

IN THE SUPREME COURT OF FLORIDA

DANNY HAROLD ROLLING,

Appellant,

v.

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

ANSWER BRIEF OF APPELLEE

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Statement of the Case and Facts

Between August 24 and August 27, 1990, five college students were found murdered in Gainesville, Florida. On February 15, 1994, Danny Harold Rolling withdrew his prior pleas of not guilty and entered pleas of guilty to the five first-degree murders of Sonia Larson, Christina Powell, Christa Hoyt, Manuel Taboada and Tracey Paules; three counts of sexual battery, and three counts of armed burglary of a dwelling with a battery. In support of the change of plea, Rolling prepared a petition to enter plea of guilty dated February 10, 1994, and filed the said plea in open court on February 15, 1994, specifically acknowledging that he understood his constitutional rights.

On February 15, 1994, following a factual recital accepted for the pleas, the trial court accepted Rolling's pleas of guilty (TR 2243).¹ On February 16, 1994, jury selection commenced for the penalty phase of Rolling's trial. On February 25, 1994, Rolling filed a motion for change of venue (TR 2388-2390(a)), and a hearing was held that day (TR 7269-7311). The trial court denied the motion for change of venue (TR 26-42), and filed a written order May 20, 1994 (TR 3258-3266), concluding:

The court, therefore, found that the publicity, although pervasive, was not hostile so as to inflame the community

¹ Hereinafter "TR" will refer to the original trial transcript.

in general and further found that the pretrial publicity did not so prejudice prospective jurors that they could not evaluate impartially those facts which were to be evaluated in determining the penalty to impose in a capital case.

(TR 3266).

Following the empaneling of the sentencing jury, the penalty phase commenced March 7-24, 1994. The jury, by a 12-0 vote, recommended the death penalty for each of the five counts of first-degree murder.

On April 20, 1994, the trial court entered its written order (TR 3198-3224), finding four aggravating factors as to each murder.²

The trial court found two statutory mitigators – Rolling’s emotional age of fifteen (15) was a mitigating factor deserving slight weight and Rolling suffered from a chronic anti-social personality disorder – given substantial weight (TR 3216-3217).

² (1) Rolling was previously convicted of another capital felony or of a felony involving the use or threat of violence; specifically that each of the other murders were contemporaneous to the others and that Rolling had a series of prior violent felonies; to-wit: a 1976 Mississippi conviction for armed robbery; a 1979 Georgia conviction for two counts of armed robbery; a 1980 Alabama conviction for robbery; a 1991 Hillsborough County, Florida, conviction for three counts of attempted robbery with a firearm and two counts of aggravated assault on a law enforcement officer, and a 1992 federal conviction for armed bank robbery (TR 3200-3202); (2) the capital murders were committed while Rolling was engaged in the commission of sexual battery or burglary (TR 3202); (3) the capital murders were cold, calculated and premeditated without any pretense of moral or legal justification (TR 3202-3209), and (4) the capital murders were especially heinous, atrocious or cruel (TR 3209-3214).

As to nonstatutory mitigation, the trial court found: (1) Rolling came from a dysfunctional family and suffered from physical and emotional abuse – significant weight was placed on these factors (TR 3219), the court further observed Rolling’s background clearly influenced his mental condition; (2) moderate weight was assigned to Rolling’s cooperation with law enforcement officers in that he confessed and pled guilty; (3) remorse existed to some degree and the court assigned slight weight to Rolling’s regret; (4) slight weight was also assigned to Rolling’s family history of mental illness (TR 3220-3221), and (5) Rolling’s mental condition or his capacity to conform his conduct to the requirements of law was afforded moderate weight (TR 3221-3222): “He does not suffer from a psychosis, he is in touch with reality, he can appreciate the criminality of his conduct of his actions, he knows the difference between right and wrong, and he does have the ability, impaired though it may be, to choose what’s right and adhere to it.” (TR 3222).

The record reflects that the first time a change of venue was sought occurred on February 28, 1994, six days into the voir dire for the penalty phase of Rolling’s sentencing proceeding. Defense counsel informed the court that he sought to introduce newspaper accounts and information disseminated since the plea of guilty on February 15, 1994, into the record and argued that it was necessary to move the

sentencing hearing based on defense counsel's "experience during the preliminary jury selection round."

As this process continued, I have an increasing sense of unease that was best explained to me by Professor Buchanan as resulting from what seemed to me to be an irreconcilable conflict between jurors comments concerning what they knew about the case, as well as how others felt, and their ability to disregard community sentiment in favor of Mr. Rolling's electrocution . . .

(TR 7274).

The State countered that the trial court had engaged in a very organized and concerted effort to secure persons for a jury venire.³

³ The State argued:

I have that we've selected a hundred and seventeen people to the final pool

That the day that we made that selection, which would be Wednesday of last week, when we arrived at a hundred and seventeen, the defense had the opportunity that afternoon - we had additional panelists that we could have taken to the box and examined further; the defense stated at that time, in response to the court's inquiry that they believed that we had a sufficient number of people who had - from whom we could select a final jury to hear this penalty phase.

We have literally, Your Honor, another couple of hundred of people that were scheduled to come in who have never been called before this Court and have never given their feelings about this case because we have reached a point where we had a

The Court, in denying Rolling's motion for change of venue (TR 7292-7310),

hundred and seventeen people that were identified as plainly being the persons who said: I can set aside what I've read, and I've heard, what I've been told, what's been suggested to me at work, and decide this case solely on the evidence in the Court and the instruction of the Court. You ask that question, I ask that question, Mr. Kerns and Mr. Parker asked that question; and we asked it in a wider array of fashions.

We were able to - we have seventy-eight people, I think, that were dismissed from the pool.

Of course, Your Honor seventeen were dismissed because they plainly stated that they could not sit on the jury because they had made up their mind that the only penalty they could administer in this case would be life sentence. That is approximately twenty three, twenty three plus percent, Your Honor.

In any instance, I submit to the Court, to some frustration on the State's part, as the Court probably knows, every time there was a close call on the issue of cause, I believe the record would support, would say: I have some reasonable doubt. Even though there was rehabilitation of that prospective juror, I have some reasonable doubt by the manner in which they responded, equivocations that I heard in their voice or I saw in their mannerisms; and this Court excused them, still leaving us with a hundred and seventeen people, for which there was very little question.

(TR 7282-7284).

stated that it had reviewed a plethora of case authority and detailed the jury selection process undertaken to ensure that careful scrutiny was employed as to each potential venireman that ultimately made up 117 persons constituting the final jury selection panel.⁴

Considering the principles as we have evolved from guilt phase litigation in trying to extrapolate from those principles a set of principles we apply to a strictly penalty phase situation, for those reasons at this time and from my own

⁴ The court observed that (a) the defense's challenges for cause were granted whenever the trial court had a reasonable doubt as to the ability of a juror to sit fairly and impartially in this case; (b) since this case was not dealing with the guilt phase of Rolling's trial, but rather the penalty phase, "I find it interesting that, in many instances the panels, which were dealt with separately per day, often suggested back to the defense upon inquiry that such things as the defendant's background, his childhood experiences, any mental stabilities of infirmities that he may have, could be and would be considered by them in determining whether they were established; and, secondarily, that weight should be put upon them.", and (c) ". . . the Court has to consider on the issue of pretrial publicity, at least in a guilt phase consideration, has always been not only that there is extensive publicity, but that it is of a hostile nature, using the terms, I believe, that probably were established in Shepard v. Maxwell, that it is of a hostile nature and so inflamed the community that even those who sat on the jury and would espouse that they could be fair, in essence, could not because they could not place their will, as it were, in contravention to the general inflamed will of the community. I do not sense that in Gainesville, Florida, at this moment. And I certainly don't sense that in the statements of the jurors." (TR 7305-7308); (d) the court found that based on some of the newspaper articles concerning possible mitigation as to Rolling's "mental disabilities", that he "did not find pervasive hostile publicity to Mr. Rolling on this issue of the implementation of the death penalty or the implementation of a life sentence." (TR 7309).

observations of the responses of the hundred and seventeen people who have returned, I deny the motion for change of venue. . . .

(TR 7309), and (TR 3258-3266).

This Court, in Rolling v. State, 695 So.2d 278 (Fla. 1997), affirmed Rolling's appeal based on the claims presented.⁵ In denying Rolling's complaint that a change of venue should have been granted, the court observed:

Rolling and his defense counsel 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 for these offenses because they believed he could be fairly tried by an impartial jury in Gainesville. Instead, contrary to the dictates of Florida Rule of Criminal Procedure 3.240(c), which requires that a change of venue motion be filed no less than 10 days before trial, Rolling waited until his sixth day of jury selection to request a change of venue for the first time, when defense counsel admitted to the Court: 'I have to swallow my pride and admit that I was incorrect in my original opinion that this case could be fairly tried here.' The trial court subsequently denied the motion after a hearing.

Rolling now argues on appeal that the trial court erred in denying his motion for change of venue because the record

⁵ 1) pretrial publicity did not require a change of venue; 2) statements to fellow inmates and to investigators were not the result of Sixth Amendment violations; 3) the inventory search of a tote bag found at the campsite was proper; 4) Rolling waived any claim of error in joinder of offenses for penalty phase; 5) the instruction of heinous, atrocious and cruel was proper, and 6) the death penalty for five capital murders was not disproportionate.

shows that the pretrial publicity in this case during the three and a half years between the time the murder occurred in August 1990 and Rolling's guilty plea in February 1994 was so pervasive and prejudicial that this Court must presume as a matter of law that the venire, as well as the actual members of the jury, were biased against him. Rolling points also to the response of certain prospective and actual jurors during their voir dire as further evidence that the entire Gainesville and Alachua County community had been victimized by Rolling's crimes and harbored an inherent prejudice and animosity against him.

To the contrary, the State, while candidly acknowledging that this case generated massive pretrial publicity, maintains that the three and a half years between the crimes and the trial served to distance the community from most of the media coverage surrounding Rolling's case, and, even assuming otherwise, the publicity was not presumptively prejudicial because it consisted of 'straight news stories', relating 'cold, hard facts.' Moreover, the State contends that 'beyond a doubt the trial court undertook extraordinary measures to ensure jurors who sat were fair and impartial,' and 'all jurors who served affirmatively and unequivocally stated that they could put aside any prior knowledge and decide the case based solely on the evidence presented at trial.' Upon thorough review of the record in this case, we agree with the State.

695 So.2d at 283-284.⁶

⁶ To the extent Rolling argues his counsel rendered ineffectiveness based on the timely filing of a motion for change of venue, this Court rejected the State's arguments that the claim was procedurally barred from appellate review. See 695 So.2d at 20, n.4, wherein the court held, in material part:

" . . . We agree that Rolling's deliberate strategy choice to proceed to trial in

In relying on McCaskill v. State, 344 So.2d 1276 (Fla. 1977), the Court reaffirmed the test for determining whether a change of venue was required and further noted: “On appeal, . . . the appellate court has ‘the duty to make an independent evaluation of the circumstances,’” citing to the standard set forth in Murphy v. Florida, 421 U.S. 794 (1975), that the two-pronged analysis required evaluating: “(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury.” 695 So.2d at 285.

Following a detailed recital of the law, as well as the circumstances unique to Rolling’s case, the court held:

As to the first prong of our analysis, it is undisputed that the brutal slaying of five young students deeply affected the college community of Gainesville, Florida, and generated overwhelming local and national media attention. While the amount of media coverage in this case makes it unique, the extent of publicity it receives was certainly not surprising or unwarranted given the circumstances of this case. Indeed, in light of the fact that Rolling chose not to request a change of venue pretrial, it appears that even he was not concerned or otherwise disturbed by the extent or nature of the coverage at any time during the three years he awaited trial.

Gainesville despite the publicity indicates he did not believe it to be prejudicial at that time. **We find, however, that Rolling’s motion filed after the first phase of voir dire preserved his claim for review on appeal.** (Cites omitted).

Likewise, the trial court's order denying Rolling's request for a change of venue reflects a candid and legally grounded review of the media attention this case received. **Because we find the trial court's evaluation of media coverage in this case to be consistent with our own view of the record, we reject Rolling's claim that the pretrial publicity presumptively prejudiced the entire Alachua County community against him.**

We also find unpersuasive Rolling's related assertion that the responses of both prospective and actual jurors during voir dire further demonstrated a real, community-wide prejudice and animosity towards him. Not surprisingly, of course, every member of the venire had some extrinsic knowledge of the facts and circumstances surrounding this case. Also as expected, the responses of certain prospective jurors showed that their knowledge of the case prevented them from sitting impartially on the jury. Nevertheless, the animus towards Rolling expressed by these individuals reflected nothing more than their own personal beliefs or opinions. Contrary to Rolling's assertions, we find no reason to believe that certain prospective jurors who voiced a bias against Rolling – none of whom sat on Rolling's jury – somehow spoke for the entire Alachua County community.

We also must reject Rolling's claim that the responses of actual jurors demonstrated a community-wide bias against him because we find it to be completely contrary to the evidence in the record. Rolling never challenged for cause any member of his actual jury based on bias or any other grounds; and the trial court found credible the assurances of every member of Rolling's jury that they could lay aside their extrinsic knowledge of the case and recommend a penalty based upon the evidence presented in court.

As to the **second prong** of our analysis, we must determine whether any difficulty encountered in selecting a jury in this case reflected a pervasive community bias against Rolling which so infected the jury selection process that it was impossible to seat an impartial jury in Alachua County. Jury selection in this case was no small task. In fact, the process spanned a three week period. Nevertheless, we do not believe that sheer length of this selection process indicates that impartial jurors could not be found. Rather, the amount of time it took to select a jury was largely attributable to the trial court's extensive and deliberate efforts to ensure that the jurors selected were, without a doubt, impartial and unbiased.

