

IN THE SUPREME COURT OF FLORIDA

DANNY HAROLD ROLLING,

Appellant,

vs.

Case No. SC01-625

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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**AS TO THE APPELLEE'S STATEMENT OF THE CASE AND
THE FACTS**

On pages 1-12 of its Answer Brief, in the course of setting forth a Statement of the Case, the state does not take issue with the Statement of the Case as set forth on pages 1-4 of the Appellant's Initial Brief. In addition, the state includes a significant amount of argument at least in terms of describing in some detail the contents of various court orders which the state suggests support its position in the premises. This is not entirely consistent with the primary purpose of the Statement of the Case which is to describe the nature of the case, course of the proceedings leading up to the issues at bar and disposition in the lower tribunal.

The state interprets the recent amendment to Florida Rule of Appellate Procedure 9.210(c) to mean that it is not necessary to address the Statement of

the Facts in Rolling's Initial Brief, as set forth on pages 4-28, and to identify with specificity any fault, error or omission it found therein. This was required under the former rule. Instead, the state completely ignores the appellant's Statement of the Facts as if it did not exist. The appellant stands on his original Statement of the Facts and asserts the right to consider it unchallenged and unrefuted. In addition, appellant notes (without repeating that which is already set forth in the Initial Brief) the following regarding the state's recitation of the facts:

With regard to Rolling's evidentiary hearing testimony, the state does not contest (see the Answer Brief, pp. 13, 14) appellant's assertion that, while Rolling eventually went along with his lawyers, he was never comfortable with having the trial in Gainesville, stating on cross examination "(w)ould you be?" (EH VII 46)

Assistant Federal Public Defender Thomas Miller defended Rolling in his bank robbery case. Regarding his testimony, the state does not contest the fact that this witness stated that, had Judge Morris ruled first to grant a venue change before Judge Paul had done so, he (Miller) would have seized upon that action to support his motion for a venue change in the federal case. (EH VII 19; The Answer Brief, pp. 14, 15)

In its Answer Brief, the state references only very briefly the important evidentiary hearing testimony of Second Judicial Circuit Public Defender Dave Davis. (The Answer Brief, pp. 15-17) The state hardly mentions Davis' concerns about Rolling's inability to get a fair trial with Alachua County jurors. As he described the situation, "[t]his case is unique, among venue cases anywhere in the United States, in that there was incredible, incredible amounts of pretrial publicity in this case, starting really from August 1990, when the murders happened, almost continually up through the trial." (EH VII 70) Without citation to the record, the state claims instead that "Mr. Davis' review

of the appellate record was limited.” (The Answer Brief, p. 16) This is certainly not correct as to the key issue in this appeal, which is venue. A review of the record, including Davis’ work on the direct appeal following the capital trial, reveals that his knowledge of the venue issue was exhaustive and he took the initiative to go beyond the normal parameters to supplement his argument. See for example EH VII 52-102 and Davis’ Initial Brief regarding the direct appeal, Defense Ex. 6).

The state, in setting forth the facts concerning Public Defender C. Richard Parker’s testimony presented at the evidentiary hearing, refuses to fully address and concede Parker’s admission that he realized, deep into jury selection, that the defense team had made a mistake about Alachua County being the proper venue in which to try the case noting, “. . . we were looking at a 12-0 recommendation. We were looking for 6 votes, but it became apparent . . . that we didn’t have them.” (EH VIII 182, 183)

The state is accurate on page 20 of its Answer Brief in acknowledging that the defense lawyers succeeded in overcoming Dr. Buchanan’s initial belief that a venue change was necessary based upon the gravity of the crimes Rolling had committed and the pretrial publicity those crimes generated. The state confuses the issue on page 21, however, by claiming that “Mr. Parker testified that he never told Dr. Buchanan that funds were unavailable to do a survey,” citing from the record at EH VIII, p. 195. This double negative masks the important fact that Parker never told Dr. Buchanan that ample funds were available for that very purpose. Thus, when on page 21 of the Answer Brief, the state notes that “Mr. Parker recalled that Dr. Buchanan told them that he, Buchanan, had missed the issue that no one had anticipated the ‘continuing trauma and fear these deaths had on the Alachua County community,’” the state is attempting to shift the blame away from defense counsel and does not acknowledge that the defense team effectively prevented Dr. Buchanan from arriving at that realization before trial.

