Filing # 130162264 E-Filed 07/07/2021 10:55:34 AM

RECEIVED, 07/07/2021 10:56:27 AM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF APPELLANT

HOWARD L. “REX” DIMMIG,II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

KAREN M. KINNEY
Assistant Public Defender
FL BAR NO 856932

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 3

PART I: ERRORS IN THE CONVICTIONS (I-XI) 4

ISSUE I: JUDICIAL REBUTTAL TO SIEVERS' CLOSING ARGUMENT 4

ISSUE II: PROSECUTORIAL MISCONDUCT IN THE STATE'S REBUTTAL CLOSING 14

ISSUE III: ALLOWING DETECTIVE LEBID TO OPINE ON HIS ABILITY TO TELL WHEN WRIGHT WAS LYING 16

ISSUE IV: WRIGHT'S TESTIMONY THAT HE PRAYED BEFORE CHANGING HIS STORY AND TELLING THE TRUTH.............. 18

ISSUE V: EXCLUDING THE VIDEO OF WRIGHT'S PROFFER AND THE CLIP FROM THAT VIDEO WHERE THE PROSECUTOR DISCUSSED THE INVOLVEMENT OF WRIGHT'S WIFE 20

ISSUE VI: PROHIBITING CROSS-EXAMINATION OF WRIGHT ON A POSSIBLE SEXUAL MOTIVE FOR THE MURDER 29

ISSUE VII: ADMITTING THE TESTIMONY OF KIMBERLY TORRES, SIEVERS' NEIGHBOR 31

ISSUE VIII: ADMITTING GRUESOME AUTOPSY PHOTOS THAT WERE NOT RELEVANT TO ANY ISSUE IN DISPUTE 33

ISSUE IX: THE CUMULATIVE EFFECT OF THE TRIAL ERRORS REQUIRES REVERSAL FOR A NEW TRIAL............................ 34

ISSUE X: DENIAL OF MOTION FOR JUDGMENT OF ACQUITTAL WHERE WRIGHT'S TESTIMONY WAS INHERENTLY UNRELIABLE AND NOT COMPETENT EVIDENCE TO SUPPORT THE CONVICTIONS........................35

ISSUE XI: DENIAL OF MOTION FOR JUDGMENT OF ACQUITTAL ON CONSPIRACY COUNT 40

PART II: SENTENCING ERRORS (XII-XVIII) 42

ISSUE XII: PROSECUTOR'S FAILURE TO GIVE NOTICE OF ANY AGGRAVATING FACTOR WITHIN 45 DAYS OF ARRAIGNMENT...42

ISSUE XIII: URGING JURY TO REJECT CONCEDED STATUTORY MITIGATOR...44

ISSUE XIV: RIGHT TO PRESENT MITIGATION VIOLATED BY REQUIRING REDACTION OF SIEVERS' DAUGHTER'S LETTER...45

ISSUE XV: VICTIM IMPACT EVIDENCE AND THE OVERLY PREJUDICIAL MADE-FOR-TV VIDEO OF TERESA SIEVERS 46

ISSUE XVI: FAILURE TO HOLD A SPENCER HEARING..................47

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 PENALTY IS UNCONSTITUTIONAL 49

ISSUE XVIII: PROPORTIONALITY REVIEW 49

CONCLUSION 50

CERTIFICATE OF SERVICE 51

CERTIFICATE OF COMPLIANCE 51

TABLE OF CITATIONS

Federal Cases

Eddings v. Oklahoma,
455 U.S. 104 (1982) 45

Ford v. Wainwright,
477 U.S. 399 (1986) 37

Lockett v. Ohio,
438 U.S. 586 (1978) 45

Payne v. Tennessee,
501 U.S. 808 (1991) 47

United States v. Brown,
720 F.2d 1059 (9th Cir. 1983) 15

United States v. Hilton,
772 F.2d 783 (11th Cir. 1985) 16

State Cases

Broward Executive Builders, Inc. v. Zota,
192 So. 3d 534 (Fla. 4th DCA 2016) 36, 39

Cardenas v. State,
993 So. 2d 546 (Fla. 1st DCA 2008) 9

Craft v. State,
312 So. 3d 45 (Fla. 2020) 48

Farrell v. State,
273 So. 3d 43 (Fla. 4th DCA 2019) 30

Felton v. State,
523 So. 2d 775 (Fla. 3d DCA 1988) 2

Forsythe v. Longboat Key Beach Erosion Control Dist.,
604 So. 2d 452 (Fla. 1992) 43