After meticulously culling the initial pool down to those venire members who were not obviously biased or otherwise ineligible to serve, the trial court allowed the parties wide latitude in questioning prospective jurors so that open animosity, as well as more subtle, unconscious prejudices could be detected. When the responses of prospective jurors raised even the slightest concern that they could perhaps not sit impartially, the court liberally granted Rolling's challenges for cause - resolving even questionable cases in favor of the defendant. In addition the court gave Rolling six additional peremptory challenges as a further safeguard to ensuring jury impartiality.⁵

⁵ Rolling argues extensively that the trial court's award of additional peremptory challenges was insufficient in this case, because the court refused Rolling's request for a seventh one to peremptorily strike Mrs. Kerrick, who sat as a member of the jury. Rolling never challenged Mrs. Kerrick for cause at any time during the voir dire or otherwise stated for the record why he wished to strike Mrs. Kerrick. As with the other members of the jury, the

court found credible Mrs. Kerrick's assurances that she could put aside her extrinsic knowledge of the case and recommend a sentence based on the trial court's instruction and the evidence presented in court. Thus, we reject Rolling's argument that he was prejudiced by the trial court's failure to award him an additional peremptory challenge.

Rolling v. State, 695 So.2d at 287-288, 297 (emphasis added).

In concluding that Rolling was entitled to no relief, the court held:

Once again, critical to the issue here is that the trial court found credible the assurances of all the members of Rolling's jury that they could lay aside their extrinsic knowledge of the case and recommend a penalty based only upon the evidence presented in court; and Rolling never challenged for cause any member of his actual jury based on bias or any other grounds. Rather than revealing a pervasive community bias against him as Rolling suggests, the intricate jury selection process employed in this case and the responses of actual jurors during questioning shows that it was possible to seat an impartial jury in Alachua County. In this regard, we must commend the trial court for employing a jury selection process with ample safeguards. Consequently, because we find that the trial court's system was an effective one which produced an impartial jury, we affirm the trial court's denial of Rolling's motion for change of venue. Neither the pretrial publicity in this case nor the lengthy jury selection process evidenced a community bias so pervasive as to make it impossible, under any circumstances to seat an impartial jury in Gainesville.

695 So.2d at 288.

On or about April 5, 1999, Rolling filed his amended postconviction motion to vacate and set aside death sentences rendered April 20, 1994.⁷ (PCR III pgs. 286-348).⁸ Rolling raised two claims: (1) “trial counsel rendered ineffective assistance of counsel regarding the failure to properly seek and obtain a change of venue, and (2) trial counsel rendered ineffective assistance of counsel regarding the failure during voir dire to challenge biased and fearful venire persons who ultimately served on the jury – the fact that some of the jurors were actually prejudiced against the defendant.”

The matter was set for evidentiary hearing commencing July 11, 2000 - July 15, 2000. On March 5, 2001, the trial court denied all relief (PCR V 625-659), holding:

. . . In essence, the plea is to grant relief because the defense attorneys did not foresee the jury prejudice they soon enough perceived and because when they did, the trial team could not convince the Court of the reality if a prejudiced jury. 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

⁷ Rolling originally filed his motion for postconviction relief on November 13, 1998, asserting thirty-one (31) claims upon which he sought relief. The record reflects, and Rolling acknowledges in his amended motion for postconviction relief, page 5, paragraph 9D, that “he has abandoned all but two [Claims I and II] of the claims asserted in the motion including the assertion that the judgments against him should be set aside. He seeks postconviction relief regarding the death sentences only.”

⁸ Hereinafter “PCR” means postconviction record.

outweighed by the mitigators presented on Rolling's behalf.

...

(PCR V 659).

At the evidentiary hearing, Rolling took the stand and testified that albeit he was uncomfortable at first about having his trial in Gainesville, because of the "trauma to the community," he did discuss with his lawyers on a number of occasions the issue of trying to keep the trial in Gainesville, Florida. Rolling recalled that he trusted his lawyers and that, in their discussions with regard to the Gainesville community, his lawyers told him that Gainesville was liberal and that, there was a good chance that they would have an unbiased trial there (PCH VII pgs. 33-38).⁹ On cross-examination, Rolling admitted that defense counsel told him that jurors were better educated in Gainesville and that previously they had secured good jury pools for criminal defendants (PCH VII pgs. 41-43). He recalled that his lawyers told him that it was going to be hard to go to trial anywhere (PCH VII pg. 45), and that his lawyer, Johnny Kearns, told him not to talk to the press and not to give interviews (PCH VII pg. 45). Rolling ultimately stated that he went along with his lawyers because they said Gainesville was a good place to have the trial (PCH VII pg. 47). He recalled that not only did they discuss the positive reasons for staying in Gainesville, but also discussed

⁹ Hereinafter "PCH" will refer to the Postconviction Hearing.

the negatives (PCH VII pg. 48). It was Rolling's "recollection" that he spoke to his lawyers between three and five times regarding venue. (PCH VII pg. 49). On redirect, Rolling reaffirmed that he was told by his lawyers that Gainesville would be one of the best places for his trial (PCH VII pg. 49).

Thomas Miller, the federal Public Defender in Rolling's robbery trial, testified that federal District Court Judge Paul moved the trial from Gainesville to Tallahassee on the Court's own motion (PCH VII pgs. 9-14). Miller did, at some point, attempt to change venue from Tallahassee because he believed Tallahassee and Gainesville were too similar and because there was a plethora of news stories with regard to Rolling in the newspaper (PCH VII pgs. 15-16). Judge Paul denied the motion for change of venue and Rolling was subsequently convicted (PCH VII pg. 21). Mr. Miller testified that although there was immense statewide coverage, he did not secure any surveys about whether Pensacola would be a proper or better venue, nor did he survey the Tallahassee community to see whether Rolling would get an "unfair" trial in Tallahassee (PCH VII pgs. 24-25). Mr. Miller observed that Rolling's convictions for robbery were affirmed on direct appeal and, that no issue as to venue or trial fairness was raised on appeal (PCH VII pg. 27). Lastly, Mr. Miller observed that he spoke with the Gainesville Public Defender's Office frequently concerning to Rolling's murder charges and that Johnny Kearns, one of Rolling's defense counsel, sat through

the robbery trial in Tallahassee because critical issues in the robbery case impacted evidentiary issues in the murder case (PCH VII pg. 28). **Mr. Miller talked to Mr. Kearns about the issue of change of venue** (PCH VII pg. 31).

The defense called Tallahassee Public Defender Dave Davis, one of four lawyers who handled Rolling's murder convictions on direct appeal. Mr. Davis was only responsible for reviewing the record as to the venue issue (PCH VII pg. 52-54). Mr. Davis' review of the appellate record was limited. He observed, however, that there was a hearing as to the change of venue motion filed by defense counsel during the jury selection process. He noted that there was no live testimony, no surveys done, although trial counsel did previously introduce articles from The Alligator, The Gainesville Sun, and television stations. Davis noted that the trial court also took judicial notice of other materials - hundreds of articles that were previously introduced during the course of numerous pretrial motions (PCH VII pgs. 66-67). On appeal, Mr. Davis argued that there were two kinds of prejudice, presumed and actual, and that it was his view, based on the reading of the record, that there was a uniformly, negative press against Rolling (PCH VII pgs. 70-71). It was his view that defense counsel was faced with the issue that although Gainesville was a "liberal community" and had been a "criminal inclined" source for jury pools previously, Rolling's jury venire was radically against him and there was no sympathy evidenced during voir dire

questioning (PCH VII pg. 73). Mr. Davis explained that a liberal community was good because the defense could legitimately believe that a “liberal” person would listen and understand arguments as to mitigation and would give a full and fair hearing - although they may not necessarily vote life in a given case (PCH VII pg. 74). Historically, Gainesville had been a community largely opposed to executing anybody, however, it was Mr. Davis’ view, based on the information and articles he had gathered, that in this instance there was immense hostility against Rolling (PCH VII pgs. 76-79).

On cross-examination, Mr. Davis admitted that Alachua County was a defense venue but that, after reading the materials, he concluded that Gainesville was very hostile towards the defendant (PCH VIII pg. 116). Mr. Davis further stated that defense counsel “sincerely believed” that based on their experience in handling cases in Alachua County, that Alachua County was the best place for them to try Rolling (PCH VIII pg. 117). Mr. Davis observed that the reading materials reflected that “Gainesville was extraordinarily traumatized by what happened in August of 1990” and that there was repeated and pervasive publicity with regard to these murders (PCH VIII pgs. 118-122). He further noted, however, that he could not speak to anywhere else because he only looked at Gainesville press and therefore had no sense with regard to other communities’ views of Rolling (PCH VIII pg. 122). Mr. Davis admitted that he did not look at the entire appellate record but only concentrated on

the voir dire portion and the newspaper articles that were included in the appellate record (PCH VIII pg. 124). He could not testify whether any studies were done anywhere else pertaining to the trauma Rolling had caused in other communities (PCH VIII pg. 128).

Mr. Rick Parker, one of Rolling's defense lawyers, was next called to the stand by the defense. Mr. Parker testified that as the Public Defender since 1984 in Alachua County, Florida (PCH VIII pg. 157), he and his staff commenced following the media and press coverage of the murders in August 1990. His office was appointed to represent Rolling on November 19, 1991 (PCH VIII pg. 159). Early on the publicity was enormous and it was clear that this was a high profile case. In July 1992, as part of an all encompassing defense strategy, his office filed a motion to reconvene another Grand Jury outside of Alachua County, citing adverse publicity (PCH VIII pgs. 161-163). At the same time, his office continued to file motions to seal disclosure of evidence to ensure that Rolling's constitutional right to be tried in the county where the crime was committed was preserved and protected (PCH VIII pg. 163-64). It was Mr. Parker's belief that Rolling had a constitutional right to have venue protected for Alachua County. He filed numerous motions seeking to secure protective orders regarding massive media disclosure (PCH VIII pg. 165). It was Parker's belief that Alachua County was a good place to try Rolling's case and he recalled that in June

1993 he made such statements publicly (PCH VIII pgs. 166-67). While Mr. Parker acknowledged that the Gainesville community suffered widespread fear from these murders, early on - in August 1990 - through and up until the trial, his office had collected information as to statewide newspapers; making comparisons of the nature and extent of the publicity statewide; assessing tenor and tone of the media responses and noting the media's presence in the Gainesville area. Mr. Parker testified that he was acutely aware, from the onset, of the pretrial publicity. However, based on his experience, Gainesville was an open-minded community, meaning that there were people who had sat on previous criminal prosecutions who were willing to listen to what "you had to say." (PCH VIII pgs. 174-75). During this time, Mr. Parker did not rely solely on his personal view but consulted with other people on the Death Penalty Steering Committee concerning the defense community's view of Gainesville. It was his recollection that venire from Gainesville were "open-minded, more understanding, and more willing to consider life recommendations as opposed to death sentences, . . . general reputation type information rather than any personal experience." (PCH VIII pg. 176). His belief was also based on the fact that he had tried cases in other cities such as Miami and other places within the circuit (PCH VIII pg. 176). While he had no "empirical data", he spoke with other criminal defense lawyers who practice death penalty cases and drew from them the same belief that Alachua County was among the

most favorable climates “which is not to say a favorable climate.” He testified that he “perceived [Gainesville] to be among the most favorable for consideration of life recommendation based on meetings with others on the death penalty steering committee.” (PCH VIII pg. 179).

At some point during jury selection, he decided that he was in error (PCH VIII pg. 181), and stated that although jurors were giving good answers, it was apparent to him that they were not willing to consider options other than the death penalty. He believed people were sincere, but he did not believe what they were saying and perceived that the jurors could not be fair (PCH VIII pg. 182). It was his view as jury selection proceeded, that he was looking at a 12-0 vote for death and he did not believe that six jury members could be empaneled who would vote life (PCH VIII pg. 183).

Mr. Parker testified that during the preparation for Rolling’s trial, he secured the services of Dr. Buchanan [who was first contacted late 1992, and who started early 1993] to assist the defense team (PCH VIII pg. 184). There were many discussions regarding venue between Dr. Buchanan, Johnny Kearns, Barbara Blount-Powell, John Fischer and Rolling (PCH VIII pg. 186). It was Parker’s recollection that they changed Buchanan’s mind as to whether venue should be changed, based on the fact that Alachua County was a relatively young community, highly educated and a likely

place for the trial (PCH VIII pgs. 186-87). Parker recalled that he had a number of conferences with Rolling and the defense team and that it was an evolving decision as to keeping the trial in Gainesville (PCH VIII pg. 188). During the jury selection process, he became concerned. In fact, Dr. Buchanan and the entire defense team determined that a change of venue was necessary (PCH VII pgs. 190-192). 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” (PCH VII pgs. 192-93).

Mr. Parker testified that he never told Dr. Buchanan that funds were unavailable to do a survey (PCH VIII pg. 195). Moreover, Mr. Parker testified he knew about Judge Paul’s order in the robbery case and it was his belief that the reason that Judge Paul moved the case from Gainesville to Tallahassee was to protect the venue for the murder case (PCH VIII pgs. 196-97). Although Mr. Parker did not submit Judge Paul’s order during the course of the proceedings, it was Mr. Parker’s view that Judge Morris, who had been following the case very closely from the onset, knew about all aspects of the case (PCH VIII pgs. 198-99).

When asked about the conflict of interest concerning Bobby Lewis and Russell Binsted and that his office had previously represented these two inmates, Mr. Parker testified that it was not until the motion for postconviction relief was filed in 1999 that

he realized that his office had represented either of these individuals (PCH VIII pg. 203). Mr. Parker admitted that both Lewis and Binsted were critical witnesses for the State and that they both produced damaging evidence against Rolling (PCH VIII pgs. 200-201).¹⁰

At no time prior to the penalty phase did Mr. Kearns, Mr. Parker, Ms. Barbara Blount-Powell, Mr. John Fischer know that Binsted had been a prior client (PCH VIII pgs. 202-03). Mr. Parker explained that when the facts became known in 1999, he went back in files from attorneys who did represent these individuals in the Bradford County Courthouse microchip files. The Public Defender's Office for the Eighth Judicial Circuit had no files because they were destroyed based on a retention schedule. The Bradford County records reflected that Assistant Public Defender

¹⁰ He stated the reason Binsted was not cross-examined was not because he had been a previous client but "in conversations with her (Barbara Blount-Powell), what she told me was that after the deposition and after Mr. Binsted's testimony at the suppression hearing, she felt that at the penalty phase his information had not been as bad as it had been earlier." (PCH VIII pg. 202). Mr. Parker further stated that the number one reason why they did not cross-examine Rusty Binsted was because "we were not contesting the aggravating circumstances to which he was testifying -- " so there was no real purpose (PCH VIII pg. 202).