The state also asserts, with regard to Dr. Buchanan’s testimony, that he had assumed that “Gainesville likely was more liberal which, perception-wise, meant it was an open-minded university town with well-educated people willing

to listen to both sides of a story.” (The Answer Brief, p. 28) Dr. Buchanan, according to the State, also testified that “. . . this was a community with a number of researchers and since there was DNA evidence and other factors, the team felt that they could get a good jury pool.” Id. The state did not address the question of whether defense counsel made it clear to Dr. Buchanan that jurors would be selected from all of Alachua County, not just Gainesville, and that the DNA evidence pointed to the guilt of their client.

The state’s assertions, on page 28 of the Answer Brief, that Dr. Buchanan was “in concurrence with the intuitive – observations and qualitative – judgments expressed by the defense team (PCH IX p. 284)” and that he had “not anticipated nor could he predict what the impact of the guilty plea would have on the community and how it had complicated an already bad circumstance where the community suffered anger, distaste and fear which turned into anger . . .” are incomplete and confusing. The state does not define what, “intuitive – observations and qualitative – judgments . . .” means, though it sounds like nothing more than guessing. Also, the state does not address the fact that defense counsel had known for months prior to trial (shortly after the defense lost the motion to suppress Rolling’s confession of guilt to Binstead, Lewis and others), that the state could prove their client’s guilt regardless of whether he pled guilty or not. (EH III, p. 366)

On page 33 of the Answer Brief, the state contends that the defense team was only a “little down based on Rolling’s confessions but that they started over at that point by challenging the voluntariness of the confessions and worked harder to keep Rolling’s statements out,” citing to the record on appeal at EH IV, pp. 368, 369. This statement does not accurately reflect the mood of resignation and defeat that permeated the defense team according to Dr.

Buchanan (see Defense Ex. 25 in evidence), especially once the trial court denied their motion to suppress Rolling's incriminating statements. And while, according to Blount-Powell, "the defense team met several times a month and during those conversations talked about venue . . ." (the Answer Brief, p. 33), the state concedes that the team did nothing about it until more than a week into jury selection at which time Parker filed the motion to change venue. (The Answer Brief, pp. 36, 37)

The state's rendition of the testimony of Assistant Public Defender John Kearns is incomplete especially in terms of revealing its substance and in responding to the essence of that testimony as contained in the Initial Brief of Appellant. For example, the state notes that Kearns filed a series of pretrial motions directed to the composition of the grand jury and petit jury in order to "preserve all of Rolling's rights and issues." (The Answer Brief, p. 38) The state neglects to reveal that among those were motions in which defense counsel alleged with specificity the fact that it would be impossible for Rolling to get a fair trial in Alachua County, due in part to the inordinate amount of adverse pretrial publicity. (R. 05192; Defense Exs. B and 18) The state also notes that Kearns relied on the Herkov Study as a factual basis for wanting to keep the case in Alachua County and to include as many African Americans on the jury since they " . . . seemingly had less involvement in the Gainesville murders." (The Answer Brief, p. 39) The state fails to address the fact that the Herkov Study (the state's Ex. 7) contained no data whatsoever regarding how African Americans felt about what Rolling had done. The state is correct in

summarizing the bottom line resignation of the defense team as reflected in Mr. Kearns' testimony, writing, "it was his (Kearns') view that almost anywhere they would have gone on a change of venue, those jurors would have come to a similar result." (The Answer Brief, p. 41)

