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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is an appeal of five death sentences. References to the eighteen-volume record on appeal are designated by "R" and the page number. References to the transcript of the penalty phase proceedings (Volumes 1-37) and motion hearings (Volumes 38-76) are designated by "T" and the page number. References to the nine-volume supplemental record are designated by "SR" and the page number. Other references are as noted in the brief.

STATEMENT OF THE CASE

On November 15, 1991, the grand jury of Alachua County, Florida, indicted appellant, Danny Harold Rolling, on five counts of first-degree murder, three counts of sexual battery, and three counts of armed burglary of dwelling with battery. (R 12-18).

The charges arose from the August 1990 homicides of five college students on three different days and at three different residences in Gainesville, Florida. All proceedings were before Alachua County Circuit Judge Stan R. Morris.

On June 9, 1992, Rolling entered a plea of not guilty to all counts. (R 95, T 5289). On July 2, 1992, Rolling filed a motion to dismiss the grand jury indictment and impanel a new grand jury outside the Eighth Judicial Circuit. (R 96-97). A hearing was held July 30, 1992, and on August 14, 1992, the court denied the motion. (R 137).

On May 7, 1993, Rolling filed a motion to sever the counts of the indictment alleged to have occurred at each residence and conduct separate trials for each episode. (R 622-623). A hearing was held August 12-13, 1993 (T 5877-6101), and on September 17, 1993, the trial court issued a written order denying the motion. (R 804-812). Prior to the penalty phase, Rolling renewed the motion to sever for purposes of the penalty phase recommendation. (R 2276, T 4-6). The trial court orally denied the motion. (T 8-9).

On September 14, 1993, Rolling filed a motion to suppress physical evidence collected at Rolling's campsite in Gainesville, asserting that the articles were seized in violation of the Fourth Amendment of the United States Constitution and provisions

of the Florida Constitution. (R 813-815). An amended motion to suppress was filed October 4, 1993. (R 922-924). A hearing was held October 28-29, 1993 (T 6206-6446), and on November 19, 1993, the trial court issued a written order denying the motion. (R 1772-1783).

On October 29, 1993, Rolling filed a motion to suppress statements he made to law enforcement officers on January 31 and February 4, 1993, at Florida State Prison, arguing that the statements were obtained in violation of his Fifth and Sixth Amendment rights under the United States Constitution and analogous rights under the Florida Constitution. (R 1611-1612). A hearing was held November 15-19, 1993 (T 6556-6880, 7465-7806), and on December 30, 1993, the trial court issued a written order denying the motion. (SR 1415-1452).

On February 15, 1994, the day set for trial, Rolling changed his plea to guilty on all counts. (R 2237-2240, 2243). The trial court accepted the plea and adjudicated him guilty on all counts. (SR 1481-1506).

Jury selection for the penalty phase began February 16, 1994. (T 1). On February 25, 1994, during jury selection proceedings, Rolling filed a motion for change of venue. (R 2388). After a hearing on February 28, 1994 (T 7269-7311), the trial court orally denied the motion. (T 26-42). The court

filed its written order on May 20, 1994. (R 3258-3267).

The penalty phase of the trial took place March 7-24, 1994. Following deliberations, the jury returned with an advisory recommendation of the death sentence for each homicide by a vote of 12 to 0. (R 2905-2908, T 5163-5165).

On March 29, 1994, the parties presented additional evidence and argument to the trial judge. The defense presented a videotaped statement by relatives and friends of Mr. Rolling, an audiotaped statement by a former girlfriend, and the depositions of Rolling's aunt, Artie Mae Strosier, and his former employer, Truman Cooley. (T 8368, 3/29/94 Hearing Exhibits 1-5). Rolling made a brief statement to the court expressing regret and sorrow for the suffering he caused. (T 8391). The state proffered victim impact statements from family and friends of the victims.[1] (T 8393).

The final sentencing hearing was on April 20, 1994. (T 7316). For each of the five homicides,[2] the court imposed a sentence of death, finding four aggravating circumstances applicable to each homicide: prior conviction of a violent

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[1]The trial judge did not read or consider the victim impact letters in determining sentence. (R 3199).

[2]The court imposed life sentences for each of the other counts. The sentences imposed as to each episode were imposed concurrently to each other and consecutively to the sentences imposed as to the other episodes and to any other sentences Rolling was currently serving. (T 7322).

felony; cold, calculated, and premeditated; heinous, atrocious, and cruel; and committed during a burglary or sexual battery. In mitigation, the trial judge found as statutory mitigating factors that Rolling had the emotional age of a fifteen-year-old and that he committed the crimes while under the influence of extreme mental or emotional disturbance. As nonstatutory mitigating factors, the trial judge found: (1) Rolling came from a dysfunctional family and suffered physical and mental abuse during his childhood and this background contributed to his mental condition at the time of the offense; (2) Rolling cooperated with law enforcement officers by confessing and entering a guilty plea, thereby saving the criminal justice system time and expense; (3) Rolling felt remorse for his actions; (4) Rolling's family has a history of mental illness; and (5) Rolling's ability to conform his conduct to the requirements of law was impaired because of his mental illness. (T 7325).

Notice of appeal was timely filed April 29, 1994. (R 3236). This Court has jurisdiction. Art. V, s. (3)(b)(1), Fla. Const.

STATEMENT OF FACTS

A. Penalty Phase[3] - State's Case-in-Chief

[3]A summary of the evidence relevant to the Fourth Amendment suppression hearing is included in Issue III. The evidence relevant to the Sixth Amendment suppression hearing is included in Issue II. The evidence relevant to the motion for change of venue is included in

1. The Prior Convictions

The state introduced into evidence Rolling's judgments and sentences for the following crimes: two counts of armed robbery in Georgia, dated June 1979; one count of robbery in Alabama, dated February 1980; one count of armed robbery in Mississippi, dated March 1986; robbery with firearm in Florida, dated September 1991; three counts of robbery with firearm, attempted robbery with firearm, two counts of aggravated assault on a law enforcement officer in Florida, dated October 1991; and armed bank robbery in Florida, dated August 1991. (T 2670-2675).

2. Pre-Gainesville

Legran Hewitt, an investigator with the Student Homicide Task Force (hereinafter "Task Force"), testified that Danny Rolling arrived in Gainesville on August 18, 1990, and departed August 30, 1990. (T 2680). A motel registration card from the University Inn in Gainesville, bearing the name Michael Kennedy and dated August 18-23, 1990, was introduced into evidence. (T 2681-2682). A handwriting expert identified the handwriting on the motel folio as Danny Rolling's. (T 3548).

Cindy Barnard, another Task Force agent, testified that a Taurus 9 millimeter handgun seized from Rolling's campsite in Gainesville was traced through previous owners to a Robert Ford

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Issue I.

in Sarasota. Ford sold the gun on July 28 or 29 to a Michael Kennedy, whom Ford identified from a photographic lineup as Danny Rolling. (T 2684-2685). Barnard also testified that a pair of eyeglasses found at the campsite were purchased at a Lens Crafters in Sarasota, Florida, by Danny Rolling, identifying himself as Michael Kennedy. A woman named Lola Seaman, who visited Rolling in his motel room in Sarasota and walked in on him while he was tape recording, identified the woman's voice on a tape found at Rolling's campsite as her voice. Seaman also saw Rolling in possession of a ten-inch hunting knife. (T 2687-2688).

Frank Troy, another member of the Task Force, testified that Michael Kennedy had stayed at the Travel Lodge in the 600 block of West Tennessee Street, in Tallahassee, Florida. A motel registration card bearing the name Michael Kennedy and dated July 17-18, 1990, was introduced into evidence. (T 2691-2692). A handwriting expert identified the handwriting on the document as Danny Rolling's. (T 3549). A store receipt for a Ka-Bar knife purchased at the Army-Navy store in Tallahassee on July 18, 1990, was introduced into evidence. (T 2692-2694). A Ka-Bar knife purchased by Frank Troy on April 26, 1993, from the same Army/Navy store was introduced into evidence. (T 2696-2702). Beth Norman, the store manager, testified the knife sold to agent

Troy was an exact replica of the knife sold on July 18, 1990. (T 2702).

3. The Homicides

The murders took place on three different nights at three different apartment complexes. Christina Powell and Sonya Larson were killed in the Williamsburg Apartments in the predawn hours of Friday, August 24, 1990. Powell's and Larson's bodies were found around 3 p.m. on Sunday, August 26. Christa Hoyt was killed at her duplex on SW 24th Avenue on Saturday, August 25, sometime after 10 p.m. Her body was discovered around 1 a.m. on Monday, August 27. Tracy Paules and Manual Taboada were killed at the Gatorwood Apartments in the early morning hours of Monday, August 27. Paules's and Taboada's bodies were discovered between 7 and 8 a.m. on Tuesday, August 28. State's Exhibit 8.

Crime Scene 1

Sonya Larson and Christina Powell were last seen on Thursday evening, August 25. (T 2725-2726). The following Sunday afternoon, the maintenance man of the Williamsburg Apartments called police in response to the concerns of one of the girl's parents. Officer Barber broke down a door leading into the upstairs of the apartment and discovered Larson's body on a bed upstairs and Powell's body on the living room floor downstairs. (T 2742-2750).

Crime scene investigators identified the rear dining room door on the first floor of the apartment, which was the second floor of the complex, as the point of entry. (T 2765, 2821). The dining room door was the only unlocked door[4] in the apartment; the other doors were secured with night chains and dead bolts. (T 2821). The wood face and door frame edge of the dining room door were damaged, as evidenced by fresh pry marks. (T 2829-2830).

Upstairs, an undamaged bra was found placed neatly across some books on the top of some shelves in the room where Larson's body was found. (T 2808-2809, 2845). A bag of clothing, containing a gray t-shirt, which appeared to have blood on it, was found above Larson's left knee. (T 2811, 2846). Her panties were against the closet door. (T 2811). Larson's shirt, which was pulled up around her neck, had multiple sharp tears that were consistent with the wounds on her body. (T 2815). The major portion of the blood on the bed was two to three feet above Larson's head. There were indications in the blood that something had been dragged through it after the injuries were sustained. (T 2813).

Downstairs, a pair of shorts was found in the hallway

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[4]The dining room door, though unlocked, required force to open because the frame was warped. (T 2827-2828).

between the kitchen and dining room (T 2774); a bra and bra strap were found near Powell's feet, along with the contents of a purse (T 2786, 2795); a yellow shirt was found at Powell's head. (T 2785, 2793). Blood on the shorts was consistent with Powell's blood type. (T 3115). Blood on the shirt was consistent with Larson's blood type. (T 3116). A two-inch void of blood or anything else on Powell's wrists indicated she was bound during the attack. In the kitchen were fresh groceries, including apples and bananas. (T 2803-2805). William Frank Hamilton, the medical examiner, testified that Sonya Larson died of multiple stab wounds.[5] (T 3566). In her right arm, there were four thrusts that went completely through the arm and three puncture wounds. There were five stab wounds, closely grouped, through the right breast, which penetrated the lungs and the heart. There was a four-inch wound beneath the left breast and beneath that a smaller stab wound of one inch in length. (T 3564). Approximately two quarts of blood had accumulated in the left pleural space. (T 3559). On the front surface of the left thigh was a slash measuring about five by two-and-a-half inches. (T 3564). The wounds were made with a fairly large knife, at least an inch thick. At the autopsy, Hamilton suggested the ideal

[5]Dr. Hamilton examined each crime scene before the bodies were moved and performed autopsies on each victim. (T 3558).

candidate would be a marine Ka-Bar knife. (T 3560).

When asked whether Larson was awakened or defended herself during the attack, Hamilton said the wound pattern in the arm was what he would expect to find if the arm had been brought up over the chest, perhaps in a reflex mode, if one were asleep. Hamilton said some of the wounds in the breast were from the thrusts that initially entered the arm. (T 2561). The leg wound did not indicate Larson defended herself or fought off the attack. (T 3566-3567). In Hamilton's opinion, the whole group of injuries could have occurred in a very short blitz-style attack in less than half a minute. Larson probably lost consciousness very rapidly, within a minute, if that long. (T 3567).

Although Larson's T-shirt was pulled upward, exposing her chest, the shirt had slits or tears corresponding to the injuries on her body, indicating the shirt was on the body in a normal fashion when she was stabbed. It appeared she had been pulled down to the edge of the bed after the attack and draped over the edge of the bed frame. (T 3577).

Christina Powell had a cluster of five stab wounds to the mid-back with perforation of the right lung, ligature marks on both wrists, small bruises on right and left legs, and a superficial cut on the right wrist. (T 3568, 3570). The wounds

appeared to have been made by the same type of weapon used on Larson. (T 3569). Hamilton could not tell in which order the blows were struck. Two wounds had short wound tracks. Two entered the lung, one of which was seven-and-a-half inches in length. Another wound track entered the right pleural space but did not puncture the lung, probably because the lung already had collapsed. Associated with this wound was an accumulation of blood in the right pleural space. (T 3571-3572). In Hamilton's opinion, Powell did not die as quickly as Larson and may have been conscious for a few minutes, perhaps a little less. (T 3572). A towel and a bottle of dish detergent were between Powell's legs and a sticky fluid in the whole pubic region. (T 3573).

Crime Scene 2

Elbert Hoover, the owner and manager of Christa Hoyt's duplex, testified that Hoyt's back yard was surrounded by a 6- to 7-foot fence. The only way to the backyard, other than over this fence, was through a gate to a storage area on the side of the apartment. The storage area was fenced with a chain link fence, which was stapled to the inside of a tree but could be unhooked and let down to get to the backyard. Hoover said he spoke to Hoyt around 5 p.m. on Saturday, August 25, 1990, because the gate was unlatched and he had noticed it unlatched several days before

as well. Hoyt said she had not unlatched it but the telephone repairman had been there that day. (T 2660-2867). That night, Hoyt played racquetball with a friend and returned home around 10 p.m. (T 2875-2976). She was wearing dark shorts, a shirt with a logo in the left corner, and white tennis shoes. (T 2875, 2879).

When Hoyt failed to report to work at the sheriff's department the following Sunday evening, Deputy O'Hara was dispatched to check on her. (T 2882). Mr. Hoover heard O'Hara knocking on Hoyt's door around 1 a.m. and came outside. Hoover noticed the gate was unlatched and the chain link fence down. (T 2869, 2870). They walked around to the sliding glass door leading into the rear of the apartment. O'Hara shined a flashlight into the apartment where the blinds were raised ten to eighteen inches and saw Hoyt's unclothed body on the edge of the bed, in a sitting position, clearly dead. (T 2888-2889, 2894-2895).

Crime scene investigators found a racquetball racket and can of balls near the front door, which was locked. (T 2900, 2910). There was a recessed area near the front door, where a bookshelf had been located. (T 2910). The bookshelf had been moved through the kitchen, down the hall, and into the bedroom. (T 2913). Some of the items in the bookcase were on the floor

near the bookcase, others were in the southeast corner of the room, including picture frames in a pillowcase that had been on the bed. (T 2914). The sliding glass door was identified as the point of entry based upon pry marks found on the door and door frame. (T 2914-2915). A pair of shorts and a balled-up T-shirt with tear marks were found on the bed. A used tampon was found on the floor near the wall. Torn panties were on the floor. A portion of a bra was at the foot of the bed; another portion under a book bag on the floor. (T 2817-1818). The body was posed on the bed in a sitting position, with shoes and socks on. A large pool of blood emanating from the feet area was on the floor, leading from the doorway into the bedroom, and from the front of the closet to the foot of the bed. Settling of blood in the back indicated the body had been lying flat for a period of time before it was moved and posed. (T 2921).

Dr. Hamilton testified that Hoyt died from a single stab wound to the back. (T 3579). The wound was seven-and-one-half inches in length and penetrated the aorta, left lung, and left breast. The wound was consistent with the wounds in Larson and Powell and could have been produced by the same weapon. There was a smaller superficial wound on the right arm. (T 3582). On Hoyt's back was a pattern of lividity, or discoloration, indicating the body was lying on its back for a while after

death, then moved to a sitting position. Sperm cells were found in the vaginal smear. (T 3584). Dr. Hamilton said Hoyt's survival interval would have been quite brief; she would have lost consciousness in probably less than half a minute. (T 3607).

Crime Scene 3

Tracy Paules spent the weekend at Merritt Island, arriving home around 9:30 p.m. on Sunday, August 26. (T 3084). She spoke to a number of friends and relatives on the phone, including a friend from Ft. Lauderdale, Lisa Buyer, who called around midnight and told her about the first two murders.[6] They talked on the phone until shortly before 1 a.m. (T 2993, 3085). Paules's roommate, Manual Taboada, who was bartending at Bennigan's that night, clocked out at 1:24 a.m. and was seen on Archer Road, between Bennigan's and the Gatorwood Apartments, around 1:30 a.m. (T 3085-3086). A man in the apartment directly above Paules and Taboada heard a scream between 2 and 3 a.m., went out on the balcony, did not hear anything else, and went back to bed.[7] (T 3088). When Paules failed to return Buyer's phone calls Monday or Tuesday, Buyer called Tom Carroll, a friend

[6]Christa Hoyt's body had not yet been discovered. Hoyt's body was found about the same time Paules and Taboada were killed.

[7]The witness's girlfriend had asked him to come stay at her apartment after she found out about the first two homicides. (T 3088).

in Gainesville, and asked him to check on Paules. (T 2994). Carroll went to Paules's apartment early Tuesday morning, and the maintenance man opened her apartment and discovered her body. (T 3003-3004).

Crime scene investigators found Paules's body on the floor in the hallway. Taboada's body was on the bed in his bedroom. (T 3009-3010). The doorway leading to Paules's bedroom was damaged and appeared to have been forced open using bodily force. Blood on the door was consistent with Taboada's blood type. (T 3018-3019, 3118). The locking mechanism was on the floor in front of the door and the door was open. (T 3061). Paules's bed was covered with blood. The carpet was blood-stained as if her body had been dragged from the bedroom into the hallway by her feet. (T 3028). There was adhesive on her wrists and a towel between her legs. (T 3056). A blood-stained towel was found in the bathroom on the toilet. (T 3060). A curling iron, paper bag, and other items were found on the floor in the hallway. (T 3063). The curtains in Paules's bedroom had been taped shut with silver duct tape. (T 3065). The contents of her purse had been dumped on the bed after the stabbing. (T 3066). A white blood-stained T-shirt was on the floor in her bedroom. (T 3070). Blood on the T-shirt was consistent with Taboada's blood type. (T 3116-3117).

In Taboada's bedroom, there were blood spatters on two walls and the pillow. (T 3034, 3062). Taboada's blood-stained shirt had multiple tear marks on the front. (T 3077). He had wounds to the mid-portion of his body, as well as cuts on his hands, arm, and legs. (T 3038-3041).

There were spots of diluted blood on the kitchen floor. In front of the sink was a bottle of dish detergent that was greasy, as if it had spilled or someone had wiped their hands over it. In the kitchen was another open bottle of cleanser, its lid on the dining room table. (T 3059).

Crime scene investigators identified the sliding glass door in the living room as the point of entry. (T 3029). The screen to the door was dislodged and leaning up on the side of the porch. (T 3051). There were pry marks on the door, near the locking mechanism. (T 3057). The pillow on the loveseat appeared to have blood on it, as well as a paper towel found along the base board of the southern wall of the living room. (T 3055). Between the dining room and front door was a blood-stained towel. (T 3058).

Dr. Hamilton testified that Taboada died of multiple stab wounds. (T 3590). He had thirty-one cuts and stabs, which included a slash of the chin, a stab wound of the neck, a grouping of eleven stabs and cuts in the upper chest, a large

stab wound in the upper abdomen, a slash on the right thigh, two cuts on the lower right leg, and cuts and stabs on the left wrist and hand and right hand. (T 3589). He was most likely sleeping on his back when attacked. (T 3590). The assault could have occurred in a very short period of time, although he would not necessarily have immediately collapsed. The wounds on his hands were not typical defensive wounds but were consistent with his having grabbed at his assailant. He could not have struggled long, though, because the internal organs were punctured, and he lost a great deal of blood in a short period of time. (T 3591, 3592). Taboada was six feet one-inch tall. (T 3594). He appeared in good health and was very muscular. (T 3595). In Hamilton's opinion, Taboada would not have remained conscious for more than a minute, possibly a little less. (T 3597). The wounds were consistent with the Ka-Bar knife. (T 3597).

There were three stab wounds on the back of Tracy Paules. One wound was a short internal wound ending in the spine. This wound would not have been fatal. Another wound penetrated the left pleural space and left lung. This wound would have been fatal. A third wound went into the left pleural space but did not hit the lung, probably because the lung was already collapsed somewhat from wound two. Associated with the third wound was an accumulation of several quarts of clotted and unclotted blood in

the pleural space, indicating the cause of death was acute blood loss. It probably would have taken between two and five minutes for her to go into irreversible shock. (T 3600-3602). Based upon the blood present on the bed, floor, and across the carpet, Paules was probably stabbed on the bed, then the body dragged across the floor into the hallway. (T 3604). There was a towel between her legs and sticky material in the pubic region, which Hamilton took to be liquid soap. (T 3605). Sperm was deposited in the rectum. (T 3606). The wounds were consistent with the wounds in the other bodies. (T 3607).

4. The Campsite

Officer Tim Merrill testified he was on patrol in southwest Gainesville at 1 a.m. on Wednesday, August 28, 1990, when he saw a white male and a black male walking north on S.W. 34th Street. The two men walked through an open gate into a fenced wooded area belonging to the University. (T 3121-3122). Merrill called for backup because there had been bank robberies in the area involving a white male and a black male, and he and Officer Liddell followed the men into the woods. (T 3123-3125). When they called out to the men to stop, the black male stopped, but the white male ran off into the woods. The black male, Tony Danzy, told the officers the white male was named "Mike." (T 3126). A police dog tracked "Mike" to a tent, some 200 to 300

yards into the woods. Near a tree was a raincoat partially covering a large sum of dye-stained money, indicating it was dye-pack money from a bank robbery.[8] (T 3130-3133). Inside the tent was a black and beige bag containing a Taurus automatic in a gun box. (T 3134). On September 5, 1990, a police detective found a blue bag, containing dye-stained currency, a pair of black and white Penn gloves, and a brown ski mask, about 75 yards west of the campsite. (T 3149).

The state introduced into evidence the following items found at the campsite: the Taurus 9 millimeter semi-automatic, magazines, and removed rounds (T 3140); the black and beige bag (T 3141); a Workman's Choice screwdriver (T 3143); a cassette player with tape inside (T 3144), from which Rolling's fingerprint had been lifted (T 3145); duct tape (T 3146); black pants (T 3148); black tank top (T 3149); the blue bag containing dye-stained currency, Penn gloves, and brown ski mask. (T 3149-3153). The ski mask fibers were consistent with fibers removed from the duct tape taken from the curtains of Tracy Paules's bedroom. (T 3207). The adhesive substance removed from Powell's wrists and leg, from Paules's wrists, and from Hoyt's watchband was an off-white colored, pressure-sensitive adhesive, consistent with duct tape. (T 3207-3209).

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[8]The dye-pack explodes when the robber gets outside the front door. (T 3133).

Task Force agents determined that the WalMart located on Archer Road and 34th Street sold tents like the tent found at the campsite. (T 3162). One such tent was sold on August 23, 1990, at 6:03 p.m. (T 3165).

The cassette tape found at the campsite was played for the jury. (T 3176-3203). The first part of the tape consisted of a dialogue from Rolling to his parents and brother, expressing his love for them, and a number of country-western songs, sung to guitar accompaniment. This part of the tape was interrupted by a woman's voice. The second part of the tape was recorded at the campsite. At the end of the tape, the voice states, "Well, I've got to go now, I've got something I've got to do." (T 3172).

5. Rolling's Statements

Rolling was interrogated by members of the Task Force[9] at Florida State Prison on January 31, 1993, and on February 4, 1993. Both interviews were audiotaped. The February 4 interview also was videotaped. (T 3211). In both interviews, Florida State Prison inmate Bobby Lewis was present. The method of questioning was the same for both interviews: The Task Force asked Lewis the questions, Lewis answered, then a law enforcement officer would ask Rolling if the response was correct, to which Rolling would respond "yes" or "no." At times, after a question

[9]Edward Dix, Steve Kramig, and LeGran Hewitt.

was asked, Rolling would lean over and whisper to Lewis, Lewis would then respond, and a law enforcement officer would ask Rolling if the response was correct. (T 3221). Redacted versions of both interviews were played for the jury.[10]

The state also played for the jury a fourteen-minute statement videotaped by WFTV, Channel 9, Orlando, at Florida State Prison on February 14, 1993. (T 3312-3314).

January 31 Statement

The interrogation began at 8:25 p.m. and ended at 12:25 a.m. (R 1883, 2009). Bobby Lewis was not present for the first fifteen to twenty minutes of the interview. Rolling told the Task Force he had summoned them because he thought they had something to do with trashing his cell,[11] and because he wanted these things to be resolved, and because he wanted to help Bobby.[12] (T 3334, 3345). After the Task Force presented Rolling with a waiver of rights to sign, Rolling said only Bobby would

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[10]The statements were redacted to exclude references to other crimes and to the post-mortem mutilations of the bodies.

[11]Rolling said the guards had torn up his cell and trashed everything he owned. He was particularly upset about a Valentine's Day card he had worked on for five or six hours. (T 3334, 3348, 3365-3366, 3380).

[12]Rolling asked not to be separated from Bobby Lewis because he needed Bobby's support. (T 3335). He wanted to see Bobby a free man (T 3341) and it would break his heart if they could not do anything for Bobby. Bobby was a "worthy soul, and he deserves a chance to make his life good, and out of all of this I'm trying to do something for someone." (T 3358). When the agents told Rolling they could not get Lewis paroled, Rolling said, "I was raised by a policeman. I know what you gentlemen can do when you put your mind to it." (T 3359).

make statements and answer questions about the Gainesville homicides. (T 3346). After being told the waiver was "just kind of something legal for us that we've got to get through to keep going here" (T 3346), Rolling signed the waiver (T 3365), and Bobby Lewis was brought into the room. (T 3369). The agents began questioning Rolling about the homicides, but Rolling repeatedly refused to answer any questions, stating Lewis was his "mouthpiece" and "confessor." (T 3369, 3382). The interview was terminated at 9:35 p.m. When the interview resumed at 9:50, the agents explained they had discussed how to make the interview workable while off the tape. (T 3386). The interrogation then proceeded, with the questions directed to Lewis. Lewis said Rolling had written a letter describing the murders, which Lewis had copied word-for-word. Lewis then destroyed the original letter. Reading the letter, Lewis told the Task Force how the murders occurred. (T 3392-3394).

Rolling entered the apartment of Christina Powell and Sonya Larson around 3 a.m. through the back door at the top of the stairs. The door was unlocked. (T 3394). He did not use the screwdriver. (T 3401-3402). Powell was asleep in the living room. Rolling stood over her for a moment, then went upstairs into Larson's bedroom. (T 3394). He stabbed Larson several times, the first blow landing in the area of her upper left

chest, near the collarbone. At the same time, he pressed tape over her mouth to muffle her cries. She fought and he stabbed her again. She tried to fend the blows with her arms. One blow pierced her right upper breast but only nicked it. She continued to struggle and he stabbed her again. The last blow was to the inside of her left thigh. The whole thing lasted maybe 30 seconds, and she died. (T 3395).

Rolling then went back downstairs and stood over Powell, who was still asleep on the couch. He pressed tape over her mouth, taped her hands behind her back, stripped her, and raped her. He then led her to the middle of the living room, made her lie down on her stomach, and stabbed her one time through the heart or upper right lung. (T 3396).

He went back upstairs and removed the tape from Larson. He removed her panties but did not have sex with her. He went back downstairs and pulled the knife from Powell's back. He removed the tape from her mouth and hands, douched her vagina with a cleanser from the kitchen, and turned her over on her back. He went to the kitchen and ate an apple and banana. (T 3397). He used a marine military Ka-Bar knife bought at an Army/Navy store in Tallahassee, near the bus station. (T 3398-3399).

Rolling entered Christa Hoyt's apartment around 10 p.m through the rear sliding glass doors, using a screwdriver. Once

inside, he moved a bookcase from behind the front door to the bedroom in order to surprise Hoyt when she arrived home. Around 11 p.m., he saw her walking across the grass towards her apartment. After she entered, he jumped her and a struggle ensued. He took her to the floor, taped her hands behind her back, and taped her mouth. He led her to the bedroom, placed her on the bed, and removed her clothing. He began to play with her and discovered she was on her period. He pulled the Tampax out and raped her, then turned her over on her stomach and stabbed her one time in the heart through the back. She died quickly. Eight to ten seconds and it was over. Then he removed the tape from her hands and mouth. (T 3403).

Later, he discovered he had lost his wallet and went back to Hoyt's apartment to search for it but could not find it. While there, he set the body on the edge of the bed, propping the elbows on the knees. A stream of blood poured from the left breast and pooled at the feet. Then he left. (T 3404).

Rolling entered the apartment of Tracy Paules and Manny Taboada around 3 a.m. through the double glass sliding doors, using the same heavy screwdriver he used at Hoyt's. (T 3423). Once inside, he entered Taboada's bedroom, where Taboada was asleep on his back. He stabbed him through the solar plexus upwards into his heart. He fought, and Danny stabbed him eight

or nine more times. The struggle took about forty to sixty seconds, and it was over. (T 3423-2434).

Tracy Paules heard the commotion and opened her door to investigate. She saw Danny and ran back into her bedroom, locking the door. Danny kicked it in and was on her. He taped her hands behind her back and taped her mouth. He removed her t-shirt and raped her, turned her over on her stomach, and stabbed her once in the back through the heart. She died quickly. Eight to ten seconds, and it was over. He removed the tape and dragged her into the hallway, went into the bathroom, wet a wash cloth, wiped the blood from her face, and raped her again. He douched her out with a cleanser and left, taking a black muscle shirt from Taboada's dresser. (T 3424).

Rolling went from the last scene to bury the knife and gloves. (T 3435). When asked why the breasts of the last victim's body were not removed, Lewis explained that after Paules died, that was the end of it. (T 3458). According to Lewis, the reason for the murders was that Rolling was subjected to inhuman conditions while incarcerated at Parchman Penitentiary in Mississippi. He just snapped and made up his mind he was going to search out and take one victim for every year he had been punished. (T 3432-3433). Paules was the fifth victim for the fifth year he served in prison. The second she died, he was

through. (T 3458).

Lewis said Danny buried the knife and gloves behind an old chicken coop down a dirt road near the convenience store across from the Gatorwood Apartments. It was close to daylight when he buried the knife and gloves, then he went back to the campsite. (T 3435-3341).

When asked if there was any special reason why Christa Hoyt's head was removed, Lewis said Danny did not understand why he did these things, except he had a "strong urge, like a hunger or sexual drive or desire, possession, a force compelling him to do these things, something he could not control at the time." (T 3414-3415). Danny did not know why he did the things he did other than that it was compulsion and drive. (T 3478). When asked whether Danny had seen Hoyt before the night she was killed, Lewis said he may have, but the choice of victims was basically at random. Rolling had tried some other places and been run off. He was not stalking specific individuals. (T 3415). Lewis said Danny was stopped by police once while he was out looking for a victim. The policeman checked his ID because a headlight on his bicycle was out, then let him go. (T 3441). At another place where Danny was looking for a victim, a security guard came out and asked him what he was doing and called the police. (T 3442).

Lewis said there were different personalities or driving forces behind what Danny does: There is Danny. There is a Jesse James side, a force known as Ennad. There is a force known as Gemini. Gemini was at the five murders. (T 3434). Danny knew the difference between right and wrong, however, and was not interested in any kind of insanity defense. (T 1359-1361).

Lewis said Rolling spent two weeks in Gainesville, one week at the University Inn, one week at the campsite. (T 3449). Rolling had never been to Gainesville before and did not know what brought him there. (T 3457). Danny denied sodomizing any of the victims. (T 3452). When Danny went to the crime scenes, he carried a bag containing the knife and whatever else he took with him. He wore the mask at each crime scene. (T 3443).

Rolling made a number of statements himself during the interview. He confirmed that he had stabbed Powell only once and said he did not go through any of the victims' belongings at the Larson/Powell residence. (T 3397-3398). He was wearing gloves at all three scenes. (T 3429). He did not eat or drink anything at scenes 2 or 3. (T 3418, 3473). He took money from one wallet, possibly at the Hoyt residence. (T 3427). When asked if any of the victims were forced to perform oral sex, he said, "maybe, I don't know." (T 3452). He said he did not take anyone to the scenes with him and no one else knew about them.

(T 3453).

He said he "struggled with this" all his life and was able to overcome it until it just got bigger than him. (T 3447). He delivered a fairly lengthy monologue on good and evil, God and Lucifer, and cherubim and demons. (T 3459-3461).

Danny told the Task Force he did not hate his dad, he loved his dad, but one day after his "problems" came to his dad's attention, he told Danny, "Danny, the word's out now. You've got to live with it." After that, it just got worse. Lewis explained that what he meant by "the word was out" was that Danny began peeping after a neighbor boy took him to peep at a young girl in the neighborhood. The peeping became an obsession and continued even when Danny was married. (T 3463). Danny told the Task Force he used the peeping as an escape from the turmoil of his household, that his mom and dad fought all the time, and his dad drove his mom to a massive nervous breakdown. He would look and see how other people were living and how they were happy and would become a member of their family, in a way. (T 3464). He said he peeped at Paules and Hoyt before entering their apartments. (T 3466).

Danny confirmed that he was headed to the campsite when he and Tony Danzy were stopped by the police. He purchased the tent at WalMart and the pistol from a man in Sarasota. (T 3473). He

got the screwdriver at WalMart, but did not remember where he got the duct tape. (T 3408, 3418). He carried the pistol to the crime scenes but did not use it. The money found at the campsite was from the bank robbery. (T 3475). The clothing, cassette player, tape, and recording on the tape belonged to Danny. (T 3476). The screwdriver found at the campsite was used in the homicides. The knit mask found at the campsite was used in the homicides and the bank robbery. (T 3480).

Lewis said the first part of the cassette tape was made at the Cabana Inn in Sarasota. The second part was made at the campsite. (T 3477). When Rolling said in the tape he had something he had to go do, he was talking about one of the homicides. (T 3478).

February 4 Statement

Task Force members Dix, Kramig, and Hewitt were present, along with Bobby Lewis and Rolling. Lewis told the officers there were two campsites. The first campsite was across the highway from Bennigan's, 200 to 300 yards out into the woods. Danny committed all five homicides from this first campsite. After the last homicide, Rolling moved the campsite to the location where the police eventually found it. Later that morning, he committed the bank robbery around 11:30 a.m. (T 3257-3261, 3279).

The next part of the interview involved the location of the knife and gloves Rolling had buried, which the Task Force had been unable to find. (T 3262-3278).