Gibson v. State,
661 So. 2d 288 (Fla. 1995) 47

Goodwin v. State,
751 So. 2d 537 (Fla. 1999) 35

Hawn v. State,
300 So. 3d 238 (Fla. 4th DCA 2020) 20

Jackson v. State,
213 So. 3d 754 (Fla. 2017) 34

Jackson vs. State,
498 So. 2d 406 (Fla. 1986) 45, 46

Jacques v. State,
883 So. 2d 902 (Fla. 4th DCA 2004) 6

Jones v. State,
648 So. 2d 669 (Fla. 1994) 34

Kasischke v. State,
991 So. 2d 803 (Fla. 2008) 43

Kellum v. State,
104 So. 2d 99 (Fla. 3d DCA 1958) 6

King v. State,
89 So. 3d 209 (Fla. 2012) 29

Kirkman v. State,
233 So. 3d 456 (Fla. 2018) 19

Latin Am. Ben. Ctr., Inc. v. Johstoneaux,
257 So. 2d 86 (Fla. 3d DCA 1972) 3

Lawrence v. State,
308 So. 3d 544 (Fla. 2020) 50

Lee v. State,
264 So. 3d 225 (Fla. 1st DCA 2018) 7, 8

McDuffie v. State,
970 So. 2d 312 (Fla. 2007) 35

McKinney v. Com.,
60 S.W.3d 499 (Ky. 2001) 39

Nixon v. State,
572 So. 2d 1336 (Fla. 1990) 34

Phillips v. State,
705 So. 2d 1320 (Fla. 1997) 47

Robertson v. State,
187 So. 3d 1207 (Fla. 1990) 47

Robinson v. State,
556 So. 2d 450 (Fla. 1st DCA 1990) 36

Scala v. State,
213 So. 3d 1085 (Fla. 3d DCA 2017) 16

Seibert v. State,
923 So. 2d 460 (Fla. 2006) 18

Shelly v. State,
262 So. 3d 1 (Fla. 2018) 20

Sparre v. State,
289 So. 3d 839 (Fla. 2019) 3

Stabb v. State,
31 A.3d 922 (Md. 2011) 9

State v. Castagna,
187 N.J. 293, 901 A.2d 363 (2006) 10

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 14, 35

State v. Gomes,
20407, 2021 WL 262029 (Conn. Jan. 26, 2021) 8

State v. Stevenson,
652 N.W.2d 735 (S.D. 2002) 10

Tumblin v. State,
29 So. 3d 1093 (Fla. 2010) 18

Woodbury v. State,
46 Fla. L. Weekly S74 (Fla. Apr. 15, 2021) 48

State Statutes

§ 90.104, Fla. Stat 30, 46

§ 90.611, Fla. Stat. 19

§ 775.021(1), Fla. Stat 42

§ 921.141(2)(b)(2), Fla. Stat. 44

State Rules

Fla. R. App. P. 9.200 3

Other Authorities

1 Fla. Prac., Evidence § 104.3 (2021 ed.) 30

PRELIMINARY STATEMENT

The circuit court clerk's original "Record of Exhibit List" filed December 12, 2019, (R807), describes Defense Exh. 4A as "Disc of Proffer from 2/19/2016." While this appeal was pending, and after Sievers' first motion to supplement was granted, on June 15, 2020, the clerk filed a "Corrected Record of Exhibit List," which says it is "Updated to correct description of Exhibit 4A." R4872-74 In this document, Defense Exh. 4A is described as "**1 Envelope containing:** 1 CD & 1 Thumb drive of proffer from 01/19/2016." (R4872-4874)

The disc in that envelope—understood by all during the trial to be the full video of the February meeting between the prosecutor and Curtis Wright—was entered into the record with the thumb drive that contained the clip. The State's assertion that "defense counsel never actually entered that video into evidence as a proffered exhibit" is false.

The trial judge has the responsibility of determining what exhibits were put in the record during the trial. The trial judge's

ministerial function regarding control over the evidence should not be appropriated and conflated with an appellate preservation issue. The State has never asserted to the trial judge that the full video on the disc is not a proper appellate exhibit, and that may be because the disc was working at the trial, as evidenced by the Assistant State Attorney's later recalling having watched it with witnesses before it was submitted. R4674

The circuit court clerk initially sent an incomplete record to this Court. At the time it was submitted, the trial judge had an outstanding order to the parties to resolve the technical issue with the disc. See hearing of April 8, 2020, on record preparation where judge says, "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." The judge also says, "Notify my office if you guys can't resolve it through stipulation." R4673-74

The trial judge's *informal* efforts to reconstruct the record with a copy of the video have failed, so in the interest of justice it is necessary for the trial judge to formally undertake a determined effort. See Felton v. State, 523 So. 2d 775, 776 (Fla. 3d DCA 1988):

> [W]e have no certification from the trial court that a record

> cannot be reconstructed under Fla.R.App.P. 9.200(b)(3). In the interest of justice, we therefore deem it necessary to relinquish jurisdiction . . . [for] a determined effort at reconstruction . . . so that an informed review of the points on appeal may be undertaken.

Appellant has an obligation to bring a complete record and counsel will be ineffective for failing to do so. See Fla. R. App. P. 9.200; Sparre v. State, 289 So. 3d 839, 854 (Fla. 2019) (appellate counsel was deficient for failing to supplement the record); Latin Am. Ben. Ctr., Inc. v. Johstoneaux, 257 So. 2d 86, 88 (Fla. 3d DCA 1972)("Where ministerial duties imposed on court officials are not timely and properly performed, the appellant is presumed to have knowledge thereof and it becomes his duty to take such affirmative action necessary to cause the ministerial acts to be performed and the record to be corrected.") Both the State Attorney and Sievers' trial attorney are in possession of the video. The trial judge should be given the opportunity to enforce his prior orders and ensure that the appellate record is complete.

STATEMENT OF THE CASE AND FACTS

Curtis Wright's trial testimony occurs at T2720 - 2966, and T3970 – 3988 in the record. Where the Answer Brief references those

pages, it is referencing Wright's testimony. Tracking the record cites in the Answer Brief demonstrates that the State's case is wholly based on Wright's uncorroborated testimony.

ARGUMENT

PART I: ERRORS IN THE CONVICTIONS (I-XI)

ISSUE I: JUDICIAL REBUTTAL TO SIEVERS' CLOSING ARGUMENT

The State's attempt to distort the record here by saying, "defense counsel never actually objected to the instruction," (AB at 46), should not be countenanced. The State tellingly ignores the fact that the judge ended the discussion by telling Sievers, "Okay. I'll make a brief statement on it. And your objection is noted for the record." T4194 Sievers' argument on appeal is exactly that made to the trial judge: first, that the State's objection was without merit because Sievers' closing argument was properly based on the evidence that Wright's plea agreement contemplated that Wright would undergo a polygraph and the agreement was conditioned on his passing, but no polygraph was given.

MR. MUMMERT: 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 Then, after the judge announced that he would be addressing the jury on the inadmissibility of a polygraph result, the defense attorney tried to dissuade the judge from doing that by explaining that he had said "nothing about admissibility or inadmissibility," and the judge should not make any comment to the jury about that.

> MR. MUMMERT: 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.

T4193-94

This issue involves error engineered by the prosecutor through frivolous objections to the defense closing culminating with a request

to the judge to rebut that argument. See T4189 where the prosecutor said, "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 . . ." The defense attorney tried to convince the judge that he was being led astray, but the prosecutor prevailed in convincing the judge to <u>comment on the evidence</u> that the State chose to forgo administering a polygraph to Curtis Wright. The judge accepted the State's request and gave an erroneous judicial instruction on the weight jurors should give to the evidence that Sievers had highlighted in closing. This invaded the province of the jury and destroyed the judge's appearance of impartiality.

The State's discussion of fundamental error and invited error has no relevance here. Nevertheless, judicial comments on the evidence generally are considered fundamental error. <u>E.g.</u>, <u>Jacques v. State</u>, 883 So. 2d 902, 906 (Fla. 4th DCA 2004) (trial court's improper commenting on the credibility of a witness constituted fundamental error); <u>Kellum v. State</u>, 104 So. 2d 99, 103 (Fla. 3d DCA 1958) (reversing for new trial based on unobjected-to judicial

remarks). Here the error was preserved, but even had it not been preserved reversal would still be required because the error was fundamental.

The State says the judge was clearing up uncertainty created by defense counsel's closing argument, AB at 48, citing Lee v. State, 264 So. 3d 225, 228 (Fla. 1st DCA 2018), in which a divided court rejected an unpreserved argument based on judicial comments made during the questioning of witnesses. Lee states that "[a] judge may question witnesses to clarify issues, as long as the questions do not demonstrate a departure from the judge's neutral position." 264 So. 3d 226. Over a dissent by Judge Makar, the majority concluded that the judge was fulfilling his duty as a neutral arbiter to prevent inadmissible evidence from being presented to the jury. 264 So. 3d at 229. Lee is not relevant to the situation here where the objected-to judicial comments were made after the evidence was closed and the defense had concluded its argument. The instant case is instead governed by the principal observed by the Lee majority that "[a] judge who assumes the role of prosecutor deprives the defendant of a fair and impartial tribunal, which, as a deprivation of due process,

constitutes fundamental error." Id. at 226.

