THE SUPREME COURT OF FLORIDA

DANNY HAROLD ROLLING,
Appellant,

vs. Case No. SC01-625

STATE OF FLORIDA,
Appellee.
_____/

On Direct Appeal from a Final Order of the Circuit Court of the Eighth Judicial Circuit in and for Alachua County, Florida, in Case No. 91-3832-CFA, Denying the Appellant's Postconviction Motion to Vacate His Death Sentences.

INITIAL BRIEF OF APPELLANT

BAYA HARRISON, III
Post Office Box 1219
Monticello, FL 32345-1219
Tel: (850) 997-8469
FAX: (850) 997-8468
Florida Bar Number 099568

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page(s)

TABLE OF CITATIONS

Cases Page(s)

Constitutional Provisions, Statutes
and Rules

Other Authorities

PRELIMINARY STATEMENT

Appellant, Danny Harold Rolling, the defendant in the lower tribunal, will be referred to by name or as "the defendant." Appellee, the State of Florida, will be referred to as "the state."

References to the record on appeal will be by symbols designed to be consistent with the manner in which the Clerk of the Circuit Court prepared the record as well as the references used by the trial court in its Order of March 5, 2001 denying Rolling's Florida Rule of Criminal Procedure 3.850 motion.

There are a total of eleven volumes in this post-conviction record on appeal. The first six volumes (I-VI) include pleadings, orders, evidence, notices and legal memoranda. Reference to specific pages within each of these volumes will be by volume number followed by a page number appearing in the lower right hand corner of each page. Eg. "(V 626)". The next five volumes (VII-XI) consist of the evidentiary hearing transcripts for the defendant's amended Florida Rule of Criminal Procedure 3.850 motion. References to a particular volume and page of the evidentiary hearing transcripts will be by the symbol "EH" followed by a volume and page number which appears in the upper right hand corner of each page. Note the Clerk of the Circuit Court has hand written a volume number on the cover page of all five volumes of the evidentiary hearing transcripts. These hand written volume numbers follow the first six volumes of the postconviction record. Thus for example, the first volume of evidentiary hearing transcript has hand written on the cover page, "Volume VII." The hand written volume number, not the typed "Volume I" which also appears on the cover page of the first volume of the evidentiary hearing transcripts, is utilized in this brief.

Documents introduced in evidence during the postconviction hearing are collected in two boxes; one box of defense exhibits and one box of the state's exhibits.

The record in Rolling's original direct appeal to this Court in Rolling v. State, 695 So. 2d 278 (Fla. 1997), is also a part of the total record in this postconviction proceeding. References to that record will be the same as utilized in the original appeal. Thus, references to the record on appeal will be by the symbol "R." followed by a page number. References to a particular page of the penalty phase trial transcripts will be by the letter "T." followed by a page number. References to the supplemental record on direct appeal will be by the symbol "SR" followed by a page number.

STATEMENT OF THE CASE AND THE FACTS

A. Nature of the Case

This is a direct appeal of the lower tribunal's final order rendered by the Honorable Stan R. Morris, Circuit Judge, on March 5, 2001 (V 625-824), denying the defendant's Florida Rule of Criminal Procedure 3.850 motion to vacate the five death sentences imposed against him.

B. Course of the Proceedings

On November 15, 1991, an Alachua County grand jury indicted the defendant on five counts (I-V) of first degree murder, three counts (VI-XIII) of sexual battery and three counts (IX-XI) of armed burglary of a dwelling with a battery. (V 626) The offenses occurred sometime between August 24-30, 1990, in Gainesville. See Rolling v. State, 695 So. 2d at 278, 279; V 626.

Former State Attorney Rod Smith led the prosecution team. (V 792) Public Defender Richard Parker and Assistant Public Defenders Johnny Kearns, Barbara Blount-Powell and John Fisher made up the defense team. (V 631; EH III 365) On June 9, 1992, the defendant pled not guilty to all counts of the indictment. (V 626; R. 95) On February 15,
1994, Rolling changed his pleas to guilty as charged. (V 626; R. 2237-2240, 2243) The trial court adjudicated him guilty on that date. (V 626; SR 1481-1506)

On February 16, 1994, jury selection commenced for the penalty phase of the trial. (V 626; T. 1) On February 25,

1994, during jury selection, Rolling's counsel filed a motion for change of venue. (V 626; R. 2388) After a brief non-evidentiary hearing, the trial court denied the motion ore tenus. (V 626, 627; T. 26-42)