The Task Force members then questioned Lewis and Rolling about some details of the homicides.[13] Rolling was unaware there were two females at the Williamsburg residence before he broke in and had not seen either Powell or Larson before he entered their apartment. (T 3282-3283). He had peeked into Hoyt's apartment and watched her undress one or two nights before he broke into her apartment. (T 3284). He had peeked into Paules's window the same night he broke into her apartment, staying there until it was time to break in. (T 3285-3286). His statement on the tape that he had something he had to go do referred to his going to the first crime scene. (T 3289). He did not remember how he took the victims' clothes off, he may have ripped them, he may have used his knife. (T 3290). He did not use the screwdriver to open the door at crime scene 1. (T 3295). He did not go back to any of the crime scenes while law enforcement was processing them. (T 3300). He was taking Tony Danzy back to the campsite the night it was busted to get money for drugs. (T 3301). He purchased the tent and foam mattress; he shoplifted the

[13]As in the January 31 interview, Lewis answered the questions, the agents then asked Danny if the response was correct, and Danny either confirmed or disavowed Lewis's response.

screwdriver, the gloves, and the duct tape. (T 3302). These items were obtained to be used in the murders. (T 3304).

Rolling said he had been dealing with different personalities all his life, but they became really prevalent when he was in solitary confinement at Parchman, where his cell got flooded out several times a week with three inches of raw sewage. Ennad, a Jesse James type, was not a good person but was not really an evil person. The person he really struggled against becoming was a person called Gemini, who "was evil, period." Danny said this was not some kind of insanity, that he had no one to blame but himself, but he wanted to understand it because "Danny's not that person. Anybody that has ever known me knows that Danny just wanted to be a good person, and likeable person, somebody who cared; and I do care." (T 3297-3298). When asked if he had anything to say to the victims' families, he said he could not fathom them having pity on him and did not ask them to have pity on him, but hoped they could find it in their hearts to forgive so the bitterness and hatred about all of this would not destroy what was left of their lives. (T 3298-3299).

<u>February 14 Statement</u>

In the Channel 9 interview, Rolling read a prepared

statement in which he defended Sondra London[14] as a sincere and honest woman of extraordinary talents. (T 3317). London was not using him. No one was using him. (T 3318). He had been dealt with honorably by all parties involved in the investigation: "The wheels of justice may turn slow, but they do turn. You don't ask of justice, it asks of you." No prison official had made any deals with him or made any promises to him or Bobby Lewis, and he had not been coerced into making any statements. (T 3317-3319).

6. Russell Binstead's Testimony

Rusty Binstead, an eighteen-year resident of Florida State Prison, convicted of 20 felonies, testified that Danny made statements to him in July of 1992 and between February and November of 1993. (T 3495-3496, 3502). Binstead first met Danny in July of 1992 on the psychiatric ward (W-wing) at Florida State Prison. Danny was in tears and told Binstead he was being harassed and called names, and he wished people would leave him alone. He said he had killed these people, but God had forgiven him and he was going to heaven. (T 3498). Binstead advised Danny to fake a suicide attempt. (T 3499). Binstead said he wanted Danny to stay on his wing because he hoped to elicit

[14]Sondra London is an author, editor and publisher, a former cohort of Bobby Lewis, and Rolling's fiancé. See Issue II, infra.

valuable information from him. Binstead knew Lewis had been talking extensively to Danny about the murders. To induce Danny to want to stay, he told Danny he could be killed if he were transferred to another wing. (T 3500). Danny was opposed to the plan but went through with it anyway. (T 3536). Binstead saw Danny again at the V-wing at FSP in February of 1993. Binstead knew Danny had been talking to Lewis about the murders and had observed Danny and Lewis engaged in very intense conversations for eight, ten, twelve hours a day. (T 3500, 3522). Danny was very upset with and felt betrayed by Bobby Lewis because Lewis had left the wing without telling Danny he was leaving. (T 3501). Danny also felt Lewis was responsible for Sondra London not being able to visit him. (T 3522). A day or so after Lewis left the wing, Danny began telling Binstead bits and pieces about the murders. (T 3500).

According to Binstead, Danny said he used the Ka-Bar knife because it was designed for killing. It was heavy with a broad blade and bloodline down the middle, which is a groove that runs the length of the blade and allows oxygen for penetration and removal from a body. It went in like butter, came out like butter, and stabbed through bone. (T 3504-3505). Binstead also said Danny told him he made Christina Powell perform oral sex on him. (T 3505). When Binstead asked Danny if he was concerned

about her biting him, he said no, she was terrified and would have done anything, hoping she could live. He had Larson's blood all over him, which added to her terror. While raping Powell, she told him he was hurting her, and he told her to "take the pain, bitch." (T 3506-3507). Binstead said Danny said he regretted not raping the girl upstairs because she had a better body. (T 3507). Danny gave Binstead a letter describing Christa Hoyt's murder. (T 3508). The letter, redacted to exclude any references to post-mortem trauma, was read to the jury. (T 3527-3528).[15] Binstead said Danny positioned Hoyt's body as he did to leave everybody something to think about and to invoke terror. (T 3530). Danny gave Binstead a poem entitled "Gemini," which was also read to the jury. (T 3510, 3530). Binstead said Manny Taboada put up a hell of a fight. Taboada realized he was fighting for his life and came close to overpowering Danny. (T 3518). After Danny saw Tracy in the hallway and kicked in her door, she asked, "You're the one?," and he told her, "Yeah, I'm the one." (T 3519).

Binstead said Danny was under the influence of cocaine and alcohol at the time of the murders. Binstead said Danny had mood swings and would go from calm to anger to tears. Danny told

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[15]The description in the letter given to Binstead was nearly identical to the description of Hoyt's murder Lewis gave the police on January 31.

Binstead he had been visited by demons and described a specific incident where a demon went up the wall and around a curtain, bringing a rush of cold air with it. It was Binstead's impression that Danny truly believed in these demons. Danny said he was Ennad when he robs and Gemini when he kills, and Gemini is invincible. (T 3558-3559).

7. Bobby Lewis's Testimony

Bobby Lewis, another eighteen-year resident of Florida State Prison (T 3620), testified that he had hundreds of hours of conversations with Danny about the murders. (T 3623). Along with Binstead, he helped Danny fake a suicide attempt so Danny could stay on W-wing. (T 3221). Lewis said Danny told him the victims he raped (Powell, Hoyt, and Paules) were alive for a "fairly long time" before he killed them. (T 3625). Danny said he did what he did to Hoyt to make a statement. He was trying to terrorize the city of Gainesville, trying to make himself famous, to be a superstar among criminals. (T 3627).[16] Danny was surprised Taboada came up fighting. Taboada called him a "bastard" and "son-of-a-bitch." (T 3630). Danny was terrified that Manny was going to get him. (T 3631). Taboada was struggling to let Paules know, to give her a chance. When Paules

[16]The defense objected to this statement by Lewis as improper embellishment as the statement had not come out in any of the numerous statements Lewis gave law enforcement or in his deposition. The trial court overruled the objection. (T 3627-3628).

came in, she screamed. (T 3630).

Lewis said there were two aborted attempts at finding victims before the first homicide. Rolling went to an apartment complex near a hospital and was standing on a can looking at two women when a night watchman asked him what he was doing, and he ran off. (T 3633). He also was interrupted while on the second-floor balcony of another apartment looking at a woman washing dishes. He had taken off his clothes and was about to go inside when a man downstairs asked him what he was doing. He grabbed his clothes, jumped off the balcony, and ran away. (T 3634).

8. Tool Mark Examiner and Microanalyst Testimony

David Warniment, an FDLE tool mark examiner, said the Workman's Choice 5/16th-inch screwdriver found at Rolling's campsite was part of a set manufactured by Vermont American for their 1989 Christmas set, available exclusively at WalMart. (T 3650-3651). In Warniment's opinion, the marks made on the sliding glass doors from Hoyt's residence and the Taboada/Paules residence were made by the Workman's Choice screwdriver found at Rolling's campsite. (T 3653, 3654). Warniment could not identify that particular screwdriver as having been used to make the marks on the door from the Powell/Larson residence although the marks we

re consistent with it. (T 3649).

Katherine Warniment, an FDLE microanalyst, said the two damaged bras found at scenes 1 and 2 were torn in a manner that allowed removal from the front. The damage was consistent with pulling or tearing rather than cutting. (T 3661-3665, 3671-3673). The gold, sleeveless t-shirt found near Powell's body, the t-shirt found near Hoyt's body, and the t-shirt found in Paules's bedroom had vertical tears down the front and cuts through the sleeves that allowed opening or removal from the front. (T 3688-3689). The damage to Powell's and Hoyt's shirts was typical of tearing damage, but an implement may have contributed to the damage. (T 3666-3668, 3675-3679). Paules's shirt had cuts typical of both tearing and cutting damage. (T 3681-3686).

B. Defense Case-in-Chief

1. The Abuse

Six witnesses testified about Danny's family: Claudia Rolling, his mother; Agnes Mitchell, his aunt; Charles Strosier, his cousin; Bernadine Holder, Claudia's best friend, who lived across the street from the Rolling family in Shreveport; Bunny Mills, a former girlfriend; and Arthur Carlisle, a former attorney. The witnesses described a chaotic and unstable home in which physical and emotional abuse were a daily occurrence.

Claudia Rolling's husband, James Harold Rolling, began

abusing her the year they married,[17] when, while she was pregnant with Danny, he choked her so badly she almost passed out. Throughout the marriage, James struck her, held her down, and pushed her, often leaving bruises. (T 3776). Danny and Kevin frequently witnessed the abuse. They tried to help her as they got older but were terrified of their father. They begged her to leave and never come back. (T 3789, 4294). Claudia left frequently, some 15 to 20 times during the marriage, but always went back.[18] (T 3833, T 3849-3852).

James Harold's rage was not directly solely towards his wife. He abused Danny from an early age, although he did not actually strike Danny until Danny was crawling. James did not like the way Danny crawled, so he kicked him down the hall. (T 3779). He was verbally abusive to Danny and Kevin "every day

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[17]James and Claudia married in 1953. Claudia was 19 years old. Danny was born May 26, 1954. Kevin was born fifteen months later. (T 3774). The family moved back and forth between Columbus, Georgia, and Shreveport, Louisiana, until Danny was six years old, at which time they settled in Shreveport, where James became a police officer. (T 3778, 3781, 3784-3785). Claudia also worked outside the home and was at work when some of the abusive incidents reported by relatives and neighbors occurred. (T 3782, 3795, etc.).

[18]Claudia left James the first time, before Danny was born, after James began sleeping with a knife under his pillow. (T 3777-3778). She left him another time after he busted her lip. (T 3781). She left another time after she tried to shoot herself with James's gun but missed after a fight in which James accused her of being a whore. (T 3782-3783). She left another time when James put Danny out of the house and threw all his clothes in the carport because he had worn jeans to church. (T 3805). Each time Claudia left, James would beg her to come home and promise he would change, sometimes on his knees. (T 3781, 3851-3852). According to Agnes Mitchell, Claudia left James "20, 25, 30 times, whenever he'd beat the hell out of her." (T 4294).

of their lives." (T 3788). They were so nervous at the dinner table, one of them invariably would knock something over or drop something, giving James an excuse to lay into them. James once told them not to breathe out, and they held their breaths until they were blue in the face. (T 3787).

The physical abuse included whippings with a belt, "fisting" the tops of their heads, handcuffing, shoving, and holding them by the throat against the wall. They received whippings about twice a week. Kevin was whipped so badly once, when he was about 14, that he wet his pants. Danny got the brunt of the whippings because Kevin learned early to hide his emotions and stay out of his father's way. (T 3787-3789, 3795). James whipped them when they made anything below a C on their report cards, and since Danny's grades were never satisfactory after the third grade,[19] he always got a beating on report card day. (T 3802-3803).

After one beating, when Danny was in high school, he left the house through a bathroom window, leaving a note in lipstick on the mirror, "I tried, I just can't make it." He went behind a nearby drive-in theater and contemplated killing himself with a razor blade but could not do it. (T 3798-3801). There were

[19]Danny repeated the third grade because he had tonsillitis that year and missed a lot of school. James's reaction was that his no account kid had failed again. (T 3793-3794).

other times he thought about taking his life. He was always trying to get rid of that person his father made him believe he was. He had no self-esteem, no self worth. When Claudia told him she loved him, he would say, "You love me, Mom?" and would then ask, "Why? What is there here for anybody to love?" (T 3802).

When Danny was about 14, he came in the house with beer on his breath. James threw him down, handcuffed him to a chair, and had the police put him a juvenile detention center for two or three weeks. Claudia was not allowed to go see him.[20] (T 3808).

Claudia had a nervous breakdown when the boys were in high school. James had refused to let her talk on the phone and would rant and rave every time the phone rang. The phone rang one morning, and James started yelling and screaming. Claudia remembered thinking, "Okay, you win," and then it was like she jumped down a big tube. She did not remember anything until she woke up in the hospital, where she stayed four or five weeks. (T 3810).

Danny went into the Air Force when he was 17 but was discharged, honorably, in less than a year.[21] Shortly after he

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[20]Claudia asked James's permission for everything she did in her marriage. (T 3797).

[21]His commanding officer told Claudia he was not mature and did not have the nervous system or maturity necessary for military life. (T 3812).

returned, he became active in the Pentecostal Church. The night he was saved, he spoke and sang in tongues. Danny was admired by the church people for his kindness to the older people and little children. He met his wife-to-be, O'Mather, at church and got married when he was 19. They had a little girl, whom Danny worshipped. (T 3813-3814). The marriage got shaky, though, and they started having trouble all the time. One morning, O'Mather called his parents and said Danny would not get up and go to work. Claudia and James went over, and James went in the bedroom where Danny was in bed, straddled him, grabbed his hair, held his head back, and put a knife to his throat. (T 3816).

Danny took the divorce very hard. He screamed and ran around and around the house when the papers were served on him. (T 3815). He was very depressed after the divorce. The next time Claudia heard from him, he was in jail in Columbus, Georgia, charged with armed robbery. They got a letter from him that said, "Dear Mommy and Daddy," followed by two pages of "I love you." (T 3818). When they went to see him, he went straight to his dad and begged him, "Please tell me you love me. Say you love me." James finally said, "I love you," in an offhand way, as if he were saying it just to shut Danny up. (T 3819). Danny told Claudia he got involved in the robbery because he thought someone would blow him away. She believed it was another way of

getting rid of that "no account Danny." The gun was empty. (T 3820).

Danny got out of prison in 1982 and returned home. He had various jobs but never held one for long. He left again, and was convicted of armed robbery in Mississippi. He returned to Shreveport in 1988 and again had little success with work. He was very depressed about not being able to get a job and told Claudia he felt useless, worthless. (T 3822-3823).

During his last visit home, Claudia and Danny were sitting at the kitchen table talking when Claudia looked up and noticed that Danny looked totally different. His whole countenance looked different. It was hard, and his voice was unrecognizable, coarse and deep. Claudia was shocked. Then he just flipped back. His face softened and his voice went back to normal. When she asked him what happened, he said he had a person that was part of him and who had a name. Claudia could not remember the name he told her but remembered it was a horrible name, not something she would want to remember. (T 3834-3835).

The last time Claudia saw Danny in the Rolling house was the night Danny shot James. In the months before the shooting, James had been saying things like, "I'd as soon shoot him as look at him." (T 3830). That day, Danny came in the kitchen and put his foot on a bench to tie his shoe. James yelled at Danny about

putting his foot on the bench. Danny just said, "I got my foot on the bench, old man. What are you going to do about it?" James went to the back of the house, and Danny left. James came through the kitchen with his gun and ran out the door, saying "I'll just get rid of all of you." (T 3828). Claudia heard three shots, then James came back inside and told her to call the police. Danny burst through the door and crouched down at the table. James was waving his gun around, and Danny said, "You want to kill somebody, kill me, but don't hurt my mom." Claudia covered her eyes, heard a shot, and left the room. When she returned to the kitchen, James was on the floor with a bullet in his head. (T 3830).

James Harold told Claudia about his family's history of mental illness. (T 3846). James's grandfather killed his grandmother by cutting her throat from ear to ear while she sat at the table, soaking her feet in a pan of water. James witnessed this and remembered looking down in the water and seeing it all bloody. (T 3835). One of James's uncles had put a shotgun in his mouth and blown his head off. Another uncle died in a mental institution. A brother was functioning only because he was on medication. His mother used to get extremely angry, yelling and doing bizarre things. Claudia assumed she was schizophrenic as she had been told the family had that illness.

(T 3835-3836).

Agnes Mitchell[22] recalled many incidents of abuse towards Claudia and the children. (T 4275). James was very domineering and always tried to control everything. (T 4170, 4191). Agnes saw him shove Claudia down the steps when she was pregnant. (T 4177). James's animosity towards Danny began the day Danny was born, when he told Claudia, "This kid is not coming home with us. Your mom's going to have to take care of this baby. We don't need any kids in our house." He said he would never be proud of Danny. Danny was not his son, he was Claudia's boy. (T 4278). When Danny was about 6 months old. James burst into the house, screaming, "I'm the boss here," and kicked Danny, who was sitting on the floor, halfway across the room into the hall, where he hit the wall. (T 4274). When Agnes threatened to call the police, James drew a gun on her.[23] (T 4274-4275).

During a six-month period when the family lived with Agnes,

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[22]Claudia had four sisters, Agnes, Artie Mae Strosier, and Nadine Johnson. Agnes and Claudia were close, but there were times when James would not allow family at his house. He watched the house sometimes, or had someone else watch it, to see who came and went and often showed up when he was on duty. (T 4168-4170).

[23]This was not the only time James pulled a gun on family members. He pulled a gun on Agnes's teenaged daughter and told her he was going to blow her brains out. When Agnes's husband got to the house, James ran out the back door and up the alley. (T 4279-4280). James also pulled a gun on Agnes's father one time after James had struck Danny with some object and Agnes's father had picked up the object. James was in police uniform during most of the abusive incidents towards Claudia or the children that Agnes saw and was on duty almost every time he drew a gun on any of them. (T 4280-4282).

the abuse occurred daily. James was constantly slapping Danny and Kevin, who were about 4 and 5, at the table. (T 4177-4179, 4182, 4189). They were so nervous, they were shaking the whole time. (T 4280). James beat them, knocked them, and screamed at them for any little thing, including for just being in the way. (T 4182). He expected them to sit still and not talk. (T 4185). The abuse was both verbal and physical, but "he loved to strike. It seemed he couldn't get his fury over unless he was hitting, abusing, torturing someone." (T 4185). Agnes saw James use the belt many times. Danny and Kevin carried bruises and welts all the time. (T 4184). James whipped Danny so hard he drew blood just because Danny was playing in the bathtub. (T 4182-4183).

James tortured his sons in other ways as well. Once Agnes found the boys sitting in the hall with pots on top of their heads. James was hitting them on the top of the head with a spoon and laughing. Kevin was crying, Danny was too afraid to cry. (T 4186). James also tied his sons up because they "squirmed." Agnes found Danny and Kevin tied up a dozen times during the six months the family lived with her. (T 4187-4188). Agnes found them blindfolded twice, once in the corner with empty plates in front of them, and another time, at the table trying to eat with the blindfolds on. (T 4189-4190). James made them walk around with paper bags on their heads. (T 4191). He handcuffed

them. (T 4287). When Danny was about 8, James beat him and handcuffed the boys to a post at the end of the driveway. When Agnes threatened to call the police, he untied them. (T 4196). When they were about 13 and 14, Agnes found them handcuffed together on the floor, with James on top of them, a knee on each boy. Danny was blue in the face. (T 4214). Another time, a neighbor called because James was whipping the boys in the back yard with a rope. When Agnes arrived, she found the boys with their hands handcuffed behind them. She called the police, and a patrolman came and unlocked them. (T 4287-4288).

James abused both boys, but they responded to the abuse differently. Danny was a hyper child who liked affection and liked to socialize and mingle with the family. Kevin was withdrawn, quiet, and often went off by himself. Kevin[24] took his abuse calmly, while Danny would beg his father not to hit him, would put his arms around his dad and say, "Dad, tell me that you love me. Why do you hate me?" (T 4276, 4285).

Agnes said it was obvious something was very wrong with Danny when he was quite young. He was having nightmares and delusions. When he was 6, he got a razor blade and cut a dress

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[24]Agnes said Kevin still had nervous habits, slapping himself in the face and side of the head, pinching his nose, rubbing his ears. (T 4276). Chuck Strosier also testified that Kevin had nervous habits and was constantly wringing his hands and running his hands through his hair. (T 3700-3701).

into strips. He said he did it because it had bugs in it and he was killing the bugs. (T 4192-4194). He also cut a scarf into shreds and destroyed things in Agnes's daughter's room. When confronted, he was so upset and nervous, he would scratch blood out of his arms, pull at his fingers, and scratch his face. (T 4199).

James's sadism was not confined to his wife and children. He also tortured animals. Agnes said he had a cage behind his house with a trap door attached to a container for food, in which he caught neighborhood cats. James shot the cats through the door and watched them die. One day, he showed Agnes a cat dying in the cage, pawing and trying to get out. (T 4262-4264). James also beat Danny's dog to death. (T 4292).

Agnes twice reported the abuse to the Shreveport Police Chief, a Mr. D'Artrois. The first time, which was after James tied the boys to the post, Mr. D'Artrois said he was sorry, but James was a good officer and there was nothing he could do, it was a family affair. (T 4295-4297). The second time, which was after James had beaten both boys badly, he told her, "There's nothing you can do. He does his job here and what happens at home is a civil suit. Tell her [Claudia] to get a lawyer." (T 4211).

A neighbor called Agnes when Claudia had her nervous

breakdown. When Agnes arrived, the boys ran outside screaming. Claudia was in the bathtub, out of her mind, screaming, blood running down her arm. She pointed to a bloody razor blade on the vanity. When Agnes asked James what he had done to her, he said, "Not half of what I'm going to do," got in his police car, and left. In the ambulance, Claudia said James put a razor in her hand and tried to force her to cut her wrist. (T 4214-4217).

Danny came to Agnes once when he was about 13 and threatened suicide. He said, "Auntie, my daddy hates me. I love him and I wish he would love me. What could I do to make him love me?" (T 4207). When she told him she loved him, he would say, "Do you really, auntie? My daddy says there's no such thing as love. You know, my dad won't let us love." (T 4208).

Agnes could not believe Danny could kill anybody. (T 4236). When he came back from prison, he worked for her and her son. He was a hard worker and was never a penny short. (T 4242). He never lied, was always up front with her. (T 4251). He was very friendly, very humble, and very loving towards her entire family. (T 4236, 4240). Around his father, though, he was fearful and acted like he wanted to hide. (T 4275). Agnes was never afraid of Danny, never saw him violent, never saw him act like his father. He worked in her shop daily for a long time. Her customers could not believe Danny could have done the things he

was accused of doing. (T 4258-4261).

Charles Strosier, Danny's cousin, testified that he, Danny, and Kevin had been very close since age six. While they were growing up, Charles spent two weekends a month at the Rolling house. (T 3692-3693). He said James Harold was very demanding, very unaccepting of Danny. He belittled Danny and showed him no love, affection, encouragement, or pride. It was not a normal father/son relationship. James Harold did not know what love was. (T 3694-3696, 3709, 3727).

buse occurred most of the time Charles was at the Rolling house. He heard beatings taking place in the bedroom. He heard the belt strap, fists, knuckles, slapping. He also saw welts on Danny's and Kevin's stomach, neck, back, and sides. The physical abuse occurred quite often, but the verbal abuse was even more frequent. James abused the boys if they made a noise or sat down on the wrong piece of furniture. Anything would set him off, and he would beat the hell out of them. James's mood was like a switch, on one minute, off the next. He was unpredictable and irrational. It did not take five minutes with James to know he had mental or emotional problems. (T 3696-3699).

James treated Danny and Kevin about the same, but Danny fought back, tried to protect himself against his dad, and Kevin did not. (T 3707, 3729). Kevin tried to intercede between James

and Danny, but James was uncontrollable. Kevin was very hurt and bothered by what had happened.

Kevin was concerned about Danny when they were teenagers. He knew Danny needed help. He knew his father needed help. (T 3700-3701). Danny talked about visions of demons, of people in his dreams beating him, of going through a gauntlet of people and being struck with sticks, tortured, and gnawed on by demons. He drew pictures of these visions. (T 3704).

Charles never saw Danny angry at anyone except himself. (T 3708). He characterized Danny's level of esteem as "none." Danny was devastated by his divorce. The marriage was the only structure he had, and he saw the divorce as another failure. (T 3702). Charles did not talk to Danny about seeing a psychiatrist at that time because, "When you talk to Danny, you've got to talk to Danny when Danny is Danny. Sometimes Danny's not Danny." (T 3725).

Bernadine Holder lived across the street from the Rollings for 28 years, since Danny was about 11. (T 3730-3731, 3746). When she first met James, he told her to go home and not come back, his wife did not need friends, and she would interfere with Claudia's wifely duties. Bernadine developed a friendship with Claudia nonetheless, and to some extent, with James. She said James was always angry about something and always had to be in

control. (T 3732). He was verbally abusive to Claudia "every day of her life." He screamed at her about everything she did. When he got angry, he went berserk, off the wall. (T 3733). He told Bernadine, "love is garbage," love is "when someone wants something for nothing." (T 3741). Bernadine took Claudia to the police station once to report the abuse. They would not let her report the abuse because it would ruin James's job. They told Claudia to stay with a friend for a few days. (T 3745-3746).

Bernadine heard the strappings James gave Danny and Kevin. Anything warranted a beating. If they did not take their shoes off fast enough, James would explode. (T 3734-3735, 3752). At meals, James would have his mouth full of food and running down the sides of his mouth, yelling and screaming at the boys that they were not eating right. (T 3740).

Danny came home from school once, and James started beating him on the porch. He told Bernadine he hated Danny and was going to kill him. She called Claudia at work because she was afraid he would do it. (T 3736). Another time, when Danny was about 15, he ran to her house and said his dad had a gun and was going to kill him. Bernadine found James with his gun out, ranting and raving that he was going to kill Danny. (T 3737).

When Claudia had her nervous breakdown, Danny and Kevin came running to her. She pushed past James and found Claudia in the

bathroom climbing the walls. The boys were in the hallway, holding a picture of Jesus and trying to tell their mother Jesus loved her and it was going to be all right. (T 3744-3745).

James treated Danny and Kevin the same but was more aggressive towards Danny. Danny tried to reason with him, while Kevin tuned him out, so Danny got the brunt of James's anger. (T 3734, 3738). Bernadine described Kevin as "a walking time bomb of emotion." She said he constantly wrings his hands and strokes his face, just kind of bounces. (T 3739).

Bunny Mills, a country & western singer, songwriter, and publisher of songs, met Danny in 1988. They began dating and were friends until 1994. (T 3981-3893). Bunny said Danny was acutely anxious all the time. He felt like he was smothering, could not be still, and would walk to the windows like he was trying to catch his breath. (T 3894, 3912). He talked often about his life and his father. He was very humble. He told Bunny he just could not get along with his dad, could not please his dad, but wished he could. He was very upset when he talked and usually cried. When he cried, he would tell her how his heart hurt, and "it was like you had crawled inside him and could feel the pain he was feeling." (T 3894-3895). He told her about the day he came home, after he and his girlfriend had a fight, and his father threw him on the floor and handcuffed him, called

the police, and put him in a detention center for several weeks. He said no one came to see him at the detention center. This incident was devastating to him, and he could not seem to keep his feet on the ground after that. (T 3896). One time he and his dad were out driving, and he was so scared of his dad he wet his pants when he got home. He told Bunny about the time his dad came over when he was married, jerked the covers off, and held a knife to his throat. He was terribly embarrassed because he thought his mom saw him nude. (T 3897).

Bunny could tell Danny was disturbed. Sometimes he would get down on his knees like a little child and tell her things were so bad at home he could not live there. She told him he could not break his parole and begged him to go to a counselor. He said his dad would kill him if he talked about him. Bunny talked to James and Claudia, who supported the idea of her taking him to the Shreveport Mental Health Clinic.[25] Bunny had to chase Danny around the apartment building four times to get him to go. He saw a psychiatric social worker for an hour and never went back. (T 3900-3901). Sometime after that, Bunny took him to LSU hospital. They sat in the waiting room most of the day, while Danny had smothering spells. When he came back out after talking

[25]James said he would go, too, if it came to that, and said, "Maybe it's me that needs to go." But Bunny did not think either of them believed Danny would ever go. (T 3900, 3917).

to someone, he said they told him he needed to go back to Shreveport Mental Health Clinic. (T 3901-3903).

Arthur Carlisle, an attorney, worked as a law clerk for the Jackson, Mississippi, law firm appointed by the court to represent Danny in 1985. (T 3922-3923). Carlisle saw Danny two to three times a week for 6 to 7 months. (T 2923, 2932). Danny told Carlisle he had been severely abused, physically and verbally, by his father from an early age. (T 3924). Although Danny was reluctant to let his family know where he was because he did not want to hurt them anymore, he eventually agreed to let Carlisle call them. (T 3938). James answered the phone, and as soon as he found out where Danny was, he proceeded to cuss Carlisle out, calling him every name in the book. He told Carlisle not to call again about that SOB and threatened him if he ever called again. Carlisle said he has never experienced anything like that in all his years as an attorney, even from opposing parties. The conversation went on for 10 to 15 minutes, but James just got worse, and Carlisle finally just hung up. (T 3925-3927). When he told Danny, Danny said, "That's how my daddy is." After that, Carlisle arranged to call Claudia when James was not home. (T 3927-3928).

2. <u>The Diagnosis</u>

Three mental health experts testified for the defense, Dr.

Harry Krop; Dr. Elizabeth A. McMahon; and Dr. Robert L. Sadoff.

Dr. Krop[26] first saw Danny in Ocala, Florida, on January 26, 1991, when he was asked to evaluate Danny's competency with regard to other charges. Danny had been diagnosed with atypical psychosis and placed on antipsychotic medication. He was very agitated, had scabs all over his body from picking at himself, and was having difficulty grasping reality. (T 3951-3953). At that time, Dr. Krop found Danny competent. (T 3957).

Dr. Krop was appointed to evaluate Danny in the Gainesville case two years later. During the course of the evaluation, Dr. Krop saw Danny eight times, spending a total of 22 hours with him.[27] (T 3962). Danny described a history of physical and emotional abuse by his father, towards him and Kevin, as well as spouse abuse. He said he prayed to God at night to come and take his father away. He described his anger, yet at the same time,

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[26]Dr. Krop has a Bachelor's Degree in psychology from Temple University, and Masters and Doctoral Degrees in clinical psychology from the University of Miami. He did a post-doctoral fellowship in neuropsychology. He was staff psychologist at the V.A. Hospital in Gainesville from 1971 to 1987, working primarily in the area of sexual disorders, and has had a private practice since 1975. He has been qualified as an expert in sexual abuse, sexual offenders, battered child syndrome, battered spouse syndrome, and posttraumatic stress disorder. He has evaluated 498 persons charged with first-degree murder. (T 3941-3947).

[27]Dr. Krop also reviewed police reports and FDLE interviews, including nineteen depositions; Danny's taped statements; Danny's psychological reports, jail records, prison records, and letters to various people, including his brother and Sondra London; the psychological testing done by Dr. McMahon; and the crime scene photographs. Dr. Krop personally interviewed Kevin Rolling, Artie Mae Strosier, Agnes Mitchell, Nadine Johnson, and James Harold Rolling. He also reviewed Claudia Rolling's videotaped trial testimony. (T 3960-3961).

love for his father. Although he talked about his mother in a positive way, Dr. Krop sensed he felt betrayed because she was unable to protect him from his father. (T 3963). He described seeing his father hit or choke his mother and seeing her screaming. One time, he and Kevin tried to pull their father off their mother while they were on the floor. (T 3964). Describing his own abuse, he said his father grabbed him by the hair, slammed him against the wall, shoved him around. He described being beaten black and blue with a belt and hit in the face. He described one incident, after he was married, when his father and mother came to his house, and his father put a knife to his throat and threatened to kill him. (T 3965).

Danny's account of the Rolling household was consistent with the accounts everyone Dr. Krop spoke with except Danny's brother, Kevin, and his father, James Harold. (T 3966). Kevin said he did not remember much about his childhood except that, "It wasn't a nice place to be." (T 4088). He did not remember abuse. (T 3967, 4088). He did tell the people at Bryce Mental Hospital, where Danny stayed in 1978, that their home life "was like living on the edge of a volcano." (T 4102). In Dr. Krop's opinion, Kevin either may not want to admit what happened or simply repressed what happened. (T 3968).

James Rolling reluctantly met Dr. Krop at his lawyer's

office in Shreveport. (T 3980). Dr. Krop said James controlled the format of the interview by responding to questions with answers that were not responsive. He had his own agenda, wanted to tell things in a particular order, and became very frustrated when Dr. Krop tried to get him to talk about Danny. (T 3980-3981). James basically said he had never been abusive in his life. (T 3981). He said he "never laid a hand on Danny," and "never whupped him," although he "probably lectured him and yelled at him." James said he himself had been abused as a child and raised in a holy roller, strict, overbearing family. He also said he had never mistreated his wife, and Claudia and her family were liars and in a conspiracy against him.[28] (T 3981, 3984). They were jealous of him because he did a fancy two-step. (T 4092). James did feel Danny was sick but not because of anything he did. Danny turned out the way he did because of Claudia and her family. (T 3981-3982, 4090). After the interview, James wrote Dr. Krop a letter, describing all the things he had done for Danny and saying his wife did not do anything.[29] (T 3983, 3990).

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[28]James also thought Bernadine Holder was a drug dealer. (T 4069, 4090).

[29]Seven pages of the ten-page letter was in question/answer form, for example, "Who would encourage to go to church three blocks from house, Church of God? His father. Who would encourage education? His father. Neither Danny or Kevin had to work outside home growing up. Why? His father. Who saw to it that each of them was taught how to drive a vehicle? His father. Who cleaned the house? Who -- who did the cooking?" (T 3990).

James and Kevin both described a history of mental illness or, as Kevin put it, a "strain of insanity," on James's side of the family, including a great grandfather who killed his wife, an uncle on psychiatric medication, and an uncle who killed himself. (T 3971, 3989).

In Dr. Krop's opinion, Danny clearly grew up in a dysfunctional family.[30] There was no praise or affection, at least by the father, and a lot of berating, criticism, secrecy, and tension. Children who grow up in this type of environment learn to be nontrusting and manipulative. They have poor self-esteem, lack confidence, and become very vulnerable to rejection and to stressors later in life. They develop coping mechanisms to avoid or tolerate the abuse, which later become maladaptive. Some children learn to take the abuse, but also to distance themselves emotionally. These children are unable to feel empathy for others. When asked why Danny would return to this type of home, Dr. Krop said the abused child's need for family wholeness never goes away. They are constantly searching, throughout their lives, for attention and love. Many seriously

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[30]Dr. Krop said a dysfunctional family is best understood by examining what a functional family is or does. A functional family is a harmonious family in which the needs of the entire family are met, including a sense of security, a sense of intimacy, a sense of responsibility, caring for each other, loving each other, and allowing each member to develop to his or her potential. (T 3975-3976). Dr. Merin defined a dysfunctional family as one where there is abuse, excessive criticism, excessive restrictions, an absence of encouragement, and an absence of opportunity to learn, to feel, to love, to be positive. (T 4729-4730).

abused children still love their parents and go back to their parents, if they can. Like many abused children, Danny would like to think he could get his father to love him.[31] (T 3973, 3977).

