IN THE SUPREME COURT OF FLORIDA

MARK D. SIEVERS,	:	
Appellant,	:	
vs.	:	Case No. SC20-225
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPELLANT'S MOTION FOR REHEARING

Appellant, MARK D. SIEVERS, by and through undersigned counsel, moves for rehearing in this capital direct appeal, pursuant to Florida Rule of Appellate Procedure 9.330, and states:

1. This Court has overlooked or misapprehended points of law and fact in affirming Mr. Sievers' case. This motion addresses only this Court's disposition of Issues Five, Seven, Ten, and Twelve, but no claim previously raised is hereby abandoned.

ISSUE FIVE: Wright's February 2016 Meeting with the State

2. This Court's opinion overlooks a significant part of the argument that was presented in the Initial Brief regarding exclusion of the full Curtis Wright video. The opinion refers only to Sievers'

attempt to introduce into evidence "the video of the 'blip' discussion at the February 2016 meeting." Slip Opinion at 16. In framing the issue as concerning solely the exclusion of the short "blip" section of the video this Court has overlooked that Sievers attempted to introduce the "quite lengthy" full video of the February meeting (T3899) and the trial court excluded two exhibits, the full video and the short excerpted clip, both of which were proffered exhibits. Sievers did attempt to introduce the short excerpt of the February 2016 meeting where the prosecutor referred to Wright's wife as a blip, but exclusion of the full video was the main focus of Issue Five in the Initial Brief, (IB at 75), and that was well-understood by the State, as the Answer Brief addresses the exclusion of the full video (AB at 66-67). This Court's limited discussion of the exclusion of the short excerpted clip overlooks the broader argument made in the Initial Brief.

3. Moreover, in addressing the issue, this Court's opinion does not address the rationale that was argued by the State and relied on by the trial judge in excluding the full video of the February meeting. The prosecutor's objection was hearsay and the trial court excluded the two video exhibits as hearsay with no exception. T3897-3901

Referring to the hearsay rule, the judge said, “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.

4. This Court’s affirmance is based on an alternative rationale where the opinion states: “*Regardless of the merits of the State’s hearsay objection* or of the State’s objection to the timing of Sievers’ attempt to introduce the footage, we conclude that the video evidence was cumulative and therefore properly excluded.” Slip Op. at 16-17 (emphasis added).

5. This Court’s rationale for upholding the exclusion of the defense exhibits as cumulative is a theory that was not advanced by the State on appeal. The State’s discussion of Issue Five in the Answer Brief does not assert that the video was cumulative. Instead, the Answer Brief discusses hearsay because that was the State’s objection in the trial court and the basis for the judge’s ruling. AB at 66-76

6. In affirming the trial court on an alternative theory that the exhibit was cumulative, which was not a theory briefed by either party in this case, this Court has overlooked the proper application

of section 90.403, Florida Statutes, when that statute is used to justify exclusion of a defense exhibit. That section does not justify exclusion of a defense exhibit unless "the probative value of the evidence is substantially outweighed by the danger of … needless presentation of cumulative evidence." See Gutierrez v. Vargas, 239 So. 3d 615, 625 (Fla. 2018) ("cumulativeness alone is not sufficient grounds to exclude evidence: the probative value of the evidence must be 'substantially outweighed' by the danger of '*needless* presentation of cumulative evidence.'"); Samiian v. Johnson, 302 So. 3d 966, 982 (Fla. 1st DCA 2020) (same), review denied, SC20-1505, 2021 WL 872300 (Fla. Mar. 9, 2021). Further, "[t]he burden is on the party attempting to exclude the evidence to make that showing." State v. Gerry, 855 So. 2d 157, 159 (Fla. 5th DCA 2003).

7. Application of section 90.403 as an alternative basis for affirmance requires a finding as to the probative value of the proffered evidence, which is the trial judge's function. The trial judge here made no finding that would justify a tipsy coachman right-for-the–wrong-reason exclusion of defense evidence as being cumulative under the test of section 90.403, and it is not an appellate court's function to make that finding in the first instance. "[A]n appellate

court cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue." Bueno v. Workman, 20 So. 3d 993, 998 (Fla. 4th DCA 2009); see also Kozel v. Kozel, 302 So. 3d 939, 953, n.6 (Fla. 2d DCA 2019)(and cases cited therein); Monticello Drug Co. v. Porter Clothing Co., 149 So. 25, 27 (Fla. 1933) ("The Supreme Court is possessed only of appellate power. It would be inappropriate, if not actually beyond its jurisdiction, for it to undertake to make an original determination of the facts in an equity case where it affirmatively appears that the factual issues involved have never been considered or determined by the circuit court as a court of first instance."); Jones v. U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr., 292 So. 3d 459, 462 (Fla. 2d DCA 2020)(holding that an appellate court is not permitted to make initial determinations about the factual effect and importance of evidence).

