IN THE SUPREME COURT OF FLORIDA

DANNY HAROLD ROLLING,

Appellant,

v. CASE NO. 83,638

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 158541

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-1778

COUNSEL FOR APPELLEE

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

OTHER

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts presented by Appellant which are not argumentative and are supported by record citations.[1] The following additional facts have been submitted from the record based on the claims presented.

On February 15, 1994, Danny Harold Rolling withdrew his prior plea of not guilty, and entered pleas of guilty to five first-

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[1] The following corrections to Appellant's Brief (AB) are submitted:

(a) AB-19 - Merrill was on patrol Tuesday, August 28, 1990, rather than Wednesday, August 28, 1990.

(b) AB-22-23 - Rolling signed waivers of counsel on the back of his previously signed Invocation of Right to Counsel form; on January 31, 1993 (handwritten) and February 4, 1993 (typed) (TR 3214-3218).

(c) AB-23 - Bobby Lewis was present at the time Rolling was provided his Miranda warning and signed the back of the Invocation of Right to Counsel form waiving same on January 31, 1993, and February 4, 1993.

(d) AB-35 - The letter that Rolling gave Binstead describing the Hoyt murder was in Rolling's handwriting (TR 3550).

(e) AB-89, footnote 59 - Dr. Sprehe was not permitted to interview Danny Rolling.

(f) AB-95, footnote 60 - Rolling filed only one motion for change of venue on February 28, 1994. To the extent that the footnote reads otherwise, Appellant is mistaken.

(g) AB-130 - The defendant's trial was set for February 1994, not February 1993.

degree murder counts, three sexual battery counts, and three counts of armed burglary of a dwelling with a battery. (TR 1481-1492). In support of said plea, Rolling filed a Petition to Enter Plea of Guilty dated February 10, 1994, and filed in open court on February 15, 1994, specifically acknowledging that he understood the nature of each charge and all of the possible defenses available to him; that he understood he was waiving constitutional rights guaranteed him such as the right to a speedy trial; the right to see, hear and face in open court all witnesses called to testify against him; the right to use the power and process of the courts to compel the production of any evidence including the attendance of any witnesses in his favor; the right to have the assistance of a lawyer at all stages of the proceedings, and the right to take the witness stand and testify if he desired to do so. (TR 1485). He also provided in his Petition to Enter Plea of Guilty that he understood that he was waiving the right to have a trial to determine guilt or innocence; and that he was subjecting himself to the maximum penalty possible of death by electrocution. He declared that no officer of any branch of government had subjected him to any force, duress, threat, intimidation or pressure to compel or induce him to enter these pleas, and declared that no one promised or suggested to him that he would receive a lighter

sentence or probation or any form of leniency if he pled guilty. He specifically provided:

> [14] I request that the Court accept my plea of guilty knowing that upon these pleas being accepted and entered by the Court that nothing will remain to be done except for the Court to empanel a jury to consider aggravating and mitigating circumstances before rendering an advisory sentence to the Court. I also recognize that the Court will order a presentence investigation before sentence but that there will be no trial of any kind.
>
> [15] I also understand that by pleading guilty to these eleven offenses that I give up my right to a direct appeal on the question of my guilt or innocence. I further understand that there may be a direct appeal from penalty phase proceedings and that I do not give up my right to appellate review by collateral attack as that term has been explained to me by my lawyer. . . .

(RA 2238-2239).

In addition to waiving all rights to direct appeal as to guilt or innocence, Rolling further acknowledged that he was required to tell the truth and answer any questions asked of him regarding the offenses. He further stated:

> I offer my pleas of guilty free and voluntarily and of my own accord and will (sic) full understanding of all the matters set forth in the Indictment, in this petition and in the certificate of my lawyer which is attached to this petition. . . . I further represent that my attorney has advised me of considerations bearing on the choice of which

> plea to enter, the pros and cons of each plea and the likely results thereof as well as any possible alternative which may be open to me. I represent to the Court that the decision to plead guilty was made by me. I fully concur in the efforts of my attorney.

(RA 2239-2240).

On February 15, 1994, following a factual recital accepted for the pleas, the court entered an order accepting Rolling's pleas of guilty, providing:

> Based upon the testimony upon affirmation of the Defendant, Danny Harold Rolling, in open court, the Court finds that the Defendant tendered pleas of guilty to each of the eleven counts of the Indictment are freely, knowingly, and voluntarily entered by the Defendant and that there is a sufficient factual basis to support the pleas.

(RA 2243).

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 (RA 2388-2390(a)), and a hearing was held that same day. (TR 7269-7311). The trial court denied the Motion for Change of Venue and filed a written order May 20, 1994 (RA 3258-3266), concluding:

> The Court, therefore, found that the publicity, although pervasive, was not hostile so 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 a capital case.

(RA 3266).

Following the empaneling of the sentencing jury, the penalty phase commenced March 7-24, 1994. While a plethora of testimony was presented, evidence pertinent to the issues at bar reflect that the medical examiner, Dr. William Frank Hamilton, testified that he was called to three murder scenes in late August 1990, upon the discovery of the bodies of Sonja Larson, Christina Powell, Christa Hoyt, Manuel Taboada and Tracey Paules, for the purpose of evaluating their death and later performing autopsies. (TR 3557-3558). Dr. Hamilton first saw Sonja Larson at her Williamsburg apartment and observed that her body had multiple sharp forced entries. (TR 3558-3559). He testified:

> There were eleven stab wound entries of the right arm, four thrusts which went completely through the arm; that is, four entry wounds and four exit wounds, and three puncture wounds; that is, a knife entered the arm, but did not exit from the opposite side, for a total of eleven separate defects.
>
> In addition, there were five stab wounds, closely grouped, on the right breast. Internally, some of those wound tracks went through the breast, through the front of the chest wall, into the right side of the chest, into the right lung, both the upper and lower

> lobes of the lung, and into the right atrium of the heart.
>
> Associated with that pattern of wounds was a collection of about two quarts of blood in the right pleural space.
>
> The deepest wound tracks, from skin surface on the breast to the end of the wound track, was five to six inches.

(TR 3559).

Dr. Hamilton also testified:

> On the anterior of front surface of the left thigh, there is a slash measuring about five by two and a half inches, about two and a half inches.

(TR 3564).

He observed that the wounds were from a fairly large knife similar to a military combat-type knife like a Marine KA-BAR knife. (TR 3560). When asked whether Sonja Larson was awakened by this attack, he testified:

> The wound pattern in the right arm and the closely spaced wounds on the breast were a little peculiar until we looked at them and realized that that would be exactly the wound pattern that I would expect to find if the arm had been brought up over the chest; perhaps in a reflex mode, if one were asleep, **the natural response to being stabbed might be to draw up (indicating) in this fashion. I believe that**

> **some of -- at least some of the wounds in the breast were from the thrusts that initially entered the arm, went completely through the arm and then into the breast.**

(RA 3561) (Emphasis added).

Dr. Hamilton testified that Sonja Larson died from multiple stab wounds as a result of an attack which could be described as a rapid succession of thrusts to her body. (TR 3566-3567). He estimated that she lived approximately half a minute and then lost consciousness quickly. "I don't think she remained conscious more than a minute, if that long." (TR 3567). Dr. Hamilton further observed that the left thigh wound could have resulted from Ms. Larson's striking a defensive posture. (TR 3567).

In addition to the medical examiner's testimony, the January 31, 1994, statement by Rolling reflects that Rolling entered the Larson/Powell apartment at approximately 3:00 a.m. (TR 3394). He admitted stabbing Sonja Larson several times and indicated that he pressed duct tape over her mouth to muffle her cries. She fought and he stabbed her again. Rolling admitted that Ms. Larson tried to fend off the stabbing blows and that the last stabbing blow to her body was to the inside of her thigh. He estimated that the attack lasted approximately thirty seconds. (TR 3395). Only after he went downstairs and raped and killed Christina Powell, did he

return to the upstairs bedroom, remove the tape from Ms. Larson's mouth and position her body on the edge of the bed. (TR 3397).

Additionally, the factual basis set forth by the prosecution on February 15, 1994, at the change of plea proceedings reveals:

> . . . in the early morning hours of August 24th, 1990, the defendant, Danny Harold Rolling, entered an apartment which served as the residence of Sonja Larson and Christina Powell. The apartment was number 113 in the Williamsburg apartment complex, located at 2000 Southwest 16th Street, in Gainesville, Alachua County, Florida. . .
>
> . . . Upon entering the apartment, the defendant observed Christina Powell asleep on the downstairs couch. The defendant stood over her but did not awaken her.
>
> He then crept upstairs where he entered into a bedroom where Sonja Larson was asleep. He paused to decide which of the girls he desired to commit sexual battery upon.
>
> He then, from a premeditated design to effect her death, stabbed Sonja Larson. The first blow was to the upper left chest area. At the same time he struck the first blow, the defendant placed a double strip of duct tape over Sonja Larson's mouth in order to muffle her cries. He continued to stab her as she fended off his blows. She was stabbed during the struggle on her arms and receiving a slashing blow to her left thigh.

(TR 1492-1494).

When asked if there were any "corrections, additions, deletions, objections to the factual basis," the defense said "none". (TR 1503).

On April 20, 1994, the trial court entered his written sentencing order (TR 3198-3224). As to each murder, the court found four aggravating factors: (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 capital murders were contemporaneous to the others and 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 Marion County, Florida conviction for robbery with a firearm; 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 1993 federal conviction for armed bank robbery. (TR 3200-3202); (2) these capital murders were committed while Rolling was engaged in the commission of sexual battery or burglary (TR 3202); (3) these capital murders were cold, calculated and premeditated without any pretense of moral or legal justification (TR 3202-3209), and (4) these capital murders were especially heinous, atrocious or cruel (TR 3209-3214).

The court found two statutory mitigators, that Rolling's emotional age of 15 was a mitigating factor deserving slight weight and that he suffered from a chronic antisocial-personality disorder given substantial weight (TR 3216-3217).

As to non-statutory mitigation, the court found: (1) Rolling came from a dysfunctional family and suffered from physical and emotional abuse. Significant weight was placed on these mitigators (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 small degree and the court assigned slight weight to Rolling's regrets; (4) slight weight was also assigned Rolling's family's history of mental illness (TR 3220-3221); (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 actions, he knows the difference between right and wrong, and he does have the ability, impaired though it may be to choose the right and adhere to it.

(TR 3222).

The trial court concluded that, "as did the jury, . . . the aggravating circumstances outweigh the mitigating circumstances as to each of the first degree murders. . . ," (TR 3223), and sentenced Rolling to death. (TR 3223).

