IN THE SUPREME COURT OF FLORIDA

RICHARD WALLACE RHODES,

Appellant,

vs. Case No. 67,842

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, RICHARD RHODES, will be referred to by name in this brief.

Page references to the record on appeal and the appendix to this brief will be designated by "R" and "A," respectively.

Rhodes would note that there is some duplication in the numbering of certain pages of the record on appeal. The transcript of the hearing on the first motion to suppress encompasses pages 2803 - 2881 of the record, while the transcript of the hearing on the second motion to suppress encompasses pages 2832 - 2902 of the record.

STATEMENT OF THE CASE

On June 20, 1984, a Pinellas County grand jury returned an indictment charging Appellant, RICHARD WALLACE RHODES, with the premeditated murder of Karen Jeter Nieradka. (R21)

This cause proceeded to a jury trial beginning on August 6, 1985, with the Honorable Helen S. Hansel presiding. (R960). The jury found Rhodes guilty as charged on August 19, 1985 (R262,2540).

Penalty phase was conducted on August 27, 1985. (R2554-2759) After receiving additional evidence the jury recommended a sentence of death by a vote of seven to five. (R274,2750)

A sentencing hearing was held on September 12, 1985. (R2909-2962) Judge Hansel sentenced Richard Rhodes to death, and orally stated her findings as to aggravating and mitigating circumstances. (R2959-2960) Written findings in support of the sentence of death were not filed until September 24, 1986. (R2985-2986,A1-2) In aggravation Judge Hansel found: (1) Rhodes was under a sentence of imprisonment when the crime was committed, as he was on parole. (R2959,2895,A1). (2) Rhodes has a propensity to commit violent crimes as evidenced by his prior convictions of felony crimes involving the use or threat of violence. (R2959,2985,A1) (3) The murder was committed while Rhodes was committing a robbery or sexual battery. (R2959,2985,A1) (4) The murder was especially heinous, atrocious and cruel. (R2959, 2985,A1). (5) The murder was cold, calculated and premeditated without any pretense of moral or legal justification. (R2959-2960, 2985,A1) In mitigation Judge Hansel found some evidence that

Rhodes suffers from a long-term personality disorder, but found that he has the capacity to appreciate the criminality of his conduct. (R2960,2986,A2)

Rhodes filed a motion for new trial on August 23, 1985 (R263-264), which Judge Hansel heard and denied on October 28, 1985 (R304,2964-2976)

Notice of Appeal was filed on October 29, 1985. (R305)

The Public Defender for the Tenth Judicial Circuit and his trial attorney were appointed to represent Rhodes on appeal to this Court. (R307)

STATEMENT OF THE FACTS

On March 24, 1984, the decomposing body of a white female, approximately 40 years old, was found in debris being used to construct a berm in the Wyoming Antelope Gun Club in St. Petersburg. (R1454-1455,1485-1486,1488-1492,1693-1696,1704) The lower right leg was missing, but was located on March 30, 1984, a few yards from where the body had been found. (R1492, 1521-1522,1695)

Debris from two buildings that had been torn down was being used to construct the berm, but the debris in the immediate area of the body came from the Sunset Hotel in Clearwater, which was demolished on March 15 . (R1453,1455,1463,1465,1467)

The body was identified as that of Karen Nieradka through fingerprints. Her known prints were on file with the Pinellas County Sheriff's Department as a result of her arrest in February, 1984. (R1546-1547,1549,1551-1555,1557-1559,1567, 1570-1572,1888)

Doctor Joan Wood, medical examiner for Pinellas County, determined the cause of death to be manual strangulation. (R1689-1690,1701) Her opinion was based on the fact the hyoid bone was broken, tests were negative for drug overdose, the circumstances under which the body was found, and the lack of any other obvious cause of death. (R1702) Nieradka had been dead from two to eight weeks. (R1705) There was no evidence of sexual intercourse, sexual molestation, or rape, apart from the fact Nieradka was nude, except for a brassiere. (R1694-1695, 1714) Numerous bones on the body were fractured, but all such

breakage (except for the hyoid bone) occurred post-mortem. (R1708,1717,1757) Cirrhosis of the liver, often caused by excessive alcohol consumption, was present. (R1714-1715)

In February, 1984, Richard Rhodes worked in the telemarketing division of the Clearwater Sun. (R381,1574-1575, 1581-1582) He only worked there a few weeks. (R1576) One day, possibly a Friday around February 24, Rhodes came to work late. (R1577,1585) He explained that he had been detained by the police overnight because he had been driving his girlfriend's car, and she was found strangled under a pile of lumber on Sunset Point Road. (R1578-1579,1583,1588-1589) Rhodes made some remark about she should not have been looking for Mr. Goodbar. (R1584) He only worked at the Sun for a few more days. (R1580,1585)

Rhodes was living at a place in Clearwater called Safe House in February 1984. (R377,1598-1599) It was a temporary shelter run by a religious organization. (R1598)

Daniel Sessions also lived at Safe House, and knew Rhodes. (R1598-1599) One night toward the end of February, possibly a Wednesday, Rhodes came in verylate. (R1601-1602,1607) He was acting very strangely, as if he were high on drugs. (R1601-1602,1608) He took a shower, then got fully dressed and went to bed. (R1601-1602,1603-1604)

Rhodes displayed an interest in the Sunset Point Hotel, which was a few blocks from Safe House. (R1600-1601,1611).

Karen Nieradka had been Rebecca Barton's roommate in Clearwater. (R1613) Barton last saw her on the evening of

February 29 when she left the house with Richard Rhodes and two other men, Danny Pauley and George. (R1620-1623,1625)

Pauley and George Kaftanden went to Mano's Bar with Nieradka and Rhodes after leaving Barton's house. (R1640-1641, 1643-1644) Pauley and Kaftanden left the bar sometime around 11:00 or 11:30, although it could have been earlier or later. (R1644,1648) Rhodes and Nieradka were still there. (R1644)

On March 2, 1984, Trooper Robert J. Drawdy of the Florida Highway Patrol stopped Rhodes in Hernando County. (R1779-1780) Rhodes was driving a white 1983 Dodge Dart. (R1781) He was headed southbound when stopped, but Drawdy had information he had originally been headed north. (R1792,1800-1801) He said the car belonged to his girlfriend, Linda, whose last name he could not pronounce because it was Russian. (R1781-1782) Documents in the glove compartment showed the car registered to Karen Nieradka. (R1783-1785) When Trooper Drawdy asked Rhodes who Karen was, he replied she was another one of his girlfriends. (R1778-1789) Rhodes said she also had a Russian name he could not pronounce. (R1789)

Also in the glove compartment was a note giving Rhodes permission to use the car. (R1783,1788) It was purportedly signed by Karen Nieradka and Richard Rhodes. (R1788)

Trooper Drawdy placed Rhodes under arrest, but not for murder. (R1789) He was transported to Citrus County Jail. (R1789) The car he was driving was impounded. (R1890-1891)

On March 3, 1984, some purses, suitcases, clothing, etc., belonging to Karen Nieradka were found in the vicinity of the Anclote Bridge in Tarpon Springs. (R1655-1662,1669-1682, 1763-1765)

Harvey Duranseau was Richard Rhodes' cellmate at the Citrus County Jail. (R1834) Rhodes generally was not interested in watching the news, but became interested when there was a broadcast regarding a body found at a Clearwater landfill. (R1836) After that newscast, Rhodes asked Duranseau many questions about dead bodies. (R1836-1838) The issue of strangulation came up often. (R1837-1838) On one occasion Rhodes remarked that only he and the girl (the same girl mentioned on the newscast) knew what occurred, and he was not going to tell. (R1840). When he mentioned the girl he made a gesture with his hands as if he were strangling someone. (R1840)

On March 26, 1984, Detectives Steve Porter and Walter Kelly, Jr. of the Pinellas County Sheriff's Department interviewed Richard Rhodes in Citrus County. (R1883, 1893-1894, 2005-2006) After the detectives introduced themselves and said they were there on a criminal investigation, Rhodes said, "I know why you're here. You're here on a murder investigation." (R1896, 2007) Rhodes then gave a number of different statements. He said he was in possession of the victim's car because he had rented it from her. (R1897-1898) He said he had taken Karen and her boyfriend, "Bear," to the Sunset Hotel and dropped them off. (R1898-1899, 1901, 1902-1903) At one point Rhodes said,

> I know you can't prove I did it. I studied forensic lobotomy in prison. Too much time has elapsed for you to prove that I did it.

(R1912)

During a second interview the same day, March 26,

Rhodes stated that a man called "Crazy Angel" killed Karen at the Sunset Hotel. (R376,1924) Rhodes waited in a car while the two went into the hotel. (R376,1924) He assumed they were going to have sex. (R376,1926) Crazy Angel returned without Karen. (R376,1924) When Rhodes asked where she was, Crazy Angel indicated he had killed her, and threatened Rhodes. (R576, 1924 -1925,1928) He instructed Rhodes to get rid of Karen's car. (R378,1925,1929)

In another statement Rhodes said he drove Karen, Kermit Villeneuve, James Foley, and Crazy Angel to the old hotel. (R1940,2011) He waited in the car while they went inside. (R2012) After a few minutes Rhodes went in to see what was happening. (R2012) He found Crazy Angel with his hands around Karen's throat, strangling her. (R2012) She was not fighting. (R2012) Crazy Angel threatened Rhodes. (R2012) He and the others told Rhodes to drive Karen's car to Georgia. (R2012-2013)

Rhodes then said the three men held Karen down and pulled her jeans down, but that she fought pretty good. (R2012-2013)

In an interview with Rhodes on March 29, 1984, Rhodes claimed he did not learn about the murder until after it happened, when Kermit Villeneuve told Rhodes he had killed Karen. (R1945-1946,2012-2014) During that interview Rhodes admitted he had been lying to the detectives. (R1951,2014) He also said he was physically incapable of strangling anyone, due to neurological damage he had suffered in his arms. (R1947,2015)

Yet another version Rhodes gave was that he entered the Sunset Point Hotel with Karen and Kermit. (R2021) Kermit

hit Karen in the throat with his open hand, knocking her down. (R2021) He tried to stab her in the neck with a piece of wood. (R2021) Both Kermit and Karen were drunk, and she did not resist. (R2021) Kermit had a pistol, which he put on the floor while he raped Karen. (R2021-2022) Rhodes tried to pull Kermit off. (R2022) He put the gun to Kermit's head, but could not pull the trigger. (R2022) Finally, Rhodes threw the gun down and ran. (R2022) Rhodes denied raping or killing Karen. (R2022)

On April 27, 1984, Rhodes was placed under arrest for first degree murder at Citrus County Jail and transported to Pinellas County. (R1953-1954) During the ride he described himself as a vampire, which he said was someone who prays upon others and lives off someone else. (R1956) Rhodes offered to tell Detective Porter how the victim died if Porter would promise Rhodes would spend the rest of his life in a mental health facility. (R1956) Then Rhodes said the victim died accidentally when she fell three stories in the Sunset Hotel. (R1956-1957) He began smiling after he said this. (R1957) Rhodes told Porter he would not get the truth out of him until he was convicted. (R1957)

