IN THE SUPREME COURT OF FLORIDA

DANNY HAROLD ROLLING,

Appellant,

v. CASE NO. 83,638

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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IN THE SUPREME COURT OF FLORIDA

DANNY HAROLD ROLLING, :

Appellant, :

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STATE OF FLORIDA, :

Appellee. :

========== :

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant files this reply brief in response to Issues I-IV in the state's Answer Brief.[1] Appellant will rely on the arguments presented in the Initial Brief as to Issues V and VI.

As to Issues II-IV, the state contends, citing Krawczuk v. State, 634 So. 2d 1070 (Fla.), cert. denied, 115 S.Ct. 216, 130 L.Ed.2d 143 (1994), that by pleading guilty, Rolling has waived his right to appeal any court rulings that preceded the plea, including the court's denial of his motions to suppress statements, suppress physical evidence, and sever the charges. Answer Brief at 11, 14-16, 51, 61, 71 & n.18.

[1]The state's answer brief will be referred to herein as "Answer Brief." Appellant's initial brief will be referred to as "Initial Brief."

Appellant is not challenging the court's pre-trial rulings as they affect the validity of his plea, nor is he challenging the plea itself. The arguments presented in Issues II-IV, address the court's pre-trial rulings as they pertain solely to the penalty phase proceedings. When Rolling filed his pre-trial motions, he challenged the admissibility of the statements and physical evidence and sought severance for both the guilt-innocence and penalty phases of the trial. When he entered his plea, he expressly waived his right to trial and his right to appeal "issues of guilt or innocence." He did not waive his right to have a jury impanelled to consider aggravating and mitigating circumstances or his right to "a direct appeal from penalty phase proceedings." (R 2237-2240). His pre-trial motions to suppress and for severance survived the guilty plea as they pertained to the penalty proceedings, and, in fact, were expressly renewed during the penalty phase by specific and timely objection. Rolling objected prior to opening statements, repeated his objection each time the evidence was introduced, and obtained rulings on all his objections. (T 4-9, 2544-46, 2686, 2689, 2696, 2853-54, 2930, 2976, 3119, 3135, 3160, 3210-11, 3218, 3223, 3623-24). The state made no "waiver" argument below, and all parties recognized Rolling's right to object to the

admissibility of this evidence during the penalty phase.[2] Krawczuk, therefore, is inapplicable because Krawczuk challenged the confession as part of his claim that his plea was invalid, and, unlike Rolling, sought review of the court's pretrial ruling on the suppression issue as it pertained to his conviction.[3]

ISSUE I

CONSIDERING THE EXTENSIVE, INFLAMMATORY, PREJUDICIAL, AND PERVASIVE PUBLICITY, AND TERROR AND PANIC THE PEOPLE OF GAINESVILLE AND ALACHUA COUNTY SUFFERED IN THE WEEKS AND MONTHS AFTER THE MURDERS ROLLING COMMITTED, THE COURT ERRED IN FAILING TO GRANT HIS MOTION FOR CHANGE OF VENUE, A VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

In his Initial Brief, Rolling presented a detailed summary of only a tiny bit of the staggering media coverage of the murders. He also examined the responses of the persons called to sit on his jury as well as those who actually sat. He did this to make two points: 1) the extremely high publicity this case generated was prejudicial to the perpetrator; and, 2) in no other

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[2]The trial court said, "I accept it, accept a renewed argument as you previously made, both orally and in writing, and the rulings of the Court will be the same as previously announced, orally and in writing." (T 2545).

[3]Even if Rolling were seeking review of his conviction or plea, which he is not, this Court is required to review the judgment of conviction in death penalty cases pursuant to section 921.141(4), Florida Statutes (1995), notwithstanding a defendant's failure to withdraw his plea or whether he pled guilty or nolo contendere. Koenig v. State, 597 So. 2d 256, 257 n.2 (Fla. 1992).

instance has a community from which a jury was drawn been so extensively and personally traumatized as was Gainesville.

This case differs, then, from other high publicity cases this Court has considered or that have had national attention. It is unlike the O.J. Simpson or Menendez brothers' cases in that there were only two victims in each case, with little possibility of more. Similarly, in Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), cert. denied, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987), Provenzano went on a killing rampage, but he was almost immediately arrested, and once the slaughter was over, people knew it had ended. The public felt no personal, imminent threat from those defendants.

Such was not the case here. Gainesville had a serial killer on the loose in the fall of 1990, and the entire community was terrified. The pervasiveness of the fear is reflected in both the press accounts and the prospective jurors' responses. An article published in the Gainesville Sun on August 29, 1990, reported, for example, that "[o]nlookers make the typical comments about the horrible state of today's affairs, then glance suspiciously at the strangers standing next to them" and quoted students as saying, "I look at every man on campus and I know he's the one" and "Nobody says it, but they all think it; by then

it might be too late." (A 4). See also Initial Brief at 104-105.