Sievers' closing argument was legitimately pointing out the weakness in the State's case. The issue of forgoing the polygraph was the Achilles' heel of the State's case. The judge's instruction left an impression that the failure of the State to test Wright with a polygraph was an illegitimate consideration because his passing such a test "would not have been admissible during this trial." T4195 This invaded the province of the jury by essentially directing it not to consider the State's failure to vet its key witness with a polygraph. The judge's instruction was an admonition to discount the terms of the plea agreement, where the polygraph was contemplated, in assessing the adequacy of the investigation. This struck at the heart of Sievers' defense.

Judicial instructions that direct a jury to ignore the State's incomplete or inadequate investigation violate a judge's obligation to remain neutral and violate the defendant's constitutional rights to due process and a fair trial. See, e.g., State v. Gomes, 20407, 2021 WL 262029, at *12 (Conn. Jan. 26, 2021) (finding a significant risk that instruction misled the jury to believe that it could not consider

the defendant's arguments concerning the adequacy of the police investigation); Stabb v. State, 31 A.3d 922, 932 (Md. 2011) (instruction directing jury not to consider the absence of corroborating physical evidence relieved the State of its burden to prove guilt beyond a reasonable doubt, invaded the province of the jury, and violated defendant's constitutional right to a fair trial).

The prosecutor could have used the State's rebuttal close to explain why the State had chosen to not administer a polygraph to Wright *if* such explanation had been developed through the testimony. The State *could have* developed the record by asking Detective Lebid to explain why no polygraph was ever given to Wright. But the prosecutor never asked Lebid why the State declined to give Wright the polygraph after he signed the plea agreement, and that is probably because a truthful response would not have been helpful to the State's case.

Although polygraph evidence is generally inadmissible in Florida to prove the guilt or innocence of a criminal defendant, e.g., Cardenas v. State, 993 So. 2d 546, 549 (Fla. 1st DCA 2008), if Wright had breached his plea agreement by failing a polygraph, that

result would have been discoverable by Sievers and admissible to show that Wright had breached his plea agreement. E.g., State v. Stevenson, 652 N.W.2d 735, 742 (S.D. 2002) (evidence of failing a polygraph was admissible to show a breach of plea agreement where passage of a polygraph was a significant part of plea bargain); State v. Castagna, 187 N.J. 293, 311–12, 901 A.2d 363, 373–74 (2006) (examining state's interest in excluding polygraph evidence against defendant's right to cross-examine witness whose test results indicated deception).

If the prosecutors suspected that a polygraph would reveal Wright as a liar, they likely chose to forgo the exam as a strategic move rather than risk the case against Sievers. If the decision to forgo a polygraph was made in contemplation of the effect that a negative result would have on the State's case against Sievers, Officer Lebid would have had no explanation to offer that would benefit the State's position.

The ASA's remarks to Wright at the end of his January 6, 2016, proffer show his intention that Wright be given the polygraph. The ASA told Wright that he would be getting a polygraph, maybe

even more than one, and he knew that Wright might have failed one that day.

> (by Mr. Hunter) … And, um, if we do agree to have that plea offer, um, we're gonna -- everybody's gonna sign. There'll be a plea and you'll probably be polygraphed. You may be polygraphed more than once. And there'd be a much longer, more detailed – I mean, today was nothing.
> . . . .
> I mean, if you were being polygraphed today, you might've failed. And failing a polygraph is pretty much bounces the plea agreement. Okay?

R4143-4144 Sievers' attorney knew that this conversation had occurred. See R4962 (defense attorney received video of Wright's statements).

It was fair game for the defense to raise the inference that the failure to test Wright's veracity through use of the polygraph was a reason to doubt the integrity of the State's case, where the prosecutor repeatedly used Wright's plea agreement to vouch for his credibility. The State's strategy in getting the jury to believe Wright was to have him freely admit on direct examination that he lied repeatedly to the detectives, to the prosecutors, and even to his own attorneys; and then claim that once he entered into the plea agreement, he started telling the truth. Therefore, according to the

State, the moment at which Wright entered the plea agreement was the pivotal moment when he started telling the truth.

The prosecutor addressed Wright's lies on direct. See T2726-2727 (Wright admits he has five prior felonies and admits he lied to the Lee County Sheriff's deputies when they questioned him in Missouri.); T2729-30, 2732 (Wright says he lied in the first meeting with the prosecutors even though he understood "the gravity of a meeting between [him] and [his] attorneys and the assistant state attorneys and law enforcement under those circumstances."); T2732 (Wright says he started telling the truth at the second meeting when he provided a sworn statement; prosecutor follows up by asking if Wright understands "there are ramifications" if he doesn't tell the truth today). Questioned by the prosecutor on redirect about his lies, Wright again says that he lied in his statement to law enforcement on July 12, 2015 and again in August 2015. Wright says that he lied during the initial proffer in January 2016 when he was talking about the specifics of what happened at the house. He says that he lied to his own attorneys about his involvement in the murder. T2954-56

Wright's propensity to lie was presumably why the State chose not to give him a polygraph exam. The prosecutor gave him a lenient plea deal because it was the <u>only</u> way to prosecute Sievers. Without Wright, there was no evidence against Sievers, and even <u>with</u> Wright's testimony, there was no corroborating evidence against Sievers.

The prosecutor's objection to Sievers' closing argument and her request for the judge's instruction were designed to divert the jury's attention away from the plea agreement and away from the fact that the State chose to not test Wright's veracity with the investigative tool it bargained for. The State was fighting to keep the jury from examining its decision to forgo the polygraph. Given that Wright admitted lying to the detectives, to the prosecutors, and even to his own attorneys about his involvement, the task of convincing the jury that Wright was a credible witness was a hard sell.

By asking the judge to address this matter after the defense attorney concluded his closing argument, the State was gambling that the propriety of the judicial remarks would be overlooked on appeal. Surely any experienced prosecutor would know that asking

the judge to rebut the defense attorney's closing argument would inject legal error into the trial. This Court should not reward the prosecutor's gamble by overlooking a clearly improper and highly prejudicial judicial comment on the evidence.

The State, as the beneficiary of the error it created through its request for the instruction, is responsible for showing beyond a reasonable doubt that the judge's instruction did not contribute to the verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). It has not even attempted to carry that burden. The Answer Brief does not address how the error could conceivably be considered harmless. Reversal is required because the State cannot show beyond a reasonable doubt that the court's instruction did not affect the verdict.

ISSUE II: PROSECUTORIAL MISCONDUCT IN THE STATE'S REBUTTAL CLOSING

Contrary to the State's contention (AB at 55), a prosecutor cannot *fairly rebut* a defense of insufficient investigation by promising to conduct more investigation after the trial is over, but that is what this prosecutor did. The jury likely received the prosecutor's argument as assurance that the verdict would be

overturned if the polygraph given after the trial showed Wright to be untruthful. That implication would follow from the questioning of Wright where the prosecutor had emphasized that ramifications would follow if Wright lied on the stand (T2732). If the jury took the rebuttal closing argument that way, then the verdict was based on facts not in evidence. See United States v. Brown, 720 F.2d 1059, 1074 (9th Cir. 1983) (recognizing the danger in a prosecutorial argument referencing the polygraph waiting in the wings in connection with a witness' promise of truthfulness in that "the jury may be led to think that should [the] testimony later be found false even after leaving the witness stand, the Government surely would know and surely would act to purge any falsity from the record").