Dr. Krop found Danny to be seriously emotionally disturbed and diagnosed him with three different types of disorders, all of which began during childhood or adolescence: (1) three different personality disorders: borderline personality disorder, antisocial personality disorder, and personality disorder, not otherwise specified, consisting of narcissistic, obsessive compulsive, and histrionic features; (2) alcohol and substance abuse; and (3) paraphilia,[32] which, in Danny's case, is voyeurism[33] of a severe nature. (T 3993-3996).

Borderline personality disorder is "a pervasive pattern of instability of self-image, interpersonal relationships, and mood, beginning, at least, by early adulthood, and present in a variety of contexts." (T 3996). In simpler terms, the way a person with

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[31]Dr. Krop said several factors explain why some children are able to surmount an abusive background. Genetics is a factor: Different children simply respond differently based on what they are born with. Birth order plays a role in how children respond to an abusive situation. Another factor is whether the child has any external support, such as teachers, coaches, or relatives. Because of all the variables, even twins who grow up in the same environment may turn out very differently. (T 3974-3975).

[32]Paraphilia is a sexual disorder in which there are recurrent, intense sexual urges and/or sexually arousing fantasies, generally involving other individuals. (T 3995).

[33]Voyeurism is peeping into windows at naked people and masturbating. (T 4045).

borderline personality thinks, interacts, and relates to others is so intense and extreme that it is maladaptive. (T 3996-3997). The cognitive aspects are poorly focused thinking, self-rumination, disorganization of thought processes under stress, impulsive actions in order to short-circuit unpleasant mental states, and a tendency to reach skewed conclusions. The primary emotional aspect is extreme lability of mood, that is, shifts from extreme mood states without anything in particular triggering the shift. Persons with borderline personality disorder are immature and manipulative. They often become overwhelmed by their environment and perceive themselves as victims. (T 3997-3998). Other traits include impulsiveness; inappropriate, intense anger, and lack of control of anger; and recurrent suicidal thoughts.[34] Danny has an incredible amount of underlying anger. (T 3999-4000). Although he is fairly bright, he functions at the level of an immature teenager. (T 3978).

Antisocial personality disorder is a pattern of irresponsible, sometimes impulsive, behavior, of nonadjustment, of not learning from the consequences of one's acts. The antisocial personality also engages in various types of

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[34]Danny had a history of suicide attempts. A report from Bryce Mental Hospital in Alabama stated his attempted robbery of a Winn-Dixie with an unloaded gun may have been a deliberate attempt to put himself at risk of being killed. The Bryce report said Danny had attempted suicide several times and wanted to die. (T 4099-4101).

antisocial behavior, which may be criminal. (T 4001). A histrionic is a person who tends to be overly dramatic, who communicates in an exaggerated way. (T 4001). A narcissist is a person who puts himself first. (T 4002). In Danny's case, the personality disorders, which overlap and interact, are in the severe range. (T 4004).

Dr. Krop explained that Danny did not choose to have personality disorders; no one consciously chooses to have a personality disorder. Both borderline personality disorder and antisocial personality disorder have been linked to abusive family backgrounds. (T 4003). In Dr. Krop's opinion, Danny's dysfunctional family environment contributed to the development of his personality disorders. (T 4002).

Danny's voyeurism began at age 14 when a friend took him to a neighbor's house and they saw a teenaged girl getting out of the shower. This became a compulsion, and he began going out at night for two or three hours looking in windows. In the beginning, he looked not only for sexual gratification but also would sit for hours watching a family having dinner, watching television, talking. From this, he found the satisfaction of feeling like he finally belonged to a family. As he got older, the compulsion became greater, and the voyeurism occurred more frequently. (T 4007-4008).

In Danny's case, the voyeurism is severe.[35] Like other voyeurs, Danny wants to stop and does not feel good about it but feels he cannot help himself. (T 4009). Although he can stop himself if someone is watching, his internal controls are very, very weak. (T 4010). He was caught a number of times and was beaten severely by his father for it. (T 4010-1011).

In Dr. Krop's opinion, Danny was aware of what he was doing when he committed the homicides and knew what he was doing was wrong. He was, however, suffering from a serious mental disorder at the time. (T 4013, 4084). He told Dr. Krop he went in to rape, not to kill. (T 4058). When asked why his voyeurism had escalated to murder, he said, "I can't understand. I -- the only thing I can say is somewhere in my subconscious mind, there was a need for revenge for all the things that had gone wrong in my life." (T 4077). He said he wanted revenge because of his experiences at Parchman Penitentiary. He was tired of suffering and wanted other people to suffer like he had suffered. The homicides were a way for him to get rid of all his pent-up frustration, anger, and need to obtain revenge for the way he had been treated in prison. He said the deaths were symbolic of his past experiences and past punishment. (T 4052, 4065).

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[35]Of the 4,000 sex offenders Dr. Krop had evaluated, three or four hundred were voyeurs. (T 4009). Voyeurism is not common among adolescent boys. (T 4110).

He described Gemini and Ennad as part of a spiritual world, demons that influenced and had some control over his life. (T 4075). He also said Danny, Ennad, and Gemini were the broken parts of his personality. (T 4078). Although he did not mention Gemini by name in the 1991 interview, he talked about demons. (T 4049).

Dr. Krop never saw Danny attempt to malinger[36] during any of his interactions with him, although he has a tendency to be histrionic and dramatic. (T 3969). Danny never blamed his behavior on anything. From the first time Dr. Krop spoke with Danny in Ocala, Danny accepted responsibility for what he did in Gainesville. (T 4110-4111).

Dr. McMahon[37] spent 29 hours with Danny, seeing him seven times between July and November of 1993,[38] and administering a

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[36]In a criminal case, malingering is when a person tries to look crazy for the purpose of avoiding responsibility. (T 3969).

[37]Dr. McMahon has a Bachelor's Degree in psychology from the University of Florida, a Master's Degree in psychology from Purdue University, and a Doctoral Degree in clinical psychology from the University of Florida. (T 4305). Her post-doctoral fellowship was in forensic psychology and neuropsychology. She was in private practice in Gainesville from 1977 to 1987, during which time she held teaching and lecturing appointments at the University of Florida in the School of Criminology, the Department of Psychiatry, and the School of Law. From 1987 to 1990, she was a court evaluator on a inpatient involuntary commitment unit in Seattle, Washington. In 1990, she reopened her private practice in Gainesville, consisting of therapy and diagnostics.

[38]Dr. McMahon also reviewed the tapes of Danny's statements with Bobby Lewis; the tape of Claudia Rolling; mental health reports from individuals and institutions; the FDLE Task Force summary of events; Sondra London's chronology of events; investigative reports of inmates at Marion County Jail; investigative reports related to various women with whom Danny had

battery of psychological tests. (T 4320, 4323-4329). The testing revealed that although Danny is mostly in contact with reality, his perceptions become clouded in the presence of high anxiety, but not reaching psychotic proportions, for the most part. (T 4329). There was tension, stress, and anxiety throughout the testing. In other words, he perceives "ego-threatening forces in his environment, which threaten the very organization of his personality." He has virtually no insight into his own dynamics and so feels anxious with no sense of where it is coming from. This is just overwhelming for him, and when that happens, he is likely to misperceive what is going on around him. (T 4330).

Danny's personality is extremely impoverished. He has virtually no internal resources. Danny runs on maximum all the time. Whereas most people have a reservoir of internal resources to draw on when a crisis or trauma occurs, Danny uses everything he has to face each day's tasks. (T 4331).

He also is impoverished in terms of emotional experiences. His way of dealing with his emotions is to keep them very superficial. The emotions he is displaying, although superficially appropriate, are not his own genuine emotions. He

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contact; sixteen depositions, including all the family members, Bobby Lewis, Dr. Sid Merin, and Danny's former attorney. (T 4321). Dr. McMahon personally interviewed Kevin Rolling, Artie Mae Strozier, Nadine Johnson, and Agnes Miller.

is playing a role. He is not doing that intentionally, but the emotions he displays are simply what he has learned to do in the social situation. (T 4331-4332).

His defense mechanisms, when he gets anxious, are repressive. He just shuts down, becomes virtually inflexible. Thus, he is likely to do the same thing again, and again, and again, even though it does not work. He has very poor emotional controls. Thus, although his emotions are repressed, when they do get expressed, they get expressed in an uncontrolled or very poorly controlled way. (T 4332-4333).

He is extremely immature. There is a great impairment in empathy. He may verbalize it, but he cannot, in truth, put himself in someone else's shoes and understand their feelings. He has tremendous unmet needs for dependency and affection. He has repressed hostility and internal anger, to the point of rage. He is depressed much of the time, fairly sad, fairly remote. He has feelings of inadequacy, hopelessness, and insecurity. He is unrealistic and grandiose in his own appraisal of himself, which is the flip side of someone whose needs for attention and affection and dependency have never been met. (T 4333-4335).

Dr. McMahon found no signs of malingering. At no time did Danny not take responsibility for his behavior. (T 4335-4336, 4381-4382).

In Dr. McMahon's opinion, Danny's primary diagnosis[39] is borderline personality disorder, with antisocial features. He also has features of a histrionic personality, narcissistic personality, dependent personality, dissociative disorder, and paraphilia. (T 4339).

Dr. McMahon explained that all personality disorders indicate stunted psychological development. Some personality disorders, such as antisocial personality, address behavior alone. Although Danny's behavior clearly is antisocial, he has the mental and emotional pathologies of borderline personality disorder.[40] (T 4340-4341). These include a pattern of unstable and intense interpersonal relationships, alternating between extremes of over-idealization and devaluation; impulsiveness in at least two areas that are potentially self-damaging; affective instability; inappropriate intense anger or lack of control of anger; a marked and persistent identity disturbance; chronic feelings of emptiness or boredom; and frantic efforts to avoid

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[39]The primary diagnosis encompasses the most "aspects" of a person. (T 4340).

[40]Dr. McMahon said borderlines often have a history of varying diagnoses, including antisocial personality, schizophrenia, depression. The borderline is like a carrel of slides and can look very different, depending on which slide drops in. If seen when they are having a mini-psychotic episode, which may last only a day or two, they look schizophrenic. If seen when they are acting out, they look like antisocial disorder. If seen when they are being very needy, they look like dependent personality disorder. (T 4372-4373).

real or feared abandonment.[41]

Dr. McMahon said Danny exhibits all of these characteristics. His relationships have been very intense and short-lived or ambivalent. He is impulsive in two potentially self-damaging areas: sex and shoplifting. His emotions are extremely labile. Very quickly, almost instantaneously, he goes from depressed to tearful to laughing to angry to frustrated, like he is on a roller coaster. (T 4342-4343, 4397). He is a very, very rageful individual, although he is completely out of touch with it. The murders themselves reflect an extreme level of uncontrolled rage.[42] (T 4343-4344). He has an identity disturbance. He has chronic feelings of emptiness. (T 4344). He also has the cognitive style of the borderline personality, the over-generalization, the loss of relevant detail. If asked about something, Danny gives you a global idea of it, an emotional impression, such as "it was horrible." He has to be asked over and over to get him to the facts. (T 4344-4345). His thinking becomes confused and disorganized under stress, and he cannot reason logically. He is overwhelmed by his own feelings.

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[41]Borderline personalities have been abandoned as children, either physically or emotionally. (T 4345).

[42]Dr. McMahon saw that level of rage only a few times, and "it was like suddenly a door opened and you just got a peek inside for a moment, and the desire was to shut the door very quickly." (T 4344).

(T 4346-4347).

Danny also has histrionic behavior, is very theatrical. It is his way of trying to convey the intensity of his feelings. He is narcissistic in the way a very small child is narcissistic, and he is very dependent. (T 4347-4348). The voyeurism was an escape mechanism. It filled not only a sexual need, but, even more so, the emotional need of allowing him to feel part of another family. (T 4348).

Dr. McMahon also diagnosed Danny as having a dissociative disorder known as possession syndrome.[43] (T 4349). Possession syndrome is a psychological defense mechanism whereby that part of the individual the person cannot accept takes on a supernatural description, a name. (T 4353-4354). In Danny's case, Gemini provides a mechanism for not acknowledging his rage. Although Danny can accept the sexual urges in him that led to the voyeurism and led, as he sees it, to the rapes (because he does not understand rape as an act of hostility), he cannot come close to accepting, or even acknowledging, the rage within him that led to the murders. He very genuinely describes himself as a gentle, loving, caring, passive individual, which he is a good part of the time, as long as that little door stays shut. The rage has

[43]Dr. McMahon said this disorder would be called dissociative disorder, not otherwise specified, in the Diagnostic and Statistical Manual-III. In the DSM-IV, it is listed as a specific syndrome, in Appendix A, among proposed disorders that need further study. (T 4352).

become compartmentalized, or dissociated. This compartmentalization is not a way of denying or avoiding responsibility, as Danny has said, repeatedly, that he did the murders. When asked what he was thinking or feeling when he went in those apartments, however, he responds, "I don't know. That was Gemini." He cannot look at that horrible bottomless pit that is the reservoir of rage he has within himself. The only way of dealing with it, and the urges that come from it, and the behavior that has resulted from it, is to encapsulate it outside, and that is Gemini. (T 4349-4351).

Dr. McMahon said the overwhelming majority of people diagnosed as borderline personality are the product of severely abusive backgrounds.[44] [45] (T 4355). Emotional abuse has the greatest destructive effect on the core of a person. Being told by a parent or caretaker, on whom the child relies for life, emotional life even more importantly than physical life, "I hate you, I wish you'd never been born, you're not mine, you're stupid, you're no good, you'll never amount to anything, get away

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[44]Citing Challenge of the Borderline Patient by Jerome Cole. (T 4398).

[45]Like Dr. Krop, everyone Dr. McMahon spoke to or read about talked about the abuse in the Rolling household except Kevin and James Harold. Dr. McMahon spoke with Kevin for several hours. Although Kevin does not remember his father ever beating him or Danny, he does not remember most of his childhood. He said he had large memory gaps: "I don't remember much about my childhood except I know it wasn't good. It was very difficult for me to go back after I was in the service." He said, "I would get out of there. I tried not to know," and "I dissociated, I left. I didn't want to know." (T 4355-4357, 4425).

from me" is extraordinarily threatening. Abuse of this nature "destroy[s] the very core of a child." The long-term effects are a sense of paranoia and distrust, as well as deficient social skills, particularly those skills necessary to interacting with other people, especially in a close relationship. The result is temper tantrums in small children, hostility in older children, and real violence in adults. (T 4359).

Persons abused as children do not think clearly much of the time. They have extremely poor self-esteem, and consequently, easily become very frustrated, do not have good control of their emotions, tend to be very impulsive, and are likely to react aggressively. They are unable to be a friend or have a friend. They do not have a sense of empathy. They are so busy trying to survive, they do not have the internal energy or resources for anything else. (T 4360-4361).

Some people from abusive backgrounds make it in life simply because they are born with resources their siblings do not have and somehow are able to protect themselves from the turmoil and chaos in the household. Other children make it because they are able to reach out and find an emotional substitute parent. The more pervasive the abuse, and the earlier it starts, the less likely the child will make it. (T 4361-4362).

Dr. McMahon characterized Danny as a severe borderline.

(T 4367). He did not choose to be that way, no one would choose to be that way, "it's a very painful way to be."[46] (T 4369). By definition, a personality disorder starts in early childhood, so the person is too young to choose such a thing. Second, no one would choose it. Third, people do not choose their psychological dynamics. (T 4368-4369). Although a psychotic, unmedicated, is probably worse, in terms of level of functioning, there are no medications for personality disorder. (T 4370).

In Dr. McMahon's opinion, Danny's abusive background had an immense effect on him psychologically. She said his anger towards his father was very clear. He still has an extremely strong allegiance toward his mother, yet when asked what might have prevented the crimes, his immediate response was, "If my mother had left my father and if I had had some psychiatric help." Thus, he is angry at his father and in touch with that, at least episodically, but is rageful at his mother and not in touch with that at all. (T 4380-4381).

In Dr. McMahon's opinion, Danny was suffering from borderline personality disorder to a severe degree at the time of the offenses, and his capacity to conform his conduct to the requirements of the law was impaired to a significant degree.

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[46]Dr. McMahon noted that borderline personalities are extremely dependent and very draining to work with. They wipe out therapists because they are so difficult to work with, but "that is not a drop in the bucket to their degree of distress." (T 4368).

(T 4383-4384). Dr. McMahon explained that people with severe borderline personality disorder lack an internal discipline system, which is what enables people to conform their behavior to rules. People like Danny, who have borderline personality disorder, and who have the severely impaired emotional controls he has, do not have the internal discipline mechanism other people have because they have not had the opportunity or mechanisms to formulate one.[47] (T 4385). Danny can conform his behavior if a policeman is standing at his elbow, but, absent that type of external control, in the face of overwhelming anxiety, in the face of overwhelming urges, he cannot control his behavior. (T 4385-4386).

On cross-examination, Dr. McMahon reiterated that Danny always said he committed the murders, that it was his body, his hands. For legal or social purposes, Danny did it, but, in fact, it was Gemini. When she asked him who bought the things at the store, he said he did. But Gemini did the killing. Gemini is strong and magical, yet he needed Danny to get the tape and screwdriver. This type of illogical thinking is one of the earmarks of possession syndrome. (T 4416-4417).

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[47]A child's first conscience is formed by his parents in that he does not do what is wrong because his parents are there to discipline him in some way. As a child gets older, she begins to internalize Mom and Dad and know what they would say even if they are not there. As the child gets even older, he develops his own internal discipline system. (T 4384-4385).

Ennad, which is Danny spelled backwards, is Danny's idealized self, the kind of self he would like to have, the debonair one who is good with women and who feels very comfortable. (T 4418-4419).

Gemini had come to Danny several times in his life. He had an illusion of an evil force during his marriage. At Parchman, he opened the door for Gemini because he wanted revenge for all the suffering in his life. (T 4421). He told her about a bird dying while he was at Parchman. He said he could tell when Gemini was around because the lights flickered. (T 4427). He wanted to say it was Gemini who performed a sex act at the third crime scene, but he knew he was a participant. Mentally, he could see what was going on, but physically he was numb and if pleasure was derived from it, he did not get it. (T 4428).

Danny told Dr. McMahon he had seen the movie "Exorcist III" the week of the murders but mentioned no details of it. He also told her the crime scenes were like a bad horror movie. (T 4447). He never told her the possessed killer in the movie was named Gemini, the spiritual language of the movie was the reverse of English, and the movie had a bird dying at a window and flickering lights. (T 4450-4451). After a recess during which she was shown film clips of these scenes, Dr. McMahon said she had not considered this information when she diagnosed Danny, but

it did not change her opinion. (T 4458). Given Danny's immaturity, his narcissistic and histrionic personality, and his suggestibility, the movie may have suggested to him a mechanism for dissociating his rage.

Dr. McMahon said it did not matter when the persona first came up in Danny's mind. Even if he got the idea from the movie, the underlying dynamic is the same. Regardless of the mechanism used, he is dissociating his rage. Whether he calls it Gemini, or puts a religious significance to it,[48] the underlying pathology and dynamic is the same. The form of it is unique to the individual, which is why it is called atypical dissociative disorder. Regardless of how he labels it, it is a level of rage he cannot accept, either its presence, the feelings he has with it, or the behavior he exhibits because of it. (T 4456-4458).

Dr. Sadoff[49] examined Danny on two days, spending a total of

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[48]McMahon noted Danny had a history of believing in spirits and demons, which is part of his religious upbringing and part of his faith. (T 4559). He has a very strong belief that spirits are influential on people and was brought up with this type of belief. Although the name Gemini did not come up before the murders, his mother had described an encounter with Danny in Shreveport, Louisiana, where Danny spoke in a different way and said, "I have another person." He said it had a name, but Mrs. Rolling could not remember what the name was. She given the same account to the FDLE and had told Kevin about it. (T 4459-4460).

[49]Dr. Sadoff has been a psychiatrist in Jenkintown, Pennsylvania, outside Philadelphia, for 34 years. He attended college and medical school at the University of Minnesota. He received a Masters in psychiatry at UCLA. He attended law school at Temple University for two years. He has taught law and psychiatry at Temple University law and medical schools, Villanova Law School, and the University of Pennsylvania, where he currently is professor of psychiatry and director of the forensic psychiatry clinic. He has written 85-90 journal articles; written, edited, or co-authored 6 books; written 25 chapters in other people's books; lectured all over the world;

8½ hours with him.[50] Dr. Sadoff said Danny could be charming and interesting. He was cooperative, but intrusive, that is, inappropriately personal. He became agitated at times, became lost in thought, or dissociated, at times. (T 4486-4487). Dr. Sadoff found no malingering[51] in his examination of Danny.

In Dr. Sadoff's opinion, the outstanding diagnosis was borderline personality disorder. He also diagnosed Danny as having personality disorder, not otherwise specified, which included a number of other personality disorders, including obsessive/compulsive, antisocial, histrionic, narcissistic, and paranoid; a history of substance abuse; and a severe paraphilia, voyeurism.[52] (T 4489-4490, 4535, 4541).

Dr. Sadoff explained that a personality disorder is a life-long situation. It starts in childhood and becomes worse as one

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received a number of awards, including the award last year for outstanding publication in law and psychiatry; and has been recognized as an expert in 20 states and 6 federal jurisdictions. (T 4469-4479).

[50]Dr. Sadoff also reviewed the depositions, police investigative reports, crimes scenes photos, and Danny's psychiatric and medical reports, and consulted with Drs. Krop and McMahon. (T 4482).

[51]Dr. Sadoff said a malingerer is someone who consciously, purposefully deceives the interviewer, knowing he is doing so, not someone who has a distorted view of the world, and gives that distortion, believing it to be the truth. (T 4516).

[52]Dr. Sadoff noted that voyeurism is recognized in the DSM-III as a mental illness. Although a voyeur has some control over his behavior in that he can stop what he is doing if caught doing it, his control over going out to look in the first place is impaired. The voyeuristic compulsion is so strong that voyeurs always take risks to satisfy it, risks that sometimes get them injured, and even killed. (T 4586).

grows and develops, interfering with the person's ability to function effectively. Borderline personality disorder often begins with a feeling of abandonment or lack of love, by one's parents, or a parent. The person develops feelings of insecurity, low self-esteem, and an emptiness inside, which Danny began to fill by voyeurism. (T 4491). Dr. Sadoff characterized Danny's self-esteem as very low, at best. (T 4504). Dr. Sadoff also viewed Danny's narcissistic and histrionic traits as an overcompensation for feelings of worthlessness and emptiness. (T 4499). Borderlines are impulsive; self-destructive; and engage in suicidal gestures, threats, or attempts. (T 4491-4493). Danny's suicidal behaviors, feigning or faking suicide in order to obtain some kind of treatment or to be placed at a certain place, are precisely what borderlines do. (T 4545). Borderlines have a number of unstable, intense relationships, which, in Danny's case, would include his wife, his mother, his father, his brother, his daughter. Danny's identity confusion--"he does not know who he is" --is one of the hallmarks of borderline personality disorder. (T 4490-4497).

The borderline has a ground in reality to a certain extent but mostly lives in distorted perceptions, fantasy, and magical thinking. (T 4500, 4519). Danny, for example, said, "Lord, I need a wife." And he prayed for a wife, and there was O'Mather.

Her appearance at that moment was not just a coincidence, it was a gift from God, something given to him, because this is the magic world he lives in. When the smoke entered his room while he was lying in bed with O'Mather, he thought it was an evil force, and said, "Jesus, Jesus, Jesus," and it went away. Danny guides his life by the signs he believes come to him supernaturally. (T 4501-4502).

Borderline personality disorder is somewhere between people who are abnormal and those who are psychotic because the borderline can become psychotic under pressure. It is a vacillating kind of disorder, where the person, at times, appears fairly rational, and at other times, appears abnormal, or even psychotic. (T 4524). A person does not consciously decide to become a borderline personality; it is a way of coping with one's environment. A severe borderline may function less well than a psychotic on medication. (T 4506-4507).

In Dr. Sadoff's view, Danny's antisocial behavior is part of the borderline syndrome. (T 4505). Based on his experience of examining 8,000 defendants, including 3,000 charged with homicide, the homicides in this case went beyond the behavior seen in persons diagnosed as having only an antisocial personality disorder. The homicides in this case had an element of bizarreness, an element of rage and symbolic representation to

the authorities, that does not exist in crimes committed by persons with antisocial personality alone. (T 4522).

Dr. Sadoff said there was a definite correlation, in the literature and in his own experience, between people who have been abused as children, or came from dysfunctional families, and mental illness or emotional disturbance. (T 4589). If abuse occurs early in life, it affects personality and development. Emotional abuse has a greater impact on a child's growth and development than physical abuse. (T 4508-4509). The extensive history of mental illness in the Rolling family suggests both a genetic link and an acquired link to Danny's illnesses. (T 4521).

In Dr. Sadoff's opinion, Gemini was a part of Danny's persona, not a separate personality,[53] and was part of his borderline personality disorder, which can include dissociative phenomena. (T 4594). Danny's conception of his persona is consistent with his fundamentalist religious background and his borderline personality disorder. (T 4599-4600). The Gemini persona originated when Danny experienced a part of himself earlier, which he felt he had difficulty controlling. He experienced this force, although he did not give it a name then,

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[53]Dr. Sadoff concluded based upon hypnosis and the other testing that Danny did not have multiple personality syndrome. (T 4514).

when he was with O'Mather and saw smoke come in the window. He saw that force several times after that, including once when he was parked at a cemetery with another person. The Ennad part, which he did not have a name for then either, was the part he identified as Robin Hood or Jesse James, the part who gave things to people less fortunate than he. (T 4517-4518).

When asked what effect the movie "Exorcist III" would have had on Danny, Dr. Sadoff said that because Danny dealt in magic, fantasy, and mysticism, and had mystical experiences before he saw Exorcist III, seeing the movie was like a sign. He latched onto it as an explanation for what he had been experiencing. It was even more real because Gemini is his astrological sign. Although most people would take that as a coincidence, the magical-thinking borderline would not. (T 4518-4519). It was consistent with Danny's personality to say, "This is what God has been wanting to tell me." (T 4575).

Although Gemini could theoretically be an excuse for crimes he committed knowingly, within his control, and without being impulsive, Danny never offered it as an excuse. (T 4600). The way he described what happened to him at Parchman was that he had gone so far down, because of the conditions and his own mental state, from the isolation, the squalor, and the barbaric conditions in which he lived, that he introduced the evil part,

or Gemini, at that point. It was not just that he vowed revenge, but it was through the magic of his unification with his devil spirit called Gemini that he would take that revenge. (T 4567-4568).

Danny's description of the murders themselves as "a horror movie" was consistent with borderline personality disorder, in that there was some dissociation at the time of the crimes. He was not totally there, so it was like a movie unfolding in front of him, and he was watching it while he was participating. That is what borderlines do. (T 4578).

In Dr. Sadoff's opinion, Danny's borderline personality disorder is extremely severe. He characterized the severity as "at least a 10," on a scale of 1 to 10, with 10 being the most severe. (T 4595).

C. State's Rebuttal

The state presented four rebuttal witnesses: Danny Rolling's former wife, O'Mather Lummus; an FDLE investigator, Edward Dix; and two mental health experts, Drs. Merin and Sprehe.

O'Mather Lummus met Danny Rolling at the United Pentecostal Church Youth Services and married him six months later, in September of 1974. They were both 19 years old. They had one child and divorced in 1977. (T 4622-4623, 4626, 4632).

While dating, Danny was considerate and kind. He was very

active in the church, very zealous, and sometimes actively "demonstrated" during services. (T 4647-4648). They often went to the Rolling house for Sunday dinner after church. O'Mather never saw Danny and his father fight, never saw James berate or degrade Danny in her presence, never saw James raise his voice to Claudia. (T 4629, 4631-4632). James and Danny appeared normal together. (T 4625, 4649, 4667). After they were married, James occasionally brought them groceries. James tried to help Danny get a job with the Fire Department. (T 4627-4628).

Danny began to be absent from the marriage at night. The police came once and told her he had been caught peeping. When O'Mather confronted Danny about his inconsistency with work, he hit her. He also was using marijuana. (T 4633-4635). She left him after he threatened her with a shotgun. (T 4637).

O'Mather was not aware James and Claudia had separated some 15 to 20 times during their marriage. She was not aware Claudia had a nervous breakdown three years before she met Danny. She was not aware Danny had been caught peeping three times before they were married. (T 4644-4646). Danny never talked to her about his childhood. (T 4648). After their daughter was born, they were at the Rolling house, and Danny went to the back room and cried and cried. He never talked about it. If he had nightmares or saw spirits, he would not necessarily have told her

about them. She did not know what happened the time James came over and held a knife on Danny because they were in the bedroom. She may have blocked out the whole situation. (T 4649-4652).

Edward Dix went to Mississippi State Penitentiary in Parchman, Mississippi, and gathered the records of quarterly inspections[54] done by the State Health Department, State Bureau of Buildings, and Fire Marshall's Office during 1986-1988, when Danny Rolling was incarcerated there. Dix also interviewed corrections officers and the state health officer. (T 4676-4679). Dix obtained building records covering all but six or seven months of the time Danny was in maximum security lockdown. (T 4682). The records showed what building, but not what cell, he was in. (T 4690). The records reflected the conditions on the day of the inspection. (T 4691). The records did not show, and no one Dix spoke to remembered, any standing sewage at Parchman while Danny was there. (T 4686). The records did indicate a recurring problem with toilets backing up in adjoining cells in the building in which Danny was housed. (T 4691). The corrections officers recalled that the toilets backed up but did not overflow. (T 4692). One inmate remembered mopping the area where the toilet problem existed. (T 4694).

[54]Mississippi State Penitentiary was under a court order from the early 1970s until two years ago, requiring quarterly inspections by the state health, building, and fire marshall's office. (T 4678).

Dr. Sidney Merin, a clinical psychologist and neuropsychologist in Tampa, Florida,[55] was appointed by the court in Hillsborough County to evaluate Danny for competency in June 1991. Dr. Merin saw Danny for one hour. His testing assistants went back twice to administer two tests. (T 4715, 4750).

Later, prior to his testimony in the instant case, Dr. Merin reviewed depositions; police reports; Danny's taped statements and taped interviews with Drs. Krop and McMahon; depositions of friends, relatives, neighbors, employers; the testimony of Drs. Krop and McMahon; and tests administered by Drs. McMahon and Sadoff. (T 4716).

During the 1991 interview, Danny told Dr. Merin that God was pulling strings, God was wiser than he, and God must have reasons for allowing these things to happen. He described the battle in heaven between God and Lucifer. He said forces greater than he pushed him in different directions. He said he felt God sometimes, and it was like cold water rushing over him on a miserably hot day. He heard voices that were like black smoke. He described quasi-hallucinations and had been taking Thorazine

[55]Dr. Merin received his B.S., M.A., and Ph.D. degrees in psychology from Pennsylvania State University. He has taught at the University of South Florida and the University of Western Carolina. He has a clinical private practice in Tampa. (T 4709-4711).

for eight months.[56] (T 4751-4754).

At that time, Dr. Merin found Danny competent but diagnosed him as having schizotypal personality disorder, which is characterized by distractions and strange, unusual, bizarre behavior. Schizotypal personalities also have magical thinking, unusual perception experiences, and tend to attribute mystical properties to various physical stimuli. (T 4715, 4772-4774).

Dr. Merin said he now believes Danny has antisocial personality disorder. (T 4719). He defined a personality disorder as a long-term maladaptive form of behavior or a "style of living." (T 4723-4724). The basis of antisocial personality disorder is that the conscience is not functioning. (T 4803). In his opinion, Danny was antisocial, not borderline, because his behavior was sadistic, that is, purposefully injurious to the victims. (T 4727-4728). Danny fit all the criteria for borderline personality disorder, but they were subsumed under the antisocial personality disorder. (T 4804-4807). Dr. Merin said Danny also was histrionic, narcissistic, dependent, and obsessive/compulsive. (T 4738-4740). In his opinion, Danny was not under extreme mental or emotional distress at the time of the crimes, nor was his ability to conform his conduct to the law

[56]Dr. Merin said the Hillsborough and Pinellas County jail psychiatrists give Thorazine "no matter what the inmate has." (T 4754).

impaired. He said Danny was no more stressed in August of 1990 than he was in August of 1980. (T 4732-4734).

Dr. Merin said Danny's graph on the MMPI would indicate to another psychologist a wide range of psychological problems. (T 4760). In his opinion, however, psychological tests are "very touchy" and behavior is the best indicator of a person's personal dynamics. There was no indication of malingering, however, in either his or Dr. McMahon's MMPI examinations, and he did not believe Danny was malingering. (T 4758-4759, 4770). Danny's depression scale was elevated, but that did not mean he really felt depressed because, without actual malingering, "he may perceive himself as being more depressed than he actually is." (T 4761). On both MMPI's, scales 4, 6, and 8 were elevated, which is the recognized profile for borderline personality disorder. The recognized profile for antisocial personality disorder is 4, 9. (T 4764-4769). Danny also had a high f scale, indicating distress, and a very low k scale, which could be interpreted as a cry for help. The low k scale was not a cry for help in Danny's case. According to Merin, it just indicated "he feels lousy about himself." (T 4770).

Dr. Merin saw the movie "Exorcist III" after he read about it in the paper and at the prosecutor's request. He saw "uncanny parallels" between the movie and things Danny had said happened

to him. (T 4741-4743). Dr. Merin also found it phenomenal that the killer Gemini in the movie had lost the tips of his fingers, as had Danny, and that a portrait on the wall bore an amazing resemblance to Danny. (T 4743). In his opinion, Danny did not have possession syndrome, he just attached the name Gemini to the bad part of himself. The movie gave him a way of explaining things in a mystical, metaphysical way, in a way that fit his personality. (T 4742-4745).

Dr. Merin said people do not choose their personalities, nor do they choose to have a personality disorder, but they choose "the behavior that can later be identified as a personality disorder." (T 4747). Dr. Merin was aware the DSM-III says both genetic and environmental factors contribute to antisocial personality disorder and that fathers of antisocial personalities frequently have a disorder, too. (T 4800-4801).

In Dr. Merin's view, voyeurism is not a compulsion. Danny was a voyeur because he liked it. Engaging in voyeuristic behavior is no different from taking one's spouse to get ice cream once a week. Peeking is not uncommon among teenagers, and most "grow out of it, and they get a man or woman of their own." (T 4748-4749). Continuing to do it, even after being beaten for it, did not indicate it was a compulsion. In his opinion, that "would be pure defiance" and no different from continuing to eat

ice cream after your doctor tells you not to eat it because it has too much cholesterol. (T 4815-4816).

Dr. Merin agreed that Danny's family was dysfunctional; that mental or emotional abuse can be more damaging than physical abuse, long-term; and that it was not uncommon for abused children to develop denial mechanisms, as perhaps Kevin Rolling had done. (T 4810-4811).

Dr. Merin reviewed the psychological reports from Bryce Hospital, Alabama's state mental hospital, where Danny was admitted in 1979. (T 4778). The reports indicated that Claudia Rolling had said Danny had violent mood swings, from deep depression to high elation, and became disturbed almost to the point of incoherence during his divorce. Kevin Rolling described living in the Rolling house as like "living on the edge of a volcano." (T 4778-4780). The report also indicated Danny had attempted suicide several times; had experienced a hypnagogic episode[57] when he was in bed with his wife and saw a spirit or smoke; that he could be dramatic; and that his judgment and insight were poor. (T 4785-4786).

