No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK D. SIEVERS
Petitioner,

v.

STATE OF FLORIDA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

At Petitioner's trial for the murder of his wife, the state prosecutor proceeded under a murder-for-hire theory that relied entirely on the testimony of the self-confessed actual killer, who had turned state's evidence, pled guilty in exchange for leniency, and was awaiting sentencing. The witness's plea agreement, which was entered into evidence, was conditioned on his passing a polygraph examination, but the State chose not to administer the polygraph prior to Petitioner's trial. Petitioner's counsel emphasized in closing argument that the prosecutor's decision to forego the polygraph was a reason to doubt the witness's credibility. Following Petitioner's closing argument, at the request of the prosecutor, the judge instructed the jury that *if the witness had passed* a polygraph, that result *would not have been admissible* in Petitioner's trial. Then, in the State's rebuttal closing, the prosecutor told the jury that *the witness was still subject to a polygraph up to the day he is sentenced and should he fail, his agreement goes away*. The questions presented are:

1. Whether a state judge violates a defendant's due process right to a fair trial by giving an impromptu jury instruction regarding the credibility of the prosecution's key witness in direct rebuttal to the defendant's closing argument.

2. Whether a state prosecutor violates a defendant's due process right to a fair trial by telling the jury in rebuttal closing that the cooperating witness is subject to a polygraph after the trial and should he fail, his plea agreement goes away.

RELATED PROCEEDINGS

Sievers v. State, No. SC20-225, 355 So. 3d 871 (Fla. 2022) (Florida Supreme Court opinion and judgment rendered November 17, 2022; order denying rehearing issued on January 18, 2023; mandate issued on February 3, 2023).

State v. Sievers, No. 15-CF-000673-B (Florida Twentieth Judicial Circuit Court judgment and sentence entered on January 16, 2020).

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The opinion of the Florida Supreme Court (App. A) is reported at *Sievers v. State*, 355 So. 3d 871 (Fla. Nov. 17, 2022). The order of the Florida Supreme Court denying Petitioner's motion for rehearing (App. B) is reported at *Sievers v. State*, No. SC20-225, 2023 WL 225747 (Fla. Jan. 18, 2023).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a). The Florida Supreme Court issued its judgment affirming Petitioner's convictions and death sentence on November 17, 2022, and denied Petitioner's motion for rehearing on January 18, 2023. Petitioner's application for an extension of time within which to file a petition for writ of certiorari was presented to Justice Thomas, who on March 30, 2023, extended the time to and including May 18, 2023.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution states:

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

STATEMENT

A. Murder Investigation Leads to Arrest of Curtis Wright

Petitioner, Mark Sievers, was in Connecticut with his daughters in June 2015 when his wife, Teresa Sievers, was bludgeoned to death by hammer blows at their home in Bonita Springs, Florida. Appendix A1-3, 5. Initially, the police had no suspects in the murder, but a break in the case came when police were tipped off to investigate a Missouri man, Curtis Wright. A6

Wright was a long-time friend of Mark Sievers, and at the time of the murder he had a business relationship with the Sievers, maintaining the computers and software for Teresa Sievers' medical office. Wright maintained the software for the patient management system and did hardware updates and repairs on the computers. His work was done mainly remotely and by phone, although there were instances when he had to be physically at the Florida office. A2, Tr. Trans. 2738-42, 2787-89 There were major software upgrades that needed to happen on the servers in the summer of 2015 and Wright was planning to come to the Sievers' medical practice to do that in person. Tr. trans. 2787-2788 He had picked the same weekend to come down as when the murder occurred, but had not told Mark Sievers. Wright told people in Missouri that he was going to Florida to do some work. Tr. trans. 2789

Wright and another Missouri man, Jimmy Rodgers, were arrested for the murder in August 2015. A6; Tr. Trans. 3395, 3403 Wright was interviewed

by police at time of his arrest, and he denied that Mark Sievers had hired him to kill his wife. He told the detectives that Mark Sievers never said anything to him about having marital issues or problems. A6, Tr. Trans. 2883-87, 3397-98.