As the trial court noted in his order, the record reflects that Binsted was cross-examined only as to a limited area regarding Rolling's antics to change his confinement and Bobby Lewis was not cross-examined at all. (TR XXIV pgs. 3533-3539; XXV pg. 3643).

Shon Saxon had provided representation to Bobby Lewis in 1979 and that Rusty Binsted had once been represented by Johnny Kearns in Bradford County in 1977 (PCH VIII pg. 236). Mr. Parker testified that if they had known they would have told Rolling about the representation but they would not have withdrawn from the case because there was no actual adversity of interest, there was no conflict of interest and there was no obligation to either Binsted or Lewis based on any confidential information that had been provided (PCH VIII pgs. 206-08).

Mr. Parker also testified that during the course of preparing for the case leading up to the guilty plea in February 1994, he and his office talked to people in Tallahassee, including Bill McLain, Doug Brinkmeyer, and Dave Davis, concerning the change of venue. They also talked to the aforementioned individuals as to the change of venue that occurred in the Bundy case. Mr. Parker was aware that in the Bundy case, surveys were used to establish negative adverse pretrial publicity (PCH VIII pgs. 209-10). He indicated that they did not do a survey in the instant case because they had Buchanan's expertise. In fact, the record reflects that Johnny Kearns and Dr. Buchanan put together a jury questionnaire. They had asked the court to circulate it to potential jurors pretrial, but the trial judge ultimately decided not to use the questionnaire. Dr. Buchanan later testified that the questions in the questionnaire were used by the defense during jury selection (PCH IX pg. 337).

Mr. Parker testified that he knew they were taking a great risk by staying in Alachua County (PCH VIII pg. 214).

On cross-examination, Mr. Parker testified that over his 27 years of practicing, he could only recall five capital murder cases where death had been imposed from Alachua County. It was his belief that juries in Alachua County were prone to life over death and he was well aware that this case had statewide publicity (PCH VIII pgs. 221-22). Parker recounted that the defense team had collected articles from all the newspapers available statewide and did recall that just prior to trial, The Gainesville Sun, which is an anti-death penalty newspaper, had published articles by the local ministers requesting that the state attorney not seek the death penalty (PCH VIII pgs. 223-24). It was Mr. Parker's recollection that he used these articles to try to get a plea agreement with the State in behalf of Mr. Rolling (PCH VIII pg. 224). On cross, Mr. Parker acknowledged that in defense of Danny Rolling, the defense team had a multi-level attack against the State's case and that, the view of the defense team in 1992, was much different than the view of the case when Rolling started talking to the police on tape - making videotapes and generating publicity (PCH VIII pg. 227). It was Parker's view that in 1992, they were trying to protect Rolling's presumption of innocence. Once Rolling started talking to the press, the strategy became more trying to save Rolling's life (PCH VIII pg. 227).

When asked whether he was aware that one of the victims came from Archer, Florida, Mr. Parker testified that not only did one of the victims come from Archer, Florida, but others came from Duval County and Dade and Broward Counties. He spoke to Rolling about the venue issue and testified that Rolling expressed concern **but never** objected to staying in Gainesville for the trial. It was Mr. Parker's stated view that it was part of their strategy to stay in Gainesville (PCH VIII pgs. 228-29). During this same time, he was receiving the assistance of Dr. Buchanan who also believed that Gainesville jurors were as good as they were going to get and no better panel would be obtained anywhere else in the state (PCH VIII pg. 232). It was Parker's understanding that Dr. Buchanan felt that Danny had a "good shot in Alachua." (PCH VIII pg. 232). Parker observed that once Rolling pled guilty, however, it became harder to see how the jurors would be able to vote for life (PCH VIII pg. 233). Although Parker moved for change of venue, he testified that he did not believe that if they went anywhere else it would be better (PCH VIII pg. 234).

On cross-examination, Parker reaffirmed that at no time during and up until the trial did anyone in the defense team know Rusty Binsted or Bobby Lewis had been clients of the Public Defender's Office. No one was aware until the postconviction motion was filed (PCH VIII pgs. 234-35). Parker testified that the files in the Bradford County Courthouse revealed that approximately fourteen (14) years earlier in 1980, an

Assistant Public Defender Shon Saxon had represented Bobby Lewis and other files reflected that Johnny Kearns in 1977, had represented Rusty Binsted. None of this came to light as to Rusty Binsted, because, Kearns was not handling that portion of the Rolling case that dealt with Binsted. He did not go to the deposition nor did he appear at the suppression hearing (PCH VIII pgs. 236-37). Mr. Parker reaffirmed on cross-examination that although there were internal policies with regard to conflicts of interest, there was no automatic conflict of interest just because of a prior representation of a State's witness. It was Mr. Parker's view that there was no relationship between the two cases and that there was no information gained from a confidential relationship that would jeopardize the current defense of Danny Rolling. Moreover, Mr. Parker stated that no decision was made concerning the representation of Rolling that had anything to do with the prior representation of Binsted or Lewis (PCH VIII pgs. 239-41).

When asked about why Parker wanted open-minded jurors he indicated that there was a lot of mental health mitigation that was going to be presented and he wanted people to listen to that type of mitigation. He testified that his strategy was not to attack the aggravation once Rolling decided to plea. The defense team strategy prior to going to trial was to restrict dissemination of material as to trial and they tried

to limit disclosure of pretrial proceedings, rulings and discovery (PCH VIII pgs. 242-44).

On re-direct, Mr. Parker testified that he spoke with the defendant five to six times about the venue issue and some of those discussions were reduced to writing (PCH VIII pg. 247). He had discussions with Rolling on January 26, 1994, the pros and cons of pleading guilty. The defense team had tried to convince Rolling go to trial. When they returned on January 26, Rolling told the defense team he was going to plead guilty and Rolling never wavered after that decision (PCH VIII pg. 252).

Rolling last called Dr. Buchanan who testified that as the Professor of Communications at Pepperdine University in Malibu, California, he came to Florida in June of 1993, to assist the Public Defender's Office in doing a public analysis, jury profiling, evidence and argument analysis, to assist in the jury selection and assist in locating experts for the Rolling case (PCH IX pgs. 269-75). He spent hours analyzing public media and working on the Rolling case. He became aware of the pretrial publicity almost immediately and his task was to compile material and ascertain, based on these materials, the public's perception of Rolling (PCH IX pgs. 275-76). Dr. Buchanan observed that the sheer volume of material was staggering and that there was media from everywhere broadcasted to everywhere. His words were that it was a "media feeding frenzy" similar to "the O.J. Simpson trial." (PCH IX pgs. 276-77). His initial impressions were that there were "no positives" about the news media

reporting of the murders and that, in and of itself, should not have surprised anyone based on the nature of the crimes (PCH IX pg. 273). When he first talked to the defense team one of the first things they talked about was venue and the need for a possible change of venue (PCH IX pgs. 279-81). Based on those early discussions, it became clear the defense team had some problems with other venues in Florida and that they thought that Gainesville was a better place to try the case (PCH IX pg. 282). From what he gathered, 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 (PCH IX pg. 282). Dr. Buchanan indicated that a highly educated jury profile was important because they needed jurors to understand and consider all the facts and did not want any “knee jerk reactions.” He also observed 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. This analysis assumed that if a change of venue did result, the defense team would likely have “no say” in where they might go (PCH IX pg. 283).

Prior to Rolling tendering his plea on February 25, 1994, Dr. Buchanan was in concurrence with the intuitive - observations and qualitative - judgments expressed by the defense team (PCH IX pg. 284). Dr. Buchanan testified that after the guilty plea, 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 (PCH IX pg. 285). He observed that the community was far more impacted than first thought and that no prior experience would have indicated how deep the feelings were in Alachua County. He observed that the people were not acting as they normally would (PCH IX pgs. 286-87).

When asked whether he would have done any surveys, Dr. Buchanan indicated that he would not have personally done them but would have hired somebody to do them. He further observed that in this case though, the defense team ultimately did ask for a change of venue. He noted that looking at the matter in hindsight, “perhaps a change of venue would have been better filed sooner.” (PCH IX pg. 294). It was his further observation that they could not guarantee any better results, wherever they did go, if a change of venue had been granted (PCH IX pg. 295). He stated that “jury selection, is a data collecting process far better, by the way, than a survey would be.” He noted that surveys do not see the people versus a jury selection process where you hear emotional tones of the people and are able to collect “hot data.” (PCH IX pgs. 296-97). He noted that a survey during the course of jury selection might have been helpful as a supplement to what the defense team already knew (PCH IX pg. 297). His personal thoughts were that the trial judge should have stopped the jury selection

process and done a survey which would have only taken four or five days to supplement the qualitative observations made during the jury selection process (PCH IX pgs. 297-98). Dr. Buchanan noted that his recommendation for a survey came **only after** the motion for change of venue had been filed (PCH IX pg. 299).

Dr. Buchanan realized that you can not stop a trial but he was making these suggestions as a researcher and academician. To him, a further delay of four or five days did not seem like much (PCH IX pg. 300).

Dr. Buchanan admitted there was no quantitative data presented but he was comfortable with the defense team's qualitative, personal, intuitive observations of Alachua County. In his discussions with the defense team, they had talked about other places such as Pensacola or larger venues like Tampa, Miami, Jacksonville, but there were reasons why all of the aforementioned were not suitable either because Rolling had committed crimes there, the victims lived in these areas or for other reasons (PCH IX pgs. 302-03). He had access to all the information. He only came full circle and started believing a change of venue was needed during the voir dire when, after hearing the jurors, he "started realizing they did not have a chance with the jury." He testified that the entire team believed that a change of venue was necessary at that point (PCH IX pg. 304). Dr. Buchanan emphatically stated that he was convinced before the voir dire that the jurors were the best they could hope for and that the defense team could

not get a better panel anywhere in the state (PCH IX pg. 306). What he did not figure on was the community-wide anger and that data started emerging during voir dire (PCH IX pgs. 307, 309). Dr. Buchanan testified that he could not say that an earlier questionnaire would have uncovered the anger (PCH IX pg. 309).

When asked about articles and other information regarding pretrial publicity, Dr. Buchanan indicated that he did not need a particular article because he knew about pretrial publicity (PCH IX pg. 310). He saw the Herkov Study which reflected that, over time, fear abated in the community (PCH IX pg. 316). Dr. Buchanan summed it up by saying that Johnny Kearns did believe that he knew the jury pool, understood the jury pool and believed that he would find open-minded people to whom to make their case. Dr. Buchanan said that this was an honest assumption, it just did not turn out to be that way. They did not know that until the defense team collected the data from the jurors themselves (PCH IX pgs. 319-20).

On cross-examination, Dr. Buchanan stated when he first came to Gainesville, he had the opportunity to speak with other defense lawyers in Gainesville about the community and whether it was a good place to try the case (PCH IX pgs. 323-24). Dr. Buchanan also had prior knowledge of the community since he had spent some time in Gainesville and his son was a defense lawyer in town (PCH IX pg. 324). Based on the statewide coverage of the case, Dr. Buchanan's first impression was that a

change of venue was automatic (PCH IX pg. 325), however, after talking to the defense team and other lawyers pretrial, he came around to believe that Alachua County was good choice because the big battle was going to be whether the jurors could listen to mitigation (PCH IX pg. 333). Dr. Buchanan voiced a strong belief that there was no likelihood of success as to the guilt portion and informed the defense team early on, that perhaps Rolling should plead guilty. In a December 28, 1993, memo, he wrote that Rolling's chances of avoiding electrocution were probably slim and none, but "I think a plea gives him, by far, his best opportunity for life." (PCH IX pg. 329).

Dr. Buchanan testified that he never requested any money nor did he discuss any money either as payment or to do a study (PCH IX pg. 336). He did assist Johnny Kearns in preparing a questionnaire to be used for potential jurors and those questions were ultimately used during the voir dire by the defense team (PCH IX pg. 337). Dr. Buchanan testified that he endorsed staying in Alachua County until jury selection because that was "a good strategy on what we knew at the time." (PCH IX pg. 339). In retrospect, Dr. Buchanan observed that they did not anticipate how bad the impact was on the community. Coupled with a bad factual case and Rolling's antics in talking to the press and confessing, the defense team's hopes were dashed with regard to securing a good panel (PCH IX pgs. 343-45, 346-47, 351-52, 360).

The defense tentatively rested.

The State called two witnesses, Barbara Blount-Powell and John Kearns, both assistant public defenders with the Eighth Judicial Circuit and part of the Rolling defense team.

Barbara Blount-Powell testified that in October 1992 she became part of the team of Johnny Kearns, Rick Parker, John Fischer and herself, that were assigned to represent Rolling. Her responsibilities were to review all investigative reports, handle discovery, handle 4th and 5th Amendment issues, work on pretrial and Phase I issues. John Fischer was to work on scientific evidence and DNA; Kearns was to work on the penalty phase and Rick Parker was to supervise the group (PCH IX pgs. 355-56).

In early February 1993, Rolling made a series of audio and video statements with Bobby Lewis wherein he confessed to the crimes. Moreover, in April 1993, while taking the deposition of inmate Russell Binsted, it was uncovered that Binsted had written documents and confessions that were generated by Rolling (PCH IX pg. 367). When asked whether at that point the defense team was down, or resigned, Ms. Blount-Powell testified that yes they were 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 (PCH IX pgs. 368-69).

Ms. Blount-Powell testified that the defense team met several times a month and during those conversations talked about venue as well as other issues (PCH IX pg. 371). It was her recollection that Dr. Buchanan was primarily involved in the venue issues on a daily basis. The defense team all agreed to try the case in Alachua County because it was recognized that the case would involve extensive and complex mental health mitigation, childhood history with psychological and psychiatric testimony and therefore, based on these “sophisticated” issues, the defense team was looking for an intelligent and open-minded jury (PCH IX pg. 372). Ms. Blount-Powell observed that historically they had had good juries in Alachua County who were generally intelligent and open-minded and more liberal than in other areas where she had practiced such as Miami and Starke (PCH IX pg. 373). While they were concerned about the adverse and massive publicity, the team liked Alachua County as the venue for the trial (PCH IX pg. 373).