SUMMARY OF ARGUMENT

Rolling pled guilty to five counts of first-degree murder, three counts of sexual battery with great force and three counts of armed burglary on February 15, 1994. A factual basis for the pleas was introduced without objection and the plea colloquy reflects Rolling knowingly and voluntarily entered guilty pleas as to all counts. Issues II, III and IV, challenging the trial court's denial of his pretrial motions to suppress statements, physical evidence and sever the charges, respectively, are not properly appealable to this appellate court. Krawczuk v. State, 634 So.2d 1070 (Fla. 1994).

As to Issue I, concerning whether the trial court should have granted Rolling's motion for change of venue, this claim has not been "fully" preserved pursuant to Trotter v. State, 576 So.2d 691 (Fla. 1990). Assuming, however, this Court reviews the issue, Rolling has shown neither presumed prejudice nor actual prejudice regarding whether the "pretrial publicity" denied him a fair trial.

See Murphy v. Florida, 421 U.S. 794 (1975); Dobbert v. Florida, 432 U.S. 282 (1977); Bundy v. State, 471 So.2d 9 (Fla. 1985), and Geralds v. State, 607 So.2d 1157 (Fla. 1992).

On the merits of Issue II, Bobby Lewis was never a "government agent" and therefore Kuhlmann v. Wilson, 477 U.S. 436 (1986); Bottoson v. State, 443 So.2d 962 (Fla. 1987), and Copeland v. State, 457 So.2d 1012 (Fla. 1984) apply. Rolling's statements were voluntary and were not obtained in violation of Rolling's Sixth Amendment right to have counsel present.

On the merits of Issue III, whether the court erred in denying the motion to suppress physical evidence, Rolling had no standing to challenge the search of the campsite because, he abandoned his "property". Moreover, pursuant to the legal theories set forth in United States v. Rigsby, 943 F.2d 631 (6th Cir. 1991), the exigency created by the potential for danger to the offices, outweighed Rolling's "privacy" considerations.

The sole portion of Issue IV that survives his guilty plea is Rolling's contention the trial court should have severed the three crime scenes for sentencing. Rolling has produced no case authority authorizing severance at sentencing. Rather, if anything, severance of the sentencing proceedings is contrary to the death penalty statute and caselaw permitting the admission of

contemporaneous convictions in multi-murder cases to prove an aggravating factor.

The finding that the murder of Sonja Larson was especially heinous, atrocious or cruel was supported by the evidence contrary to Rolling's assertion in Issue V.

The standard jury instruction as to HAC challenged in Issue VI is constitutional, see Hall v. State, 614 So.2d 473 (Fla. 1993), cert. denied, 114 S.Ct. 109 (1993).

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN GRANTING ROLLING'S MOTION FOR CHANGE OF VENUE IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Rolling readily admits that he pled guilty on February 15, 1994, to five counts of first-degree murder, three counts of sexual battery with great force and three counts of armed burglary. He also acknowledges that on February 16, 1994, the voir dire process of his penalty phase commenced. What Rolling fails to acknowledge is, that as a result of his guilty pleas, he has waived all defects raised pretrial and at trial for appellate review, see Bridges v. State, 376 So.2d 322 (Fla. 1979), State ex rel Baggs v. Frederick, 168 So. 252 (Fla. 1936); Robinson v. State, 373 So.2d 898 (Fla. 1979), and Krawczuk v. State, 634 So.2d 1070 (Fla. 1994), wherein this Court held, citing to Robinson v. State, 373 So.2d at 902:

> Once a defendant enters a plea of guilty, the only points available for an appeal concern actions which took place contemporaneously with the plea. A plea of guilty cuts off any right to an appeal from court rulings that preceded the plea in the criminal process, including independent claims relating to deprivation of constitutional rights that occur prior to the entry of the guilty plea.

634 So.2d at 1072.

In Brown v. State, 376 So.2d 382 (Fla. 1979), the court held appeals are only available following a nolo plea when a legal issue, to be determined on appeal, is dispositive. The court observed:

> We must now ascertain what constitutes a dispositive legal issue. In most cases the determination will be a simple one. Motions testing the sufficiency of the charging document, the constitutionality of a controlling statute, or the suppression of contraband for which a defendant is charged with possession are illustrative. This case, however, presents us with one of the truly inscrutable areas -- confessions. . . . We hold as a matter of law a confession may not be considered dispositive of the case for purposes of an Ashby nolo plea.

376 So.2d at 385. See State v. Carr, 438 So.2d 826 (Fla. 1983), and Monroe v. State, 369 So.2d 962 (Fla. 3d DCA 1979). See also Anderson v. State, 420 So.2d 574 (Fla. 1982) (Rule, that a defendant may not plea nolo contendere and reserve his right to appeal unless legal issue preserved for appeal is dispositive, may not apply in capital cases). However, Rolling pled guilty, and therefore Krawczuk, supra, applies.

Because a plea of guilty waives all prior defects in a case, this prohibition applies to all pretrial motions and any ruling that preceded a guilty plea including a claim related to a deprivation of a constitutional right. See Sec. 924.06(3), Fla.

Stat. (1995), and Robinson v. State, 373 So.2d 898 (Fla. 1979). In Newbold v. State, 521 So.2d 279, 280 (Fla. 2d DCA 1988), the court, relying on Robinson, observed:

> . . . Thus, by pleading guilty rather than nolo contendere, the Appellant lost his right to directly appeal the issue of whether the trial court erred in denying his motion to suppress despite the State's agreement that the denial of the motion was dispositive of the case and the Appellant's attempt to reserve his right to appeal the denial of the motion. In fact, the Appellant lost his right to appeal any rulings that preceded his plea of guilty, including any claim relating to deprivation of his constitutional rights. Robinson. He did, however, retain the right to seek review of certain areas which might have occurred contemporaneously with the entry of that plea. Such appealable errors would include only the following: lack of subject matter jurisdiction, the illegality of the sentence, the failure of the State to abide by the plea agreement, and the voluntary and intelligent character of the plea. Robinson.

521 So.2d at 280.

Given this backdrop of Rolling pleading guilty to five counts of first degree murder, three counts of sexual battery with force, and three counts of armed robbery, the appealable nature of Claim I, regarding the denial of a change of venue six days into the voir dire for the penalty phase, is significantly modified.

Albeit, Rolling sought, pretrial, individual sequestered voir dire and renewed said motion during the course of voir dire at the

penalty phase,[2] the record reflects that the first time a change of venue was sought occurred on February 28, 1994, when defense counsel informed the court:

> **. . . I would like to put material in the record, particularly that has been disseminated since the plea of guilty on Tuesday, February 15, 1994.**
>
> If often seems in life that the hard thing is often the right thing. To move this advisory jury sentencing hearing from this well-equipped, well-prepared courthouse would be exceedingly inconvenient to everyone involved; to the clerks, to the lawyers, to the court reporter, the media, as well as Your Honor.
>
> Also, inconvenient -- not in addition to inconvenient, it would also be unpopular because of the additional delay and increased expense; but, still, the right thing to do.
>
> **To move Danny Rolling's advisory jury sentencing hearing is necessary to obtain objectivity. If the goal of this Court is fundamental fairness rather than mere formality, if the goal of this Court is not his dignity and decorum but an impartial weighing of compelling claims and arguments, this proceeding must be moved.**

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[2] Albeit, the Court formally rejected Rolling's request for "individual" sequestered voir dire, the fact remains that a form of individualized voir dire occurred. The voir dire was broken down into separate groups between twenty to twenty-four people at a time. The first round dealt with questions and attitudes regarding the death penalty and pretrial publicity, and the second round pertained to all other matters. There were multiple panels of jurors and one panel did not hear the responses from another panel. See, also, Patton v. Yount, 467 U.S. 1025 (1984).

> Making this request is painful for me personally because I have to swallow my pride and admit that I was incorrect in my original opinion that this case could be fairly heard here.
>
> It also implies -- making this request also implies that this community, my community, is unfair. This is neither true, nor is it necessary for the Court to change venue.
>
> **The request is founded on my 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 juror 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 7273-7274) (emphasis added).

In response, the State detailed, "Initially, this Court sent out in excess of fourteen hundred summons's for jury duty. (TR 7279). At some point in time "relatively near to the beginning of what was scheduled to be a guilt phase trial, a pool of approximately four hundred jurors had been gleaned by the clerk and the court together as being persons who met the criteria of serving on the jury and had not requested, for some reason that this Court had found acceptable, to be excused from that service." (TR 7279).

> The Court would update the defense and the State from time to time. Those excusals were uniformly granted where there was even a hint of bias or prejudice by a juror that this Court found might influence that juror, that juror was excused.

(TR 7279-7280).

> . . . we would bring persons in, and the first thing that we would try to determine, by bringing them in on a daily basis, was whether or not there were persons who could sit fairly on an issue of what now turned out to be, at the last moment, a guilt phase proceeding. We had already arranged that procedure that we were going to bring them in and talk to them about pretrial publicity and we were going to discuss with them the issue of the death penalty.
>
> . . . we went through several days in front of this Court, with this Court's inquiry, and frankly, some redundancy among the defense and the State dealing with the issues of -- the limited issues of the effects of pretrial publicity . . .
>
> You are now **asking people whether or not they can set aside, for guilt phase purposes, the fact that they have someone in front of them who has admitted that he is now** -- who has now admitted, excuse me, that **he is the Gainesville student murderer**, having committed five first degree murders, three armed burglaries, and three sexual batteries with great force.
>
> No easy thing, I submit to the Court to set aside, whether you are in Key West or Pensacola. And along those lines, that plea that day was on national news, state news, throughout the State of Florida. It was, in

fact, the lead story or the headline story on papers ranging from the panhandle of this State to the Miami Herald.

It led to strong editorials in the Miami Herald and in the Sun Sentinel of Broward County, both of which were strongly supportive of administration of the death penalty in this case.

This community's newspaper did not carry an editorial that suggested any such penalty, but really was relieved that the matter was behind us; and that's the only editorial that we had. The rest of it has been straight news stories. And I would suggest to the Court, I have not had time to do it since this motion was filed, I'd like to file the editorials that I have referenced here with the Court.

(TR 7280-7282) (emphasis added).

The State continued:

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

That the day that we made that selection, which would now 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 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 had reached a point where we had a hundred and seventeen people that were identified as plainly being persons who said: I can set aside what I've read, what 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 instructions of the Court. You asked that question, I asked that question, Mr. Kearns and Mr. Parker asked that question; and we asked it in a wide array of fashions.