After the jury was selected, the evidentiary portion of the penalty phase reconvened on March 7, 1994, per the provisions of Section 921.141, Florida Statutes. (V 627) On or about March 24, 1994, the jury unanimously recommended that death sentences as to the first degree murder counts (I-V) should be imposed. (V 627; R. 2905-2908; T. 5163-5165) The trial court accepted the jury's advisory recommendation and, on April 20, 1994, sentenced Rolling to death on each of the murder counts. (V 627; T. 7325) The trial court, on the same date, sentenced the defendant to life in prison on each of the remaining counts. (V 617)

After the timely filing of a notice of appeal on April 29, 1994 (R. 3236), there was a direct appeal of the judgments and sentences to this Court. The judgments and

sentences were affirmed on March 20, 1997. Rolling v. State, 695 So. 2d 278 (Fla. 1997). Rehearing was denied on June 12, 1997. (V 627) The mandate was issued on July 14, 1997. The defendant then filed a timely petition for writ of certiorari in the United States Supreme Court, but that petition was denied on November 17, 1997. Rolling v. Florida, 522 U.S. 984 (1997).

In Supreme Court of Florida Case Nos. 82,322, 23 FLW S363 (6/25/98), and 92,026, 23 FLW S363 (6/25/98), respectively , this Court tolled the time for Rolling and other death sentenced prisoners to seek postconviction relief until October 1, 1999. (V 627)

On November 13, 1998, the defendant filed a motion to vacate the judgments and sentences with an appendix per the provisions of Florida Rules of Criminal Procedure 3.850 and 3.851. (I 70-130) On April 16, 1999, the defendant filed a complete, amended 3.850 motion abandoning all but two of the claims (I and II) asserted in the original motion including the contention that the judgments (as opposed to the sentences) imposed against him should be vacated. On May 18, 1999, the state filed a response to the amended postconviction motion. (III 419-461)

After a Huff hearing held on December 1, 1999 (XI 541-603), the trial court determined the defendant was entitled to an evidentiary hearing. (V 626) A three-day evidentiary hearing commenced on July 11, 2000 in Gainesville with Judge Morris presiding. (EH VII 1) Both sides presented witness testimony and introduced documentary evidence during the hearing. Counsel for the state and the defendant thereafter submitted written closing arguments. (IV 474-624)

C. Disposition in the Lower Tribunal

On March 5, 2001, Judge Morris rendered a 38 page order denying Rolling's 3.850 motion attaching a lengthy appendix. (V 625-824) On March 6, 2001, the defendant filed a timely notice of appeal of the final order to this Court. (VI 857-859)

D. Jurisdiction

This Court has jurisdiction to review the lower court's final order denying Rolling's 3.850 motion. See Art. V ¤ 3(b)(1), Fla. Const.; Fla. R. App. P. 9.030(a)(1)(A)(i); Fla. R. Crim. P. 3.850(g).

E. Statement of the Facts

The issue on appeal is venue Rolling's claim that his defense team mishandled venue. The recitation of the evidence submitted in the lower tribunal as set out below is designed to frame that issue.

Assistant Federal Public Defender Thomas Miller represented Rolling regarding a bank robbery he committed in Gainesville shortly before the homicides. (EH VII 8)

On November 5, 1991, United States District Court Judge Maurice Paul, sua sponte, transferred the venue of the bank robbery trial to Tallahassee. (defense exhibit 1) Even though Mr. Kearns attended much of the bank robbery trial in Tallahassee, defense counsel failed to bring the order to the attention of Judge Morris in support of Rolling's belated venue change motion. (EH VII 27, 28) Miller noted that the matter of venue was raised during conversations with Rolling's defense counsel. (EH VII 31) Miller also noted he would have moved for a venue change had Judge Paul not entered his sua sponte order moving the case to Tallahassee. He added that, if the trial court in the murder case granted a venue change prior to Judge Paul's order, he would have used that order to support his effort to move the federal bank robbery case from Gainesville. (EH VII 19) Miller believed a venue change was necessary due to the pretrial publicity. (EH VII 17, 18)

Rolling testified that Parker tried to "convince" him to keep the case in Gainesville which Parker advised was "a liberal town, and that [Rolling] had a good chance of ... having an unbiased trial." (EH VII 35, 49) His counsel added that the people in the community were "typically well-educated." (EH VII 43) Rolling noted that he felt uncomfortable about having the trial in Gainesville since the ". . . people of Gainesville had been traumatized." (EH VII 36, 44) The defendant did not recall Parker discussing the negative aspects of keeping the case in Alachua County. (EH VII 37) Rolling said that he did not take issue with his counsel since he "had total trust and faith in [his] lawyers." (EH VII 38) Rolling stated "I was never comfortable with having this trial in Gainesville. Would you be?" (EH VII 46)