The State defends the prosecutor's repeated assurance to the jury that Wright could be subject to a polygraph *up to the day he is sentenced* as "simply a proper explanation of the plea agreement as well as *a fair rebuttal to defense counsel's argument* that the State chose not to administer the polygraph examination." AB at 55 But, the only fair rebuttal would have been an explanation for why the State chose not to polygraph Wright. It was not a fair rebuttal for

the prosecutor to say that a polygraph would be given after Sievers' trial. See Scala v. State, 213 So. 3d 1085, 1088 (Fla. 3d DCA 2017) (prosecutor cannot use a rebuttal closing to make an improper argument and then defend that on appeal as invited or a fair reply). That was an invitation to the jury to rely on facts not in evidence, and it was an insidious form of vouching that went to the very heart of what the jury had to consider. See United States v. Hilton, 772 F.2d 783, 787 (11th Cir. 1985) (prosecutor improperly bolstered witness testimony by specifically referencing *potential* polygraph examinations that were not given). The error was a fundamental due process violation that requires reversal even without a contemporaneous objection.

ISSUE III: ALLOWING DETECTIVE LEBID TO OPINE ON HIS ABILITY TO TELL WHEN WRIGHT WAS LYING

Wright testified on direct and redirect examination in response to the prosecutor's questions that he lied repeatedly to the police and prosecutors. T2726-2727, 2729-30, 2732, 2954-56 By the time Sievers had an opportunity to cross-examine Detective Lebid, the State had established that Wright told numerous lies, including that he was at home in bed in Missouri when the murder occurred, that

he never went in the Sievers' home on the night of the murder, and that Rodgers did the murder alone. The State had presented Wright's lies on direct, to take the sting out of them before the defense could bring them out on cross.

Sievers' cross of Lebid about a polygraph that was never administered after Wright's plea agreement was signed did not open a door for the State to elicit opinion testimony as to Lebid's personal ability to discern when Wright was lying. In asking Lebid those questions on redirect, the prosecutor was trying to address the fact that no polygraph given by asserting that Lebid already knew the answer to whether Wright was lying without resort to the investigative tool of a polygraph.

The offending questions that the prosecutor posed to Lebid on redirect were meant to rebut the testimony brought out on cross- that no polygraph had been administered. The prosecutor's intention was to show that a polygraph was not necessary because Lebid could tell when Wright was lying based on his inherent ability to sniff out Wright's deception. Asking Lebid about this was impermissible as a response to the cross-examination because it called for a police

officer to give his personal assessment of the truthfulness of the State's key prosecution witness. See, e.g., Seibert v. State, 923 So. 2d 460, 472 (Fla. 2006). These questions were not fair rebuttal to the fact that no polygraph was given because they did not address why no polygraph was given. Lebid was not a human lie detector, so he could not accurately determine when Wright was lying, all he could do was offer his opinion, and that is exactly what the judge allowed him to do by overruling the defense objection. The law prohibits this, and the error of allowing the testimony cannot be harmless where it is well recognized that jurors tend to place the opinion of police officers in high regard. See, e.g., Tumblin v. State, 29 So. 3d 1093, 1101-02 (Fla. 2010) (and cases cited therein); Seibert, 923 So. 2d at 472.

ISSUE IV: WRIGHT'S TESTIMONY THAT HE PRAYED BEFORE CHANGING HIS STORY AND TELLING THE TRUTH

It is true that Wright's testimony about praying during the proffer was a "brief" remark. It did not take a lot of words for him to portray himself as a man of God. Wright's "I prayed" comment came at the beginning of his direct examination to explain why he decided to come clean after lying to the prosecutors about the murder during

his proffer. The prosecutor addressed Wright's lies during his January 2015 proffer at the beginning of his testimony, to soften the blow by depriving the defense of the opportunity to reveal it on cross.

The State says here that the testimony did not violate section 90.611, Florida Statutes, and that Wright's credibility was not enhanced by the remark. Neither of these assertions is tenable. Section 90.611 is directly applicable by its plain language. The Florida Legislature has said that this type of testimony, depicting belief on a matter of religion, is inadmissible to show that credibility is enhanced thereby. Wright's comment was meant to impress on the jury that he should now be *believed* because the decision to change his story during the proffer was influenced by prayer. The trial court's discretion to overrule the objection was limited by the rules of evidence, see Kirkman v. State, 233 So. 3d 456, 467 (Fla. 2018). Based on the plain meaning of section 90.611, the judge abused that discretion. The only serious question is whether the error can be labeled as harmless.

The State urges this Court to measure the prejudice by the length or brevity of the inadmissible remark. But a brief remark as to

a highly prejudicial matter can have a huge impact on the jury. It is not the length of the description about Wright's praying before changing his story that provides an accurate measure of the effect of the remark on the jury. That brief remark bolstered the credibility of the State's key witness, putting him a better light than he deserved, where the State's entire case rested on his credibility. The legal error of allowing that to go unchecked cannot be considered harmless. See, e.g., Hawn v. State, 300 So. 3d 238, 243 (Fla. 4th DCA 2020)(where witness's credibility is an issue, error affecting the jury's ability to assess credibility is not harmless); Shelly v. State, 262 So. 3d 1, 18 (Fla. 2018) (where it was impossible to say whether inadmissible statement contributed to the verdict, error is not harmless).

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

The State contends it never "opened the door" to admission of the video of the February 19, 2016 meeting, and it says the prosecutor never asked Wright about his honesty at the February meeting. AB at 70 These assertions are belied by the trial transcript,

where the prosecutor questioned Wright on direct and redirect about the events of the February meeting.

The State elicited this testimony to enhance Wright's credibility and to rehabilitate him after he admitted having lied repeatedly to the investigators. After Wright testified that he told the truth at the February meeting, it opened the door to the defense to admit the video to qualify and explain Wright's testimony about the plea agreement, and the entire content of the meeting where Wright accepted the deal and purportedly "told the truth."

Wright's testimony begins at T 2718. Two pages in, at T2720, the prosecutor asks Wright about his plea agreement, which was explained to him and executed at the February 2016 meeting, and his understanding that he is required him to testify truthfully in exchange for a 25-year sentence. At T2732, the prosecutor asks Wright if he told the truth during the February meeting:

> Q. And then after that initial [i.e., January] meeting, that proffer, <u>was there another meeting</u> between the same parties a month or two later [i.e., in February]?
>
> A. Yes.
>
> Q. And at that point you provided a sworn statement.
>
> A. Yes.

