion for a judgment of acquittal").

The word "must" used twice in the Act indicates that the 45-day window and the list of aggravating factors are mandatory requirements to pursue a death sentence in a first-degree murder

case. "[T]he Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute." Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976). It is not sufficient that the State simply informed the defendant of intent to seek death without providing an aggravating circumstance; use of the word "must" shows that the notice of an aggravating circumstance is the sine qua non of the statutory requirement.

The 45-day time is a jurisdictional limit that affects the trial court's subject-matter jurisdiction. See Bowles v. Russell, 551 U.S. 205, 210-11 (2007)(recognizing the jurisdictional significance of a time limitation set forth in a statute in contrast with a procedural rule adopted by the Court and noting that "[j]urisdictional treatment of statutory time limits makes good sense."). In Bowles, the Court recognized that it had no authority to make an equitable exception to a jurisdictional requirement. Id. at 214.

At least one Florida Court has recognized that the failure to file timely notice under section 782.04(1)(b) precludes the state attorney from seeking a death sentence. See State v. Chantiloupe, 248 So. 3d 1191 (Fla. 4th DCA 2018)(denying State's petition seeking to quash

trial court's order that precluded state from seeking death where state failed to file timely notice of intent under section 982.04(1)(b), Fla. Stat. (2017)). In contrast, a rule 3.202 notice is not jurisdictional and does not foreclose the State's ability to seek a death sentence. "If the State fails to give notice of its intent to seek the death penalty within ten days after arraignment, the State still may seek the death penalty, although it may not avail itself of the provisions of the rule." Amendments to Florida Rule of Criminal Procedure 3.220 Discovery (3.202 Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 674 So. 2d 83, 84 (Fla. 1995).

This Court adopted new rule 3.181 in In re Amendments to Fla. Rules of Criminal Procedure, 200 So. 3d 758, 760 (Fla. 2016), recognizing that implementing the Act required a procedural rule distinct from the judicially created discovery provision in rule 3.202. "Consistent with the statutory requirements, new rule 3.181 requires the prosecutor to give the defendant notice of intent to seek the death penalty and to file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the prosecutor intends to prove." 200 So. 3d 758, (Mem)–759.

Neither the Act nor rule 3.181 includes the now deleted language from rule 3.202, i.e., that "[f]ailure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty." The Legislature's omission of that or any similar language in the Act is evidence of a contrary intent.

The trial judge made several legal errors in his order denying Sievers' amended motion to strike the notice of intent to seek death (R153-156), First, the court concluded that Sievers' waiver of arraignment filed on May 5, 2016 was essentially a nullity because: "Defendant did not file the pleading designed to trigger a waiver of arraignment." R154 This statement was not followed by any legal authority and it is patently false. The court adopted May 9, 2016, as the date "[a]n arraignment was held." R155 That is wrong because the record shows that no arraignment was held on May 9. On that date, the Assistant State Attorney gave the judge bad information when, without the defense attorney present, he questioned whether a not guilty plea had indeed been filed. In the afternoon court session, the defense attorney corrected the mistake and the judge simply acknowledged the May 5, 2016, written waiver of arraignment and

not guilty plea.

The written waiver and plea that was filed on May 5 was the trigger that started the 45-day window. See Fla. R. Crim. P. 3.160(a) ("If the defendant is represented by counsel, counsel may file a written plea of not guilty at or before arraignment and thereupon arraignment shall be deemed waived."); Tellis v. State, 779 So. 2d 352, 354 (Fla. 2d DCA 2000) ("Refusal to honor a written plea of not guilty would never be approved as a standard procedure by a trial court and an exception to the right to enter a written plea of not guilty should be employed only under the most unusual circumstances."); Tishner v. Cameron, 75 So. 3d 787, 789 (Fla. 2d DCA 2011)("having filed a valid waiver of arraignment and plea of not guilty prior to arraignment, Tishner thus satisfied the requirements of rule 3.160"); Gonzalez v. State, 829 So.2d 277 (Fla. 2d DCA 2002)(holding that written plea of not guilty was an arraignment for determining timeliness under rule 3.202); cf., Young v. State, 784 So. 2d 1249, 1252 (Fla. 1st DCA 2001)(holding that prosecution "commenced" for statute of limitations when defendant filed written waiver of arraignment and plea of not guilty).