AS TO THE STATE'S SUMMARY OF THE ARGUMENT

Claim I – Ineffective Assistance Regarding The Venue Issue

On pages 46-78 of its Answer Brief, the state attempts to justify defense counsel's utter failure to give their client a chance of avoiding a death

recommendation by professionally preparing for and prosecuting a legitimate venue change motion. But as well written as the Answer Brief is, the undisputed facts of the case make it clear that no such justification is possible. This is so because even a half-hearted effort at a venue change would have been successful. The trial was presided over by a trial judge who appellant concedes was committed to fundamental fairness for the state and the defense -- and who would have most certainly granted a venue change had the matter been properly presented in a timely manner. But defense counsel did just the opposite by recklessly insisting for years-- despite overwhelming evidence to the contrary -- that it was in their client's interest to invoke his constitutional right to be tried in Gainesville. This, of course, tied the trial judge's hands making it impossible to move the case from Alachua County to a venue where passions were not nearly so intense and hostile. The defense team then added insult to injury, once the lawyers supposedly realized the gravity of their miscalculation, by being totally unprepared to effect a venue change. This was without doubt constitutionally ineffective assistance of counsel, and must be remedied by affording Rolling a new penalty phase trial.

Claim II – The Prejudice Issue

In its Answer Brief, the state carefully avoids admitting that the trial court used the wrong legal test to determine whether Rolling proved prejudice during

the course of the post conviction proceedings in this case. That is, the trial court held that Rolling did not prove prejudice because the record did not establish that, had his counsel performed effectively regarding the venue issue, the trial court “. . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” See the trial court’s Order denying the Florida Rule of Criminal Procedure 3.850 motion, p. 31, V 655, quoting from Strickland v. Washington, 466 668, 695 (1984). However, the required legal analysis is whether, had defense counsel performed effectively, “. . . there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue . . .” Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000) The Meeks decision was adopted by the 10th Circuit Court of Appeals in Tofoya v. Tancy, 2001 U. S. App. LEXIS 10788 No. 00-2049, 9 Fed. Appx. 862, 2001 WL 557971 (10th Cir. 2001, May 24, 2001) where the Court held :

Petitioner contends that his counsel was ineffective because he failed to move for a change of venue due to prejudicial pretrial publicity that petitioner contends denied him a fair trial. To establish ineffective assistance in this regard, petitioner must show, at a minimum, that the trial court would have or should have granted a change of venue motion. This, in turn, requires him to show actual or presumed prejudice on the part of jurors. See Hale, 227 F.3d at 1332; Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000), cert. denied, 148 L. Ed. 2d 983, 121 S. Ct. 1114 (2001).

Admittedly, actual prejudice is not reflected in the record, but that is because defense counsel conducted only a very cursory *voir dire* regarding those persons (and the extent to which they were affected by the pretrial publicity) who ultimately made up the jury panel. See the Initial Brief of Appellant, pp. 68-70, and the Schedule and Synopsis of the *voir dire* of the jurors prepared by Mary Weber, found in this record at IV 618-624. However, by virtually everyone's admission, presumed prejudice, defined as a situation where the influence of the news media pervades the proceedings and creates an irrepressibly hostile attitude in the community in which the case is tried, is clearly established in the record. See Sheppard v. Maxwell, 384 U.S. 333 (1966); Murphy v. Florida, 421 U.S. 717 (1961); Stafford v. Saffle, 34 F.3d 1557 (10th Cir. 1994).

At no time in its Order denying the 3.850 motion does the trial court address the question of whether it would have granted a venue change motion had such a motion been properly presented in the manner that the appellant has described in his Initial Brief. Thus, at the very least, this Court should remand the cause to the trial court for that purpose.

AS TO THE STATE'S ARGUMENT

CLAIM I

THE STATE'S ARGUMENT THAT TRIAL COUNSEL DID
NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL
REGARDING VENUE.