Q. Did you tell the truth then?

A. Yes.

Q. All right. So do you understand that if you don't tell the truth today, there are ramifications?

A. Yes.

On redirect examination, the prosecutor asked a series of questions about the events of the February meeting depicted in the video. He questioned Wright specifically about the conversation at the meeting that he, Mr. Hunter, had with Wright involving Wright's wife.

BY MR. HUNTER:

Q. Mr. Wright, is it -- do you understand that your plea agreement is still in effect, right?

A. Yes.

. . .

Q. Do you remember <u>the discussion that you and I had at your proffer about your wife, Angie Wright,</u> about Mrs. Wright?

A. Yes.

Q. What did I tell you about Mrs. Wright?

A. You said that there was nothing in our agreement to protect her. I mean, probably not those exact words, but . . .

Q. Did I threaten?

A. No.

Q. -- Mrs. Wright?

A. No.

Q. Did I threaten you about Mrs. Wright?

A. No.

Q. Was there any legal action taken against Mrs. Wright at all, first of all, by the state of Florida regarding this case?

A. No.

. . .

Q. Is Mrs. Wright mentioned anywhere within our plea agreement?

A. No.

Q. Is what you're doing today, and have done before regarding this case and regarding your testimony, in any way motivated by anything having to do with Mrs. Wright?

A. No.

T2951- 53

The State repeatedly makes a factually incorrect assertion in the Answer Brief where it contends that Sievers did not cross Wright about his discussion with the prosecutor as to Angela Wright's involvement. (AB at 71, 72, 73) Sievers' attorney first cross-examined Wright as to his discussion with the prosecutor about

Angela's involvement at T2903-2905. Then he delved more into that on recross of Wright.

RECROSS-EXAMINATION

BY MR. MUMMERT:

Q. Mr. Hunter, again, brought up your February 19th statement wherein you expressed concern about Ms. Wright.

Do you recall Mr. Hunter telling you that then some other things happened that I can't discuss right now, but that blip got a little bigger and a little louder, referring, of course, to Angie.

Do you recall him saying that?

A. [by WRIGHT:] I don't remember when that was said, but yes, we -- I remember.

Q. And he 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.

Do you recall Mr. Hunter telling you that?

A. Yes.

Q. He then asked you, "Do you understand what I'm saying?"

Do you recall Mr. Hunter asking that you?

* * *

A. Not specifically, but I know that was said.

Q. He said -- Mr. Hunter, that is -- 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."

Do you recall Mr. Hunter saying that?

A. Yes.

Q. And without making a promise to you, without making a promise to you about what would or what wouldn't happen to your wife, Angela Wright, did that make you feel a little better with going forward with the rest of your statement that day?

A. I -- not necessarily about going forward with the statement.

Q. You were worried about –

A. Maybe feeling better about Angie.

Q. You were worried about your wife, weren't you?

A. I was worried about my entire family. But here, we were talking about Angie.

. . .

Q. Obviously you loved your wife, correct?

A. Yes.

Q. You're going to try and protect her, right?

A. Yes.

Q. You're going to make sure that whatever else happens that your wife is going to be okay, correct?

A. I -- yeah, I would like -- yeah, I would say I would like to do that.

Q. And so one of the things that you can do is participate

in this prosecution, correct?

A. No, this -- my participation in this had nothing to do with whether she was protected or not. I voiced the concern, he responded to it.

But, again, he clearly stated that it had nothing to do with this agreement.

Q. That's when your lawyer, Ms. Parker, told you, or maybe Mr. Hunter -- I can't really tell from the transcript.

Ms. Parker said, “Is it -- is it fair to say, though, if things don't differ from what you--”
. . .

Q. And do you recall Ms. Parker saying that if it's [status] quo from here on out, that that blip will go away?

Do you recall her saying that?

A. Not those precise words, but ...

Q. And then do you recall Mr. Hunter saying, "I just want the blip to go away"?

A. Yes.

Q. To which, if you remember, did your lawyer say "Gotcha"?

A. I -- I don't remember.

T2962-66

Shining light on the relationship between Wright and the prosecutors was central to establishing Sievers' defense, which was

that Wright lied about Sievers' involvement to sell the prosecutor a story that would get him a deal. The video of Wright's meeting with the prosecutors where the deal was finalized was the best evidence for the defense because it depicts the closing of that deal between Wright and the State and the discussion over immunity for Angela Wright.

The transcript of the February meeting is over 200 pages long. R1634-1883 At the meeting, the plea agreement is discussed in depth (R1635-1652), and accepted after some wrangling involving whether Angela Wright will be given immunity and threats by the prosecutor to tear up the agreement (R1652-1657). Wright was then interviewed in depth. There is a lot of back and forth during the interview. When the State raised the issue on direct examination of whether Wright told the truth at that meeting, it opened the door for the jury to decide whether that testimony was credible by viewing the video of the meeting.

Regarding Wright's bias, the State now admits that the "video could have potentially shown some bias." AB at 72 But then it makes a confusing argument about it being unclear how Sievers was

intending to show bias through Detective Lebid's testimony. Sievers called Lebid as a defense witness, T3896, to authenticate the video since Lebid was present during the February meeting. But the prosecutor preempted the questioning by objecting to the defense exhibit before Sievers could ask Lebid a single question. T3897 Here, again, the prosecutor made a frivolous objection and convinced the judge to make an erroneous ruling to benefit the State. T3897-3898 The defense attorney did what he could to explain that he should be able to lay the foundation because the exhibit was admissible after the State opened the door and because the exhibit went directly to the witness's bias, showing that he was offered beneficial treatment. T3898-99

The video of the entire interview was relevant and admissible to give the jury "a greater scope of understanding as to how the investigation unfolded," as Sievers' attorney told the judge at T3899. Shining a light on the deal between the prosecutors and Wright was the central object of the defense, and the erroneous ruling excluded crucial defense evidence that was necessary to assess Wright's bias, and hence his credibility. The judge failed to comprehend the

admissibility of this crucial defense evidence when he abruptly sustained the State's objection at T3900-01, which meant that Sievers could not lay a foundation for admissibility of the exhibits by getting Lebid to authenticate the video.

The video was being offered to show that the State's investigation was deficient and that Wright was a biased witness whose interest in cooperating was to benefit himself and his wife. The exclusion of the defense exhibit requires reversal for a new trial.

ISSUE VI: PROHIBITING CROSS-EXAMINATION OF WRIGHT ON A POSSIBLE SEXUAL MOTIVE FOR THE MURDER

The prosecutor's objection and the judge's ruling were based on relevancy. The relevancy was explained by counsel's proffer that a sexual motive for Wright (1) was part of the investigation, (2) Detective Lebid had spent a significant amount of time talking about it, (3) there were questionable text messages that corroborated the theory, and (4) the questions could potentially lead to an alternative motive for the murder that Wright committed. The State first defends the judge's restriction of Sievers' cross-examination of Wright by citing a case not applicable here, King v. State, 89 So. 3d 209, 224 (Fla. 2012). King addressed a defense of third-party culpability and

upheld a judge's instruction to the jury to disregard questions designed to introduce a possibility that someone else committed a crime since there was no evidence in the record to support that underlying theory. That is much different from a claim based on the restriction of cross-examination of the State's key witness concerning his motive for the murder that he committed.