After Rhodes got to the Pinellas County Jail, Edward Cottrell discussed his case with him many times, as they were incarcerated in the same wing of the facility. (R2031) Rhodes told Cottrell he had gone with a girl named Karen to the "Sunset Fort Harrison Hotel," which was being torn down. (2032-2033) Rhodes tried twice to "get into her pants," but she resisted. (R2033) The second time, she hit him, and he hit her back,

choked her, and hit her in the head and/or neck with a board. (R2033) Rhodes then took her clothes, watch, ring, and purse, and hid the body under some carpet or rubbish. (R2033-2034) He threw the clothes and purse into a river between Hudson and New Port Richey and sold her watch and some eight-track tapes to someone in a bar. (R2034) Rhodes changed his story many times during his conversations with Cottrell. (R2034)

Another inmate, John Bennett, asked Rhodes what he was in for. (R2060) When Rhodes replied, "murder," Bennett said, "It looks like you couldn't bruise a grape." (R2060) Rhodes remarked, "I bruised more than a grape, but they can't prove it." (R2060)

Michael Guy Allen was a good friend of Rhodes while they were incarcerated at the Pinellas County Jail. (R2079) Among other things, Rhodes told Allen the person he supposedly killed was a girl he was out "partying" with. (R2080) Allen asked Rhodes if he shot her. (R2080) Rhodes said he tried to break her neck. (R2081) He and the girl "had got it on," after which she became angry and threatend to "tellher old man." (R2081) Theyfought, and Rhodes knocked her out. (R2081)

At Richard Rhodes' trial he presented five witnesses in his defense (R2195-2268) One of them, Sandra Nieradka, was married to Richard Nieradka, who previously had been married to Karen Nieradka. (R1761,2225) She testified concerning a fight she had with Richard in November of 1984 during which he started choking her and said, "This is how I killed Karen." (R2228-2231)

The State put on four rebuttal witnesses, much of whose testimony Rhodes objected to as constituting impeachment

on collateral matters or as not rebutting anything presented by the defense. (R2273-2316)

At the penalty phase of Rhodes' trial June Blevins testified for the State that Rhodes worked at the Clearwater Sun for about two weeks, from late February until March 2, 1984. (R2559-2560) He came in 10 minutes late on February 24. (R2559)

The State also introduced judgments and sentences showing that Rhodes had been convicted of robbery in the first degree and assault in the third degree in Oregon, and battery with a deadly weapon and attempted robbery in Nevada, and that he had been paroled on the Nevada battery charge, with a parole expiration date of April 16, 1985. (R394-397,2595-2597)

Captain Jerry Rolette of the Mineral County, Nevada, Sheriff's Office briefly described his investigation of the Nevada offenses. (R2637-2639) He identified a cassette tape recording of his interview with the victim, which was admitted into evidence after denial of a defense motion in limine, and played for the jury. (R2600-2636,2639-2640,2984,2994-3011) 1/ Also admitted were two pictures of the elderly female victim. (R398,2642-2643)

The defense presented the testimony of Dr. Walter Afield, a psychiatrist who had examined and evaluated Rhodes at the Pinellas County Jail. (R2645-2649) He found Rhodes to be one of the most abused people he had seen in many years, from early

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1/ The cassette tape was not included in the original record on appeal that was sent to this Court, but the tape and a transcript thereof were forwarded to the Court as part of a supplemental record on September 29, 1986. (R2984,2994-3011)

childhood on. (R2650-2651) Rhodes had had an enormously disturbed life, and had spent most of his time in institutions from the age of five. (R2651-2652) He had been trained into becoming a very isolated, lonely, empty, shallow, inadequate, angry, disturbed individual, who had been diagnosed as psychotic around 1971 or 1972. (R2656) Dr. Afield concluded that on or about February 29, 1984, Rhodes was under the influence of extreme mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R2655, 2657) Rhodes' condition could be controlled in a prison setting, and a positive impact upon his character might result if he received very good, long-term (15 to 20 years) treatment while incarcerated. (R2658-2659)

Janet Foltz also testified for Rhodes at the penalty phase. (R2681-2694) She was with a prison ministry team. (R2682) She had witnessed a change come over Rhodes at the Pinellas County Jail. (R2685) He began caring about people. (R2685) He was continually changing, growing spiritually. (R2689)

The court instructed the jury on all statutory aggravating and mitigating circumstances. (R2739-2742)

During their deliberations the jury apparently asked the court whether they would be polled concerning the penalty recommendation. (R2753-2754) Without notifying counsel, the court sent back word through the bailiff that polling was a possibility. (R2753-2754) Rhodes objected to this procedure and moved for a mistrial based upon the court's communication with the jury, but the motion was denied. (R2757)

SUMMARY OF ARGUMENT

I. Trooper Drawdy lacked probable cause to arrest Richard Rhodes without a warrant for driving without a driver's license. Rhodes explained why he was unable to produce his license. As the arrest was illegal, all subsequent statements Rhodes made should have been suppressed.

11. Edward Cottrell's testimony concerning inculpatory statements Richard Rhodes allegedly made to him when they were in jail together should have been suppressed. Cottrell was, at least indirectly, encouraged by the authorities to obtain information from Rhodes, and employed a scheme of deceit to accomplish this. Cottrell expected to be compensated for his work as a state agent by receiving a lower sentence on pending serious felony charges.

111. Testimony Michael Allen gave concerning supposed threats made by Richard Rhodes against Harvey Duranseau, Richard Nieradka, and "snitches" in general should not have been admitted as it was irrelevant and prejudicial.

IV. The State should not have been allowed to introduce color photographs and a color videotape depicting Karen Nieradka's

decaying remains in the rubble at the Wyoming Antelope Gun Club, or pictures of her corpse at the medical examiner's office, as this evidence was cumulative and irrelevant, serving only to inflame the jury.

V. Michael Malone, accepted as an expert in hair and fiber analysis, offered prejudicial testimony outside the scope of his expertise when he testified that people in death throes have a tendency to grab their own hair.

VI. Detective Steve Porter's testimony that Richard Rhodes told him he (Rhodes) had "studied forensic lobotomy in prison" was irrelevant and highly prejudicial, as it suggested Rhodes' guilt of collateral crimes, and should not have been admitted.

VII. Defense witness Paul Collins should have been allowed to testify that Karen Nieradka told him Richard Rhodes had her car in New Port Richey. The testimony was admissible under the state of mind exception to the hearsay rule, and would have shown Nieradka's willingness to let Rhodes use her car, supporting his statements to the detectives.

VIII. The State's rebuttal testimony from Richard Nieradka and Detective Steve Porter should not have been admitted as it did not serve to rebut any defense evidence or constituted an attempt to impeach defense witness Sandra Nieradka on

collateral matters. Rebuttal witness Margaret Tucker was permitted to give double hearsay testimony over objection.

IX. The assistant state attorneys who prosecuted Richard Rhodes made closing arguments to the jury that were inflammatory and not supported by the evidence in referring to Rhodes as an "admitted murderer" and analogizing Karen Nieradka's life to that of the protagonist in the novel, Looking for Mr. Goodbar.

X. A. There was no clear, competent evidence to justify the special instruction on flight the court gave to the jury.

B. The State improperly attempted to amend the indictment herein by filing a statement of particulars which expanded the time period within which Karen Nieradka allegedly was killed. The jury should have been instructed that the State was obligated to prove the narrower time frame set forth in the indictment.

C. Rhodes' request for jury instruction on second degree felony murder should have been granted as there was some evidence that he aided and abetted a robbery or sexual battery committed by "Crazy Angel" during which Karen Nieradka was killed, but was not present at the murder.

XI. Judge Hansel's instruction to the alternate jurors, in the presence of the other jurors, to remain in the courtroom

in the event they were needed for a penalty phase prejudiced the deliberating jurors against Richard Rhodes by suggesting that the judge felt Rhodes would be convicted.

XII A. Richard Rhodes' confrontation rights were violated when the State introduced at penalty phase a tape recording of an interview with the victim of an attempted robbery and battery with a deadly weapon in Nevada.

B. The State's cross-examination of penalty phase defense witness Janet Foltz was improper, especially as it suggested Rhodes' guilt of having "shanks" (knives) in his shoes, with which he had not even been charged.

C. The prosecutor's penalty phase argument to the jury was filled with improper comments, including a "Golden Rule" argument, misstatement of the law, and inflammatory remarks not confined to the evidence.

XIII. The court's answering of a penalty phase jury question by telling them there was a possibility they would be polled, without opening court or consulting counsel, was reversible error.

XIV. The "barebones" findings in aggravation and mitigation made by Judge Hansel are insufficient to sustain imposition of the death penalty upon Richard Rhodes. They lack analysis and adequate factual recitations.

XV.A. The evidence presented below will not support the finding that Karen Nieradka was killed during a sexual battery or robbery. No completed sexual battery was proven, and any taking of her property was not contemporaneous with the force used against her.

B. The heinous, atrocious or cruel aggravating circumstance is insupportable, as the facts surrounding Karen Nieradka's death are unknown. She may well have been highly intoxicated or unconscious before she was killed.

C. The State failed to prove that Karen Nieradka's murder was accompanied by the heightened premeditation required for the cold, calculated and premeditated aggravating circumstance. The court recited no factual justification for this factor. The only evidence that conceivably could support it was contradictory and uncertain.

D. The court should have given more consideration to the mitigating evidence Rhodes put on, especially Dr. Afield's testimony and the conclusions he reached concerning Rhodes' troubled life and disturbed mental condition.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN DENYING RICHARD RHCDES' MOTION TO SUPPRESS STATEMENTS HE MADE AFTER HIS ARREST, AS THE STATEMENTS WERE THE PRODUCT OF AN ILLEGAL ARREST.

The jury which tried Richard Rhodes was not apprised of the circumstances leading up to his arrest by Trooper Drawdy, but the circumstances were developed at the August 1, 1985 hearing on Rhodes' first motion to suppress. (R 162-163, 2803-2833) (Interestingly, one of the written questions propounded to the court by the jury during deliberations was "Why was defendant stopped in Citrus County?" (R 259))

Trooper Drawdy testified he pursued a speeding pick-up truck from Citrus County into Hernando County, where he stopped it. (R 2808-2809) Two men exited through the window on the passenger side. (R 2809) They appeared excited. (R 2809) One of the men, named Connors, said they were after a white Dodge Dart that "rammed [him] off." (R 2810) The men gave the tag number of the Dart to Drawdy. (R 2810) The men also said they had been "ripped off." (R 2812,2820)

Drawdy drove off to try to find the Dart, and the men followed in the pickup. (R 2810) About three miles away Drawdy saw a white Dart parked behind an abandoned building. (R 2810-2811) He had already driven by the building and so he turned around to come back by it. (R 2811) As he did so,

the Dart was pulling out onto the highway. (R 2811) Drawdy executed another U-turn so that he was behind the Dart, southbound. (R 2811) The tag number of the Dart matched the number he had been given. (R 2811) Drawdy turned on his blue light and executed a traffic stop, pulling the car over. (R 2811) He observed a number of articles in the car, such as duffel bags or cloth bags for packing clothes. (R 2811)

Richard Rhodes got out of the car, and Drawdy requested his driver's license. (R 2812) Rhodes responded that he had just been ripped off by an armed gunman who took his wallet, identification, and money. (R 2812) When the pickup truck arrived and Connors got out, Rhodes pointed to him and said, "That's the man that robbed me." (R 2812) The two men walked toward one another, and Drawdy stepped between them. (R 2812-2813) He placed Rhodes under arrest for operating a motor vehicle without a driver's license. (R 2813) Drawdy arrested Rhodes primarily to keep control of the situation. (R 2826)

After arresting Rhodes, Drawdy tried to locate his driving record out of the computer in Tallahassee. (R 2817) (In his deposition Drawdy had stated he did <u>not</u> run a license check on Rhodes at the scene. (R 706,2817))

Trooper Drawdy's warrantless detention of Rhodes was illegal. He did not have probable cause to arrest Rhodes for driving without a license. While Rhodes did not produce a

license upon request, he explained that all his identification papers had been stolen. This circumstance should have prompted Drawdy to conduct a further investigation instead of summarily seizing Rhodes. Yet Drawdy's computer check with Tallahassee occurred only after Rhodes was in custody. Assuming the check verified that Rhodes had no Florida license, a fact to which Drawdy did not specifically testify, this after-acquired information could not give legitimacy to the earlier arrest. Carter v. State, 199 So.2d 324 (Fla.2d DCA 1967); Cameron v. State, 112 So.2d 864 (Fla.1st DCA 1959); Brown v. State, 62 So.2d 348 (Fla.1952). Furthermore, checking with the computer in Tallahassee would not indicate if Rhodes had a legitimate out-of-state driver's license, from Nevada, for example, as defense counsel suggested at the suppression hearing. (R 2823) Trooper Drawdy conceded that his primary purpose in arresting Richard Rhodes was to keep control of the situation. He felt he had to arrest someone to avoid a physical confrontation between Rhodes and the men from the pickup truck, and he chose to arrest Rhodes,

> ....[S]tatements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and are not the result of an independent act of free will. [Citations omitted.]