In his order, Judge Kyle relied upon language in the Act that allows a prosecutor "to amend" a notice upon "good cause" shown. The provision is irrelevant to a proper analysis of the issue because the right to amend presupposes a timely notice within the 45-day window, which did not occur here. Thus, the question of whether the State showed "good cause" to amend was not a valid question. Nevertheless, if it were valid, the State could not meet the legal standard for showing good cause to amend. The judge wrote, "the State's response, filed contemporaneously with the amended notice, cited good cause to amend the notice." R155 It did no such thing. The State's response said only, "[t]he omission was inadvertent." R104 The attorney took no responsibility and gave no explanation. The statement suggests that the prosecutor was not aware of the new law and its requirement, but that is not explicit in the State's response.

A litigant's ignorance of the law is not "good cause" to excuse an out-of-time filing**.** Inadvertence or mistake of counsel is not good cause for missing a filing deadline and the State offered nothing more. See, e.g., In re Goldman's Estate, 79 So. 2d 846, 848 (Fla.

1955) ("a cause sufficient to authorize an extension of time for filing suit must be a 'good cause,' by which it is meant that 'the adjudication is to be governed by a given standard of judicial action,' . . . contemplating 'a substantial reason, one that affords a legal excuse,' or a 'cause moving the court to its conclusion, not arbitrary or contrary to all the evidence,' and not mere 'ignorance of law, hardship on petitioner, and reliance on (another's) advice.'"); Hernandez v. Page, 580 So. 2d 793, 795 (Fla. 3d DCA 1991) ("Inadvertence or mistake of counsel without more does not constitute sufficient good cause to avoid dismissal under [Rule 1.070(j)]"). The rule of lenity requires that "good cause" in the Act should be construed with a meaning at least as demanding as that term has been construed in the civil statutes. §775.021(1), Fla. Stat. ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."); Key v. State, 296 So. 3d 469, 471 (Fla. 4th DCA 2020) ("Instead of the court arbitrarily choosing one of the competing interpretations, the rule [of lenity] provides that a court should apply

the interpretation that treats the defendant more leniently.").

In sum, the trial court's discussion of good cause at R155 starts the 45-day clock on May 9, 2016, and invalidates Sievers' written waiver of arraignment. That conclusion is wrong. The State's invocation of the rule 3.202 discovery provision was insufficient to stop the clock on the 45-day time limit. The trial court's reliance on the good cause provision to excuse the late filing was not justified.

This Court has analyzed the Act for an ex post facto challenge, describing the notice requirement as a benefit to defendants that they were not previously afforded, and which was not required by Hurst. See Perry v. State, 210 So. 3d 630, 636 (Fla. 2016), receded from in part on other grounds, Rogers v. State, 285 So. 3d 872, 885-86 (Fla. 2019).

> Section 2 of the Act amends section 782.04(1) to create a notice requirement whereby prosecutors must notify the defendant within forty-five days after arraignment of the aggravating factors the State intends to prove at trial. Id. at § 2. Though not required by the United State Supreme Court's decision in Hurst v. Florida, by providing notice of aggravating factors, this change in section 2 provides a benefit to capital defendants that they were not previously afforded.
>
> * * *

> The amended section 921.141(1) limits the State to presenting evidence of only those aggravating factors of which it provided notice to the defendant pursuant to section 782.04(1)(b), as amended by section 2 of the law. Id.

210 So. 3d at 636 (emphasis added). Sievers was denied the benefit conferred by the legislature in the Act when the trial judge refused to enforce the Act's notice requirement.

The constitutional principle of separation of powers prohibits a court from subverting the express terms of a statute to accommodate a prosecutor's mistake, but that is what the trial judge did. The State was statutorily precluded from seeking death by presenting aggravating factors to the jury after the prosecutor failed to timely file a notice. This Court should uphold the statute and reverse the death sentence.

ISSUE XIII: THE PROSECUTOR VIOLATED SIEVERS' CONSTITUTIONAL RIGHTS BY URGING THE JURY TO REJECT THE CONCEDED STATUTORY MITIGATOR

Mark Sievers had no prior criminal history, which is the first statutory mitigating circumstance listed in the death penalty statute. §921.141(7)(a), Fla. Stat. ("The defendant has no significant history of prior activity.") The prosecutor conceded in the penalty phase closing

argument that Sievers had no criminal history but told the jury to disregard this and find no mitigating circumstance was established. As reflected in the verdict, the jury followed his legally erroneous advice.