Following hearings in November 1993, relating to the suppression of Rolling’s statements, the defense team approached Rolling and informed him of what they perceived were the two possible avenues to move forward with: the strategies of the case. Ms. Blount-Powell testified that two attorneys took one view and two other attorneys took another view and they looked to Rolling for guidance (PCH IX pg. 374). Rolling indicated that he wanted to plead guilty, however the defense team was

able to put off a final decision until just before trial (PCH IX pg. 375). Ms. Blount-Powell testified that their view as to a venue changed, finally occurred during the voir dire (PCH IX pg. 375).

Ms. Blount-Powell testified that she met Rusty Binsted in February and April of 1993 when took his deposition. At the time of the first deposition, Mr. Binsted handed over documents to her during the middle of the deposition which reflected written confessions by Rolling. She also cross-examined Binsted during the suppression hearing held with regard to the statements. She testified that the defense team elected not to cross-examine him at the penalty phase of Rolling's trial because Binsted's testimony went to aggravating circumstances and the defense had strategically determined that they were not going to contest the aggravation but were to focus on mitigation.¹¹ (PCH IX pg. 377). Binsted's testimony at the penalty phase proceedings was not as devastating as it had been in earlier testimony and it was her view that cross-examination of him would not add anything to the proceedings. Ms. Blount-Powell testified that the decision not to cross-examine Binsted was not based

¹¹ The record reflects at PCR V pgs. 741-747 that Binstead was cross-examined as to Rolling's mental state and the fact that Rolling told him about using cocaine and alcohol at the time of the murders (PCR V pgs. 745-746), and that Rolling was Gemini when he kills and Ennad when he robs (PCR V pg. 747). Bobby Lewis was not cross-examined at trial based on the record (PCR V pg. 749).

on the fact that he was a former client of the Public Defender's Office because at that time no one knew that he had been a client (PCH IX pg. 378).

With regard to the Herkov Study, Ms. Blount-Powell testified that the study had been discussed by the defense team, and that the team planned to secure African Americans as potential jurors because the Herkov Study reflected that African Americans were not as affected by the case as others in the Gainesville community (PCH IX pg. 379). In hindsight she believed that the strategies employed by the defense team to keep the trial in Alachua County was a sound one and it was shared by the entire team (PCH IX pgs. 380-81). Her main reason for this opinion was that based on the nature of the case, and how it progressed, the focus would be on what mitigation evidence could be presented during the penalty phase (PCH IX pg, 381).

On cross-examination, she agreed that the strategy to keep the case in Alachua County was a good one until a number of days into jury selection (PCH IX pg. 381). The motion to change was a collegial decision. She had input but that the defense team had employed Dr. Buchanan to get information as to the jury venire (PCH IX pgs. 381-82). The group discussed the pros and cons of staying in Alachua County, however, it was a group consensus that Alachua was the best place. The team stuck to that strategy until, during jury selection, it became apparent to Johnny Kearns and

Dr. Buchanan that it was becoming impossible to get a “fair jury”. (PCH IX pg. 384).

Ms. Blount-Powell testified that during jury selection, the decision was ultimately made to file a motion for change of venue (PCH IX pg. 398).

The State also called John Kearns who testified that based on his experience, Alachua County had a general reputation for favorable venue for defense cases, including capital cases (PCH X pg. 424). Mr. Kearns testified that he shared that general view based on his personal experience of 28 years in the community and the opportunity he had to discuss the Rolling case with other attorneys in Tallahassee, such as Dave Davis, Bill McLain, Nada Carey, Mike Minerva, Nancy Daniels and Doug Brinkmeyer (PCH X pg. 425). Over the years, based on the size and population of the county, Alachua County had had few capital cases compared to other counties or circuits (PCH X pg. 426). Because Alachua County, particularly Gainesville, was in the business of education, Mr. Kearns testified that he looked for educated jurors (PCH X pg. 427). He also noted that the community had a large medical community with a VA hospital and a teaching school which meant that he was more likely to secure medically-oriented, potential jurors. Additionally, he believed that these type jurors were more receptive to mitigation and opposed to the death penalty (PCH X pg. 428).

He commenced representation of Rolling prior to the Grand Jury being convened (PCH X pg. 431), and one of the first pleadings filed was a challenge to the Grand Jury composition (PCH X pg. 434). Prior to that time, his office had collected newspapers from around the state and observed nationwide television coverage and sensationalistic television shows with regard to these murders. He knew that there was extensive radio and television coverage and personally saw the Jacksonville stations. He observed that there was an extraordinary number of news vans from all over the country in the parking lot when anything occurred during the pretrial proceedings (PCH X pgs. 434-36). Mr. Kearns testified that he made the initial challenge to empaneling a Grand Jury in Alachua County to preserve all of Rolling's rights and issues. He testified they did not want it waived [so it was preserved, for the appellate record] based on the composition of the Grand Jury issue (PCH X pgs. 442-43). Kearns's strategy pretrial was to file protective motions defending Rolling's rights (PCH X pg. 443). It was Mr. Kearns' view that as the case progressed and the evidence became stronger against Rolling, that the case was quickly moving towards a penalty phase case (PCH X pgs. 443-44). In summarizing his motives for challenging the Grand Jury in Alachua County, Mr. Kearns testified that that was not a motion for change of venue and, the issue of venue was still open (PCH X pgs. 444-45). Mr. Kearns knew about the federal charges, specifically the Gainesville bank

robbery, and in fact was present at the federal robbery trial in Tallahassee, Florida (PCH X pgs. 445-46, 447). He was aware of Judge Paul's order transferring the case to Tallahassee, and in fact introduced the federal bank robbery trial record into evidence in the murder case (PCH X pg. 446) (See also Original RA, Vol. VI-VIII, pages 947-1475).

Following denial of the defense's motions to suppress Rolling's statements and confessions, the defense team held several meetings with Rolling about his options (PCH X pg. 448). While Mr. Kearns realized that there was no real trial issues after the motions to suppress were denied, he did not agree with Rolling's decision to enter a guilty plea (PCH X pgs. 448-49).

Based on the Herkov Study, Mr. Kearns testified that during jury selection he was trying to get as many African Americans jurors because based on that study, they seemingly had less involvement in the Gainesville murders (PCH X pg. 455). He further observed that Dr. Buchanan had come on board to assist in assessing potential jurors. In viewing the pros and cons as to retaining venue in Alachua, the cons were the widespread publicity and the fear and anger that permeated the community but was perceived to have dissipated over time (PCH X pgs. 454, 458-60), versus the pros which were (a) Kearns' experience about Alachua County as far as a defense oriented community; (b) the reputation of the county in general; (c) the fact that local papers

were actively against the death penalty; (d) Alachua looked like a more favorable venue based on other places; (e) Alachua had a highly educated community; (f) Alachua had a high percentage medical community; (g) the issues remaining were what mitigation was going to be presented; (h) the defense team had no control over where they would go should a motion for change of venue be granted; and (i) historically other places suggested had stronger support for the death penalty (PCH X pgs. 458-59). Mr. Kearns testified that he knew that the decision not to change venue would be controversial but, based on the foregoing and the fact that the emphasis had to do with the presentation of mental health mitigation versus attacking the aggravating factors, he believed that Gainesville was best location (PCH X pg. 460).

When asked about his health problems, Mr. Kearns testified that he had done the voir dire during the first week of Rolling's death penalty proceedings, had surgery and Rick Parker then took over. Both he and Rick Parker used the questionnaires that had been prepared pretrial to question potential jurors. Mr. Kearns testified that he was in constant communication with the defense team from the hospital and at home. He knew what was happening because the questions to be asked were from the questionnaire that he and Buchanan had prepared (PCH X pgs. 461-63).

In preparing for the penalty phase pretrial, Mr. Kearns testified that he knew he had to look for potential jurors who had weak feelings about the death penalty; who

were educated; perhaps familiar with medical terms and mental health issues since, the main focus of the mitigation was to be presented through Dr. Betty McMahon, Dr. Harry Krop and Dr. Robert Sadoff (PCH X pgs. 464-65). Mr. Kearns testified that what he encountered during the first week of voir dire was that people said they were ambivalent and had not made up their mind with regard to the death penalty. Unfortunately, however, because of the nature of the case and facts and because Rolling pled guilty, even persons who might have been ambivalent about the death penalty no longer had any doubt as to Rolling's guilt, ergo, there was no residual doubt (PCH X pg. 466). It was his view that these ambivalent people based on the facts and Rolling's guilt, tilted towards the death penalty (PCH, pg. 467). By the end of the week, Kearns had a bad feeling and at the beginning of the second week, the final decision to file a motion for change of venue was made (PCH X pg. 468). Kearns admitted that he did not have a better place for the trial but he was willing to see if another locale existed at that point. Since they no longer had residual doubts as to Rolling's guilt, it was his view that almost anywhere they would have gone on a change of venue, those jurors would have come to a similar result (PCH X pg. 469). Mr. Kearns explained that to him speaking to potential jurors was the best way to ascertain the jurors demeanor and their views. He opined that the final panel that was picked for Rolling's case, in any other circumstance, would be considered a good jury

for the defense. He still thought that they were a pretty decent jury for consideration of sentencing issues (PCH X pg. 473).

On cross-examination, Mr. Kearns admitted that he had been sensitive to the widespread publicity as early as October 1991 and that he used the motion to challenge the convening of the Grand Jury as a basis to preserve and keep all of his options open (PCH X pgs. 478-79, 483). He recalled that at first, much of the adverse publicity was directed to Ed Humphries, rather than Danny Rolling, and as time passed, it was his job to ensure that he did not preclude any constitutional rights that Rolling might assert (PCH X pgs. 485-86, 488, 493). When asked a series of questions as to the motions the defense did file in Rolling's behalf, Mr. Kearns explained that the same motions would have been filed in the case no matter had the case been transferred at an earlier stage to another venue. He would have asked for individual sequestration of the voir dire and closure in the dissemination of evidence (PCH X pgs. 497-500).

Mr. Kearns testified that they tried to collect empirical data when he and Dr. Buchanan prepared a questionnaire for prospective jurors (PCH X pg. 508). Although no money was spent on any empirical study on pretrial publicity, Mr. Kearns believed that with Dr. Buchanan's help and the use of the Herkov Study they, the defense team, had a fair understanding of the communities sentiment (PCH X pgs. 509-10). **When**

it became apparent that a motion for change of venue was needed, one was filed (PCH X pg. 511). Mr. Kearns was not able to specifically articulate everything that was argued or not argued with regard to the motion for change of venue. He was recuperating from back surgery at the time it was filed. However, he did testify that he spoke with Rick Parker who argued the motion and they talked about what was to be presented (PCH X pgs. 511-14).

When asked about Rick Parker's remarks to the public that Mr. Parker believed Alachua was a good place to try the case, Mr. Kearns testified that although Mr. Parker made those comments, said comments would not have impacted him in deciding to change venue at an earlier point. Moreover, he believed that the public remarks made by Parker would not have affected the judge's decision whether to grant or deny a motion for change of venue (PCH X pgs. 523-25). When asked whether Kearns agreed with Mr. Parker's remarks that a change of venue was necessary and that they had made a "mistake," Mr. Kearns characterized the change and views with regard to a change in venue as a "miscalculation" based on factors not considered (PCH X pg. 526). When asked what those factors were, Mr. Kearns stated that the change of plea a week before jury selection had a grave impact that could not be realized. He testified that only when they actually started questioning potential jurors during voir dire did they then realize the plea's impact on the jurors (PCH X pgs. 527-

28). It was his view that even beyond the guilt/innocence portion of Rolling's trial, when sentencing became the focus, he believed Rolling's best interests lie in Alachua County (PCH X pgs. 528).

On re-direct, Kearns re-emphasized that from August 1990 until the early part of 1991, Rolling was not even a part of the publicity because he was not a suspect. The press was unfavorable anywhere you looked and it was his view that the most devastating event to Rolling occurred when the trial court denied suppression of his confessions which moved the case from the guilt/innocence phase to the penalty phase (PCH X pg. 529). Mr. Kearns admitted that he filed a motion for individual sequestration in every capital case and that he would have filed that same motion in Rolling's case, a second time, had the jury been moved to another locale (PCH X pg. 530). Mr. Kearns reiterated that as to the change of venue motion, the trial court was well aware of all previous actions in this case, in particular the extensive closure hearings and was aware and had been presented with large quantities of evidence as to newspaper articles and television accounts pretrial (PCH X pgs. 531-32).

Mr. Kearns told Rolling that he did not think it was in his best interest to change his plea to guilty and disagreed with that decision. He also testified that he understood that position because Rolling is a "deeply religious person." The plea was the means

by which Rolling could make peace with his God and stand before his maker (PCH X pg. 533).

Finally, Mr. Kearns testified that he believed based on the impact of the plea that the result would have been the same no matter where the case was tried within the state (PCH X pg. 534).

Summary of Argument

Claim I: Following an evidentiary hearing on Rolling's challenge to trial counsels' effectiveness, the trial court denied all relief finding that neither deficient performance nor prejudice resulted in the strategy employed by counsel. The fact that a motion for change of venue occurred during the voir dire at the penalty phase of Rolling's trial resulted because Rolling pled guilty and the dynamics of the defense's case changed significantly. When it became apparent that the venire was not likely to vote for a life sentence based on these crimes and Rolling's admitted guilt, the defense team determined that a change of venue was required. Under Strickland v. Washington, Rolling failed to demonstrate both deficient performance and prejudice in the strategies undertaken at trial.

Claim II: Rolling next asserts that presumed prejudice resulted from the failure to change venue based on the community bias against him. While neither presumed

nor actual prejudice can be demonstrated on this record, the trial court meticulously reviewed the evidence presented at the evidentiary hearing and properly determined that under the appropriate standard of review that Rolling was entitled to no relief. The fact that some potential jurors may have had knowledge of the case at the penalty phase did not diminish their ability to listen to the evidence and determine the aggravation and mitigation. As Judge Morris observed: “Perhaps the jury simply believed, after a full consideration, that the aggravating circumstances were not outweighed by the mitigators presented in Rolling’s behalf.”

Argument

Claim I

TRIAL COUNSEL DID NOT RENDER INEFFECTIVE
ASSISTANCE OF COUNSEL REGARDING A
CHANGE OF VENUE.