Dr. Merin was aware from Kevin Rolling's deposition that like Danny, Kevin believed in spirits and demons. (T 4791).

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[57]Dr. Merin said a hypnogogic episode is an image a person sees while in the twilight state between sleep and wakefulness. (T 4785).

Kevin also said he had visited Danny at Parchman, and Danny had told him he had to stand on a chair because the cell filled up with sewage and that he was in solitary for a long time. (T 4792).

Dr. Sphrehe, a forensic psychiatrist,[58] diagnosed Danny as having antisocial personality disorder, paraphilia, and a history of multiple substance abuse.[59] He also expressed the opinion that Danny had some traits of borderline personality disorder, and that people do not choose to have a personality disorder. (T 4835-4846). In Dr. Sprehe's opinion, Danny does not have possession syndrome. (T 4839).

In Dr. Sprehe's opinion, Danny was at all times during the crimes able to conform his conduct to the requirements of the law and was rationally aware of what was going on at the time because, inter alia, antisocial personalities always are in control of themselves. (T 4841-4843). In his opinion, voyeurism is a preference, not a compulsion, and was not a significant aspect of the crimes. (T 4845-4846).

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[58]Dr. Sprehe received his B.S. and M.D. degrees from the University of Oklahoma and did his psychiatric residency at Tulane University. He has been in private practice in Tampa since 1966 and is a clinical professor of psychiatry at the University of South Florida. He is board certified in psychiatry and forensic psychiatry. (T 3829-4830).

[59]Dr. Sprehe did not interview Danny. His opinion was based on his review of crime scene photographs; Danny's taped statements; the audiotape interviews of Drs. Krop and McMahon; depositions of witnesses; Danny's medical and psychiatric records; and transcripts of the trial testimony of Drs. Krop, McMahon, and Sadoff.

SUMMARY OF ARGUMENT

ISSUE I. The Sixth Amendment to the United States Constitution requires that jurors who sit in criminal trials must be impartial and fair. Although they may have some knowledge of the case, they must be excused if they cannot set their knowledge aside and judge the defendant without any preconceived biases.

In this case, the pretrial publicity concerning the Gainesville murders and Danny Rolling was so pervasive and traumatizing that this Court should presume as a matter of law that the venire was prejudiced against him. The entire Gainesville community was so seared with fear, terror, and panic for weeks and months after the killings that even three years later they could not fairly judge Rolling. The press contributed to developing this attitude by its relentless reporting of the murders, Edward Humphrey, Danny Rolling and every facet of the case. The press coverage continued without a break for three years, peaking at the time of his sentencing trial. Such extensive, overwhelming publicity presumptively tainted the venire. Accordingly, the lower court should have moved the trial away from Alachua County.

Additionally, those called to serve demonstrated an actual prejudice against Mr. Rolling that time had not softened. Among the jurors who sat, several expressed open animosity to Rolling,

believing that death was the only sentence appropriate for him. Others knew one of the victims or were afraid for their lives at the time these murders occurred.

The venire, as a whole, echoed and amplified the negative feelings that the jurors expressed. Even though the trial judge tried to seat a fair jury, the record shows that it could not be done. Therefore, because of the actual prejudice of the jury, this Court should reverse the lower court's sentence and remand for a new sentencing hearing.

ISSUE II. The state violated Rolling's Sixth Amendment right to counsel when it deliberately elicited, via Bobby Lewis, statements from Rolling in the absence of counsel after Rolling had invoked his right to an attorney. Bobby Lewis first created the opportunity to elicit incriminating statements from Rolling in order to make money and get out of prison by playing on Rolling's weaknesses. Law enforcement and prison officials encouraged him and did everything possible to facilitate Lewis in garnering information from Rolling about the Gainesville homicides. The state's knowing exploitation of the opportunity to confront Rolling in the absence of counsel violated his Sixth Amendment privilege. Moreover, the prosecutor's active participation in the interrogations of Rolling on January 18, January 31 and February 4th constituted a serious breach of

ethics. Together, the constitutional and ethical violations warranted suppression of all of Rolling's incriminating statements to Lewis and law enforcement.

ISSUE III. Rolling was living in a tent in a wooded area owned by the University of Florida when Deputy Merrill spotted two suspicious males enter the woods at 1 a.m. on August 28, 1990. As officers followed the suspects and announced their presence, one male turned back to the officers and the other fled. A canine unit called to track the fleeing suspect discovered Rolling's campsite. The officers searched the tent, discovered a tote bag containing a gun box, and after opening the box and finding a handgun, seized the tent and all its contents. Rolling moved to suppress all physical evidence seized as a result of this warrantless search.

The trial court found that Rolling had a reasonable expectation of privacy that society was willing to recognize in the tent, but that the search and subsequent seizure of the tent were justified by exigent circumstances. Appellant contends that the state failed to prove that the officers' conduct was reasonable, i.e., justified by any exceptions to the warrant requirement. The officers entered the tent, Rolling's zone of privacy, without a warrant or exigency; the property was not abandoned, and the area could have been secured until a warrant

was obtained. The trial court erred in denying the motion to suppress.

ISSUE IV. There were three separate complete episodes of criminal activity tried together in Rolling's penalty trial. The first episode occurred on Friday, August 24, 1990 at a Gainesville apartment building; the second occurred at a complex two miles away almost two days later; and the third happened at an apartment another mile away a day later. Thus, each episode involved different victims, on different days, in different places, and although they were in the same general vicinity, there was no evidence that they comprised a single uninterrupted crime spree. Furthermore, there was no causal link between the three crimes. On these facts, the joinder requirements of Florida Rule of Civil Procedure 3.150(a) were not met because there was no showing that the crimes were "connected acts or transactions." This Court's case law has consistently held that the rules do not warrant joinder of charges based on similar but separate episodes, separated in time, which are connected only by similar circumstances. The trial court's finding that the crimes were connected by a "unity of purpose" is not recognized in the case law relating to joinder, and severance of the cases should have been granted to assure a fair determination of the penalty decision. Accordingly, this Court should reverse Rolling's death

sentences and remand for three separate penalty proceedings.

ISSUE V. The trial court found that the homicide of Sonya Larson was especially heinous, atrocious, or cruel. The evidence, however, showed that she was attacked in her sleep and died quickly. There was no evidence of prolonged suffering or anticipation of death. The heinous, atrocious, or cruel aggravating factor is reserved for unnecessarily torturous murders where the defendant intends to cause the victim extreme pain or prolonged suffering. The evidence here did not meet that test, and accordingly, this Court should reverse the HAC finding as to victim Sonya Larson.

ISSUE VI. The trial court gave a modified heinous, atrocious, or cruel instruction which was vague and overbroad. The definitions given for heinous, atrocious, and cruel were precisely the ones used and found constitutionally inadequate in Shell v. Mississippi, 488 U.S. 1 (1990). Furthermore, the portion of the instruction taken from Florida cases was ambiguous and did not provide proper guidance to the jury. A jury instruction which gave more specific parameters for the heinous, atrocious, or cruel aggravator should have been given under the U.S. and Florida Constitutions, and this Court should reverse Rolling's resulting death sentences.

ISSUE I

CONSIDERING THE EXTENSIVE, INFLAMMATORY, PREJUDICIAL, AND PERVASIVE PUBLICITY THE TERROR AND PANIC THE PEOPLE OF GAINESVILLE AND ALACHUA COUNTY SUFFERED IN THE WEEKS AND MONTHS AFTER THE MURDERS ROLLING COMMITTED, THE COURT ERRED IN FAILING TO GRANT HIS MOTION FOR CHANGE OF VENUE, A VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.[60]

> Deciding a motion for change of venue is often the most difficult decision a trial judge must make in a well-publicized case. Copeland v. State, 457 So. 2d 1012, 1020 (Fla. 1984) (Overton, dissenting).

Rolling pled guilty to the five murders, three sexual batteries with great force, and three armed burglaries, on February 15, 1994. (T 1481-1506). The sentencing phase of Rolling's trial began the next day with voir dire. It lasted until March 3rd at which time twelve jurors and four alternates were selected. (T 2525). About six days into the voir dire, Richard Parker, the Public Defender for the Eighth Judicial Circuit and Rolling's lead counsel, renewed a pretrial motion for

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[60]The discussion of this issue involves extensive references to media reports. The newspaper clippings, which were submitted during voir dire as Defense Exhibit 1, cover the period from August 28, 1990, to April 16, 1993, the date of the hearing on Rolling's motion for change of venue. Over 450 newspaper articles were filed. They are listed in Appendix A, attached to this brief, by date and publication. Appendix B is a graph of the number of articles printed each week and the total number of column inches devoted to the articles. The graph runs from August of 1990 to April of 1993. An eight-month gap occurs after mid-April 1993 because trial counsel stopped collecting press clippings for that period. It does not indicate the Gainesville Sun stopped reporting the case.

The articles in Appendix A are numbered and will be referred to in the argument with a letter "A" followed by the assigned number.

individual "sequestered" voir dire, noting that the prospective jurors' answers were becoming homogenized. (T 660). The court denied that request. (T 663-668).

A week later, on February 28, Parker asked the court to change the venue. (T 7272, R 2388-90). Acknowledging that moving "this advisory jury sentencing hearing from this well-equipped well-prepared courthouse would be exceedingly inconvenient to everyone involved" (T 7273), Parker nevertheless made the personally difficult request 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." (T 7274). With obvious poignant feelings, he admitted, "It also implies-- making this request also implies that this community, my community, is unfair." (T 7274).

The court denied the request.

Immediately after the 12 jurors were selected, Rolling renewed his motion for a change of venue and supplemented the record with other press releases. (T 2267-68). The court again denied the motion. (T 2268-69). At Rolling's request, the court allowed evidence that the community was aware Rolling was wearing a bullet-proof vest and aware that another inmate at the Alachua County jail had just escaped. (T 2542-43). The court again denied Rolling's motion. (T 2544).

The court swore those selected to consider the case, and the penalty phase hearing proceeded.

In light of the extensive pretrial publicity and the terror cexperienced by the entire Gainesville community at the time of the murders, and the press's unrelenting coverage of this case and exposure of every facet of Danny Rolling's life and criminal activity (real and suspected), the trial court erred in denying counsel's request. By failing to move the sentencing hearing, the court denied Rolling his Sixth Amendment right to a fair and impartial jury.

A. The Sixth Amendment Standards

The law in this area is deceptively simple to state; applying it is much harder. The Sixth Amendment to the United States Constitution guarantees every person charged with a crime a fair trial, free of prejudice. Murphy v. Florida, 421 U.S. 794, 799, 95 S. Ct. 2031, 2036, 44 L. Ed. 2d 589, 594 (1975); Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966); Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 1965; Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963); Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); Woods v. Dugger, 923 F. 2d 1454 (11th Cir. 1991).

The United States Supreme Court has recognized two types of

prejudice that will justify moving a trial from the community where it would normally be tried: presumed and actual. To establish presumed prejudice, the 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. . . ." Mayola v. Alabama, 623 F. 2d at 997 (5th Cir. 1980). Actual prejudice means any actual, expressed opinions indicating the jurors' prejudice or inability to be impartial and indifferent as the Sixth Amendment requires. Irvin v. Dowd.

When this Court reviews a trial court's ruling denying a motion for change of venue, it must reverse if the lower court manifestly or palpably abused its discretion. Gaskin v. State, 591 So. 2d 917 (Fla. 1991). Meeting that standard should not be so difficult because this Court has also said:

> We take care to make clear, however, that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubts to the ability of the State to furnish a defendant a trial by fair and impartial jury. Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is a reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to

> it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant a change of venue.

Singer v. State, 109 So. 2d 7, 14 (Fla. 1959).

In short, "Where the evidence presented reflects prejudice, bias, and preconceived opinions, the trial court is bound to grant the motion" to change venue. Manning, 378 So. 2d 274, 276 (Fla. 1979).

Florida courts, while following the pronouncements of the United States Supreme Court in this area, have given their own perspective to issues involving juror impartiality and bias.

In ruling on a motion to change venue, a trial court should determine

> 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.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977); Pietri v. State, 644 So. 2d 1347, 1352 (Fla. 1994); Manning.

Rolling has the burden on appeal to show prejudice. Id. He

will do this, first, by showing that the pre-trial publicity, the fear experienced by everyone in Gainesville so permeated and infected the venire that the trial court should have presumed the prospective jurors were prejudiced against the defendant. Second, the voir dire revealed that the prospective jurors were actually prejudiced and could not sit as impartial, indifferent members of the community to determine what sentence Rolling should receive. Each approach will show a city and county seared with a red hot poker of terror, horror, and panic.

B. Presumed Prejudice

A defendant can establish a presumption of prejudice by showing "that the general atmosphere of the community was deeply hostile to him" or by showing "great difficulty in selecting a jury." Copeland v. State, 457 So. 2d 1012, 1017 (Fla. 1984).

Presumed prejudice, thus, examines the influences that affected members of the community. What prospective jurors actually said when questioned about their impartiality has no relevance.

In Rideau v. Louisiana, for example, a man robbed a bank in Lake Charles, Louisiana, kidnapped three of its employees, and killed one of them. The police quickly apprehended the defendant, and by the next day he had confessed to committing the crimes. The 20-minute confession was played and replayed on the

local television station, and it was estimated that about one third of the community saw it. The United States Supreme Court held that this repeated showing sufficiently prejudiced the community such that he could not get a fair trial there:

> [W]e hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense, was Rideau's trial-at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be a hollow formality.

373 U.S. at 726.

In Rideau, the Supreme Court needed to examine only one widely viewed television report to justify presuming that any juror chosen would have been prejudiced against Rideau. Of course, if potential jurors are subjected to other prejudicial influences, those also should be considered.

Since Rideau v. Louisiana, the United States Supreme Court has decided two other significant venue cases: Murphy v. Florida and Patton v. Yount, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Neither decision retreated from the considerations fundamental to the earlier case.

In Murphy, a flamboyant jewel thief was convicted in 1970 of burglary and assault with the intent to commit robbery, based on events in 1968. In the intervening two years, he was found incompetent to stand trial, committed to a hospital, restored to competency and convicted of murder. He also pled guilty to a federal charge involving stolen securities. Because of Murphy's notoriety, the Miami press covered those events, and there were scores of articles, many purportedly relating statements Murphy or his attorney made to reporters. 421 U.S. at 296.

Of the 78 persons in the venire, one fourth were excused by the court because they had prejudged Murphy guilty, 20 were peremptorily challenged, and 30 did not have to serve for personal reasons. The defendant asked for a change of venue because the jurors knew of his murder conviction and his theft of the "Star of India" sapphire. The court denied the request, and the United States Supreme Court affirmed. It did so for several reasons: The jurors who served showed no hostility to Murphy that could not be laid aside; some of the jurors had only a vague recollection of the robbery, and none saw any relevance of his past to the present crimes; only one possible juror expressed any partiality against Murphy, and that was in the context of having to sit through a two or three week case; the press reports were largely factual; and only one quarter of the venire had any

preconceived bias against Murphy.

In Patton v. Yount, Yount was convicted in 1966 of a murder and rape that had occurred earlier that year. The victim had been his student at the local high school. On appeal, the Pennsylvania Supreme Court reversed the convictions. On remand in 1970, the prosecutor dropped the rape charge, but proceeded on the murder allegation. Before and during voir dire, the defendant made several requests for a change of venue, which the court denied. Yount claimed extensive publicity that "could not be eradicated from the minds of potential jurors." 467 U.S. at 1027.

The United States Supreme Court afffirmed the trial court's ruling, reasoning that the extensive publicity had occurred almost four years earlier; press coverage was considerably less on retrial (on average, about one article per month); the articles were extremely brief announcements of the trial dates and scheduling; the articles published were "purely factual articles"; during the time between the two trials, the press printed practically nothing about the matter; community sentiment against Yount had softened, and many potential jurors had forgotten about the facts of the crime.

From these cases and others decided by this Court, three broad, significant, analytical categories emerge: 1) the factual

and emotional content of the articles; 2) the amount of repetition of information; and 3) the prominence the press gave the crime and the level of community interest. Each category and the associated factors will be considered.

1. Factual Versus Emotional Content

Unlike the "purely factual" and "largely factual" pretrial publicity in Murphy and Patton v. Yount, the press here developed and pursued several highly emotional themes during the four-year period between the murders and the start of trial.

Community Hysteria

During the first three months, the press focused on the community-wide hysteria that began the day the first victims' bodies were discovered. Expressions of terror and horror regularly appeared in print, describing the community's reaction to the murders. For example:

> The community reacted with stunned horror. An editorial in the paper on August 29 tried to capture the emotions "But now it is the season of fear. Someone--the killer or killers among us--has ripped away the good feelings and the sense of anticipation that usually accompany this community's rites of autumn. . . Panic has replaced hope. . . . (A 2).
>
> Mass hysteria [gripped this college town]. (A 4).
>
> A 23-year-old Gainesville woman awakens at 4 in the morning, terrified and frozen, unable

to even turn on a light." (A 64).

> As [one woman student] spoke of the recent events, her voice cracked with fear, anger, and frustration. "Why aren't they telling us anything? I just want to know how he's getting in," she said, leaning her head against her boyfriend's shoulder. "I'm scared; I didn't even sleep at my house last night." (A 12).
>
> This is really a panicked town right now." (A 12).
>
> "I have no choice," explained Sheri of Fort Lauderdale . . . My parents said, "Come home right now." . . . "My parents are hysterical," she said. "My parents said, "Just leave your stuff here and get in the car." (A 10).
>
> [N]early everyone in Gainesville--college students and permanent residents alike--is anxious. . . . People glare warily at strangers who walk near them in the dark. . . [M]any won't even respond to a knock. Favorite bedside weapons are baseball bats." (A 69).

The press also focused on the gory details of the murders. The situation was inflammatory. The press only made it more so:

> The list [of things the police were looking for when they applied for a search warrant] clearly indicated just how gruesome the crime scenes were. . . . Among the evidence sought was human flesh, female nipples, women's undergarments, photographs of victims, knives, screwdrivers, shoes, a black hood and other black clothing, liquid soap, adhesive tape and sexual bondage paraphernalia. (A 125).
>
> Police spokesme haven not confirmed or denied

> reports from some sources that one of the victims, Hoyt, was decapitated and her head displayed on a shelf in the apartment." (A 30).

Sympathy For the Victims

The press focused on the victims, expressing a common loss and sorrow. The University and Santa Fe Community College quickly responded to this crisis, and so did the rest of the community. (A 83 206, 207, 208, 209, 210, 211, 212, 213). For example:

> [The mayor said] the tragedy was felt by all. "When ever young people come to our city, I think the community really thinks of them as our young people," he said, "so when anything happens to them, it affects all of us deeply." (A 27).

> President Lombardi eulogized them. "These five outstanding people were ours. They belonged to us." (A 88).

Trees were planted in their memory (A 148); white ribbons were displayed (A 148); quilts were sewn (A 240); and flags flew at half mast (A 152). Huge crowds attended memorial services. (A 88). Scholarships were established in the names of the slain students. (A 208). A wall on 34th Street with the name of the five students became something of a shrine. (A 78). Thank-you cards were signed and sent to the police. (A 152).

The Sun began printing pictures of the five victims when it published an article about the murders. (A 79, 255, 362, 364,

376, 413). Occasionally, it included short biographical statements about them. (A 255, 376, 413). The pictures became almost per se inflammatory. Each showed a smiling, happy young woman or man. They radiated life, hope and that special air of confidence that successful youth have. Yet, those who saw those beautiful women and handsome man knew they had been brutally murdered and mutilated.

The pictures were published at least six times the week Rolling went to trial. (A 413, 416, 419, 429, 433, 439).

The press also reported that members of the victims' families wanted Rolling dead:

> We want Danny Rolling dead. Electrocuted. . . . No matter what it takes or what we have to go through, we want to see him as dead as Tracy is. (A 411).

Victimization of Edward Humphrey

The media also focused on suspects during the first months after the murders, particularly on Edward Humphrey. The "Humphrey" story exhibits the media's fascination with this case, its willingness to use "objective"-type (R 3265) reporting to portray that young man as the crazed maniac the police were hunting for, and its obsession with reporting every facet of the suspect's life.

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 revealing and reveling in Humphrey's mental problems and troubles with the law.[61] (A 41, 45). It explored his violence. (A 45, 55). Former neighbors described him as "scarred mentally as well as physically.[62] (A 45, 55).

> One incident of bizarre behavior was during an encounter with military police at Patrick Air Force Base. After breaking onto the base, he was seen chewing on a beer can, and while in custody, talked of "hanging someone up and gutting them like a deer," according to a witness. (A 55).

Building their case, the press related that Humphrey let a firecracker explode in his hand. Even his best friend believed him capable of murder: "Ed could have done it . . . He can be strange, moody." The Sun also renamed Humphrey. He was no longer simply Edward Humphrey. He became "Edward Humphrey, a mentally disturbed UF freshman." "Edward Lewis Humphrey, 18, an emotionally disturbed UF student." (A 47, 55).

Other accounts were similar. "Humphrey acted obsessed with

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[61]Humphrey had allegedly beaten his grandmother in Brevard County a few weeks earlier, and he was being held in that county's detention facility. The court in Brevard County increased the $10,250 bond set when he was booked into jail to $1 million. Police in Gainesville denied that their interest had anything to do with this extraordinarily high bond. A prosecutor in Brevard County said yes, it did. (A 41).

[62]Humphrey's face was scarred as a result of a 1988 suicide attempt in which he jumped from a speeding vehicle. (A 45).

women, violence." (A 68). He also had "a major crush on Tracy," according to Rachel Oliver, a Gatorwood resident. "That boy was fierce -- he really scared me. You could tell by the look in his eyes that he was fierce and totally crazy." Weeks before the murders, he harassed female clerks in a surf shop. (A 68). "Just days before five college students were found brutally slain in their apartments, Edward Lewis Humphrey displayed a pattern of irrational behavior when he took a trip to visit relatives in Montana." (A 108). His aunt would confess, "Humphrey's violent visit scared us."[63] (A 114). Others simply said he was extremely belligerent, irate, and threatening to strangers. (A 94).

Police continued to look for evidence that would link Humphrey to the murders, as did the press, and what they discovered, however tangential, was published. A woman claimed that Humphrey was the mustached man in his mid to late 20's who had tried to rape her two years earlier. (A 82). Motel rooms where he may have stayed were checked. "Humphrey was treated at Shands Hospital's psychiatric unit for two months in 1988."

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[63]Amidst this expose, Humphrey's psychiatrist implied, "Humphrey's mental condition could make it less likely that he could carry out such crimes, which have been described as methodical" (A 69), and his brother insisted on his innocence. (A 70). Others were leery of the allegations the press was making. "Some students say they don't think Edward Lewis Humphrey is the killer." (A 81). Such voices were usually drowned in a sea of bad press on this 18-year-old emotionally disturbed man.

(A 89). The media reported the custody battle for Humphrey and his siblings, his mother's mental illness, and his "fascination with military combat paraphernalia." (A 147). "'John,' one of his multiple personalities, [was] patterned after John Rambo." (A 150).

The police conducted extensive searches of Humphrey's apartment, his grandmother's home, and the woods, lakes, and ponds near wherever he went. They took blood samples from him. However, "Lab results failed to link Edward Humphrey to the student murders." (A 173).

As they later treated Rolling's robbery trials in Tampa, Ocala, and Tallahassee, the Sun gave front page coverage to Humphrey's Brevard County battery trial, covering the case from arraignment to sentence. (A 191, 192, 193, 194, 196, 197).

In January 1991, when Rolling emerged as the prime suspect, the press relegated Edward Humphrey to back page articles, and Rolling came under the same intensive scrutiny Humphrey had received.

The press treated Danny Rolling much like they had Edward Humphrey: allegations became accepted fact; trials in other cities became daily front page news, and mental defects or problems were explored, exalted, but never explained. The only difference with Rolling was that the press carried its mania to

even higher inflammatory levels.

The Prejudice to Danny Rolling

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. The Sun gave extensive front page coverage to all aspects of his two robbery trials in Tampa (including his competency determination), his plea to a similar charge in Ocala, and his federal bank robbery trial in Tallahassee. Not only were these news items reported, they were repeated, almost monotonously. In the same manner the press referred to Humphrey, Danny Rolling became, Danny Rolling, career criminal, or Danny Rolling, career criminal with several life sentences. The repeated references to other crimes fatally undermined the fairness of Rolling's sentencing hearing. See infra, p. 122-128.

The press devoted extensive space to Rolling's psychological condition, as well. Long before counsel for Rolling began considering their client's mental condition, people in Gainesville knew it:

> He may be the neighborhood oddball nicknamed 'Rambo' who practiced martial arts by sparring with trees and always jogged with a

> heavy piece of wood across his shoulders. (A 216).
>
> The odd behavior and military fatigues may remind people of another name that suddenly became widely known through the Gainesville case; Edward Humphrey. (A 216).
>
> Everybody around here knew that the little Rolling wasn't right. (A 216).
>
> Psychiatrists in the past have described the day laborer and frequent armed robber as an alcoholic with a personality disorder. (A 217).
>
> [While awaiting sentencing for a Mississippi robbery he] offered to have his hands cut off rather than go to prison. (A 218).

The newspaper reported in detail the psychological evidence Rolling presented to prove his incompetency as well as the judge's findings at each of his other trials:

> Danny Harold Rolling is "suffering from a schizophrenic-type illness" and that his guilty plea should be withdrawn. (A 217).
>
> While Rolling has some symptoms of a personality disorder and other mental problems, as well as substance abuse, and apparently suffered abuse from his father as a child, it did not make him incompetent to plead guilty. (A 248).
>
> Judge ruled Rolling competent in his guilty plea for Ocala armed robbery. (A 250).
>
> Evaluations may have been justified because of the daily dosages of Thorazine, a drug prescribed to control hallucinations and other psychotic episodes. (A 281).

> [Hallucinations undoubtedly came from] using LSD between 60 and 100 times, and, in the week or so before his arrest, using crack cocaine several times. (A 250).
>
> Mr. Rolling can be psychotic on Monday, better on Tuesday, and psychotic on Wednesday. (A 285).

Some of the mental health experts' findings on Rolling's incompetency resurfaced in the penalty phase portion of his capital trial, as predicted by the press, but by then the jurors knew the courts had uniformly rejected them. The jurors may very well have believed they need not have considered it as mitigation.

Another press issue was Rolling's childhood and background. While perhaps correct, press reports were woefully incomplete and denigrated his mental illness defense. (A 439, 443, 453a, 440). For example:

> By claiming mental illness, Rolling will admit his guilt, then try to produce sympathy from the jurors. If it works - and it has in the past in Florida - Rolling will get his wish and not be executed. (A 440).

Rolling, thus, went to trial with jurors who thought they knew what he would present in mitigation. The press's reporting may have given the jurors the impression that whatever problems Rolling had, they were not serious enough to bother several judges. It also attempted to predict what Rolling's defenses

would be.

The press reported on virtually every move defense counsel made to represent Rolling. When his lawyers raised questions concerning DNA evidence (A 334), the press countered by informing readers that genetic fingerprinting was a reliable and valid way of convicting the guilty and freeing the innocent. (A 350).

The Sun then began educating the community about the mitigating and aggravating factors the jurors would hear when deciding Rolling's fate. "Parker maintains that a long history of abuse contributed to Rolling's mental illness." (A 437). Immediately after the plea, the press presented the defense's strategy: "Danny Harold Rolling is, and has been since before these crimes, mentally ill." (A 439).

The Sun speculated how counsel would be "selling" his story. (A 439). Rolling's courtroom demeanor

> is the polar opposite of the violent, unfathomable murderer he now admits to being. Previous psychological reports and comments from fellow inmates hint that his Jekyll and Hyde personality may actually exist. That contrast may be what defense attorneys will try to show. The remorseful, pitiful Danny versus the violent killer that was so smart he left no clues behind.

(A 439).

The Times-Union also theorized what defense strategies Rolling's counsel might attempt to utilize.

> Parker didn't use the insanity defense because he would not be able to convince a jury that Rolling was so mentally ill during the slayings that he didn't know right from wrong. Parker can concentrate on creating sympathy for his client by explaining Rolling's mental illness and abusive upbringing and how they may have affected his state of mind at the time of the slayings. (A 440).

The Tampa robbery received front page attention (including pictures). The Gainesville paper carried that story for three days, detailing the state's evidence, the eyewitnesses, and the hair evidence. (A 299, 300, 301). The sentencing jury heard none of this evidence. The paper gave front page, bold print headlines to the Tampa jury finding him guilty of that offense. When the court sentenced him, the Gainesville paper again told the community that the court had sentenced him to life in prison for the crimes, and he was now an habitual offender.

The press then printed numerous articles over a several day period about the Gainesville bank robbery trial in Tallahassee. Again, it got front page coverage. (A 341, 342, 344, 345, 346, 347). So did the jury's verdict and the court's life sentence. By now, the newspaper was referring to Rolling as a career criminal, frequently mentioning his crime spree.

Beyond inflammatory headlines and stories, the articles themselves often had an eerie, gruesome quality almost beyond

imagination:

> Rolling often made him nervous or shocked him with things he said. One of them stands out in his mind, Cooper said, and his eyes got big as he told of the conversation.
>
> "He said,'Have you ever held titties in your hands'?" Cooper said, explaining that he responded that of course he had, many times. He said Rolling then explained that he meant holding them, literally- meaning a woman's breasts that had been cut away. "I mean really in your hands."
>
> Nipples were cut from some of the women killed in August, police have confirmed. (A 237).

The murders themselves were so horrible that the news media needed only to give them brief mention before terror and imagination took over. Nevertheless, during the weeks, months and years after the homicides, the newspaper repeatedly mentioned the decapitation of Hoyt, the multiple stabbings of all the victims, the disemboweling of Hoyt, the sexual batteries on Hoyt, Powell and Paules, and the fierce struggle Taboada must have had with Rolling. The Sun capped this three-year effort by publishing the verbatim factual plea the state presented at Rolling's change of plea. (A 421). This occurred the day before jury selection for the sentencing phase of the trial began, without any warning from the court not to read any of the articles even though the venire had been called for the trial.

Keeping the Case in the Public Mind

The press kept this story in the public eye in other ways. Another inflammatory story line pursued was the serial killer persona. Articles relating to serial killers repeatedly appeared in the Sun , feeding the community's insatiable appetite for information. (A 11, 98, 169, 204, 225, 292). For example, the press extensively quoted "experts" on serial killers:

> [Bundy expert] convinced a psychopathic killer just like Bundy is responsible for the Gainesville killings. It is an absolute chilling resemblance. (A 7).
>
> The mood on the FSU campus during the 1978 investigations [disbelief, sadness, fear, and rage] . . . mirrored the one felt in Gainesville this week. (A 7).
>
> The recent murders could be the work of a "spree-killer'--someone on a short-term rampage. Serial killers are usually not this sloppy. (A 11).
>
> Based on profiles of known multiple murders, the killer or killers may not be insane in the classic sense, but driven by an anger by years of failure. (A 11).
>
> The psychological characteristics that make up serial killers--who are genuinely sociopaths and sexual sadists--are clearly on the rise. There are a lot more people out there now who have no feelings of guilt or remorse or emphathy or concern for others. (A 204).
>
> A true serial murderer stalks, plans, relishes, fondles and tortures. He breathes on his victims and cherishes their gurgles of

> fear. Blood becomes vital, as does the respiratory sounds of death. (A 169).

The newspaper published maps showing where the murdered students lived. (A 6, 255, 416). A year later, two more females were murdered, and the paper published another map showing that their bodies were found in an apartment in the general vicinity of the killings a year earlier. (A 255). Actually, the paper went further by including the location where another female student who had disappeared in 1989 lived.

The paper also published time lines that tracked when the murders occurred and what the police had done in the days after the homicides. (A 47, 60, 73, 79, 106). A final time line including the triple murder in Louisiana, and the thefts, burglaries, and robberies in central Florida was published on the day his trial was to start. (A 413, 416-day of plea).

Finally, the press kept the murders in the public eye by reports on weirdos and jail house snitches. Early, a woman fell instantly in love with Rolling. Even the press gave her short shrift. (A 295). Sondra London, however, was one of them, a writer of sorts. They gave her lots of ink, discussing her background, her torrid love affair (by mail) with Rolling, and their professions of undying love and desire to be married. During this steamy affair, she convinced him to let her write a

book about him. Litigation was pursued and more articles were written about whether this unconvicted killer could reap a financial reward from his crimes. To the dismay of many, the First District Court of Appeal ruled that as long as he remained legally innocent he could. Rolling v. State ex. rel. Butterworth, 630 So. 2d 635 (Fla. 1994). (A 382, 383, 385, 386, 387, 392, 397, 399, 403, 404).

By now others wanted a piece of the action, even former death row inmate Bobby Lewis. Lewis, the only person to escape from death row (as the paper reported) became Rolling's father confessor, and many of the details of the murders were presented to the jury and the press through him. But not all of what the press reported Lewis claimed Rolling told him was presented to the jury. (A 390, 409).

Recent Exposure

As the trial approached, the memories of Gainesville's most heinous slayings were resurrected:

> People are dreading the trial because it's all going to be rehashed again. When the trial comes, I don't want to read it. I don't even want to talk about it because I'll get sick. (A 413).
>
> Every person in this community was held hostage. We couldn't go where we wanted to go. We couldn't do what we wanted to do." (A 413).

Remembering a season of fear. (A 422).

Rolling trial may bring painful memories. (A 415).

Those who lived in Gainesville when the students were killed may feel as if the trial's extensive coverage is forcing them to relive the tragedy." (A 415).

Every time I drive on 34th Street, I see the wall, and I do remember all these people. (A 415).

2. Repetition

How often a newspaper repeats the facts of a story, particularly those about the murders, confessions, and other crimes is an important consideration. The human mind tends to recall that which is frequently repeated. Coleman v. Kemp, 778 F. 2d 1487, 1541 (11th Cir. 1985).

The press repeatedly mentioned other crimes Rolling committed or allegedly committed, even though the crimes or details of the crimes were never introduced at trial. For example:

Shreveport, La. Triple Murder (27 Articles)[64]

The most serious, prejudicial reporting of uncharged crimes involved a multiple murder in Shreveport, Louisiana, Rolling's home town. About ten months before the Gainesville killings,

[64]This refers to the number of articles in which references to this offense were made or discussed in any detail. The headlines to the articles are listed in Appendix A.

someone brutally murdered Julie Grissom, a 24-year-old petite brunette college student at Louisiana State University-Shreveport; her father, Tom Grissom, 55, and nephew Sean, 8, in southern Shreveport. (A 246, 268, 293). The boy was stabbed in the back while he laid on the floor watching TV with such force that the weapon passed through his body (A 246). Ms. Grissom's nude body, like two of those in the Gainesville homicides, was posed. (A 246).

Police could only weakly connect Rolling to the murders. He may have jogged on the same track as Julie, and on the day of the murders, he had been fired from his job, which was a mile from where she lived. DNA tests tried to make a stronger connection, but they were inconclusive. (A 359).