> Mark Sievers has no significant history of prior criminal activity. We agree with that. The defense has met its burden. We checked his criminal history. We agree. You don't have to use up time trying to figure out whether Mr. Sievers has a criminal history. He does not. okay? That burden is met.
>
> However, his lack of criminal history doesn't outweigh the aggravating circumstances. It doesn't outweigh that this murder was committed for financial gain. It doesn't outweigh the cold and calculated and premeditated nature of this murder.

R1361 After conceding the mitigating factor, the prosecutor instructed the jury to check the box for “NO” to the question of whether a mitigating circumstance was established.

> So, if one or more individual jurors find that one or more mitigating circumstances was established by greater weight of the evidence, check "no." It was not.

R1364 The State apparently used a PowerPoint slide to instruct the jury how to fill in the penalty verdict form. See R824 The jury followed the prosecutor’s instructions and checked the line for “NO” on question C on the verdict form indicating that no juror found that

a mitigating circumstance was established, R762, despite the State's explicit concession that Sievers had no criminal history.

The prosecutor persuaded the jury to reject the important undisputed statutory mitigator for a legally indefensible reason. This corrupted the jury's decision-making process. See Santos v. State, 629 So. 2d 838, 840 (Fla. 1994)(where the State concedes no significant history of prior criminal activity, "the factor cannot be discounted"); Hess v. State, 794 So. 2d 1249 (Fla. 2001) (trial court erred in failing to find statutory mitigator of no significant history of prior criminal activity).

The no prior history mitigator was an extremely important consideration that reflected on Sievers' entire 51 years of life. "[T]he less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). The mitigator is important because it shows, in conjunction with a defendant's age, "the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life." Id. at 10.

The Eighth Amendment requires the capital sentencer to focus on the individual characteristics of the offender. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("[T]he rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency").When the prosecutor urged the jury to reject the conceded statutory mitigator, he violated Sievers' rights under Eddings and the Eighth Amendment. The jury followed the prosecutor's instruction, with the result that the Eighth Amendment's requirement of reliability needed for a death sentence is lacking.

Eddings makes explicit that the sentencer may not refuse to consider any relevant mitigating evidence. The jurors could determine the weight to be given to the conceded statutory mitigator, but they could not give it no weight and exclude it from their consideration. Id. at 114-115; see also Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) ("when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved").

The constitutional violation is fundamental error where it would

only take one juror to vote for life, and the wrong response to question C on the verdict form shows that the decision for death was not properly reached. After question C on the verdict form was decided improperly, the other questions that followed on the verdict form could not have been considered correctly. The prosecutor's instruction to the jury to disregard the statutory mitigator was error that went to the heart of the case and violated Sievers' due process and Eighth Amendment rights.

After the jury's verdict, the prosecutor noted in his sentencing memorandum that the judge was required to find the statutory mitigator because it was conceded. R3985 at n.3 (Supp1-1090) (And it was conceded because it was true.) The Court, like, the individual jurors could determine the appropriate weight but neither of the cosentencers was entitled to reject the mitigator outright.

An alternative to the fundamental error analysis is ineffective assistance of counsel on the face of the record, which also requires reversal. The defense attorney should have objected to the prosecutor's urging the jury to ignore a concededly proven mitigator. There is no conceivable tactical or strategic reason for him not to

have made the objection. See, e.g., Ross v. State, 726 So. 2d 317 (Fla. 2d DCA 1998) (ineffective assistance on the face of the record where counsel failed to object to State's closing argument that denigrated evidence to the extent that it affected the integrity of the factfinding process): Benitez-Saldana v. State, 67 So. 3d 320 (Fla. 2d DCA 2011)(counsel ineffective for unintentionally conceding guilt where conflict in evidence would support acquittal); Faulk v. State, 222 So. 3d 621, 624 n.1 (Fla. 1st DCA 2017)(failure to request necessary jury instruction was ineffective on the face of the record). (If this Court concludes that the ineffective assistance claim would require more evidentiary development, Sievers reserves the right to raise it by postconviction motion.)