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

Of those, 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 a 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 an issue of cause, this Court**, 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, equivocation that I heard in their voice or I saw in their mannerism; and this Court excused them, still leaving us with a hundred and seventeen people, for which there was very little question.**

(TR 7282-7284) (emphasis added).

The State argued that there had been an extensive two step elimination process and there still remained a hundred and seventeen people who had passed scrutiny. Moreover, because the defense identified concerns about the publicity following the plea, the pretrial publicity was not the focus for the change of venue.

The Court, in denying Rolling's motion for change of venue (TR 7294-7310), presented a plethora of case authority that he had reviewed as to the appropriateness of said motion and detailed the jury selection process undertaken by the Court to ensure that careful scrutiny was undertaken as to each potential venireman that ultimately made up the hundred and seventeen persons constituting the final jury selection panel. The court observed:

> If I find a -- that I have **a reasonable doubt as to the ability of a juror to sit fairly and impartially in this case, upon request by the defense for challenge for cause, that has been granted**, often over the objection of the State because I think I do have to make factfindings in that regard and cannot rely solely on the answer rendered by the juror.
>
> The other matters that I think should be considered in the case are that, first of all, **we are not dealing with a guilt phase issue. Guilt has been decided in this case by the entry of the plea, the recital of the factual basis, the determination of competency and the acceptance of the plea tendered by Mr. Rolling.**

I think **we are dealing with a separate issue, and that is the ability of the jurors to be fair, to set aside any preconceived notions of the appropriateness of a particular penalty in this case, and to be open to the considerations of the determination of aggravating factors, and the determination of mitigating factors, and the weight to be assessed to each in their rendition of a verdict to this court.**

I find it interesting that, in many instances, **these 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 disabilities or infirmities that he may have could be and would be considered by them in determining whether they were established; and, secondly, what weight should be put upon them.**

I did not sense, in those responses from the jurors, based on the extensive questioning by the lawyers, that these were simply recitations of matters that were not firmly held by the jurors.

So I don't believe we had any state of mind of the hundred and seventeen people that the defense has suggested to the Court exists.

Finally, in an analysis, and although the Court has not been supplemented by the defense, I'm not unaware of the publicity that has been -- that accompanying Mr. Rolling's change of plea and the various articles that have come, at least in the local media, after the change of plea.

One of the things that 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 Shepherd v. Maxwell, that it is of a hostile nature and so inflamed the community that even those who sit 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) (Emphasis added).

The court further 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).

> . . . Considering the principles as they have evolved from guilt phase litigation and 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 observations of the responses of the hundred and seventeen people who have returned, I deny the motion for change of venue. . . .

(TR 7309). (See Order on Defendant's Motion for Change of Venue (RA 3258-3266)).

To the extent the defense had no trepidation about selecting a jury for the guilt phase of Rolling's trial up to day February

15, 1994, when Rolling pled guilty; the news articles and other documentation regarding the community feelings prior to February 15, 1994, are not germane. They should not be considered in ascertaining whether the trial court properly denied Rolling's request. It is clear from the caselaw that in order to present a claim for change of venue, a timely motion must be filed. The failure to do so waives any ability of a defendant to assert on appeal that the issue has been preserved. In the instant case where no motion for change of venue was forthcoming prior to the commencement of the jury selection process for the penalty phase, it would seem reasonable to assume that had the hostility and pretrial publicity existed in such a quantity as to deny Rolling a fair trial, a motion pretrial would have been filed. Based on the facts, Rolling cannot make a showing that presumed prejudice exists herein.

Citing Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980), Rolling argues that "A defendant must present '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 that community . . .'". (Appellant's Brief, page 98).

The standard governing the change of venue issue derived from the Fourteenth Amendments due process clause, safeguarding the defendant's Sixth Amendment rights, is to 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 a trial court to grant a change of venue, Rideau v. Louisiana, 373 U.S. 723 (1963), or at least grant a continuance, Shepherd v. Maxwell, 384 U.S. 333, 362-63 (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. Rideau v. Louisiana, 373 U.S. at 726-27, 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. Mayola v. Alabama, 623 F.2d at 997. As observed in Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985): "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, the defendant must show "manifest error" in demonstrating presumed prejudice. In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), the court formulated the test:

> 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.

A juror's ability to put existent prejudice out of their minds may be judged by the standard of whether "it would be difficult for any individual to take 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 court, based on massive pretrial publicity, held:

> . . . 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 the extent of the prejudice or lack of impartiality among

> potential jurors that may accompany the knowledge of the incident. Copeland v. State, 457 So.2d 1012 (Fla. 1984). . . .

497 So.2d at 1182.

The court further observed that the burden was on the defendant to raise a presumption of partiality.

> An 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. In evaluation of the pretrial publicity and voir dire testimony reveals that an unfair and impartial jury was ultimately empaneled.

497 So.2d at 1182.

In determining the pervasiveness of pretrial publicity, it is relevant to look at several factors:

(1) Presumed Prejudice

(A) The Time That Has Passed From The Crime To The Trial And When The Publicity Occurred

Rolling has submitted to the court numerous newspaper articles from August 28, 1992, to April 16, 1993 (Appellant's Brief, page 95, footnote 60).

In the instant case, many of the news accounts regarding the community "hysteria", sympathy for the victims, and victimization

of Edward Humphrey appeared in newspaper articles fairly soon after the murders. "During the first three months, the press focused on the community-wide hysteria that began the day the first victims bodies were discovered." (Appellant's brief, page 104). "The University and Santa Fe Community College quickly responded to this crisis, and so did the rest of the community." (Appellant's brief, page 106). "Humphrey first came to the public's attention on August 31, 1990, with a front page article. (A 30). In the following days, the Sun presented a long series reveling in Humphrey's mental problems and troubles with the law." (Appellant's brief, page 108). "In January 1991, when Rolling emerged as the prime suspect, the press relegated Edward Humphrey to the back page articles . . ." (Appellant's brief, page 110). Clearly the articles referred to in his brief demonstrate that many of the articles submitted were not even related in time or specifically to Danny Rolling and were not of the nature that would support a finding of prejudice necessary to satisfy McCaskill, supra.[3] See Provenzano, supra. In Provenzano v. State, the court recognized that massive pretrial publicity can be expected in cases

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[3] The record bears out that Rolling's counsel made numerous court statements that the defense wanted the trial held in Alachua County, and strongly inferred that Alachua County was the most advantageous locale for Rolling to get a fair trial.

such as the one in Provenzano where the defendant walks into a courtroom and is ordered to be searched and then shoots and kills a probation officer and attempts to murder several other court personnel. See, also, Patton v. Yount, 467 U.S. 1025 (1984) and Larzelere v. State, ___ So. 2d ___ (Fla. decided March 28, 1996), where the Court relying on Provenzeno supra and Pietre v. State, 644 So. 2d 1347 (Fla. 1994) ("Although many of the prospective jurors had read or heard media reports about the murder, the extensive questioning of those jurors by the trial judge and by the attorneys for both sides reflects that the jurors' knowledge of the incident was not such that it caused them to form any prejudicial, preconceived opinions about the case." Slip op. at p.24).

(B) Whether The Publicity Consisted Of Straight, Factual News Stories Or Inflammatory Stories

In Provenzano, supra, and Oats v. State, 446 So.2d 90 (Fla. 1984), the court recognized that "while pretrial publicity may be pervasive, the articles were straight news stories of a factual nature and were not inflammatory." 497 So.2d at 1182.

Rolling asserts, "over the course of three years, the press paraded before its readers a steady stream of articles alleging Rolling had committed similar heinous crimes; had almost murdered his father; had participated in a Lakeland murder, and had plotted

to murder a prison guard so he could escape before his trial." (Appellant's brief, page 111). He further argued that "there was extensive front page coverage of two bank robberies (including his competency determination), pleas to similar charges in Ocala and his federal bank robbery trial in Tallahassee. The press devoted extensive space to Rolling's psychological condition, as well." (Appellant's brief, page 111). Newspaper clippings referencing to Rolling as an oddball, an alcoholic with a personality disorder and reporting that there was psychological evidence presented at Rolling's bank robbery trial that he was suffering from a schizophrenic type illness were all revealed in the newspapers.[4] These cold, hard facts however, clearly fall within the straight, factual news stories - reporting, not only the events surrounding the murder, but other criminal endeavors to which Rolling pled guilty. In some instances they were actually used at the penalty phase of his trial to support mitigation, specifically, mental health. Moreover, with regard to "keeping the case in the public mind", again some of these general articles concerned serial killers and correct factual accounts surrounding the murders. As

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[4] Not only did the Gainesville Sun and Channel 20 report what Rolling did but every paper in the state, as well as media coverage nationwide.

observed in Provenzano, expectation of massive pretrial publicity does occur in cases where newsworthy events occur. The press' mentioning of other crimes Rolling committed or allegedly committed were factual stories that were generated early on prior to Rolling becoming a suspect (on the bank robbery charges) or after he became a suspect in January 1991. See Dobbert v. State, 328 So.2d 433

(Fla. 1976); affirmed, Dobbert v. Florida, 432 U.S. 282 (1977),[5] and Thompson v. State, 374 So.2d 508 (Fla. 1979).

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[5] The United States Supreme Court, in Dobbert, 432 U.S. at 303, held in this highly publicized murder of two of his children; where there were massive searches for the bodies which were never recovered:

> 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 portions 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 the community of either the crimes or the putative criminal is not sufficient by itself to render a trial unconstitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us 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 reasonably suspected of murdering his children cannot expect to remain anonymous. . . .

Similarly, Rolling cannot reasonably suggest at the penalty phase of this trial, after pleading guilty, that people called for the voir dire selection would be devoid of information concerning the murders. When asked, 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.

(C) The Size Of The County

Rolling argues that ". . . the three and a half year span between the crimes and the trial was prominently interrupted when the State first identified Rolling as a suspect and again when he was indicted. Moreover, during the entire time, the press created a cottage industry from the murders. It published a steady stream of articles either about the suspects the police identified, matters relating to the Gainesville slaying, or Rolling himself." (Appellant's brief, page 131). While not unmindful that the trial court did find the amount of publicity from the time of the trial to the day of Rolling's plea pervasive, **no** efforts had been made by Rolling to change venue prior to the date he was ready to go to trial, specifically February 15, 1996.[6] Assuming this is true, it would seem that his agreeing to cull through 1400 potential jurors until 117 potential jurors were identified who had "no bias or excessive knowledge," estops Rolling from arguing that this pretrial publicity could possibly rise to the level of presumed error. In Copeland v. State, 457 So.2d 1012, 1016-1017 (Fla.

[6] Rolling knew he would plead guilty to the five murders that day and apparently had no concerns regarding the publicity that preceded his change of plea to guilty since he contested it not.