B. Curtis Wright Negotiates Plea Agreement

In January 2016, Wright met with prosecutors and detectives to make a proffer for the purpose of negotiating a plea agreement. A6-7, Tr. Trans. 2728-30, 2890 Wright changed his story throughout the meeting and testified at trial that he lied about his involvement in the murder during the proffer. Tr. Trans. 2729-30, 2899-2900 The lead detective testified that Wright had given detectives several untruthful statements over the course of the investigation. Tr. Trans. 3401-3402 Nevertheless, the prosecutor offered Wright a deal that required him to testify truthfully against Sievers and Rodgers in exchange for a plea to a lesser charge of second-degree murder and a 25-year sentence. A6, Tr. Trans. 2722, Record filed in Fla. Sup. Ct. SC20-225 at R2758-62

Mark Sievers was arrested a week after Wright signed his plea agreement and eight months after the murder. R66 Sievers was indicted for first-degree murder and conspiracy to commit first-degree murder. A7

C. Petitioner Sievers' Trial

Wright had already entered his plea to second-degree murder but had not been sentenced when Sievers' trial occurred. Tr. trans. 2722, 3989-3990 The prosecutor questioned Wright on direct about the terms of his plea agreement, emphasizing that the deal was contingent on his telling the truth.

[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.

Tr. Trans. 2722, 2732 The prosecutor also questioned Wright about his proffer. Wright testified that he lied in the beginning of the proffer when he said that Rodgers had done the murder alone and that he was not present when Rodgers did it. But Wright said he corrected his lies during the proffer after he was told he was not believed. Wright said he initiated the attack on Teresa Sievers by hitting her with a hammer and that Rodgers joined in by hitting her with a second hammer. Wright claimed that the murder was committed at the request of Mark Sievers. A2, Tr. Trans. 2729-2732, 2896-97, 2900, 2955

Wright's written plea agreement was admitted into evidence by Sievers without objection. Tr. Trans. 3934, R2758-62 The lead detective acknowledged that the agreement required Wright to submit to a polygraph and that no polygraph was ever administered to Wright in this case. Tr. trans. 3402 Wright

also testified that he never took a polygraph and was not asked to take one. Tr. trans. 2882

Four paragraphs in the Wright's plea agreement address a polygraph examination.

> 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.

R2760-27621

Under the agreement, the prosecutor 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 Wright's guilty plea would stand and he could be sentenced to the maximum and could be additionally prosecuted for first-degree murder and conspiracy, among other things. The results of a failed polygraph would be admissible in any subsequent prosecution. R2759-60

Sievers' attorney emphasized in his closing argument that the prosecutor elected to forego giving Wright a polygraph despite having bargained for Wright to submit to one. A11, Tr. Trans. 4175-78,4188 Sievers' counsel ended his closing argument by saying: "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?" A11, Tr. trans. 4187-88

After the defense attorney finished his closing argument, the jury was sent out for a break, and the prosecutor raised an objection and asked 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." A11, Tr. trans. 4189 The defense attorney countered that if Wright had been offered and passed a polygraph, he could not have made the argument.

> [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.

Tr. trans. 4189-90 After sustaining the prosecutor's objection, the judge next asked the prosecutor if she wanted to give the curative instruction as part of her rebuttal argument or if the judge should do it. The prosecutor asked the judge to make the statement to the jury. At this point the defense attorney was asked his preference and he said he preferred that the State make it as argument. Acquiescing to the prosecutor's request, while acknowledging Sievers' objection, the judge said he would "make a brief statement" to the jury.

> 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.*

Tr. trans. 4193-94

When the jury returned to the courtroom, the judge addressed the jury, saying: *"If Mr. Wright had actually taken a polygraph, those results, if they were – if he passed, would not have been admissible during this trial."* A11, Tr. trans. 4195

The prosecutor then gave a rebuttal closing argument, and said, in part:

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.

A12-13, Tr. trans. 4210-11

Seivers was found guilty as charged in December 2019. A penalty phase occurred a week later. A8 The jury found a single aggravator, that the murder was committed in a cold, calculated, and premeditated manner, and it checked

a box to indicate a unanimous vote for death. A8-9, R761-62 A sentencing hearing was conducted on January 2, 2020. The judge found that Sievers had no criminal record, had been a devoted father who taught his children their faith, 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. R1026-28 Sievers' children did not want the death penalty imposed. A9, R1027 The judge gave great weight to the single aggravating factor and found that it outweighed the mitigation. A10, R1028 He sentenced Sievers to death for first-degree murder and thirty years for conspiracy. R991-1032

D. Direct Review Proceedings

On direct appeal to the Florida Supreme Court, Sievers' first two issues concerned the judge's impromptu instruction and the State's rebuttal closing. He argued that the trial court erred by sustaining the State's objection to his closing argument and giving a judicial rebuttal to that argument, which among other things, deprived Sievers of his due process right to a fair trial. Initial Brief in Fla. S. Ct at 47, 62. He argued in Issue II that when the prosecutor suggested in the State's rebuttal closing that Curtis Wright would be polygraphed before his sentencing and lose his plea ageement if he failed, that was prosecutorial misconduct which violated Sievers' due process right to a fair trial. Initial Brief in Fla. S. Ct at 64.