The defense attorney belatedly recognized the issue in his sentencing memorandum but characterized it as "juror error" rather than as prosecutorial misconduct and fundamental error. R824-25 The jurors' mistake in not finding this significant statutory mitigator was the direct product of the prosecutor's misstatement of law. This Court should reverse for a new penalty phase.

ISSUE XIV: THE TRIAL COURT VIOLATED SIEVERS' CONSTITUTIONAL RIGHT TO PRESENT MITIGATION BY REQUIRING REDACTION OF HIS DAUGHTER'S LETTER

Sievers' eldest daughter wrote to her father on August 20, 2016, when he was in jail awaiting trial. Before the defense could enter the letter into evidence at the penalty phase, the prosecutor objected to a portion where she expressed hope that he would not be killed, claiming that part of the document was "not appropriate." R1258-1263 The judge sustained the State's objection on the grounds that a victim's wish that a defendant not be killed is not admissible. In sustaining the prosecutor's objection to the exhibit, the trial judge stated:

> THE COURT: Okay. I think the portion where she says she loves him is relevant. I think if there's no objection from the State, I'll allow that portion.
>
> But if you want to present this, we need a redacted copy that would go to the jury, if this is going to be admitted, removing the line – three lines:
>
> "Is it possible they could kill you?"
>
> "I really hope not."
>
> "Please say no."

> You can leave the "I L Y." I'm assuming that is "I love you" behind it.

R1263 The original unredacted (not admitted) exhibit is at R2857-58. The admitted redacted exhibit is at R2859-60. The blacked-out text said: “Is it possible they could kill you? I <u>really</u> hope <u>NOT</u>. Please say no.” R2858 (emphasis in original).

Mark Sievers’ loving relationship with his daughters was central to his mitigation and plea for a life sentence during the penalty phase. The State’s successful objection kept the jury from seeing a crucial piece of evidence showing the reciprocal nature of that relationship. Neither of Sievers’ daughters testified. Other family members related things that Sievers did for his daughters, but testimony about his activities with his daughters cannot adequately substitute for a daughter’s own expression of her connection to her father. The fact that her connection withstood knowledge of what he was jailed for and facing was shown by the redacted passage. The defense attorney made the point that the passage was crucial mitigation.

> So, basically, we're submitting it to show the relationship between Mr. Sievers and his daughter, and that there was love

there, and that there was a caring, loving relationship, which we feel is certainly a mitigating circumstance.
* * * *
So I believe that this exhibit does – does shed light on the defendant's character, because it's a note from his daughter saying that she loves him and that she wants to basically protect him or values his life.

R1259-61

The State's representation to the Court that the daughter's wish expressed in the letter was inadmissible was legally wrong and based on a mischaracterization of the evidence. The redacted passage was not a statement of opposition to the death penalty in general, nor was it written under contemplation of being testimonial. The prosecutor's contention that a general statement of the victim's wishes for a life sentence is irrelevant in a death penalty sentencing proceeding—a dubious proposition after passage of Marsy's law—was not justification for excluding the mitigation in this case where the evidence had an alternative legitimate purpose.

"Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose." Breedlove v. State, 413 So. 2d 1, 6 (Fla. 1982). "When evidence that is admissible as to one party or for one purpose, but inadmissible as to another

party or for another purpose, is admitted, the court, upon request, shall restrict such evidence to its proper scope and so inform the jury at the time it is admitted." § 90.107, Fla. Stat.

The exclusion of the evidence violated Sievers' rights under the Eighth and Fourteenth Amendments. See Lockett v. Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."); Franklin v. Lynaugh, 487 U.S. 164, 184–85 (1988)("[A] State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty.") (O'Connor, J., concurring); Porter v. McCollum, 558 U.S. 30, 43 (2009) (rejecting claim that nonstatutory mitigating evidence would not have made a difference in the case).

The daughter's expression of hope conveyed in the letter to her father was important mitigation, and had the jury seen the excluded evidence, it likely would have considered the daughter's wishes as

significant mitigation showing that she reciprocated the affection that her father had for her, which was powerful evidence of the connection between them. The jury might well have reached a different conclusion as to whether any mitigation was proved, which was crucial to the outcome. The State cannot show beyond a reasonable doubt that the error could not have affected the jury's verdict, especially since it would have taken only one juror to recommend life and there was only one aggravator. State v. DiGuilio. 491 So. 2d 1129 (Fla. 1986).