Undeterred by the facts, the Sun noted the striking similarities "linking the two" crime scenes and repeatedly emphasized that deduction. (A 214, 215, 217, 218, 246, 261, 268, 293, 359, 416, 430).

Attempted Murder of Father (22 articles)

In May 1990, Rolling shot his father, a retired police lieutenant, in the head. One article reported that Claudia Rolling, his mother, said the two had gotten into an argument after her husband told Danny to roll his car windows up because it was raining. When he returned he kicked in a door and

threatened his father. The elder Rolling fired several shots. (A 215, 250).

> The press reported it slightly, but significantly differently: Police reports said that Danny stormed out of the house followed by his pistol-toting father. Three or four shots were fired and James Rolling went back inside. Danny went to the back yard and got a pistol he had stashed in a shed. Claudia Rolling told police her husband was standing in the doorway to the kitchen when Danny kicked in the door and said, "Old man, you want to shoot it out?" Shots were fired and James Rolling was hit in the head and stomach. (A 293).

Ocala, Florida- Winn Dixie Robbery (9 articles)

The press reported that a week after the Gainesville murders, Rolling robbed a Winn-Dixie grocery store in Ocala brandishing a .38 caliber gun. He fled in the car he had stolen in Tampa but was quickly caught. (A 215, 217, 218, 293, 306).

1985 Kroger Robbery (2 articles)

The press reported that in July 1985 Danny Rolling went to a Kroger grocery store in Jackson, Mississippi. As he was going through the check out line he pulled out a gun, and told the clerk to, "Give me your money." He left with $290. He was caught the next day. (A 216, 293). While awaiting sentencing, he offered to have his hands cut off rather than go to prison. (A 216, 218, 293). At the sentencing hearing, he appeared with his head and eyebrows shaven. When asked why he had done that,

he said, "He wanted to change, that he was cleaning up."

Tampa Pack and Save (16 articles)

The press reported that a few days after the Gainesville murders, Rolling robbed several cashiers at a "Pack and Save" in Tampa. As he fled with $3000, the police gave chase. He pointed his gun at one of them and told her, "Lady, I don't want to shoot you." He fled in a car he had stolen in Gainesville, barely missing another officer. Two other officers caught up with the car and shot at it 19 times, hitting it 17 times. The vehicle careened into a cement wall, and struck a mobile home. Rolling fled into some nearby woods. (A 217, 224, 235, 267, 269, 270, 279, 280, 281, 293, 299, 300, 301, 304, 416, 431).

Gainesville Bank Robbery (7 articles)

The press reported that "[o]n August 27, 1990, at 11 a.m., Rolling walked into the First Union National bank and demanded money. He appeared to be carrying a gun under his jacket or shirt and disappeared into a nearby wooded area." (A 315, 341, 416). He was armed with a .9mm semi-automatic pistol. "He was not yelling or screaming or anything like that. He was being calm in his manner, . . ." Rolling took money in a bag he had brought with him, then ran into a wooded area behind a nearby trailer park. (A 276).

The significance of this incident was evident to the press,

as it repeatedly informed its readers. "Rolling robbed the First Union National Bank on Archer Road hours after Christa Hoyt's stabbed and decapitated body was discovered in her apartment less than a mile away." (A 293, 315, 342). Eventually, the police searched those woods and discovered Rolling's campsite and cash stained with red dye from the bank robbery. (A 293, 341, 342).

Stolen car-Gainesville (13 articles)

The press reported that Rolling broke into an apartment in northwest Gainesville on August 30, 1990. While there he ate some oatmeal, put the dishes in the sink, watched a Playboy video and left with the television on. (A 332, 416). He stole the occupant's car and drove it to Tampa where it became the "get-away" car for the "Pack and Save" robbery. (A 217, 224, 225, 233, 235, 267, 270, 276, 278, 279, 293, 332, 416).

Stolen car and Burglaries - Tampa (21 articles)

The press reported that three days later (the same day as the Pack and Save robbery) Rolling broke into an apartment in Tampa and took cash, a camera, a wallet, and a stone used for sharpening knives. Police believe he also broke into two more apartments in Tampa by prying open sliding glass doors -- the same method of entry used in the Gainesville killings. In one of the Tampa apartments, the intruder called Shreveport four times. Three calls were traced to the home of one of Rolling's close

friends, and the other to Rolling's parents. At another apartment, he ate a banana as the residents slept. He left the peel on a chair he had placed in the hallway. The victim remembered the scene well. He awoke the morning after to find a chair had been moved to the hall in front of his apartment bedroom and the banana peel was "posed" flat on the seat. "It was put there deliberately. . . . He obviously wanted it to be the first thing I saw when I got up." (A 217, 224, 228, 233, 267, 270, 279,280, 281, 293, 308, 210, 311, 312, 332, 373, 416). These retellings had special significance because Rolling broke into two houses while the occupants were asleep, and either ate their food or used their telephone. The clear message was that these sleeping victims could have been killed as easily as the Gainesville students, all of whom were murdered in their homes at night.

Kansas City Robberies (4 articles)

The press reported that authorities believe Rolling drifted into the Kansas City area shortly after shooting his father. While there he robbed three stores and burglarized a house. During the break-in, he may have stolen some identification. (A 254, 293, 379, 416).

Lakeland, Florida Murder (2 articles)

The press reported that George Brown, charged with an April

1990 murder, admitted that he was "kind of involved," in the homicide but not responsible for it. A man identified as "Danny" and matching Rolling's general description had killed the victim. Brown's defense counsel filed a motion, the Sun reported, to find out where Rolling was on April 22, 1990, whether any of the Gainesville or Shreveport victims had holes inflicted in their bodies, their tongues, eyeballs, or throat cartilage were missing; if any male victims were mutilated, and how; whether the Gainesville victims were posed similarly to the Lakeland victim. (A 231, 232).

Shreveport, La. Home Invasion Robbery (2 articles)

The press reported that the day Rolling shot his father, he burst into the bedroom where Stephen and Louisa Clausen were watching television. Although they were his friends, he pointed a gun at them, telling them he had "just shot his father, and I want all your money." When the Clausens called the hospital and learned the elder Rolling was alive, Danny calmed down. He took $21 from Louisa's purse, she gave him a coat, an apple and some cookies, and bid him good-bye. He apologized for tracking mud on their carpet. Crying, he left their house, saying "God bless you all." (A 225, 293).

Grocery stores in Columbus, Ga. and Montgomery, Al.

(1 article)

The press reported that in May 1979, Rolling robbed grocery stores in Columbus, Georgia and Montgomery, Alabama. He pled to those offenses and served time in the Georgia State Prison. (A 225).

3. Prominence/Community Interest

The number of articles written about the crime, the defendant, and other related subjects has obvious importance. See Oats v. State, 446 So. 2d 90, 93 (Fla. 1984). In this case, Rolling's counsel filed 453 articles from the Gainesville Sun alone. Except for a few transcripts of video reports, he included none of the television coverage, although this case obviously attracted a world-wide attention. (A 18, 418, 419). In truth, what was introduced into the record must account for only a small chip off a huge iceberg of the total space and air time the news media devoted to Danny Rolling and the Gainesville murders. Even the notorious cases of Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), and Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1965), lacked the overwhelming volume of media attention that Rolling's case generated. At the trial, over three years later, the press attended the sentencing phase of the trial in such numbers that the Chief Judge of the Eighth Judicial Circuit Court issued a

special administrative order controlling the press.[65] Dozens of TV satellite vans were anticipated. (A 418). No other case except O.J. Simpson's generated as much publicity.

Also, as expected, many of the articles dealing with this case had front page notoriety, further evidence that the Gainesville murders and Rolling's trial continued to excite public interest. In Gainesville, this case usually was the lead article and separated from other front page news by large, bold headlines. (A 341, 342, 345, 348).

Most of the other articles about the case were on the front page of the local section. The stories on Rolling were far more prominent than the "extremely brief announcements of trial dates

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[65]In October 1991, Elzie Sanders, then the Chief Judge for the Eighth Judicial Circuit, signed Administrative Order 1.990 which defined the procedures the courts in that circuit would follow for "media coverage of Special Interest/High Profile Proceedings." In another order, dated February 14, 1994, the Chief Judge found that "the trial proceedings in Alachua County of State of Florida v. Danny Harold Rolling are declared to be a Special High Interest/High Profile proceeding of great public interest." According, the order designated a "Court Press Liaison," and appointed a "Media Committee." It restricted the fourth floor of the courthouse, allowing access only to persons with appropriate media credentials, and others having business on that floor. It allocated nine rooms on that floor to the prosecution and one for the defense. The press took over a courtroom on the first floor and another room on the second floor. An entire parking lot was dedicated for use by satellite trucks "with overflow parking on Third Street between Second and Third Avenues." Daily briefings were authorized, and numerous other rules sought to ensure the press would be controlled.

Similarly, Judge Morris issued a "Decorum Order" "In the exercise of its inherent power to provide for the orderly disposition of the case." (R 2230). Of the approximately 106 seats in the courtroom, 36 were reserved for the media. The general public had 54 spaces, "on a first-come, first-serve basis." (R 2230). Sixteen were reserved for the victims' families, and the rest were given to the defense, prosecution, and Court Administrator. (R 2231). One television camera was allowed and two still cameras were permitted. Strict rules were laid out to control their use as well as the rest of the press corps that flocked to this trial.

and scheduling" that typified the monthly articles about the defendant in Patton v. Yount, 467 U.S. at 1032. None of that occurred here. The press almost always gave Rolling front row attention.

In short, the level of press and community interest was so intense that for weeks after the murder, periodically over the following three years, and again immediately before trial, Rolling's case was the only thing people in Gainesville could talk about. (A 391).

Articles were written about the murders, of course, but considerable space was devoted to, inter alia, the victims; the University's efforts to cope with the panic; the search for other suspects; Rollings other crimes, mental health, and possible defenses; the profile of a serial killer. See Appendix A.

Even one, two, and three years later, Rolling's case continued to generate press. See Appendix A. During the weeks immediately before trial, more than two articles appeared in the Sun each week, totaling over 20 column inches in length. See Appendix B. Then, during the trial itself, the newspaper published a high count of 27 articles in one week with 400 column inches. Appendix B.

There can be no denying that this case had a prominence unequaled to any other case in Florida.

Granted, there was a 3-1/2 year gap between the crime, August 1990, and the defendant's trial, February 1993. In Patton v. Yount, four years separated the crime and Yount's retrial, and as the Court in that case noted, "That time soothes and erases is a perfectly natural phenomenon, familiar to all." 467 U.S. at 1034. Of particular importance, the high Court stressed that little publicity surrounded the second trial, many of those who were called for jury duty had forgotten about the case or could recall few of its actual details, and others no longer had any fixed opinion of the defendant's guilt. Id. at 1034-35.

Patton v. Young is clearly distinguishable from the instant case. First, every member of the venire recalled or knew about this case, itself a very unusual and significant fact. In a "typical" murder case, such as Patton v. Young, after an initial flurry of press, the media moves on to other matters, and the case largely fades from view. Similarly, people's interest wane, even in a first degree murder, and other events and daily occurrences soon push the homicide into the recesses of the mind and out of memory. When asked to recall the case months and years later, most jurors have only a sketchy memory of what happened.

Rolling's case, however, was not the typical case factually, nor did the media or court treat it as such. First, the 3-1/2

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 slayings, or Rolling himself. Appendix B.

After the first three months of hysteria, even the press tapered off, but it never abandoned the case or Rolling. About five months after the homicides Rolling became a suspect, and for the next two months, the Gainesville Sun published several long articles about him. There was a lull (only one article per week) for about a month, then another big increase when the State Attorney sought indictments on Rolling and Edward Humphrey. The press spent several weeks speculating about their relationship and about six weeks on the defendant's robbery trials and his sanity. A year after the murders the newspaper recapped the events of the previous 12 months with a special "One Year Later" edition. (A 288).

During the next year, the paper published several articles about thefts he allegedly committed, indictments for the five murders and other crimes, the DNA evidence linking him to the murders, life sentences he received for the robberies, and

whether he should be tried for the murders. Appendix A.

In the third year, the press increased its coverage of pre-trial matters and the discovery files. (A 410). Bored with that, it then uncovered the titillating subject of Sondra London and her manipulation of Rolling. (A 399, 403, 404). Bobby Lewis then became the focus of press accounts, as he came forward with claims that Rolling had confessed to him. The press clippings introduced in the record end in April of 1993 with the debate over whether Rolling and his instant paramour should be able to profit from his crimes. (A 399).

The number of articles surged about ten weeks before Rolling's trial began, focusing on pre-trial matters. Then, of course, when the trial started, the number of articles and the space devoted to the case reached levels unseen since the murders occurred.

Consequently, no one should have been surprised when 100% of the venire knew about the case. The facts of the murders would almost have assured that; the press's unrelenting efforts to keep the matter in the public eye guaranteed it.

Moreover, even after three years, a significant number of people were excused because they believed Rolling should be summarily executed for his crimes. Twenty-four had beliefs so strong that the judge removed them from the panel before the

lawyers had a chance to question and possibly rehabilitate them. The court, after voir dire, granted almost every cause challenge Rolling raised for people who had a fixed belief on the punishment he should receive. Others were removed because they could not view the pictures of the victim, even though they had never seen them, itself a strong indicator of the effectiveness of the press in conveying the horror of these murders. That was a large number of people. Memories rather than dimming with time had been seared. The events of August 1990 and Danny Rolling had not faded. Nor had opinions about what should be done with him.

Contrary to the folk wisdom expressed in Patton v. Yount, time had not soothed and erased the memories of those in Gainesville, the University of Florida or Alachua County.

C. Actual Prejudice

Richard Parker, the Public Defender for the 8th Judicial Circuit, and Johnny Kearns, his chief assistant, were Rolling's lawyers and presumably knew the tolerant temperament of their community. As one columnist noted, Gainesville was the most liberal city in the state (A 448), and counsels' experience justified their belief that if any county could give them a jury sympathetic to Rolling's defense it was Alachua County. Such belief justified the decision, at least initially, for the defense to keep the case in Gainesville.

As the voir dire proceeded, however, the optimism that a fair, unbiased, and impartial jury could be picked faded. By the 28th of February, after two weeks of questioning, the disturbing reality became evident to trial counsel: that Gainesville and the larger Alachua County community had been far more affected by the serial murders than the lawyers had believed when they began the jury questioning. More ominous, they belatedly realized that the trauma the community had suffered persisted. Even three years after the murders and two years after Rolling's indictment, a large segment of this traditionally liberal community felt and expressed a deep-seated, virtually unaltered animosity toward Rolling.

Thus, Parker approached the court late in the voir dire process and asked for the change of venue. Clearly he was embarrassed in making such a request because his years of experience with the community had so clearly lulled him into believing his client could get a fair trial in this town:

> 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.

(T 7274).

By that time, it had become clear that Rolling's case was so unusual that it was unique in the history of the criminal law in

this state and perhaps the nation. As will be discussed, infra, the members of the venire and the jury, like no other similar body, exhibited such prejudice against Rolling that this Court can only conclude the trial court manifestly erred in denying counsel's request to move the trial. See Davis v. State, 461 So. 2d 67, 69 (Fla. 1984).

Actual prejudice can be shown if there was great difficulty in seating a jury. Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); Copeland v. State, 457 So. 2d 1012, 1017 (Fla. 1984). Obviously, if the party seeking the change of venue can show the prospective jurors had an actual bias against him, the court should move the trial. Irvin v. Dowd.

In Dowd, the defendant was charged with committing six murders over a four-month period in a small town in Indiana. The media covered the tragedies to such an extent that it "aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants." 366 U.S. at 719. The news coverage became so intense that by the time of trial, one newspaper reported, "impartial jurors are hard to find." Id. at 727. Indeed, the Supreme Court discovered the panel consisted of 430 persons, of whom the court excused 268 for cause because they believed Irvin guilty and 103 because they objected to

imposing death. The defendant used all 20 of the peremptory challenges permitted (the state used 10), and the rest were released for health or other personal reasons. At least 370 of the prospective jurors believed, with varying levels of intensity, that Irvin had committed the murder. The pattern of deep and bitter prejudice he faced was demonstrated by the fact that 8 of the 12 jurors who actually determined his guilt believed him to be the one who had committed the six murders. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." Id. at 728. Indeed, "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Id. at 727.

Here, between 1200 and 1400 prospective jurors were summoned (T 7296-97), an indication in itself that the court anticipated a difficult time getting a fair jury. Of those, 845 were excused for hardship. (T 7297-7300). Included in that number were 24 who had formed an opinion that Rolling should be executed. (T 7300-7301). The court also excused several who could not view the photographs of the victims. (e.g. T 264, 365-66).

The state and defense then began questioning those who had

passed this preliminary screening. Before trial, Rolling's lawyers had filed a Motion for Individual, Sequestered Voir Dire Examination. (R 420-23). The court denied it, and prospective jurors were questioned in panels of twenty to twenty-four. (R-3261). Parker renewed that request during voir dire when it became evident that the jurors' responses regarding attitudes towards the death penalty parrotted those given earlier in the day. (T 660). The court, however, refused. (T 663-68). This was a significant mistake. Cf. Patton v. Yount, 467 U.S. at 1034 n. 10; Gaskin v. State, 591 So. 2d 917, 919 (Fla. 1991) (No change of venue needed in part because the trial court had granted a defense motion for individual voir dire and defense counsel had not used all his peremptory challenges). Even without individual voir dire, jury selection lasted three weeks.

Both the state and defense made numerous cause challenges, and generally neither side opposed the other's challenges. The court granted them, and on the infrequent occasion that the state balked at a defense cause challenge, the court usually, but not always and especially towards the end, denied the objection. (T 2028-2034). Within its power, the court tried to be as fair as it could in giving Rolling an impartial jury. (R 3261-66). The court's efforts were inadequate, however, because the venire was so fundamentally prejudiced against Rolling that no amount of

questioning could have guaranteed Rolling an unbiased jury.

The court gave Rolling 20 peremptory challenges, twice the number allowed by Rule 3.350, Florida Rules of Criminal Procedure. He used all 20 and asked for more. He was given two, which he quickly used. (T 2260). He asked for two more, which the court granted, and when those were used, the court, again at his request, parceled out one more. He used it, asked for more peremptory challenges, and told the court he intended to excuse Ms. Kerrick. The court denied that request, and Ms. Kerrick sat on Rolling's jury. (T 2260-67).

Despite the initial screening of jurors, the large number of jurors excused for cause, and the 26 peremptorily challenged by the defense, there were still many who were biased. This became evident from the responses the venire made to the questions posed. Two general categories of responses exhibiting bias emerge from their answers: opinions regarding the death penalty and knowledge of the case.

1. Opinions Regarding the Death Penalty

Typical of any capital case, the venire in this one had several people who strongly favored execution and those who just as adamantly opposed it. The court quickly excused both ends of the spectrum. Those who remained supported executions in general, and many, "a majority of you" (T 77, 260), were

predisposed to the death penalty in this case. (T 502-503, 453, 524-25, 527, 550, 579, 588). Three years after the crimes people still had strong opinions that Rolling should die. (T 146, 149, 150, 152-55, 736, 878-81, 1552, 1668-74, 1776-78, 1930, 2046-50). Prospective juror Wilkinson, for example, concluded that death was the only sentence possible in this case and had held that view for "approximately three years." (T 299). Mr. Lytton held similar beliefs for the same length of time. (T 302). Other jurors simply agreed that death was the only sentence possible in this case. (T 397, 399-400, 464). "Miss Montane, how long have you held this opinion?" "Three years." "I assume that this is also a pretty deep strong opinion?" "Right. Extremely." (R 398).

The jurors who sat held similar views. Juror Stubbs said he could "impose the death penalty with no problem." (T 916). Coleman saw it as a "legitimate type of penalty." (T 1025). Ms. McDaniel believed that "to actually sit there and calculate something in their mind to take the life of another human being, I think it should be enforced." (T 333). Ms. Kerrick agreed that "Possibly premeditated murder" should receive an automatic death sentence. (T 346). "Very strong [mitigating] evidence would have to be presented for me to change my mind about the death penalty." (T 347). Ms. Tignor was "for it if someone has

committed crimes like these." When asked if "It would be a safer place if we execute Mr. Rolling?" she responded, "Probably." (T 908). Ms. Williams told counsel, "I think, from what I've read and seen and heard, that he would still deserve the death penalty." (T 978).

Several prospective jurors said they would have had difficulty considering any mitigation. Kerrick said the defense would have to present "very strong evidence . . . for me to change my mind about the death penalty." (T 347). When asked if there were any mitigating circumstances that would allow her to consider a life sentence, she explained, "No." (T 347). Mr. Segura was the same: "I am for the death penalty, sir." "It doesn't matter what the mitigation might be?" "It doesn't matter." (T 819). The next prospective jurors, Hester, Taylor, Chavez, White, Moorhouse, and Davis, uniformly felt the same way. (T 819). Mr. Parker (a prospective juror) was more discriminating, but not much. When asked if he considered "factors such as mental state at the time of the offense, background of the individual, physical, emotional" as mitigation, he answered, "I really personally would not consider those as good mitigating factors." (T 337). Several other prospective jurors tended to agree with Parker. (T 1011, 1019, 1121, 1139, 1238, 1258, 1269, 1289, 1292). "What kind of information would

be necessary to get you off of your presumption in favor of death for Mr. Rolling?" "Right now, there's nothing in mind that would." (T 1126). Mr. West "would have to say that I have a serious doubt that there are mitigating circumstances that I think would over-weigh the aggravating circumstances, of which I have read in the newspaper account." (T 926).

2. Knowledge of the Case

Perhaps the most unusual factor in this unusual case was that every member of the venire knew about the case. (T 70, 682, 699, 948, 1063). That they should universally remember crimes that had occurred 3½ years earlier sets this case apart. Contrast Patton v. Yount, 467 U.S. at 1033 ("Many veniremen, of course, simply had let the details of the case slip from their mind); Esty v. State, 642 So. 2d 1074 (Fla. 1997) (only 7 of the 12 jurors knew some of the facts); Oats v. State, 446 So. 2d 90, 93 (Fla. 1984) (one of the seated jurors knew nothing of the case and the rest had only a fuzzy recollection of it). Even those who lived out of state in August 1990 knew a "great amount." (T 163). Of course, some followed the case with greater interest than others. Some had read little about it. (T 1099). Others had kept up with the case "fairly closely" or "very closely." (T 174, 1453, 1681).

When asked specific questions, several jurors remembered

that Rolling was from Louisiana (T 1676) and had camped in the woods. (T 1676). Others recalled specific descriptions that Sondra London, Rolling's girl friend and a so-called serial killer expert, had given of the defendant. (T 2178).

Several prospective jurors, including those who sat, could not set aside what they had read, seen, or experienced. (T 119-20). Juror Bass admitted there were things she had read or heard about the killings that she could not set aside. (T 119-20). I felt frightened and I felt victimized because of that." (T 224). Prospective juror Smith bought a gun. (T 224). Prospective juror Norris tended "to be more careful now." (T 225). Many of those called to serve had changed the way they lived, such as taking added security precautions (T 17, 139, 224-225, 732-34, 876-77, 980, 1001-1002, 1113, 1250-51, 1682-83, 1939-41, 2433), even years after the murders. (T 2340). One person left work early to get home before dark. (T 2433). Some, including husbands, wives, and children left town to appease their parents. (T 898, 1251, 1682, 1939). "During the crimes, of course, we pulled them out." (T 2338). One parent who had a daughter living near the murder scenes "would wake up at night in a cold sweat." (T 1995). Those who remained in town were so scared that they left the lights on at night. One had an infant "sleep with us because there was this maniac on the loose." (T 1098). Most of

the venire had lived in terror for weeks after the murders, afraid that Rolling, or whoever had murdered the five students, might kill them. (T 223-25, 732-34, 876-77, 980, 1098, 1113, 1682, 1939, 1995, 2027-28, 2338, 2341-43).

Several members of the venire were affected in other ways. Some had serious reservations about looking at the photographs of the victims. (T 264, 399, 692, 748, 853, 955, 1074, 1118, 1215, 1234). Even though none had seen them, "the way I have heard it, that they are very disgusting." (T 1100). Juror Williams said, "The descriptions in the paper were so vivid that I don't know that I could look at the pictures." (T 988). Some said they would have difficulty being fair because of the photographs. (T 310, 749). They would have responded emotionally to what they saw and "didn't want to have nightmares the rest of my life, no." (T 1101 1102). "I don't want to be in fear for the rest of my life." (T 1103). One juror could not look at the pictures and "put that aside." (T 1234).

Community sentiments also affected prospective jurors. As mentioned earlier, the murders and the murderer became the only subject people talked about in Gainesville for weeks. Even those who lived outside Florida at the time found that it dominated conversations when acquaintances learned a prospective juror was from Gainesville. (T 143). Everyone talked about the case and

expressed opinions to friends, family and co-workers. (T 143, 296, 301-302, 1097, 1253). It was also something they would probably take with them into the jury room. (T 298).

So intense was the community interest in the case that several members of the venire reported that friends and co-workers approached them during the jury selection to give them advice about what penalty they should recommend. (T 146-56, 736-37, 837-886, 1552, 1668-74, 1776-78, 1930, 2046-50). Prospective juror Hardin's boss told him, "I think the man ought to fry." (T 146). Prospective juror Katovich had two people approach her after she returned to work. One, whom she respected, told her "there could be no other penalty other than the death penalty." (T 149). "They should kill him." (T 153). Others simply offered their unsolicited opinions.[66] (T 878-881, 1552, 1670, 1673, 1776-78, 1930, 2046-48, 2300-2301). Most of the prospective jurors were left alone when they had told their friends they could not talk about the case. (T 1552, 1670-73, 2047, 2050).

People had also approached Ms. Bass at work, after she had been released for the day by the court, and "everyone is helping you along with your decision. . . . Some are fry and some say 25

[66]Apparently, the local newspaper printed the names of the venire (T 1778), itself very unusual and another indication of the intense community interest in this case.

years. I said, I don't know anything until I have heard the evidence and I can't say." (T 154-55).

Others had approached Ms. Sajczuk, wanting to know if she had been picked and offering their opinions about what she should do. (T 1670, 1673). She apparently successfully told them to leave her alone. (T 1670). Green, Staab, and Stubbs similarly had to brush off inquiries. (T 1778, 2050). Bass, Sajczuk, Green, Staab and Stubbs all served on the jury. Such willingness to influence members of the venire reflects the persistent hatred this university town felt for Danny Rolling more than three years after the crimes. Thomas v. State, 374 So. 2d 508 (Fla. 1979).

Several prospective jurors and those who actually sat heard statements from the victims' families about what they thought should happen to Rolling. Manny Taboada's brother, Mario, told the press immediately before Rolling's trial, "I have no pity for this individual. . . . This is a life form gone bad. . . . I don't . . . feel for him." (Times-Union, February 16, 1994, "Guilty"). (T 169, 171-73, 309, 311-12, 314-16, 403, 737, 1005).

Bass heard Mario Taboada's statements but "I didn't really pay that much attention to it." (T 172). Jurors Sajczuk and Kerrick had also heard the reports and promised that they would have no effect on them. (T 316). Ms. Sajczuk also admitted to briefly seeing Sondra London on the television show Geraldo, as

she "flipped" the channels one morning. (T 1679).

Other members of the venire also saw television tabloid type reports specifically discussing Rolling's case that were aired immediately before trial (T 158, 1451), or watched live broadcasts of the proceedings. (T 735-36). Others recalled seeing "The Donahue Show," which had come to Gainesville immediately after the murders. (T 156). Besides the local newspapers, television and radio stations, several members of the venire admitted reading about the case in the Orlando Sentinel, the Boston Globe, and People Magazine, and hearing about it on CNN. (T 160, 167-68).

Several members of the jury panel had some familiarity with Christa Hoyt. (T 109, 386, 637, 697). Prospective juror Burke had gone to school with her but had not known her well. (T 1078). Prospective jurors Mueller and Ackland knew her. (T 696). Mueller admitted he could not set aside his personal knowledge of her in considering what sentence to recommend. (T 696). Ackland made a similar admission; Hoyt's father was a personal friend of his. (T 698-70). Others also knew him, but not as well. (T 838). Venireperson Losch said Hoyt was "one of my dad's prize students. He helped her to get her scholarship at Santa Fe." (T 836). Another said he had relatives who worked "closely with Hoyt's family." (T 835-36). Juror Bass believed

she knew Hoyt but did not have a close friendship with her. (T 109-10).

Several members of the jury panel knew or had heard of people associated with the case, most notably Rolling's fiancé, Sondra London. (T 159, 1677-79, 1934, 1936).

In sum, the jurors who actually sat favored death sentences in general and for Rolling in particular, discounted mitigation, had been frightened by the murders, and had been pressured, however slightly, by friends and acquaintances. They had a good idea what sentence the victims' relatives wanted. This latter point was especially important because Ms. Bass knew Christa Hoyt.

If ever a defendant presented a case where the jurors showed actual prejudice, Danny Rolling has done so. The court manifestly, palpably abused its discretion in denying his motion for a change of venue. He presented a reasonable basis for the court to have changed the location of his trial. Singer.

D. This Court's Analysis of Capital Cases Involving Venue Issues

Several capital cases have presented this Court with issues involving a trial court's denial of a motion to change venue. Except for Manning v. State, 378 So. 2d (Fla. 1979), appellate challenges to the lower court's rulings have been rejected. The

reasons have been varied, and the Court's analysis has depended on the strength of the evidence and the arguments presented. None, including Manning, however, presented such compelling facts as this one. Indeed, the factors identified in Manning that justified moving that case from Wakulla County are present here in abundance. Some, such as local awareness and interest, are much more evident.

1. Cases Where Venue Was Granted

Interestingly, trial courts have occasionally granted a change of venue after a remand from this Court for either a new trial or new sentencing hearing. Walls v. State, 641 So. 2d 381 (Fla. 1994) (Pre-trial publicity); Long v. State, 610 So. 2d 1268 (Fla. 1992); Johnson v. State, 608 So. 2d 4 (Fla. 1992)(triple murder, two robberies, two attempted first degree murders); Delay v. State, 440 So. 1242 (Fla. 1983). These instances refute the United States Supreme Court's homily that "time soothes and erases is a perfectly natural phenomenon, familiar to all." Patton v. Yount, 467 U.S. at 1034 (Four years between trial and retrial partially justified not moving trial).

This Court, too, has recognized the persistence of pre-trial publicity. In Francis v. State, 413 So. 2d 1175 (Fla. 1982), the defendant's conviction for first degree murder was reversed because Francis was absent from part of the jury selection.

Giving a broad hint to the lower court, the Court said, "We are concerned, however, about the jurors' knowledge through pre-trial publicity of Francis' prior conviction and sentence of death. . . . The trial court should consider this fact if, upon remand, Francis renews his motion for change of venue." Id. at 1179.

In other cases, the murders were so outrageous that cautious judges moved the defendants' trials. In Lovette v. State, 636 So. 2d 1304 (Fla. 1994), Lovette and a co-defendant escaped from a North Carolina prison and fled to Florida where they killed four people, kidnapped three of their victims, robbed two of them, and committed three grand thefts. In Cruz v. State, 588 So. 2d 983 (Fla. 1991), the defendant went on a killing rampage at a shopping center in Brevard County. He committed six first degree murders, including the homicides of two police officers responding to his shooting, two attempted second degree murders, a kidnapping and a false imprisonment. Finally, in Bundy v. State, 455 So. 2d 330 (Fla. 1984), Bundy's trial was moved from Tallahassee to Miami. The defendant had killed two sorority sisters at Florida State University, attempted to murder three others, and committed two burglaries. In Bundy v. State, 471 So. 2d 9 (Fla. 1985), the court moved Bundy's Lake City trial to Orlando. In that case he was convicted of kidnapping and murdering a 12-year-old girl. These crimes occurred about a

month after the ones in Tallahassee.

In two other cases, Card v. State, 497 So. 2d 1169 (Fla. 1986), and Francis v. State, 473 So. 2d 672 (Fla. 1985), there is no information clearly indicating why the trials were moved.

Thus, in cases with facts much less egregious than those presented here and with communities far less pervasively inflamed and biased, courts have properly moved trials to less prejudiced venues.

2. Cases Where Requests to Change Venue Were Denied

While adhering to the "manifest error" standard in reviewing trial court orders denying motions for change of venue, this Court's analysis has shown considerable sophistication and flexibility in applying it. There are several levels of review, depending on the facts supporting the motion for a new venue. At one end of the spectrum are cases where few, if any, of the venire or the jurors who sat recalled much about the case. The press articles were written a year or more before the trial, and the jurors, if they remembered anything, had only a fuzzy recollection about the case. See Oats v. Staten, 446 So. 2d 90 (Fla. 1984). In such instances, this Court dismissed the issue by noting that "all the jurors who served stated affirmatively and unequivocally that they could put aside any prior knowledge of the crime and decide the case solely on the evidence adduced

at trial." Geralds v. State, 601 So. 2d 1157, 1159 (Fla. 1992). The court reached this decision despite language in Irvin v. Dowd that jurors' claims of impartiality are not dispositive. In those instances, the appellant had simply failed to present much, if any, evidence of prejudicial influences on the venire. Pietri v. State, 644 So. 2d 1347 (Fla. 1994).

Cases where the defendant could find only one or two articles about the case, or where some members of the venire admitted having knowledge of the case or acquaintance with the victim similarly presented few difficulties, and this Court easily affirmed the denial of the motion to change venue. Robinson v. State, 610 So. 1288, 1289 (Fla. 1992); Holsworth v. State, 522 So. 2d 348, 350 (Fla. 1988); Jackson v. State, 359 So. 1190 (Fla. 1978).

In cases having more evidence of jury bias, the examination became more detailed. The number of jurors who knew about the case was counted, and their recollection of the events of the trial was examined. In Esty v. State, 642 So. 2d 1074 (Fla. 1994), for example, seven of the jurors had some knowledge of the case, but they said they could put that information aside. In Hoy v. State, 353 So. 2d 826, 829 (Fla. 1977), some of the jurors had only a vague recollection of the events, and six of them said that such information was irrelevant. See also Oats v. State

(vague or no recollection); Knight v. State, 338 So. 2d 201, 203 (Fla. 1976).

What the trial court did to ensure a fair trial is another relevant factor this Court has examined. The judge may have given additional peremptory factors, Gaskin v. State, 591 So. 2d 917 (Fla. 1991); Mills v. State, 462 So. 2d 1075 (Fla. 1985), or the court may have liberally excused questionable jurors. Straight v. State, 397 So. 2d 903 (Fla. 1981); Mills; Holsworth. Finally, this Court has occasionally noted that a trial judge allowed extensive voir dire. Straight; Dobbert v. State, 328 So. 2d 433, 440 (Fla. 1976).

If the defendant either failed to renew an earlier motion for change of venue, or had peremptory challenges left, this Court has reasonably presumed he was satisfied with the jury that passed on his guilt and recommended a sentence. Dobbert; Gaskin, Hoy; Davis v. State, 461 So. 2d 67 (Fla. 1984); Provenzano v. State, 497 So. 2d 1177, 1182-1183 (Fla. 1986) ("More importantly, the fact that the defense did not use all of its peremptory challenges is the best evidence that Provenzano was personally satisfied with the jury selected").