1984), the court held the trial court had not abused his discretion in denying Copeland's motion for change of venue.

> Appellant's motion was based on a showing that there was widespread public knowledge of the crimes throughout Wakulla County. Public knowledge alone, however, is not the focus of the inquiry on a motion for change of venue based on pretrial publicity. The critical factor is the extent of the prejudice, or lack of impartiality among potential jurors, that may accompany the knowledge. It has long escaped strict definition:
>
> > Impartiality is not a technical concept. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the constitution lays down no particular test and procedure is not chained to any ancient and artificial formula.
>
> United States v. Wood, 299 U.S. 123, 145-46, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936). The question of jury impartiality is one of mixed law and fact, requiring an appellate court to independently evaluate the voir dire testimony of empaneled jurors. (cites omitted). The test for determining whether a change of venue is required was expressed in Kelly v. State, 212 So.2d 27, 28 (Fla. 2d DCA 1968), and adopted by this Court in McCaskill v. State (cite omitted). . . . In determining the extent of prejudice toward a defendant, one factor to consider is whether 'it would be difficult for any individual to take an independent stand adverse to this strong community sentiment.' Manning v. State (cite omitted). If it is possible to empanel a jury comprising persons who can be relied upon to decide the case based upon the evidence, and

not be influenced by knowledge gained from sources outside the courtroom, then a denial of change of venue is proper. See, e.g., Dobbert v. State, 328 So.2d 433 (Fla. 1976), affirmed, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 166 (1977).

In the present case, the transcript of the jury selection proceedings reveal that every member of the jury panel had read or heard something about the crime. However, they all said they would be able to disregard the previously gained information and render a verdict based on the evidence presented in court. Although such assurances are not dispositive, they support the presumption of a jurors' impartiality. It is the defendant's burden to demonstrate 'the actual existence of such an opinion in the mind of a juror as to raise the presumption of partiality.'"

457 So.2d at 1016-1017.

The court further noted:

Appellant argues, however, that proof of a general atmosphere of hostility against him was established by testimony that the crimes were the main topic of conversation in the rural community of Wakulla County, citing Manning v. State, 378 So.2d 274 (Fla. 1979). Although we said in Manning that the size of the community is a factor to be considered in determining the prejudicial impact of intense publicity, we did not hold it is the only factor. Manning should not be extended to require a change of venue in every highly publicized criminal prosecution in a rural community. In this case there was not shown the degree of community hostility towards the defendant that existed in Manning. . . .

457 So.2d at 1017. See also Straight v. State, 397 So.2d 903 (Fla. 1981), and Jackson v. State, 359 So.2d 1190 (Fla. 1978).

Lastly, the trial court recognized that the empaneling of a jury in Rolling's case was for the penalty phase only. Those jurors who may have heard something about the case through newspaper articles or TV reports knew far less than any juror who would have sat in judgment 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 determination based on the evidence presented. See Dobbert, supra; Bundy v. State, 471 So.2d 9 (Fla. 1985), and Geralds v. State, 601 So.2d 1157, 1159 (Fla. 1992).

(2) Actual Prejudice

A second method of evaluating the partiality of the prospective jury is to determine if there was great difficulty in selecting an impartial jury at voir dire. If the prospective jurors have no knowledge of the case or even with that knowledge, have no fixed opinion, or if only a few of a large panel have such knowledge or opinion, then prejudice probably does not exist. Oats v. State, 446 So.2d 90 (Fla. 1984). To be a qualified juror, a juror need not be totally ignorant of the facts of the case nor do

they need to be free from any preconceived notion. Rather, as announced in Irvin v. Dowd, 366 U.S. 717:

> To hold that the mere existence of any preconceived notion as to the guilt of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

If a prospective juror can assure the court during voir dire questioning that he has no extrinsic knowledge or that he is impartial despite any extrinsic knowledge, he will be qualified and a change of venue is not required. Davis v. State, 461 So.2d 67 (Fla. 1984); Copeland v. State, supra, and Jackson v. State, supra. In Murphy v. Florida, supra, the United States Supreme Court 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 suggest a community with sentiments so poisoned against petitioner as to impeach the indifference of jurors who display no animous of their own.

421 U.S. at 794. See also Provenzano v. State, supra, Copeland v. State, supra, and Pitts v. State, 307 So.2d 473 (Fla. 1st DCA

1975). Moreover, as announced in Pietri v. State, 644 So.2d 1347 (Fla. 1994); Wuornos v. State, 644 So.2d 1000 (Fla. 1994), and Castro v. State, 644 So.2d 987 (Fla. 1994), an assurance by jurors that they will be impartial despite their knowledge of pretrial publicity is legally sufficient to support the trial court's denial for a change of venue.

Sub judice, the trial court took appropriate measures to eliminate prejudice and the need for a change of venue. Similar to this Court's decision in Gaskin v. State, 591 So.2d 917 (Fla. 1991), and Pietri v. State, supra, the trial court herein, (a) excused potential jurors with any significant knowledge of the case; (b) insured 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.[7]

The trial court, in denying the motion, observed:

> . . . Because of the meticulous jury selection process used in this case, because of the

[7] In fact, the record reflects, except for the defense asking general questions into potential jurors' childhood, all topics were fair game for this inquiry.

> strict standard 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).

The court devised an intricate screening process to arrive at a pool of prospective jurors who would be able to serve a case of "this magnitude and duration, and who would be able to impartially decide the case." (TR 3259). 1400 prospective jurors were summoned and 1233 responses were filed. The court reviewed each response and excused approximately a thousand of those summoned for jury duty. (TR 3259).

> On the basis of the initial responses, the prospective jurors were separated into six categories: first, the court excused those who had sought a statutory exemption under the law of the state; second, the court excused those who were automatically disqualified under the law of this state; third, the court excused those who demonstrated a hardship which, under the law of this state, would allow excusal. A fourth category was comprised of those venirepersons who requested excusal from jury service, but whose request was denied. The fifth category was comprised of those whose responses indicated that the prospective juror was not exempt or disqualified, and which

> contain no request for excusal. As a sixth category, the court excused those who claimed to have a state of mind that would render them unable to be impartial either to the State or to the defense.

(TR 3259-3260).

On February 15, 1994, the numerical breakdown of those categories reflected:

> ". . . there were approximately two hundred and eleven prospective jurors who were found to be exempt from jury service under Florida law. Approximately another seventy-five persons were excused because they were disqualified under Florida law. Of those five hundred sixty-eight excused for hardship, two hundred and forty-six were excused for job complications, one hundred seven were excused because they were either students or teachers who could not miss such an extended period of classroom attendance, one hundred five were excused for illness, eighty-six for other miscellaneous hardships. Finally, twenty-four individuals were excused who admitted to a fair state of mind which resulted in a prejudgment of the case and who admitted that they could not be fair and objective.

(TR 3260).

> . . . The court was liberal throughout its giving credence to jurors requests. In case of doubt, the court accepted the juror's stated reason and excused the juror. The court conducted this elaborate screening process in order to be able to focus the actual voir dire questioning on those persons who would be statutorily qualified to serve, who did not have a hardship which would

prevent them from serving, and who had no conscious bias for or against any party.

(TR 3261).

The voir dire process was conducted in two stages. During the first stage, prospective jurors were brought into the courtroom in panels of twenty to twenty-four prospective jurors per panel. Questioning during this stage was directed primarily toward the juror's attitude toward the death penalty itself. Challenges for cause were freely granted. If the voir dire questioning raised any reasonable doubt in the mind of the court about the juror's ability to be impartial, the court excused that juror for cause. **Of those who were excused for cause during the jury selection process, approximately one fourth were excused for bias in favor of the defendant: jurors were excused who stated that they would be unable to vote for a death penalty, or because they stated that they would be unable to impartially view the photos of the victims, rather than because of a bias against the defendant. During this process, the defendant exercised two peremptory challenges. Because of the Court's concern that one of the challenges had been exercised in a situation in which grounds for a challenge for cause were arguably present, the Court granted defendant one additional peremptory challenge.** When one hundred and seventeen jurors had been accepted during the first stage, the Court, believing that this number was sufficient, had the jurors return to the courtroom for the second stage of the process.

(TR 3261-3264).

The court then explained the second stage of the process:

> . . . The second stage questioning was more far-reaching, and involved questions that were more personal to the jurors. Both parties, but particularly the defendant, were given wide latitude in the questions asked. The sole question which the Court did not permit defense counsel to ask was an overbroad question asking the jurors to tell about their childhood. The Court, at a bench conference, asked counsel the purpose of this question. On being informed that counsel wanted to inquire about any experience or training potential jurors may have had concerning child abuse or sexual abuse, the Court raised the subject with the jurors and requested candid responses.

(TR 3262).

The court further observed:

> Challenges for cause were again granted liberally by the Court. During this phase, the defendant exhausted the number of peremptory challenges initially allotted, and the court granted each party additional challenges bringing the total to twenty-four per side. During the second stage of the jury selection process, the defendant used all of his peremptory challenges; the State used twenty-one peremptory challenges.

(TR 3263).

The trial court, in denying the motion, held:

> The jury selection process in this case was designed to obtain a fair and impartial jury for the penalty phase of a capital case. In selecting a jury for the penalty phase only, the jurors cannot be expected to show a

> presumption of innocence to the defendant who, by a plea of guilty, has admitted that he committed five murders. . . . The mental state of the jurors, therefore, is not equivalent to that expected of jurors who are to decide guilt or innocence. The question is rather whether the jurors can be fair with respect to the sentence to be imposed, whether they can set aside any preconceived notions of the propriety of a particular penalty, can impartially make a factual determination of the existence of aggravating and mitigating factors and can then give those factors the appropriate weight in recommending a penalty to the Court.

(TR 3264).

While acknowledging that there was a high degree of pretrial publicity, the court found that the publicity was not hostile:

> Of the publicity given this case by the local media shows that, while the media has kept the public apprised of all court procedures which have not been held in camera, the approach of the local media has been objective, not directed toward 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 be a journalist local to the area, but by 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 defense 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 to life imprisonment. They presented various reasons for their position, including a general proposition for the death penalty itself, the physical 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, the responses were presented effectively on both sides of the issue.**

(TR 3265-3266).

Beyond a doubt the trial court undertook extraordinary measures to ensure jurors who sat were fair and impartial. To the extent that Rolling now points to comments made by potential jurors and jurors who sat with regard to their knowledge of the case, it is of no moment since, the thrust of the jury selection process was to ferret out those individuals who had knowledge and meticulously cross-examine those persons as to whether they could set aside that knowledge, listen to the evidence and be fair and impartial.