8. Further, the prosecutor never actually made a section 90.403 objection in the trial court. See Reynolds v. State, 660 So. 2d 778, 780 (Fla. 4th DCA 1995) (holding that the trial court is not alerted to the fact that the objection is based upon a contention that the probative value of the otherwise admissible evidence is outweighed

by the danger of unfair prejudice by simply objecting to testimony on the grounds that it is "cumulative"); Bass v. State, 35 So. 3d 43, 46 (Fla. 1st DCA 2010) (same).

9. The tipsy coachmen analysis relied on to affirm Issue V is not fitting here because the trial court made an evidentiary ruling on a hearsay rationale, the State did not make a section 90.403 objection at trial nor advance that argument on appeal, and the trial court did not make any factual findings on the weight of the probative value being *substantially outweighed* by the *danger* of needless presentation of cumulative evidence.

10. And the trial court could not have made a section 90.403 ruling to exclude the exhibits in this instance because there was no danger of needless presentation of cumulative evidence where the Defense had barely begun to put on its case when the prosecutor raised the objection and the judge excluded the videos. The video exhibit was new evidence being introduced to show how the investigation unfolded and to demonstrate how Wright's bias in favor of the State was induced through the sweet deal he made with the prosecution in exchange for his testimony. T3898-3899

11. The excluded video could not rise to the level of "unnecessary

cumulativeness" under section 90.403 because it was qualitatively different from any testimony that had come in during the State's case. See Gutierrez v. Vargas, 239 So. 3d 615, 626 (Fla. 2018). Evidence that differs in quality cannot be deemed cumulative. See Cox v. State, 189 So. 3d 221, 223 (Fla. 2d DCA 2016) ("testimony would have differed in quality and thus would not have been cumulative") (and see cases cited therein); Defuria v. State, 328 So. 3d 389 (Fla. 2d DCA 2021) (same).

12. Because Curtis Wright was the single critical witness for the State and the video would have put his relationship with the State on graphic and stunning display, the fact that he was impeached during cross in the State's case, does not make the video repetitious. See Cardona v. State, 826 So. 2d 968 (Fla. 2002) (discussing the cumulative effect of suppressed evidence in terms of materiality) (citing United States v. Rivera Pedin, 861 F.2d 1522, 1530 (11th Cir. 1988)).

13. The audio-visual of Wright's meeting with the State's representatives packs a much bigger punch in demonstrating Wright's bias than anything the jury heard during the first part of the trial in the State's case. There is a good reason the prosecution

did not want the jury to see a graphic depiction of Wright's desperation to sign the deal and please his handlers, the official representatives of the State of Florida, who held all the cards at the meeting. This is the bias that is referred to by the defense counsel at trial in his explanation of the relevance of the video. T3898-99

14. This Court's statement in the opinion misapprehends the bias discussion when it states that the video would show "Wright's bias *to protect his wife*." Slip op. at 16 While the video showed that Wright was continuing to negotiate the terms of his plea bargain and wanted to protect his wife, it is Wright's bias in favor of the State that makes the hearsay objection non-meritorious.

15. And the full video shows that Wright was being coached by the investigators, which goes to how the investigation unfolded. "When a particular witness is crucial to the State's case, evidence of coaching is especially material to that witness's credibility." Cardona, 826 So. 2d at 981.

16. This Court should reconsider the affirmance of Issue Five and reverse for a new trial. The exclusion of this "crucial" video evidence (T3899) violated Sievers' Constitutional rights under the Fifth, Sixth, and Fourteenth Amendments and cannot be justified by the

alternative rationale of cumulativeness.

ISSUE SEVEN: Neighbor's Testimony

17. In denying this claim as to the neighbor's testimony recounting snippets of an argument she overheard between the husband and wife a month and a half before the murder (T3790-93), this Court holds that there is no reasonable possibility that the error of admitting the testimony contributed to the conviction, referencing the closing arguments. But this Court has overlooked the possibility that the jury improperly used the testimony to corroborate the testimony of Wright as to Sievers' motivation.