Florida v. Royer, 460 U.S. 491,103 S.Ct. 1319,75 L.Ed.2d 229, 237 (1983). The prosecution bears the burden of showing the

admissibility of statements obtained after an illegal detention. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). The prosecutor below failed to show that the statements Rhodes made to Detectives Porter and Kelly and the statements he made to various people while incarcerated were free from the taint of his illegal arrest. The statements were the fruit of that arrest, and should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Rizo, 463 So.2d 1165 (Fla.3d DCA 1984). Because they were not, Rhodes is entitled to a new trial.

ISSUE II

INCRIMINATORY STATEMENTS RICHARD MODES ALLEGEDLY MADE TO EDWARD COTTRELL SHOULD HAVE BEEN SUPPRESSED, AS THEY WERE OBTAINED IN VIOLATION OF RHODES' RIGHT TO REMAIN SILENT, RIGHT TO COUNSEL, AND RIGHT TO DUE PROCESS OF LAW.

Edward Cottrell testified for the prosecution during the guilt phase of Richard Rhodes' trial. (R *2027-2055)* He had been convicted of a felony or a crime involving moral turpitude about five times. (R *2040)*[2/] He had been convicted of escape four times. (R *2041)*

According to Cottrell he had discussed Rhodes' case with him many times when they were incarcerated on the same wing of the Pinellas County Jail. (R *2031)* Cottrell made notes after some of his conversations with Rhodes. (R *2032, 2840)* Rhodes told Cottrell he had gone with a girl named Karen to the "Sunset Fort Harrison Hotel," which was being torn down. (R *2032-2033)* He twice "tried to get into her pants," but she resisted. (R *2033)* The second time, she hit him, and he hit her back, choked her, and hit her in the head and/or neck with a board. (R *2033)* Rhodes then took her ring, watch, clothes, and purse, and hid the body under some rubbish or carpet. (R *2033-2034)* He threw the clothes and purse into a river between Hudson and New Port Richey and sold her watch

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2/ Several times in the trial transcript the word "acquitted" erroneously appears instead of the word "convicted." (R *2038, 2040-2041)*

and eight-track tapes to someone in a bar. (R *2034)* Rhodes changed this story many times during his conversations with Cottrell. (R *2034)*

Cottrell's testimony was the subject of a pretrial motion to suppress (R 164), which was heard by Judge Hansel on August 1, *1985* (R 2832-2879), and denied. (R *981-982)*

Cottrell initially disclosed discussions he had with Rhodes to Officer Phillips at the jail. (R *2837-2838)* Phillips told Cottrell he might possibly help himself out if he took his information to the State. (R *2043,2837)* Phillips then had a jail detective named Day contact Cottrell. (R *2838)* Day subsequently sent Detective Porter of the Pinellas County Sheriff's Department to speak with Cottrell. (R *2839)* Porter told Cottrell he could not tell him to go back and seek more information from Rhodes, as that would make Cottrell a State agent. (R *2839,2856)* However, Cottrell felt Porter was encouraging him to gather information without explicity saying so. (R *2044)* Cottrell did, in fact, attempt to elicit statements from Rhodes after the conversation with Detective Porter. (R *2863-2864)* He felt a need to talk further with Rhodes. (R *2048)* Cottrell attempted to encourage Rhodes to talk about his case by lying to Rhodes, and saying that he (Cottrell) had friends in high places. (R *2043,2863-2864)*

At the time of Rhodes' trial, Cottrell had already entered a plea of guilty to "felony possession of a firearm''

and nolo contendere to sexual battery and aggravated assault (in cases unrelated to that of Richard Rhodes). (R 2028,2041-2042,2054,2835) Sentencing on these charges had been continued several times so that Cottrell could first testify against Rhodes. (R 2054-2055,2842-2844) Although no promises had been made, Cottrell was expecting and counting on a deal that would result in a lower sentence on the charges to which he had pled. (R 2028,2050,2841,2864-2865)

The circumstances surrounding Cottrell's discussion with Rhodes show that Cottrell was functioning as a State agent, and use of Rhodes' statements against him at trial violated his privilege against self-incrimination and right to counsel. Amends. V., VI., XIV., U.S. Const.; Art.I, §§9, 16, Fla.Const.; Maine v. Moulton, 474 U.S. ___, 106 S.Ct. , 88 L.Ed.2d 481 (1985); United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Malone v. State, 390 So.2d 338 (Fla.1980).

Rhodes' case may be distinguished from cases in which the courts have found no violation of defendants' rights resulting from the use of jailhouse informants. For example, in Kuhlmann v. Wilson, 54 U.S. L.W. 4809 (June 26, 1986) the Supreme Court of the United States interpreted Henry and Moulton to require a showing by the defendant that the police informant took some action beyond merely listening that was designed to

elicit incriminating remarks. Edward Cottrell admitted he used a stratagem of deceit to encourage Rhodes to talk, representing to Rhodes that he had friends in positions of power and influence.

Rhodes' case may be differentiated from Johnson v. State, 438 So.2d 774 (Fla.1983) (upon which the court below relied in denying Rhodes' motion to suppress (R 981-982) for the same reason, that is, active solicitation of incriminating statements from the defendant by the State operative, and also by the fact that in Johnson the detectives did not direct the informant, either directly or surreptitiously, to talk to the defendant. Here, Cottrell felt Detective Porter was, in effect, telling him, by a figurative nod and a wink, to continue to gather information from Rhodes.

Finally, in Bottoson v. State, 443 So.2d 962 (Fla.1983), unlike here, there was no proof the informant actually solicited incriminating statements from the accused, and, in fact, the informant was advised by the authorities not to question the defendant. Also, there was insufficient connection between the informant and the State to establish his status as an agent. Cottrell, on the other hand, had discussions with three representatives of the State concerning Rhodes' statements, and believed Detective Porter was encouraging his efforts.

Cottrell's testimony was particularly damaging to Rhodes, containing as it did a direct admission by Rhodes to killing Karen Nieradka. The trial court's failure to suppress

Cottrell's testimony must result in a new trial for Richard Rhodes.

ISSUE III

THE COURT BELOW ERRED IN PERMITTING STATE WITNESS MICHAEL ALLEN TO TESTIFY CONCERNING STATEMENTS ALLEGEDLY MADE BY RICHARD RHODES WHICH WERE IRRELEVANT AND PREJUDICIAL.

Some of the testimony Michael Allen (who had been incarcerated with Richard Rhodes in Pinellas County Jail) gave during the guilt phase of Richard Rhodes' trial was referred to in the Statement of the Facts. However, Allen gave additional testimony which should have been excluded.

The State initially proffered Allen's testimony outside the presence of the jury, and Rhodes lodged objections thereto. (R 2064-2076)

In the presence of the jury Allen stated that Rhodes had mentioned a man with whom he had been in jail who had given a deposition against him and was now in prison in Michigan. (R 2083) Rhodes asked Allen if he knew anybody in prison in Michigan so that Rhodes could "send word'' to the man who gave the deposition. (R 2083)

The State justified admission of the above testimony as a threat by Rhodes in an attempt to induce a witness not to testify or to testify falsely. (R 2070) As supporting authority the State cited Jones v. State, 385 So.2d 1042 (Fla.1st DCA 1980) and Goodman v. State, 418 So.2d 308 (Fla.1st DCA 1982). (R 2070-2071) The witness in uuestion would have

been Earvey Duranseau, who was in prison in Michigan before he was brought down to testify against Rhodes, as he informed the jury at the beginning of his testimony. (R 1832,2071-2072) The problem with the State's theory is that Rhodes' statement was not evidence of any threat; it was very equivocal, and could have meant anything. Therefore, it was irrelevant. Yet it was prejudicial because the jury was left to speculate as to what Rhodes meant by the statement.

Another objected-to statement that came before the jury was Rhodes' remark to Allen that if anyone in the jail cell had told the detectives anything at all about the case, Rhodes would find out through his lawyer and the snitch would be a dead snitch. (R 2083) Again, this testimony was irrelevant. 590.401, Fla.Stat. (1985). Threats made against unknown, potential future witnesses are not the type of threats found to be admissible in Jones, Goodman, and other cases. Rather, these cases address specific threats against specific individuals. Furthermore, Rhodes' threats were never communicated to all potential informants in the jail. Allen's testimony was highly inflammatory, especially in its character attack upon defense counsel, implying that Rhodes and his attorney would conspire together to eliminate anyone who might "snitch."

The third statement in question was made after Rhodes became aware that the husband of the victim, Richard Nieradka,

was also in jail. Rhodes thought the sheriff's department might try to "set him up'' with Nieradka. (R 2084) Rhodes remarked to Allen that if he (Rhodes) ever went into the hallway wearing leg shackles and handcuffs, and "this guy" (Rhodes did not use Nieradka's name) was waiting for him, he would get worse than his old lady got. (R 2084) This was yet another irrelevant, prejudicial piece of testimony. Rhodes' comment obviously was not a threat to induce a witness to testify falsely or not to testify, as it was not communicated to Nieradka and was not linked to any testimony he might give against Rhodes. The remark about what Nieradka's "old lady got'' did not prove anything, because Rhodes did not say he was the one who inflicted any injury to her.

Evidence concerning threats Rhodes allegedly made that were not relevant was similar to highly prejudicial evidence of collateral crimes, which has been condemned in such cases as Jackson v. State, 451 So.2d 458 (Fla.1984), Drake v. State, 400 So.2d 1217 (Fla 1981), etc. Rhodes did not actually commit the crimes, but allegedly threatened to do so.

The above-mentioned testimony of Michael Allen deprived Richard Rhodes of a fair trial consistent with principles of due process of law. Amends. V., VI., and XIV., U.S. Const.;

Art.I., §§9 and 16, Fla.Const. A new trial for Rhodes must be the result.