The prospective jurors' responses echoed the press accounts of three-and-a-half years earlier. When asked whether he felt he had been a victim, prospective juror Lepke said:

> "Yes. I don't think I was unique or even distinctive at all, I think the whole community was that way. We wouldn't have had the national or the world press come in here if we didn't feel that wa[y] as a community. . . . This was a seige situation." (T 223-224)(emphasis added).

Prospective juror Bright expressed the same sentiment:

> "I live here, this is my hometown, and we before we even knew who the person was that committed these crimes, . . . I was in fear of my life. I'm sure it affected everybody else." (T 1287)(emphasis added).

People not only talked about the killings and the killer, they changed their living habits. One article reported,

> Students who normally never read the newspaper sit transfixed, taking in every detail of the night's horrors. . . . Everything else--classes, jobs, meetings--seems unimportant. Protection becomes the driving issue. . . . "You can't concentrate in class; you can't study at home because you feel like you have to have the TV news on all the time, and you can't study at the library because you'd have to walk home." (A 20).

Again, the pervasiveness of these effects was reflected in the

voir dire. Most of the venire lived in fear after the murders, and many revealed they had had personal, physical reactions to the murders, had taken extra security measures, or changed their living arrangements. See Initial Brief at 142-143.

This case is unusual, then, because unlike other capital cases the Court has considered, every potential and actual juror not only knew about the Gainesville slayings but had been acutely affected by them. The entire community had been victimized by the crimes.

Thus, the state's bare allegations that the press accounts were nothing more than "straight news stories" that presented "cold, hard facts," and that articles printed before Rolling became a suspect are irrelevant to show prejudice, see Answer Brief at 29-31, not only are wrong, they miss the point and ignore the realities of life in Gainesville after August 1990.

The articles themselves belie the state's assertion that the press had no bias against Rolling or was merely providing routine coverage for a routine murder. In the early weeks, the press was rife with speculation, rumor, and the few titillating details the police released. When it had no firm suspect, it created one in Edward Humphrey. Articles about community hysteria, the psyche of serial killers, and later, the psychological condition of

Rolling, were not factual and objective. They were speculative and inflammatory. The tone and subject matter of many articles was sensationalistic. For example,[4] "experts" in serial killings speculated on what the killer thought and why he killed:

> "That sounds like a serial killer; that sounds like someone who was having fun." (A 11).
>
> "[T]hey often use their hands or a knife in carrying out the act, to attain an intimacy with their victim that isn't possible by shooting them." (A 11).
>
> "The serial killer left virtually no trace of himself, even though he may have fled the final murders in fear. I thought I'd seen everything. When the full story is released, you'll be shocked and amazed. Such a killer will strike again if not caught and put away." (A 98).

While there may have been no editorial calls by the local paper[5] for vigilante justice, the bias against <u>any</u> suspect was manifest. The press's treatment of Humphrey, the unfortunate early suspect, demonstrates how so-called "straight news stories" created such prejudice. Even though the police considered

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[4]Appellant has included only a sampling of the inflammatory news reports in this and in his Initial Brief. Numerous other examples abound.

[5]After Rolling pled guilty, the <u>Miami Herald</u> and the <u>Sun Sentinel</u> of Broward County printed editorials calling for Rolling's death. As the State Attorney noted at the change of venue hearing "both [] were strongly supportive of administration of the death penalty in this case." (T 7280-7282). The <u>Herald</u> article was reprinted in the <u>Gainesville Sun</u>. (T 1232).

Humphrey only one of their suspects, the media brushed that aside in its rush to find the killer, and for weeks, the Sun published article after article detailing Humphrey's disturbed lifestyle, his "violent streak," his fascination with military paraphernalia, his alleged crush on victim Paules, his obsession with women, and his purported multiple personalities. (A 45, 55, 68, 82, 108, 114, 147, 150). See also Initial Brief at 107-110. As one prospective juror stated, "The media pretty well had [him] ready to be hung." (T 1146).

When the press finally latched onto Rolling, it used the same approach. It portrayed Rolling in the darkest, most dangerous colors with little regard for whether the information was fact, rumor, innuendo, allegation, or speculation. See Initial Brief at 110-116. Moreover, from the standpoint of the community, once Rolling was identified as the prime suspect, the people of Gainesville had an identity to associate with all the speculation previously published about serial killers.

Furthermore, contrary to the state's argument at page 37, the jurors who heard about the case from newspapers and television did not know less than the jurors who sat. Much of what was reported about the murders themselves, or Danny Rolling, as well as references to body mutilations and gruesome

photographs, was not admitted (or admissible) at Rolling's trial. For example, the jury did not hear allegations that Rolling killed three people in Shreveport and robbed friends while holding them at knife point (27 articles); robbed a store in Kansas City (4 articles); or helped commit a murder in Lakeland (A 231, 232). The jury did not learn of the link to Ted Bundy and his rampage in Tallahassee, or predictions that had Rolling not been caught, he would have headed there. (A 7, 16, 18, 128). The jury did not listen to serial killer experts testify about what was going on in Rolling's mind when he committed the crimes.