Second Judicial Circuit Assistant Public Defender Dave Davis and other lawyers in his office represented Rolling in this Court on direct appeal. (EH VII 53) In his 22 years of practicing criminal law, Davis handled approximately 80 capital cases. (EH VII 52) Davis stated that the venue issue was the first one raised in Rolling's initial brief. He noted that Parker filed a motion for a change of venue (defendant's exhibit 6) about six to ten days into the voir dire. (EH VII 60) He explained that Florida Rule of Criminal Procedure 3.240 requires the movant to file the motion ten days before the commencement of trial. (EH VII 60) He emphasized that "any lawyer who expects to prevail on this type of motion has got to present more than the two affidavits that the rule requires." (EH VII 63) Of the three affidavits attached to Mr. Parker's motion, Dr. Raymond Buchanan's was more detailed, but even it contained only a brief statement as to his reasons for a venue change. (EH VII 64) As to the other affidavits, Davis stated, "well, Buchanan's was the most detailed of the three, which is not really saying very much." (EH VII 65)

Davis affirmed that he has handled other capital appeals involving a venue issue. He felt that the motion filed in this case as written and argued had little hope of being granted. (EH VII 65) He pointed out that, at the hearing on the motion for venue

change, no live testimony or surveys were offered to support the motion. (EH VII 65) He disagreed that Mr. Parker presented any significant evidence of pervasive media coverage, stating:

> [Parker] introduced those articles. Whether he showed that, he introduced them, but there's no discussion made about those articles.

(EH VII 91) As to the documentation presented in support of the motion, Davis said that he found some newspaper articles and transcripts of television news stories in the file, but it was not clear to him whether they were presented at the hearing. (EH VII 65) Davis stated that it appeared that Parker submitted a few newspaper articles and a transcript from television station "TV 20" during the hearing, and that the trial judge took judicial notice of an exhibit which was filed earlier containing more newspaper articles. (EH VII 67) Davis did not believe that Parker made any statement that he would supplement the record at a later date. (EH VII 67) He acknowledged that Parker submitted a supplement to his motion for change of venue "at the end of voir dire" (EH VII 67, 83) but noted "[b]y that time, I think they had already basically gotten a jury." (EH VII 83)

Davis added that, in trying to convince a trial court that a venue change is necessary, there are two types of prejudice to be considered. Presumed prejudice is based on the nature and extent of adverse pretrial publicity while actual prejudice is shown when the venire person, in answering questions about his or her ability to be objective, expresses an actual bias against the defendant or the state. (EH VII 69-70) Davis affirmed that there was an inordinate amount of adverse pretrial publicity generated against Rolling prior to trial, stating:

> [T]his case is unique among venue cases anywhere in the United States, in that there was incredible, incredible amounts of pretrial publicity in this case, starting really from August 1990, when the murders happened, almost continually up through the trial.

(EH VII 70) Davis testified that he documented the number of articles and the amount of space that the newspapers gave to this case, and although it tapered off somewhat, "it never really went away" and that "starting about two months before trial, it then picked up, then was just a total explosion of pretrial publicity immediately before the trial." (EH VII 70, 71) He clarified the quantity and extent of the exposure:

> The Gainesville Sun gave a lot of press to the Tampa robberies--the robberies the robbery trials. They gave press to the Tallahassee robberies and those things, and

during this whole three-year period, they also went back and just repeatedly linked Rolling to the Shreveport murders, just a whole -- I mean they had attempted murder of his father. The Ocala robbery they talked about repeatedly; Gainesville several times; Tampa, steals a car, more robberies. He was linked to a murder in Lakeland. The Shreveport triple murder was repeated--a particularly gruesome murder of three people, they repeated that article 27
times, by my count, of the articles that I had. There was also robberies in Georgia and Alabama they linked him to; they linked him to just about everything they could find on him, they being the press.
(EH VIII 119) Drawing on his extensive experience in the field, Davis said of the adverse nature of the pretrial publicity:

. . . this is just unheard of in the annals of legal history, as far as I can tell, of any case that has generated -- well, perhaps except O. J. Simpson, maybe Menedez brothers -- that has generated as much pretrial publicity that was uniformly negative to Mr. Rolling.
(EH VII 71, emphasis added) According to Davis, during the argument for venue change, Parker not only made few references to the extent of the pretrial publicity, but mentioned just one newspaper article. (EH VII 71) He stated that Parker tried to show actual prejudice during the venue change hearing when it would have been more relevant to argue presumed prejudice due to the unusual circumstances of the case. (EH VII 71, 72) Davis alluded to Mr. Parker's apparent embarrassment in asking for a venue change. (EH VII 72) He explained that Parker and Kearns had been practicing law in that community for 25 years, but that:

[n]ow he comes up with a situation where this community that has traditionally, at least, given him a fair hearing in the cases he's tried and now turn radically against him, I mean, in the sense that they were, the animosity coming out of voir dire was palpable towards Mr. Rolling. Nobody that I saw when I read the transcript in the voir dire expressed any sympathy for Mr. Rolling. It was, it was shocking.
(EH VII 73) When asked if Alachua County was the best place for Mr. Rolling to be tried, Davis said:

[W]ell, no, obviously not. I mean, based on the pretrial publicity that I've read, and the voir dire, the extensive voir dire and pretrial publicity, it was abundantly obvious that Gainesville was extraordinarily traumatized by
what happened August of 1990.
(EH 118) Davis conceded that it would have been unpopular, due to the consequent additional delay and expense, "but still it would be the right thing to do, that is,

changing venue." (EH VII 73)

Davis stated that to prove presumed prejudice one should gather as much documentation of pretrial publicity as possible and present it to the court in an organized fashion to demonstrate community hostility toward the defendant. (EH VII 78)

Davis acknowledged that appellate counsel is normally limited to making legal arguments based upon the record as it existed in the lower court. (EH VII 80) In the course of his representation of Rolling on appeal, however, Davis was forced to take the unusual step of supplementing the record regarding the venue issue and presumed prejudice. (EH VII 78) He filed a motion to take judicial notice of a trial court order on decorum and the recommended procedure for handling well publicized cases. (EH VII 78) There were many newspaper articles from an 18-month period which Mr. Parker had not submitted. Davis gathered some of them and moved to have them made a part of the record. (EH VII 78) He noted that most of them (about 95%) came from The Gainesville Sun. (EH VII 90) He attempted to get into the record certain research articles prepared by experts from Shands Teaching Hospital and the University of Florida regarding the existence of post-traumatic stress among the citizens of the Alachua County community as a result of the homicides. (EH VII 79) This Court granted the first two motions but denied the third. (EH VII 81) Davis explained that he felt compelled to supplement the record because:

[It] seemed like everybody knew there had been
a lot of press here, and that was kind of like a given, one of those things everybody understood, but it wasn't; but as an appellant attorney I
wanted something in writing that basically said what everybody else basically took for granted.
(EH VII 83)

Davis conceded that from a defense standpoint Alachua County is normally considered a good place for trial, as the Eighth Circuit has a relatively low number of death sentences pronounced. (EH VII 93) With reference to his statement that he sensed "palpable animosity" on the part of the Alachua County venire towards Mr. Rolling, Davis was asked on cross examination:

Have you ever reviewed a case in which at jury selection, the defendant comes in having admitted to and been found guilty of five murders, three sexual batteries, and three armed burglaries, that the ... venire, is informed of, have you ever had that happen before?
(EH VII 96) He answered that he had not, stating "like I say, this was a most unique case." (EH VII 96) When asked "of the 80 cases you've had, the facts alone in this

[Rolling] case would be among the worst for the defense counsel?" He acknowledged, "Yes, sir, clearly, clearly a horrible, horrible crime." (EH VII 97) He was then asked if under these circumstances it would be unexpected to find palpable animosity anywhere. He answered:

This is the first case, and only case I've ever seen where the animosity--I mean, when I say "palpable," the words escape me to describe the impression I got, not only from voir dire, but
from the newspaper articles, of just the fear, the terror, the hatred of Danny Rolling, from a traditionally liberal community. It was an amaz-ing experience.
(EH VII 98) When pressed to answer if this palpable animosity was not felt throughout the state, Davis replied:

What you gain from voir dire, as well as the newspaper articles, is a community that was absolutely terrorized by this man in the most--in the worst possible sense. The repeated use in the articles of -- for example, they say "the community reacted with stunned horror." These are quotes from articles. There's "mass hysteria grips this college town." "23-year-old Gainesville woman awakens at 3:00 in the morning, terrified and frozen, unable even to turn on a light." "This is a really panicked town."