The jurors who sat were Ms. Bass, Ms. McDaniel, Ms. Kerrick, Ms. Sajczuk, Ms. Diaz, Ms. Staab, Mr. Green, Ms. Williams, Mr.

Coleman, Mr. Stubbs, Ms. Tignor and Ms. Brown. Following the selection of these twelve jurors, the defense requested an additional peremptory challenge arguing that with an additional peremptory challenge they would remove Ms. Kerrick.[8] (TR 2266). Rolling renewed his motion for change of venue which was denied. (TR 2269).

Of these jurors, Mr. Green (TR 1525), Ms. Staab (TR 1968), Ms. Sajczuk (TR 1731), Mr. Stubbs (TR 2244) and Ms. McDaniel (TR 1530) stated that they either did not read newspapers or did not buy newspapers. Ms. Bass stated that she only got the Saturday Gainesville Sun for the sales and coupons. (TR 1526).

Ms. 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 Ms. Daniels lived in Orange County and was not in the area (TR 1446).

Ms. Staab, an oncology nurse, was only moderately in favor of the death penalty and admitted that in the past her feeling about the death penalty had been stronger (TR 437). Ms. Williams was a nurse's aide and had assisted a person who had been raped (TR

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[8] The record reflects that the defense never challenged Ms. Kerrick for cause. Moreover, none of her statements during voir dire were any different than any other juror that sat and Rolling has not identified anything that would disqualify Ms. Kerrick.

1804). Ms. McDaniel's 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). Ms. Diaz was involved in Bible studies and Ms. Daniel, a social worker (TR 318), believed that poor people are more likely to get the death penalty (TR 325).

Inquiry during voir dire also revealed that Ms. Sajczuk's father is a police officer at Sante Fe College (TR 1586), and that Ms. Bass was not sure but she might have gone to school with Christy Hoyt in Newberry (TR 109). Ms. Bass also stated that she had formulated no opinion with regard to the death penalty (TR 219).

The only person that Rolling mentioned as someone he would have used an additional peremptory challenge on is Ms. Kerrick, a retired office manager with the astronomy department at the University (TR 1581). She admitted that she received the Gainesville Sun and Reader's Digest and that her husband received Sports Illustrated (TR 1728). She concurred with the idea that family support helps people get over problems and described herself as cheerful and prompt (TR 1728). She admitted seeing a report on Manny Taboada's brother's news conference but said it would have no

effect with regard to evidence she heard in these proceedings.[9] (TR 315-316). Moreover, she said 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 stated that the death penalty possibly should be given for premeditated murder. (TR 346). When asked to explain, she said if a person put 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.[10] (TR 347).

Albeit Rolling used all of his peremptory challenges and the additional peremptory challenges during the course of the voir dire, the record reflects that only two of Rolling's cause

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[9] Other jurors like Coleman made a similar remark about seeing the Taboada interview, but also said it would have no effect (TR 566).

[10] Similarly, Ms. Tignor 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 Ms. Daniel's statement (death penalty for premeditated murder but will follow court's instructions (TR 334-336); Ms. Williams' similarly answered that she thought death penalty okay but would need to hear aggravation and mitigation (TR 978).

challenges were denied. More importantly, neither of the two cause challenges were for Ms. Kerrick. In fact, the record also reflects that upon reconsideration, the court provided an additional peremptory challenge to the defense because the court felt that one of the cause challenges should have been granted. Rolling, on page 155 of his brief, provides: "He used all his peremptory challenges, asked for more, and identified a juror he wanted, but was unable, to challenge." It truly must be questioned as to whether Rolling has "preserved the issue" for appellate review **since he never challenged Ms. Kerrick for cause and has failed to show that harmful error resulted because Ms. Kerrick sat on the jury.** Moreover, he has failed to even argue that the lone defense challenge for cause that was denied, was inappropriate. See Trotter v. State, 576 So.2d 691, 693 (Fla. 1990); Watson v. State, 651 So.2d 1159, 1160-1162 (Fla. 1994); Bryant v. State, 656 So.2d 426, 428 (Fla. 1995), and Kearse v. State, 662 So.2d 677, 683 (Fla. 1995).

Having failed to perfect his need for an additional peremptory challenge, it would seem there is no basis to argue that Ms. Kerrick should not have sat on Rolling's jury.

He cannot demonstrate that he has satisfied either standard articulated in Murphy or McCaskill, and therefore is entitled to no relief as to Issue I.

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING ROLLING'S MOTION TO SUPPRESS STATEMENTS IN VIOLATION OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16, FLORIDA CONSTITUTION

Rolling argues that the trial court erred in denying his motion to suppress statements made on January 18, 1993, January 31, 1993, February 4, 1993, and all written and oral statements to Bobby Lewis on the grounds that both the statements violated his privilege against self-incrimination, right to counsel and right to due process under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9 and 16, of the Florida Constitution. (Appellant's Brief at 158). The trial court, following an extensive evidentiary hearing pretrial, ruled that Bobby Lewis was not an agent of the State when he obtained statements from Rolling relating to the Gainesville murders and that Rolling voluntarily waived his right to remain silent and his

right to counsel when he gave statements to law enforcement on January 31 and February 4, 1993. Rolling argues: "This issue that the trial court erred in denying his motion to suppress because inmate Bobbie Lewis elicited discriminatory statements from him while acting as a government agent," resulted in Rolling's Sixth Amendment rights being violated. **First and most importantly, this issue is not properly preserved for appellate review. Rolling pled guilty and as such has waived any infirmity with regard to any pretrial motions even dealing with issues of a constitutional magnitude.** See Krawczuk, supra.

Assuming arguendo that the court will provide a cursory review of the issue, on pages 159-185 of Appellant's Brief, Rolling restates facts surrounding his motion to suppress statements made on January 18, 1993, January 31, 1993, February 4, 1993, and all written and oral statements to Bobby Lewis. Citing Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), he asserts that Bobby Lewis was a government agent and Rolling was "particularly susceptible to the ploy" of this undercover government agent.[11] (Appellant's Brief at 195).

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[11] Lewis and Binstead were interviewed by members of the Task Force between July 1992-October 1992 to determine if these two inmates had any information. Lewis' attorney, Mr. Robert Link, had called the prosecutor's office asking for a deal for Lewis during

Fortunately, the trial court, after discussing the applicable law, in particular, United States v. Henry, supra,; Maine v. Moulton, 474 U.S. 159 (Fla. 1985), and Kuhlmann v. Wilson, 477 U.S. 436 (1986), reached a contrary conclusion and determined that no Sixth Amendment violation occurred. The court observed:

> With respect to those statements made to Lewis prior to January 18, 1993, the court finds that the defendant's privilege against self-incrimination was not abrogated by state agents because as stated above, Lewis was at no time an agent of the State when he obtained the statements from the defendant. Further, even if Lewis were an agent of the State, the statements were not made by the defendant as a result of custodial interrogation. In Illinois v. Perkins, 110 S.Ct. 2394 (Fla. 1990), the United States Supreme Court reviewed a claim that statements were obtained from a defendant in violation of the defendant's privilege against self-incrimination. In Perkins, the defendant was not incarcerated pending trial on a charge of aggravated battery. Law enforcement officers had reason to suspect him of having committed a murder, unrelated to the battery. In order to obtain statements from the defendant relating to the murder, law enforcement

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this time. He was informed that no deal would be forthcoming for any information from Lewis. See Link's testimony at suppression hearing. Clearly, what was proven at the suppression hearing was Binstead's and Lewis' involvement with Rolling and "their" the intent to benefit from such a relationship. While the "motive" was selfish for Binstead and Lewis, the facts remain clear, the State was not involved. More importantly, Rolling knew all about Binstead's and Lewis' motives and indicated that he wanted to help them.

> officials placed an undercover police officer in his cell block. The undercover officer posed as a fellow prisoner. While in the cell block, the officer questioned the defendant, and obtained statements in which the defendant admitted the murder. In approving the procedure against the claim of a Fifth Amendment violation, the court noted that "Miranda" forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. Since the defendant had not been charged with the murder, the Sixth Amendment right to counsel did not apply. The court held that, so long as the statement was voluntary, the Fifth Amendment was satisfied, and Miranda warnings were not required.

(Supp. Record 1443-1444). See also United States v. Stubbs, 944 F.2d 828, 831-832 (11th Cir. 1991) (Fifth Amendment is not implicated when an incarcerated person speaks freely to another undercover agent or a cell mate who is not an undercover agent but a confidential informant. "Miranda and Fifth Amendment concerns are not implicated when a defendant misplaces her trust in a cell mate who then relays the information - - whether voluntarily or by prearrangement -- to law enforcement officials.").

With regard to the January 18, 1993, statement, the court found that Rolling's privilege against self-incrimination was not violated.

> First, although the defendant was in custody, the defendant himself sought the meeting with law enforcement officers and

> initiated the conversation with the officers. Law enforcement officers were first notified of the defendant's request when they were told, by Captain Davis, that he had received a request from the defendant from Lewis. When the law enforcement officers were first informed of this request, they asked Captain Davis to verify the request by asking the defendant directly if that was what he wanted. Captain Davis, therefore, asked the defendant if he wished to initiate contact with law enforcement personnel. On being asked by Captain Davis whether the defense wished to talk with task force investigators, the defendant replied 'Yes sir, I do and God bless you, Captain.'
>
> The only questions asked by officers were asked in an effort to clarify the list of conditions submitted by the defendant to the officers, a list which had previously been written out by Lewis and the defendant and signed by the defendant. The defendant was setting out the conditions under which he would be willing to make statements to law enforcement officers. When the conditions were made clear, the officers informed the defendant that they could not comply with them and that they would make him no promises. They took no further statements, terminated the interview, and did not question the defendant about the homicide. Under these facts, there was no custodial interrogation of the kind prescribed by Miranda v. Arizona and subsequent cases. Id.

(Supp, Record at 1444-1445). See also Peterka v. State, 640 So. 2d 59 at 66-67 (Fla. 1994); Davis v. United States, 512 U.S. ___, 102 L.Ed.2d 362, 114 S.Ct. ___ (1994).

As to the January 31, 1993, statements, the court first found that the defendant initiated contact with law enforcement officers by requesting that they meet and that Rolling controlled the direction of the conversation through his "presentation of his conditions for giving further statements" (Supp. Record at 1445). Rolling was handed a copy of his "prior notice of invocation" and he read it aloud. Law enforcement officers also provided a written copy of the Miranda rights which he also read aloud.[12] "Once the officers indicated that they would permit him to speak through Lewis provided that he verified what Lewis said, the defendant readily agreed to waive his right to remain silent.[13] An analysis of the recordings and transcript of the interview show clearly that the defendant understood what he was doing and that he only made a knowing and voluntary waiver, but he affirmatively wished to waive his privilege in order that Lewis would be able to delay his statements to law enforcement officers." (Supp. Record at 1446).