The state argues that if the publicity was so bad, the defense would have moved for a change of venue before trial. Since it did not, urges the state, the articles prior to entry of the guilty plea "are not germane" and "should not be considered in ascertaining whether the trial court properly denied Rolling's request."[6] Answer Brief at 24-25, 34. Of course, no one could know the full impact of the publicity until the prospective jurors were questioned. As voir dire progressed, the extent of

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[6]The state also suggests Rolling failed to file a timely motion for change of venue by waiting until trial to raise the issue. Answer Brief at 25. That suggestion has no basis in law, and indeed, in Manning v. State, 378 So. 2d 274, 276 (Fla. 1979), this Court said rulings on pre-trial motions to change venue may be postponed until the parties have tried to select an impartial jury. Rolling's motion was timely.

community bias became increasingly evident. By the time Parker requested the venue change, the prejudice had to be admitted. The timing of Parker's request in no way amounted to an admission that the overwhelmingly negative and hostile press directed at the killer in general, and at Rolling in particular, was somehow not so bad.[7] The jurors' responses also indicated a strong bias against Rolling and a predisposition to impose the death penalty. Defense counsel recognized the prejudice generated both by the press, and equally important, by the fear the murders themselves had created.

The state also incorrectly states the standard of review to be whether "it would be difficult for any individual to take an independent stand adverse to the strong community sentiment," citing Copeland v. State, 457 So. 2d 1012 (Fla. 1984), cert. denied, 471 U.S. 1030, 105, S.Ct. 2051, 85 L.Ed.2d 324 (1985).

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[7]The state also argues that Rolling's "agreeing to cull through 1400 potential jurors until 117 potential jurors were identified who had `no bias or excessive knowledge' estops Rolling from arguing that this pretrial publicity could possibly rise to the level of presumed error." Answer Brief at 34. This argument ignores that Rolling's request for a change of venue came before the second phase of questioning began. On February 23, when the court announced it wished to proceed with the second phase of questioning on the 117 jurors, Mr. Parker agreed but reserved his right to conduct phase one questioning of additional jurors, should he feel it necessary to do so in order to obtain an impartial jury. (T 1312-1314). The jury was excused until February 28, as February 24 and 25 had been set aside for motion hearings. Mr. Parker filed his motion for change of venue on February 25, having concluded that no amount of further questioning of jurors in Alachua County would produce an impartial jury. (R 2388).

See Answer Brief at 27. Community sentiment is only one factor used in measuring the impartiality of the jury. Manning, 378 So. 2d at 276. It is not the standard to measure whether the court should have granted a motion for a change of venue. The proper standard is whether "the general state of mind" of the community "is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds." Id. Rolling has satisfied this standard.

The state distorts other well-settled law, asserting an "assurance by jurors that they will be impartial despite their knowledge of pretrial publicity is legally sufficient to support the trial court's denial of a change of venue." Answer Brief at 39; see also id. at 33, 37. This contention ignores the Court's observation in Irvin v. Dowd, 366 U.S. 717, 728, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961):

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. (Emphasis added).

This contention also ignores this Court's admonition in Thomas v.

State, 374 So. 2d 508, 516-517 (Fla. 1979), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980), that jurors' assurances of impartiality must be questioned where the record shows "a substantial number of the venire[] had lived in fear as potential victims" or there existed "a pervasive community atmosphere of fear." The record in this case bears out the existence of both of these factors.

The state also relies on cases not remotely comparable to this case. As discussed in the Initial Brief, the cases cited by the state on page 39 of its Answer Brief, Pietri v. State, 644 So. 2d 1347 (Fla. 1994), cert. denied, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995), Wuornos v.State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995), and Castro v. State, 644 So. 2d 987 (Fla. 1994), represent one end of the venue spectrum. In those cases, the press had written relevant articles a year or more before the trial; few prospective jurors recalled many facts; and the jurors who remembered anything had only a fuzzy recollection. In such instances, the appellants summarily lost because they failed to present any evidence of a prejudiced venire, and jurors' assurances of fairness rebutted the unsupported claim that they could not decide the case solely on the evidence adduced at trial. This Court, on the other hand,

has used a more in-depth analysis when the defendants presented more proof of a prejudiced jury panel. E.g. Copeland, 457 So. 2d at 1017.

The state relies extensively on the trial court's evaluation of the fairness of the jury selection. Answer Brief at 39-45. There are glaring omissions in the court's evaluation, however.

First, the numbers do not tell the whole story. For example, 1400 jury summons were sent, an unusually high number, even in a high publicity case. This undoubtedly reflected the court's concern at finding a fair and impartial jury. It is noteworthy, however, that of the 1200 who responded, 800 were summarily excused without ever having set foot in the courtroom. Of those 800, the court excused 568 jurors for "hardship" (job, school, or childcare difficulties, illness) and 24 jurors for conscious bias.[8] These numbers are misleading, however, because the court listed "hardship" as the basis for excusal whenever this was the primary reason given, even though many of those 568 individuals also said they could not be fair. (T 3260-3261).