18. The jury apparently discounted any pecuniary gain motivation, which left only Wright's testimony about Sievers' marital problems to explain Sievers' alleged motive. Wright testified extensively about that alleged motivation. He said that Sievers said they were having marital problems, that Teresa was having an affair, and that she was leaving him and taking the children out of state. T2761-2766, 2769-2771 There was no other evidence put on to corroborate that alleged motive through any source. The neighbor's testimony was put on by the State to corroborate that motive. There is no possible relevancy or purpose for the neighbor's testimony if it were not offered to prove

the truth of the matters asserted in the words uttered, so it was hearsay that cannot be considered harmless error. This Court should reconsider these overlooked facts and reverse for a new trial.

ISSUE TEN: Motion for Judgment of Acquittal

19. The point made on appeal as to insufficiency of the evidence is that Wright's testimony alone will not satisfy the Constitutional reliability standards to justify Sievers' conviction and death sentence given (1) the lack of corroboration, meaning some independent verification of Wright's testimony implicating Sievers, (2) the terms of the deal made with Wright, and (3) his known propensity to lie to the police and prosecutors about the crime. (Initial Brief at 109-114).

20. This Court's opinion overstates the evidence against Sievers by asserting that there was cell phone, GPS, and video surveillance records that "documented . . . Sievers' painstaking planning," implying that the State had evidence independent of Curtis Wrights' testimony that tied Sievers to the crime. Slip op. at 7 In denying the claim raised in Issue X regarding the motion for judgment of acquittal, this Court's opinion states that "the State *corroborated* Wright's testimony with cell phone evidence showing their communications leading up to the murder." Slip op. at 25 (emphasis

added). By these statements, this Court has overlooked the deficiency in the State's case and given it an unmerited boost. There was no GPS or video surveillance that addressed Sievers' involvement, and the evidentiary value of the cell phone records is not as represented.

21. For the purpose of tying Sievers to a murder conspiracy, the cell phone evidence has virtually no value. It cannot be accurately characterized as *corroborative* of Wright's testimony inculpating Sievers in the murder. The cell phone record evidence shows only that the two men communicated orally with prepaid phones in addition to their regular cell phones, but *what* they talked about is *not* known and the records do not corroborate what Wright says they talked about.

22. The independent evidence of the cell phone *usage* that the State developed is not inculpatory because it does not show or indicate any illegal purpose. In telling the investigators about their cell phone usage, Wright could have been using innocent conduct to beef up his lies in order to convince the State to give him a deal. As a technology expert, Wright would have known that the investigators would be able to confirm through phone records that Wright and

Sievers did use the prepaid phones to communicate. But Wright alone indicated a nefarious purpose to the communications where there is no proof in those records of anything that was discussed.

23. The phone records are not evidence that should be characterized as corroboration for Wright's story about Sievers' involvement in the murder, where the term corroboration suggests that there is more evidence of Sievers' involvement than the story told by Wright. The bottom line is that evidence of Sievers' involvement rests entirely on the credibility of Wright, who offered *nothing* in the way of independent confirmation that Sievers' planned a murder.

ISSUE TWELVE: Notice of Intent to Seek Death Penalty

24. In denying this claim, this Court cites to and follows Massey v. State, 609 So. 2d 598, 600 (Fla. 1992). But this court has overlooked two big textual distinctions between the statute at issue here with its 45-day notice provision and with the notice provision in the habitual offender (HO) statute, § 775.084, Fla. Stat, at issue in Massey. The HO provision does not provide for any defined time limit of days in which to serve the notice before sentencing and the HO statute does provide in the text a specific purpose to be served by the notice

requirement: “Written notice shall be served on the defendant and the defendant's attorney *a sufficient time* prior to the entry of a plea or prior to the imposition of sentence *in order to allow the preparation of a submission* on behalf of the defendant.”

25. In Massey, although no notice had been served on the defendant prior to the defendant’s sentencing, this Court found that the noncompliance with the written notice provision was harmless because the “purpose of requiring a prior written notice is to advise of the state's intent and give the defendant and the defendant's attorney an opportunity to prepare for the hearing,” and that purpose had been accomplished where the defendant’s attorney had been served with notice so the defendant had actual notice before the hearing.