ISSUE IV

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE COLOR PHOTOGRAPHS AND A COLOR VIDEOTAPE OF THE VICTIM WHICH WERE CUMULATIVE, IRRELEVANT, AND HAD THE EFFECT OF INFLAMING THE JURY, THEREBY DENYING RICHARD RHODES HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

At the guilt phase of Richard Rhodes' trial, the State introduced into evidence, over objections, some 10 color photographs of the body of the victim lying in the rubble at the Wyoming Antelope Gun Club (State's composite Exhibit 5-A through 5-J) (R 342-346,1513-1518), as well as three color photographs of the victim's severed leg (State's Exhibits 5-C through 6-C) (R 349-350,1522-1525), four color photographs of the victim on the medical examiner's table (State's composite Exhibit 36-A through 36-D) (R 370-371,1540-1543), and a color videotape, running time approximately five minutes, showing the body in the debris at the gun club, and Dr. Wood's examination of it there (State's Exhibit 16). (R 1493-1499,1503-15'362983)[3/]

The initial test for the admissibility of photographic evidence, as for other evidence, is relevance. Straight v. State, 397 So.2d 903 (Fla.1981); $90.402,Fla.Stat. (1985).

3/ The videotape was not forwarded to this Court as part of the original record on appeal, but was sent as part of a supplement to the record on September 29, 1986. (R 2983)

However, even

> [r]elevant evidence is inadmissible if its probative value is outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

§90.403, Fla.Stat. (1985).

The State here engaged in overkill in the quantity and type of photographic evidence it presented to the jury. For example, the multiple photographs of Karen Nieradka's remains at the gun club added nothing to what was depicted in the videotape, and vice versa; the evidence was cumulative. The videotape was the more prejudicial, as it gave movement to the scene depicted in the photographs as Dr. Wood was examining the decomposing, discolored corpse, allowing the head to flop over as the body was turned. (Defense counsel moved to have the tape edited to remove the most prejudicial scenes, but the court refused.(R 1498-1499)) Certainly, the State could have presented whatever it needed through the testimony of Dr. Wood and others who observed the body at the scene, perhaps corroborated by either the videotape or the photographs. Presentation of both photos and tape was pointless and could have served only to arouse the jurors' emotions.

The State's introduction of four color pictures of Karen Nieradka's corpse at the medical examiner's office,

mouth agape, is inexplicable. What possible relevance could these "morgue photos" have to the issues involved in this case?

In Reddish v. State, 167 So.2d 858 (Fla.1964) this Court noted:

> Ordinarily, photographs normally classed as gruesome should not be admitted if they were made after the bodies have been removed from the scene unless they have some particular relevance. ...

167 So.2d at 863. Although the Court may have retreated from this position somewhat in more recent years, it still holds true that the fact pictures were taken after a body has been moved to another location from that where found certainly may be considered in assessing the relevance of those pictures. See State v. Wright, 265 So.2d 361 (Fla.1972)

In the case of the photographs and, especially, the videotape admitted into evidence below

> the gruesomeness of the portrayal [was] so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence.

Leach v. State, 132 So.2d 329,332 (Fla.1961). They served "only to create passion," and should have been rejected. Swan v. State, 322 So.2d 485,487 (Fla.1975). Because they were not, Richard Rhodes is entitled to a new trial not tainted by this prejudicial, inflammatory evidence. Amends. V., VI., and XIV., U.S. Const.; Art.I., §§9 and 16, Fla.Const.

ISSUE V

THE COURT BELOW ERRED IN ADMITTING TESTIMONY OF F.B.I. SPECIAL AGENT MICHAEL MALONE THAT WAS OUTSIDE THE AREA OF HIS EXPERTISE AS AN EXPERT IN HAIR AND FIBER ANALYSIS.

Michael Malone, special agent with the F.B.I., testified at the guilt phase of Richard Rhodes' trial. (R 1862-1880) He was accepted as an expert in the field of hair and fiber analysis. (R 1864) Among other things, Malone testified that hairs found in the victim's hands were her own hair. (R 1873) He went on to say that probably 99 out of 100 times, hairs found in the hands of a murder victim belong to the victim. (R 1874) When the prosecutor asked the reason for this, Malone was permitted to testify, over defense objections, that "in the death throes, the moment before death, people have a tendency to grab their own hair." (R 1876-1877) The source of Malone's knowledge was something a medical examiner told him during the course of Malone's training. (R 1875-1876)

In Buchman v. Seaboard Coast Line Railroad Company, 381 So.2d 229 (Fla.1980) this Court noted two elements to be considered relative to the admission of expert testimony: (1) The subject about which the expert will testify must be beyond the common understanding of the average layman. (2) The expert witness must have such knowledge as will probably aid the trier

of facts in its search for the truth. See also $90.702, Fla.Stat. (1985). Malone's testimony failed at least the second part of this test. The only source of his "knowledge" was hearsay from an anonymous medical examiner; it was not within the scope of his expertise as an expert in hair and fiber analysis. Nor was his testimony relevant to any issue in this cause. It added nothing to the search for truth at Rhodes' trial.

In Fisher v. State, 361 So.2d 203 (Fla.1st **DCA** 1978) and Wright v. State, 348 So.2d 26 (Fla.1st **DCA** 1977) convictions were reversed where expert witnesses were permitted to give testimony that was beyond their competence to give.

It should also be noted that even if otherwise admissible, expert testimony must be excluded if

> its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

590.403, Fla.Stat. (1985). Kruse v. State, 483 So.2d 1383 (Fla.4th **DCA** 1986). Whatever utility Malone's testimony might 'nave had was far outweighed by its tendency to confuse issues and prejudice the jury against Rhodes.

Malone's testimony as to Karen Nieradka Dulling her own hair out during death throes was emphasized by the prosecutor in his final argument to the jury both at the guilt phase (R 2040)

and at the penalty phase. (R 2705-2706) He argued it to the court at the sentencing hearing as a reason for imposing the ultimate punishment upon Richard Rhodes. (R 2943-2944) And, notably, Judge Hansel used the hair pulling in finding the aggravating circumstance of especially heinous, attrocious, or cruel, as evidence of the pain and mental anguish Karen Nieradka must have suffered. (R 2959,2985,A1) Undoubtedly, the jurors must have considered that pain and anguish, seeing Karen Nieradka in death throes in the mind's eye while deliberating Richard Rhodes' guilt. A needless, prejudicial element was injected into the proceedings. Rhodes must be granted a new trial.

ISSUE VI

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF COLLATERAL CRIMES WHICH ONLY TENDED TO PROVE RICHARD RHODES' PROPENSITY TO COMMIT CRIME.

Detective Steve Porter of the Pinellas County Sheriff's Department testified, among other things, to statements made by Richard Rhodes when he was interviewed on March 26, 1984. (R 1893-1912) In the course of recounting Rhodes' statements, Porter gave the following testimony (R 1911-1912):

> He indicated that on the evening of March 2 of 1984, he had proceeded to Pasco County to take his girlfriend, Jan Pitkin, and her daughter to the fair.
>
> And at that point he made a statement, he says, I know you can't prove I did it. I studied forensic lobotomy in prison. Too much time has elapsed for you to prove that I did it.

Rhodes thereafter objected and moved for a mistrial on grounds the reference to "prison" was an improper reference to collateral crimes. (R 1912-1917) He initially took the position that the remark could not be remedied by a curative instruction. (R 1912, 1914), but later requested one. (R 1916) However, the court effectively talked defense counsel out of following through with the request by her comments that curative instructions only put more emphasis on the objected-to testimony. (R 1916) Thus the court ultimately took no action. She did not even sustain

the objection in the jury's presence.

Rhodes' statement that he "studied forensic lobotomy in prison" suggested his guilt of a collateral crime, was not relevant to any issue in the case, and should not have been admitted. It was prejudicial evidence tending to prove nothing more than bad character or propensity. §90.404(2)(a), Fla.Stat. (1985); Jackson v. State, 451 So.2d 458 (Fla.1984); Drake v. State, 400 So.2d 1217 (Fla.1981); Williams v, State, 110 So.2d 654 (Fla.1959).

As the court observed in Green v. State, 190 So.2d 42 (Fla.2d DCA 1966):

> [A]ny evidence that has no more attributes of admissibility than merely to suggest, or tend to suggest, commission of an independent crime, goes out. [Citations omitted.]

190 So.2d at 45. See also Wilson v. State, 171 So.2d 903 (Fla.2d DCA 1965).

In Dibble v. State, 347 So.2d 1096 (Fla.2d DCA 1977) the detective/victim testified he made the following remarks to the defendant after he arrested her for robbery:

> "I told her that this happens all the time on the street, people getting robbed, but this time I was a police officer, and 'You just all hit the wrong guy this time.' "

347 So.2d at 1097. The court ruled that the last statement about "hitting the wrong guy this time" was "highly prejudicial and a mistrial should have been granted," 347 So.2d at 1097.

It suggested appellant had been involved in similar criminal activity in the past. (The lower court did not strike the statement nor instruct the jury to disregard it.) Certainly the testimony given by Detective Porter was at least as prejudicial to Rhodes' cause as the testimony which prompted reversal in Dibble.

Richard Rhodes' rights to due process and a fair trial were denied by the testimony of Detective Porter. Amends. V., VI., XIV., U.S. Const.; Art.I., §§9 and 16, Fla.Const. He therefore should be granted a new trial.

ISSUE VII

THE COURT BELOW ERRED IN EXCLUDING ON HEARSAY GROUNDS TESTIMONY OF DEFENSE WITNESS PAUL COLLINS AS TO A STATEMENT MADE BY KAREN NIERADKA, BECAUSE IT WAS ADMISSIBLE UNDER THE STATE OF MIND EXCEPTION.

Paul Collins was the second defense witness. (R 2215) Before he testified, the State moved in limine to keep the jury from hearing a portion of the testimony the State expected him to give. (R 2173-2182) The State objected on hearsay grounds to Collins testifying that, on the night after Karen Nieradka supposedly was killed, Collins saw Nieradka in a bar and she told him Richard Rhodes had her car in New Port Richey. (R 2173-2182) The court granted the State's motion in limine. (R 2181) Defense counsel then proffered Collins' testimony. (R 2182-2185,2187) He would have testified that eight or nine months prior to trial, toward the end of the week, he saw Richard Rhodes and a girl named Karen in Mano's Tavern. (R 2183) Collins borrowed ten dollars from Rhodes and agreed to pay him back the next night. (R 2183) When Collins returned the following night, Rhodes was not there. (R 2183-2184) Collins asked Karen where he was, and she replied that he had her car in New Port Richey and should be back later on. (R 2184)[4/]

4/ Janelle Pitkin, a friend of Rhodes who had dated him occasionally, and who testified for the State at trial, lived in the New Port Richey area. (R 1823-1824)

Collins was permitted to testify concerning the money-borrowing incident and seeing Karen at Mano's, but not about the statement Karen made as to Rhodes having her car. (R 2216-2219)

Collins' testimony should have been admitted under the state of mind exception to the hearsay rule. §90.803(3)(a), Fla.Stat. (1985); Peede v. State, *474* So.2d 808 (Fla.1935); Jones v. State, *440* So.2d 570 (Fla.1983). Karen's statement demonstrated her willingness to let Rhodes have her car, thus corroborating his statements to the detectives that he had rented the car from her. It was therefore an important piece of defense evidence, the exclusion of which was error, entitling Rhodes to a new trial.

ISSUE VIII

THE STATE SHOULD NOT HAVE BEEN PERMITTED TO PRESENT REBUTTAL EVIDENCE THAT WAS EITHER HEARSAY, IMPEACHMENT ON COLLATERAL MATTERS, OR DID NOT SERVE TO REBUT ANYTHING PRESENTED BY THE DEFENSE.