And those articles repeat, and repeat, and repeat, describing, perhaps accurately, what's going on with this town. It's like they've all gone to the beach and here comes Jaws swimming out in the water. It's that sort of terror that has just freezes the community. And they were just absolutely terrified about it.
(EH VIII 120) He stated that the fear factor was further enlarged because a suspect had not been found. (EH VIII 120, 121) The intensity of the fear stemmed from the pervasive feeling that people living in the Alachua County area "personally thought that they were going to be Danny Rolling's next victim." (EH VIII 121) He added in this regard:

No other case considered by the United States Supreme Court and no cases considered by the Florida Supreme Court, except one, deal with this sort of situation where the victim--or the defendant is not very quickly apprehended and the people themselves are not--are never ever person- ally involved in it.
(EH VIII 121)

Regarding the timing of Parker's decision, several days into voir dire, to try to move the case elsewhere, Davis stated that it "was very obvious he was very pained to make the discovery that this community was so antagonistic." (EH VII 98) He agreed that the case law recommends that an attempt should be made to seat a jury

before deciding on a venue change. (EH VII 101) However, he pointed out that this works only when actual prejudice is suspected and that, in the case of presumed prejudice, the issue can be litigated before the trial even begins. (EH VII 101) When pressed about the supposed advantage of first trying to seat a jury in Gainesville, Davis answered:

That would have been difficult. I, I'm hesitant about that because of what I read in the news-
paper articles. I mean, the press was just so -- the animosity towards Rolling was so palpable.
(EH VII 102)

Davis did not see a package of news articles presented by the media to the trial judge early on in the proceedings, and did not know whether those were the ones that the trial judge took judicial notice of. (EH VII 103)

Mary Weber served as the court appointed investigator for undersigned Registry counsel in the postconviction proceedings. One of her assignments was to determine what data was available to the defense team to present as evidence of widespread, adverse pretrial publicity. (EH VIII 132)

She acquired transcripts about the student homicides from television station, "TV 20." (EH VIII 133) She noted that in his supplement to the motion for venue change (defense exhibit 9), Parker introduced transcripts of the station's broadcasts about the Rolling case only for about a two-month period, from January 6, 1994, through March 2, 1994. (EH VIII 134) She testified that the 1,245 pages of transcripts that she copied represented only about half of what was actually available at the station -- but that she referenced all of them in a chart attached to the defendant's amended 3.850 motion. (II 134-165; EH VIII 135) She also went to Channel 5 in Gainesville and Channel 4 in Jacksonville, where she acquired more transcripts. (EH VIII 135-137; II 166-179) She testified that, with regard to news stories from both Channel 5 and "TV 20," there were many transcripts that were available to Parker but that he did not include in support of his venue change motion. (EH VIII 137) She also documented the existence of many other news stories about the case from 1990 through the time of jury selection which were not submitted. (EH VIII 137; II 136-139)

Weber then testified regarding grants of $250,000.00 from the Florida Department of Community Affairs (DOC) and $900,000.00 from the State of Florida, Violent Crime Emergency Account Fund, which were made available to the court administrator, the state attorney and the public defender to defray some of the costs of the instant case. (EH VIII 144) She clarified that, of the $250,000.00 in grant money from the DOC, $150,800.00 was allocated to the Public Defender and, of that, the Public Defender used $52,000.00, (EH VIII 155) and from the $900,000.00 allocation,

the defense spent $255,837.00. (EH VIII 144) She confirmed that none of the money was used in support of the motion for a change of venue. (EH VIII 145)

C. Richard Parker is the Public Defender for the Eighth Judicial Circuit of Florida. (EH VIII 157) In discussing the nature and extent of the pretrial publicity in this case, he acknowledged:

Well, it was enormous. It was, by far, the case of highest public interest that I had been aware of.

[A]s the indictment was returned and the reports focused on Mr. Rolling, they did disclose amounts of information that were prejudicial to him, yes.
(EH VIII 160-161) Therefore Parker's office tried to get a new grand jury appointed outside of Alachua County because "the concern was over the nature and extent of pretrial publicity." (EH VIII 162, 163) He was then asked:

Q. But is it your testimony that the amount of adverse pretrial publicity which was published or broadcast into other parts of the state was the same amount, the same intensity as the pretrial publicity in Gainesville, Florida, or in Alachua County?