On pages 35-62 of the Initial Brief of Appellant, the excuses offered by defense counsel during the evidentiary hearing for their deficient performance on the venue issue, as restated by the state on pages 46-78 of the Answer Brief, are anticipated, discussed (and refuted) in some detail. Only a few additional comments need be made here.

This Court's statement in Rolling v. State, 695 So. 2d at 283 that "Rolling and his defense team made a deliberate and strategic choice not to file a motion for change of venue at any time during the three years Rolling awaited trial because they believed he could be fairly tried by an impartial jury in Gainesville," emphasized by the state on page 47 of the Answer Brief, must be reevaluated in light of the evidence brought to light during the evidentiary hearing. Defense counsel knew better as they themselves noted repeatedly by averring on the record, for example, that Judge Morris' efforts to limit disclosure of facts about the homicides had "not been sufficient in nature to overcome the enormous pre-indictment publicity that was so invidious as to

cause vindictive and retributive feelings among the majority of members of the Alachua County community.” (Defense Ex. 18, emphasis supplied)

The state’s argument on page 52 of the Answer Brief, that Rolling’s post conviction venue claim is procedurally barred because it was fully considered on direct appeal and is merely clothed here “in ineffectiveness garb”, is ironic to say the least. This Court is asked to recall that, on direct appeal, the state argued that the venue issue was procedurally barred because it had not been timely raised during the penalty phase trial. See Rolling v. State, 695 So. 2d at 284, f.4. (Fla. 1997), Defense Ex. 6. And in a sense, the state got it right the first time, for defense counsel’s handling of the venue issue during trial was so deficient, unsubstantiated and poorly handled that the motion had virtually no chance of being granted.

The state’s claim (the Answer Brief, pp. 60-64) that Dr. Buchanan’s involvement in decisions made regarding venue justifies what defense counsel did (or did not do) regarding venue is again side-stepping the issue. The fact is that defense counsel did a great disservice to Rolling by rejecting Dr. Buchanan’s early warnings (State’s Ex. 3, p. 1) about the dangers of keeping the case in Alachua County. They then convinced Dr. Buchanan that he was wrong and that he should adopt their “intuitive,” phantom “liberal community” theory. (State’s Ex. 3, p. 1) The communications expert from Pepperdine

could not confirm his original concerns by conducting surveys, because they offered not even a dime of the tens of thousands of dollars in grant money they had been provided for Rolling's defense. (EH IX, pp. 288-291) It was only when Dr. Buchanan could no longer remain silent -- and when he documented (and thereby created a paper trial regarding his concerns) his original belief that the lawyers were wrong about thinking that Rolling could get a fair trial in Alachua County (Defense Ex. 29, p. 2), that the lawyers filed a venue change motion. But by then (deep into jury selection), it was too late.

The state claims (the Answer Brief, pp. 64-67) that defense counsel's failure to use United States District Court Judge Maurice Paul's order (Defense Ex. 1) moving Rolling's bank robbery trial out of Alachua County to support their belated venue change motion is not evidence of ineffectiveness, because: (a) Judge Paul made that decision on his own, (b) Judge Morris knew about it and (c) the time frames were different. This of course totally misses the point. Strickland v. Washington, 466 U.S. 668 (1984) requires the defendant to allege and prove specific acts of ineffective assistance of counsel. And that is exactly what we attempted to do in this case. The federal venue change matter is just one element in support of that effort. Surely the fact that a United States District Court judge had recognized the impossibility of a fair and impartial trial in Gainesville for Rolling, would add strength to a venue change motion at the

state level. The fact that defense counsel would be so lackadaisical and not take advantage of it (by presenting the issue to Judge Morris), shows one of two things: either they were just seriously negligent or they really did not want Judge Morris to grant their belated venue change motion. Regardless of defense counsel's motives, if their actions regarding venue do not constitute ineffectiveness, then nothing ever will.