The most difficult cases present situations where all the jurors have knowledge of the case. Particularly in these instances, this Court has been unwilling to rely on juror

assurances of impartiality. In Copeland v. State, 457 So. 2d 1016, 1017 (Fla. 1984), for example, this Court found that although everyone in the community knew about the case, the intensity of community hostility to Copeland was less than that in Manning v. State, 378 So. 2d 274 (Fla. 1979). Justices Overton and MacDonald dissented in Copeland, seeing no distinction between Manning and Copeland.

Finally, in Thomas v. State, 374 So. 2d 508 (Fla. 1979), Thomas and his gang terrorized central Florida for 18 months, committing several crimes, including murder. This Court affirmed the trial judge's refusal to change the location of the trial because although the large majority of the prospective jurors knew about the facts, only three had some disqualifying prejudice. This Court nevertheless was troubled by Thomas, and stated that in a more egregious case, it may have reversed.

> Had the record contained evidence that a substantial number of the veniremen had lived in fear as potential victims of the Ski Mask Gang, . . . their representation that they could, nonetheless, serve as impartial jurors might well have been questioned by this court. . . . However, the record of the voir dire in this case simply does not bear out the existence of a pervasive community atmosphere of fear.

Id. at 516-17.

How then does Rolling fare when measured against these other

cases? First, Judge Morris used some of the techniques employed by other courts to ensure that defendants got fair and impartial juries. He granted the defendant six additional peremptory challenges. Counsel used them and requested more. The court granted many of his cause challenges, but the state rarely objected to them. It allowed extensive voir dire. Significantly, however, it refused Rolling's renewed request for an individual, sequestered voir dire to get more honest answers from the jurors. (T 663-68).

In several cases, this Court affirmed a lower court's ruling denying a motion for a change of venue in part because the jurors could promise they could be fair and impartial. While those who passed the court's initial screening were asked a similar question, their answers have little persuasive value here. Thomas v. State, 374 So. 2d at 516 (Juror assurances of fairness carry little weight where the community has a bias against the defendant). This is especially true here where the court refused a request to question prospective jurors individually and in private.

In Patton v. Yount, the Supreme Court found it significant that the voir dire had been done individually. As this Court and the United States Supreme Court have recognized, assurances of impartiality cannot be conclusive that a prospective juror is in

fact impartial. The best way the defendant can show juror bias comes through individual, sequestered voir dire. After all, most people will say in public they can be fair, but when questioned in private admit an animosity against the defendant.[67] Irvin v. Dowd, 366 U.S. at 728; Leon v. State, 396 So. 2d 203, 205 (Fla. 3rd DCA 1981). An in-depth questioning in private about a prospective juror's knowledge of the facts of this case and biases against the defendant is the best way to determine a prospective juror's true position. The court, by refusing to grant individual voir dire, not only made it more likely that juror biases would remain undiscovered, he assumed a greater responsibility for ensuring the jury was untainted. See Woods v. State, 490 So. 2d 24 (Fla. 1984) (Shaw, J., dissenting).

Rolling gave no evidence he was satisfied with his jury. To the contrary, this issue arose because he believed "that the pool of 117 prospective jurors is not now, nor can a group be selected in the future, that would be fairly constituted legally in Alachua County." (T 7275). Additionally, as mentioned, he used all his peremptory challenges, asked for more, and identified a juror he wanted, but was unable, to challenge. Finally, after the court had ruled on the motion, he added more press clippings

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[67]"No doubt each juror was sincere when he said that he would be fair and impartial to Rolling, but the psychological impact requiring such a declaration before one's fellows is often its father.

into the record and renewed his motion for a change of venue. (T 2268).

As with Copeland and Manning, all the members of Rolling's venire knew about this case. Far more important and supremely distinguishing, they had lived through the terror Rolling created, and had permanent emotional scars from those dark days. They were victims of the terror and horror Rolling had inflicted on this college community.

In Manning, this Court reversed the trial court's order denying the defendant's motion for a change of venue because Manning had killed two well-liked policeman who served in the rural county. Manning was a black man from outside the county. Knowledge of the murders was universal, and "hostility existed in the community against the accused to the extent that it would be difficult for any individual to take an independent stand adverse to this strong community sentiment." Id. at 276.

In Rolling's case, the victims were "our kids." Monuments have been erected to them, trust funds established. Rolling was an outsider, certainly not one associated with the university or community at large.

Of course, Gainesville and Alachua County probably do not qualify as a rural county, but it is essentially a one industry town. The University of Florida dominates it. Everything is

either orange and blue or has an alligator on it. If some were not directly connected with that school or Santa Fe Community College they were nevertheless affected by it. When the students were murdered, the entire community mourned and felt the terror Rolling created. They universally believed they could be his next victim. More so than in Manning, the feelings in Gainesville against the defendant turned from fear to hatred. The record in this case meets the requirements this Court needed in Thomas.

The record here demonstrates that the vast majority of the citizens of Alachua County had lived in fear as potential victims of Danny Rolling. Accordingly, in fairness, this Court has no choice but to reverse Rolling's sentences of death and remand for a new sentencing hearing.

ISSUE II

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

Prior to trial, Rolling filed a motion to suppress his statements of January 18, 1993, January 31, 1993, and February 4, 1993, and all written and oral statements to Robert [Bobby] Lewis on the the grounds that 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.[68] (T 1611-1612). The motion was heard on November 15 - 19, 1993. (R 7465-7806, 6556-6880).[69] Several witnesses testified, and the state and defense stipulated to the admission of tape recorded interviews, transcripts of the tapes, and other exhibits.[70] (T 6784). Following the hearing and

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[68]Rolling also moved to suppress his statements to FDLE agents on April 17, 1991. This motion was granted. (R 1611-1612; SR 1415-1452).

[69]The transcript of the suppression hearing begins in Volume 69 and is continued in chronological order in Volumes 70, 60 and 61.

[70]The exhibits introduced at the November 15-19 suppression hearing are listed in a master Evidence and Exhibits List at pages 11-21. They will be referred to herein by number as State Ex. No. or Def. Ex. No. State Ex. 21 is a compilation of transcribed statements, notes, correspondence and other documents contained in a black three ring binder and tabulated. That exhibit is consecutively numbered and will be referred as State Ex. 21 followed by the page number and tab notations in quotation marks.

submission of written memoranda of law (R 1649-1771), the trial court denied the motion. The court ruled that Bobby Lewis was not an agent of the state when he obtained statements from Rolling relating to the Gainesville murders, regardless of whether Rolling volunteered or Lewis elicited those statements. The court further concluded that Rolling voluntarily waived his right to remain silent and right to counsel when he gave the statements to law enforcement on January 31 and February 4, 1993. (SR 1415-1452). Rolling maintains in this issue that the trial court erred in denying his motion to suppress because inmate/informant Bobby Lewis elicited the incriminatory statements from him while acting as a government agent, thereby violating Rolling's Sixth Amendment right to the assistance of counsel.

In order to understand this issue, it is important to examine the relationship between Rolling and Bobby Lewis and review the chronology of the events leading up to Rolling's statements to law enforcement on January 18, January 31, and February 4, 1993.

The Gainesville Student Homicide Task Force [Task Force] was formulated in late August, 1990, to investigate the murders of five students. Task Force members included Investigators Steven Kramig of the Gainesville Police Department and Legran Hewitt of

the Alachua County Sheriff's Office, FDLE Special Agents Ed Dix and Don Maines, and Assistant State Attorney Jim Nilon. The Task Force worked out of the Gainesville State Attorney's Office. Jim Nilon was the official legal advisor to the Task Force and frequently gave advice throughout the investigation and during the time of the statements in question here. (T 6576-6577, 6590).

Rolling was indicted in this case on November 15, 1991. (R 12-18). On November 18, counsel was appointed, and the following day, Rolling and his attorney signed a "Notice of Invocation of Counsel," which read as follows:

> NOTICE OF INVOCATION OF THE RIGHT TO COUNSEL
>
> I hereby invoke and exercise my right to counsel pursuant to the Sixth Amendment and Fourteenth Amendment to the United States Constitution and Article I, Section 9, 12, and 16 of the Florida Constitution and the case law thereunder.

I desire to have my attorney, the Public Defender, or one of his/her assistants, present before and during any questioning, interrogations, interviewing or other conversation whatsoever between myself and any police agency, prosecutor or agents thereof wherein there is any possibility that anything I say could be used against me.

I hereby announce my desire to have counsel present before anybody talks to me about any matters relating to this case or any charges pending against me or any other criminal matter in which I am suspect or can reasonably be expected to become a suspect based on anything I might say.

This Notice is solely on exercise of my rights and in no way is to be construed as any direct or indirect admission of guilt or criminal liability.

I further state that at no time in the future do I or will I waive (that is, give up) my right to have my attorney present unless and until, after adequate consultation with my attorney, I specifically waive (give up) all or part of my rights in written form.

Notice is hereby given by me and my undersigned attorney that I will litigate and seek sanctions and/or damages against anyone who violates or attempts to violate my constitutional and/or statutory rights invoked by me with this Notice.

After being fully advised of my constitutional and statutory rights against self-incrimination by my attorney, I am signing this Notice upon advice of counsel.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Office of the State Attorney, Post Office Box 1437,

Gainesville, Florida, and to the Alachua
County Department of Corrections,
Gainesville, Florida.

(State Ex. 21, p. 504-505 "Invocations/Waivers")(Emphasis added). The notice was signed by Danny H. Rolling and his attorney and sent to the State Attorney and filed with the court.

Rolling executed a second "Invocation of Right to Counsel" with identical language as that quoted above on May 29, 1992. (State Ex. 21, p. 506 "Invocations/Waivers"). This invocation was likewise filed with the court and delivered to the State Attorney. On June 15, 1992, Assistant State Attorney Nilon notified the sheriff's office, police department and FDLE of the invocation of counsel and requested that those agencies notify the State Attorney prior to having any contact with Rolling for any reason. (State Ex. 21, p. 518-520 "Letters to LEO").

On May 22, 1992,[71] Rolling was transferred to Florida State Prison [FSP] and placed in Administrative Confinement on W-wing, a psychiatric unit. It was there that he met inmates Bobby Lewis and Rusty Binstead, both "runners" or trustees on the wing. (T 6687-6688, 6691, 7704-7705; see Def. Ex. 1, "Inmate Posting Sheet for Russell Binstead;" Def. Ex. 3, "Inmate Posting Sheet for Robert Lewis"). Lewis and Binstead had previously worked

[71]The trial court's Order on Motion to Suppress inadvertently states that Rolling was transferred to the custody of the Department of Corrections on May 21, 1991, and transported to FSP on the following day.

as informants in the prison. (T 6690, 6695-6696, 7789-7790). In fact, Binstead was placed in a protective management wing because of his involvement in a prison investigation. (T 7695; Def. Ex. 1, "Report of Administrative Confinement" and "Report of Protective Management," dated 8/692). Rolling was restricted to his cell on W-wing, although Lewis and Binstead had unrestricted access to the whole wing (T 6690-6691, 7705), even though Binstead was serving a 109-year sentence for multiple offenses; had an "extensive history of escape;" had stabbed another inmate just three years before and had a lengthy disciplinary record (Def. Ex. 1, "Close Management Review" dated 6/2/92), and Lewis was serving a life sentence for first degree murder and had previously escaped from prison. (Def. Ex. 3, "Progress Report for Robert Lewis" dated 6/19/92). Lewis had been at FSP for 17 years (T 6683) and had a special relationship with prison authorities. He claimed he was on "very good terms" with prison inspector Arnold (Def. Ex. 4-5), and he had easy access to prison officials throughout the period in question. He had previously worked as a runner for Sargeant Bradley on death row, and when Bradley was assigned to W-wing, he asked Lewis to continue working for him there. (T 6688). Lewis claimed he was assigned the task of looking after Rolling when Rolling was put in W-wing. (Def. Ex. 4-5).

Although Lewis and Binstead admittedly despised Rolling for his alleged crimes, they befriended him because they both recognized an opportunity to profit, personally and monetarily, from his story. (T 6740-6742, 6754, 7723-7725). Lewis referred to Rolling in his correspondence as "a woman and kid killer," whom he wanted convicted. (Def. Ex. 4-12, 4-18). Binstead thought the person responsible for the Gainesville murders deserved the electric chair. (T 7725). Nonetheless, within days of Rolling's arrival at FSP, Lewis and Binstead won Rolling's trust. From the beginning, Rolling was verbally harassed by inmates and prison employees alike.[72] (T 7707; State Ex. 21, p. 3-5 "7/2/92;" State Ex. 21, p. 16-17 "7/14/92"). Lewis reported the harassment to the wing sargeant, and the abuse subsided. (State Ex. 21, p. 13 "7/2/92"). Lewis even bragged that Rolling wanted him around for security because Lewis got the guards to leave him alone. (Def. Ex. 4-16).

Because of the harassment, Rolling was afraid of being moved into the prison population. Binstead regaled Rolling with horror stories about life in population; he and Lewis wanted to be near Rolling so they could gather information about the murders. (T 7714-7716). Binstead said he convinced Rolling to stage a suicide attempt so he could stay on the psychiatric wing.

[72]Lewis called this the "boo game." (State Ex. 21, p. 49 "10/1/92").

Binstead claimed he assisted in the "suicide" attempt by tying a sheet around Rolling's neck and that Lewis summoned the guards to "rescue" Rolling. (T 6699, 7715-7716, 7723). Lewis similarly took credit for the faked suicide attempt, admittedly to keep Rolling from being moved ["Suicide attempt was a fake and me and him put together to keep him from getting moved"]. (Def. Ex. 4-6; State Ex. 21, p. 8 "7/2/92;" State Ex. 21, p. 20 "7/14/92). Binstead testified that it was not hard convincing Rolling what to do because he was so easily led. (T 7713). Lewis concurred that Rolling was easily led. (Def. Ex. 4-22). He told prison investigators in July that Rolling was terrified, upset and tearful when he first got to FSP. (State Ex. 21, p. 3 "7/2/92").

Lewis was determined to get information from Rolling to sell and use as a bargaining chip with the state. Actually, Lewis had made a career of selling his own stories and those of others on death row (T 6683, 6742), but he saw Rolling's as the biggest story ever (T 6741), and his ticket to freedom ["I got in this to make $ & get out of prison"]. (Def. Ex. 4-18). Lewis began corresponding with freelance journalist Sondra London in early 1990, and London edited and published Lewis' stories about his life and crimes. (T 6603, 6606-6607). Between the summer of 1992 and January of 1993, Lewis wrote 44 letters to Londonn concerning Rolling. (T 6603-6604, 6684-6687; State Composite

Ex. 27; Defense Composite Ex. 4). In these letters, he repeatedly declared his literary and liberative ambitions. In the first such letter in May, 1992, Lewis wrote London that Rolling was on his wing and it was his job to look after him, and he planned on "making a deal with the people hear [sic]. . . I will get his hole [sic] story - in his handwriting or on tape on two conditions - that I get out of prison for testifying against him and . . . I'm gone have him sign a agreement to give you the exclusive to his life story." Lewis asked London to write a contract; he wanted one-third of the profits for himself, one-third for Rolling, and one-third for London. Lewis further wrote that the state's case against Rolling was "very weak" and he intended to let the state copy all his information: "I've already got stories, art work, songs and enough to convict this man." (R 6701-6702; Def. Ex. 4-5). In another letter, Lewis wrote: "He's got a big ego. You gone to need to stroke how good his writing is, how big this can be. Talk books, movies, TV, gross net, all that shit, and that you have a contract . . . all this gone set me free. It also will open a lot of doors and we can cut out Danny as he told me the whole story. . . .Me & you split minus legal costs to Link [Lewis' attorney]." (T 6704; Def. Ex. 4-8). In a subsequent letter, Lewis wrote that he hated what he was going to do to Rolling: "It not something I'm

proud of--it just survival--in a animal world." (T 6709-6710; Defense Ex. 4-9). Lewis brazenly stated, in a letter dated August 5, 1992, that he was "out to make money." (Def. Ex. 4-17). He repeatedly told London he was out to make money and get out of prison: "I wanted to help me and I wanted to help you" (Def. Ex. 4-12); "I got in this to make money & get out of prison" (Def. Ex. 4-18); "If I testify I will get out" (Def. Ex. 4-20; "It's no secret I want out of prison, with what he's told me, I probably can get out" (Def. Ex. 4-31).

Lewis testified that he always intended to profit from Rolling's story and cut Rolling out, but he became more motivated to make a deal with the state when he feared that London would deal directly and split the profits 50/50 with Rolling and cut out Lewis. (T 6746-6748). By the time of the suppression hearing, Lewis had become more benevolent; he claimed his motives had dramatically changed, and he no longer wanted to profit personally from Rolling's story but rather wanted to give the money to the families of the victims. (T 6726). He also insisted he had no deal with the state (T 6742, 6745), although he assured Sondra London there was only so much he was willing to do if he did not make a deal. (Def. Ex. 4-26).

There is no question that Binstead and Lewis questioned Rolling about the murders. Both were admitted opportunists with

strong motives and clever methods for extracting information. Binstead testified that he overheard Lewis questioning Rolling. (T 7717). He said Lewis persuaded Rolling to talk to him byconvincing Rolling that he [Lewis] was Rolling's best friend in the world and the only one who could or would do anything for him. (T 7719-7720). Lewis ingratiated himself to Rolling through Sondra London;[73] by buying him items from the canteen, and even sending flowers to Rolling's ailing mother. (T 6706, 6722; State Ex. 21, p. 29 "7/14/92;" Def. Ex. 4-19). For this, Lewis was rewarded with poems, drawings and tales of crime.

Binstead admitted that he, too, elicited information from Rolling because he thought the information would be valuable to him. He claimed he did it on his own initiative and denied having any deals with the state. (T 7723-7725). Binstead kept handwritten notes of his conversations with Rolling on W-wing in the summer of 1992. (T 7699). One note read, "Possibilities of escape from here or county jail with Lewis and my help; wants to write or record his life story for money." (T 7699-7700). According to Binstead, it was Lewis' idea that Rolling give them information about the murders so he and Binstead could be brought

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[73]London began corresponding directly with Rolling in July. (R 6620). By early August, 1992, Rolling was falling in love with London ["I see our boy got the love bug"]. (Def. Ex. 4-11, Letter from Lewis to London). Rolling and London were engaged to be married at the time of the suppression hearing in November, 1993. (R 6623).

to Gainesville as prosecution witnesses and assist Rolling in an escape. (T 7698, 7700). Lewis discussed his past escape attempt with Rolling and showed Rolling articles about it. Rolling was very interested. (T 6694-6695, 7713).

Despite their denials of any deals with the state, Lewis and Binstead began talking to prison officials about Rolling in the summer of 1992 while they were all on W-wing together. (T 7789-7790). Lewis and Binstead met with DOC officials and members of the Task Force periodically over the next five months, even though Rolling left FSP on July 2, 1992 and did not return until the end of December. (R 6696-6698, 7712). In fact, Lewis was interviewed by Prison Inspectors Paul French and Steven Arnold on July 2, 1992 (State Ex. 1; State Ex. 21, p. 1-15 "7/2/92"), the day Rolling was transferred from FSP to North Florida Reception Center in Lake Butler.[74] (Def. Ex. 2, "Inmate Posting Sheet"). Lewis turned over Rolling's artwork, stories and notes Lewis made about their conversations. He relayed that Rolling had admitted the murders and revealed three details about the crimes: 1) that the breast was cut off one of the victims and the body was posed in a sexual position on the floor; 2) that tape was used on the victims, and 3) that a screw driver was used to enter their

[74]This move was in anticipation of a transfer to CMHI in Chattachoochee. Rolling was at CMHI from July 14, 1992, to December 22, 1992. (Def Ex. 2, "Inmate Posting Sheet").

apartments.[75] (T 6696-6697; State Ex. 21, p. 6 "7/2/92").

Lewis was interviewed again by Inspector French and FDLE Agent Strope on July 14, 1992. (State Ex. 2; State Ex. 21, p.16-34 "7/14/92"). At that interview, Lewis said he was "waiting for somebody to tell me what to do." (State Ex. 21, p. 28). He admitted he was doing this for personal gain to "get time off my sentence, possibly get out of prison, whatever the best deal I can make." (State Ex., p. 29). It is clear during this interview that Rolling had not told Lewis much about the crimes. In fact, Lewis repeated the same three details he told the investigators at the July 2 interview. (State Ex. 21, p. 19). When asked whether he thought Rolling would tell the whole story, Lewis responded, "it's just a matter for him getting a little bit of money and . . . I can even set up where he tells it to you all direct." (State Ex. 21, p. 30). He said Rolling would talk when they got high together, either smoking dope or drinking alcohol. (State Ex. 21, p. 31). A day after this interview, Lewis wrote London that he met with Agent Strope and still believed that he could make a deal with the State. (T 6710-6711; Defense Ex. 4-13). Binstead was also interviewed by Agent Strope on July 14,

[75]These facts had been well publicized in the Gainesville Sun prior to Lewis' interview. In fact, there were at least nine articles which mentioned body mutilation and nipples in 1990 and 1991 (A 16, 79, 91, 106, 125, 127, 229, 237, 257); five articles which referred to the posing of bodies (A 217, 225, 235, 246, 268); five articles which mentioned duct tape (A 125, 127, 229, 246, 268); and two references to a screwdriver. (A 125, 127).

1992. (State Ex. 3; State Ex. 21, p. 35-46 "7/14/92").

In a letter to FDLE Agent Don Maines in September, 1992, Lewis expressed plans to check with Rolling regarding facts he remembered from the summer. (State Ex. 21, p. 542 "Correspondence/Lewis to Maines"). On October 1, 1992, the three task force members, Maines, Kramig and Hewitt, interviewed Lewis at FSP. (T 6577; State Ex. 4; State Ex. 21, p. 47-103 "10/1/92"). Lewis revealed no additional information about the murders at this meeting. In response to Lewis' statement that he was told he would be moved to be with Rolling whenever Rolling was released from CMHI, Maines confirmed the plan but stated that Rolling was still in Chattachoochee. In a letter to London the day of this interview, Lewis wrote that he "got a visit from 3 of our friends, I look to be moved in 2 weeks. I talked a lot about the access we need to a phone, to each other, & to D.R., and they all in agreement with that . . ." (Def. Ex. 4-25). The same three officers interviewed both Lewis and Binstead again on October 20, 1992 (State Ex. 5; State Ex. 6; State Ex. 21, p. 104-133, 134-157 "10/20/92"), even though Rolling had not been at FSP for over three months. Lewis gave the investigators some notes and pictures Rolling had drawn in June but again had no additional details about the crimes.

During the summer and fall months, Lewis corresponded

prolifically with London about selling Rolling's story. In his letters, Lewis was anxiously awaiting Rolling's return to FSP so he [Lewis] could gather more information. In one letter, Lewis explained that one of the reasons he wanted to know if the FDLE was going to use him was because he could get a transfer if he was not going to be a witness. (T 6711; Defense Ex. 4-14).[76] Lewis told London that he had "seen a lot of people at top state level, all this is a go." (T 6707; Def. Ex. 4-10). He testified, however, that he was not referring to anyone in particular in this letter and a lot of what he told London was not true. (T 6707-6708). Nonetheless, Lewis did meet with prison officials and law enforcement to divulge information, and he was clearly under the impression that he would be moved with Rolling for the purpose of continuing to elicit information for the benefit of the Task Force. Lewis knew from some source ["Somebody told me"] when Rolling was transferred to the state hospital in Chattachoochee (T 6716; Defense Ex. 4-13, 4-18), and he was confident he would be moved to the same facility or wing to be near Rolling upon Rolling's release from CMHI. (Def. Ex. 4-17, 4-19, 4-20, 4-22, 4-23, 4-24, 4-25, 4-29, 4-31). Lewis wrote that the state told his attorney no deals because his price

[76]In a progress report dated June 19, 1992, a special review team recommended that Lewis be transferred from FSP to Union Correctional Institution (Def. Ex. 3, "Progress Report," p. 1-2).

[release from prison] was too high. He speculated that the state was playing hardball because he was told that Rolling would be moved back to FSP in a month and they would be on the same wing. (Def. Ex. 4-19). Lewis testified nobody told him that and he lied to London to keep her from moving and keep her interested in the story. (T 6716-6717; Defense Ex. 4-19). Yet he subsequently wrote London numerous times that he and Rolling would be moved together soon. Lewis even told his lawyer that FDLE or DOC was going to move him to be with Rolling when Rolling was released from CMHI. (T 6769-6780).

Rolling returned to FSP on December 22, 1992, and was again placed in administrative confinement, this time on Q-wing. (Def. Ex. 2, "Inmate Posting Sheet" and "Quarters Assignments"). On December 23, 1992, Lewis advised London by letter that "They just brought our boy in, don't know where they put him yet." (Def. Ex. 4-30). On January 8, 1993, Lewis was moved from M-wing to U-wing, where he was once again made a trustee, which allowed him free access on the wing. (T 6724-6725; Def. Ex. 3, "Quarters Assignments"). Five days later, on January 13, 1993, Rolling was also moved to U-wing. (Def. Ex. 2, "Quarters Assignments"). Once the two inmates were housed together, as Lewis had been predicting all fall, Lewis wrote London that Rolling was in population on the wing and he [Lewis] was the runner so they got

to see each other a lot and talk.[77] Lewis again expressed confidence that he would win his release from prison based on what Rolling told him. (Def. Ex. 4-31).

Sometime during the month of January, Paul Decker, Assistant Superintendent of FSP, learned that Lewis was passing on information from Rolling to prison officials and had other written materials pertaining to the Gainesville murders. (See State Ex. 21, p. 539 "Correspondence/Lewis to Decker"). Decker had numerous meetings with Lewis and with institutional investigators to discuss the situation with Lewis. (T 7632-7634). Decker also contacted the Task Force on Lewis' behalf. (T 7636). He maintained that he was merely a conduit for information between Lewis and the Task Force. (T 7649).

On January 17, Lewis approached Captain Davis and told him that Rolling wanted to talk to outside law enforcement about the Gainesville homicides. (T 7524, 7528; State Ex. 21, p. 516 "DOC Incident Report"). Davis reported this to Inspector Arnold, who in turn contacted FDLE. (T 7528, 7773). FDLE agent Ed Dix informed Assistant State Attorney Jim Nilon of Rolling's request, and Nilon instructed Dix to have someone contact Rolling directly and if Rolling wanted to talk to law enforcement, Dix could go to

[77]According to Rusty Binstead, Lewis and Rolling spent between eight and twelve hours a day in intense conversation. (T 3500, 3522).

the prison to interview him. (T 7539-7540). Dix relayed this Arnold, and pursuant to Arnold's instructions, Davis went to Rolling's cell in U-wing and confirmed that Rolling wanted to see law enforcement agents (T 7529, 7531, 7774). Lewis then gave prison officials a two-page letter, partially in his handwriting and partially in Rolling's handwriting, listing five demands: 1) allow Sondra London to visit and marry Rolling; 2) release Lewis after the trial; 3) allow Rolling to stay in population as long as possible; 4) allow Lewis to visit Rolling, and 5) "that you know you did it for God & Sondra." In a postscript, Rolling advised that the first bit of information would come after London was allowed to visit. In a final postscript, Rolling offered to give the statement to Lewis "because I would like to see him set free. He has suffered enough in his lifetime and I feel he deserves a chance to make good what is left of his life." The demands were in Lewis' handwriting; everything else was written by Rolling. (T 7543-7544; State Ex. 21, p. 521-522 "Rolling Demands").

Dix, Kramig and the prosecutor, Jim Nilon, traveled to FSP at 1:00 a.m. on January 18, 1993, to meet Rolling. (T 7540, 6578). Dix and Kramig interviewed Rolling while Nilon remained outside the room, although Nilon instructed the agents on procedures for the interview. (T 7546). Dix and Kramig discussed

the previous invocation of right to counsel with Rolling, and Dix told him several times that Rick Parker, his Public Defender, would not like Rolling talking to the police. Rolling asked if Mr. Parker had to know, and Dix responded that Parker would be notified but he would not be happy. (T 6579-6580, 6589, 7546-7547, 7604-7605). Rolling agreed to talk but only if his demands were met. (T 7603). No statements pertaining to the murders were made on January 18, 1993; however, at the end of the meeting, Rolling told Dix that "When Sondra London visits me, I will give Bobby Lewis all the information you want." (T 7552, 7606). Dix told Rolling he had no control over that but indicated he would inquire why London had not been allowed to visit. (T 7552).

Before leaving the prison that day, Dix asked Inspector Arnold why London had not been allowed to visit. He then called London and advised her to apply for visitation and told her the application would be expedited.[78] (T 6609-6610, 7553-7554). London followed Dix's advice and followed up her written request with daily telephone calls to Rolling's classification officer and Inspector Arnold. (T 6611).

Two days later, Lewis sent another note to prison officials

[78] London had attempted to visit Rolling at CMHI but was unsuccessful. (R 6608-6610). She also had requested permission to visit Rolling upon his return to FSP in December but never received the appropriate paperwork to complete. (R 6609).

advising them to "Don't just move fast" and not to take away any of his privileges or Rolling would "freeze up." Lewis also advised the prison officials that his [Lewis'] demands were negotiable. (State Ex. 21, p. 523 "Lewis Notes").

Lewis gave a taped statement to Prison Inspectors Arnold and Minshew and Assistant Superintendant Decker on January 20, 1993. (State Ex. 7; State Ex. 21, p. 158-191 "1/20/93"). Lewis knew at the time of this interview that someone had spoken to Sondra London about visitation. (State Ex. 21, p. 164-165). Lewis stated that Rolling was going to give him additional details and asked if he should write them down and send them to the investigators. (State Ex. 21, p. 185).[79] Arnold told Lewis that Lewis could suggest that Rolling go ahead and talk to the agents who were at the prison two days earlier. Lewis also discussed how he turned down two transfers for which he was recommended, apparently because of his desire to work on the investigation of Rolling. It is apparent throughout this interview that Lewis believed he would benefit from assisting law enforcement: "Just common sense tells me I'm gonna to be better off than I am now, when it's all over. I don't have to be no brain surgeon to figure that out." (State Ex. 21, p. 191 "1/20/93").

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[79]Lewis had previously requested a tape recorder from Arnold, presumably to tape his conversations with Rolling. (State Ex. 21, p. 537 "Correspondence/ Lewis to Arnold").

On January 21, 1993, Lewis told Arnold in another taped statement that he broached the subject of Rolling coming to talk directly to the investigators, as suggested by Arnold in their previous discussion, but that Rolling would not talk to anyone except through him [Lewis]. (State Ex. 8; State Ex. 21, p. 191-204 "1/21/93"). Lewis also complained in that meeting that he and Rolling were having problems with other inmates on the wing. The officials told Lewis that in order to get moved they must ask for protection. (State Ex. 21, p. 195-197).

On January 22, 1993, Rolling and Lewis were both moved from U-wing to V-wing, (Def. Ex. 2 and 3, "Quarters Assignments"), where their respective cells were directly across from each other. (State Ex. 21, p. 244 "1/31/93," 2:28 a.m. interview). Assistant Superintendant Decker insisted that Lewis and Rolling were each given separate hearings on their requests for protective confinement and the normal procedures were followed as to their requests. Decker approved the requests as part of the protective management review team. (T 7660-7661).

On January 25, 1993, the four principals of the Task Force, Dix, Hewitt, Kramig, and Nilon, again traveled to FSP and met with prison officials Minshew and Decker. The purpose of this visit was to pick up a five-page letter purportedly written by

Lewis at Rolling's instructions.[80] (T 6580-6581; State Ex. 21, p. 528-532 "Lewis 5 page letter"). At this meeting, Decker advised the Task Force that the relationship between Rolling and Lewis was causing administrative problems for his staff because of Lewis' constant requests to speak with officials. Decker could not recall this conversation at the time of the suppression hearing (T 7666-7667), although Detective Kramig did. (T 6581). Decker did acknowledge receiving information that Lewis was suspected of snitching on Rolling, which placed Lewis in peril of his life. (T 7682). The Task Force members returned to the prison the next day, January 26, 1993, to meet with Decker. (T 6581). Jim Nilon hand-delivered a letter to Decker, in which Nilon instructed Decker to treat Bobby Lewis and Danny Rolling like any other inmates. (T 6591, 7555-7557, 7640; State Ex. 22).

On January 30, Decker was notified at home that Bobby Lewis wanted to talk to the Task Force. (T 7635). Decker met Lewis, who claimed to have written materials in his cell that he wanted to surrender. Decker did not send Lewis back to his cell to retrieve the materials for fear of exposing Lewis as an informant. Instead, Lewis was kept in a holding cell behind the control room overnight. (T 7636-7637, 7639). Decker notified

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[80]Lewis had given this letter to Inspector Arnold that afternoon. (State Ex. 21, p. 533 "Evidence Receipt").

the Task Force (T 7638), and a conference was held in the State Attorney's Office that morning between State Attorney Rod Smith, Assistant State Attorneys Jim Nilon and Bill Cervone, Professor Fletcher Baldwin and Steven Kramig to determine whether there were legal grounds to secure those documents from Lewis. A decision was made at the meeting to search the cells of Lewis and Rolling and seize any materials. (T 6582-6584).

Following this meeting, Assistant State Attorneys Jim Nilon and Don Royston, and Task Force members Dix, Kramig and Hewitt returned to FSP in the early morning hours of January 31, 1993, to take the first of two taped statements from Lewis and Rolling. (T 6582, 7558-7559). Prior to that interview, DOC officials conducted a shakedown of seven or eight cells, including the cells of Rolling, Lewis and Binstead, for any written material produced by Rolling.[81] (T 7609, 7641, 7646-7647). Decker testified that he met with Task Force members Dix, Kramig and Nilon before the shake-down and discussed conducting a search to secure any evidence. Decker said the Task Force had no authority to direct a cell search, but the decision to conduct the search was made in conjuction with the Task Force. (T 7648, 7670). Inspector Arnold recalled that the Task Force requested the

[81]The search of the other cells was merely to divert suspicion from the real target of the search. (R 7646-7647).

search. (T 7786, 7795). Kramig similarly recalled having "some discussions [with Decker and Minshew] about what we [the Task Force] intended to do," i.e., search Lewis' and Rolling's cells. (T 6584). The search was in fact conducted while Lewis was being interviewed by the prison superintendent.[82] (T 6585). DOC and Task Force officials examined the results of the search together. (T 6585, 7671). Apparently nothing of interest was seized. Shortly after the search, however, word came that Rolling wanted to speak with law enforcement. (T 6585-6586). Rolling was extremely upset about the search and demanded to know if the Task Force was involved; Dix and Kramig told him no as they did not want to make Rolling hostile. (T 6586-6587, 7612-7613). While the prosecutors did not directly participate in any interrogation of Rolling, Nilon was available to consult and instruct the interrogators. (T 7575, 7579).

In the ten days between January 21 and January 31, when the first taped statement was taken of Rolling and Lewis, Rolling provided substantially more details of the murders (and of other crimes) to Lewis, which Lewis dutifully passed on to law

[82]Decker met with Lewis three times in the early morning hours of January 31, 1993: at 12:29 a.m., 2:28 a.m., and 3:55 a.m., and again at 5:20 and 5:45 p.m. (T 7667; State Ex. 21, p. 222-242, 243-256, 257-273, 274-295, 296-308).

enforcement.[83] Curiously, Rolling did not make any statements about the crimes the entire time he was at CMHI separated from Bobby Lewis. During this same ten-day period, Lewis expressed concern to Decker that Rolling would tell everything to Sondra London when she visited. (T 6581-6582).