A. I wouldn't say that that was true. That was not my opinion.
(EH VIII 252)

Nevertheless, his office filed pleadings, in March and July of 1992, insisting on Rolling's constitutional right to be tried in Alachua County. (EH VIII 164) Parker acknowledged that this was done even though the adverse pretrial publicity continued. (EH VIII 163) He explained:

As you are familiar with your practice, attorneys frequently plead in the alternative, and this is just an example of claims that were both being asserted.

. . .

The first decision, made early, was to try to protect venue in Alachua County, and as part of that, to try to protect venue in any county in Florida, because my concern was that, upon receipt by me of the discovery information, the Florida Public Record Law allowed the media to have access to that.

We were seeking the protective orders, and it just seemed to me at that time that the most effective way to do it that was to assert the constitutional right to venue. That incurred the Court's obligation, then, to do everything within the court's power to

protect and preserve that constitutional right by trying to override the media's interest and the public's interest in reviewing that information at what I considered to be an entirely too early stage of the process.
(EH VIII 165) He further explained:

The attorneys that were representing Mr. Rolling's interests believed that that motion was necessary as part of our challenges to the process. But I still believed that he should preserve the right to have the case tried in Alachua County.
(EH VIII 167) Parker acknowledged that he maintained that position despite the fact that Rolling never asked that the trial be held in Alachua County, no survey was conducted by his office that would support that position, Rolling had no ties to the Alachua County community, it was publicly known that Rolling was a convicted felon who had been convicted of bank robbery in the Gainesville area, it was also widely reported that Rolling had committed crimes in other jurisdictions and that he had an extensive criminal record, it was known that one of the murdered victims was from Alachua County and that there was widespread fear in the Gainesville community because, for a long time, the perpetrator of the crimes was not apprehended. (EH VIII 168-171)

Initially Parker did not agree that there was more intensity of feeling in Alachua County than elsewhere in Florida since the victims were students and the University of Florida was so important to the community. However, he then conceded:

I'm not disputing that there was a very powerful reaction, I'm just not sure that it was related as directly -- certainly them being -- you know, I said in the motion hearing on the change of venue that I felt that people were reflecting that these were our kids. I do believe that. I believed it then and I believe it now.
(EH VIII 173)

In defending his decision to try the case in Alachua County, Parker confirmed that he had no personal knowledge and no statistical surveys to support his belief that residents of Alachua County were more open-minded than persons living in any other county in Florida. (EH VIII 175, 176) When asked what empirical data and hard scientific evidence he had to support the decision to keep the trial in Alachua County, he answered, "[n]one." (EH VIII 178) Instead, Parker based his opinion on what he learned in talking to other people at conferences for death penalty defense lawyers and what he considered to be Alachua County's reputation for being unfavorable to death sentences. (EH VIII 175, 179) On cross-examination, Parker disagreed with the prosecutor's suggestion that there had been very few death penalties rendered in the Eighth Judicial Circuit noting that, on the contrary, there were "[w]ay too many." (EH VIII 221) He added that his decision regarding venue came down to his "gut feelings."

(EH VIII 181) However, he conceded that at about eight days into jury selection, he realized he had made a mistake, noting:

> Even though the people in the panels had been giving what the court apparently believed were acceptable answers to serve as qualified jurors, my gut was telling me that these people were not willing to consider any option other than death as a possible penalty.

(EH VIII 182) He added:

> It was not my perception that they were fair and impartial; no, sir.
>
> . . . That they had prejudged the issue of life versus death, and they were prepared to render a death sentence . . . we were looking at a 12-0 recommendation. We were looking for 6 votes, but it became apparent . . . that we didn't have any.

(EH VIII 182, 183)

When questioned about the advice given them by their own media expert concerning the venue issue, Parker admitted that Dr. Buchanan originally advised defense counsel that it would be a rare case in which a change of venue would not be appropriate in such a high profile case as Rolling's. (EH VIII 185, 186) Parker confirmed that Dr. Buchanan changed his opinion after talking with Mr. Kearns and him. (EH VIII 186) He also confirmed that Dr. Buchanan left Gainesville to return to Pepperdine before voir dire was completed and from there sent several memoranda to the defense team telling them of his concern about the anti-Rolling sentiments expressed by the venire. (EH VIII 189, 190,). Parker filed the venue change motion on the same day, February 25, 1994, that he received a memorandum from Dr. Buchanan advising of the need to do so. (EH VIII 189, 190) He admitted that he wasn't prepared to aggressively litigate the venue change motion once it was filed and that Dr. Buchanan's one-page affidavit was attached merely as a requisite to get the motion in the record. (EH VIII 191-92) He admitted further that, because they were not prepared to litigate the issue, the defense team did not supplement the venue motion for another twenty days. (EH VIII 192) He was asked if the proper way to litigate a venue change motion was to have witnesses and other evidence ready to present and to make it clear to the court that counsel was serious about the relief sought. Parker answered:

> That's is [sic] the way it was supposed to be done, but not doing it that way was not intended by me in any way, nor do I believe it was perceived by the trial judge, to be

an indication of my lack of sincerity on my wish to move the venue.
(EH VIII 194)

Concerning Judge Paul's transfer of the Rolling federal bank robbery trial out of Alachua County, Parker stated that he believed Judge Paul did so to preserve Alachua County for the murder trial. (EH VIII 195-97) Parker stated that he did not attach Judge Paul's order as supporting evidence for his own motion for a venue change and, although it would have been useful, he was sure that Judge Morris knew about it. (EH VIII 198) However, he was asked:

Q. But, now, the fact that the trial court may have been aware in his own mind of this order doesn't help Mr. Rolling on appeal, does it?

A. No, sir. It needs to be in the record.
(EH VIII 199) Parker acknowledged that Russell Binstead and Bobby Lewis were very strong state witnesses whose testimony was critical to the prosecution. (EH VIII 205) He confirmed that both men had earlier been represented by his office but that he had not informed Rolling, the state, or the trial court of this fact. (EH VIII 201) He stated that the defense team was unaware of it at the time, and he later learned that Mr. Shawn Saxon of his office defended Lewis in 1979 and Mr. Kearns defended Binstead in 1977. (EH VIII 203-205) He denied that he would have withdrawn from the case had he known about it even if Rolling had requested it. (EH VIII 207) He first stated that he saw no conflict because there was no adversity of interest, and because he had no loyalty to either Lewis or Binstead, but then conceded that adversity did exist between Mr. Rolling and Lewis and Binstead. (EH VIII 205, 207) On cross-examination, he stated there was no conflict of interest, nor did he feel that there was a breach of confidential information. (EH VIII 239-40) He acknowledged that, had he withdrawn from representing Rolling, his office would not have received the public funds for the representation from that point on. (EH VIII 208)

Parker affirmed that he talked with attorneys from the Public Defender's Office of the Second Judicial Circuit who handled the Bundy case. However, he could not recall if he learned from them about their venue change from Leon County, or that used a survey which helped establish the need for the venue change. (EH VIII 210) When asked why he did not commission a survey, instead of depending on his "gut feeling" to support the venue motion, he stated that once the trial began, the defense team prepared one for prospective jurors, but Judge Morris would not allow its use. (EH VIII 210, 211) He was asked about the form questionnaire that was eventually allowed:

Q. And so a questionnaire was ultimately employed in this case, but it was just a very

simple, little one-page thing that asked people's name, address, and phone number, right?

A. Nothing that had anything to do with attitudes.
(EH VIII 211, 212)

Parker reiterated that he had no factual basis upon which to support his feeling that the case should remain in Alachua County -- and acknowledged that studies existed at the time which indicated that to do so was risky. (EH VIII 214) One such report (defense exhibit 21) was a document sent to his office from Florida International University's Department of Psychology warning of the prejudicial effects of the adverse pretrial publicity on potential jurors. He said he never read it, but passed it on to Barbara Blount-Powell who must have read it. (EH VIII 213) Nor was he familiar with the articles, "Emotions and Coping Responses to Serial Killings, the Gainesville Murders," and "Campus in Crisis, Coping With Fear And Panic Related to Serial Murders," published in 1992 and 1993 (defense exhibits 22 and 23), though he acknowledged that he could have acquired them. (EH VIII 216-218) Parker stated that they did not gather any professional articles to support the venue motion and that it would have been useful if they had. (EH VIII 218)

There was a packet of news reports (state's exhibit 1) that was submitted by media counsel at a pretrial hearing in opposition to Rolling's motion to prohibit disclosure of certain evidence to the media. Parker stated that he did not include that packet with his motion for a venue change and that it was the trial judge who brought the packet to his attention. (EH VIII 219) Parker had no idea why these articles were not a part of the original record on appeal. (EH VIII 220)