The Florida Supreme Court disposed of the claims with brevity. For the first issue, the court said it disagreed with Sievers' assertions that the trial

court's instruction misstated the law, that it amounted to a comment to the jury on the evidentiary weight of the State's decision not to give Wright a polygraph exam, and that it indirectly commented on Wright's credibility. A11-12

Further, the court said Sievers "forfeited any challenge to the substance of the trial court's instruction," since "counsel told the trial court that the State, rather than the court itself, should raise the admissibility issue with the jury in the form of an argument." A12 Next, the court explained "it was not error for the trial court to issue a clarifying instruction" in response to Sievers' closing argument because "[t]he jury could reasonably have taken defense counsel's closing argument to imply that the jury would have known the results of any polygraph exam administered to Wright." A12 In addition, the court noted that "the trial court gave Sievers free rein to argue to the jury that the decision not to subject Wright to a polygraph showed the State's unwillingness to find the truth." Id.

For the second issue, the Florida Supreme Court stated only: "It is true that the State's rebuttal told the jury that Wright remained obligated to take a polygraph at the State's request, but the argument did not imply that the State necessarily would avail itself of that option." A13

The court acknowledged that the State proved its case "principally through Wright's testimony." A13 Sievers filed a motion for rehearing in which he pointed out, among other things, that there was no evidence of any wrongdoing by Sievers without Wright's testimony and that the opinion

overstated the evidence against Sievers by the assertion that the State had admitted evidence independent of Wright's story—specifically, cell phone records—that tied Sievers to the crime. ¶¶ 20-23 of motion filed Dec. 1, 2022 in Fla. S. Ct. SC2020-0225, The motion for rehearing was summarily denied on January 18, 2023. Appendix B1

REASONS FOR GRANTING THE PETITION

I.

This Court Should Decide Whether a State Trial Judge Violates a Defendant's Due Process Right to a Fair Trial By Giving an Impromptu Jury Instruction Addressing a Prosecution Witness's Credibility to Rebut the Defendant's Closing Argument

Whether a state trial judge violates a defendant's due process right to a fair trial by giving an instruction immediately following the defendant's closing argument in direct rebuttal to that argument concerning the credibility of the key state witness is an unsettled question that this Court should answer. The Fourteenth Amendment "imposes minimum standards of fairness on the States, and requires state criminal trials to provide defendants with protections 'implicit in the concept of ordered liberty.'" *Danforth v. Minnesota*, 552 U.S. 264, 269-70 (2008) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

While the Constitution does not prohibit a judge from commenting on the facts in evidence, see *Starr v. United States*, 153 U.S. 614, 625 (1894) ("it has been held that an expression of opinion upon the facts is not reviewable on error"), this Court has recognized inherent limitations of that privilege with regard to a criminal defendant's right to a fair trial in federal court. The judge "should take care to separate the law from the facts, and to leave the latter, in unequivocal terms, to the judgment of the jury, as their true and peculiar province." *Starr, id*; See also, *Quercia v. United States*, 289 U.S. 466, 470 (1933) ("He may analyze and dissect the evidence, but he may not either distort it or add to it"); *United States v. Breitling*, 61 U.S. 252, 254–55 (1857) ("It is clearly error in a [federal] court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered."). The duty of impartiality requires that trial judges refrain from taking on the role of an advocate during the course of the proceedings. *E.g.*, *United States v. Musgrave*, 444 F.2d 755, 763 (5th Cir. 1971) ("the trial judge must be careful to maintain an attitude of impartiality and avoid giving the jury any impression that he believes the defendant is guilty").