26. Here, in contrast, this Court cannot say what purpose the Legislature intended to be served by the 45-day notice requirement in the death penalty statute without making an assumption and reading words into the death penalty statute. But to do so violates this Court’s own rules of statutory construction. See Statler v. State, 47 Fla. L. Weekly S257 (Fla. Oct. 13, 2022) (“We begin, as always, from the premise that ‘[i]n construing this statute, this Court must

give the 'statutory language its plain and ordinary meaning,' and is not 'at liberty to add words . . . that were not placed there by the Legislature.'" (quoting McDade v. State, 154 So. 3d 292, 297 (Fla. 2014)).

27. This Court must add words found in the HO statute that are not present in death penalty statute to assume that the 45-day notice requirement in the death penalty statute is meant to serve the same purpose discussed in Massey of allowing the defendant and the defendant's attorney an opportunity to prepare a submission for the sentencing hearing.

28. It is faulty to assume that the legislature had that same purpose in mind when one accounts for the material variation between the terms of the HO statute--with no defined term of days for notice to be given *before* a sentencing hearing--and the terms of the death penalty statute--with its 45-day limit for notice to be given *after* Arraignment. The stark variation in terms for the notice to be given at the beginning of a case and notice required at the end of a case suggests a variation in purpose and meaning. See Thompson v. DeSantis, 301 So. 3d 180, 186 (Fla. 2020) ("one canon of construction holds that "a material variation in terms suggests a

variation in meaning.”") (quoting Scalia & Garner, Reading Law: The Interpretation of Legal Texts 170 (2012)). In almost all death penalty cases, the sentencing hearing will occur many months or years after the 45-day time limit expires, so it is highly likely that the Florida Legislature had a different purpose in mind when it fashioned the 45-day-after-arraignment notice requirement than the purpose expressly stated in the HO statute. This Court's decision makes no allowance for that possibility of a distinctly different purpose to be served by the death penalty statute's notice provision time limit. And the fact that no purpose is expressly stated by the legislature in the statutory text of the death penalty statute makes it impossible for this Court to accurately state that the failure to give the required notice was harmless error without making judicial assumptions about the purpose for the notice.

29. By holding the prosecutor's clear violation of the statute to be harmless, this Court's treatment of the 45-day requirement here renders the statutory notice requirement ineffective, which violates another canon of construction, that of a presumption against ineffectiveness. See Thompson v. DeSantis, 301 So. 3d 180, 185–86 (Fla. 2020) ("This implausible reading of the relevant constitutional

provisions conflicts with the 'presumption against ineffectiveness' canon, which 'ensures that a text's manifest purpose is furthered, not hindered.'") (quoting Scalia & Garner, Reading Law at 63).

30. Correctly interpreting the statute requires adherence to the supremacy-of-text principal and to expound every word in its plain meaning to arrive at a fair reading of the text. See Ham v. Portfolio Recovery Associates, LLC, 308 So. 3d 942, 947 (Fla. 2020). In this case, a reasonable reader would have understood this text at the time it was issued to be a condition precedent to the State's ability to seek death sentence: "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." § 782.04, Fla. Stat. It is apparent by its plain language that the intent of the statutory provision at issue was to impose a statutory time limit on the prosecutor's decision to seek a death sentence. See Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1095 (Fla. 2005) (upholding statute with 30 day time limit acting as a condition precedent to filing claim for insurance benefits). There is

no doubt that the statute was not followed. To say that harmless error excuses noncompliance is to depart from this Court's own first principals in interpreting statutory mandates.

31. On a separate point, this Court's opinion states that "Sievers was arraigned on May 9, 2016." Slip op. at 28 This statement of fact overlooks that Sievers filed and served the State Attorney with a written plea of not guilty and waiver of arraignment on May 5, 2016. R83 The unacknowledged written plea of not guilty is central to Sievers' position on this claim because the May 5th date puts the State's discovery filing outside the 45-day time limit. This Court should amend its opinion to discuss the relevance of the May 5 written plea of not guilty because the law should be clear on what effect a written plea of not guilty has in relation to the prosecutor's duty to provide the statutory notice. That could be important, assuming the notice provision is a meaningful requirement.

WHEREFORE, Appellant, Mark Sievers, asks this Court to grant this motion for rehearing and reverse the judgment and sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at capapp@myfloridalegal.com and to Christina Z. Pacheco at christina.pacheco@myfloridalegal.com, stephanie.tesoro@myfloridalegal.com, and paula.montlary@myfloridalegal.com, on this 1st day of December, 2022.

Respectfully submitted,

/s/Karen M. Kinney

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