All allegations that counsel rendered ineffective assistance of counsel as to the change of venue issue, must fail because Rolling cannot satisfy the standard for review announced in Strickland v. Washington, 466 U.S. 668 (1984), that a defendant must demonstrate deficient performance by counsel **and** demonstrate that such deficient performance resulted in prejudice. Rolling has met neither the deficient performance or prejudice prong of the Strickland standard, and as noted in Strickland and other

cases by the Florida Supreme Court, in order to meet said standard, Rolling must prove both. Van Poyck v. State, 694 So.2d 686 (Fla. 1997); Kokal v. State, 718 So.2d 138 (Fla. 1998); Rutherford v. State, 727 So.2d 216 (Fla. 1998).¹²

This Court, in Rolling v. State, 695 So.2d 278 (Fla. 1997), affirmed the direct appeal based on six claims, one of which was a question of pretrial publicity and whether a change of venue was required. The Court observed that:

Rolling and his defense counsel 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 for these offenses because they believed he could be fairly tried by an impartial jury in Gainesville.

¹² Moreover, it is well settled that postconviction proceedings are not to be used as a second appeal. Cherry v. State, 659 So.2d 1069 (Fla. 1995); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995); Zeigler v. State, 654 So.2d 1062 (Fla. 1992); Bryan v. Dugger, 641 So.2d 61 (Fla. 1994); Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993); Chandler v. Dugger, 634 So.2d 1066 (Fla. 1994). Matters that were, or could have been, raised on direct appeal of the conviction and sentence cannot be raised in a postconviction motion. Raising a different argument to relitigate an issue raised and rejected on direct appeal is also inappropriate. E.g., Harvey, Bryan, Remeta v. Dugger, 622 So.2d 452 (Fla. 1993). Furthermore, "charges of ineffective assistance of counsel cannot be used to get around the rule that postconviction proceedings cannot be used as a second appeal." Lopez, 634 So.2d at 1057; Valle v. State, 705 So.2d 1331 (Fla. 1997); Cherry; Brown v. State, 596 So.2d 1026 (Fla. 1992); Medina v. State, 573 So.2d 293 (Fla. 1990); Quince v. State, 477 So.2d 534 (Fla. 1985). See also Lockhart v. Fretwell, 506 U.S. 364 (1993) ("To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." 506 U.S. 364 (1993)).

695 So.2d at 283 (emphasis added)

The Court observed that six days into the jury selection process, defense counsel sought a change of venue for the first time, noting that defense counsel's belief, that a fair trial could be obtained, had changed during jury selection.

Upon reviewing the entire record, the Court concluded that although the case generated massive pretrial publicity, and that three and a half years occurred between the crime and the actual trial,¹³ "... even assuming otherwise, the publicity was not

¹³ The record reflects that during the course of many of these pretrial motions to prohibit public disclosure of information, the purpose of said motions was to restrict the public's knowledge of the facts and evidence surrounding Rolling's case. Defense counsel filed said motions to ensure that his client would have a fair trial by an unbiased jury in Alachua County. Clearly, defense counsel undertook strategic plans to help ensure that when Rolling ultimately came to trial, an unbiased jury might be selected.

The record reflects that defense counsel filed Motions for Protective Orders on all aspects of the case on July 27, 1992; October 26, 1992; November 2, 1992; November 30, 1992; January 3, 1993; February 12, 1993; March 3, 1993; September 24, 1993; November 29, 1993, and sought Motions in Limine and various other motions to restrict the public and potential venire from facts surrounding the case. See also Judge Morris' Order on Disclosure March 18, 1993 (Vol. II, p. 321-351), referring to an earlier disclosure order.

For example, in the Public Defender's October 26, 1992, motion, he asserted a protective order is warranted:

In support of these requests for protective order, the Defendant submits that irreversible damage to fundamental rights will result from public disclosure of material or information prior to review by

presumptively prejudicial because it consisted of ‘straight news stories,’ relating ‘cold, hard facts.’” Moreover, the State contends that beyond a doubt the trial court undertook extraordinary measures to ensure jurors who sat were fairly and impartial, “and ‘all jurors who served affirmatively and unequivocally stated that they could put aside any prior knowledge and decide the case based solely on the evidence presented at trial.’” 695 So.2d at 284.

In reviewing the manner in which the trial court conducted jury selection, and the screening process to “ultimately seat a jury able to impartially recommend an appropriate sentence,” this Court held:

Counsel for Danny Harold Rolling. Investigative report 2429 is proof that good faith efforts of the State of Florida to comply with the Court’s summary review without review by the Defendant will irreversibly damage Danny Harold Rolling’s fundamental constitutional right to a fair trial before impartial Alachua County jurors. . . .”

Supp. Record Vol. I, page 32.

November 30, 1992, defense counsel argues “delay release until selection of trial jury,” information surrounding the murder. Supp. III, page 275-76, to name just two of a number of assertions made by the public defender. The record demonstrates that defense counsel not only monitored the sense of the community, but actively engaged in a motion practice to prevent extensive knowledge of the case from being disseminated into the community.

As to the first prong of our analysis, it is undisputed that the brutal slayings of five young students deeply affected the college community of Gainesville, Florida and generated overwhelming local and national media attention. While the amount of media coverage in this case makes it unique, the extent of publicity it receiving was certainly not surprising or unwarranted given the circumstances of this case. Indeed, in light of the fact that Rolling chose not to request a change of venue pretrial, it appears that even he was not concerned or otherwise disturbed by the extent or nature of the coverage at any time during the three years he awaited trial.

Likewise, the trial court's order denying Rolling's request for change of venue reflects a candid and legally grounded review of the media attention this case received. Because we find the trial court's evaluation of the media coverage in this case to be consistent with our own review of the record, we reject Rolling's claim that the pretrial publicity presumptively prejudiced the entire Alachua County community against him.

695 So.2d at 286-287 (emphasis added).

In rejecting Rolling's claim that the responses of both prospective and actual jurors during voir dire further demonstrated a real, community-wide prejudice and animosity towards him, the Court observed:

... Not surprisingly, of course, every member of the venire had some extrinsic knowledge of the facts and circumstances surrounding this case. Also, as expected, the responses of certain prospective jurors showed that their knowledge of the case prevented them from sitting impartially on the jury. Nevertheless, the animus towards Rolling expressed by these individuals reflected nothing

more than their own personal beliefs or opinions. **Contrary to Rolling's assertion, we find no reason to believe that certain prospective jurors who voiced a bias against Rolling – none of whom sat on Rolling's jury - somehow spoke for the entire Alachua County community.**

695 So.2d at 287 (emphasis added).

As to the second prong of Strickland, the Court considered whether any difficulty was encountered in selecting a jury which reflected a pervasive community bias against Rolling and so infected the jury selection process that it was impossible to seat an impartial jury in Alachua County. The Court, in carefully reviewing what transpired by the trial court, observed:

Once again, critical to the issue here is that the trial court found credible the assurances of all the members of Rolling's jury that they could lay aside their extrinsic knowledge of the case and recommend a penalty based upon the evidence presented in court; and Rolling never challenged for cause any member of the actual jury based on bias or any other grounds. Rather than revealing a pervasive community bias against him as Rolling suggests, **the intricate jury selection process employed in this case and the responses of actual jurors during questioning showed that it was possible to seat an impartial jury in Alachua County. . . . Neither the pretrial publicity in this case nor the lengthy jury selection process evidenced a community bias to pervasive as to make it impossible, under any circumstances, to seat in impartial jury in Gainesville.**

695 So.2d at 287, 288 (emphasis added).

Based on the aforementioned backdrop, and the lack of any credible evidence presented at the evidentiary hearing that, Rolling's trial lawyers rendered ineffective assistance of counsel, all relief must be denied.

Moreover, Rolling can not satisfy the prejudice prong of Strickland by arguing that counsel **was not successful** in having the change of venue granted. Prejudice as defined by Strickland does not rise or fall upon trial counsel's success. What must be considered, and in this case occurred, was that trial counsel ultimately moved for a change of venue once it became clear, during jury selection that a fair and impartial jury panel might not obtain. That decision was made only after Rolling pled guilty and the dynamics of the case "so changed" that the original trial strategy agreed to by all, was modified.¹⁴ See Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999), and Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998); Provenzano v. State, 561 So.2d 541 (Fla. 1990) (regarding a challenge to counsel's ineffectiveness in failing to request a change of venue).

¹⁴ This Court on direct appeal acknowledged that trial strategy was replete on the record and was at work in determining whether a change of venue should be filed, "...because they believed he (Rolling) could be fairly tried by an impartial jury in Gainesville." 695 So. 2d at 283. See also Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000).

Rolling again raises identical issues as to a change of venue in his postconviction litigation, but clothes them in ineffectiveness assistance garb. The State continues to maintain that since this Court has already addressed the prejudice prong of Strickland, on direct appeal, it is impossible for Rolling to satisfy the cause and prejudice prongs in challenging the effectiveness of his trial counsel. To the extent that the evidentiary hearing below ended any further question left unanswered regarding the performance prong of Strickland, and counsel's efforts, the trial court was correct in evaluating whether the "defense team was ineffective for failing to timely appreciate the need for a change of venue or present additional evidence to support its motion." (PCR V pgs. 655-656).

In concluding Rolling had failed to satisfy the Strickland, standard, the trial court held:

D. Conclusion

While the defense team's belief in the ability to choose their model jury in Gainesville may have changed because of their evaluation of the jurors during voir dire, it was certainly not an unreasonable one. The record is replete with evidence that these attorneys did everything in their power to ensure that the adversarial process functioned as it should in our system of justice. One need only peruse the index of pleadings¹¹⁸ to see the Herculean efforts of the defense attorneys to protect their client's best interests. The index shows four pleadings relating to the grand jury; ten pleadings concerning protective orders; eight pleadings

relating to suppression of evidence; four pleadings regarding voir dire (including the motion for change of venue); five jury-related documents; and at least twenty-nine other motions. All told, the defense team filed in excess of seventy pleadings on Rolling's behalf. While the Court is mindful that quantity does not necessarily reflect quality, this case is a textbook example of strategic thinking and careful planning by skilled defense attorneys whose reputations amongst other members of the Florida bar, such as Dave Davis, bespeak their effectiveness.

A glance through the motions for protective orders and motions to prohibit public disclosure is ample reminder that for three years, the defense team took every opportunity possible to bring to this Court's attention the considerable publicity surrounding the case. It is difficult to fathom what else counsel could have done to make this jurist any more acutely aware of the circumstances of this case prior to jury selection. There is nothing counsel could have done in the voir dire process itself that would have increased this Court's scrutiny of each venireman, heightened the Court's observations, or increased the Court's attention to the reasonable doubt standard to which each juror was held.¹¹⁹

A survey such as suggested by Defendant would not have changed the responses of the potential jurors. The defense team members testified that although technically giving all the right answers during voir dire, they concluded that the potential jurors were affected at a deeper level than perhaps even the jurors themselves knew. The only way the team was able to arrive at such a conclusion was to stand eye-to-eye with them, observing facial expressions and hearing vocal inflections. None of this information would have emerged from a pen-and-pencil questionnaire, and the lawyers were not ineffective for failing to conduct such an exercise.

In the final analysis, the difficulty with the defense team's case lay not in combating the extensive media coverage, but in the detailed confessions that came from the hand and mouth of their own client and the stark reality of the acts visited upon his victims. The jury selected received an abbreviated and condensed exposure to the horrific facts of this case. The evidentiary portion of the proceedings took two weeks, not the many months contemplated for a complete guilt phase trial. Any challenge to the integrity of the proceedings that occurred must be measured against the gravity of the offenses and the total absence of innocence, or even the thought of innocence, of Rolling in the minds of the advisory jury.¹ That would occur no matter where this case was tried.

In essence, the challenge here is based upon the belief of the defense's jury expert, Rolling's trial lawyers, and now his post-conviction counsel that the jury was prejudiced, and that this prejudice was unbeknownst even to the jury members themselves. This trial judge did not find that to be the case from listening to and watching these jurors. Nothing in the evidence presented at the hearing on the motion has moved the Court to find any lack of effort or thought on behalf of Defendant's trial team. In essence, the plea is to grant relief because the defense attorneys did not foresee the jury prejudice they soon enough perceived and because when they did, the trial team could not convince the Court of the reality of a prejudiced jury. 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.

¹¹⁸ This index of pleadings was prepared to assist the Court in organizing the voluminous documentation in the case file. Each motion is separately numbered and cross-referenced with its corresponding order. Various additional pleadings are indexed as well, enabling the Court to readily locate virtually any filed document at a moment's notice.

¹¹⁹ "When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause." Hill v. State, 477 So.2d 553, 556 (Fla. 1985), (citing Thomas v. State, 403 So.2d 371 (Fla. 1981)).

¹ This concept of residual or lingering doubt was heavily weighed by Kearns in developing his defense strategy. Evid. Hrg. Tr. vol. IV 466-470.

(PCR V pgs. 657-659).

A. The Failure Of Trial Counsel To Appreciate The Dire Need For A Change Of Venue Despite Repeated Warnings.

Citing to the trial court's order of March 11, 1992, approximately two years prior to the actual guilty plea and penalty phase proceedings, Rolling urges that defense counsel was warned that there was extensive pretrial publicity in this case. The crux of this argument is that trial counsel should have moved for a change of venue sooner rather than later.¹⁵

¹⁵ The State would submit that Rolling cannot prove deficient performance or prejudice - since there was a motion for change of venue and both the trial court and this Court

The record reflects that trial counsel pretrial, filed motions for protective orders on all aspects of Rolling's case on July 27, 1992; October 26, 1992; November 2, 1992; November 30, 1992; January 3, 1993; February 12, 1993; March 3, 1993; September 24, 1993; November 29, 1993; and sought motions in limine and various other motions to restrict the public and potential venire from facts surrounding the case. (See also Judge Morris' order on disclosure, March 18, 1993, Page 321-351). The Public Defender, in an October 26, 1992, motion, seeking protective order, argued: "In support of these requests for protective order, the defendant submits that irreparable damage to fundamental rights will result from public disclosure of material from information prior to review by counsel for Danny Harold Rolling. Investigative report 2429 is proof that good faith efforts of the State of Florida to comply with the court's summary review without review by the defendant will irreparably damage Danny Harold Rolling's fundamental constitutional right to a fair trial before an impartial Alachua County jurors . . ." (Supp. TROA, Vol. I, page 32). See also Supp. TROA Vol. III, page 275-76, wherein defense counsel, in a November 30, 1992, motion argues that the court should delay release until selection of trial jury information

concluded "in this case" it was timely. Both the trial court and this Court also have held that just because defense counsel **was not** successful as to the motion, prejudice has not been demonstrated. See Lockhart v. Fretwell, 506 U.S. 364 (1993).

surrounding the murder, who point to two instances at a minimum where defense counsel was fully aware of pretrial publicity in the release of evidence to the public and its impact with regard to selection of a fair and impartial jury.