In addition to the relevance of the evidence going to show the connection between father and daughter, the evidence was admissible under the victims' rights provisions in Article 1, section 16 of the Florida Constitution. Josephine Sievers was the victim's next of kin, so her preference for a life sentence could not be excluded without running afoul of her rights under the Marsy's Law provision in Article 1, section 16 of the Florida Constitution. The prosecution did not contend that the letter misrepresented the daughter's wishes. At the sentencing hearing, the trial judge accepted that the daughters, the victim's next of kin, did not want the death sentence.

R1006-07 The State produced a new victim impact statement written by the daughter that the judge noted was "similar in tone and meaning as to the postcard," in which the daughter expressed opposition to a death sentence. R1010,1014,1016 The judge afforded that little weight, but the jury or individual jurors might have weighed it differently. If it was a relevant consideration for one of the cosentencers, it was a relevant consideration for the other. The consideration of the evidence by the judge alone does not satisfy Florida law or the U.S. Constitution's requirements in capital sentencing proceedings. The error of excluding the crucial mitigation requires reversal for a new trial.

ISSUE XV: THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT VICTIM IMPACT EVIDENCE TO THE JURY, INCLUDING THE OVERLY PREJUDICIAL MADE-FOR-TV VIDEO OF TERESA SEIVERS

The trial court erred by permitting the State to present the jury with overly prejudicial "victim impact" evidence that eclipsed Sievers' penalty phase presentation. It is ironic that the judge *excluded* the mitigation evidence described in Issue XIV, which had evidentiary bearing on the jury's task of determining mitigating circumstances

but then *admitted* overly prejudicial victim impact evidence, which did not have evidentiary bearing on the jury's task. Prior to trial, the defense moved unsuccessfully to have all victim impact evidence presented to the judge alone. R353-361,408-418(motion),R496-498(response), R615-616(order) The motion asserted that the victim's high status in the community is not an aggravating factor and there was significant danger that the evidence would likely overwhelm the emotions of the jury and deflect the jury from its proper role. The motion also requested that the evidence be proffered outside of the presence of the jury. R357-58,359

Sievers' penalty phase began with the State calling Teresa Sievers' mother who read a long, emotional statement, infused with Christian references, in which, among other things, she compared her daughter to Mother Teresa, saying, "I used to call her my modern day Mother Teresa," and she "lived her life like Christ." R1244-52, 2717-18 The defense then unsuccessfully objected to the prosecution showing the jury a promotional video of Teresa Sievers that had been shot for a television program. R1235-1242, 1252-54, 2716, Exh. 123S

The trial court erred in overruling the defense's pretrial motion and the defense's in-court objection to the video. The video was not proper victim impact evidence, and it was far more prejudicial than probative. It should have been excluded under section 90.403, Florida Statutes. Showing it to the jury following the mother's testimony violated Sievers' rights under the Eighth and Fourteenth Amendments.

Payne v. Tennessee, 501 U.S. 808 (1991), established that victim impact evidence is not per se inadmissible, but Payne involved only a short statement of the murder victim's mother relating the sadness of the victim's young son. 501 U.S at 814. "[T]he only evidence of the impact of Payne's offenses during the sentencing phase was Nicholas' grandmother's description--in response to a single question—that the child misses his mother and baby sister." 501 U.S. at 826. Payne overruled the per se bar that had previously been established in Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989). But Payne recognized that unduly prejudicial evidence, even if labeled victim impact, violates due process. "In the event that [victim impact]

evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825.

The statement given by Teresa's mother in this case, detailing her grief and loss, Teresa's educational attainment, and her charitable work, was much more detailed than the evidence approved in Payne. In the video of Teresa's television show, she is first viewed in profile, speaking to someone off camera. In the second shot, she is seated on a sofa talking directly into the camera. She is made up and dressed to highlight her attractiveness for the television audience. The only plausible reason for showing the jury the video of Teresa on the television program was to inflame the jury's emotions and divert attention away from the mitigation offered by Sievers, and it was effective in accomplishing that objective.