The main witness who testified on behalf of Richard Rhodes was Sandra Nieradka, the wife of Richard Nieradka. (R *2225)* She testified that she had a fight with her husband during which he began choking her and said that was how he killed Karen (to whom he had been married before her death). (R *1761,2230-2231)*

The State called Richard Nieradka as its first rebuttal witness. (R *2273)* He testified that he was in the Pinellas County Jail on a fugitive warrant for failing to return a car he rented in Brevard, North Carolina. (R *2273-2275)* He had gone to Brevard with Sandra. (R *2274)* He described it as her home town and said she knew most, if not all, of the police officers there. (R *2274-2275)* Rhodes objected to this testimony. (R *2274-2277)* It should have been excluded. Apparently, the State was trying to establish that Sandra was somehow responsible for Richard's arrest, but the testimony utterly failed to accomplish this. There is a danger, however, that the jury may have implied a connection between Sandra and Richard's arrest that was not proved, thus prejudicing Rhodes.

Nieradka also was permitted to testify, over objection, that Sandra had called his probation officer to report violations of probation Richard committed. (R 2283-2284) This testimony did not rebut anything presented by the defense. At best, it was an attempt to impeach Sandra Nieradka on collateral matters, which is improper. See Wallace v. State, 41 Fla. 547, 26 So. 713 (Fla.1899); Gelabert v. State, 407 So.2d 1007 (Fla.5th DCA 1981); McClain v. State, 395 So.2d 1164 (Fla.2d DCA 1981).

Other testimony admitted over objection was Nieradka's testimony as to when he married Karen, when they separated, when and where he last saw her (Morton Plant Hospital in January, 1984), and the fact that Richard felt at fault for the separation. (R 2277-2278) Again, none of this served to rebut anything in the defense case. See Donaldson v. State, 369 So.2d 691 (Fla.1st DCA 1979); Garcia v. State, 359 So.2d 17 (Fla.2d DCA 1978). Elicitation of the fact of Karen's hospitalization in the month before she disappeared prejudiced Rhodes by engendering sympathy for the victim.

Richard Nieradka and Detective Steve Porter both testified as rebuttal witnesses concerning Richard's reaction when he learned of Karen's death, again, over defense objections. (R 2286-2287) During the defense case Sandra Nieradka had testified on cross-examination by the State that Richard "went violent" and became crazy when he was informed of the death,

but she did not know whether he was upset or distraught. (R *2245-2246)* On rebuttal Richard Nieradka said he "turned into an animal" when he heard the news. (R *2286-2287)* He got very upset and charged Detective Porter. (R *2287)* Detective Porter testified that Nieradka became ''very emotional" and "emotionally distraught." (R 2313)

It is questionable whether Richard Nieradka's reaction to the news of his wife's death was a material fact. If it was not, then Nieradka's and Porter's testimony was not proper impeachment. §90.608(1)(e), Fla.Stat. *(1985).* If it was a material fact, the testimony was irrelevant because it did not serve to rebut anything; it was entirely consistent with Sandra Nieradka's description of Richard's reaction when he learned Karen had died.

Finally, the State elicited double hearsay testimony from its third rebuttal witness, Margaret Tucker. (R *2306-2307)* Tucker testified concerning a conversation she had with a woman named Jackie Ellis at the state attorney's office. (R *2306-2307)* Over objection Tucker said:

> Jackie Ellis made the statement that the reason they were here was Sandra said she was going to make sure Richard didn't get out of jail.

(R *2307)* Tucker's recounting of what Jackie said Sandra said was double hearsay, inadmissible under subsection *90.802* of the

Florida Statutes, and not within any recognized exception to the hearsay rule. It was an improper attempt to discredit Sandra Nieradka by showing bias.

"Rebuttal evidence explains or contradicts material evidence offered by a defendant." Britton v. State, 441 So.2d 638,639 (Fla.5th DCA 1982). The State's rebuttal testimony at Rhodes' trial did not accomplish this purpose. Its admission was improper, and Richard Rhodes must be granted a new trial.

ISSUE IX

THE COURT BELOW ERRED IN DENYING RICHARD RHODES' MOTIONS FOR MISTRIAL DUE TO IMPROPER REMARKS OF THE PROSECUTOR DURING HIS FINAL ARGUMENTS TO THE JURY.

The State argued to the jury first and last at the guilt phase of Richard Rhodes' trial. (R 2380-2424,2474-2513) The argument was divided between the two assistant state attorneys who prosecuted Rhodes. (R 2830-2424,2474-2513) Arguments of each prosecutor prompted Rhodes to move for a mistrial.

The first motion for mistrial occurred after the prosecutor said, very near the end of the first portion of the bifurcated argument, "Don't let that admitted murderer walk out of here...." (R 2424-2426)

A prosecutor must confine his remarks to matters which are in evidence. Huff v. State, 437 So.2d 1087 (Fla. 1983); Thompson v. State, 318 So.2d 549 (Fla.4th DCA 1975). Although Richard Rhodes made a number of admissions, he did not unequivocally state that he killed Karen Nieradka. Therefore, the prosecutor's comment was not in conformity with the evidence. It was prejudicial to Rhodes because it suggested he might be guilty of other murders.[5/]

5/ The remark by the assistant state attorney below was similar to the characterization of the defendant by the prosecutor in Meade v. State, 431 So.2d 1031 (Fla.4th DCA 1983) as a "real live murderer."

The motion for mistrial during the second half of the State's bifurcated argument came when the prosecutor persisted in attempting to analogize Karen Nieradka's case to that of the protagonist in the book, Looking for Mr. Goodbar, even after the court admonished him not to pursue this line of argument. (R 2510-2512) He spoke of the "meaningless existence'' of the woman in the book, her "brutal and meaningless death," and how she was ''murdered after picking up some men in a bar." (R 2511) He referred to the message of the book being that "when you can't find love you take something else,''and said Richard Rhodes "could not find love on February 29, 1984." (R 2512)

Obviously, the prosecutor was attempting to capitalize upon the statement Rhodes allegedly made to a co-worker at the clearwater Sun that his girlfriend should not have been looking for Mr. Goodbar. (R 1584) However, the book was not in evidence, and the attempt to analogize the circumstances of the person in the book to those of Karen Nieradka was merely designed to inflame the jury. In fact, the prosecutor even agreed that what he was saying to the jury was "improper for closing argument'' (R 2510), yet he continued in the same vein. (R 2511-2512)

> The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that

> responsibility with the circumspection and dignity the occasion calls for. His case must rest on evidence, not innuendo.

Kirk v. State, 227 So.2d 40,43 (Fla.4th DCA 1969). The prosecutors below failed to exercise their responsibility with the "circumspection and dignity" called for by this most important of cases, a capital case.

There is no way for the Court to determine from the record before it that the effect of the prosecutors' remarks did not prejudice Richard Rhodes. Therefore, he must be granted a new trial. Pait v. State, 112 So.2d 380 (Fla.1959). See also Grant v. State, 194 So.2d 612 (Fla. 1967) and Teffeteller v. State, 439 So.2d 840 (Fla.1983).

ISSUE X

THE COURT BELOW ERRED IN INSTRUCTING TEE JURY ON FLIGHT, IN GIVING AN ERRONEOUS INSTRUCTION REGARDING PROOF OF THE TIME OF COMMISSION OF THE CRIME, AND IN REFTJSING TO INSTRUCT ON SECOND DEGREE FELONY MURDER.

A. Flight Instruction

The following special instruction on flight, requested by the State, was given to the jury over defense objections that it was not supported by the evidence (R 223, 2361-2362,2526):

> Where a suspected person endeavors to evade threatened criminal prosecution by flight, concealment, or other ex post facto indications of desire to evade prosecution, that fact may be shown as one of a series of circumstances from which guilt may be inferred.
>
> Ex post facto means after the fact.

The State claimed the above instruction was supported by two pieces of evidence: Rhodes' statement to the police that he was going to take the car to Georgia, dump it, and fly back to Las Vegas, and the fact that he had been northbound before he was stopped by Trooper Drawdy going south. (R 2361-2362) Rhodes' statement of intent must be discounted unless it was accompanied by actions, that is, by actual flight. "Under

the law flight is considered to exist when an accused departs from the vicinity of the crime" under certain circumstances. Williams v. State, 268 So.2d 566,566 (Fla.3d DCA 1972) (emphasis supplied). Merely planning or thinking about leaving is not flight. Furthermore, in one of his statements to the detectives, Rhodes said he was not going up north when he was stopped, but was merely going to Jan Pitkin's house in Hudson. (R 2020)

Thus we are left with only Trooper Drawdy's testimony that he "had information" Rhodes had been headed north before Drawdy stopped him headed south. (R 1800-1801) This testimony was hearsay, as the source of Drawdy's information was the two men in the pickup truck that he stopped for speeding. (R 1798) Rhodes timely lodged a hearsay objection at trial, but Drawdy's testimony was improperly admitted over it. (R 1797-1801) Also, the fact Rhodes was traveling north, even if established by competent evidence, would prove nothing, particularly in view of his explanation that he was going to visit Jan Pitkin. And the fact that he had already turned south before he was stopped negated any inference he was fleeing. Finally, there is nothing to suggest that Rhodes did not immediately pull over when Trooper Drawdy turned on his blue light. (R 1780,2811,2822-2823)

One final point that needs to be made is that the flight instruction, by its terms, applies only to a ''suspected person." Rhodes was stopped about three weeks before Karen Nieradka's body was found, and so he was not, could not have been, a "suspected person" at that time.

A jury can only be instructed on flight when the evidence clearly establishes that an accused fled the vicinity of the crime or did something indicating an intent to avoid detection or capture. Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985). No such clear evidence was presented below, and the erroneous giving of the flight instruction must result in a new trial for Richard Rhodes. Williams v. State, 378 So.2d 902 (Fla.5th DCA 1980); Barnes v. State, 348 So.2d 599 (Fla.4th DCA 1977).

B. Instruction Regarding Proof of Time of Commission of Crime

The indictment returned by the grand jury alleged that the murder of Karen Nieradka occurred between February 29, 1984, and March 2, 1984. (R 21) However, the statement of particulars filed by the State gave the time of the homicide as "sometime between 12:01 a.m. on February 28, 1984, and 11:59 p.m. on March 2, 1984." (R 194)

During the jury charge conference the State argued that the court should instruct the jury that the State had to prove the crime occurred within the time frame set forth in the statement of particulars, while Rhodes argued that the time frame given in the indictment must be used. (R 2325-2335, 2352-2358) Ultimately, the court adopted the State's position and instructed the jury that the State had to prove the crime was committed between 12:01 a.m. on February 28, 1984, and 11:59 p.m. on March 2, 1984. (R 2525)

The trial court was in error. To begin with, the statement of particulars filed by the State was not a proper one. The purpose of a statement of particulars is to narrow the time within which acts alleged as constituting the offense may be proved. Smith v. State, 93 Fla. 238, 112 So. 70 (Fla. 1927); Smith v. State, 253 So.2d 465 (Fla.1st DCA 1971); Fla.R. Crim.P. 3.140(n). In Rhodes' case the State attempted to expand the time frame to lessen its burden of proof.