The record reflects that defense counsel undertook strategic plans to help ensure that when Rolling ultimately came to trial, an unbiased jury might be selected. In Roe v. Flores-Ortega, 528 U.S. ____, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), the United States Supreme Court, in reaffirming Strickland v. Washington and applying it to circumstances where counsel had failed to file a notice of appeal, observed:

As we have previously noted, ‘[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel.’ Id., at 688-689, 104 S.Ct. at 2052. Rather, courts must ‘judge the reasonableness of counsel’s conduct on the facts of the particular case, viewed as of the time of counsel’s conduct,’ id., at 690, 104 S.Ct. 2052, and ‘[j]udicial scrutiny of counsel’s performance must be highly deferential,’ id., at 689, 104 S.Ct. 2052.

120 S.Ct. at 1034-35.

The Court further observed that:

... But we have consistently declined to impose mechanical rules on counsel – even when those rules might lead to better representation - not simply out of deference to counsel’s strategic choices, but because ‘the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation [but rather] simply to ensure that criminal defendants

receive a fair trial.’ 466 U.S., at 689, 104 S.Ct. 2052. The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable. . . .

120 S.Ct. at 1037.

The trial court’s order denying relief meticulously reviewed the record to show the factual basis for denying Rolling’s claim that the “defense team” had failed to appreciate the need for a change of venue. (PCR V pgs. 638-653).

Review of the trial counsel’s performance is highly deferential, especially where matters of trial strategy are concerned. Extensive scrutiny and second-guessing of an attorney’s performance is not appropriate and all analysis of any claim of effective assistance of counsel must begin with “a strong presumption that counsel’s performance falls within the wide range of reasonable professional assistance.” As observed in Waterhouse v. State, 522 So.2d 341, 343 (Fla. 1988), a defendant is not entitled to a perfect or error-free counsel only to reasonable effective assistance of counsel. Even if the defendant establishes that a more thorough investigation could have been conducted, and even if the investigation might have been fruitful, that showing does not establish that counsel’s performance fell outside the wide range of reasonable effective assistance. Burger v. Kemp, 483 U.S. 776, 794 (1987); Sims v. Singletary, 12 Fla.L.Weekly Fed. C113 (11th Cir. 1998). As observed in Francis v. State, 529 So.2d 670, 672, n.4 (Fla. 1988), “a fair assessment of an attorney’s

performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. The ultimate question is not what the best lawyer would have done, nor is it what most good lawyers would have done - the question is only whether a competent attorney reasonably could have acted as this one did given the same circumstances." White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992); Sims v. Singletary, *supra*. Consequently, strategic decisions do not constitute ineffective assistance of counsel especially where alternative courses are considered and then rejected.

In light of the extensive pretrial motion practice engaged by the defense team and the statements made by defense counsel in an effort to prevent evidentiary matters from being disseminated into the community, trial counsel's strategy pre-trial not to move for a change of venue was reasonable. Moreover, Rolling failed to show at the evidentiary hearing below that trial counsel did not "appreciate the dire need for a change of venue despite repeated warnings."

Based on the aforementioned, there is no question that the defense fully appreciated and considered the pretrial publicity in determining the strategies to employ. This fact driven claim has not been proven by any of the testimony presented postconviction.

B. The Failure to Pursue a Motion for Change of Venue.

Rolling next argues that there was a conflict between Dr. Buchanan¹⁶ and the defense team regarding the strategy pretrial as to whether to seek a motion for change of venue.

The record reflects, based on the evidentiary hearing testimony, that Dr. Buchanan fully expected that a change of venue would occur when he arrived in Gainesville, Florida, mid-year 1992. He readily admitted in his testimony, and Rolling has presented no evidence to the contrary, that after talking with the defense team, he became convinced that Alachua County was the best place in which to try Rolling's case. The record bears out that Rick Parker and John Kearns both relied on Dr. Buchanan's efforts in combing through the plethora of press items and advising them as to whether a change of venue was necessary. The record further bears out that Dr. Buchanan readily admitted that they all miscalculated the impact of Rolling's pleading guilty had on potential jurors who were questioned during voir dire. While acknowledging that staying in Alachua County was a good, sound, strategy, there came a time in the second week of voir dire where the defense team became aware of

¹⁶ Dr. Raymond W. Buchanan, Ph.D., a Professor of Communications at Pepperdine University, a jury selection expert, was employed by the defense team to assess pretrial publicity.

the impact Rolling's plea had on the community. At that time a motion for change of venue was submitted to the trial court. Dr. Buchanan testified that he only came full circle and started believing a change of venue was needed during voir dire when, after hearing the jurors, he "started realizing they did not have a change with the jury." (PCH IX pg. 304). Dr. Buchanan emphatically stated that he was convinced before the voir dire that the jurors were the best they could hope for and that the defense team could not get a better panel anywhere in the state (PCH IX pg. 306). What he did not figure on was the community-wide anger and that data started emerging during voir dire (PCH IX pgs. 307, 309). Dr. Buchanan testified that he could not say that an earlier questionnaire would have uncovered the anger (PCH IX pg. 309). In retrospect, Dr. Buchanan observed that the defense team and he could not have anticipated how bad the impact was on the community and that coupled with the bad factual scenario as well as Rolling's antics in talking to the press and confessing, removed any hope by the defense team in securing a good panel from Alachua County.

Dr. Buchanan was the only witness other than Dave Davis, who testified for Rolling at the postconviction hearing that in any way addressed this allegation. Dr. Buchanan's opinions and views were more contemporary and reality-based than Dave

Davis's, the appellate lawyer who only partially reviewed the record.¹⁷ It was very easy for Mr. Davis to make judgment calls with regard to what transpired during the course of the 3½ years leading up to Rolling's guilty plea since, he had a record to read and was not actually there trying to process the information coming in on a daily basis. Moreover, the myopic view that Mr. Davis relied upon, specifically, that he only looked to the Gainesville press and did not have a sense of what other communities were doing, certainly did not put him in a better position to sit in judgment as to whether defense counsel made wise strategic decisions. Ultimately, whether reasonable experts would differ with regard to the climate of the Gainesville community, is not a legitimate basis upon which to gauge whether defense counsel had a reasoned, strategic basis for the pretrial strategy employed. See Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998) (issue of counsel's effectiveness based on failure to timely move for change of venue), see also Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) ("the more experienced an attorney is the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.").

¹⁷ Davis looked at only the voir dire and did not review all the activities that occurred pretrial or review the evidence in assessing whether a valid strategy was undertaken by the defense team in not seeking to change venue sooner.

The Court, in Provenzano, *supra*, relying on Spaziano, observed:

At the time of Provenzano's trial, one of his two counsels had tried eighty-seven criminal cases and had been lead counsel nine capital cases. The other attorney had tried even more criminal cases in general and capital cases in particular, had been practicing twenty years, and had earned the reputation in the bar and community as a leading criminal defense attorney. Clearly, these two experienced criminal defense attorneys knew what they were doing; their decisions were informed by years of experience with juries in capital and non-capital cases . . .

We will not second-guess their considered decision about whether Provenzano stood a better chance, however slim it may have been, with a jury in Orlando than with a jury in St. Augustine. As we said in Spaziano, 36 F.3d at 1039, cases in which habeas petitioners can properly prevail on the grounds of ineffective assistance of counsel are few and far between, and cases in which deliberate strategic decisions have been found to constitute ineffective assistance are even fewer and farther between. This is not one of those rare cases.

148 F.3d at 1327. See also Weeks v. Jones, 26 F.3d 1030, 1046, n.13 (11th Cir. 1994); Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989); Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995).

Additionally, to the extent Rolling now argues that the defense team failed to review or provide Dr. Buchanan with reports and other items concerning the Gainesville murders and the community's view, Dr. Buchanan, as well as the defense team, relied heavily on the Herkov Study which provided the basis upon which the

defense team formulated their strategies. Neither Dr. Buchanan nor Dave Davis, nor any other witness or document presented by Rolling would suggest that the defense team erred in this reliance. The most Rolling can assert is that other documents should have been reviewed. To that end, Dr. Buchanan, Rolling's witness, testified that he did not need other studies to tell him that there was widespread adverse publicity in Gainesville, Florida, following these murders.

Ultimately, the defense team made strategic decisions which can never equate to ineffective assistance of counsel simply because, based on the change in dynamic of Rolling's case, it became apparent that a strategy to keep the trial in Gainesville, Florida, proved to be a miscalculation based on jury selection during voir dire.

C. The Failure to Take Advantage of United States District Court Judge Maurice Paul's Order Changing the Venue in the Federal Bank Robbery Case Along with the Evidence of the Need for a Venue Change Generated by the Federal Public Defender.

Rolling argues trial counsel rendered ineffective assistance of counsel because he failed to bring Judge Paul's venue order to the attention of the trial court in the state case.

First of all, as previously noted, a review of the order setting trial on other pretrial matters in United States v. Rolling, Case No. GCR:91-01023-01-MP, issued

November 5, 1991 (Rolling's original Exhibit D), reveals absolutely no reference to the reason why the trial court set the trial in Tallahassee, Florida. The order on its face, if provided to the trial court, would have meant nothing.¹⁸ Mr. Thomas Miller, the federal public defender in Rolling's robbery trial, testified that Judge Paul moved the case on his own motion rather than any motion for change of venue filed by Mr. Miller (PCH VII pgs. 9-14). In fact, when Mr. Miller finally filed a motion for change of venue from Tallahassee to another location, the trial court denied said motion. Rolling was subsequently tried and convicted in Tallahassee, Florida (PCH VII pg. 21). Mr. Miller testified that although there was immense statewide coverage, he secured no surveys of either the Tallahassee community or the Pensacola community to establish a better locale (PCH VII pgs. 24-25). Mr. Miller testified that he spoke with the Gainesville Public Defender's Office frequently and that in fact, Johnny Kearns sat through the robbery trial in Tallahassee because critical issues in the robbery case as to the campsite were also relevant to the Gainesville murders. Mr. Miller testified that he talked to Mr. Kearns about the issue of change of venue.

¹⁸ The trial court acknowledged in his order denying relief (PCR V pg. 637, n.36), that he was well aware of all actively occurring in federal court prior to and during the pendency of proceeding in Alachua County.

While Mr. Parker testified at the postconviction hearing that he did not include the federal order as part of his motion for change of venue, he also was quite confident that the trial court knew the circumstances surrounding the robbery case being transferred to Tallahassee for trial. Absent some clear, definitive statement from either Judge Paul in his written order or testimony presented at the postconviction hearing, Rolling has totally failed to demonstrate how his counsels' performance were deficient by not attaching an irrelevant order to a motion for change of venue.

Moreover, the time frame when adverse publicity occurred in the federal bank robbery trial, was not a period of time when Rolling was the only suspect in this case. Rolling had not been indicted for the murders at the time Thomas Miller defended Rolling in the federal bank robbery trial, in March 1992. Moreover, until mid-September 1991, another suspect, Mr. Ed Humphries, was prominently featured in many of the news accounts regarding the Gainesville murders while Rolling was featured based on a series of robberies he committed contemporaneous to the murders. Lastly, the distinction between the publicity that presumably motivated Judge Paul to change venue for the Gainesville bank robbery and the instant case is that the jury was being selected to sit in judgment of Rolling's guilt as to the bank robbery

charges, not to assess the appropriate penalty following pleas of guilty to five capital murder charges.¹⁹

D. The Failure of Trial Counsel to Collect Evidence to Support the Motion for Change of Venue, to Present that Evidence and to Properly Argue it in the Context of the Applicable Law.

Rolling next chides defense counsel and the defense team because they failed to secure every newspaper and television story surrounding the Gainesville murders and Rolling's other criminal endeavors. Rolling confuses the adequacy of a motion for change of venue prepared by the defense at the time when it appeared a change of venue was needed, versus any **success** by the defense in convincing the trial court that a change of venue was required six days into jury selection. The trial record supported this Court's findings that a fair and impartial jury obtained. Counsel cannot be held to be ineffective for not discerning every viable argument, see Jackson v. State, 547 So.2d 1197, 1200-1201 (Fla. 1989), nor for failing to secure every newspaper article in an attempt to secure a change of venue. In the instant case, at the

¹⁹ See Dr. Buchanan's testimony concerning his strong belief that there was no likelihood of success as to the guilt portion of the trial and that he so informed the defense team early on that perhaps Rolling should plead guilty. In a December 28, 1993, memo, he wrote that Rolling's chances of avoiding electrocution were probably slim and none, but "I think a plea gives him, by far, his best opportunity for life." (PCH IX pg. 329).

postconviction hearing, every witness, with the exception of Mr. Thomas and Miss Weber, testified that an overwhelming amount of pretrial publicity news articles was presented to the trial court throughout the pretrial proceedings. Whether through motions to prevent disclosure of evidence, motions to sequester jurors or the motion to reconvene the Grand Jury in some other locale, the trial court was bombarded with evidence of pretrial publicity. All witnesses admitted that the publicity was harsh and all witnesses believed, with the exception of Mr. Davis, that the pros and cons of retaining venue in Alachua County was discussed and the adverse pretrial publicity reviewed. However, based on the pros and cons, the pros won out with regard to keeping venue in Alachua County.