The court's conclusion that a fourth of those excused had a bias in favor of the defendant (T 3261) also is misleading. No

[8]The other 286 persons summarily excused were disqualified by law. (T 3260).

one had a bias in favor of Rolling. Only one or two jurors said anything remotely sympathetic to Rolling. (T 980, 2187). The "bias in favor of the defendant" was the philosophical or religious opposition to imposing the death penalty in any case. (T 505, 1214). The sole juror who expressed the view that life in prison might be appropriate for Rolling felt that way not out of sympathy but because death in the electric chair would be a "cop-out. It's too quick for him. Let him suffer." (T 979).

The trial court's order also notes, purportedly in Rolling's favor, that the photographs of the crime scenes and victims had not been released to the public. (T 3265). The photographs had been graphically described by the press, however, and many jurors were aware of them. As a result, an unusually large number of those questioned, about 12%, said they would have difficulty viewing the photographs of the victims.[9]

Third, the court's analysis of the content of the publicity was cursory, at best. The court's order mentions only three articles: (1) an editorial calling out for the death penalty,

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[9]One prospective juror stated, "from what I read in the paper . . . if they're as bad as the papers and the articles and the media said they are, [I] wouldn't be able to put that aside." (T 1234). Another prospective juror said, "I have a problem with decapitation, taking the head off of a body. You can mutilate the person and they still be living." (T 1102). For other examples and record citations, see Initial Brief at 143.

which the court discounted because it was written by a columnist from Miami even though it was reprinted in the Gainesville Sun; (2) a story about an out-of-state interview, the tenor of which was "that there may be evidence supporting the mitigating factors which the defense might raise" (R 3265); and (3) a letter to the Sun by a group of local ministers urging the State Attorney to accept a plea in exchange for a life sentence (in part because this would save the county a lot of money), which the court failed to note had no affect on all but one prospective juror who had seen it. (T 124-125, 279-280, 391, 463, 707-710, 847-849, 972-973, 1083-1085, 1231-1232). In finding the pretrial publicity was not inflammatory or hostile, the trial court (and the state) failed to acknowledge the overwhelming publicity submitted by Rolling with his venue motion and outlined in the appendix to the Initial Brief. The 453 articles and photographs listed are not exhaustive but illustrative of the volume and sensational nature of the publicity. There can be no credible contention that this publicity was merely factual and objective.

Perhaps most significant is the court's failure to address the substance of the jurors' responses, which showed how profoundly they, and the entire community, had been affected by these murders. As prospective juror Roberts said:

> "[I would have a] difficult time putting out my personal feelings about it, you know, having grown up in Gainesville and just having a very strong emotional reaction . . . in this particular case." (T 1210).

The hysteria that erupted in Gainesville following the murders had so defined people's attitudes towards the punishment for the perpetrator that even three years later, it remained palpable. Unlike the typical case, where a number of jurors express a predisposition towards death in any first-degree murder case, here, a large number of jurors, including half of the jurors who sat, had a fixed opinion in favor of death in this case. Prospective juror Davis was for death because, "I've been frightened since it happened." (T 833). Another juror said Rolling "doesn't deserve to live." (T 1097). Unlike other cases, these opinions arose from having "lived in fear as potential victims" of Rolling. See Thomas, 374 So. 2d at 516-17.

A majority of the panel had discussed the appropriate penalty with friends, relatives, and co-workers. Co-workers of one prospective juror had "expressed strong opinions, some graphic. Some said they could save the county a whole lot of money." (T 155-156). Prospective juror Knowles heard lots of rumors, also that "whoever did that, he should fry, that sort of thing." (T 548). Members of the venire reported that friends

and associates approached them with advice about the sentence Rolling should receive.[10] (T 146-56, 736-37, 879-886, 1552, 1668-74, 1776-78, 1930, 2046-50). In sum, the jurors knew their friends, associates, the victims' families, and the rest of the Gainesville community wanted Rolling to die.

Finally, while the trial court took measures to seat a fair and impartial jury, such as freely granting both the state's and defense's cause challenges, the court refused Rolling's repeated requests for individual, sequestered voir dire. (R 420-23, T 660). Accordingly, all those who sat were exposed once again to the fear other residents of the city had experienced after the killings; the steps they had taken to protect themselves; and the resulting deep-seated hatred they felt towards Rolling.