Any attempt to humanize Mark Sievers directly following that presentation was futile after the indelible emotional impact created by the mother's statement and the video of Teresa, speaking into the camera. See Christine M. Kennedy, *Victim Impact Videos: The New-*

Wave of Evidence in Capital Sentencing Hearings, 26 Quinnipiac L. Rev. 1069, 1104 (2008) ("This new evidence in video form has its own characteristics, different from written or photographic evidence, that create the potential for more intense, more biased, minimally probative, and unfairly prejudiced emotional responses from jurors.").

The video of Teresa could not be cross-examined or countered by the defense. It was not relevant to proving an aggravating factor. While it lacked any probative value on the issues involving the statutory weighing process, its emotional impact was immeasurable. That emotional impact likely contributed to the jury finding no mitigation and that death was the appropriate penalty. The risk is great that the jury was moved to vote for death based on improper factors that correlated with the class and wealth of the victim, as well as her mother's hyperbolic comparison of her daughter to Mother Teresa and Christ. See Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 Am. Crim. L. Rev. 93, 107 (1997).

This Court should reverse for a new penalty phase because the trial court abused its discretion in denying Sievers' pretrial motion

and overruling his objection to unduly prejudicial victim impact evidence that violated his constitutional rights under the Eighth Amendment and the Due Process Clause of the U.S. Constitution, and corresponding provisions of the Florida Constitution.

ISSUE XVI: THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO HOLD A SPENCER HEARING BEFORE IMPOSING THE DEATH SENTENCE

The trial judge did not follow the mandatory procedure that this Court set forth in Spencer v. State, 615 So. 2d 688 (Fla. 1993), before imposing the death sentence. In Spencer, this Court clarified that the trial judge must hold a sentencing hearing to give the parties an opportunity to be heard, to object to the presentence report (as was done here), and for the defendant to be heard in person. Then the court must adjourn after the hearing to consider the appropriate sentence and set forth in writing the reasons for the sentence. "[A]fter hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence." Id. at 691. The judge should set the final sentencing on a separate date and impose sentence contemporaneously with the written order. Id. "[T]he Spencer rule is a mandatory one which must be followed in a

death penalty sentencing." Phillips v. State, 705 So. 2d 1320, 1323 (Fla. 1997)(Anstead, J., concurring). Failing to follow the procedure shows that a judge fails "to take seriously the independent judicial 'obligation to think through [the] sentencing decision.'" Id. at 1324 (quoting Gibson v. State, 661 So.2d 288, 293 (Fla.1995).

At the sentencing hearing on January 3, 2020, Mark Sievers made a statement and the judge received new evidence, including a letter written by Sievers' daughter asking for a life sentence. R1021-22,1029. The defense attorney was remarking that it was unusual for the sentencing memos to be required before the sentencing hearing, when the judge then indicated his intention to impose sentence that same day.

> MR. MESSORE: . . . . I didn't know if the Court was inclined to render a decision today. Otherwise, we were going to be asking you leave to amend our –
>
> THE COURT: I am going to issue a sentence today.
>
> MR. MESSORE: You are.
>
> THE COURT: Yes, sir.

R1021 After the judge imposed the sentence, he said, "And I'll sign the order today and send it down," R1030. The clerk time stamped

the judge's 11-page sentencing order at 4:04 p.m. the same day. R834 So there was no Spencer hearing, just a sentencing hearing, which violates this Court's mandatory procedure.

Sievers' attorney did not object when the judge said he intended to impose sentence immediately, but an objection would have been a futile gesture where it was obvious that the judge had made up his mind. See Bailey v. State, 224 So. 2d 296, 297 (Fla. 1969) (attorney not required to pursue useless course where judge announced in advance it would be fruitless).

And, anyway, the error is structural because it is impossible to tell now whether the judge took seriously the judicial obligation to think through the sentencing decision and consider the new evidence presented before deciding on a death sentence or whether he was determined to impose the death sentence before carefully considering all the evidence. Alternatively, the failure of counsel to raise an objection to the process was ineffective assistance apparent on the face of the record as there was no conceivable strategy that would have justified not objecting when the judge said he was going to

announce his sentence. This Court should reverse and remand for a new judge to preside over a resentencing proceeding.