Mr. Davis, Rolling's appellate expert, testified that historically Gainesville had community largely opposed to executing anybody, but based on information and articles he gathered, it was clear to him that there was hostility against Rolling.²⁰ Mr. Davis testified that defense counsel "sincerely believed" that based on their experience in handling cases in Alachua County, that Alachua County was the best place to try Rolling (PCH VIII pg. 117). Although Mr. Davis' review of the record was based

²⁰ Mr. Davis presented additional articles as an appendix to his appellate brief on direct appeal and this Court had an opportunity to view those attachments on direct appeal and still determined that no change of venue was warranted.

upon hindsight, and, limited to only the voir dire, Mr. Davis could not say, and did not say, that the defense team rendered ineffective assistance of counsel in waiting until voir dire to move a change of venue. Indeed, Dr. Buchanan likewise could not flaw the defense team, but rather opined that no one could have anticipated the impact on the community of Rolling pleading guilty, and the only way that impact surfaced was through the questioning done during voir dire of potential jurors.

Counsel did not render deficient performance by failing to collect evidence in support of the motion for change of venue or to present that evidence or to properly argue it before the trial court.

E. Trial Counsel's Failure to Present the Law Favorable to the Defendant in the Context of the Presumed Prejudice Standard and the Available Evidence.

Rolling contends that trial counsel failed to carry its burden of proving the need for a venue change due to pervasive, inflammatory, prejudicial pretrial publicity. First and foremost, argument was made with regard to the motion for change of venue. The fact that it was not successful does not demonstrate deficient performance. On direct appeal, this Court found that although the publicity was pervasive, it was no so hostile as to inflame “the community in general and further found that the pretrial publicity did not so prejudice prospective jurors that they could not evaluate impartially those

factors which were to be evaluated in determining the penalty to be imposed in the capital case.” Rolling v. State, 695 So.2d at 286-87.

Moreover, appellate expert Dave Davis could not point to any case that trial counsel failed to argue nor any deficiency as to the arguments presented to the trial court. Dave Davis testified at the postconviction hearing that, not only was he able to argue that the motion for change of venue was timely filed, but, that he presented both the presumed and actual prejudice arguments to the Florida Supreme Court on direct appeal. Likewise, he acknowledged that trial counsel made arguments as to both presumed and actual prejudice before the trial court.

As observed in Rolling v. State:

Likewise, the trial court order denying Rolling’s request for change of venue reflects a candid and legally grounded review of the media attention this case received. Because we find that trial counsel’s evaluation of the media coverage in this case to be consistent with our own review of the record, we rejected Rolling’s claim that pretrial publicity presumptively prejudiced the entire Alachua County community against him.

695 So.2d at 287.

Defense counsel was not deficient in how it presented its case for change of venue following the commencement of voir dire during the penalty phase of Rolling's trial.²¹

²¹ The trial court, in denying relief, observed that Dave Davis' testimony in behalf of the ineffectiveness claim for Rolling was "belied" by the record. The Court correctly noted ". . . The proper question is not whether the outcome of the decision was favorable to Defendant, but whether the decision to challenge venire when the team did was reasonable. . . ." (PCR 656). See also Provenzano v. Singletary, 148 F.3d 1327, 1330-32 (11th Cir. 1998):

Even if the affidavit had said that its author would have insisted on a change of venue, it would establish only that two attorneys disagreed about trial strategy, which is hardly surprising. After all, '[t]here are countless ways to provide effective assistance in any given case,' and '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.' Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); accord, e.g., Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995) (en banc) ('Three different defense attorneys might have defended Waters three different ways, and all of them might have defended him differently from the way the members of this Court would have, but it does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance.'). In order to show that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice. See, e.g., White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) (defendant must establish 'that the approach taken by defense counsel would have

been used by no professionally competent counsel'); Harich v. Dugger, 844 F.2d 1464, 1470-71 (11th Cir. 1988)(same). Even if accepted as gospel, the affidavit does not do that.

There is another more fundamental reason why Provenzano is not entitled to an evidentiary hearing on the reasonableness of his counsel's decision to forego a change of venue, regardless of any affidavit he may have proffered. Our Jackson, Horton, and Bundy decisions establish that the reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof. Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

We have no doubt that the Florida courts and the district court were correct in concluding that the strategic choice Provenzano's trial attorney made not to pursue a change of venue was well within the broad boundaries of reasonableness staked out by decisional law in this area. We reached the same decision in Weeks v. Jones, 26 F.3d 1030, 1046 n.13 (11th Cir. 1994), in which the petitioner challenged his trial counsel's decision not to have the case moved from a county in which there had been considerable pretrial publicity, because counsel thought that the petitioner still had the best chance for acquittal in that county. We said, 'this is the type of tactical decision that the Supreme Court has

recognized that a criminal defendant's counsel may elect as a reasonable choice considering all of the circumstances and has cautioned courts against questioning.' Id. The Supreme Court and this Court have said that strategic choices are 'virtually unchallengeable.' See, e.g., Strickland v. Washington, 466 U.S. at 690, 104 S.Ct. at 2066; Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995).

Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel. See Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) ('[T]he more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.') (quoting Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989)). At the time of Provenzano's trial, one of his two counsel had tried eighty-seven criminal cases and had been lead counsel in nine capital cases. The other attorney had tried even more criminal cases in general and capital cases in particular, had been practicing twenty years, and had earned the reputation in the Bar and community as a leading criminal defense attorney. Clearly, these two experienced criminal defense attorneys knew what they were doing; their decisions were informed by years of experience with juries in capital and non-capital cases. We will not second guess their considered decision about whether Provenzano stood a better chance, however slim it may have been, with a jury in Orlando than with a jury in St. Augustine. As we said in Spaziano, 36 F.3d at 1039, cases in which habeas petitioners can properly prevail on the ground of

F. The Failure of Trial Counsel to Acknowledge and Act Upon Conflicts of Interest Regarding the Representation of Other Clients and to Take Advantage of Financial Resources Expressly Offered for the Defense of Mr. Rolling.

Rolling also contends that a conflict of interest existed with the Public Defender's Office in the Eighth Judicial Circuit because Rick Parker and his staff had previously represented two of the State's key witnesses in prior proceedings. Specifically, he argued below that Florida state inmates Bobby Lewis and Russell Binsted had been represented by the Public Defender's Office and, that information, had not been conveyed to Mr. Rolling. Testimony at the postconviction hearing reflects that neither Rick Parker nor Barbara Blount-Powell nor John Kearns were aware of any previous representation of either Bobby Lewis or Rusty Binsted prior to seeing the allegations in the postconviction relief motion filed in 1999. Mr. Parker further testified that all records in the Public Defender's Office had been destroyed as to both Lewis' and Binsted's representation. A check of the Bradford County Courthouse microchip files finally revealed that the Public Defender's Office for the

ineffective assistance of counsel are few and far between, and cases in which deliberate strategic decisions have been found to constitute ineffective assistance are even fewer and farther between. This is not one of those rare cases.

Eighth Judicial Circuit, through Assistant Public Defender Shon Saxon, had represented Bobby Lewis in 1979, and that Rusty Binsted had once been represented by Johnny Kearns in Bradford County, in 1977 (PH, pg. 236). Mr. Parker testified that had the defense team known about the prior representation, they would have told Rolling about the representation but, they would not have withdrawn from the case. There was no actual adversity of interest, there was no conflict of interest and there was no obligation to either Binsted or Lewis based on any confidential information that had been provided, that would have compromised Rolling's defense (PH, pgs. 206-08).

Likewise, Barbara Blount-Powell testified that it was her responsibility to handle the depositions and suppression proceedings regarding Rusty Binsted and that at no time was Johnny Kearns around when Binsted either testified or was deposed. The reason Binsted was not extensively cross-examined at the penalty phase was because his direct testimony was not as bad as his testimony could have been. More importantly, however, the defense was not challenging directly the aggravating circumstances.

Likewise, Mr. Kearns testified that he had no recollection of representing Rusty Binsted and that he did not participate nor handle any aspects of the Binsted depositions or the suppression hearing where Mr. Binsted testified.

There is clearly no conflict of interest in the instant case and the fact that defense counsel failed to tell Rolling about something they did not know does not reflect a conflict of interest. See Smith v. White, 815 F.2d 1401 (11th Cir. 1987); Freund v. Butterworth, *supra*.

Rolling also asserts that the defense team failed to spend available dollars in “securing or seeking a change of venue.” The State conceded below that an evidentiary was necessary to unravel any mystery with regard to the Public Defender’s use of the dollars made available from the county and the state to prosecute this case. At the evidentiary hearing, however, Rolling all but abandoned this issue. He provided no evidence that reflects that defense counsel purposefully did not use available dollars for gathering information for a change of venue. In fact, based on the testimony at the hearing, the defense team commenced immediately upon being made aware of the murders to secure pretrial publicity information and that effort continued up to and including the trial. Mr. Parker secured the services, albeit a volunteer, of Dr. Buchanan, a communications expert from Pepperdine University. While Dr. Buchanan admitted that he had no knowledge with regard to available dollars, Rolling presented no evidence at the hearing that Dr. Buchanan felt impaired and could not perform his tasks in securing pretrial publicity and assessing community feelings. In fact, Dr. Buchanan testified that when he came to Gainesville, he was well aware of the pretrial

publicity, almost immediately, and set about the task to compile material and ascertain, based on that material, the public's perception of Rolling (PCH IX pgs. 275-76). Dr. Buchanan observed that the sheer volume of material was staggering and there was media from everywhere broadcasting to everywhere. His words were that it was a media feeding frenzy similar to the O.J. Simpson trial (PCH IX pgs. 276-77).

Dr. Buchanan, when asked, about whether surveys would have been of assistance, testified that he would not have personally done the surveys but would have hired someone to do them. Further, he could not guarantee any better result than the data collection process which did occur when, during the course of voir dire, he heard the answers of the potential jurors. It was Dr. Buchanan's view that the trial court should have stopped the jury selection process and done a survey [which would only have taken four or five days, during the jury selection process]. Dr. Buchanan noted that his recommendation for a survey during voir dire, came only after the motion for change of venue had been filed, however (PCH IX pg. 299). Dr. Buchanan also noted that although there was not quantitative data presented, he was comfortable with the defense team's qualitative personal, intuitive, observations of Alachua County. Terminally, Dr. Buchanan only came full circle and started believing a change of venue was needed when, after hearing the jurors, he "started realizing they did not have a chance with the jury." (PCH IX pg. 304).

There was no other testimony presented at trial that reflected that the defense team either squandered the money available to them or wrongfully returned money that was not used. To the extent that the evidentiary hearing was held to explore and develop evidence with regard to the funding and use of extra dollars provided the Public Defender and the State Attorney's Office in April of 1993, Rolling's claim is without any proof, and was properly denied below.

G. Conclusion

Based on the record before this Court, the testimony presented at the postconviction hearing, and the legal arguments presented herein, Rolling has failed to demonstrate any deficient performance in the defense team's representation of him either pretrial or at the sentencing phase of his case. More importantly, however, Rolling cannot satisfy the two-prong test of Strickland v. Washington, *supra*, which requires that not only proof exist that defense counsel's representation was deficient but that that deficiency resulted in prejudice. In the instant case, this Court, in Rolling v. State, *supra*, concluded that a change of venue was not warranted and that neither presumed nor actual prejudice was demonstrated. Rolling has not come forth with any credible evidence to show that had more been done, had surveys been secured, had venue been changed, that the end result would have been different. Rolling was not

prejudiced by the representation he received by the Public Defender's Office in the Eighth Judicial Circuit in and for Alachua County, Florida. All relief must be denied.

Claim II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN CONCLUDING THERE WAS NO PREJUDICE IN DENYING THE MOTION FOR CHANGE OF VENUE

“The standard governing a change of venue in safeguarding a defendant's Sixth Amendment right, is that he be tried by a panel of impartial, “indifferent”, jurors.” Irvin v. Dowd, 366 U.S. 717 (1961). If a trial court is unable to seat an impartial jury because of prejudicial pretrial publicity, or an inflamed community atmosphere, due process requires the court grant a change of venue, Ridealu v. Louisiana, 373 U.S. 723 (1963), or at least grant a continuance, Shepard v. Maxwell, 384 U.S. 333, 362-363 (1966). At the heart of the issue is the fundamental fairness of the defendant's trial. Murphy v. Florida, 421 U.S. 794 (1975). Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity has saturated the community where the trial is to be held. Ridealu, *supra*; Estes v. Texas, 381 U.S. 532 (1965). As observed in Nebraska Press Association v. Stuart, 427 U.S. 539, 554 (1976), the presumed prejudice principle is “rarely” applicable and is reserved for an “extreme” situation. See also Mayola v.

Alabama, 623 F.2d 992 (5th Cir. 1980). In Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985), the court held: “In fact, our research has uncovered only a very few additional cases in which relief was granted on the basis of presumed prejudice.” 778 F.2d at 1490. In essence, the burden placed upon a defendant to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one. As announced in Irvin v. Dowd, supra, the defendant must show “manifest error” in demonstrating presumed prejudice. The Florida Supreme Court, in McCaskill v. State, 344 So.2d 1276 (Fla. 1977), relying on Murphy v. Florida, supra, formulated the following test:

A determination must be made as to whether the panel’s state of mind of the inhabitants of a 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 and try the case solely on the evidence presented in the courtroom.

A jurors ability to put existing prejudice out of their minds may be judged by the standard of whether “it would be difficult for any individual to make an independent stand adverse to the strong community sentiment.” Copeland v. State, 457 So.2d 1012 (Fla. 1984). In Provenzano v. State, 497 So.2d 1177, 1182-1183 (Fla. 1986), the Florida Supreme Court, based on massive pretrial publicity and in reliance on Murphy v. Florida, observed:

. . . We recognize that the courthouse shooting and Provenzano's arrest received extensive publicity in Orange County. However, pretrial publicity is expected in a case such as this, and, standing alone does not necessitate a change of venue. Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). a critical factor is that the extent of the prejudice of the lack of impartiality among potential jurors that may accompany the knowledge of the incident. (Cite omitted).

...

497 So.2d at 1182.

The court further observed that the burden was on the defendant to raise a presumption of impartiality:

Atmosphere of deep hostility raises a presumption, which can be demonstrated by either inflammatory publicity or a great difficulty in selecting a jury. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). Provenzano has failed to meet this burden. An evaluation of the pretrial publicity and voir dire reveals that a fair and impartial jury was ultimately empaneled.