Although Sondra London had corresponded with Rolling over the months, she had never met him face-to-face. Inspector Arnold talked to London several times between January 18 and February 5, 1993, regarding visitation with Rolling, but he could not remember when he called her regarding a special visitation pass. (T 7787-7788). London testified that she called Arnold on the morning of February 4, and Arnold told her he would have a special pass for her to visit Rolling the following day. (T 6611-6612). Decker arranged the special pass for London's February 5th visit. (T 7651-7652). He denied that anyone from the Task Force or State Attorney's Office requested a special pass for London, or that Lewis' efforts had any impact on London's eligibility for a special pass (T 7655), although he did consult with the Task Force prior to issuing the pass. (T 7674). Nonetheless, the timing of the pass was highly suspect. Dix and Arnold knew about the pass on February 4 before Rolling's

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[83] Lewis met with prison officials and Task Force members no less than eight times in that ten day period, often in the middle of the night. (State Ex. 7, 8, 9, 10, 11, 12, 13, 14).

statement. Rolling did not know about the visit in advance, but apparently Lewis did. (T 7583).

Sondra London finally visited Rolling at FSP on February 5. She was not allowed any visits after that day. (T 6615).

After the statements in question, Rolling remained in V-wing, (Def. Ex. 2, "Quarters Assignment"), while Lewis was segregated from Rolling and the rest of the prison population. He was first moved to the Clinic on February 8, and on February 9, 1993, he was permanently moved to a solitary "death watch" cell in Q-wing, better known as Death Row. (Def. Ex. 3, "Quarters Assignment"). These moves were precipitated by Lewis' fear that his life was in immediate danger, as well as by the institution's concern about being able to protect him. A Protective Management Report dated February 9, 1993, identified three groups of inmates who posed a potential threat to Lewis: 1) friends of Rolling who thought Lewis was a snitch; 2) inmates who disliked Rolling and thought Lewis was his friend, and 3) inmates who thought Lewis might snitch on them too. The review team recommended that Lewis be placed in Q-wing "with no inmate contact" and that he be considered for an interstate transfer "due to the extraordinary circumstances in this case." (Def. Ex. 3, "Report of Protective Management").

Lewis testified at the suppression hearing that no one ever

instructed him to gather information or ever offered any deals in exchange for his information. He even went so far as to suggest he had been moved to Death Row as punishment for his role in providing information to law enforcement (T 6742, 6745, 6756-6757, 6761, 6778), although it is clear from both prison documents and his lawyer's correspondence with the prosecutor that he was segregated from the prison population, not in retribution, but purely for his own protection. Lewis' attorney, Robert Link (T 6774-6775), wrote Jim Nilon in July, 1993:

> Since providing his evidence to the authorities, Mr. Lewis has been detained in a solitary "death watch" cell near the electric chair at the Florida State Prison. . . . He has been detained in this fashion for his own safety, because the prison recognizes that his life will be in danger if he is put back into general population . . . Paul Decker has advised me that he has been attempting to arrange a transfer of Mr. Lewis to another prison within the State, or even to another prison outside the State. Mr. Decker advises that no one is willing to accept Mr. Lewis as a transfer, primarily because of his escape from death row some fifteen years ago.

(T 6782-6783; State Ex. 21, p. 573-574 "Correspondence/Link to Nilon")]. Link also testified that he was never successful in negotiating a deal on Lewis' behalf, and he advised Lewis that there were no deals. (T 6776-6778).

At his deposition on September 14, 1993, Russell Binstead disclosed a three page document about the Christa Hoyt murder,

which he obtained from Rolling in February, 1993. He said Rolling gave him the statement and asked him to copy it in his own handwriting and destroy the original. However, Binstead did not destroy the original. (T 7687, 7689-7691; State Ex. 26). Rolling had verbally told Binstead about the Gainesville murders before writing the document. According to Binstead, "We had off and on talked and discussed [the murders]." (T 7691). Rolling gave Binstead the information when they were together on V-wing when Rolling felt Lewis had betrayed or abandoned him.[84] (T 7726-7728). Binstead likewise denied any deals or promises from either DOC, FDLE or the State Attorney for gathering information from Rolling. He denied receiving any favorable treatment as a result of providing information, but unlike Lewis, he never attempted to negotiate any deals on his own behalf. (T 7687-7688, 7693).

On these facts, it is clear that Bobby Lewis was an agent for the State when he elicited incriminating statements from Rolling, and Rolling's written and oral statements to Lewis and law enforcement should have been suppressed.

The Sixth Amendment of the United States Constitution and

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[84]Rolling and Binstead were together on V-wing during the first half of 1993. (Def. Ex. 1, "Quarters Assignment"). Lewis left V-wing on February 8, 1993, and he and Rolling were not housed in the same wing after that. (Def. Ex. 2 and 3, "Quarters Assignments"). Rolling began talking to Binstead about the Gainesville murders after Lewis left the wing in February and after Rolling's two taped interviews with law enforcement. (R 7696; T 3500).

Article I, Section 16 of the Florida Constitution prohibit the government from deliberately eliciting, directly or indirectly, incriminating information from an accused after indictment and in the absence of counsel once counsel has been invoked. The seminal cases in this area are Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). In Massiah and Henry, the Supreme Court disapproved the police tactic of using informants to surreptitiously question the defendant. In Massiah, the government used a co-defendant to deliberately elicit statements from the defendant in the absence of counsel after he had been indicted. In reversing the conviction, the Court held that the defendant was denied "the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him." 377 U.S. at 206.

Massiah applies to indirect interrogations by the police, see Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 7d 424 (1977)(statement obtained by use of psychology on deeply religious and mentally unstable defendant afer he had invoked his right to counsel and while he was isolated from attorney during transport), as well as to information obtained by use of a

jailhouse informant. Henry. In the latter context, in order to establish a violation of the right to counsel, a defendant must show 1) that the inmate was acting as a government agent, and 2) that the inmate deliberately elicited the incriminating statements. Henry; United States v. York, 933 F. 2d 1343 (7th Cir. 1991). There is no bright line rule for determining whether an individual is a government agent for purposes of the Sixth Amendment right to counsel. The answer depends on the facts and circumstances of each case. Depree v. Thomas, 946 F. 2d 784 (11th Cir. 1991). At a minimum, there must be some evidence that an agreement, express or implied, between the individual and a government official existed at the time the elicitation takes place. Id. Both agency and elicitation are present here.

The facts of Henry are pertinent to the instant inquiry. Henry was arrested and indicted for a bank robbery in Virginia. While in jail awaiting trial, he told his cellmate, Nichols, about the robbery. Unbeknownst to Henry, Nichols was a paid FBI informant. Nichols was instructed not to initiate any conversation with or question Henry about the robbery but to be alert to any statements he made. In finding that the government deliberately elicited incriminating statements from Henry, the Court considered three factors: that Nichols was acting as a paid informant for the government and therefore had an incentive

to produce useful information; that Henry was unaware of Nichols' role as a government informant, and that Henry and Nichols were incarcerated together at the time the conversations took place. With respect to the last factor, the Court reasoned that "confinement may bring into play subtle influences that will make [an individual] particularly susceptible to the ploys of undercover Government agents," influences that were facilitated by Nichols' "apparent status as a person sharing a common plight." 447 U.S. at 274. The Supreme Court adopted the Court of Appeals' conclusion that Nichols had developed a relationship of trust and confidence with Henry such that Henry even requested Nichols to assist him in his escape plans when Nichols was released, and further that Nichols deliberately used his position to secure incriminating information from Henry when counsel was not present in violation of the Sixth Amendment. The Court further found that the two cellmates "had some conversations" and that Henry's incriminating statements "were the product of this conversation." 447 U.S. at 271. The Court concluded that Nichols deliberately used his position to secure incriminating information from Henry when counsel was not present, in violation of the Sixth Amendment.

The same is true here of Bobby Lewis. Rolling, like Henry, was "particularly susceptible to the ploys of undercover

government agents," 447 U.S. at 274, and Lewis' actions were calculated to elicit information. He befriended Rolling when everyone else in the prison taunted him; supplied him with alcohol and drugs to get him to talk; contacted Sondra London on Rolling's behalf with promises of financial security for Rolling's daughter, and lulled Rolling with tales of escape from Death Row. Initially, in the summer of 1992, Rolling confided in Lewis and Binstead, at Lewis' suggestion, so they would become state witnesses, accompany him to the Alachua County jail for trial, and help him escape. By the time Rolling began negotiating with the Task Force in January, 1993, Lewis had so ingratiated himself with Rolling that Rolling agreed to talk to law enforcement to reward Lewis, not himself.[85] Rolling told Agent Dix at their first meeting on January 18, 1993, that he wanted to help Lewis get out of prison by making him a prosecution witness because Lewis had been kind to him at FSP, spent time talking to him, made him comfortable, and put him in contact with Ms. London, who was going to help him get his works published. (T 7605-7606). Dix testified at the suppression hearing that on January 31, 1993, Rolling was "insisting that Bobby tell the story, . . ., because he wants Bobby to be a

[85]According to Lewis, Rolling was "real super religious," and he prayed for Lewis every day. (State Ex. 21, p. 166 "1/20/93").

witness against him, come to court and maybe get a deal out of this, . . ." (T 7573); "He was really adamant about the fact that he wanted this information to come out through Bobby Lewis." (T 7577). Lewis told investigators during the July 2, July 14, October 1 and October 20, 1992, interviews that he was able to convince Rolling that he could make a media deal and that Lewis could assist in an escape plan if brought to Gainesville or released prior to trial, and that these plans could only be accomplished if Rolling made Lewis privy to incriminating information. In January, 1993, Lewis told investigators that the whole wing was giving Rolling a hard time and that Rolling cried all the time in front of Lewis' cell. (State Ex. 21, p. 175, 177 "1/20/93"; State Ex. 21, p. 199 "1/21/93"). Rolling was clearly susceptible to Lewis' ploys, and Lewis deliberately used his position to secure incriminating information.

Indeed, the Supreme Court's description of the informant in Henry sounds uncannily like the Bobby Lewis revealed in his letters and taped statements. Nichols, according to the Supreme Court,

> managed to become more than a casual jailhouse acquaintance. That Henry could be induced to discuss his past crime is hardly surprising in view of the fact that Nichols had so ingratiated himself that Henry actively solicited his aid in executing his next crime--his planned attempt to escape

from the jail.

Id. at 274, n. 12. Lewis, too, was more than a mere casual jailhouse acquaintance; he offered to assist Rolling with his escape plan, even plotted a fake suicide attempt to keep Rolling near him on W-wing, and persuaded authorities to keep them in a wing together upon Rolling's return to FSP. Lewis' "conversations" with Rolling were protracted, intimate and cunning. In Henry, the high Court rejected the notion that Nichols was merely a listening post who made no effort to stimulate the conversation with Henry, stating:

> Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result.
>
> The Government argues that the federal agents instructed Nichols not to question Henry about the robbery. Yet according to his own testimony, Nichols was not a passive listener; rather, he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminatory statements were 'the product of this conversation.'

447 U.S. at 271. In a footnote, the Court noted that the agent only instructed Nichols not to question Henry or to initiate conversations regarding the robbery charges, but "[u]nder these instructions, Nichols remained free to discharge his task of eliciting the statements in myriad less direct ways." Id. at 271

n. 8. Finally, the Court found immaterial the fact that Nichols was fortuitously in jail and the government did not actively place him in close proximity to Henry. Id. at 272 n. 10.

Here, Lewis was told by his lawyer not to elicit any information from Rolling (T 6745), but he indirectly did so by playing on Rolling's transparent weaknesses, and, by his own account, Lewis initiated the conversations: "I'd tell robbery stories, he would [tell] robbery stories. I'd tell this adventure, he'd tell that adventure. We had tons of them kind of conversations . . ." (State Ex. 21, p. 31 "7/14/92"). Lewis maintained constant contact with Rolling from the time Rolling first arrived at FSP until his stint at CMHI, providing much needed support and companionship as well as basic necessities, and anxiously resumed the role of confidant and provider again upon Rolling's return to the prison. Lewis may have been in the same wing as Rolling by coincidence in May and June of 1992, (T 6739), but it was not by chance that Lewis and Rolling were twice moved to the same wings of an institution housing over 1,000 inmates[86] in January, 1993, when Lewis was certain he could get Rolling to talk to him and the Task Force.

Lewis did not need to be paid to be acting as a government

[86]Captain Donald Davis testified at the suppression hearing on November 15, 1993, that there were 1031 inmates at Florida State Prison on that date. (R 7524).

agent when he elicited the various oral and written statements from Rolling. He had worked as an informant before and knew the rewards, promised or implied. He was given the opportunity and encouraged to gather whatever information he could with the expectation that he would be rewarded this time as well. While the state did not pay him, as the FBI agents did Nichols, the Task Force nonetheless encouraged Lewis to ferret out as much information as possible and condoned his actions. See United States v. Geittmann, 733 F. 2d 1419 (10th Cir. 1984)(although informant not paid for his services, court concluded informant was a government agent because government officials led him to believe that his cooperation would be to his advantage). As noted by the Seventh Circuit Court of Appeals in United States v. York, 933 F. 2d 1343, 1357 (7th Cir.), cert. denied, 112 S. Ct. 321, 116 L. Ed. 2d 262 (1991):

> [A]greements . . . don't have to be explicit or formal, and are often inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct over a sustained period of time.

Here, the parties clearly behaved as if there was an agreement, despite their protestations to the contrary. Although Task Force members insisted no promises were ever made to Lewis (T 7598-7599), they did not disabuse him of that notion either. ["Just

common sense tells me I'm gonna be better off than I am now, . . . I don't have to be no brain surgeon to figure that out."). Lewis was, in short, no less an informant than was Nichols, and he deliberately, if indirectly, solicited those statements by playing on Rolling's weaknesses in contravention of Rolling's right to counsel. See Malone v. State, 390 So. 2d 338 (Fla. 1980)(statements to inmate/informant in absence of counsel should have been suppressed where statements were directly elicited by ruse employed by the informant and condoned and participated in by the state).

As illustrated above, Lewis' role in ferreting out information from Rolling was significantly greater than that of the informant in Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 2d 364 (1986), which the state relied upon below. In Kuhlmann, the police intentionally placed the defendant in a cell with Lee, a prisoner who agreed to act as an informant, in an attempt to discover the identities of the defendant's accomplices. They instructed the informant not to question the defendant about his crimes but simply to listen and report any information the defendant volunteered. Unlike Lewis and the informant in Henry, Lee obeyed these instructions. The defendant ultimately confessed to Lee, and the government introduced those statements at his trial. In holding that the

defendant was not entitled to relief, the Supreme Court ruled that the Sixth Amendment did not forbid admission of an accused's statements to a jailhouse informant who acted only as a listening post and did nothing to deliberately elicit the incriminating statements. 477 U.S. at 456, 459.

Here, contrary to the court's findings below, Lewis was clearly a state agent. Prison officials and Task Force members met with Lewis no less than four times after Rolling was removed from FSP and while he was at CMHI; they promised to house the two together upon Rolling's return, as Lewis requested. They intentionally placed the two in the same wing in January, 1993, even though this caused administrative difficulties in the prison. It is evident that Lewis was affirmatively given assess to Rolling so that he would have an opportunity to renew and intensify his friendship with Rolling and garner more information. Unlike the informant in Kuhlmann, Lewis was not merely a listening post but an active and skillful siphon of information. See United States v. Johnson, 954 F. 2d 1015 (5th Cir. 1992); United States v. Mitcheltree, 940 F. 2d 1329 (10th Cir. 1991).

As recognized by the Court in Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985), when an accused invokes his right to counsel, he is telling the state

that he wants to "rely on counsel as a 'medium' between him and the state." Accord Peoples v. State, 612 So. 2d 555, 556 (Fla. 1992)(State knowingly circumvented accused's right to have counsel present to act as a "medium" between himself and the state when the state taped the defendant's conversation with his co-defendant after right to counsel attached).

> Once the right to counsel has attached and been asserted, the State must of course honor it. . . . The Sixth Amendment . . . imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and the police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

Maine v. Moulton, 474 U.S. at 170-171 (footnote omitted). Whether a Sixth Amendment violation has occurred must be evaluated in light of this affirmative obligation. Id. Surreptitious interrogation which knowingly circumvents the accused's right to counsel is unconstitutional.

A written waiver is invalid to justify police-initiated questioning after the right to counsel is invoked. Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); Brewer v.Williams (clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right

to legal representation when the government interrogates him). A waiver of the Sixth Amendment right to counsel cannot be presumed, and courts will indulge in every reasonable presumption against waiver. Brewer v. Williams; Traylor v. State, 596 So. 2d 957 (Fla. 1992). Once the right to counsel has attached and a defendant has affirmatively asserted his desire to communicate with the state only through counsel (in this case, not once but twice in writing), he must use that medium to waive his right to counsel's assistance. Otherwise, the right to counsel is meaningless. Brewer v. Williams (no waiver of right to counsel found where defendant consulted with counsel before turning himself in; counsel advised him not to make statements and assured him that the police would not question him, and defendant asserted right to counsel by having attorneys, acting as his agents, make clear to police that no interrogation was to occur during transport). A defendant has no right to represent himself on some matters and have counsel represent him on others. State v. Tait, 386 So. 2d 338 (Fla. 1980); Goode v. State, 365 So. 2d 381 (Fla. 1979). Certainly, a represented defendant should not be allowed to make the critical choice of submitting to interrogation without the assistance of his lawyer, especially after he has expressly advised law enforcement that he will not "waive . . . my right to have my attorney present unless and

until, after adequate consultation with my attorney, I specifically waive . . . all or part of my rights in written form." Agent Dix even acknowledged this right to consult with counsel when he told Rolling that Mr. Parker would be notified if Rolling talked (T 7605) (but he wasn't).

Michigan v. Jackson requires a high standard for finding a waiver in the context of clandestine government interrogations. United States v. Johnson, 954 F. 2d at 1020. In Johnson, the court held:

> The government violates the accused's Sixth Amendment right to counsel by exploiting the opportunity to secretly question the accused after indictment and appointment of counsel regardless of who creates that opportunity.

Id. As in Johnson, the state here circumvented the protection afforded by the presence of counsel during questioning by exploiting the opportunity for Lewis to gather information. Lewis did everything in his power to convince Rolling that he was on Rolling's side, not the state's. Although Rolling may have wanted to sell his story to make money when he first started talking to Lewis, he did not know that Lewis was in fact a state agent. Rolling may have known he was being questioned by the state in January and February, 1993, but by then it was too late. Rolling's right to counsel had already been breached. Rolling might have thought he was using Lewis as his mouthpiece and

confessor, but Lewis had been acting as an arm of the state long before. See United States v. Geittmann, 733 F. 2d 1419 (10th Cir. 1984). The January 31 and February 4 statements were fruits of the poisonous tree.

It is absolutely clear that Lewis gathered information from Rolling to further his own cause. He knew how the system worked, having been used as an informant in the prison in the past, and apparently the prison officials recognized his special status in the prison by granting this former death row escapee special privileges. That he intended to use Rolling to advance his interests is readily shown by his correspondence with his attorney, Robert Link, and his writer friend/agent, Sondra London. That Rolling may have been using Lewis is of no consequence since it is patently clear that Lewis was acting as a double agent, trying to get whatever benefit he could from each side. He clearly knew how the system worked and how to make it work for him, and he expected to be rewarded. Although the state made no overt promises of benefit to Lewis, law enforcement encouraged and ratifyed his actions, doing everything possible to facilitate him in getting the desired information. Lewis was not only placed in the same wing with Rolling when the latter returned to FSP from CMHI, he was in a trustee position where he could have continual and sustained contact with Rolling. More

telling is the fact that Lewis was denied approved transfers from FSP to another institution to keep him in constant communication with Rolling. As stated in Maine v. Moulton, the knowing exploitation of an opportunity to confront the accused without counsel being present is as much a breach of the state's obligation not to circumvent the right to counsel as the intentional creation of such an opportunity. 474 U.S. at 176. In the summer of 1992, the state exploited Lewis to glean information from Rolling. By January 1993, the state intentionally created the opportunity to confront Rolling via Lewis. This was a blatant attempt to circumvent Rolling's right to counsel, and it succeeded.

It is clear that Rolling's incriminating statements were not voluntary but were the result of affirmative conduct on the part of Bobby Lewis to elicit the information. Because Lewis was acting as a de facto agent of the state, his confrontations with Rolling violated Rolling's right to counsel. Lewis' testimony at the penalty phase and the tapes of the January 31 and February 4 statements should not have been admitted into evidence. The court committed harmful, reversible error in denying the defense motion to suppress. Rolling is entitled to a new penalty proceeding before a newly empaneled jury.

Suppression is also 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. As noted above, the Task Force investigating the Gainesville student murders was made up of members of three law enforcement agencies and Assistant State Attorney Jim Nilon. The Task Force worked out of the State Attorney's Office, and Nilon served as its official legal advisor. During the feverish events of January, 1993, it became apparent that Nilon's role was more than a mere passive consultant to the Task Force; he was an active member who fully (if not directly) participated in the investigation and interrogations of Mr. Rolling.

Rolling asserted his right to counsel twice in writing. Nilon received copies of the notices invoking the right to counsel and forwarded the May 29, 1992, notice the Sheriff's Office, Police Department and FDLE. (State Ex. 21, p. 518-520 "Letters to LEO"). The written terms of the notices specifically referred to Rolling's intent to consult with counsel before waiving his rights:

> I further state that at no time in the future do I or will I waive . . . my right to have my attorney present <u>unless, and until, after adequate consultation with my attorney</u>, I specifically waive . . . all or part of my rights in written form.

In effect, Rolling told law enforcement and the State Attorney,

"This is the only way I will waive my right to counsel." Nilon was clearly aware of these explicit conditions in January, 1993, when he sanctioned the Task Force's three face-to-face meetings with Rolling in the absence of counsel.

When Rolling requested the meeting with investigators on January 17, 1993, Nilon was immediately contacted. (T 7539). Nilon, Kramig and Dix traveled to FSP at 1:00 a.m. on January 18 to meet Rolling. (T 6578, 7540). Although Nilon did not participate in the actual meeting, he stood by while the meeting occurred and instructed the agents on procedures for the interview. At no time did Nilon contact defense counsel regarding this meeting.

Nilon made two subsequent trips to FSP on January 25 and 26, 1993, to retrieve documents. (T 6580, 6581). Then, on the morning of January 31, Nilon assembled with the top brass of his office and Investigator Kramig, when it was decided to search Rolling's and Lewis' cells without a warrant. (T 6582-6583). Later that day, Nilon accompanied his fellow Task Force members to FSP and was present when the search was conducted. He was also present in his supervisory capacity when Hewitt, Kramig and Dix interviewed Rolling that day. Nilon told the Task Force how to proceed with the interview. (T 7611). When the interview appeared to break down over the logistics of using Lewis as

Rolling's mouthpiece, the interrogators took a coffee break to confer with Nilon, and Nilon instructed Steve Kramig to ask Rolling direct questions and see what happened. (T 6587, 7575).

Nilon was again present in the identical capacity on February 4, 1993, during the videotaped interview. Although he did not have direct contact with either Rolling or Bobby Lewis on January 31 or February 4, (T 6595-6596, 7579), the Assistant State Attorney was present on each occasion incriminating statements were taken from Rolling by the Task Force, and his complicity with the investigative team made him as much an interrogator as if he had been actually posing the questions. The Task Force proceeded at his direction, and he served as their legal and technical consultant. Yet, at no time did Mr. Nilon notify Rolling's counsel of the meetings between Rolling and law enforcement.

Florida Rule of Professional Conduct 4-4.2 prohibits a lawyer who represents a party from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." Rule 4-5.3(c), which pertains to the conduct of nonlawyers employed or retained by or associated with a lawyer, provides in pertinent part:

(c) a lawyer shall be responsible for

> conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; . . .

The prohibition against contact with represented parties applies to state attorneys. Suarez v. State, 481 So. 2d 1202 (Fla. 1985); United States v. Hammad, 858 F. 2d 834 (2d Cir. 1988); United States v. Lopez, 765 F. Supp. 1433 (N.D. Calif. 1991). Even if a defendant waives his Fifth and Sixth Amendment rights to counsel, the defendant cannot waive the ethical rule. Id.

In Suarez, this Court considered a violation of former Disciplinary Rule (DR) 7-104, the predecessor of Rule 4-4.2. In that case, the defendant twice requested interviews with state attorneys regarding his case. The defendant was represented by a public defender during the first interview, and the state attorney was aware of that fact. Defense counsel complained about the interview but subsequently withdrew from the case due to a conflict, and appointment of conflict counsel was pending at the time of the second interview. Suarez was advised of his Miranda rights and unequivocally waived his right to counsel during both interviews. Despite the fact that there was no constitutional error, the Court found that an ethical violation

had "most definitely" occurred. 481 So. 2d at 1205. The Court concluded that

> it is a violation of the rule for a prosecuting attorney to interview a defendant represented by counsel without notice to defense counsel when the defendant requests or acquiesces to the interview. Again we have no problem in finding that a violation does occur under these circumstances. United States v. Thomas, 474 F. 2d 110 (10th Cir.), cert. denied, 412 U.S. 932, 93 S. Ct. 2758, 37 L. Ed. 2d 160 (1973)(DR 7-104 violated when presecution uses statement, at trial, taken by FBI agent during interview requested by defendant); United States v. Four Star, 428 F. 2d 1406 (9th Cir.), cert. denied, 400 U.S. 947, 91 S. Ct. 255, 27 L. Ed. 2d 253 (1970)("We emphatically reiterate, however, that in-custody interrogation of an accused person known to be represented by counsel without affording the counsel an opportunity to be present is undesirable and that a prosecuting attorney who knowingly participates in such an interrogation or takes advantage of its results violates professional ethics." 428 F. 2d at 1407 (citation deleted); State v. Yatman [320 So.2d 401 (Fla. 4th DCA 1975)]; People v. Green [405 Mich. 273, 274 N.W.2d 448 (1979)].

Id. at 1206.

The Suarez Court held that a violation of the disciplinary rule alone did not require suppression of the statements under the exclusionary rule because an effective deterrent for such violations is the initiation of disciplinary proceedings by the Florida Bar. Other courts, however, have recognized that under certain circumstances suppression may be an appropriate remedy

for a prosecutor's ethical violation. See United States v. Hammad, and cases cited therein.

In Hammad, the court held that a prosecutor violated DR 7-104(A)(1) by employing an informant as an alter ego to elicit admissions from a represented suspect. Although the court did not suppress the evidence in that case, it held that in future cases, suppression may be ordered in the district court's discretion:

> The exclusionary rule mandates suppression of evidence garnered in contravention of a defendant's constitutional rights and protections. [Citation omitted]. The rule is thus intended to: deter improper conduct by law enforcement officials, [citations omitted]; preserve judicial integrity by insulating the courts from tainted evidence, [citations omitted]; and maintain popular trust in the integrity of the judicial process, [citations omitted]. . . .
>
> The same needs arise outside the context of constitutional violations. . . . Hence, the exclusionary rule has application to government misconduct which falls short of a constitutional transgression.

858 F. 2d at 840-841. The court noted several cases in which evidence obtained in contravention of the ethical rules had been suppressed, with and without a constitutional basis for suppression.

The prosecutor below not only authorized but orchestrated the interrogations of Rolling. The Task Force was in essence the

alter ego of Jim Nilon. Nilon and the Task Force failed to advise defense counsel of their meetings with Rolling despite Rolling's invocation of his right to the assistance of counsel and the explicit notification that he would not waive his right to have counsel present "unless and until, after adequate consultation with my attorney, I specifically waive . . . all or part of my rights in written form." This violated both the Sixth Amendment and the Rules of Professional Conduct. Even absent a finding of a constitutional violation, Nilon's conduct in this regard was egregious and prejudicial and warrants suppression of Rolling's statements.

ISSUE III

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

Rolling moved to suppress physical evidence seized from a tent and the curtiledge of his campsite located at or about a wooded area off of the 2800 block of S.W. 34th Street in Gainesville, Florida, on the ground that the warrantless search and seizure of items violated Article I, section 12 of the Florida Constitution and Amendments IV and XIV of the U.S. Constitution. (R 922-924). The motion was heard on October 28-29, 1993. The evidence at the hearing was as follows.

The search in question occurred on University of Florida property. It was a wooded area enclosed by a barbed wire-type fence. A gas line ran through the property, and there was access to the utility easement through a gate on S.W. 34th Street. (T 6225, 6240). The gate was not locked; in fact, the gate was sometimes wide open. (T 6233, 6245). There was a well-defined path leading through the gate, and the fence was not marked with no trespassing or private property signs. (T 6233-6234). Trash and beer cans were strewn along the path. (T 6245). Although there were no signs prohibiting tents or camping on the property

(T 6234), the University required a "dig" permit before a tent could be erected on its property. No permits had been issued for the S.W. 34th Street property. (T 6229-6230, 6241-6242).

Deputy Sheriff Tim Merrill was on patrol in the southwest sector of Gainesville at one a.m. on August 28, 1990, when he saw two males, one white and one black, walking north on S.W. 34th Street and enter the UF property through the S.W. 34th Street gate. (T 6281-6282). Merrill testified that there was an unusually large number of officers patrolling that night due to the discovery of three murder victims and recent bank robberies in the area, and he was looking for potential suspects or witnesses. (T 6279). He knew of recent bank robberies, including one the day before, committed by a black and white team.[87] Merrill called for a back-up and followed the suspects through the gate and into the woods. (T 6282-6284). He and Deputy Liddell caught up with the men 200 to 300 feet into the woods and identified themselves. The black male, Tony Danzy, came back to the officers; the white male ran off. (T 6285-6286, 6293).

Deputy Liddell chased the white suspect 200 yards until he disappeared into denser woods and turned off the path. (T 6294-

[87]Contrary to this "knowledge," the bank robbery on August 27, 1990, was committed by a single white male. See Transcript of Trial in United States v. Rolling, Case No. GCR-91-01023 (R 951-1475), and testimony of Deputy Jim Liddell. (T 6298).

6295). Dogs picked up the track and led deputies to a small, two-person pup tent deep in the woods. (T 6295-6296, 6300). As they approached the tent, the officers found a raincoat on the ground and dye-stained money under it. (T 6297). Knowing that a bank had been robbed across the street from the tent the day before and that the white male robber had been armed, the officers decided to secure the tent. (T 6298-6299). The tent flaps were closed, and the officers could not see inside. (T 6299-6300). A search dog entered the tent. When he came out, Deputy Liddell then lifted the flaps and looked inside to verify that the tent was empty. He found a tote bag inside on top of more red-stained money. Fearing that the fleeing suspect had returned to the tent for a gun, Liddell searched the bag for a weapon and found a gun box. He opened the box and discovered a blue steel Taurus handgun. (T 6300, 6302-6304). He stopped his search once he found the weapon and called for a crime scene unit. (T 6305). Liddell justified opening the gun box for officer safety purposes. (T 6321).

Crime scene investigators first arrived at the campsite at approximately 1:30 a.m. on August 28, 1990, and collected the tent, tent poles, a blue foam pad, rain poncho, money and the bag with the weapon. (T 6323, 6328). Deputy Liddell returned to the area later that morning. He did not see anything that looked

like a latrine; he did not find any food stocks or consumed food or water containers, and there was nothing to suggest the tent had been there any length of time. (T 6309-6310). Other investigators similarly testified that there was no evidence that the area had been occupied for a long period of time. (T 6329).

On September 4, 1990, six days after the bag was seized, Investigator Jack Smith removed the money from the bank bag, counted it and verified the serial numbers. He also conducted a "routine" inventory of the contents of the tote bag removed from the tent. Among the items removed from the bag were a screwdriver and roll of duct tape. At that point, Smith notified the task force and turned the evidence over to the FDLE. (T 6330-6331, 6339).

On September 5, investigators returned to the site and located a vinyl bag on the ground under dense brush. (T 6342, 6357-6359). A red dye pack was protruding from the bag (T 6333), and a brown ski mask, pink sunglasses and a pair of black and white gloves were inside. (T 6334, 6337).

The state and defense stipulated into evidence two exhibits on the issue of standing: excerpts from Rolling's interviews with the Gainesville Student Homicide Task Force on January 31, 1993 (pages 114-121), and February 4, 1993 (pages 8-12, 49). (T 6212-6213). The defense also introduced the transcript of

testimony from Rolling's federal bank robbery trial in March, 1992. (R 951-1475; T 6251). The testimony at the bank robbery trial revealed that the First Union National Bank at 3505 S.W. Archer Road in Gainesville was robbed by a single white male on the morning of August 27, 1990. The tellers gave the robber bait money, and as the robber exited the bank, a timing mechanism was triggered, and the dye packs in the stolen money exploded 50 to 75 feet from the bank entrance. (R 960-962, 975, 981-983, 988-989, 990-995, 997, 1011-1014, 1017-1018). Of the $7,005.00 taken, $6,118.00 was recovered. (R 998). The money, including all ten bait bills from the bank, was recovered at Rolling's campsite. (R 1333-1334). The campsite was located northeast of the intersection of Archer Road and S.W. 34th Street, approximately one-half mile from the First Union National Bank. (R 1055, 1335).

Following this evidence, the state argued that the search of the campsite began as a legitimate investigatory stop on University of Florida property, the police knowing of black and white suspects in a nearby armed bank robbery the previous morning. [As previously noted, there was only one, white male suspect in the bank robbery]. When one suspect fled and a canine unit was called in, the dogs inadvertently discovered the campsite, and the raincoat and dye stained money were then found

in plain view. (T 6371-6367). The state justified the search of the tent as necessary for public safety, contending that Officer Liddell opened the gun case just enough to see if a weapon was inside. (T 6374, 6376), and further claimed that Rolling abandoned the property, and because he was a trespasser and had no possessory interest in the land, he had no reasonable expectation of privacy in the tent. (T 6381-6384). Finally, the state argued that the subsequent seizure of the bag on September 5th was proper as that property had been abandonned. (T 6381, 6393).

At the conclusion of the hearing, the trial court entered an order denying the motion to suppress. (R 1772-1782). With regard to the standing issue, the court first found that Rolling did not have permission to camp on the University property and, as a trespasser, had no reasonable expectation of privacy in the items found outside the tent. Even if Rolling did have standing to challenge the seizure of these items, the court ruled, the seizure was proper in that the items were in plain view. The court did find that Rolling had a proprietary interest in the tent and thus had standing to challenge the search of the tent. The court concluded, however, that the items inside the tent were properly seized based on exigent circumstances.