In discussing the responses of the jurors who actually sat, the state notes that Mr. Green, Ms. Staab, Ms. Sajczuk, Mr. Stubbs, and Ms. Daniels "stated that they either did not read newspapers or did not buy newspapers" and that "Ms. Bass stated that she only got the Saturday Gainesville Sun for the sales and coupons." Answer Brief at 46. But these jurors, like the rest of the venire knew about the case. Moreover, their other

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[10]The Gainesville Sun published the names of those in the venire. (T 1778).

responses revealed they would have trouble being fair and impartial for Rolling: They had friends and associates approach them after the press had printed their names in the paper as potential jurors, offering their opinions about what should be done with Rolling; they heard Mario Taboada's call for Rolling's execution made the day before trial; they felt frightened and victimized by the murders. Initial Brief at 144-147. That some of the jurors who recommended Rolling die did not read or buy newspapers misses the point. The venire in general, and the selected jurors in particular, were incapable of impartial, detached judgment because they had lived through the horror and knew what their friends and associates wanted done.

Finally, the state makes the following bizarre and misleading argument regarding Rolling's request for an additional peremptory challenge to excuse Ms. Kerrick: "It truly must be questioned as to whether Rolling has `preserved the issue' for appellate review since he never challenged Ms. Kerrick for cause and has failed to show that harmful error resulted because Ms. Kerrick sat on the jury." Answer Brief at 46 (emphasis in original). Apparently, the state thinks Rolling never really wanted to excuse Kerrick because he never challenged her for cause. This is wildly speculative and not legally or logically

supported. Challenging a juror for cause is not a prerequisite for seeking additional peremptory challenges, nor must a defendant contest the denial of a cause challenge to be entitled to a change of venue. See Manning, 378 So. 2d at 279 (Alderman, J., dissenting)(noting court had reversed for new trial on venue issue even though Manning had peremptory challenges remaining). This issue was fully preserved, and Rolling's failure to challenge Kerrick for cause does not mean he was satisfied with his jury.

As the state notes at page 26 of its Answer Brief, "the presumed prejudice principle is `rarely' applicable and is reserved for an `extreme' situation." Mayola v. Alabama, 623 F.2d 992, 997 (5th Cir. 1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1986, 68 L.Ed.2d 303 (1981). This was an extreme situation. The state itself acknowledges Rolling's plea "was on national news, state news, throughout the state of Florida. It was, in fact, the lead story or the headline story on papers ranging from the panhandle of this State to the Miami Herald," id. at 19, quoting the prosecutor's argument at the hearing below. Indeed, this case was so sensational, it was the topic of tabloid TV, and one talk show even moved its production to Gainesville to broadcast the story. As noted by the state,

Rolling's plea "led to strong editorials in the Miami Herald and the Sun Sentinel of Broward County" advocating the death penalty in this case, id, before any evidence was presented. Friends and colleagues of jurors expressed strong sentiments in favor of the death penalty while the jury selection was in progress, and numerous jurors were predisposed to imposing death before hearing any evidence. Perhaps the prosecutor said it best:

> "These are legendary murders. These aren't just murders you hear about or read about, these are murders you never forget about." (T 5003).

This was an "extreme situation," which warranted a change of venue. Rolling was entitled to be tried in a community that had not been personally traumatized by his crimes; that had not been inundated for three-and-a-half years with prejudicial and inflammatory news articles; and that did not "still fe[el] the pain." (A 423). This Court should reverse and remand for a new sentencing hearing.

ISSUE II

THE TRIAL COURT ERRED IN DENYING ROLLING'S MOTION TO SUPPRESS HIS STATEMENTS AS THE STATEMENTS WERE OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16, FLORIDA CONSTITUTION.[11]

On the merits, the state spends four pages reciting the trial court's order and discussing Rolling's privilege against self-incrimination, although Rolling has not asserted a violation of his Fifth Amendment rights in this appeal.

With regard to the Sixth Amendment violation, the State makes the conclusory statement that Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), controls, Answer Brief at 57, although the State does not discuss the facts of either Kuhlmann or the instant case, let alone compare the two. As noted in the initial brief at page 194, the informant in Kuhlmann was specifically instructed not to question the defendant about his crimes, and he obeyed those instructions. The Supreme Court held the Sixth Amendment was not violated since the informant only listened to the defendant's spontaneous statements and took no action deliberately designed to elicit

[11]The state initially argues this issue is not preserved for appellate review. Rolling has responded to this argument in the Preliminary Statement.

incriminating statements.

The state does not contend in its brief that Bobby Lewis was merely a listening post, yet somehow the state thinks Kuhlmann is controlling. The state concedes that Lewis had a selfish motive for developing a relationship with Rolling, Answer Brief at 52 n. 11, and it is further undisputed that Lewis deliberately elicited incriminating information from Rolling after conferring with law enforcement. Kuhlmann, therefore, does not apply.

The state does not dispute the facts of the case as detailed in the Initial Brief with regard to the agency relationship between Lewis and law enforcement. In its Summary of Argument, the state avers that Bobby Lewis was never a "government agent," Answer Brief at 12, but the body of the brief never discusses the issue or provides facts to support that conclusory statement.