The state (the Answer Brief, pp. 64-67) chides appellant for referencing the fact that Rolling's appellate counsel was forced to take the extraordinary step of supplementing the record on appeal with newspaper articles regarding the extent of the adverse pretrial publicity. This of course ignores the fact that, in order to win a venue change motion (in part by establishing presumed prejudice), a defendant must prove that an extraordinary amount of adverse pretrial publicity has pervaded the venue where the crime occurred and the trial is to be held. Provanzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998). Actions speak louder than words. The fact that appellate counsel would feel it necessary to supplement the record in this regard speaks volumes. It is just another example of the fact that defense counsel simply went through the motions regarding the venue issue.

On pages 69-73 of the Answer Brief, the state takes issue with our claim that Rolling's defense counsel failed to present the trial court with a strong legal argument in support of a venue change. That, however, is a fact.

The hearing on the venue change motion was brief to put it mildly and devoid of any real legal authority to convince Judge Morris that the law supported a venue change, the belated timing of the motion notwithstanding. In fact, defense counsel virtually assured that the motion would be denied when he reminded the court of the "well equipped" courthouse in Gainesville and how "exceedingly inconvenient" it would be to the court personnel, including "Your Honor" if the venue change motion were granted. (R07273)

The state, on pages 73-75 of the Answer Brief, has no alternative but to admit that the Public Defender's Office had previously represented two of the state's most important witnesses against Rolling, Bobby Lewis and Russell Binstead, and that defense counsel never told their client about it. Binstead and Lewis, of course, were instrumental in aiding law enforcement in securing Rolling's confessions to the murders of the five victims. Both Binstead and Lewis testified during the penalty phase of the trial in support of the state's efforts to prove statutory aggravating factors. John Kearns himself, had actually represented Binstead in a felony case in Bradford County. (The Answer Brief, p. 74) Kearns attempted to justify this conflict of interest by claiming that there

really wasn't one since there was no adversity of interests. Neither Kearns nor Assistant Public Defender Barbara Blount-Powell could deny, however, that the defense utterly failed to vigorously cross-examine Binstead and attempt to impeach his credibility during the trial.

On pages 75 and 76 of the Answer Brief, the state writes around the fact that the defense team, through various grants, had been provided with many thousands of dollars to cover the costs of trial preparation in the Rolling case. However, they did not advise Dr. Buchanan of that fact, nor did they provide the expert with any of that money so that he could research and document the presumed prejudice in the potential jury pool to support a motion for venue change. This is so even though Dr. Buchanan had the experience to do so based upon his work in the Bundy case, where he had been provided with funds to conduct surveys regarding the effect of pretrial publicity on the potential jury pool in Leon County. (EH IX 288-93; Defense Ex. 16)

CLAIM II

THE STATE'S ARGUMENT THAT THE TRIAL COURT
DID NOT COMMIT REVERSIBLE ERROR IN FINDING

THAT ROLLING FAILED TO PROVE PREJUDICE
REGARDING THE VENUE ISSUE.

On pages 78-93 of its Answer Brief, the state simply brushes aside the fact that the trial court clearly used the wrong legal standard to determine whether Rolling established prejudice as a result of trial counsel's failure to protect his right to a fair and impartial jury by properly seeking and obtaining a venue change. The trial court held in this regard:

Defendant seemingly would have this Court second-guess its decision on the suitability of the jury pool and grant a new sentencing hearing because the jurors of Alachua County were exposed to a great deal of pretrial publicity and could not sit as a fair and impartial jury. The sole duty of this Court, in ruling on a motion for post-conviction relief alleging ineffective assistance of counsel, is to determine "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."¹ (Emphasis supplied.)