The State asserts that Sievers needed to show that he had a sexual relationship with Wright before he could cross-examine Wright on the fact that Lebid had raised the subject with Wright during the investigation. There is no serious question that there was a good faith basis for the cross-examination where Sievers' counsel told the judge that a sexual motive was indeed a subject of discussion between Wright and Lebid. Statements of counsel can constitute a sufficient proffer. § 90.104, Fla. Stat. ("When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked."); Charles W. Ehrhardt, 1 Fla. Prac., Evidence § 104.3 (2021 ed.); Farrell v. State, 273 So. 3d 43, 47 (Fla. 4th DCA 2019).

Any testimony that could shed light on Wright's motive for committing the murder was relevant, so the ruling excluding the cross was error. The State attempts to circumvent the test for harmless error by asserting that the error is harmless because the excluded questions "would not have eliminated or negated the evidence showing that Sievers hired Wright." AB at 79 But Sievers could not eliminate or negate that evidence because he had no way of making Wright retract false testimony. Sievers' most important tool to test Wright's credibility was through cross-examination, which is why the restriction of that vital truth-seeking tool was not harmless error. The State has not shown that the restriction of questioning designed to expose an alternative motive for the murder committed by the State's key witness, with all of his faults, did not possibly affect the jury's verdict.

ISSUE VII: ADMITTING THE TESTIMONY OF KIMBERLY TORRES, SIEVERS' NEIGHBOR

1. Irrelevant Evidence: Sievers on the Lanai

The State defends the ruling to allow Torres's testimony as relevant "to show that Sievers had scoped out the area in preparation for Wright," which was supposed to be corroboration for

Wright's story. AB at 80-81 But then the State reverses its field and claims, with regard to its harmless error theory, that "testimony about seeing Sievers in her yard could have easily been discounted by the jury as unconnected to the planning of the murder, especially in light of the timeline Torres provided." AB at 84 So under the State's own faulty analysis, the testimony was both (1) important corroboration and (2) entirely unconnected to the murder (and therefore would have been disregarded). The State cannot have it both ways. Since the State did not connect the lanai incident to the murder, the trial court erred in overruling the relevancy objection. Given that the incident was improperly used by the prosecutor as if it showed Sievers' planning and CCP, the error of overruling Sievers' objection was harmful.

2. Inadmissible Hearsay Overheard by Torres

The State first uses the hearsay involving the marital discourse as substantive evidence of Sievers' guilt in arguing that the words attributed to Sievers, "If that's what you want to do, fine, but we'll see about that," explain his conduct in arranging to have his wife murdered. AB at 83 The State then turns around and claims for its

harmless error argument that "[t]he testimony could easily be perceived as innocuous and a typical marital spat." AB at 84 Once again, the State cannot have it both ways.

Torres did not know what the husband and wife were talking about, so any context given to the words would simply be by conjecture, misleadingly used by the prosecution to implicate Sievers in his wife's murder. That is why this hearsay testimony was not relevant and also so harmful. The error requires reversal for a new trial.

ISSUE VIII: ADMITTING GRUESOME AUTOPSY PHOTOS THAT WERE NOT RELEVANT TO ANY ISSUE IN DISPUTE

The State fails to adequately address the fact that Sievers was not the person who inflicted the fatal injuries. In trying to justify the trial court's ruling on the gruesome photos, the State says only that "[t]he victim's injuries and her cause of death are not somehow rendered irrelevant just because Sievers chose to have someone else commit the murder for him." T88 The State implies that this Court no longer follows the well-established legal test for admitting gruesome autopsy photos, which requires that the photos be relevant to an issue in dispute. E.g., Jackson v. State, 213 So. 3d

754, 777 (Fla. 2017) ("When the State seeks to admit autopsy photographs of a victim, the photographs must be relevant to an issue in dispute.").

The cases cited by the State that are claimed to involve "no dispute" do not actually stand for that proposition. In Jones v. State, 648 So. 2d 669, 679 (Fla. 1994), this Court found that the photos admitted had probative value and were more relevant than prejudicial. In Nixon v. State, 572 So. 2d 1336, 1342 (Fla. 1990), the Court explained how the gruesome photos were relevant and concluded that they were not so shocking as to outweigh their relevancy. Neither case involves a defendant who was out of the state when the crime occurred. The State has failed to justify the admission of the gruesome autopsy photos here where it is entirely undisputed that the victim was killed by Curtis Wright and Jimmy Rodgers, and where the cause of death is also not in dispute.

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

By refusing to acknowledge any legal error addressed in the first eight issues, the State has abdicated its burden, as beneficiary of those errors, to prove there is no reasonable possibility that the

errors contributed to the conviction. See McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007) (citing State v. DiGuilio, 491 So. 2d 1129, 1138-39 (Fla. 1986)); Goodwin v. State, 751 So. 2d 537 (Fla. 1999). The State's response should be taken as a concession that it cannot meet that burden here. The State's case rested tenuously on the credibility of Curtis Wright, who admitted to having lied repeatedly to the authorities and who only implicated Sievers when he was given the opportunity to accept a favorable plea deal. The State cannot establish that the errors were harmless when viewed cumulatively because the errors (1) unfairly reinforced Wright's credibility [Issues I, II, III, IV, VII]; (2) excluded questions and evidence that would have diminished Wright's credibility [Issues V, VI]; and (3) unfairly inflamed the jurors emotions against Sievers [Issues VII, VIII]. The cumulative error requires reversal.

ISSUE X: DENIAL OF MOTION FOR JUDGMENT OF ACQUITTAL WHERE WRIGHT'S TESTIMONY WAS INHERENTLY UNRELIABLE AND NOT COMPETENT EVIDENCE TO SUPPORT THE CONVICTIONS

The State mischaracterizes this issue when it claims that Sievers is asking this Court to reweigh the evidence. (AB at 92) This issue does not concern evidentiary conflict; rather, this issue

concerns the due process implications of a criminal conviction based on witness testimony that was acquired through a coercive plea agreement, akin to a contract that violates public policy (but one with life or death consequences).

The State attempts here to set out facts that it claims corroborate Wright's testimony. (AB at 93) But the facts the State relies on are innocent details as opposed to those which would establish Sievers' involvement. See Robinson v. State, 556 So. 2d 450, 452 (Fla. 1st DCA 1990) ("the tip itself offered nothing more than innocent details of identification that could have been provided by any pilgrim on the roadway"). It requires a stacking of inferences to transform such details into evidence implicating Sievers, and that would be improper use of circumstantial evidence where a contrary inference can be just as likely drawn from the circumstance. See Broward Executive Builders, Inc. v. Zota, 192 So. 3d 534, 537 (Fla. 4th DCA 2016) ("Where an inference is based upon circumstantial evidence in a civil case, it must be the only reasonable inference that can be formed from that evidence for the plaintiff to build further inferences upon it."). In a capital case, where the need for reliability

is heightened by the Eighth and Fourteenth Amendments' requirements, it should be less tolerable than it is in a civil case to rely upon an ambiguous factual situation as a foundation to build inferences. See, e.g., Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability.").