Under *Breitling*, *Starr* and *Quercia*, a federal judge would have violated the inherent limitations of the privilege to comment on the facts by giving the instruction given here. When the judge instructed the jury in response to the defense attorney's closing argument, he interjected with a supposed or conjectural situation to justify the State's decision to forego a polygraph before

putting a known liar on the stand. The judge's instruction implicitly hypothesized that (1) the cooperating witness, Curtis Wright, actually took and passed a polygraph exam, (2) then the State prosecutor attempted to offer that passing result into evidence, (3) and the judge then ruled the polygraph result inadmissible. Since none of this occurred, the instruction was injecting pure conjecture into the jury's understanding of the case, which enured to the benefit of the prosecution. The instruction redirected the jury away from considering the Petitioner's point that the prosecutors had not wanted to give Curtis Wright a polygraph because they suspected that he would not pass.

In *Starr*, this Court reversed for a new trial due to the judge's argumentative jury instructions, saying that "argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them." 153 U.S. at 628. This Court also recognized the power of the judge's words to influence a trial's outcome. "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." *Id. at* 626 (1894).

But the fact that a *federal* judge's authority to comment on evidence would have been exceeded here does not resolve the question of whether a violation of a state defendant's due process right to a fair trial occurs when a judge so instructs the jury. See *Wong v. Smith*, 562 U.S. 1021 (2010) (Alito, J., dissenting from denial of certiorari) (recognizing that "[n]o constitutional

decision of this Court has ever explained how the general rule against 'coercion' applies to the traditional practice of judicial comment on the evidence"). The only case from this Court that has addressed "the constitutional rule against coercive jury instructions" is *Lowenfield v. Phelps*, 484 U.S. 231 (1988). *Wong*, 562 U.S. at 1021. In *Lowenfield*, this Court held that coercive jury instructions are unconstitutional and that courts must judge coerciveness based on the totality of the circumstances. 484 U.S. at 237-41. "Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Id.* at 241. But this Court's jurisprudence lacks a definitive example of judicial remarks that would violate this prohibition. The present case provides an opportunity to address this important shortcoming in this Court's jurisprudence.

As the constitutional question presented has not been clearly decided, if a constitutional violation did occur—if the judge's instruction violated Sievers' right to a fair trial—that violation will remain unremedied and will evade federal habeas review in this capital case because the constitutional rights at issue have not been clearly established by this Court. *E.g.*, *Shoop v. Cassano*, 142 S.Ct. 2051 (2022) (Justice Thomas, dissenting) (describing the limited power of federal courts to upset state criminal convictions under the Antiterrorism and Effective Death Penalty Act of 1996).

Given the timing of the judicial remarks and the substance of the remarks, responding to the defense closing argument on the key witness's

credibility, this case presents an excellent opportunity for this Court to address the limitations of a state trial judge's privilege to comment on the facts in evidence, if any, and the interplay of such privilege with the defendant's constitutional right to a fair trial under the Due Process Clause. The facts of this case are straightforward where the judge's remarks directly followed the defense closing argument and were made in direct response to that argument.

Further, this issue was properly preserved, notwithstanding the Florida Supreme Court's statement to the contrary. The record clearly refutes the Florida Supreme Court's statement that Sievers forfeited any challenge to the substance of the trial court's instruction. Significantly, the trial judge noted the defense's opposition just before giving his improper instruction by saying: "Okay. I'll make a brief statement on it. *And your objection is noted* for the record." Tr. trans. 4194 When Sievers' lawyer answered the judge's question as to whether *the judge or the prosecutor* should address the admissibility of a polygraph with the jury in a curative instruction, the judge had already sustained the prosecutor's objection. The judge's question gave the defense attorney two options and the defense attorney chose the least bad among them. That was not an abandonment or forfeiture of the defense's opposition to the prosecutor's frivolous objection.

The issue should result in a reversal for a new trial where the judge's remarks following the defense closing argument served to invade the jury's fact-finding function at a time when the defense had no further opportunity to

respond. "It was for the jury to determine which of the witness' stories would be given credence, or indeed whether the witness would be believed at all. The comments by the trial judge clearly infringed upon the jury's credibility determining process and appellant was thereby deprived of a fair trial." *Anderson v. Warden, Maryland Penitentiary*, 696 F.2d 296, 299 (4th Cir. 1982) (quoting *United States v. Bates*, 468 F.2d 1252, 1255 (5th Cir.1972)). "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U.S. 607, 613 (1946).