The relationship between Lewis and the government is clear. Lewis first met Rolling at Florida State Prison on May 22, 1992, then met with law enforcement on July 2, 1992, the day Rolling left FSP. He continued to meet with state officials over the next six months, although Rolling was isolated in Chattahoochee and not corresponding with Lewis, and Lewis had no new information to provide. These were not social gatherings; the Task Force wanted information as much as Lewis and encouraged and

helped him to get it. It was more than coincidence that Lewis and Rolling were placed in the same wing of the giant maximum security prison on January 13, 1993, and that Lewis was again made a trustee. Over the next few weeks, Lewis extracted details of the murders from Rolling, without ever disclosing that he was cooperating with the State. The Rolling/Lewis statements on January 31 and February 4 were a continuation of Lewis' illegal elicitation of that incriminating information.

Lewis did not have to be a paid informant to be a government agent, nor did he have to derive some tangible benefit for his information. It was enough that the State created and exploited the opportunity for Lewis to elicit the desired information. See Malone v. State, 390 So. 2d 338 (Fla. 1980)(although informer gained no benefit from the State for disclosures he obtained, it was indirect surreptitious State action which elicited Malone's incriminating statements in violation of right to counsel), cert. denied, 450 U.S. 1034, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981).

The state maintains the prosecutor did not violate Florida Rules of Professional Conduct 4-4.2 and 4-5.3 because Nilon did not participate in the actual meeting with Rolling and was there merely to respond to questions of the investigators. Answer Brief at 58-59. This simplistic response ignores Nilon's true

function as a member of the Task Force. He did not play a supporting role but was a major force in the investigation, traveling to the prison no less than five times to retrieve documents and secure statements from Rolling, often in the middle of the night. He directed the course of the interrogation much like a doctor channeling orders through her nurse. Although the nurse may inject the patient, the doctor is still responsible for the treatment. If Nilon's function at the interrogations was merely to respond to the investigators' questions, this could easily have been accomplished by telephone and did not require his being within earshot of the actual interviews.

Finally, the state takes the inconsistent position that "None of the evidence introduced at the penalty phase regarding these statements impacted any of the aggravating factors," Answer brief at 60, while relying on Rolling's January 31, 1993, statement to demonstrate the aggravating factor of heinous, atrocious and cruel in the death of Sonja Larson. Answer Brief at 75. If the statements did not affect the jury's consideration of aggravating factors, one wonders why the state introduced both the January 31 and February 4 statements in addition to Lewis' testimony at the penalty proceeding.

The statements to Lewis and law enforcement were relevant to

three aggravating factors: in the course of a sexual battery; heinous, atrocious, and cruel; and cold, calculated, and premeditated.[12] The various statements clearly bolstered the state's physical evidence by establishing the victims' awareness of their impending deaths and how long each victim lived during the ordeal. (T 3395, 3403-3404, 3424, 3625, 3630; see also, Closing Argument at T 4997-5001). The statements also definitively established that the three sexual batteries were committed before death.[13] Id. The February 4 statement bolstered the state's argument that the murders were cold and calculated. In that statement, Rolling told the Task Force what he meant on the tape found in his tent when he said he had to go,

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[12]In his summation, the prosecutor told the jury, "You remember, you've seen the tapes, you've seen his confession. . . . There is no question that we've proven [the aggravating factors] beyond any reasonable doubt." (T 5006).

[13]The prosecutor argued to the jury:

> We know, unequivocally, and unquestionably, and beyond any reasonable doubt, that Danny Rolling committed rape at scene one when he went into Christina Powell's house and he raped her before he killed her.
>
> We know that he raped Christa Hoyt before he killed her; we know that he raped Tracy Paules before he killed her, we know that with a certainty that cannot be questioned.

(T 4976-4977). The state could only know "unequivocally" and "unquestionably" and "with a certainty" that the rapes occurred prior to death by virtue of Rolling's statements.

he had something he had to do. (T 3172, 3478). The state urged the jury to consider that (T 4985-4986), as well as Rolling's statements about his planned and aborted attempts to enter other apartments (T 3441-3442, 3633-3634); his black clothing, ski mask, gloves and duct tape (T 3302-3304); how he contemplated which victim to rape at the first scene and stood over Sonja Larson for five to ten minutes; how he checked out Christa Hoyt's fence on a prior occasion and waited for her return (T 3284) and waited at Paules' apartment until it was time to break in (T 3285-3286), in finding that each murder was cold, calculated, and premeditated. (T 4987-4989, 4993).

All of this evidence was derived from Rolling's statements to Lewis and law enforcement. The erroneous admission of these statements cannot be deemed harmless beyond a reasonable doubt.