The mere fact that both Wright and Sievers used prepaid cell phones to communicate does not corroborate Wright's conspiracy story because there are legitimate reasons for law-abiding citizens to buy prepaid cell phones from Walmart and use them to communicate. Wright was a technology expert, his house contained a multitude of cell phones, and he was involved in the handling of the Sievers' medical office computers. So there was nothing nefarious about the use of the prepaid cell phones in and of itself. Wright's wife, Angela, used a prepaid cell phone, with a (702) number, which was activated on June 28, 2015, to communicate with Wright's prepaid phone, with a (404) number, on the night he was in Florida committing the murder. T3961-68, 3373, 3399, 3574,

3902-03 She also tampered with witnesses during the investigation. T3908 Yet the State was sure that she was not involved. T3905-07, 3377-78

There was no evidence of the content of any communication that took place over Sievers' prepaid phone. The fact that Sievers had a prepaid phone is not incriminating unless Wright's testimony is considered to be credible. That is not corroboration because Wright had the ability to incorporate innocent conduct into his story. Basically what the State claims as corroboration is merely a recap of Wright's testimony.

The State also lists events that occurred after the murder through which it attempts to portray Sievers as acting curious, with the implication that it was not the way an innocent man would act. (AB at 99-103) But none of this is corroboration for Wright's testimony that Sievers solicited the murder. For instance, the State claims it is significant that Sievers thought he would be a target of the investigation, but that was just Sievers facing reality because Detective Lebid was suspecting his involvement, as shown by the suggestions Lebid put to Wright during their first encounter. See,

e.g., McKinney v. Com., 60 S.W.3d 499, 504 (Ky. 2001)(“Appellant[‘s] . . . lack of emotion on the day of the fire could be perceived as an inference of guilt, [but] we are of the opinion that the evidence was just as consistent with innocence.”). Sievers was not privy to law enforcement’s investigation into Wright and Rodgers, so his thinking that Wright could not have done the murder was understandable, given that Wright was his long-time friend. In short, the behavior evidence that the State relies on as corroboration for Wright’s testimony is not incriminating per se because it is based on inferences that are equally consistent with innocence. “In our system of jurisprudence, we require more than just dartboard decision-making by juries to sustain verdicts. Allowing a jury to derive inferences from unproven allegations serves no purpose other than to erode a plaintiff's burden of proof, and to raise rank speculation to the same status as established fact.” Broward Executive Builders, Inc., 192 So. 3d at 539.

The State had no evidence linking Sievers to the murder other than Wright’s testimony, and Wright’s testimony was not independently corroborated as to any incriminating fact. The

evidence was insufficiently reliable to satisfy the constitutional beyond-a-reasonable-doubt standard because Wright is a liar who only implicated Sievers when he was able to get a deal for leniency, under a plea agreement that was contingent on satisfying the prosecutor. The trial judge erred in failing to grant the motion for judgment of acquittal.

ISSUE XI: DENIAL OF MOTION FOR JUDGMENT OF ACQUITTAL ON CONSPIRACY COUNT

The State relies on Wright's testimony for the proof that Sievers was in a conspiracy with Rodgers, which was required for the conspiracy offense based on the wording of the Indictment, but the State does not correctly describe Wright's testimony. Wright said that Sievers asked him "if I would kill her or take care of it." T2770 Wright said, "if there was someone else involved, he didn't want them to know who he was." T2773 Sievers and Wright never talked about specifics of how payment would be given. T2773-74 Wright never told Sievers that he was talking to Rodgers, and he did not tell Rodgers that he had been talking to Mark Sievers. Wright said, "[t]here was never any direct communication between the two of them." T2779 The prosecutor asked: "If Jimmy Rodgers didn't know

about Mark Sievers and if Mark Sievers didn't know about Jimmy Rodgers, then how was Jimmy Rodgers going to get paid?” Wright answered, “It would have been through me. I would have been the one paying Jimmy.” T2779 Although Wright did not tell Rogers anything about Sievers, and he had no intention of doing so, Rodgers “figured it out,” shortly before they left for Florida. T2794 When asked why he referred to himself as the middle person, Wright said, he was the middle person “[b]ecause Mark didn't know anything about Jimmy, [and] Jimmy didn't know it was Mark until the very end.” T2966

Wright’s testimony makes clear that there was no agreement between Sievers and Rodgers. Examining the testimony of the only witness to address Sievers’ involvement, it is clear that Sievers and Rodgers did not “agree, conspire, combine or confederate with each other,” as alleged in the Indictment. Given that testimony, the trial court erred in denying the motion for judgment of acquittal made at the end of the State’s case.

PART II, SENTENCING ERRORS (XII-XVIII)

ISSUE XII: PROSECUTOR'S FAILURE TO GIVE NOTICE OF ANY AGGRAVATING FACTOR WITHIN 45 DAYS OF ARRAIGNMENT

This Court should not excuse the State's failure to comply with the requirements in the Act. Both the trial judge and the Second District were willing to overlook the prosecutor's negligence where the alternative was finding that the State lost the opportunity to seek a death sentence.

The Florida Legislature put the notice-of-aggravating-factors requirement in the Act using the "must" imperative language and the "good cause" standard for amendment of a timely notice. Prior to March 7, 2016, the State was not required to provide a capital defendant with advance notice of the aggravating factors it would be relying on. The Legislature chose to put that notice requirement in the new statute using "must" to indicate no leeway for non-compliance based on a prosecutor's negligence. There is no ambiguity in the statute, but if there were, the rule of lenity would require that the Act be construed favorably to Sievers. See § 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"); Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008) ("the rule is not just an interpretive tool, but a statutory directive").

The State seeks to avoid enforcement of the statutory requirement with a judicially created exception to the 45-day time limit and the "good cause" provision. The proposed exception would excuse a late notice and not require good cause to amend a timely notice *unless the defendant can show he was prejudiced* by the State's delinquency. This Court should decline the State's invitation to eviscerate the statutory requirement with a judicial exception. It should uphold the plain language of the statute because "[i]t is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992). The sentence must be vacated because the State lost the opportunity to seek death when the prosecutor failed to file the notice of aggravating factors within the statutory time limit.

ISSUE XIII: URGING JURY TO REJECT CONCEDED STATUTORY MITIGATOR

The State asserts that the prosecutor's directive to the jury to check the box for "no" on the verdict form in answer to the question of whether a mitigating circumstance was established "appears to be a brief misstatement about which box to check," and it claims "[t]he prosecutor never told the jury to disregard that mitigating circumstance." AB at 122 The record belies these assertions. The prosecutor's argument was not a slip of the tongue, rather it was a calculated effort to corrupt the decision-making process by getting the jury to fill out the verdict form incorrectly, and it succeeded. The improper argument counseled the jury to disregard a conceded mitigating factor, which was fundamental error because when the jury filled out the form as instructed by the prosecutor, it could not have undertaken the required weighing of the conceded mitigator, as required by section 921.141(2)(b)(2), Florida Statutes.