Sievers' right to a fair trial was violated when the trial judge instructed the jury that a passing polygraph test result for Curtis Wright would not have been admissible in Sievers' trial. That instruction was a rebuttal to the defense attorney's rhetorical question posed at the end of the closing argument addressing the pivotal question for the jury, which was the credibility of the State's disreputable witness, Wright. The defense attorney's closing argument was an indictment of the prosecution for failing to test the credibility of its star witness with an available tool that it bargained for in Wright's plea agreement. The subsequent judicial instruction was intended to assuage any potential doubt over whether the State had properly vetted the witness before presenting him as truthful.

The issue of forgoing the polygraph was the Achilles' heel of the State's case. The judge's instruction left an impression on that jury 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." Tr. trans. 4195 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. The judge took on the role of the prosecution's apologist, and in so doing, 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.

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*, 337 Conn. 826, 854, 256 A.3d 131, 149 (2021) (concluding "that there is a significant risk that the instruction given by the trial court 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).

In rejecting the suggestion that *any* error occurred, the Florida Supreme Court noted that "the trial court gave Sievers free rein to argue to the jury that the decision not to subject Wright to a polygraph showed the State's unwillingness to find the truth." A12 What this misses is that any argument from a defense lawyer pales in comparison to the effect that a judge's words can have on a jury. See *Carter v. Kentucky*, 450 U.S. 288, 304 (1981) ("[A]rguments of counsel cannot substitute for instructions by the court.") (quoting *Taylor v. Kentucky,* 436 U.S. 478, 489 (1978). The judge's instruction was a rebuke of the defense attorney's argument, which destroyed the defense's best chance to convince the jury of reasonable doubt. "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. "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." *Herring v. New York*, 422 U.S. 853, 862 (1975). A persuasive summation in closing

argument can "spell the difference, for the defendant, between liberty and unjust imprisonment," *id.* at 863, or in this case, liberty and an unjust execution. This Court should grant the writ because the Florida Supreme Court has sanctioned a violation of Petitioner's Fourteenth Amendment due process right to a fair trial.

II.

This Court Should Decide Whether a State Prosecutor Violates a Defendant's Due Process Right to a Fair Trial by Telling the Jury in Rebuttal Closing Argument that the Cooperating Witness Is Subject to Polygraph after the Trial and Should He Fail His Agreement Goes Away

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

> 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.

Tr. trans. 4210-11 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 before Wright was sentenced.

"[A] prosecutor's improper comments will be held to violate the Constitution only if they " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Parker v. Matthews*, 567 U.S. 37, 45 (2012) (quoting *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Whether that line has been crossed is a question that this Court should address here. The Florida Supreme Court saw no error in this case whereas the federal circuit courts have reversed for new trials on the basis of similar prosecutorial remarks.

The federal circuit courts have recognize this specific type of argument—suggesting that the prosecutor would hold a witness accountable by taking away a plea agreement—to be an insidious form of vouching that denies a defendant the right to a fair trial. *See 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, 933-36 (9th Cir. 1992) (plain error occurred when the prosecutor vouched for the codefendant who testified pursuant to a plea agreement); *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.");

In *Carroll*, the prosecutor vouched for its witnesses similarly to the situation in the instant case by actually saying they would lose the benefit of their plea agreement if they lied:

> [T]he prosecutor stressed that the Patricks' plea agreements provided that any lies or half-truths on the part of the witnesses would void the agreements, and he declared that if Richard Patrick lied, he would lose the benefit of their plea agreement. Appellant objected, and the court sustained, ruling that the prosecutor could comment on what the agreement says, but could not tell what the government would or would not do if the witness did not tell the truth. Moments later, the prosecutor made a very similar point with regard to Robin Patrick. There was no objection at that time. During his rebuttal, the prosecutor reiterated these points. Again, Appellant objected, but this time the court overruled the objection, saying that the agreement is in evidence and that the statement to which Appellant objected was 'a proper comment on the evidence.'

Carroll, 26 F.3d at 1382–83 (footnotes omitted). The Sixth Circuit said, "We cannot overstate the extent to which we disapprove of this sort of improper vouching by prosecutors." *Id.* at 1389. Noting that the only evidence against the defendant was the testimony of the cooperating witnesses, the court held that the appellant was entitled to a new trial untainted by improper prosecutorial vouching.