(EH V 653, citing Strickland v. Washington 466 U.S. 668 [1984]). Elsewhere in the final Order, the trial court stated that Rolling did not prove prejudice because the record did not establish that, had Rolling's counsel performed effectively regarding the venue issue, the trial court "... would have concluded

¹ The "result" in this case, of course, being the recommendation by the jury that Rolling be sentenced to death.

that the balance of aggravating and mitigating circumstances did not warrant death.” See the trial court’s Order denying the Florida Rule of Criminal Procedure 3.850 Motion, V 655, emphasis added. The trial court reaffirmed its mistaken opinion that an outcome-determinative test was appropriate for analyzing prejudice where venue is the issue by stating:

The reality being overlooked in this argument is the entire history of the voir dire and the events underlying it. Perhaps the jury simply believed, after a full consideration, that the aggravating circumstances were not outweighed by the mitigators presented on Rolling’s behalf.

(V 659, emphasis supplied.)

This was reversible error.

The correct, required legal analysis for prejudice is whether, had defense counsel performed effectively, “. . . there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue . . .” Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000) The Meeks decision was adopted by the 10th Circuit Court of Appeals in Tofoya v. Tancy, 2001 U. S. App. LEXIS 10788, No. 00-2049, 9 Fed. Appx. 862, 2001 WL 557971 (10th Cir. 2001, May 24, 2001) where the Court held :

Petitioner contends that his counsel was ineffective because he failed to move for a change of venue due to prejudicial pretrial publicity that petitioner contends denied him a fair trial. To establish ineffective assistance in this regard, petitioner must show, at a minimum, that the trial court

would have or should have granted a change of venue motion. This, in turn, requires him to show actual or presumed prejudice on the part of jurors. See Hale, 227 F.3d at 1332; Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000), cert. denied, 148 L. Ed. 2d 983, 121 S. Ct. 1114 (2001). Actual prejudice requires showing that one or more jurors believed before trial that petitioner was guilty and that they could not set these pre-formed opinions aside at trial. Id. Presumed prejudice requires showing that "an irrepressibly hostile attitude pervaded the community." Hale v. Gibson, 227 F.3d at 1332 (quotation omitted, emphasis supplied).

For this reason alone, the Order denying Rolling's Florida Rule of Criminal Procedure 3.850 motion must be reversed and the case remanded to the trial court so that the issue of prejudice may be properly and lawfully evaluated.

Actual prejudice is determined by showing that one or more jurors believed before trial that petitioner was guilty and that they could not set these preconceived opinions aside at trial, Hale v. Gibson, 227 F.3d at 1332. That actual prejudice is not set forth in the record, is just one more example of defense counsel's ineffectiveness. As explained and documented on pages 68-70 of the Initial Brief of Appellant, the mood of resignation was so severe as jury selection dragged on (as early as May of 1993, Dr. Buchanan was reporting that there was " . . . not even a faint glimmer of hope that there was any light at

the end of this long and dark tunnel . . .”²), the persons who eventually made up the jury panel were asked few, if any, questions at all³ about the extent to which they had been affected by the mountain of adverse pretrial publicity. As Dr. Buchanan acutely observed in Defense Ex. 30:

First I noted yesterday that as we moved into the afternoon session, jurors began to sound very much alike. They repeated the same kinds of statements over and over. I got the clear impression that the later jurors were significantly influenced by what the earlier jurors had said. They had learned to say the right words to gain acceptance from both the court and the attorneys.

(EH IX; emphasis added.) Dr. Buchanan added, regarding the unreliability of the jurors’ answers to *voir dire* questions, “. . . [o]f course, they did not openly lie, they simply did not admit verbally to the truth.” (State’s Ex. 3)

While the appellant may not have been able to show the existence of actual prejudice in this record due to defense counsels’ ineffectiveness in the *voir dire* proceedings, proof of presumed prejudice is an entirely different matter, acknowledged by virtually everyone connected with the case,

² See Defense Ex. 25.