ISSUE XVII: WHERE THE ONLY EVIDENCE SUPPORTING THE CONVICTION AND THE SINGLE AGGRAVATOR IS THE CODEFENDANT'S UNCORROBORATED TESTIMONY THAT CONFLICTS WITH HIS PRETRIAL STATEMENTS AND WAS INDUCED THROUGH THE STATE'S PROMISE OF LENIENCY, THE DEATH SENTENCE IS UNCONSTITUTIONAL

The evidence for CCP, and hence the death sentence, is insufficient and flawed for the same reason that Wright's testimony was incompetent evidence on which to sustain the convictions, discussed in Issue X. The State offered no new evidence in the penalty phase, so Wright's guilt-phase trial testimony was the only evidence offered for CCP. Wright's trial testimony conflicted with his pretrial statements exculpating Sievers. His testimony never inculpated Sievers until he attempted to negotiate for a reduced sentence. The terms of his plea bargain render his testimony so unreliable as to be incompetent evidence on which to base the facts necessary for the aggravating factor, where his sentencing had been deferred and the prosecutor had unfettered discretion to deprive him of the benefit of the bargain if not satisfied with his testimony.

Imposition of a death sentence based on Wright's inherently unreliable testimony given under those circumstances violates the Eighth Amendment's prohibition against cruel and unusual punishment, as well as due process requirement of fundamental fairness in the Fifth and Fourteenth Amendments and the Florida Constitution.

ISSUE XVIII: PROPORTIONALITY REVIEW IS AN ESSENTIAL COMPONENT OF FLORIDA'S CAPITAL SENTENCING SYSTEM AND NECESSARY TO AVOID AN ARBITRARY AND CAPRICIOUS RESULT; THE SENTENCE SHOULD BE REDUCED TO LIFE BECAUSE THIS IS NOT AMONG THE MOST AGGRAVATED AND LEAST MITIGATED FIRST-DEGREE MURDERS

The death penalty cannot be imposed under sentencing procedures which create a substantial risk it will be inflicted in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238(1972). There must be a meaningful basis for distinguishing the few cases in which capital punishment is imposed from the many in which it is not. Gregg v. Georgia, 428 U.S. 153,188 (1976)(citing Justice White's concurring opinion in Furman). For nearly five decades, this Court has considered proportionality review to be "a unique and highly serious function of [the] Court, the purpose of

which is to foster uniformity in death-penalty law." Crook v. State, 908 So.2d 350,356 (Fla. 2005); Urbin v. State, 714 So.2d 411,417 (Fla. 1998). "The inquiry is two-pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. . . so as to justify the imposition of death as the penalty." Crook, 908 So.2d at 357 (emphasis in opinion), see also Davis v. State, 121 So.3d 462,499 (Fla. 2018). In Urbin, 714 So.2d at 416, this Court recognized that "[t]he requirement that death be administered proportionately has a variety of sources in Florida law," one of which was the state constitution's prohibition against unusual punishments. Another source, however, is legislative intent to comply with Furman's prohibition of the arbitrary imposition of death. Id. at 416.

When the United States Supreme Court upheld the constitutionality of Florida's post-Furman death penalty law in 1976, it emphasized that any risk of arbitrary or capricious imposition is minimized by Florida's system of appellate review, to determine whether the ultimate penalty is or is not warranted.

Proffitt v. Florida, 428 U.S. 242,252-53 (1976). Trial judges' decisions to impose death "are reviewed to ensure that that they are consistent with other sentences imposed in similar circumstances," and thus in Florida it is no longer true that there is "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." Proffitt, 428 U.S. at 253. The U.S. Supreme Court subsequently decided in Pulley v. Harris, 465 U.S. 37,38-41 (1984), that comparative proportionality review was not required in California, because that state's 1977 statutory scheme provided adequate safeguards to prevent arbitrary and capricious imposition of the death penalty. 465 U.S. at 51-54. Pulley v. Harris does not categorically hold that proportionality review is never constitutionally required; it depends on the presence or absence of sufficient other "checks on arbitrariness."

In 2002, the Florida Constitution was amended to provide that the state's prohibition against cruel and unusual punishment shall be construed in conformity with decisions of the U.S. Supreme Court which interpret the Eighth Amendment's prohibition against cruel and unusual punishment. Art. 1, §17, Fla. Const. Whether a

U.S. Supreme Court decision automatically modifies Florida law depends on whether the Supreme Court decision "is both factually and legally on point" and "whether it is controlling." Smallwood v. State, 113 So.3d 724,730 (Fla. 2013). Since Pulley v. Harris expressly decides only whether California's 1977 capital sentencing scheme provides sufficient safeguards against arbitrary imposition of the death penalty even without mandatory proportionality review, it is neither controlling in Florida nor is it factually and legally on point.