The State says that the error was not prejudicial and did not impact the verdict because Sievers' lack of any criminal history is essentially insignificant mitigation. The Eighth Amendment's requirements should not be so easily dismissed in regard to this

capital sentencing proceeding. This Court should not allow the State to diminish the importance of its concession and to minimize the ASA's conduct in misleading the jury on its responsibility to weigh a critical statutory mitigator.

ISSUE XIV: RIGHT TO PRESENT MITIGATION VIOLATED BY REQUIRING REDACTION OF SIEVERS' DAUGHTER'S LETTER

The prosecutor's objection to the daughter's letter was specific to the ground that the jury could not hear that the victim did not want the defendant to die, relying on Jackson vs. State, 498 So. 2d 406 (Fla. 1986). R1259 The prosecutor recognized that the letter was hearsay, but she made clear that the objection was not based on hearsay (R1262-63), so the discussion of hearsay in the Answer Brief is an irrelevant distraction. The State cannot now rationalize exclusion of the mitigating evidence on a hearsay rationale that was explicitly waived by the prosecutor.

The prosecutor's successful objection was based on Jackson, which the State does not even acknowledge in the Answer Brief. Jackson turns on recognition of the judge alone being the ultimate sentencing authority. There, the requirements of Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586

(1978), were satisfied when the judge alone considered the testimony of the victim's brother that the family did not want a death sentence for the brother's killer. 498 So. 2d at 413. Further, in Jackson the proffered testimony was based on a witness' religious objection to the death penalty and "sheds no light on appellant's character," id., in contrast with this case where the passage was relevant to Sievers' character. Jackson is not good law and it is factually distinguishable, which is why the State cannot justify the ruling excluding from the jury's consideration the passage from the daughter's letter where she tells her father that she does not want him to be killed. The error of excluding the passage requires reversal.

ISSUE XV: VICTIM IMPACT EVIDENCE AND THE OVERLY PREJUDICIAL MADE-FOR-TV VIDEO OF TERESA SIEVERS

The trial judge's ruling denying Sievers' pretrial motion (R615-616) preserved for appeal his objection to the victim impact evidence. See § 90.104, Fla. Stat. ("If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."). The State acknowledges the specific contemporaneous objection to the professionally produced

promotional video of Teresa Sievers, but downplays the emotional impact of it. This Court should view the video to determine whether it was proper victim impact evidence under Payne v. Tennessee, 501 U.S. 808 (1991), and whether it was more prejudicial than probative. The video was irrelevant, outside the scope of the Court's holding in Payne, and so unduly prejudicial that it violated Sievers' Eighth Amendment and Due Process rights.

ISSUE XVI: FAILURE TO HOLD A SPENCER HEARING

A Spencer hearing cannot be consolidated with a sentencing hearing and still serve all the same functions. The Spencer procedure ensures that the judge carefully considers the contentions of both sides and takes seriously the independent judicial "obligation to think through [the] sentencing decision." Phillips v. State, 705 So. 2d 1320, 1324 (Fla. 1997) (Anstead, J., concurring) (quoting Gibson v. State, 661 So. 2d 288, 293 (Fla. 1995)).

The State's reliance on penalty-phase waiver cases such as Robertson v. State, 187 So. 3d 1207 (Fla. 2016), to justify the procedure in this case is misplaced. Robertson involved a sentencing that was handled by agreement of the parties after the defendant

waived jury sentencing and all mitigating evidence, id. at 1216. In Woodbury v. State, 46 Fla. L. Weekly S74 (Fla. Apr. 15, 2021), the defendant "expressly objected to the court delaying the pronouncement of sentence and told the court to proceed directly to sentencing." In Craft v. State, 312 So. 3d 45, 50 (Fla. 2020), the defendant waived counsel, waived his right to a penalty-phase jury, and indicated that he did not intend to present mitigation. Sievers, in contrast, did not waive any penalty-phase rights.

Regarding the failure of the defense counsel to object when the trial judge announced his intention to impose sentence that same day, this Court should recognize that such an announcement would be normal if the trial judge intended to impose a life sentence. There would be no need for a Spencer hearing when a life sentence is forthcoming; therefore, the trial attorney would have no reason to object. That reality is why this error cannot be assessed using the normal contemporaneous objection rules. It is only after the death sentence is handed down that the failure of the judge to follow the Spencer procedure becomes apparent, and at that point, any objection is futile because the judge has made up his mind.

<u>ISSUE XVII</u>: 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 State's recitation of the evidence it relies on for CCP reinforces that Wright's uncorroborated testimony is the only evidence it has to support this aggravating factor. The State does not address the crux of this issue, which is whether the Eighth Amendment and due process can be satisfied when the only evidence of the sole aggravating factor is testimony acquired by the prosecution through promised leniency to a cooperating codefendant, who, prior to the plea agreement, had made conflicting statements as to any involvement by Sievers, and where the plea agreement was contingent on the testimony satisfying the prosecutor. Under these circumstances, the reliability needed to satisfy the Constitution is absent.

<u>ISSUE XVIII</u>: PROPORTIONALITY REVIEW

The State does not address whether the death sentence is disproportionate or arbitrary here. This case is clearly not among the most aggravated and least mitigated of death cases, given the

single aggravating factor of CCP and the conceded mitigator of no prior criminal history. The lack of any analysis of proportionality offered in the Answer Brief shows an abandonment of the safeguards against the arbitrary and capricious implementation of the death penalty, which in turn shows that the narrowing function required to satisfy the Eighth Amendment is now non-existent in Florida. Unless this Court overturns its flawed decision in Lawrence v. State, 308 So. 3d 544 (Fla. 2020), to jettison proportionality review, Florida's death penalty scheme violates the Eighth Amendment and Sievers' death sentence cannot constitutionally be upheld.

CONCLUSION

Mark Sievers respectfully requests this Court to reverse the judgment and sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been served on Christina Z. Pacheco of the Office of the Attorney General at capapp@myfloridalegal.com, on this 7th day of July, 2021.

CERTIFICATION OF COMPLIANCE

I hereby certify that this document was generated using Bookman Old Style 14-point font. It complies with the font and word count limit requirements in Florida Rule of Appellate Procedure 9.045(b) and 9.210(a)(2)(C).

Respectfully submitted,

/s/ Karen M. Kinney

KAREN M. KINNEY
Assistant Public Defender
Florida Bar Number 856932
P. O. Box 9000 - PD
Bartow, FL 33831
appealfilings@pd10.org
kkinney@pd10.org
kstockman@pd10.org

HOWARD L. "REX" DIMMIG,II
Public Defender
Tenth Judicial Circuit
(863) 534-4200