³

See the very pertinent Schedule and Synopsis of the *voir dire* questions put to the 12 jurors who eventually recommended that Rolling be sentenced to death at IV 618-624. It shows that the jurors were not subject to anything like a probative inquiry into the extent to which they were affected by the homicides and massive media attention they drew prior to trial.

documented in the record on appeal to the nth degree and referenced repeatedly in the Initial Brief of Appellant. As noted above, “. . . presumed prejudice requires showing that ‘an irrepressibly hostile attitude pervaded the community.’” Tofoya v. Tancy, 2001 U. S. App. LEXIS 10788, No. 00-2049, 9 Fed. Appx. 862, 2001 WL 557971 (10th Cir. 2001, May 24, 2001), citing Hale v. Gibson, 227 F.3d at 1332, emphasis added. “A trial judge is bound to grant a motion for change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias and preconceived opinions are the natural result.” Manning v. State, 378 So. 2d 274, 276 (Fla. 1979).

For example, Assistant Public Defender Dave Davis, who in his capacity as appellate defense counsel carefully reviewed the media coverage, noted the “palpable” nature of “. . . fear, the terror, the hatred of Danny Rolling . . .” by Alachua County residents. (EH VIII 98) Davis testified about the community’s reaction of “stunned horror” to what Rolling had done and about the reports of the “mass hysteria” that gripped the college town. (EH VIII 120) Davis likened the situation to where the community had “. . . gone to the beach and here comes Jaws swimming out in the water. It’s that sort of terror that has just freezes the community. And they were just absolutely terrified about it.” (EH VIII 120)

It was not just a matter of a great deal of news coverage, nor the reporting of the grisly facts by the media. As Dr. Buchanan noted:

I think this is more than an issue of pretrial publicity. I think there are other issues here that are important.

....

The pretrial publicity was statewide. However, the personal processing of the anger, the fear and the anger in the community, was a personal thing. That would be secondhand in other communities, that's all I'm saying, Rod. And that's made the difference, to me at least. (EH IX 344, 345, emphasis added.)

. . . the Gainesville community was reacting almost like a family would react, and because they had experienced the fear, they had experienced the trauma in a very personal kind of way, and of course the antics of Mr. Rolling were aggravating this all along . . . they were very angry as a community . . . this personal processing of this information by a community that's kind of like a family might be different than it is in most cases. (EH VIII 343, emphasis added.)

Dr. Buchanan added that the defense team should have acknowledged the community hostility, fear and hatred of Rolling from the very beginning, stating:

Nevertheless, the defense was convinced that there was no other place in Florida that had more open minded people than in Gainesville, so, at this time, the decision was made to keep the trial in Gainesville and not ask for a change of venue. It turned out that this decision was a mistake and, frankly, I think we should have spotted the potential error right at the beginning. (EH VIII 343; emphasis supplied)

Public Defender Richard Parker admitted, “I was incorrect in my assessment of the situation, yes sir.” (EH VIII 69) And despite the inadequate questioning of those who eventually sat on the jury, there are disturbing indications in the record that the jurors also had to be prejudicially affected by the media coverage and the horror of the murders themselves. Juror Bass, for example, was aware of the Rolling case (IV 618; T. I 69), knew Christa Hoyt, one of Rolling’s victims (IV 618; T. I 109), and said that she “felt frightened” and “victimized” (IV 620; T. II 273) by what Rolling had done. Lest there be any doubt about the volume of the adverse pretrial publicity and the resulting “irrepressibly hostile attitude (that) pervaded the (Alachua County) community” please review Defense Exhibits 1, 3-5, 9-14, and 21-23, and State’s Exhibit 1.