In *Brown*, as here, the full texts of plea agreements between the Government and three key prosecution witnesses were entered into evidence. "Each agreement featured provisions by which the witness agreed to tell the truth and testify truthfully and to have their continuing veracity confirmed by polygraph or 'lie detector' tests at the Government's option." 720 F.2d at

1062. The admission of the agreements was over the objection of the defense, and held to be error in *Brown*. That was not an issue in the present case, however, because Sievers admitted Wright's plea agreement in the defense case without objection by the State. What is relevant here is what the *Brown* court said about the prosecutor's unfair use of the polygraph provisions in the agreements in the government's closing argument:

> The impropriety of this evidence was compounded by the prosecution's final arguments which skillfully tied the strands of witness credibility to the bonds of the plea bargain contract, the essence of which was that continuous monitoring of the witnesses' reliability was available to the Government by means of the polygraph. We conclude that the result was impermissible witness "vouching" which substantially prejudiced the rights of all appellants to fair trial.

720 F.2d at 1062–63. In *Brown* the court recognized that the government's case rested on convincing the jury of the credibility of the inside witnesses. *Id.* at 1070. The same is true here where the State's case rested entirely on the credibility of the cooperating witness, Curtis Wright.

In the present case, the prosecutor questioned Wright on direct about the requirement to tell the truth in his plea agreement. The defense then rightly questioned why the State had decided to not use the one investigative tool in its arsenal that was designed to test the witness's credibility before putting him on the stand. The prosecutor's response in closing argument that it could use a polygraph after the trial was a particularly invidious form of vouching, as characterized by the court in *Brown*, *id.* at 1072.

> Admission in this case of the reference to the polygraph waiting

> in the wings, and the use in argument of its provisions combined to create errors which we believe infected the whole case. . . . The jury could well have decided to believe the witnesses without the back-up of "lie detector" evidence. But, taken as a whole, the plea-bargain agreement, like a covenant of faith, told them that the prosecution stood ready at all stages to bring the witnesses to account should they stray from the truth. It gave assurance not only that the witnesses were truthful when the prosecution decided to put them on the stand, but also that their revelations to the jury could be believed because of the threat of certain exposure. That resource, like a bright line to honesty, suggests that the scientific apparatus can tell the difference. It also opens the intimation that the Government knows that its witnesses have told and are telling the truth because otherwise they would not have been offered as witnesses. *Further, the jury may be led to think that should their jury 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.*

Brown, id. at 1074 (emphasis added). What was discussed as a potential future polygraph in *Brown* was here explicitly referenced by the prosecutor with the specter that Wright would lose the plea agreement if he failed a polygraph occurring before was sentenced.

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." 962 F.2d at 928. The comments assured the jury that the government would prosecute its witness 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 [the witness's] account of the events." Id. at 935. In the present case, 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. In *Smith*, the court said it "cannot presume that those comments played only a minor role in a largely predictable calculus." *Smith*, 962 F. 2d 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. In contrast to what occurred, the prosecutor could have used the State's rebuttal closing argument 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 the lead detective why no polygraph was ever given to Wright. But the prosecutor never asked the detective why the State declined to give Wright the polygraph after Wright signed the plea agreement and that is probably because a truthful response would not have been helpful to the State's case. See *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 Hastings L.J. 1381, 1408 (1996) (advising that "[c]riminals testifying as witnesses are notorious for setting polygraph tests on their ears."). 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.

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 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, the lead detective would have had no explanation to offer that would benefit the State's position.

The Florida Supreme Court's treatment of the issue—by not recognizing any error let alone a violation of the constitutional right to a fair trial based on improper vouching—is in stark contrast with the treatment of the issue by the federal circuit courts in *Carroll*, *Brown*, and *Smith*. This Court should grant the writ to decide whether the prosecutorial vouching issue implicates the Fourteenth Amendment by infecting the trial with unfairness that makes the resulting conviction a denial of due process under the standard set out in

Donnelly v. DeChristoforo, 416 U.S. 637, 94 (1974), as the federal circuit courts have held.

In *Berger v. United States*, 295 U.S. 78, 88–89 (1935), this Court recognized that the prosecuting attorney's "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." This Court noted that the case against Berger was weak because it depended upon the testimony of an accomplice with a long criminal record. The same situation is presented here. The State's case rested entirely on the testimony of the self-confessed actual killer with a long criminal record.

The two questions presented in this petition are intertwined and should be considered together. The prosecutor's improper rebuttal closing argument compounded the prejudice resulting from the improper judicial remarks that followed Sievers' closing argument regarding the inadmissibility of a hypothetical passing polygraph result. Even if the one or the other error can be overlooked, they both should not be because the cumulative effect of the improper rebuttal argument and the judicial remarks denied Sievers his right to due process and a fundamentally fair trial as required by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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