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[12] Rolling signed the waiver of his right to counsel on the back of each Invocation of Counsel form on January 31, 1993, and February 4, 1993 (TR 3212-3216).

[13] Rolling initiated contact with outside law enforcement for the January 18, January 31 and February 4 meetings. On the February 4, 1993, videotape, Rolling states plainly that he did not want defense counsel called and suggests that the agents call his lawyers only after the interview.

The trial court found a similar scenario on February 4, 1993, when law enforcement officers spoke with Rolling. (Supp. Record at 1446).

Rolling argues that statements made through Bobby Lewis and verified by him violated his Sixth Amendment right to counsel. As a result of Massiah v. United States, 377 U.S. 201 (1964), any inquiry as to validity to Rolling's assertion must be premised on whether "law enforcement agents" deliberately elicited incriminating statements from him in the absence of his lawyer. In United States v. Henry, 447 U.S. 264 (1980), the court applied the Massiah test to inculpatory statements made to a jailhouse informant, striking the confession because the police, through the informant, elicited incriminating information from the defendant without the presence of counsel by stimulating conversation about the crimes. In Maine v. Moulton, 474 U.S. 159 (1995), the court further explained that Massiah and the Sixth Amendment are violated whenever the government either "intentionally creates" or "knowingly exploits" an opportunity to confront the defendant without counsel. In Kuhlmann v. Wilson, 477 U.S. 436 (1986), the court clarified the facts necessary to find a Massiah violation:

> The primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the

> equivalent of direct police interrogation. . . A defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed to elicit incriminating remarks.

The court ultimately held no Massiah violation where a jailhouse informant is placed in close proximity to a defendant but makes no effort to stimulate conversation on the crime charged.

In the instant case, Kuhlmann v. Wilson controls. See United States v. Stubbs, 944 F.2d 828 (11th Cir. 1991) (no Sixth Amendment right to counsel violation where defendant made admissions to her jailhouse cellmate after her right to counsel had attached); Brooks v. Kincheloe, 848 F.2d 940, 944-945 (9th Cir. 1988), wherein the court held:

> This case more closely resembles Kuhlmann v. Wilson (cite omitted) . . . State appellate court found that 'the police in this case did not intentionally create a situation likely to induce the defendant into making incriminating statements.' Brooks, 38 Wash. App. at 262, 684 P. 2d at 1371. The findings made by the state court established that Kee was not a government agent at the time that Brooks made the incriminating statements concerning the murder of Bryan Miller. While these findings indicate that Kee did take action beyond mere listening, they also clearly demonstrate that he did this before the detectives talked to

> him. The findings also established that the detectives did not request Kee to elicit any information from the defendant. In addition, the state court findings make it clear that Kee was not promised any payment at the time the detective spoke to him.
>
> Given the facts of this case, Brooks cannot establish any Sixth Amendment violation. 'The Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached.' Maine v. Moulton (cite omitted) 848 F.2d at 945.

See also Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995); Muehleman v. State, 503 So.2d 310, 314 (Fla. 1987); Bottoson v. State, 443 So.2d 962, 965 (Fla. 1983) (United States v. Henry "does not apply to unsolicited statements made to a cellmate who is neither paid nor instructed by the government"); Duboise v. State, 527 So.2d 260, 263 (Fla. 1988); Copeland v. State, 457 So.2d 1012, 1017-18 (Fla. 1984).

Rolling also argues that suppression is warranted because of the prosecutor's ethical violation in authorizing and participating in the interviews of Rolling on January 18, January 31 and February 4, 1993. (Appellant's Brief at 200-201). Citing to Rule 4-4.2 and Rule 4-5.3 of the Rules of Professional Conduct of the Florida Bar, Rolling argues that Mr. Nilon violated the prosecutor's

professional ethics by interrogating the accused known to be represented by counsel. This allegation is wanting. Mr. Nilon did not participate in the actual meeting with the defendant, and he was there to merely respond to questions of the investigators as needed. The trial court concluded that Nilon's action in no way infringed on the Rules of Professional Conduct. Moreover, "as legal advisor to law enforcement officers, he made himself available to render such advice as appropriate under the circumstances. Mr. Nilon was careful to ensure that he did not participate in any of the interviews with the defendant, but was available to advise law enforcement officers should such advice be sought." The fact that Mr. Nilon was in geographic proximity to the sight of the interview, rather than merely being available to render advice by phone, does not rise to the level of a violation of the Code of Professional Responsibility. (Supp. Record at 1451). Citing to Suarez v. State, 481 So. 2d 120 (Fla. 1985), Rolling acknowledges that this Court held that a violation of a disciplinary rule does not require suppression of statements. More importantly, however, the facts in Suarez are distinguishable from the instant case.

Albeit, the State has engaged in extensive discussion with regard to the appropriateness of the trial court denying Rolling's

motion to suppress his statements, it cannot be reiterated enough that this issue has not been preserved for appellate review because Rolling pled guilty. None of the evidence introduced at the penalty phase regarding these statements impacted any of the aggravating factors that were proven beyond a reasonable doubt and unassailed here.[14] Additionally, unlike Castro v. State, 547 So.2d 111, 116 (Fla. 1989), the admissions of these statements in no way "... tended to negate the case from mitigation" and "thus may have influenced the jury in its penalty phase deliberations." In fact, no allegations of this nature have been raised by Rolling.

Based on the foregoing, all relief must be denied as to this claim because it has not been preserved for appellate review.

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[14] These confessions/statements were not the sole evidence that the State introduced to prove any of the aggravators. In fact, the crime scenes speak for themselves. Physical evidence presented proved the five murders, three sexual batteries and three burglaries. Evidence placed Rolling in Gainesville, Florida in August 1990; physical evidence placed him at the crime scenes, and a plethora of evidence demonstrated that Rolling armed himself and intended the consequences of these crimes.

Terminally, it cannot be overlooked that Rolling has challenged only one aggravating factor, HAC as to Sonja Larson, and it seems unlikely that even if this Court found these admissions were in violation of Massiah, supra, this Court would still be bound to find that the confessions are not dispositive Rolling has not challenged the voluntariness of his guilty pleas or moved to withdraw them.

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING ROLLING'S MOTION TO SUPPRESS THE PHYSICAL EVIDENCE SEIZED FROM HIS TENT.

Rolling next argues that the trial court erred in failing to suppress physical evidence seized from a tent and the curtilage of his campsite on the grounds that the warrantless search and seizure of the items violated Article I, Section 12 of the Florida Constitution and the Fourth and Fifteenth Amendments of the United States Constitution. Once again, this issue has not been preserved for appellate review because Rolling pled guilty. Krawczuk v. State, supra.

Following an evidentiary hearing pretrial on October 28-29, 1993, the trial court denied Rolling's motion (TR 1772-1782). In order to get around this waived claim, Rolling argues at page 226 of his brief that "the error in denying the motion to suppress was unquestionably prejudicial since the evidence seized, i.e., black clothing, screw-driver, duct tape, and tape-recording were introduced at the penalty phase and heavily relied upon by the State to establish the CCP aggravator (T 4983-4986), and by the trial court in its sentencing order. (R 3203-3204). Such a nexus is wanting for a number of reasons. First, the physical evidence gathered at the campsite and in the tent merely corroborated

Rolling's actions and the other physical evidence that placed him in Gainesville, Florida, preparing to do murder. Second, the mere fact that the trial court mentioned these items of physical evidence in and of themselves does not demonstrate beyond a reasonable doubt that the CCP aggravating factor was proven. Third, Rolling is hard pressed to demonstrate harmful error with regard to the admission of said evidence to prove the CCP aggravating factor since he did not challenge the sufficiency of the CCP factor on appeal,[15] and fourth, the law is adverse to Rolling with regard to whether the evidence should have been suppressed in the event this Court does not find the claim barred on appeal.

Citing Rakas v. Illinois, 439 U.S. 128, (1978), the trial court concluded that Rolling had no standing to challenge the seizure of the raincoat and dye-stained money discovered on the "curtilage" of the tent on September 5, 1990. The court did, however, find in spite of State v. Fisher, 529 So. 2d 1256 (Fla. 3d

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[15]Additionally, as recognized by Alvord v. State, 322 So.2d 533 (Fla. 1975); Clark v. State, 613 So.2d 412 (Fla. 1992); Waterhouse v. State, 596 So.2d 1008 (Fla. 1992); Long v. State, 610 So.2d 1268 (Fla. 1992), and King v. State, 514 So.2d 354, 359 (Fla. 1987), Sec. 921.141(1), Fla. Stat., permits relaxed rules governing the admission of probative value (admission of hearsay testimony did not deny King's rights to a fair hearing).

DCA 1988), that Rolling had an ownership interest in the tent which was pitched on the University of Florida property while Rolling was trespassing and therefore he had standing to challenge any seizures therein. (Record 1778-1779). In Fisher, the court, citing United States v. Smith, 783 F.2d 648 (6th Cir. 1986), observed that "a defendant who does not testify at his suppression hearing and otherwise provides no explanation for his presence on the premises, being searched has no standing to object to the search." 529 So.2d at 1258. See also Knowles v. State, 526 So.2d 1052 (Fla. 3d DCA 1988); People v. Rodriguez, 505 N.E.2d 586 (1986); Odums v. State, 714 P.2d 568 (Nev. 1986), and Smith v. State, 702 P.2d 1063 (Ok. Crim. App. 1985). The court further observed:

> Finally, even assuming, arguendo, that, as the defendant suggests, the front door to this two-room house was shut, thereby arguably evincing defendant's subjective expectation of privacy, the expectation is not one which society is prepared to recognize as reasonable. In United States v. Pitt, 717 F.2d 1334 (11th Cir. 1983), the court refused to extend Fourth Amendment protections, that is standing, to a defendant who had locked the door of the room which was searched. The room was in a garage owned by the defendant's girlfriend landlady, the landlady had a key, and the defendant knew that others had access to and were using the room. The court said that the defendant was 'an intruder, trespasser if you will who assumed to lock a door which he had no legal right to lock on the premises of another and without the

> owner's consent. . .. such activity is not entitled to Fourth Amendment protections.' Id. at 1337 (emphasis). Thus, Fisher's expectation of privacy would not have been recognized even if he had bothered to close the door to and in the two-room shack.