Furthermore, the State was, in effect, trying to amend the indictment by filing its statement of particulars. But only the grand jury can amend the indictment. Phelan v. State, 448 So.2d 1256 (Fla.4th DCA 1984) and Russell v. State, 349 So.2d 1224 (Fla.2d DCA 1977).

The time of Karen Nieradka's death was an issue below. It was not established with certainty. Rebecca Barton

last saw her on February 29 (R 1620), but the testimony of defense witnesses Juanita Bruce and Paul Collins suggested she might have been alive after that date. (R 2198-2204, 2216-2219)[6/]

The State must prove the crime occurred within the time specified in the statement of particulars. State v. Jefferson, 419 So.2d 330 (Fla.1982). This principle, combined with principles stated above concerning the purpose of a statement of particulars and the unamendability of an indictment, leads to the conclusion that the State should have been required to prove that Karen Nieradka was killed between February 29 and March 2, 1984, as specified in the indictment. Richard Rhodes' case was submitted to the jury upon improper instructions, and his conviction must be reversed.

C. Second Degree Felony Murder

At the conference on jury instructions, Rhodes asked the court to instruct on second degree felony murder, but the court refused. (R 2338-2340) The jury was instructed on first and third degree felony murder. (R 2516-2520)

6/ The jury itself was uncertain as to when Karen Nieradka was last seen alive. During deliberations the jurors propounded the following question for the court: "Was victim seen alive after February 29?" (R 259)

An instruction on second degree felony murder should have been given, as it was supported by the evidence. In one of his statements to the deputies from Pinellas County, Rhodes said he had waited in the car while "Crazy Angel" went into the Sunset Hotel with Karen. (R 1924) Crazy Angel later emerged, and informed Rhodes he had killed Karen. (R 375-376,1924-1925, 1928) From the evidence presented, the jury could have concluded that Rhodes was aidinq and abetting a robbery or sexual battery by Crazy Angel, but that Rhodes was not present at the murder. This scenario would support a conviction for second degree felony murder. State v. Aguiar, 418 So.2d 245 (Fla. 1982); State v. Lowery, 419 So.2d 621 (Fla.1982). Yet Rhodes was deprived of the opportunity to have the jury consider his theory that the facts supported a finding that he was guilty of less than a first degree murder by the trial court's refusal even to submit second degree felony murder to the jury.

Where there is any evidence to support his theory of defense, a defendant is entitled to have the jury instructed on the law applicable to that theory. Bryant v. State, 412 So.2d 347 (Fla.1982). The court below usurped the jury's function by refusing to give Rhodes' requested instruction, and he must therefore be given a new trial.

ISSUE XI

THE COURT BELOW ERRED IN INSTRUCTING THE ALTERNATE JURORS, IN THE PRESENCE OF THE JURORS WHO ULTIMATELY FOUND RICHAXD RHODES GUILTY OF MURDER, TO REMAIN IN THE COURTROOM IN CASE THEY WERE NEEDED FOR A PENALTY PHASE.

Immediately before the jurors retired to deliberate upon whether or not Richard Rhodes was guilty of murder, Judge Hansel instructed the alternate jurors as follows:

> THE COURT: Before I do that -- excuse me, forgot one thing. With the spilling of the water here, the alternates are now excused fcom the deliberations, but you are requested -- Mrs. Yablonski, Miss Arnold -- to kindly wait in the courtroom in the event you're needed for the second phase, which was explained to you during voir dire, if you recall, which is the recommendation to the Court as to the penalty, which is the second phase, if the defendant is found guilty of murder in the first degree. Therefore, at this time Mrs. Yablonski, Mrs. Arnold, if you will step down and remain in the courtroom until the call of the Court in case you're needed. Okay?

(R 2532) Rhodes immediately moved for a mistrial at the bench, on the grounds the court's comment presupposed the need for a second phase and was prejudicial. (R 2532-2533)

The procedure followed by Judge Hansel was a clear violation of Florida Rule of Criminal Procedure 3.280(b), which sets forth the manner in which alternate jurors are to be instructed in a capital case:

> At the conclusion of the guilt or innocence phase of the trial, each alternate juror will be excused with instructions to remain in the courtroom. The jury will then retire to consider its verdict, and each alternate will be excused with appropriate instructions that he may have to return for an additional hearing should the defendant be convicted of a capital offense.
> Amended Feb. 10, 1977, effective July 1, 1977 (343 So.2d 1247).

The committee note to the 1977 amendment explicates the reason for the rule:

> This rule clarifies any ambiguities as to what should be done with alternate jurors at the conclusion of a capital case, and whether they should be available for the penalty phase of the trial. The change specifies that they won't be instructed as to any further participation until the other jurors who are deliberating on guilt or innocence are out of the courtroom, in order not to influence the deliberating jurors, or in any way convey that the trial judge feels that a capital conviction is imminent.

Thus it is clear that Judge Hansel merely should have told the alternates to remain in the courtroom and instructed them concerning penalty phase only after the regular jurors had cleared the courtroom.

Because of the dominant position the judge holds in the courtroom, he or she must be especially circumspect in the remarks made within hearing of the jury. Hamilton v.

State, 109 So.2d 422 (Fla.3d DCA 1959). As this Court observed in Raulerson v. State, 102 So.2d 281 (Fla.1958):

> Certainly persons charged with a crime, no matter how heinous it may be, are entitled to a fair trial in accordance with law and with precedents established through the years. One of the oldest of these under our system is an inhibition against any comment by the judge on the evidence in the case. It was stated with clarity and emphasis in the opinion in Leavine v. State, supra [109 Fla. 447, 147 So. 902]: "* * * a trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, inferentially, or by innuendo of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character, or credibility of any evidence adduced."

102 So.2d at 285. See also James v. State, 388 So.2d 35 (Fla.5th DCA 1980).

While it may not have been intended, the comments of the court below necessarily influenced the deliberating jurors by conveying that the court felt that a capital conviction was imminent, as the committee note suggests. Rhodes'conviction was thereby seriously tainted, and cannot stand.

ISSUE XII

THE PENALTY PHASE OF RICHARD RHODES' TRIAL WAS TAINTED BY EVIDENCE HE WAS UNABLE TO CONFRONT, IMPROPER CROSS-EXAMINATION OF A DEFENSE WITNESS, AND IMPROPER AND INFLAMMATORY ARGUMENT BY THE PROSECUTOR.

A. Inadmissible Evidence

At the penalty phase of Rhodes' trial the State introduced into evidence a judgment and sentence from Nevada showing Rhodes' conviction for battery with a deadly weapon and attempted robbery. (R396,2595-2596) Thereafter the State introduced testimony of Captain Jerry Rolette of the Mineral County, Nevada Sheriff's Office, who discussed his investigation of the Nevada incident, and identified a tape recording of an interview he conducted with the 60-year old victim, Jema Adduchio (R2637-2639). The tape was played for the jury. (R2640)[7/]

Rolette's testimony and, especially the taped interview, were the subject of a defense motion in limine that sought to exclude them. (R1191-2636)

This Court has held the right of an accused to confront and cross-examine witnesses against him to apply to the sentencing phase of a capital trial. Engle v. State, 438 So.2d 803 (Fla. 1983). Admission of the tape of Rolette's interview with the victim in the Nevada incident denied Rhodes these important Sixth

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7/ The tape was not transcribed as it was being played. (R2640) However, it was later transcribed by the court reporter, and the transcript and tape itself have been forwarded to this Court as a supplement to the record on appeal. (R2984,2994-3011)

Amendment protections. Although Rolette testified at trial, the interviewee did not, nor was she available to testify. (R2605) And Rhodes could not cross-examine a tape recording. Nelson v. State, 490 So.2d 32 (Fla. 1986).

Furthermore, the contents of the tape were not as represented by the prosecutor during the hearing on Rhodes' motion in limine. He thought the victim would state that she never actually saw a weapon. (R2619) In fact, however, she clearly stated that her assailant had a knife (R3002), and even described it. (R3005-3006) Rhodes moved for a mis-hearing based upon this discrepancy, but the court denied the motion. (R2640-2641)

The tape recording contained much that was prejudicial to Rhodes' cause, including the victim's description of how her assailant tried to cut her throat (R3006-3007), and how she "got panic inside." (R3009) The prosecutor made vivid use of Adduchio's account of the incident in his argument to the jury. (R2719) It was admitted in derogation of Rhodes' constitutional rights. As a result, he must be given a new penalty trial.

B. Improper Cross-Examination

Janet Foltz testified on behalf of Rhodes at the penalty phase of his trial. (R2681-2695) She was with a prison ministry team. (R2682) She testified concerning a change she had seen come over Rhodes at the Pinellas County Jail. (R2685) He became a person who cared about other people. (R2685) He was continually changing and growing spiritually. (R2689)

On cross-examination the prosecutor asked Foltz about another member of the prison ministry group, Becky Meisner, who was present in the courtroom. (R2690) Over objection the prosecutor was permitted to explore Meisner's relationship with Rhodes. (R2690-2691) Foltz said the two were friends, and there had been some discussion about them marrying. (R2691) This testimony was wholly irrelevant and, therefore, inadmissible. §§90.401 and 90.402, Fla.Stat. (1985).

The prosecutor then followed up with m re improper ross-examination that was highly prejudicial. Over objection he was permitted to ask Foltz if she knew whether or not Rhodes was caught coming back from the courthouse on August 8, 1985, with shanks (knives) in his shoes. (R2691-2694) Foltz replied that she did not know that. (R2694)

Eere the prosecutor engaged in the same sort of conduct this Court condemned in Robinson v. State, 437 So.2d 1040 (Fla. 1986). There the State cross-examined defense witnesses during the sentencing portion of trial concerning crimes Robinson had not beenconvicted of or even charged with that occurred after the murder for which he was on trial.

Not only was Rhodes not charged with or convicted of any offense arising out of the alleged "shanks in the shoes" incident (none of which would likely constitute a statutory aggravating circumstance anyway), but testimony presented during the sentencing hearing of September 12, 1985, showed that the factual foundation for the State's question was very tenuous at best. David Mullett, a correctional officer with the Pinellas County

Sheriff's Department, frisked Rhodes after he came back from court on August 8, 1985. (R2910-2911) He found two metal shoe shanks, which were braces for soles of shoes, but they had not been taken out or sharpened, and they did not look like weapons in any way. (R2912) Thus the "shanks" Rhodes was wearing hardly qualified as the "knives" the prosecutor suggested they were in his cross-examination of Janet Foltz. Mullett himself did not consider the incident to be a "big deal." (R2913) And the prosecutor never bothered to talk to him about it before using the incident (or, more properly, non-incident) to inflame the jury. (R2913)

"Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial." Robinson, at 1042. Here, as in Robinson, the State "went too far," (at 1042), and Rhodes must receive a new penalty proceeding.

C. Prosecutor's Improper, Inflammatory Argument

On five occasions the prosecutor's penalty phase argument to the jury drew objections from Rhodes.

The first offending remarks were these:

> You know, it's kind of nice to come in here and we all wear coats and ties, present kind of a, I would think, somewhat of a sterile appearance here, kind of hard for attorneys to express in words what a person would be going through in death. It's hard to express in words and place you at that hotel just by speaking words, place you at that hotel on February 29, 1984, when Karen Nieradka was being murdered.