ISSUE III

THE TRIAL COURT ERRED IN DENYING ROLLING'S MOTION TO SUPPRESS THE PHYSICAL EVIDENCE SEIZED FROM HIS TENT AS THE WARRANTLESS SEARCH AND SEIZURE VIOLATED HIS REASONABLE EXPECTATION OF PRIVACY.[14]

The state's first sentence in this issue is incorrect and much of its argument irrelevant. Rolling has not argued that the

[14]The state's preservation argument with regard to this issue is addressed in the Preliminary Statement.

trial court erred in failing to suppress physical evidence seized from the *curtilage of his campsite*; he has only challenged the search inside his tent and seizure of his personal effects. His reply will be confined to that issue.

Relying principally on State v. Cleator, 71 Wash. App. 217, 857 P.2d 306 (1993), review denied, 123 Wash.2d 1024, 875 P.2d 635 (1994), the state contends Rolling had no reasonable expectation of privacy in his tent. In Cleator, the court held there was no reasonable expectation of privacy in a tent on public land where the area was not a campsite and *the tent did not belong to Cleator*. The court did find, however, that Cleator had a limited expectation of privacy in his personal effects inside the tent. Unlike in Cleator, it was undisputed here that the tent was in a campsite and belonged to Rolling. Moreover, the officer in Cleator lifted the tent flap and seized only that which was in plain view and plainly contraband. Significantly, he did not disturb Cleator's personal effects. In contrast, here, Deputy Liddell opened the tent flap and instead of just seizing the red-stained money in plain view, he searched the tote bag inside the tent and the gun box inside the bag, and summoned crime scene investigators, who seized the tent and all its contents.

Relying on United States v. Rigsby, 943 F.2d 631 (6th Cir. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1269, 117 L.Ed.2d 496 (1992), the state contends the exigency created by the potential for danger outweighed Rolling's privacy interests. The Rigsby court approved a cursory visual inspection of a tent for an armed suspect, and a seizure of a shotgun in plain view, as a protective sweep. The search of the tent was not preceded by a dog search, which would have removed any legitimate concerns that the armed suspect was hiding inside. Here, once the dog went into the tent, it was apparent the suspect was not inside, and any exigencies dissipated. The deputies, therefore, could not continue to search the tent without a warrant simply because they were lawfully at the campsite. See Alward v. State, 912 P.2d 243 (Nev. 1996).

In Alward, police were summoned to a campsite in response to a reported suicide. An officer unzipped the tent flaps and found the victim inside. Evidence in plain view was seized and the tent was secured and guarded over night. The following morning, officers seized everything inside the tent and the tent itself. In reversing Alward's murder conviction, the court held the initial entry into the tent was justified by a medical emergency and to see if a killer was on the premises, and any items

discovered in plain view at this time were lawfully seized. But once the exigency was over, the officers could not search the tent further either that day or the next morning simply because they were lawfully present. The court further noted the tent was guarded after the police left the scene the first night, and there was no reason why they could not obtain a warrant.

The rationale of Alward applies here. Once the dog entered the tent, any exigency dissipated, and there was no justification for searching the tent further without a warrant.

Although Rolling has not challenged the cold, calculated, and premeditated aggravator based on the evidence admitted at the penalty phase, this does not render the issue moot or harmless. Contrary to the state's argument at page 62 n.15, although the rules of evidence may be relaxed in a penalty phase, evidence seized in violation of the state and federal Constitutions is not admissible. s. 921.141(1), Fla. Stat. (1993). Because there was other evidence of premeditation does not mean the aggravating factor would have been found had the illegally seized evidence not been admitted. The state has failed to demonstrate the error was harmless, nor can it, especially in light of the prosecutor's reliance on the evidence seized from the tent, including the tape

recording, in arguing the existence of this aggravating factor.[15]

ISSUE IV

THE TRIAL COURT ERRED IN DENYING ROLLING'S MOTION TO SEVER AND CONDUCT THREE SEPARATE SENTENCING PROCEEDINGS WHERE THE EVENTS AT EACH RESIDENCE WERE NOT CAUSALLY LINKED TO THE EVENTS AT THE OTHER RESIDENCES AND WERE INTERRUPTED BY A SIGNIFICANT PERIOD OF RESPITE.

The state's first argument is that Rolling cited no caselaw in which Rules of Criminal Procedure 3.150 and 3.152 were applied to penalty phase proceedings. This Court has addressed severance in the context of penalty proceedings in several cases. See Roundtree v. State, 546 So. 2d 1042 (Fla. 1989)(reversible error for trial court to deny Roundtree's motions for severance of defendants in both guilt and penalty phases); Puitti v. State, 495 So. 2d 128 (Fla. 1986)(severance not required in penalty

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[15]"We've got a tape, . . ., at the end of the tape, where he talks to his brother, in what now seems eerie and almost prophetic. He says to his brother, this little conversation about: You know, if you want to kill a deer, you want to make sure you kill them with a lung shot, you get them to the heart or a vital organ. . . . [T]hen what does he say? 'I'm signing off now. There's something I got to go do. There's something I got to go do.'

You heard the tape. Well, one can argue maybe that that doesn't mean what he went to do. . . . [D]o you remember when he's later asked by Legran Hewitt on the videotape . . . 'Danny, what was it you had to go do?'