In 2014, Justices Canady and Polston announced their conclusion that proportionality review is prohibited in this state by the (then twelve years old) conformity clause, coupled with the (then thirty years old) Pulley v. Harris decision. Yacob v. State, 136 So.3d 539,557-63 (Fla. 2014)(Canady J., joined by Polston, C.J., concurring in part and dissenting in part). The plurality opinion in Yacob and the concurring opinion of Justice Labarga each emphasized that proportionality review arises from a variety of sources in Florida and federal law and it is essential to guard against the arbitrary imposition of the death penalty. 136 So.3d at

546-550,552-57. The plurality opinion points out another fatal flaw in the dissent's conformity clause analysis, i.e., its implicit assumption that what the U.S. Supreme Court said about California's 1977 capital sentencing scheme necessarily applies to Florida's quite different scheme. 136 So.3d at 549 n.2.

This Court receded from Yacob and adopted the position advocated by Justices Canady and Polston in their dissent in that case, in Lawrence v. State, 308 So.3d 544 (Fla. 2020). Justice Labarga, who had authored a concurring opinion in Yacob, was the lone dissenter in Lawrence. He characterized the majority decision as its "most consequential step yet in dismantling the reasonable safeguards" in Florida's capital sentencing system. Lawrence, 308 So.3d at 552 (Labarga, J. dissenting)(emphasis supplied).

This court's abandonment of proportionality review renders Florida's system unconstitutional. Florida's current system of sixteen aggravators is very different from the 1977 California system which was upheld in Pulley v. Harris. It is possible that this Court's proportionality review may have saved the continued viability of Florida's system. See Jones v. State, 705 So.2d 1364,

1366 (Fla. 1998). But now that this Court has abandoned proportionality review in favor of minimalist policing (or no policing), whatever meaningful safeguards Florida may once have had to comply with Furman have been eviscerated. Without proportionality review Florida's system, especially as administered by this Court since 2019, lacks the safeguards against arbitrariness that were present in California's 1977 statute and are required by Furman.

Contrary to the conclusion in Lawrence, proportionality review is not prohibited by the Florida Constitution's conformity clause, and because of the absence of other adequate safeguards in Florida to guard against arbitrary imposition of the death penalty, proportionality review is necessary under the Eighth and Fourteenth Amendments of the United States Constitution to perform the required narrowing function.

The present case falls squarely under the general rule that death is not appropriate in a single-aggravator case. See Jones v. State, 705 So.2d 1364 (Fla. 1998) (noting that "[t]o rule otherwise on this issue would put Florida's entire capital sentencing scheme at risk"); see also Besaraba v. State, 656 So. 2d 441 (Fla. 1995)

(reversing death sentence in single aggravator case). The only motivation offered by Curtis Wright for Sievers' part in the scheme was his desire to protect his daughters from danger. This Court considers "the nature and quality of [the aggravating and mitigating] factors as compared with other similar reported death appeals." Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). CCP can be a weighty aggravator, but the facts underlying it in this case will not lead to the conclusion that this case is among the most aggravated of reported death appeals where Sievers was not present for the murder. Nor is this case among the least mitigated of death cases. The State conceded the statutory mitigator of no prior criminal history and the judge found other factors demonstrating good character, including that Sievers was a good father to his daughters. A proportionality review analysis requires reversal. To uphold the sentence under these circumstances would demonstrate the lack of safeguards against arbitrary and capricious implementation of the death penalty.

CONCLUSION

Mark Sievers respectfully requests this Court to reverse the

judgment and sentence.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the e-filing portal to Assistant Attorney General Christina Pacheco at christina.pacheco@myfloridalegal.com, cappapp@myfloridalegal.com, deborah.speer@myfloridalegal.com, paula.montlary@myfloridalegal.com, on this 22nd day of March, 2021.

CERTIFICATION

I certify, as required by Fla. R. App. P. 9.210 this document contains 31,280 words (Motion to Accept Enlarged Brief pending), excluding parts of the document exempted by Fla. R. App. P. 9.045(e). I further certify that this document complies with the typeface requirements of Fla. R. App. P. 9.045(b).

Respectfully submitted,

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