529 So. 2d at 1258.

In State v. Cleator, 857 P.2d 306 (Wash. 1993), the court citing to State v. Pentecost, 825 P.2d 365 (1992), reaffirmed the notion that an individual wrongfully camping on private property has no "reasonable expectation of privacy in the area surrounding his tent". 857 P.2d at 308. The court further observed although no "Washington case directly addressed whether a squatter has a reasonable expectation of privacy inside his tent, the Pentecost court noted, in dicta, the trial court's conclusion that Mr. Pentecost had 'a limited expectation of privacy, if any, in only his tent'" 857 P.2d at 308. Citing State v. Mooney, 588 A.2d 145 (Conn. 1991), the court further observed that no reasonable expectation of privacy has been found in the squatter's homes under a bridge or in a squatter's home in a cave on federal land, see United States v. Ruckman, 806 F.2d 1471 (10th Cir. 1986) (no reasonable expectation of privacy in a cave from which defendant could be ejected at any time) or in a squatters home on state land. Amezquita v. Hernandez-Colon, 518 F.2d 8, 11 (1st Cir. 1975) (no

reasonable expectation of privacy on land which squatters had no right to occupy). Where an individual places effects upon premises where he has no legitimate expectation of privacy, then he has no legitimate reasonable expectation that his effects will remain undisturbed on those premises. Further, as noted in State v. Petty, 740 P.2d 879 (Wash. 1987), "an individual has no reasonable expectation of privacy in a particular area, the police 'may enter on hunch, a fishing expedition for evidence, or for no good reason at all.'" See Maryland v. Macon, 472 U.S. 463 (1985). The court in State v. Cleator, held:

> Lance Cleator and Kahere Sidiq wrongfully occupied public land by living in a tent erected on public property. The public property was not a campsite and it is undisputed that neither Cleator nor Sidiq had permission to erect a tent in that location. Under these circumstances, he could not reasonably expect that the tent would remain undisturbed. As a wrongful occupant of public land, Cleator had no reasonable expectation of privacy at the campsite because he had no right to remain on the property and could have been ejected at any time. (Cites omitted). Under the totality of the circumstances in taking into account the tent was not his, that the tent was a temporary, unsecured shelter, and that it was wrongfully erected on public property which was not a campsite, Cleator's legitimate privacy expectations, to the extent they existed, were limited to his personal belongings. . . . Officer Denevers only raised the tent flap and observed what was clearly visible and seized only that which he knew to

> be wrongfully obtained. Because he did not disturb Cleator's personal effects, his actions did not violate Cleator's limited expectation of privacy.

857 P.2d at 308-09. See State v. Dess, 655 P.2d 149 (Mont. 1982), wherein the court found the defendant had no reasonable expectation of privacy in a campsite at Moose Camp and therefore he lacked standing to assert a Fourth Amendment objection to admission of the evidence found and seized there. 655 P.2d at 152. And in Standridge v. State, 826 S.W.2d 303, 305 (Ark. App. 1892), the court held:

> The tent was located on federal land in a very remote, isolated area that was designated for public camping or recreational use. A trespasser on federal land who is subjected to immediate ejection has no standing to evoke the exclusionary rule of the Fourth Amendment for the suppression of incriminating evidence. See U.S. v. Ruckman, 806 F.2d 1471 (10th Cir. 1986). A trespasser who is wrongfully on the premises has no expectation of privacy that would justify a claim of violation of Fourth Amendment rights. Id. Given the facts of this case, Standridge did not have a reasonable expectation of privacy in the tent or the items seized, and accordingly cannot claim Fourth Amendment protections. See Izzard v. State, 10 Ark. App. 265, 663 S.W.2d 192 (1984).

Even assuming arguendo that Rolling may have had standing as to personal property inside the tent, and for that matter the tent itself, there is no "curtilage to a tent." As such, any evidence

seized on the grounds surrounding the tent would not be subject to Fourth Amendment review based on the above-cited authorities and the fact that any evidence to be found would have been in plain view.

With regard to the items found in the tent, the trial court found, based on the evidence, that there was sufficient exigent circumstances surrounding the officers looking into the tent and the subsequent seizure of objects therein which rendered the actions of the officers reasonable. (TR 1780). See United States v. Rigsby, 943 F.2d 631 (6th Cir. 1991), relied upon by the trial court. In Rigsby, the circumstances were ". . . a significant marijuana raid was in progress, the suspected presence of an armed individual in the woods and the firing of a booby-trapped shotgun -- the agents had probable cause to believe that the ammunition, gun-cleaning materials and marijuana seized from the picnic site were evidence of a crime. Thus, the search of the picnic site and the seizure of the items found there were properly admitted into evidence at the defendant's trial." 943 F.2d at 637. The court further observed:

> In addition, the search of the tent and the seizure of the shotgun in the tent were valid based on the government's legitimate interest as weighed against any privacy expectation which defendant may have had in the tent. The

> cursory search of the tent by the agents is analogous to a 'protective sweep.' 'A protective sweep is a quick and limited search of a premise, instant to an arrest and conducted to protect the safety of the police officers and others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.' Maryland v. Buie, 494 U.S. 325, ___, 110 S.Ct. 1093, 1094, 108 L.Ed.2d 276 (1990). In order for officers to search an area under the 'protective sweep' exigency, there must be 'articulable acts which, taken together with the rational inferences from those facts, would warrant a reasonable prudent officer believing that the area to be swept harbored and individual posing a danger to those on the . . . scene.' (cite omitted). Moreover, items which were in the officers plain view during the course of the lawful search and which the officer has probable cause to believe are evidence of a crime may be seized. Id. at 1096.

943 F.2d at 637.

In essence, the exigency created by the potential for danger outweighed the defendant's privacy considerations.

Similarly, in the instant case, proceedings from bank robberies were found in plain view. The officers were aware of at least three victims at two homicide scenes within the general vicinity and the officers had seen a black man and a white man near the campsite and the white man fled from the officers into the

woods.[16] Moreover, a K-9 Unit tracked the fleeing individual and led the officers to the area of the tent. The officers knew the bank robbers had been armed and it was reasonable to assume that since the bank proceeds were found near and about the tent and the bank robbers were armed, the officers' safety, as well as the safety of others, was called into question. See also Minnesota v. Olson, 495 U.S. 91 (1990).

Rolling has (1) failed to acknowledge how this claim has been preserved for appeal; (2) cited no authority holding the trial court's ruling on the motion to suppress was in error; and (3) failed to demonstrate a nexus between the admission of said evidence at the penalty phase and the appropriateness of the imposition of the death penalty in this case. Absent a showing of all of the above, no relief may be granted on this point.

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[16] The fact Rolling ran away evinces abandonment of his campsite. Rolling was certainly not going fishing as suggested in his brief, rather he was seen in the woods, returned to his campsite, retrieved some property and then fled the area, leaving his campsite, tent and all, to whomever might come upon it. See California v. Hodari D., 499 U.S. 621 (1991); Hester v. United States, 265 U.S. 57 (1924); California v. Greenwood, 486 U.S. 35 (1988) and United States v. Leon, 468 U.S. 897 (1984) (not all evidence obtained in "violation" of the Fourth Amendment require suppression in all circumstances. Rather, Supreme Court decisions concerning the scope of the Fourth Amendment exclusionary rule have balanced the benefits of deterring police misconduct against the costs of excluding reliable evidence of criminal activity).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN DENYING ROLLING'S MOTION TO SEVER AND CONDUCT THREE SEPARATE SENTENCING PROCEEDINGS

Citing a plethora of cases concerning whether a motion to sever should be granted based on the phrase "connected acts or transactions" found in Fla.R.Crim.P. 3.150(a), Rolling has not explained why the denial of his pretrial motion to sever has not been waived by his plea of guilty to five counts of first-degree murder. Moreover, he has cited no authority to suggest how pretrial motion authorized in Rule 3.150, and Rule 3.152, Criminal Procedure, pertaining to charging documents extends to "joinder or severance" to sentencing in a penalty proceeding. In fact, technically speaking, a severance for penalty phase purposes could result in a Lockett v. Ohio, 438 U.S. 586 (1978), violation should the defendant and/or the State not be able to fully explore the circumstances of the crime and the record and character of the defendant regarding what mitigation is presented from one case to the next.[17] Sec. 921.141(5)(b), Fla. Stat., specifically provides

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[17] See also § 921.141(1) Fla. Stat., wherein the legislature authorized "[I]n the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and character of the defender and shall include matters relating to

that the State may introduce proof in aggravation at the penalty phase of a trial, proof of a defendant's conviction of another capital felony or of a felony involving the use or threat of violence to a person, and as recognized in Pardo v. State, 563 So.2d 77 (1990), contemporaneous convictions of a violent felony may qualify as an aggravating circumstance in capital murder prosecutions as long as the crimes involved multiple victims. See also Jones v. State, 612 So.2d 1370 (Fla. 1992), McCroy v. State, 533 So.2d 750 (Fla. 1988), and Echols v. State, 484 So.2d 568 (Fla. 1985).

Assuming these sentencing principles hold true, joinder or severance for sentencing purposes is inapplicable. As such, all relief must be denied with regard to Rolling's assertion that the penalty phase should have been severed into three separate sentencing proceedings.

To the extent this Court entertains the non-preserved claim[18] that the trial court erred in denying Rolling's motion for severance pretrial, the State would direct the Court's attention to the Order denying severance entered by the trial court (TR 804-

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any of the aggravating or mitigating circumstances. . . .."

[18] All pretrial motions including a motion for severance are waived based on Rolling's plea of guilty.

808). Following two days of hearing and receiving testimony from investigating officers and other appropriate submissions from the parties, the trial court relied on the decision in Bundy v. State, 455 So.2d 330 (Fla. 1984), as controlling. The court concluded that the instant offenses were connected based on temporal and geographical association, the nature of the crime, and the manner in which they were committed. (TR 806). Reviewing Wright v. State, 586 So.2d 1024 (Fla. 1991); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Crossley v. State, 596 So.2d 447 (Fla. 1992), and Ellis v. State, 622 So.2d 991 (Fla. 1993):

> From the review of those cases, the Court discerns several rules to be applied to determine whether or not offenses are 'connected' for purposes of the rules of joinder. First, the Court found that 'for a joinder to be appropriate the crimes in question must be linked in some significant way.' (cite omitted). The recognized 'links' were mentioned by the Court in its opinion: the fact that one crime is causally related to the other, and the fact that the crimes occurred 'during a 'spree' interrupted by no significant period of respite.' Id. The Court then added that the general temporal and geographical proximity is not, in and of itself, a link, but is considered insofar as it 'helps prove a proper and significant link between the crimes.' Citing Crossley.
>
> In this case, based on the testimony presented at the hearing, the Court finds no causal link between the offenses in the sense that one offense was used to induce someone to commit

> another. Fotopoulos. The Court finds, however, that the offenses charged at the three crime scenes are linked by a temporal continuity, not merely a temporal proximity. Temporal continuity is one of the 'significant links' recognized by the Supreme Court in Ellis as found in Bundy -- although by a different name. The court noted that the offenses in Bundy occurred 'during a 'spree' interrupted by no significant period of respite.'
>
> It is apparent from the context and from the reference to 'respite', the word 'spree' was meant to refer to a temporal continuity. From the factual information provided to the court at the hearing, the Court finds that the events were so linked as to constitute a single prolonged episode during which the deaths of five persons were effected.