Do you remember what he had to go do? Was it the homicides, Danny? Was it the killings? That's what he had to go do."

(T 4984-4986).

phase of trial), vacated and remanded, 481 U.S. 1027, 107 S.Ct. 1950, 95 L.Ed.2d 523 (1987); see also Espinosa v. State, 589 So. 2d 887 (Fla. 1991)(Barkett, J., dissenting)(where defendants present antagonistic defenses in capital case, severance should generally be rule in guilt phase and always rule in penalty phase), reversed on other grounds, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Furthermore, logic dictates that the severance rules apply to a capital defendant's entire trial and not simply to the guilt portion of the trial. As Rolling pointed out initially, the reason for requiring separate trials for unrelated crimes--to prevent the mutual contamination of each distinct charge--is equally applicable to a jury's sentencing recommendation.

The state's second argument is that because the state can introduce proof of contemporaneous convictions in a multi-murder case to prove an aggravating factor, severance of counts for sentencing is inapplicable.

First, convictions are deemed "contemporaneous" only because they are tried together. Thus, if the trial court had properly severed the crime scenes, the convictions related to the other episodes would not be "contemporaneous." The existence of the unrelated convictions would nonetheless be admissible to prove

the aggravating factor of prior conviction of another capital felony or felony involving the use or threat of violence. See 941.141(b), Fla. Stat. (1993). That the *existence* of these convictions is admissible does not mean, however, that severance is inapplicable. The state is confusing the standard for determining whether offenses were improperly joined with the standard for determining whether a court's failure to sever was harmless error. In order for offenses to be properly joined for trial, they must be connected in an episodic sense, either because of an obvious causal link or because they occurred as an uninterrupted crime spree. Ellis v. State, 622 So. 2d 991, 999-1000 (Fla. 1993). If offenses are not related in an episodic sense, then the defendant is entitled to have them tried separately. The test for determining whether a misjoinder is harmless error, on the other hand, is whether the error caused actual prejudice by having a damaging effect or influence on the jury's verdict. Livingston v. State, 565 So. 2d 1288, 1290 (Fla. 1988).

In a capital case, the fact that unrelated convictions are admissible in aggravation does not necessarily render a misjoinder harmless error. Although some evidence concerning the circumstances of a prior violent felony conviction is admissible,

"there are limits on the admissibility of such evidence." Duncan v. State, 619 So. 2d 279, 282 (Fla.), cert. denied, 114 S.Ct. 453, 126 L.Ed.2d 385 (1993). "`[T]he line must be drawn when [evidence of the circumstances of the prior offense] is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value.'" Id. The evidence related to prior crimes may not become a feature of the trial. Lockhart v. State, 655 So. 2d 69, 73 (Fla.), cert. denied, 116 S.Ct. 250, 133 L.Ed.2d 175 (1995). Accordingly, this Court has found error in admitting a tape recorded statement of a prior victim, Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), and gruesome photographs of prior victims. Duncan, 619 So. 2d at 282; Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993).

In the present case, if the court had properly severed the three crimes scenes for sentencing purposes, it is unclear what details of the other crimes would have been allowed to support the prior violent felony aggravator. The trial judge may have permitted very little other than copies of the judgments, in light of the tremendous prejudicial effect and dubious relevance of other details. It is highly unlikely, however, the judge would have allowed the massive amount of evidence admitted below,

including photographs of the other scenes and victims and the extensive testimony about the discovery of the unrelated crime scenes, the other victims' activities prior to their deaths, and their wounds, torn clothing, and trauma.

In light of the substantial and compelling mitigation in this case, the court's failure to sever the crime scenes was not harmless. Every single mental health expert, including the state's experts, agreed that Rolling did not choose to have the four or five personality disorders with which he was afflicted. Nor did he choose the psychological and physical abuse which contributed to the development of his personality disorders. The expert testimony, along with all the other mitigation, bore directly on the question the jury was required to answer: To what extent should Rolling be held morally culpable for his acts? Jurors have voted for life under similar circumstances. See Wournos v. State, 21 Fla. Law Weekly S201 (Fla. May 9, 1996)(5 jurors voted for life imprisonment even though defendant had 9 prior violent felony convictions, including 4 convictions for first-degree murder). Accordingly, this Court cannot say beyond a reasonable doubt that the sentencing recommendation would not have been different had the severance error not occurred. This Court should reverse and remand for new sentencing proceedings.

CONCLUSION

Based upon the argument, reasoning, and citation of authority in this and the initial brief, appellant asks that this Court grant the relief requested in his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished to Richard B. Martell, by delivery to the Capitol, Plaza Level, Tallahassee, Florida,and a copy has been mailed to appellant, DANNY HAROLD ROLLING, #521178, Union Correctional Institution, Post Office Box 221, Raiford, Florida, on this 29th day of May, 1996.

Nada M. Carey