(R2704) Rhodes immediately objected and moved for a mistrial, to no avail. (R2704-2705) As his counsel stated, in the above

remarks the prosecutor was attempting to have the jurors place themselves in the position of the victim when he talked about placing them at the hotel when Nieradka was being murdered. This type of "Golden Rule" argument frequently has been condemned by the courts of this State as violative of the defendant's right to a fair trial by impartial jurors, E.g., Bertolotti v. State, 476 So.2d 130 (Fla. 1985); Barnes v. State, 58 So.2d 157 (Fla. 1952); Bullard v. State, 436 So.2d 962 (Fla. 3d DCA 1983); Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979); Lucas v. State, 335 So.2d 566 (Fla. 1st DCA 1976). See also Adams v. State, 192 So.2d 762 (Fla. 1966). It should not have been allowed to taint the penalty proceedings below.

The next remarks to which Rhodes objected occurred immediately thereafter (82705-2706):

> It's impossible with just mere words to try and express what somebody is going through in the last second of her life. At some point in time, when she was down on the ground and Rhodes had his hands around her throat and was pressing, at some point in time she knew without a doubt that she was going to die. She could fight no longer.
>
> And what did she do? Mike Malone testified what she did. Last seconds of her life, instead of trying to fight any longer, she knew it was a hopeless effort to try and get his hands off her throat, she just grabbed her own hair out of her head and pulled. The death throws [sic] of manual strangulation. And she was found three weeks later in that dump after having gone through the demolition of a building being placed in a dump truck and transported in that dump truck and dumped into a dump and she was found still with the hairs of her head --

The prosecutor's remarks did not relate to any of the aggravating circumstances found in subsection 921.141(5) of the Florida Statutes, which are exclusive. State v. Dixon, 283 So.2d 1 (Fla. 1973); Elledge v. State, 346 So.2d 998 (Fla. 1977).

What happened to Karen Nieradka's body after her death is irrelevant to the heinous, atrocious or cruel aggravating circumstance, which the State argued was applicable. (R2707) Jackson v. State, 451 So.2d 458 (Fla. 1984). The court below displayed her misunderstanding of the aggravating circumstance found in subsection 921.141(5)(h) when, in overruling the defense objection to the above prosecutorial argument, she noted that the jury could consider "improper burial" or that the defendant was trying to cover his crime. (R2707)

Rhodes next objected to the following comments by the assistant state attorney:

> Might say the defendant will be sentenced to a life term imprisonment without parole for twenty-five years. The defendant was placed in prison in Oregon, January, 1984, for a period of five years and six months. Should have been released in July of 1980, but was released in 1978.
>
> Placed in prison in Nevada in January of 1979 for a period of twelve years -- eight years plus four years -- consecutive. Total of twelve years and should have been released not until 1991. But he was released on parole.

(R2714-2715) This argument was improper because the prosecutor was misstating the law. Pait v. State, 112 So.2d 380 (Fla. 1959). See also Cave v. State, 476 So.2d 180 (Fla. 1985). Firstly, by saying that Rhodes "should have been released" at certain times in Oregon and Nevada, he was implying that there was something improper in the fact Rhodes was paroled, when there was no legal support for such an assertion. Perhaps more importantly, the prosecutor was insinuating that if Rhodes were sentenced to life in prison, he might somehow be paroled before he had served his 25-year minimum mandatory term, an incorrect statement of the law.

In Harris v. State, *438* So.2d *787* (Fla. 1983), the prosecutor made the following comments to the jury during sentencing phase:

> The Defense may tell you, well, 25 years is a long time, 25 years without eligibility for parole, but I can tell you this: That in 25 years this 27 year old Defendant will be 52 years old. He will walk out of prison as he walked out of prison before.

438 So.2d at *797.* Although these remarks did not prompt this Court to reverse, the Court did note that they "should not have been made" because they were "not a fair comment either in rebuttal or upon any of the aggravating or mitigating factors." Harris at *797.* The argument of the assistant state attorney below likewise was inproper, but was even more *so* because of the suggestion Rhodes might be released early, before 25 years elapsed. The argument fell just short of the prohibited message that Rhodes must be sentenced to death, or would be released from prison and kill again. Teffeteller v. State, *433* So.2d *340* (Fla. *1983);* Grant v. State, *194* So.2d 612 (Fla. *1967).* Indeed, that message was just beneath the surface of the prosecutor's remarks.

Rhodes lodged his next objection after the following prosecutorial argument:

> ....Something else he told Detective Porter and Detective Kelly was he was a vampire, one who preys upon others.
>
> After hering all the evidence in the guilt phase and hearing the tape recording, testimony of Captain Rolette, I think you get some idea what the defendant means when he says he's a vampire. A vampire is a person that attacks at night. In this case he attacked Karen Nieradka at night, Sunset Point Hotel. He attacked Mrs. Adduchio at night, 11:00 P.M. A vampire is someone who looks for blood. In this case he said hat [sic] Karen Nieradka was bleeding from the

> mouth, and the bra is in evidence, indicating the amount of blood on the bra itself.

(R2718-2719) After Rhodes' objection to these remarks was overruled, the prosecutor continued in the same vein:

> He attacked Mrs. Adduchio and cut her about the face and hand and the throat, drawing that blood. A vampire is someone that goes for the throat. That's exactly what the defendant did in both of these crimes. He attacked Mrs. Adduchio and tried to stab her in the throat, put up her hand to try to protect herself and still got slashed in the throat. And attacked Karen Nieradka, by placing his hands around her throat and squeezing and squeezing and squeezing until all the life was out of her body; truly is a vampire. As a vampire he deserves to be put to death.

(R2719)

Counsel must confine their remarks to matters which are in evidence. Huff v. State, 437 So.2d 1087 (Fla. 1983); Goddard v. State, 143 Fla. 28, 196 So. 596 (Fla. 1940). While there was testimony Rhodes had called himself a "vampire," this was not related in any way to the killing of Karen Nieradka or the attack upon Jema Adduchio. Nor was there any connection in the evidence between Rhodes' statement and blood on Nieradka or her bra. The prosecutor's attempt to establish such a link was not relevant to any of the statutory aggravating circumstances; it was merely an effort to inflame the passions of the jury and was improper. See Goddard; Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982); Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983); Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982).

Finally, Rhodes objected and moved for a mistrial when the assistant state attorney concluded his argument to the jury this way:

> In a few seconds the defense will be asking for mercy. Show him the same mercy, same mitigating circumstances he gave Karen Nieradka on February 29, 1984, and recommend a sentence of death by electrocution. Thank you.

(R2720) Again, this was an attempt to inflame the jury. (See cases cited above.) The prosecutor below committed somewhat the same error as the prosecutor in Breniser v. State, 267 So. 2d 23 (Fla. 4th DCA 1972), who urged the jury not to have sympathy for the accused, but for the family of the victim. Also, the comment about showing Rhodes the "same mitigating circumstances he gave Karen Nieradka" was akin to the improper remark in Meade that the victim "did not get his day in court." 431 So.2d at 1032.

The net effect of the prosecutor's argument was to prejudice the jury against Rhodes.

This Court has indicated that it is more likely to reverse for improper prosecutorial argument where, as here, there was not merely a single improper comment, but the whole tenor of the argument was improperly emotional and prejudicial. Johnson v. State, 442 So.2d 185 (Fla. 1983).

Even though the jury's sentencing recommendation is only advisory, "it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake. [Citations omitted.]" Hall v. Wainwright, 733 F.2d 766,774 (11th Cir. 1984). The prosecutor below violated this principle, and Richard Rhodes must therefore receive a new penalty trial.

ISSUE XIII

THE COURT BELOW ERRED IN ANSWERING A QUESTION FROM THE JURY WITHOUT NOTIFYING COUNSEL FOR THE STATE OR COUNSEL FOR THE DEFENSE, AND WITHOUT CONDUCTING THE JURY INTO THE COURTROOM.

During the penalty phase of Rhodes' trial, counsel for Rhodes learned that the court had responded, through her bailiff, to a question from the jury without notifying counsel or opening court. According to Judge Hansel, the jury asked, through the bailiff, if they would be polled. (R2753-2754,2756) The judge had the bailiff tell the jury that it was a possibility. (R2735-2754,2756) Rhodes objected to this procedure and moved for a mistrial, which was denied. (R2757)

The procedure followed by the court below was improper. Florida Rule of Criminal Procedure 3.410 mandates that any time the jury requests additional instructions, they must be conducted into the courtroom and the instructions given only after notice to the prosecuting attorney and to counsel for the defendant. The court should have adhered to the rule.

In Ivory v. State, 351 So.2d 26 (Fla. 1977) this Court observed:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel, is so fraught with potential prejudice that it cannot be considered harmless.

351 So.2d at 28. The Court reaffirmed the ~~per se~~ rule of Ivory earlier this year in Williams v. State, 488 So.2d 62 (Fla. 1986).

If the occurrence below would be considered the type of communication that is outside the express notice requirements of Rule 3.410, then harmless error analysis is applicable. Williams. However, the error here cannot be considered harmless. The jury obviously was concerned about being polled. The only previous experience they had with being polled came at the end of the guilt phase, when each juror was asked whether the guilty verdict was his verdict. (R2540-2542) Therefore, the jurors may have feared they would again be required to announce their individual verdicts in open court and tell the world how they voted on the penalty recommendation. As the jury recommended death by a vote of seven to five (R274,2750), the swaying of a single vote by the possibility of being polled may have meant the difference between life and death for Richard Rhodes. Had counsel been consulted, they could have recommended a course of action that would have avoided such a prejudicial situation. However, that was not done. The penalty recommendation of the jury was tainted, and Rhodes is entitled to a new sentencing proceeding.

ISSUE XIV

THE FINDINGS OF THE COURT BELOW IN AGGRAVATION AND MITIGATION ARE INSUFFICIENT TO SUPPORT IMPOSITION OF THE DEATH PENALTY UPON RICHARD RHODES.

In order for a sentence of death to be imposed, the sentencing court must make findings of fact concerning the aggravating and mitigating factors set forth in subsections 921.141(5) and (6) of the Florida Statutes. §921.141(3), Fla. Stat. (1985). These findings must be sufficient to provide the appellant the opportunity for meaningful review of his sentence by this Court. See Cave v. State, 445 So.2d 341 (Fla. 1984); Thompson v. State, 328 So.2d 1 (Fla. 1976). The findings made by the court below do not meet this requirement.

Orally, at the sentencing hearing of September 12, 1985, Judge Hansel made the following findings (R2959-2960):

> That you [Richard Rhodes] committed the crime of which the jury found you guilty while you were under sentence of imprisonment from which you were on parole.
>
> That you had a propensity to commit violent crimes and have a propensity to commit violent crimes as evidenced by your prior convictions of felony crimes involving use or threat of violence.
>
> That you committed the murder of Karen Nieradka while you were engaged in the commission of a robbery or sexual battery.
>
> That the murder of Karen Nieradka was especially heinous, atrocious and cruel in that the victim was manually strangled and the clumps of her own hair found in her clenced [sic] hands indicates the pain and mental anguish that she must have suffered in the process.
>
> That you murdered Karen Jeter Nieradka in cold, calculated and premeditated manner, without any pretense of moral or legal justification.
>
> The only mitigating circumstance which the Court finds is some evidence of a long-term

> personality or character disorder. But your own statements showed that you had the capacity to appreciate the criminality of your conduct, and, in addition, the capacity to try to cover your tracks and to try to outwit and to confuse those investigating the crime.
>
> Therefore, this Court adopts the recommendation of the majority of the jury that you, Richard Wallace Rhodes, receive the death penalty.