497 So.2d at 1182.

In Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000), that court held:

In order to satisfy the prejudice prong of Strickland's ineffective assistance analysis, Meeks must establish that there is a reasonable probability that, but for his counsel's failure to move the court for a change of venue, the result of the proceeding would have been different. This requires, at a minimum, that Meeks bring forth evidence demonstrating that there is a reasonable probability that the trial court would have or at least should have, granted a motion for

change of venue if Meeks' counsel had presented such a motion to the court. Meeks has failed to carry this evidentiary burden.

Likewise, Rolling cannot urge that a different result would have occurred and therefore he has no basis to carry his burden of demonstrating either actual or presumed prejudice.

To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Second, these jurors, it must be determined, could not have laid aside these preformed opinions and rendered a verdict based on the evidence presented in court.

Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983). If a defendant cannot show actual prejudice, then he must meet the demanding presumed prejudice standard.

Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held. The presumed prejudice principle is rarely applicable, and is reserved for an extreme situation. . . . [W]here a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from the community, jury prejudice is presumed and there is no further duty to establish bias.

Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985); see also Manning v. State, 378 So.2d 274, 276 (Fla. 1979) (“[A] determination must be made as to whether the general state of mind of the inhabitants of a 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 and try the case solely on the evidence presented in the courtroom”). See also Spivey v. Head, 207 F.3d 1263, 1270-1271 (11th Cir. 2000).

1. Presumptive Prejudice

The record reflects that many of the news accounts regarding the community’s hysteria, sympathy for the victims and victimization of Edward Humphries appeared in newspaper articles fairly soon after the murders. Many of the articles are either not related in time to the actual trial or did not specifically mention Rolling and were not of the nature that would support a finding of prejudice necessary to satisfy Payton v. Yount, 467 U.S. 1025 (1984). In most instances, the news articles relating to Rolling were over a three year period and are properly characterized as “straight, factual news stories” . . . reporting, not only the events surrounding the murders, but other criminal endeavors to which Rolling had pled guilty. Some of these news articles were used at the penalty phase of Rolling’s trial to support mitigation, specifically regarding

Rolling's mental health. Some of the news stories which kept the case in the public eye were general articles concerning "serial killers" or provided a correct factual account of the murders. While it is to be expected that massive pretrial publicity will occur in cases where newsworthy events happen, the newspapers mentioning of other crimes that Rolling committed or allegedly committed were factual stories that were generated early on prior to Rolling becoming a suspect in his bank robbery charges or a suspect in January 1991, three years prior to his ultimate guilty and sentencing.

As observed in Dobbert v. Florida, 432 U.S. 282, 303 (1977):

Petitioner's argument that extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portion of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under Murphy, extensive knowledge in a community of either the crimes or the punitive criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case had simply shown that the community was made well aware of the charges against him and asks on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage,' Murphy v. Florida, *supra*, at 798. One who is presumably suspected of murdering his children cannot expect to remain anonymous. . . .

Likewise, Rolling cannot reasonably suggest that at the penalty phase of his trial, after pleading guilty, the people called for the voir dire selection would be devoid of information concerning the murders. When asked, however, potential jurors in the main were able to say they could set aside anything they might have heard and listen to the evidence that would be presented in court.

Rolling further suggests that the community was scarred by these crimes. No doubt the community was. However, the record bears out that the twelve jurors who actually sat survived an intricate jury selection process to which he agreed and did so because they were able to convince the trial court that they could set aside their knowledge and views and fairly weigh the evidence presented at the penalty phase.

In determining the impact or extent of prejudice towards a defendant, one factor that may be considered and, in fact, was considered herein, is whether it would be difficult for any individual to take an independent stand adverse to a strong community sentiment. A jury composed of persons who can be relied upon to decide the case based on the evidence and not be influenced by knowledge gained from sources outside the courtroom, will support a denial of a change of venue. Dobbert v. Florida, supra. Albeit many of the twelve jurors who sat stated that they had heard something about the crime, they all said they would be able to disregard the previously gained information and render a verdict based upon the evidence presented.

Moreover, it cannot be overly emphasized the empaneling of a jury trial was for the penalty phase only. Those jurors who may have heard something about the case through newspaper articles or television reports knew far less than any juror who would have sat in judgment of Rolling had Rolling gone to trial. None of the jurors who actually sat suggested that they could not set aside any prior knowledge they acquired and listen to the evidence as it was presented and make their determinations based on that evidence.

2. No Actual Prejudice

To be a qualified juror, a person need not be totally ignorant of the facts of the case nor does he need to be free from any preconceived notions. Rather as announced in Irvin v. Dowd, *supra*, to hold that the mere existence of any preconceived notion as to the guilt of the accused, without more, is insufficient to rebut the presumption of a prospective juror's impartiality and it would be an impossible standard to establish. It is sufficient if the juror can lay aside his impressions or opinions and render a verdict based on the evidence presented in court.

In Murphy v. Florida, *supra*, the United States Supreme Court further observed:

In the present case, by contrast, twenty of the seventy-eight persons questioned were excused because they indicated an opinion as to the accused's guilt. This may indeed be twenty more than would occur in the trial of a totally

obscure person, but it by no means suggests a community with sentiments so poisoned against petitioner as to impeach the indifference of jurors who display no animus of their own.

421 U.S. at 794.

Herein, the trial court took appropriate measures to eliminate any bias or prejudice and the need for a change of venue. Following the Florida Supreme Court's lead in Gaskin v. State, 591 So.2d 917 (Fla. 1991), and Pietri v. State, 644 So.2d 1347 (Fla. 1994), the trial court: a) excused potential jurors with any significant knowledge of the case; b) ensured that all jurors who served affirmatively and unequivocally stated that they could put aside any prior knowledge and decide the case solely on the evidence presented at trial; c) granted each side additional peremptory challenges, and d) allowed the defense wide latitude in the questioning of jurors with regard to pretrial publicity and their views.

The trial court, in denying the motion, observed:

. . . Because of the meticulous trial selection process used in this case, because of strict standards for acceptance used by the court in determining which jurors should be retained and which jurors should be excused, based on the court's evaluation of the jurors' responses during the voir dire questioning in light of the overall selection process and the court's evaluation of the jurors' ability to follow the instructions to avoid exposure to extra judicial information regarding the case, the court finds that the jury empaneled was a fair and impartial jury.

(TR 3258-3259).

While the trial court acknowledged that there had been a high degree of pretrial publicity found, that publicity was not hostile:

All the publicity given this case by the local media shows that, while the media has kept the public composed of all court proceedings which have not been held in camera, the approach of the local media has been objective, not directed towards inflaming the citizens or suggesting to them the penalty that ought to be imposed in this case. The most inflammatory item of pretrial publicity was that written, not by a journalist local to the area, but a columnist for the Miami Herald. Indeed, in a story involving one of the interviews conducted out of state, the lead to the story indicated that the evidence from the interviewee might well support the defendant's position with respect to the penalty that should be imposed. The tenor of the presentation was that the interview showed that there might be evidence supporting the mitigators which the defendant might raise. To further protect the defendant from hostile pretrial publicity, photographs of the victims and the crime scenes were not released to the public, and had not been published. Some of the pretrial publicity was favorable to the position of the defendant, rather than hostile to the defendant. There was one significant issue, not hostile to the defendant, but opposing the imposition of the death penalty. a number of local ministers had written publicly, urging the state attorney to offer the defendant the opportunity to plead to the offenses in return for sentences of life imprisonment. They presented various reasons for their position, including a general opposition for the death penalty itself, the fiscal savings which would result from entry of a plea of guilty and the like. The Gainesville Sun published responses from readers reacting to the letter. In the publicity, responses were presented effectively on both sides of the issues.

(TR 3265-3266).

Rolling presented no evidence at the postconviction hearing that would impact on the issue. This Court, on direct appeal, rejected the underlying claim and the fact that he now raises the issue as an ineffectiveness claim merely recasts the claim to seek “second appellate review.”²²

To show how he was prejudiced, Rolling again argues that certain jurors should not have sat at the penalty phase of his trial. He notes that juror Bass, who felt frightened and victimized by the murders; juror Kerrick, who revealed strong support

²² On direct appeal, Rolling argued that the trial court erred when it did not provide further, additional peremptory challenges in his case. As a result, Rolling argued that had he received a seventh peremptory challenge, he would have struck Mrs. Kerrick, who sat as a member of the jury. The Florida Supreme Court, in denying relief, observed:

. . . Rolling never challenged Mrs. Kerrick for cause at any time during the voir dire or otherwise stated for the record why he wished to strike Mrs. Kerrick. As with the other members of the jury, the court found credible Mrs. Kerrick’s assurances that she could put aside her intrinsic knowledge of this case and recommend a sentence based on the trial court’s instructions and the evidence presented in court. Thus, we reject Rolling’s argument that he was prejudiced by the trial court’s failure to award him an additional peremptory challenge.

695 So.2d at 297.

for the death penalty and “virtual automatic imposition” of the same in a premeditated murder case; and juror McDaniel, who likewise expressed a strong belief in the automatic imposition of the death penalty for premeditated murder.

The jurors who actually sat were Mrs. Bass, Mrs. McDaniel, Mrs. Kerrick, Mrs. Sajczuk, Mrs. Diaz, Mrs. Staab, Mr. Green, Mrs. Williams, Mr. Coleman, Mr. Stubbs, Mrs. Tignor and Mrs. Brown. Following the selection of the twelve jurors, the defense requested an additional peremptory challenge arguing that with an additional peremptory challenge, the defense would remove Mrs. Kerrick. (TR 2266). As this Court noted, the defense never challenged Mrs. Kerrick for cause.²³ Moreover, none of Mrs. Kerrick’s statements during voir dire were any different than other jurors that sat and Rolling never identified anything concrete that would have disqualified her from sitting on his sentencing panel. The record reflects that Mr. Green (TR 1525), Mrs. Staab (TR 1968), Mrs. Sajczuk (TR 1731), Mrs. Stubbs (TR 2244), and Mrs. McDaniel (TR 1530), stated that they either did not read newspapers or did not buy newspapers. Mrs. Bass stated that she only got the Saturday Gainesville Sun for the sales and coupons (TR 1526).

²³ The trial court, in denying postconviction relief on this claim, determined that it was procedurally barred because it was raised on direct appeal, citing Asay v. State, 769 So.2d 974, 988 (Fla. 2000).

Mrs. Tignor lived in Virginia at the time of the crime (TR 876, 908); Mr. Coleman lived in Georgia but had family in Gainesville (TR 1864), and Mrs. McDaniel lived in Orange County, Florida, and was not in the area at the time of the murders (TR 1446).

Mrs. Staab, an oncology nurse, was only moderately in favor of the death penalty and admitted that in the past her feelings about the death penalty had been stronger (TR 437). Mrs. Williams was a nurse's aide and had assisted a person who had been raped (TR 1804). Mrs. McDaniel only read Today's Christian Woman (TR 1530), and Mr. Coleman was part of a Christian prison ministry in Georgia (TR 2012), and stated that he believed background was very important in shaping an individual (TR 2014). Mrs. Diaz was involved in Bible studies and Mrs. McDaniel, a social worker (TR 318), believed that poor people were more likely to get the death penalty (TR 325).

Mrs. Sajczuk's father was a police officer at Sante Fe College (TR 1586), and Mrs. Bass stated that she was not sure but she might have gone to school with Christa Hoyt in Newberry, Florida (TR 109). Mrs. Bass also stated that she had formulated an opinion with regard to the death penalty (TR 219).

When asked, Mrs. Bass testified that although she felt frightened and victimized by the murders, she had formulated no opinion with regard to the death penalty.

Mrs. Kerrick stated that she concurred with the idea that family support helps people get over problems and described herself as cheerful and prompt (TR 1728). She stated that she was moderately in favor of the death penalty and had always felt that way but she believed factors such as home environment and abusiveness might be a factor in determining the appropriate sentence (TR 345). When asked whether she thought capital punishment was a deterrent, she said it was not and said that the death penalty possibly should be given for premeditated murder (TR 346). When asked to explain, she said if a person puts lots of thought into it, “there should be a time when they can turn back and not carry out that.” (TR 347). She indicated that there needed to be strong evidence to change her mind about the death penalty (TR 347).²⁴

The record reflects that defense counsel was able to freely and clearly investigate the biases, proclivities and predispositions of each of the jurors currently under review. None of the jurors that sat expressed such a bias that they could not set

²⁴ Likewise, Mrs. Tignor, who is not assailed herein, stated that she “will listen and try to weigh everything out, but right now I am for it (the death penalty).” (TR 908). See also Mrs. McDaniel’s testimony, whose statement reflected that she believed in the death penalty for premeditated murder, “but will follow the court’s instructions.” (TR 334-336). Mrs. Williams similarly answered that she thought the death penalty was okay but would need to hear aggravation and mitigation (TR 978).

their views aside and listen to the aggravation and mitigation and, following the presentations, follow the law.

The record further reflects that while Rolling did use all of his peremptory challenges and additional challenges during the course of the voir dire, the record bears out that only two of Rolling's cause challenges were denied. More importantly, neither of the two cause challenges were for Mrs. Kerrick, Mrs. Bass or Mrs. McDaniel. In fact, the record also reflects that upon reconsideration, the trial court provided an additional peremptory challenge to the defense because the court felt that one of the cause challenges should have been granted. Under Trotter v. State, 576 So.2d 691, 693 (Fla. 1990); Watson v. State, 651 So.2d 1159, 1160-62 (Fla. 1994); Bryan v. State, 656 So.2d 426, 428 (Fla. 1995); Kearse v. State, 622 So.2d 677, 683 (Fla. 1995); Kokal v. State, 718 So.2d 138 (Fla. 1998); Williams v. State, 673 So.2d 960 (Fla. 1st DCA 1996), and Rutherford v. State, 727 So.2d 216 (Fla. 1998), there is no basis to conclude trial counsel rendered ineffective assistance of counsel for failing to inquire of these three jurors in more detail. Rolling has failed to demonstrate that prejudice was evident based on the jurors that sat. This issue was found to be procedurally barred by the trial court and Rolling has made no showing of ineffectiveness of counsel under Strickland v. Washington.

Conclusion

For the aforementioned reasons, Appellant would contend that no relief is warranted in this cause and would request this Honorable Court affirm the trial court's denial of postconviction relief.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Baya Harrison, Silver Lake Road, P.O. Box 1219, Monticello, Florida 32345-1219, this 8th day of November, 2001.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

Certificate of Compliance

This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

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