CONCLUSION

The trial court erred in rejecting appellant's documented claim that Rolling's trial counsel rendered ineffective assistance of counsel regarding the venue issue and that the client suffered prejudice as a result. For the reasons set forth above, the Court is requested to reverse the Order of the trial court which denied the defendant's Florida Rule of Criminal Procedure 3.850 Motion, remand the cause to the trial court, require the trial court to set aside the defendant's death sentences and hold a new penalty phase trial in an impartial county other than Alachua County, Florida per the provisions of Section 921.141, Florida Statutes, and grant the defendant such other relief as is deemed appropriate in the premises.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant has been provided counsel for appellee, Deputy Chief Assistant Attorney General

Carolyn Snurkowski, the Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050, and to the Office of the State Attorney, Eighth Judicial Circuit of Florida, P. O. Box 1437, Gainesville, FL 32602, by United States mail delivery, this 14th day of January, 2002.

CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief of Appellant was prepared using a 14 point Times New Roman font, a font that is not proportionally spaced.

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Just as it was unfair to try Dr. Sam Sheppard in Cleveland, see Sheppard v. Maxwell, 384 U.S. 333 (1966), and just as it would have been unfair to try Theodore Bundy in Leon County for the student homicides he committed there, see Bundy v. State, 455 So. 2d 330 (Fla. 1984), it was not fair to try Rolling in Alachua County.

The degree to which the jurors were tainted by presumed prejudiced was catalogued by Mary Weber, who prepared a table and synopsis fo the *voir dire*, including any questions about prejudice. (EH IV 618-624; T. I-XIV) It is obvious from this synopsis and the record upon which it is based that the trial

court's efforts to protect Rolling were not sufficient. As Parker admitted, at that point, they were resigned to a death sentence, no matter where the trial was moved. (EH VIII 233) As *voir dire* dragged on, the defense did not aggressively and effectively question those who actually served on the jury about pretrial publicity and the effect it may have had upon them.

The detrimental effects of the group questioning of potential jurors has been discussed above. Aggravating that circumstance, they were asked little about the significance of pretrial publicity. For example, jurors Diaz and Staab, after acknowledging that they had seen photographs of the victims and were aware of news reports regarding the position of a group of local ministers had taken regarding the case, were not pressed at all regarding the effect that the publicity may have had upon them. (IV 620, 621; T. III 385-472)

Jurors Green and Williams did not respond when asked whether they had read or seen anything in the media which would cause them to vote for death no matter what was presented to them during the trial – and whether they could put aside what they might have read or seen and rely only on what was presented in the courtroom. (IV 621; T. III 486, IV 606)

Juror Bass was aware of the Rolling case (IV 618; T. I 69), knew Christa Hoyt, one of Rolling's victims (IV 618; T. I 109), "felt frightened" and "victimized" (IV 620; T. II 273) and did not respond when asked (collectively)

whether she had made any adjustments in her living arrangements as a result of the homicides. (IV 619; T. I 137)

Jurors McDaniel, Kerrick and Sajczuk at first did not respond when asked whether anything they might have read or seen might influence them. (IV 620; T. II 281) Sajczuk and Kerrick then acknowledged that they had seen television reports about the brother of one of the victims insisting on the death sentence for Rolling, but they both indicated it would not affect them. (IV 620; T. II 281) The only specific question responded to by Juror McDaniel was regarding what magazines were regularly received in her home. (IV 622; T. X 1530)

Jurors Stubbs, Tignor and Brown had read or seen reports about the case but did not respond when asked whether they had made up their minds about what the appropriate “verdict is, no matter what the evidence is presented by the State or the Defense.” (IV 621; T. V 816) When juror Tignor was asked whether Gainesville would be a safer place if Rolling were executed, she responded, “probably.” (IV 622; T. VI 906)

The rest of the jurors were asked only very general questions about how the pretrial publicity might have affected them, and there was no real effort made to identify the jurors who, like so many other residents of Alachua County, were traumatized and angered by the crimes. (IV 618-624; T. I-XIV)

The inquiry was clearly inadequate. This is strong proof of the fact that the outcome of the proceeding was not reliable because the twelve jurors from Alachua County who ultimately made the death recommendations, were not asked specific, pointed questions about their opinions in light of the massive negative pretrial publicity and the community wide fear and hatred that resulted from the murders.