The court's findings demonstrate virtually no analysis, and very little application of the specific facts of Rhodes' case to the aggravating and mitigating circumstances set forth in the statute. They are "barebones," and no flesh was added by the written sentencing order the court filed on September 24, 1986. (R2985-2986, A1-2) [8/] Thus the task of appellate counsel, in arguing on behalf of his client, and this Court, in reviewing the propriety of Rhodes' death sentence, is made difficult if not impossible.

In the recent case of Van Royal v. State, 11 F.L.W. 490 (Fla. Sept. 18, 1986), this Court emphasized the importance of the trial court making sufficient findings in aggravation and mitigation contemporaneous with imposition of the death penalty. The trial court in Van Royal orally imposed sentences of death upon the appellant with the comment that he had never seen, or heard of, a more brutal crime. His written findingsupon which the death sentences were based were not made until six months after the record on appeal was certified to this Court. The Court vacated the death sentences, and noted that without written

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8/ The written order is dated September 12, 1985. (R2986)

findings of fact the Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in subsections 921.141(5) and (6). (Van Royal was a life override case, but the court's opinion did not turn on that fact.)

The findings made in Rhodes' case, orally and in writing, are not sufficient to demonstrate a well-reasoned application of the mitigating and aggravating factors set forth in Florida's capital sentencing statute. And the written order was not filed until almost 11 months after the notice of appeal was filed, and more than six months after the record on appeal was transmitted to this Court, at a time when the circuit court had lost all jurisdicatian over this cause. Van Royal. See also State ex rel. Faircloth v. District Court of Appeal, Third District, 187 So.2d 890 (Fla. 1966); Gonzalez v. State, 384 So.2d 57 (Fla. 4th DCA 1980).

For these reasons Judge Hansel's finding will not support Rhodes' death sentence, and it must be vacated.

ISSUE XV

THE TRIAL COURT ERRED IN SENTENCING RICHARD RHODES TO DIE IN TEE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court improperly applied section 921.141 of the Florida Statutes in sentencing Richard Rhodes to death. This misapplication of Florida's death penalty sentencing procedures renders Rhodes' death sentence unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Specific misapplications are addressed separately in the remainder of this argument.

A. The Evidence Was Insufficient To Support The Court's Finding That The Murder Of Karen Nieradka Was Committed While Rhodes Was Engaged In The Commission Of A Robbery Or Sexual Battery.

The court's finding that Richard Rhodes was engaged in a robbery when he killed Karen Nieradka was not supported by the evidence adduced below. In order for a robbery to exist, there must be a taking, the use of actual or constructive force, the absence of consent on the part of the victim, and the intent to deprive the owner of the property. Bell v. State, 394 So.2d 979 (Fla. 1981); §812.13(1), Fla. Stat. (1985). If the force used does not coincide with the intent to take the property, then the offense would not be robbery, but theft. $812.014, Fla. Stat.

(1985). See a1 o McCloud . State, 335 So.2d 257 (Fla. 1976). However, Rhodes' statement to Edward Cottrell, which is the only real evidence concerning how Nieradka came to be dprived of her property, indicated he only took her watch, ring, etc., after the homicide. Nothing was presented to show that the reason Rhodes killed Nieradka was to obtain her property, or that he had the requisite intent to deprive her of her property at the time of the killing. Therefore, there was no robbery.

With regard to the sexual battery, Rhodes admitted to Cottrell only trying to "get into [Nieradka's] pants;''he never admitted that he completed the act. And there was no physical evidence of any type of sexual molestation or sexual battery. (R1714) Thus the court's finding was unsupported.

B. The Court Below Erred In Finding The Murder Of Karen Nieradka To Have Been Especially Eeinous, Atrocious Or Cruel.

The court below found this aggravating circumstance because Nieradka "was manually strangled and the clumps of her own hair found in her clenched hands indicate the pain and mental anguish she must have suffered in the process." (R2959, 2985,A1)

The court's finding was based partly on inadmissible evidence, as discussed in Issue V of this brief.

With regard to the cause of Nieradka's death being manual strangulation, the evidence on this point was tenuous, in that the physical evidence to prove strangulation was quite weak. Dr. Wood's conclusion as to cause of death was based almost entirely on the fact that the hyoid bone was broken. (R1702,1717)

But this could have occurred from some other method than manual strangulation, such as a direct karate blow to the chin (R1706), or could even have occurred post-mortem, (R1757-1758)

Assuming, for the sake of argument, that Nieradka was strangled, this would not necessarily, in and of itself, establish the homicide as especially heinous, atrocious or cruel. In ~~State v.~~ Dixon, 283 So.2d 1,9 (Fla. 1973) this court defined this aggravating circumstance as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Although this Court has observed that homicide by strangulation may qualify as especially heinous, atrocious or cruel, e.g., Johnson v. State, 465 So. 2d 499 (Fla. 1985), in at least one case the Court has found a strangulation killing not to qualify for this aggravating circumstance. Herzog v. State, 439 So.2d 1372 (Fla.1983). In Herzog the victim was apparently unconscious when she was finally dispatched, and the evidence suggests Karen Nieradka may have been in a similar condition. In the story Rhodes told Michael Guy Allen, he said he "knocked her out." (R2081) And in two of the versions Rhodes gave to the detectives Nieradka was not

fighting or resisting. (R2012,2021) He said that when Kermit Villeneuve attacked Nieradka, they were both drunk, and that is why she did not resist. (R2021) Other evidence indicated that Nieradka was a heavy drinker. She had cirrhosis of the liver (R1714-1715), and was known to frequent bars. (R1639, 1648,2179) On the very night she disappeared, Nieradka was last seen in a bar. (R1644) Thus it seems likely she was either highly intoxicated or unconscious in the time immediately before her death.

What this case comes down to is that we really do not know the circumstances under which Karen Nieradka die. Rhodes' many stories about the incident were conflicting. The physical evidence was inconclusive. Therefore, there is no factual basis for the heinous, atrocious or cruel aggravating circumstance, and, as in Bundy v. State, 471 So.2d 9 (Fla. 1985), the finding of this factor cannot stand.

C. The Court Below Erred In Finding That Rhodes Murdered Karen Nieradka In A Cold, Calculated And Premeditated Manner, Without Any Pretense Of Moral Or Legal Justification

The court's finding of this aggravating circumstance contains absolutely no hint of the facts upon which the court relied to make this finding. (R2959-2960,2985,A1) Therefore, it is virtually impossible for appellate counsel to discuss it intelligently, or for this Court to review the propriety of this aggravating circumstance. (In this regard, please see Issue XIV in this brief.) Suffice it to say that the evidence will not support a finding that the homicide was cold, calculated and

premeditated.

Florida's legislature did not intend this aggravating circumstance to apply to all premeditated killings. Harris v. State, 438 So.2d 787 (Fla.1983). It must be limited to those having some quality to set them apart from the ordinary premeditated murder. Brown v. State, 473 So.2d 1260 (Fla.1985). It is reserved primarily for executions or contract murders or witness-elimination murders. Bates v. State, 465 So.2d 490 (Fla.1985); Herzog v. State, 439 So.2d 1372 (Fla.1983). The defendant must have exhibited a heightened degree of premeditation in order for this aggravating element to apply. Mills v. State, 462 So.2d 1075 (Fla.1985).

The evidence produced below failed to show that Karen Nieradka's murder possessed any of the extraordinary attributes needed to qualify it for the aggravating circumstance found in subsection 921.141(5)(i) of the Florida Statutes. At most the evidence showed a killing resulting from an angry reaction to a rebuff of sexual advances, not a killing planned in advance.

The only conceivable shred of evidence the State might argue as justification for this aggravating factor is the statements Rhodes allegedly made to his coworkers at the Clearwater Sun to the effect that his girlfriend had been found strangled. (R1578-1579,1583,1588-1589) These statements standing alone were not adequate to show that Richard Rhodes was actually planning to kill Karen Nieradka. Furthermore, the evidence concerning when the statements were made was uncertain and contradictory. At the guilt phase of trial Rhodes' coworkers

thought the statements were made on a Friday toward the end of February (1984), possibly around the 24th. (R1577,1585) During the penalty phase June Blevins testified that the only day Rhodes came in late was February 24. (R2559) That would seem to pinpoint the date Rhodes made the statements. However, Blevins gave contradictory testimony as to when Rhodes actually worked at the Sun. On direct examination she said he worked there from February 20, 1984 through March 2, 1984. (R2559) But on cross-examination she said he worked from "2/27 to 3/2." (R2560) Obviously, if Rhodes did not start work until February 27, he could not have made the statements to his fellow workers on February 24. And, just as obviously, if Rhodes did not make the statements before Karen Nieradka disappeared, they could not constitute evidence that he was planning to kill her.

The court's finding that Nieradka's killing was cold, calculated and premeditated, without pretense of moral or legal justification is insupportable and must be stricken.

D. The Court Below Failed To Give Adequate Consideration To The Substantial Evidence Rhodes Presented In Mitigation, Particularly Dr. Afield's Testimony

The sentencing judge in a capital case must consider all evidence offered in support of a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Songer v. State, 365 So.2d 696 (Fla.1978).

At the penalty phase of his trial Richard Rhodes presented substantial mitigating evidence, most notably the testimony of Dr. Walter Afield, a psychiatrist who had examined and evaluated Rhodes at the Pinellas County Jail. (R2645-2649) He found Rhodes to be one of the most abused people he had seen in many years, from early childhood on. (R2650-2651) Rhodes had had an enormously disturbed life, and had spent most of his time in institutions from the age of five. (R2651-2652) He had been trained into becoming a very isolated, lonely, empty, shallow, inadequate, angry, disturbed individual, who had been diagnosed as psychotic around 1971 or 1972. (R2656) Dr. Afield concluded that on or about February 29, 1984, Rhodes was under the influence of extreme mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R2655,2657) Rhodes' condition could be controlled in a prison setting, and a positive impact upon his character might result if he received very good, long-term (15 to 20 years) treatment while incarcerated. (R2658-2659)

The State presented no evidence that rebutted Dr. Afield's conclusions. Yet Judge Hansel found only some evidence of Rhodes' long-term personality disorder in mitigation. (R2960,2986,A2) She dismissed Dr. Afield's finding that Rhodes' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, but did not

even discuss Dr. Afield's uncontradicted finding that Rhodes was under the influence of extreme mental or emotional disturbance on or about February 29, 1984, which would constitute a mitigating circumstance under subsection 921.141(6)(b) of the Florida Statutes.

Judge Hansel was not free to reject Dr. Afield's uncontradicted expert testimony. Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984), especially without any discussion or statement of reasons for doing *so.* Her failure to give this vital defense testimony due consideration skewed the sentencing weighing process against Richard Rhodes in an unconstitutional manner.

CONCLUSION

Appellant, Richard Wallace Rhodes, was deprived of a fair trial and due process of law as guaranteed by Amendments V, VI, and XIV of the Constitution of the United States and Article I, sections 9 and 16 of the Constitution of the State of Florida. Therefore, he prays this Honorable Court to grant him a new trial for the reasons expressed in Issues I through XI herein. If this relief is not granted, Rhodes asks that his death sentence be reduced to a sentence of life imprisonment. In the alternative he requests a new sentencing trial before a jury.

Respectfully submitted,

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CERTFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Eighth Floor, Park Trammell Building, 1313 Tampa Street, Tampa, FL 33602, by mail on this 27th day of October, 1986.

Robert F. Moeller

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