(TR 807-808).[19]

Based on the foregoing, all relief should be denied as to this point.

ISSUE V

THE TRIAL COURT DID NOT ERR IN FINDING THE HOMICIDE OF SONJA LARSON WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL

Rolling argues that the trial court erred in finding that the heinous, atrocious or cruel aggravating factor applied to the death

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[19] The trial court added an addendum to this order detailing the facts and circumstances which supported his conclusion that a motion for severance should not be granted. (TR 810-812).

of Sonja Larson. Specifically, he asserts that since there was "no evidence of prolonged suffering or anticipation of death" this factor was inappropriately found.

The trial court sentencing order reflects:

> There are facts which are common to all of the crime scenes which show that all of the offenses were committed in a manner that was especially heinous, atrocious or cruel. All of the offenses were committed in the middle of the night. The attacker was dressed in black and wearing a ski mask, factors which disguised his identity and inspired terror in his victims. The offenses were committed in a place in which the victims had a sense of security -- their own homes. The murders were all committed by stabbing the victims to death with a knife . . .
>
> Sonja Larson was killed in her own bed by multiple stab wounds. There were eleven stab wounds of the right arm, four of which went completely through the arm. There were five deep stab wounds on the right breast. Another stab wound was found beneath the left breast. Still another slash wound was found on the anterior surface of the left thigh. The attack was characterized by the medical examiner as a 'blitz' attack after which the victim would have remained alive for a period from thirty to sixty seconds. Despite the relative shortness of the event, the fact that many of the wounds were characterized as defensive wounds indicates that the victim was awake and aware of what was occurring. During all of this time, the victim's mouth was taped shut so that she could not cry out.

(RA 3210).

Contrary to Rolling's suggestion that there was no evidence of "prolonged suffering or anticipation of death", the record reflects the medical examiner, Dr. William Hamilton, testified that not only were there defensive wounds on Ms. Larson's arm and leg, but, based on the nature of the attack, she would have remained conscious between thirty second to sixty seconds before losing consciousness and subsequently dying. (TR 3567). In support of the medical examiner's testimony, Rolling's statement on January 31, 1994, revealed that upon entering Ms. Larson's bedroom, he started stabbing her and pressed duct tape over her mouth to muffle her cries. He testified that Ms. Larson fought and he stabbed her again. Rolling admitted that Ms. Larson tried to fend off the stabbing blows and that the last stabbing blow to her body was to the inside of her thigh. He estimated that the "attack" lasted approximately thirty seconds. (TR 3395). In addition, Rolling did not contradict or object to the factual scenario provided by the prosecution at the February 15, 1994, change of plea proceedings wherein the prosecution provided a factual basis for the plea which contained facts and evidence that Ms. Larson was awake, aware and struggled with her assailant and sustained defensive wounds on both her arms and leg. (TR 1492-1494, 1503).

The nature of the murder in the instant case is controlled by decisions such as Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993); Nibert v. State, 508 So.2d 1, 4 (Fla. 1987); Campbell v. State, 571 So.2d 415 (Fla. 1990); Garcia v. State, 644 So.2d 59, 63 (Fla. 1994); Barwick v. State, 660 So.2d 615 (Fla. 1995); Merck v. State, 664 So.2d 939, 943 (Fla. 1995); Taylor v. State, 630 So.2d 1038 (Fla. 1993), and Geralds v. State, ___ So.2d ___, 21 Fla.L.Weekly S85 (Fla. 1996).

For example, in Hansbrough v. State, 509 So.2d at 1086, the court upheld the finding of heinous, atrocious and cruel where the victim had been stabbed over thirty times and money was missing from the office. The court held:

> The record supports the finding of heinous, atrocious and cruel. The medical examiner identified several of the victims thirty-some stab wounds as defensive wounds, indicating she was aware of what was happening to her. Moreover, testimony indicated that she did not die, or even necessarily lose consciousness, instantly.

509 So.2d at 1086.

In Garcia v. State, 644 So.2d at 63, two elderly sisters who shared a house in Homestead, Florida, were found stabbed to death in their respective bedrooms. This Court found the HAC aggravating factor applied as to both where one sister was found in a sitting

position as if cornered with fourteen stab wounds, nine of which were defensive wounds to the arm, and the other sister was found face down, her legs spread apart with thirty stab wounds, with twelve defensive wounds, and evidence of sexual battery occurring. In Atwater v. State, 626 So.2d at 1329, this Court held, in a stabbing of a sixty-four year old man, "The medical examiner . . . testified that these injuries occurred while Kenneth Smith was alive, and that death or unconsciousness would not have occurred until one or two minutes after the most serious, life-threatening wounds to the heart were inflicted." The Court further observed:

> This Court has consistently upheld finding HAC where the evidence shows the victim was repeatedly stabbed. Nibert v. State, 508 So.2d 1, 4 (Fla. 1987); Johnston v. State, 497 So.2d 863, 871 (Fla. 1986); Lusk v. State, 446 So.2d 1038, 1043 (Fla.), cert. denied, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); Morgan v. State, 415 So.2d 6, 12 (Fla.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982). In this case, the State produced sufficient evidence to adequately establish the existence of the HAC aggravating factor beyond a reasonable doubt and by any standard. . . .

626 So.2d at 1329.

Where, as here, the evidence reflects the victim was conscious, was disabled by the duct tape muffling her cries, fought off her attacker and sustained multiple defensive wounds and death

was not instantaneous, the heinous, atrocious or cruel aggravating factor has been proven beyond a reasonable doubt.

Rolling's strongest case in opposition to finding the murder was HAC is Elam v. State, 636 So.2d 1312 (Fla. 1994). Clearly, that case is distinguishable. The facts reflect Elam was hired by the victim, Carl Beard, to manage Beard's motorcycle parts store. A confrontation ensued when Beard confronted Elam concerning misappropriated funds, and as a result of that confrontation, Beard was bludgeoned to death. The medical examiner testified that the altercation occurred within a very short period of time and the defendant was probably unconscious after the first blows and never regained consciousness. The court found there was no "prolonged suffering or anticipation of death." 636 So.2d at 1314. Likewise, Rolling's other authorities, specifically Rhodes v. State, 547 So.2d 1201 (Fla. 1989), and Herzog v. State, 439 So.2d 1372 (Fla. 1983), are distinguishable in that the victims were not fully conscious during their attack.

Based on the foregoing, it is clear the murder of Sonja Larson was heinous, atrocious or cruel and this aggravating factor was proven beyond a reasonable doubt.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN GIVING A VALID AND CONSTITUTIONAL JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE

Rolling objected to the standard jury instructions on the heinous, atrocious or cruel aggravating factor regarding Sec. 921.141(5)(i), Fla.Stat., and requested a substitute instruction which read as follows:

> The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the Defendant must have deliberately inflicted or consciously chose a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.
>
> Events occurring after the victim dies or loses consciousness should not be considered by you to establish that this crime was especially heinous, atrocious or cruel.

(RA 2844).

The trial court rejected the aforenoted proposed instruction and gave the standard jury instruction approved in Hall v. State, 614 So.2d 473, 478 (Fla. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 109, 126 L.Ed.2d 74 (1993), with an additional modification (regarding events occurring after the victim dies or loses

consciousness). (RA 2877, TR 5123). The jury instruction provided:

> The crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means especially wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> In order for you to find a first-degree murder was heinous, atrocious or cruel, you must find that it was accompanied by additional acts that showed that the crime was consciously or pitiless, and was unnecessarily torturous to the victim. Events occurring after the victim dies or loses consciousness should not be considered by you to establish that this crime was especially heinous, atrocious or cruel.

(TR 5123).

The instant instruction (without the additional modification) has been upheld by this Court as acknowledged by Rolling in Hall v. State, supra, and reaffirmed in Whitton v. State, 649 So.2d 861 (Fla. 1994); Merck v. State, 664 So.2d 939 (Fla. 1995); Barwick v. State, 660 So.2d 685 (Fla. 1995); Taylor v. State, 630 So.2d 1038 (Fla. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 107, 130 L.Ed.2d 54 (1994), and, most recently, Geralds v. State, ___ So.2d ___, 21 Fla.L.Weekly S85, n.6 (Fla. 1996). The jury in Rolling's penalty phase proceedings received a specific instruction on heinous,

atrocious and cruel that fairly apprised the jury of the actual parameters necessary in considering this aggravating factor. There was no deficient instruction which deprived Rolling of a fair sentencing determination as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution.

Finally, albeit not argued by Rolling on appeal, the facts and evidence presented, demonstrate that death is the appropriate sentence in this multiple-murder crime spree. See Bundy v. State,. 455 So. 2d 330 (Fla. 1985); Henderson v. State, 463 So. 2d 196 (Fla. 1985); Coleman v. State, 610 So. 2d 1283 (Fla. 1992); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); and Francois v. State, 407 So. 2d 885 (Fla. 1981).

CONCLUSION

Based on the foregoing, all relief should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

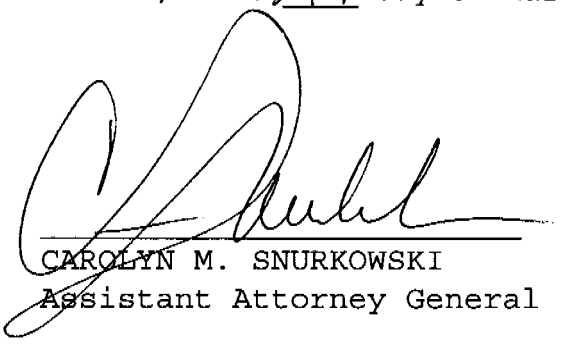
CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-1778

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Nancy A. Daniels, Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32302 and Mr. Rod Smith, State Attorney, Eighth Judicial Circuit, P. O. Box 1437, Gainesville, Florida, 32602-1437, this 29th day of March, 1996.



CAROLYN M. SNURKOWSKI
Assistant Attorney General