Appellant maintains in this issue that the trial court

properly found that Rolling's status as a trespasser did not undermine his Fourth Amendment claim with respect to the search of the tent. The court erred, however, in ruling that the search of the tent was otherwise justified.[88]

A. Standing

In Dean v. State, 478 So. 2d 38 (Fla. 1985), this Court adopted the "single-treatment analysis" set forth by the United States Supreme court in Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), for determining whether a defendant is entitled to bring a Fourth Amendment challenge to a search or seizure. Under this analysis, a defendant has "standing" to challenge a search or seizure if the defendant's Fourth Amendment rights were infringed by the challenged search or seizure. Jones v. State, 648 So. 2d 669 (Fla. 1994); State v. Suco, 521 So. 2d 1100, 1102 (Fla. 1988). In order to establish standing, the defendant must demonstrate that he or she has a reasonable expectation of privacy in the premises or property searched. Suco. To determine whether a defendant has a reasonable expectation of privacy in the premises or property searched, courts must consider the totality of the circumstances in the particular case. Id.

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[88]This issue does not address the seizure of the raincoat and money found outside the tent on August 28, 1990, or the seizure of the vinyl bank bag on September 5, 1990.

Courts may consider a variety of elements in making that detemination. For instance, in State v. Suco, this Court rejected the "arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like," 521 So. 2d at 1102 (quoting Rakas v. Illinois, 439 U.S. at 143, 99 S. Ct. at 430), and held that a defendant's status as a lessor or as an invitee in the premises was merely a factor to be considered in conjunction with all the surrounding circumstances. Pursuant to this rationale, Rolling's status as a trespasser on State-owned property was merely one factor to be considered in determining whether he had a reasonable expectation of privacy in the tent he erected in a secluded, dense part of the woods precisely because it provided him with privacy, a place where he and his possessions would not be disturbed.

The question presented here is whether Rolling's actual expectation of privacy is one our society is willing to recognize as reasonable. This Court has never confronted the issue whether our society is willing to recognize that the Fourth Amendment protects trespassers who take up residence on public property. In State v. Fisher, 529 So. 2d 1256 (Fla. 3d DCA 1988), the court found that a trespasser in an abandoned home did not have standing to move for suppression because he had neither a proprietary or possessory interest in the house and did not

otherwise establish a reasonable expectation of privacy of the premises. Courts in other jurisdictions have come to realize, "in light of contemporary norms and conditions," that the Fourth Amendment must make room for trespassers, such as the growing number of homeless people in this country, who squat on public property.[89] Community for Creative Non-Violence v. Unknown Agents of the United States Marshals Service, 791 F. Supp. 1, 5 (D.D.C. 1992) (hereinafter referred to as CCNV v. Unknown Agent) (quoting Payton v. New York, 445 U.S. 573, 591 n. 33, 100 S. Ct. 1371, 1382-1383, 63 L. Ed. 2d 639 (1980)); see also Pottinger v. City of Miami, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992); State v. Mooney, 218 Conn. 85, 588 A. 2d 145 (1991).

Rolling, unlike the defendant in Fisher, was a transient who established domicile on public, not private, property. The instant case thus poses the Court with a question of first

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[89]Although it is impossible to accurately estimate, the number of homeless people in this country is staggering. Recent studies suggest that in the latter half of the 1980s, four to eight million people, or between 2.3 percent and 4.4 percent of the adult population, in the United States were homeless. Interagency Council on the Homeless, "Priority: Home! The Federal Plan to Break the Cycle of Homelessness" (March 1994). Advocacy groups for the homeless had previously estimated the homeless population in America to be a more conservative three million. See Robert C. Coates, Legal Rights of Homeless Americans, 24 U.S.F.L.Rev. 297, 298 (1990). By all accounts, the homeless population has continued and is continuing to grow. See CCNV v. Unknown Agents, 791 F. 2d 1, 5 (D.D.C. 1992), noting that the plaintiffs were tragically "among the growing number of our nation's homeless citizens." According to the Interagency Council on the Homeless March 1994 report, the average homeless person is a single, unattached adult, unaccompanied by children, in the late 30s. Only one in four homeless men has no history of any institutional stay, either hospitalization, jail or prison, or inpatient chemical dependency treatment, and one-third of homeless adults have severe mental illness.

impression and "with the challenge of 'interpreting the Fourth Amendment in light of contemporary norms and conditions.'" CCNV v. Unknown Agents.

The court below found, and the state conceded, that Rolling had a subjective expectation of privacy in his tent. Rolling had purchased the tent he erected in the woods and lived in the tent for several days in a nearby campsite. He had just moved his tent to a new campsite on the morning of August 27, 1990 (before the First Union National Bank was robbed). Although he had been at the campsite off S.W. 34th Street just one day [hence no evidence of a latrine and water or food supplies], he had his bedroll and a bag with his clothing, glasses, jewelry, a tape recorded letter to his family, and other personal effects concealed inside, as if he were establishing residence there. See Transcript 1/31/93 statement, p. 114, 116-117; Transcript 2/4/93 statement, p. 8-11. Indeed, at the federal bank robbery trial, the government established that the campsite belonged to Rolling. See Motion for Judicial Notice, and Finding for Purposes of Motion to Suppress, that "Campsite" Belonged to Defendant, Danny Harold Rolling. (R 947-949). The tent was located in the woods, 10 yards off the path, and it could not easily be seen. In fact, it was so well concealed that Rolling had difficulty finding it himself. (Transcript 2/4/93 statement,

p. 49). See Pinyon v. State, 523 So. 2d 718 (Fla. 1st DCA 1988) (the reasonableness of the expectation of privacy depends, in part, upon the degree to which the locale, object, or conduct is viewable by a member of the public without visual aids); State v. Mooney (homeless defendant had a reasonable expectation of privacy in the contents of his duffel bag and box, which he kept under a bridge where he slept). Clearly, Rolling had manifested an expectation of privacy in the contents of his tent.

This expectation of privacy persisted whether or not Rolling was physically present at the time of the search. Certainly, an individual retains an expectation of privacy in his or her dwelling when away from home at work or school, to shop, or even to rob a bank. See Pottinger v. City of Miami, 810 F. Supp. at 1571 (plaintiffs, 6,000 homeless people living in the City of Miami, exhibited subjective expectation of privacy in their belongings and personal effects when leaving their living areas for work or to find food); Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (defendant who has been taken into custody is entitled to Fourth Amendment protection against warrantless search of premises in which he was residing at time of his arrest); State v. Mooney (defendant had reasonable expectation of privacy in containers under bridge which he regarded as his home, even though defendant was in police custody and could not be present

at his "home" when search occurred).

In determining whether a homeless person had a legitimate expectation of privacy in personal belongings on public property, i.e., whether the expectation of privacy was one society was prepared to recognize as reasonable, the federal district court in Pottinger deemed the two most relevant factors to be whether the person occupying the property was a trespasser and whether the property was left in a manner readily accessible and exposed to the public. Relying on State v. Mooney, the court noted that the simple personal effects of the homeless were the last vestiges of privacy they had and were often left in parks and under overpasses considered their homes. The court concluded that society was prepared to recognize their expectations of privacy in their personal property as reasonable.

In State v. Mooney, the court found that the homeless defendant had a reasonable expectation of privacy in the contents of his duffel bag and box, which he kept under the bridge abutment where he slept. In so finding, the court considered society's high degree of deference to the expectations of privacy in closed containers, the fact that the containers were located in a place that the defendant considered his home, and the fact that, because the defendant was under arrest, he could not be at the place he regarded as his home to assert his Fourth Amendment

rights when the search occurred. The court agreed with the state that the defendant did not have a reasonable expectation of privacy in the bridge abutment area but concluded that the interior of the duffel bag and box was "the last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize it as reasonable under the circumstances of this case." Id. at 161.

While a transient, such as Rolling, should not receive any greater rights under the Constitution than a citizen who has a home, those who lack permanent shelter and reside on the streets or in the woods should not be deprived of any privacy rights. Society is willing to recognize as reasonable the privacy interests of conventional families who camp in our state and national parks, even though their dwellings are temporary and on public property. So, too, should society recognize a legitimate expectation of privacy for the many who permanently dwell in lean-tos on public property, especially where, as here, that dwelling is erected in an area not readily accessible or exposed to the public. As stated in CCNV v. Unkown Agents, 791 F. Supp. at 5:

> It is equally clear, . . . , that homeless

> people do not have any lesser rights under the Fourth Amendment than those who have homes. Therefore, a person who stays at a homeless shelter because he cannot obtain other housing does not do so at the loss of his most basic rights of privacy and freedom from unreasonable government intrusions.

The Court there concluded that residents of a homeless shelter in Washington, D.C., had an expectation of privacy which society was prepared to recognize as reasonable, noting:

> To reject this notion would be to read millions of homeless citizens out of the text of the Fourth Amendment. [Citation omitted]. Furthermore, courts have long recognized 'the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place.' Rakas, 439 U.S. at 142-143, 99 S. Ct. at 429-430. Thus, the Constitution does not contemplate a society in which millions of citizens have no place where they can go in order to avail themselves of the protections provided by the Fourth Amendment.

Id.

The trial court was thus correct in finding that Rolling had a reasonable expectation of privacy in his tent and standing to challenge the warrantless search and seizure therein.

B. Abandonment

The state maintained below that Rolling abandoned the campsite and thus exhibited no proprietary interest or expectation of privacy. (R 6263). Abandonment is a question of

intent. The inquiry should focus on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure. United States v. Nordling, 804 F. 2d 1466, 1469 (9th Cir. 1986). There is no evidence here to suggest that Rolling intended to abandon or did abandon his tent and personal belongings just because he was not physically present when the tent was searched.

Without question one does not abandon his or her property and relinquish an expectation of privacy when leaving home to go to work or school, any more than a camper abandons his or her tent and relinquishes an expectation of privacy when leaving a campsite to fish, hunt or hike. The tent was not like a fungible object which Rolling discarded as he fled from police, cf. California v. Hodari, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991); this was the functional equivalent of his home. That Rolling pitched his tent in a remote area and left his sleeping gear and personal effects, e.g., eyeglasses, tape recording to his family, etc., inside with the flaps closed, manifested a clear intent to return. The tent was not left open to public scrutiny, cf. California v. Greenwood, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988), nor did Rolling deny ownership of the tent and its contents. See United States v.

Sanders, 719 F. 2d 882 (6th Cir. 1983) (no abandonment where defendant, believing she was under surveillance, left airport without retrieving suitcase, but did not deny ownership of suitcase when questioned by police).

C. Exceptions to Warrant Requirement

It is undisputed that no warrants were obtained for the seizures at issue here. While the police may have been justified in seizing the dye stained money observed in plain view on the ground outside the tent, the officers were not justified in conducting a warrantless search of the interior of the tent. It is important to note that the flaps of the tent were closed when the police sent the dog inside, concealing the contents inside. The bag in the tent was not in plain view. It matters not that the tote bag containing the gun box was unzipped since the bag was inside the tent in which the defendant had a reasonable expectation of privacy.

This was not merely a "protective sweep" to protect the officers from someone hiding inside the tent, see Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990); this was a full scale search for weapons. That the gunbox was incidentally found in the bag sitting at the threshold of the tent did not minimize the scope of the search. A warrantless intrusion may only be justified by hot pursuit of a fleeing

felon, imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. Minnesota v. Olson, 495 U.S. 91, 100, 110 S. Ct. 1684, 109 L. Ed. 2d 85, 95 (1990). Here, once the dog entered the tent and found it empty, all exigencies dissipated. Any additional examination of the tent's interior was nugatory in terms of officer safety, and even if there was a weapon in the tent, the officers could not be assured that the suspect in the woods was unarmed. The state's theory of officer safety was speculative and not supported by the evidence.

The testimony at the suppression hearing further established that the area was secured after the search until the crime scene unit arrived approximately 20 to 30 minutes later. (R 6306, 6322-6323). If the area could be secured for the crime scene unit, then certainly it could have been secured until a warrant was obtained. Jones v. State, 648 So. 2d 669 (Fla. 1994), is on point. There, the Court held illegal a warrantless search and seizure of the defendant's clothing from his hospital room, finding no exigent circumstances to support the warrantless seizure. The Court noted that a guard was posted outside the room a short time after the seizure and there was no explanation as to why a guard was not posted outside the room before the seizure to safeguard the clothing until a warrant could be

obtained. See also United States v. Jeffers, 342 U.S. 48, 52, 72 S. Ct. 93, 95, 96 L. Ed. 59 (1951) (No exigent circumstances supporting warrantless seizure of contraband from hotel room where officers admit they easily could have prevented destruction or removal of seized property by merely guarding the door); State v. Mooney, 1588 A. 2d at 155 (police could have seized transient's duffel bag and cardboard box upon probable cause to believe they contained evidence and preserved them until a search warrant was secured).

Because the officers were not acting pursuant to a warrant or pursuant to a recognized exception to the warrant requirement, the search and seizure of the tent and bag were unlawful. Even if the police could have lawfully impounded the tent and its contents, the subsequent search six days later could not be justified as a legitimate inventory search since there was no testimony that the search was conducted pursuant to any standardized criteria or established routine. Florida v. Wells, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990). Moreover, waiting six days defeats the purpose of an inventory search, i.e., to protect an individual's property while it is in police custody and insure against claims of lost, stolen or vandalized property. Id.

For all the foregoing reasons, Rolling's motion to suppress

should have been granted. The error in denying the motion to suppress was unquestionably prejudicial since the evidence seized, i.e., black clothing, screwdriver, 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).

ISSUE IV

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

Rolling moved to sever the counts of the indictment alleged to have occurred at the three different crime scenes on the ground that the events at each crime scene constituted a separate and distinct episode. (R 2276, T 4-6). The trial court denied the motion, finding the alleged offenses "constituted a continuing episode, linked by [the defendant's] unity of purpose, temporal and geographic proximity, and the manner and method by which the homicides were committed." (R 812, T 8-9).

The trial court's ruling was error as the events at each crime scene clearly were not part of one continuous episode but were separated by significant periods of respite. The fact that each criminal episode had in common the ultimate object of raping and then killing a young woman created at most a similarity in circumstance that does not justify joinder under Florida law.

Under Florida Rule of Criminal Procedure 3.150(a), offenses may not be tried jointly unless they are based on the same or "connected acts or transactions":

> [t]wo or more offenses that are triable in

> the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses . . . are based on the same act or transaction or on 2 or more connected acts or transactions.

This Court has strictly construed the phrase "connected acts or transactions." To summarize well-settled law, offenses are "connected acts or transactions" within the meaning of Rule 3.150(a) only if they occurred within a single episode. Ellis v. State, 622 So. 2d 999 (Fla. 1993); Wright v. State, 586 So. 2d 1024, 1029-30 (Fla. 1991); Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 113 S. Ct. 2377, 124 L. Ed. 2d 282 (1993); Crossley v. State, 596 So. 2d 447 (Fla. 1992); Garcia v. State, 568 So. 2d 896 (Fla. 1990); Bundy v. State, 455 So. 2d 330 (Fla. 1984), cert. denied, 476 U.S. 1109, 106 S. Ct. 1958, 90 L. Ed. 2d 366 (1986).

In Ellis, this Court reviewed its prior cases and clarified what is meant by a single episode. The Court first noted that

> [t]he rules do not warrant joinder or consolidation of criminal charges "based on similar but separate episodes, separated in time, which are `connected' only by similar circumstances and the accused's alleged guilt in both or all instances." Courts may consider "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." However, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair determination of

guilt or innocence.

622 So. 2d at 999 (quoting Wright, 586 So. 2d at 1029-30).

The Court then discussed its prior decisions in Crossley, Bundy, and Fotopoulos:

> [T]he Crossley crimes were temporally and geographically close to one another because they were separated by less than three hours in time and only two or three miles in distance. Likewise, both offenses involved an armed robbery of a woman in a commercial establishment by a black man wearing a cap, dark sunglasses, a blue shirt or jacket, and gray shorts. On the other hand, one of the crimes involved a kidnapping, while the other did not. But most importantly the Court found that "the two episodes were entirely independent" and that "there was absolutely nothing to connect one crime with the other."
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> . . . .
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> [I]n Bundy, . . . we confronted a situation in which serial killer Ted Bundy had gone on a murderous rampage in the housing facilities near Florida State University in Tallahassee. Bundy first attacked four women, killing two, in the Chi Omega sorority house near the university; then within roughly an hour Bundy proceeded to a duplex apartment a few blocks away and attacked a fifth woman. Thus, in Bundy we confronted a classic example of an uninterrupted crime spree in which no significant period of respite separated the multiple crimes. As such, the crimes were connected and constituted a single uninterrupted episode.
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> . . . .
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> [I]n Fotopoulos, . . . we addressed a case in which the defendant first induced a woman

> under his influence to shoot and kill a man while he videotaped the crime. Fotopoulos then used the video tape as blackmail to induce the woman to hire a "hit man" to murder Fotopoulos' wife about one month later. While there was a substantial lapse of time in Fotopoulos, it was clear that the two crimes were linked in a causal sense: One was used to induce the other. That causal link was sufficient to permit joinder, since one crime could not properly be understood without the other. In sum, the two crimes Fotopoulos helped commit constituted a single episode because of their obvious causal link and despite a lapse of time greater than in Bundy or Crossley.

Id. at 999-1000 (citations omitted).

The Court then announced the following rule:

> First, for joinder to be appropriate the crimes in question must be linked in some significant way. This can include the fact that they occurred during a "spree" interrupted by no significant period of respite, Bundy, or the fact that one crime is causally related to the other, even though there may have been a significant lapse of time. Fotopoulos. But the mere fact of a general temporal and geographic proximity is not sufficient in itself to justify joinder except to the extent that it helps prove a proper and significant link between the crimes. Crossley.

Id. at 1000.

The Court then turned to the case before it, which involved two murders and an attempted murder of black men in Jacksonville. The first victim was found dead on U.S. Highway 1 on March 21, 1978; the second victim was found dead in the same general

vicinity on March 24, 1978; the third victim was attacked in the same area on July 7, 1978. Id. at 993. Ellis was charged with the crimes ten years later when a man named Phillips told the police Ellis confessed the crimes to him in 1978 and said they were racially motivated. Id. at 994. The Court concluded the three crimes had been improperly joined:

> [E]ach of Ellis' alleged crimes was freestanding and distinct. None was a causative link in the commission of the other crimes. It is true that Ellis' alleged crimes are similar, but this alone is insufficient to warrant joinder. Wright. Finally, while the alleged actions of Ellis might loosely be called a "spree," they are not so in the sense contemplated in Bundy. Here, each crime was interrupted by a significant period of respite, several months in the case of the Reddick attack.

Id. at 1000.

Ellis makes very clear that separate and distinct crimes, or criminal episodes, may not be jointly tried solely on the basis of their similarity or their temporal and geographic proximity. Separate crimes are deemed a single continuous episode under Rule 3.150(a) only if the crimes were committed without interruption. Here, as in Ellis, although the three episodes might loosely be called a "spree," they were not so in the sense contemplated in Bundy.

The state's evidence showed that the Larson/Powell homicides

took place at the Williamsburg Apartments on Friday, August 24, at 3 a.m. The Hoyt homicide took place at a different apartment, two miles away (T 5934), almost two days later, on Saturday, August 25, around 11 p.m. The Taboada/Paules homicides took place at another apartment complex a day later, on Monday, August 27, around 3 a.m. The third crime scene was one mile from the other two crime scenes. (T 5934). Thus, each episode involved different victims on different days and in different places. Although the three crime scenes were in the same general vicinity and the crimes were committed within a four-day period, the crimes were not a single continuous event. Rather, there were significant breaks between the crimes committed at each location. As the Court made clear in Ellis, a significant link between the crimes can be established only by evidence that the crimes constituted an "uninterrupted crime spree in which no significant period of respite separated the multiple crimes," as in Bundy, or a causal link such that "one crime could not properly be understood without the other," as in Fotopoulos.

This was not an "uninterrupted crime spree," as in Bundy. There was a 42-hour respite between the first two episodes and a 24-hour respite between the second and third episodes. In contrast, the two episodes in Bundy occurred within an hour and a few blocks of each other. In Bundy, the crimes were so close

together in time and location it was presumed Bundy went from one scene to the next without any interruption. In contrast, Rolling clearly did not go from one crime scene to the next. As the trial judge found, Rolling returned to his campsite after each episode. (R 811).

Furthermore, the trial judge erred in dismissing the 42-hour respite between scenes 1 and 2 and the 24-hour respite between scenes 2 and 3 on the basis that (1) Rolling spent a portion of one of the days "stalking one of his future victims" and (2) "the other hours between the homicides were daylight, in which it was impossible for him to act in secrecy and to have access to his victims." (T 812). Neither of these reasons is supported by the record. First, there was no evidence Rolling stalked Hoyt, or any of the other victims. Although Rolling peeped on Hoyt before entering her apartment, this may have been two days earlier (T 3284), which would have been before the first two homicides occurred. Second, the 42 hours between the first and second episodes were not all daylight hours. No crime was committed during the evening and early morning hours of September 24 and 25. Even if the murders had been committed on three consecutive nights, that fact would not transform the three separate episodes into one continuous event unless Rolling had gone from one crime scene to the next without interruption.

The trial court also erred in concluding that Rolling's "unity of purpose" linked the three episodes sufficiently to permit joinder. This Court has rejected a defendant's motivation for committing a series of crimes as sufficient to warrant joinder of otherwise separate and independent crimes. Ellis; Garcia. Ellis's crimes, for example, were linked by Ellis's racial hatred and avowed goal of killing blacks. Despite this unity of purpose, this Court declined to find the crimes were connected in an episodic sense. Similarly, in Garcia, which involved four pairs of double murders, the Court rejected the state's theory that the pairs of crimes were "connected" by evidence that each double-murder was related to a falling-out between Garcia and one of the victims, a drug kingpin, who had been buying drugs from the other victims. 568 So. 2d at 900-901.

Here, the fact that each criminal episode had in common the ultimate goal of raping and then killing a young woman created at most a similarity in circumstance that does not justify joinder. See Ellis. Nor does Rolling's after-the-fact statement that he had vowed to kill a victim for each year he spent in prison provide the connection or causal link required under the rule. Although Rolling said he decided to kill a victim for each year he had spent in prison, there was no evidence he "developed a

plan to embark on a continuous series of five murders."[90] (R 812)(emphasis added). After Paules was killed, Rolling concluded he was done, "eight for eight." There is nothing in the record to show he planned to kill five victims in Gainesville, although he, in fact, did so. The killings themselves were committed at random, and in two of the residences, he did not even know before he entered how many people were inside.

As in Garcia, each episode of killing was "singular, discrete, and only tenuously related, if at all, to the other episodes." 568 So. 2d at 901; see also State v. Williams, 453 So. 2d 824 (Fla. 1984)(defendant charged with burglary and theft of nine different structures on nine different days between November 18, 1981, and December 11, 1981); Boyd v. State, 578 So. 2d 718 (Fla. 3d DCA 1991)(four teenagers charged with driving through Dade County over a two-week period, committing a series of robberies involving a gun, stolen cars, and elderly victims); Jones v. State, 497 So. 2d 1268 (Fla. 3d DCA 1986)(defendant charged with kidnapping a man, robbing him, and fleeing in his car, and three hours later, while driving the car, robbing and

[90]The only evidence of a "plan" to a kill a victim for each year Rolling spent in prison was his statement of January 31, in which the "plan" was revealed to the Task Force by Bobby Lewis and in Bobby Lewis's words. According to Lewis, Rolling decided while he was incarcerated at Mississippi State Prison between 1986 and 1989 to take one victim for each year he had been punished (T 3432, 3458), which, by his count, meant eight victims. [The first three victims were three Shreveport homicides committed in November of 1989. (R 1953, 1984).]

shooting to death a woman); McMullin v. State, 405 So. 2d 479 (Fla. 3d DCA 1981)(defendant charged with five similar robberies, occuring within nine days of each other); Macklin v. State, 395 So. 2d 1219 (Fla. 3d DCA 1981)(defendant charged with two taxicab holdups five days apart at locations less than one block apart where both cab drivers were dispatched to the area by a prior phone call).

The improper joinder of the three separate episodes cannot be deemed harmless in this case. The purpose of requiring separate trials for separate episodes is to assure that evidence adduced on one charge will not be misused to dispel doubts on the other, and so effect a "mutual contamination" of each distinct charge. Garcia, 568 So. 2d at 898. The Court emphasized this admonition in Ellis:

> The danger in improper consolidation lies in the fact that evidence relating to each of the crimes may have the effect of bolstering the proof of the other. While the testimony in one case standing alone may be insufficient to convince a jury of the defendant's guilt, evidence that the defendant may also have committed another crime can have the effect of tipping the scales. Therefore, the court must be careful that there is a meaningful relationship between the charges of two separate crimes before permitting them to be tried together.

622 So. 2d at 991 (quoting Crossley, 596 So. 2d at 449-50)(citations omitted).

Although Rolling's guilt was not at issue here, the same danger exists when separate but unrelated crimes are improperly joined for penalty phase proceedings in a capital case: The evidence of aggravation related to one crime may bolster the evidence of aggravation as to the other crimes. The danger of mutual contamination may be even greater in a penalty phase proceeding, where the jury's task is to weigh aggravators and mitigators. It cannot be said beyond a reasonable doubt that the jury's exposure to the details of all three episodes, including the crime scene and autopsy photographs of all the victims,[91] did not affect their deliberations as to the other episodes.

Even when joinder is otherwise proper, a defendant is entitled to have separate trials upon a showing that severance is "necessary to achieve a fair determination of the defendant's guilt or innocence of each offense." Fotopoulos, 608 So. 2d at 790. In this case, in particular, severance was necessary to ensure a fair determination of the penalty. These crimes were shocking. They also garnered an unprecedented volume of press coverage over a four-year period. See Issue I, supra. As this Court stated in Garcia, it "must not allow [its] revulsion over this series of crimes, nor [its] interests in

[91]The jury viewed a total of 104 crime scene and autopsy photographs. These included twenty-five photographs of the five victims.

practicality, efficiency, expense, convenience, and judicial economy, to outweigh [its] constitutional obligation to provide the defendant a fair trial." 568 So. 2d at 901. This Court repeatedly has emphasized that the cost of conducting separate proceedings does not supercede the defendant's right to a fair trial:

> "Even if consolidation is the `most practical and efficient method of processing' a case, practicality and efficiency should not outweigh a defendant's right to a fair trial. `The objective of fairly determining a defendant's innocence or guilt should have priority over the relevant considerations such as expense, efficiency, and convenience.' . . . We emphasize that prejudice to the defendant will outweigh judicial economy."

453 So. 2d at 825 (quoting State v. Vasquez, 419 So. 2d 1088, 1091 (Fla. 1982))(emphasis added); accord Ellis, 622 So. 2d at 999; Crossley, 596 So. 2d at 449-50. The trial court erred in refusing to sever the offenses, and this Court should reverse Rolling's sentences and remand for three separate penalty proceedings for each of the separate episodes.

ISSUE V

THE TRIAL COURT ERRED IN FINDING THE HOMICIDE OF SONYA LARSON WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL.

Sonya Larson was attacked in her sleep and died quickly. There was no evidence of prolonged suffering or anticipation of death. The aggravating factor of especially heinous, atrocious, cruel (HAC) is therefore inapplicable to this murder.

In finding this aggravating factor, the trial court said:

> 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.
>
> In addition to the facts which are common to all of the crime scenes, facts unique to each of the individual crime scenes also prove that each of the offenses was especially heinous, atrocious or cruel.
>
> Sonya 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 slashing 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 of 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.(R 3210).

The heinous, atrocious, or cruel aggravator is reserved for killings where the victim was tortured, e.g. Douglas v. State, 575 So. 2d 165 (Fla. 1991), or forced to contemplate the certainty of his or her death. E.g. Sochor v. State, 619 So. 2d 285 (Fla. 1993), cert. denied, 114 S. Ct. 638, 126 L. Ed. 2d 596 (1994). For a murder to be considered especially heinous, atrocious, or cruel, there must be "such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974). As this Court recently said, the HAC factor applies only to torturous murders, "as exemplified either by the desire to inflict a high degree of pain or the utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So. 2d 908 (Fla. 1990). Furthermore, the defendant must have intended to cause the victim "extreme pain or prolonged

suffering." Elam v. State, 636 So. 2d 1312 (Fla. 1994); see also Stein v. State, 632 So. 2d 1361 (Fla. 1994), cert. denied, 115 S. Ct. 111, 130 L. Ed. 2d 58 (1994); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993).

Here, the injuries were inflicted in less than half a minute. Furthermore, contrary to the trial court's findings, there was no evidence the victim was ever awake or aware of the nature of the attack.

According to the medical examiner, Larson sustained five wounds to the right breast and two wounds beneath the left breast. Although she also sustained multiple wounds[92] to the right arm, some of the wounds in the breast were from thrusts that initially entered the right arm. The medical examiner specifically did not characterize any wound as a defensive wound and could not say whether Larson was awake during the attack:

> Q. . . . Let me ask you, specifically about Sonja Larson; are you able to state based upon your experience and in your expertise as a medical examiner, whether or not Sonja Larson was awakened in any way, whether or not she defended herself during the stabbing?
>
> A. 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

[92]The eleven wounds to the right arm consisted of four entry wounds, four exit wounds, and three puncture wounds. (T 3559).

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.

There were other wounds on the body by the way.

(T 3560-3561).

The medical examiner was then asked about the leg wound:

Q. Dr. Hamilton, the leg wound on Miss Larson, does that in any way -- does that particular wound in any way say anything about whether or not Miss Larson defended herself, or in any way fought off the attack before she was fatally -- fatally stabbed?

A. We're talking about the wound in the left leg, is that correct?

Q. Yes.

A. No. I don't really think it speaks to that issue. It may have been something from a defensive posture, but not necessarily.

Q. Were you able to determine how long Miss Larson would have lived from the time she was initially stabbed?

A. I think the whole group of injuries could have occurred in a very short blitz-style type of assault period of time, certainly less than half a minute.

Q. Did you say blitz style?

A. Blitz style. That means rapid succession of thrusts into the body.

> She probably lost consciousness very rapidly, considering all the punctures of vital organs; heart and lungs. I don't think she remained conscious for more than a minute, if that long.

(T 3566-3567).

In Elam, this Court disapproved the HAC aggravator where the victim was bashed in the head repeatedly with a brick. The victim in Elam, in contrast to the victim here, was fully awake when attacked and did try to defend himself from the attack. This Court nonetheless rejected the trial court's finding of the HAC aggravator because

> although the victim was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute"), the victim was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

636 So. 2d at 1314.

As in Elam, this was a quick killing that did not involve extreme pain or prolonging suffering. Here, however, there was no evidence Larson was ever aware of what was occurring. Although she may have reflexively raised her arm after the first blow, there was no evidence showing she awoke or was conscious of the nature of the attack. Cf. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989)(HAC struck where victim may have been semi-conscious

at time of death); Herzog v. State, 439 So. 2d 1372 (Fla. 1983)(HAC not applicable where victim was under heavy influence of methaqualone prior to her death and possible semi-conscious during entire incident). That the offense occurred at night, in the victim's home, and the attacker was dressed in black and wearing a mask are of no consequence since there was no evidence Larson was aware of what was occurring. The trial court's finding of the heinous, atrocious, or cruel aggravating factor as to Sonja Larson was error.

ISSUE VI

THE TRIAL COURT ERRED IN GIVING AN INVALID AND UNCONSTITUTIONAL JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

Rolling objected to the standard jury instruction on the heinous, atrocious, or cruel aggravating factor and requested a substitute instruction. (T 4877, R 2844). The trial court rejected Rolling's proposed instruction and gave the standard instruction with one modification. (T 4881-4882, 5123). Rolling's objection to the modified standard instruction was overruled. Rolling recognizes this Court has approved the standard instruction on the heinous, atrocious, and cruel aggravating circumstance. Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 114 S. Ct. 109, 126 L. Ed. 2d 74 (1993), but urges the Court to reconsider that issue in this case. Rolling further contends the modified standard instruction given here did not cure the deficiencies .

The trial court gave the following instruction on the aggravating circumstance provided for in section 921.141(5)(h), Florida Statutes:

> 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 consciousless 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.

(T 5123, R 2877).

The instruction given is unconstitutionally vague because it failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. See Espinosa v. Florida, 505 U.S. 112, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1980).

The United States Supreme Court held Florida's previous heinous, atrocious, or cruel standard penalty phase instruction unconstitutional in Espinosa. Prior to Espinosa, this Court consistently had held that Maynard v. Cartwright, which held HAC instructions similar to Florida's were unconstitutionally vague, did not apply to Florida on the basis that the jury is not the sentencing authority in Florida. Smalley v. State, 546 So. 2d 720 (Fla. 1989). The United States Supreme Court rejected this

reasoning in Espinosa, however, because Florida's jury recommendation is an integral part of the sentencing process and neither the jury nor the judge is constitutionally permitted to weigh invalid aggravating circumstances. Although the instruction given in this case included definitions of the terms "heinous," "atrocious," and "cruel," where the instruction in Espinosa did not, the instruction as given nevertheless suffers the same constitutional flaw: The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor exists.

In Shell v. Mississippi, 488 U.S. 1, 111 S. Ct. ___, 112 L. Ed. 2d 1 (1990), the state court instructed the jury on Mississippi's heinous, atrocious, or cruel aggravating circumstance using the same definitions for the terms that the trial judge used in the present case. The Supreme Court remanded to the trial court, stating, "Although the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L. Ed. 2d at 4. Since the definitions employed here are precisely the ones used in Shell, the instruction to Rolling's jury was likewise constitutionally inadequate. This Court recently held that the mere inclusion of the definition of the words "heinous," "atrocious," and "cruel"

does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 626 So. 2d 1325 (Fla. 1993), cert. denied, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994).

The remaining portion of the HAC instruction used in the present case reads:

> 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 show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(T 5123). This addition also fails to cure the constitutional infirmities in the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction. The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, 504 U.S. 967, 112 S. Ct. 2114, 2121, 119 L. Ed. 2d 326 (1992). Second, assuming the language could be interpreted as a limit on the jury's discretion, the

disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily tortorous." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So. 2d at 9. Third, the terms "conscienceless," "pitiless," and "unnecessarily torturous" are subject to overbroad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So. 2d 1073, 1077-78 (Fla. 1983), that an instruction that invites the jury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions were critical in the penalty phase of Rolling's trial. However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor when death or unconsciousness occurs relatively quickly. Each of the homicides in this case occurred quickly, within minutes. Rolling was entitled to have a jury recommendation which gave proper guidance from the court concerning the applicability of this aggravating circumstance.

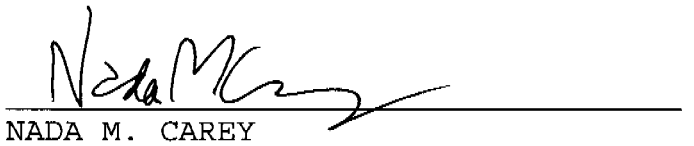
The jury should have received a specific instruction on HAC that advised the jury of the factual parameters necessary before HAC could be considered. The deficient instruction deprived Rolling of a fair sentencing determination as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 9, 16, and 17, of the Florida Constitution.

CONCLUSION

Based on the argument presented in this brief, the Appellant, Danny Harold Rolling, respectfully asks this Honorable Court to reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, by delivery to the Capitol, Plaza Level, Tallahassee, Florida,and a copy has been mailed to appellant, DANNY HAROLD ROLLING, #521178, Union Correctional Institution, Post Office Box 221, Raiford, Florida, on this 23rd day of January, 1996. NaD

NADA M. CAREY