On cross-examination, Parker did not agree that his decision to keep the case in Gainesville was based on the fact that there was only one major newspaper, The Gainesville Sun, published in Alachua County, nor that it was the most widely read paper in the community. (EH VIII 223) He confirmed that The Gainesville Sun had an editorial policy against the death penalty. (EH VIII 224) However, on redirect, Parker confirmed that many other Florida newspapers take an editorial position against the death penalty as well. (EH VIII 246) He admitted that during one of several conversations with his client about venue, Rolling expressed reservations about keeping the case in Alachua County, but never actually objected to doing so. (EH VIII 229)

Parker stated that when he filed the motion for change of venue on February 25, 1994, he was certain at that point that Mr. Rolling would get the death penalty no matter where he was tried. (EH VIII 251, 252)

Dr. Raymond W. Buchanan, a professor of communications at Pepperdine University, volunteered to help the defense team during the trial. His assignments

included publicity analysis, jury profiling, assistance in jury selection and analyzing the significance of media reports. (EH IX 274-275) At the beginning of his involvement in the case, he reviewed files of pretrial publicity, "of which there was tons." (EH IX 276) He found:

(U)p until that time I couldn't recall a case that had more pretrial publicity than the Rolling case...The sheer volume of the publicity in the Rolling murders was just staggering . . . I really had never experienced anything like it before, not even with the Bundy trial, in which I had worked.

. . .

It was a media feeding frenzy, if I ever saw one. I think a similar case developed in O. J. Simpson trial, which I was able to observe, but at the time this was probably the greatest feeding frenzy that I have ever personally observed.
(EH IX 276) When asked whether the publicity was statewide, Dr. Buchanan answered:

Yes, sir. It was reported everywhere in the State, . . . as I indicated earlier, I think this is more than an issue of pretrial publicity. I think there are other issues here that are important. . . . I think I need to say that.

(EH IX 344) He clarified what he meant by stating:

The pretrial publicity was statewide. However, the personal processing of the anger, the fear and the anger in the community, was a personal thing. That would be secondhand in other communities, that's all I'm saying, Rod. And that's what made the difference, to me at least.
(EH IX 344, 345) One of the first things he did therefore was to discuss a venue change with the defense lawyers. (EH IX 279) They told him that Gainesville was more liberal than other potential areas in Florida and that, by "liberal," he understood it to mean more open-minded. He stated:

This was a university community, with a lot of university-involved people. They tended to be well-educated and consequently willing to listen to both sides.
(EH IX 282, 283) He said "[i]ntuitively [the defense team] had a good feeling about the Gainesville area jury pool . . " (EH IX 283) Dr. Buchanan confirmed that defense counsel, in persuading him that the trial should take place in Alachua County, provided him with no empirical data. Instead, their opinions were "based on their personal,

intuitive observations of the people of Alachua County." (EH IX 302) He acknowledged that he conducted a survey of public opinion in the Bundy case, but that he assumed that funds were not available in the Rolling case to do so. He would have recommended that the defense team hire someone from the University of Florida to conduct such a survey, and he did bring up the subject with the defense team. (EH IX 289, 290)

Dr. Buchanan stated that he realized Rolling could not get a fair trial in Alachua County once Rolling pled guilty. He explained:

[A]fter that guilty plea, it was my observation that people in Gainesville were more than just stunned. The reactions were -- that you heard almost everywhere, were reactions of anger and distaste, as one might expect. I mean, that's not an unexpectable reaction, and very strong. And I think by that time. . . I had begun to realize that the fear which had generated the anger in that community, really was an awesome power . . .

(EH IX 285) He added that later, during voir dire, when questioning the venire pool, the defense team "sensed" that they had not anticipated the community feeling of hatred towards Mr. Rolling. (EH IX 287) He stated that the sense of community which was created by the murders themselves, then led to a sense of community anger. (EH IX 294, 295) When Dr. Buchanan was asked by the prosecutor to concede that the defense "just couldn't have anticipated how bad these facts would affect people," Dr. Buchanan responded:

(W)e didn't anticipate it, let me put it that way. Maybe we should have. That has haunted me, Rod, a lot.

(EH IX 341)

Assistant Public Defender Barbara Blount-Powell was in charge of Fourth and Fifth Amendment issues as well as reviewing the voluminous discovery information provided by law enforcement. (EH III 366) This included the "devastating" April 1993 video and audio-taped confessions Rolling made to two fellow inmates, Bobby Lewis and Russell Binstead, at Florida State Prison. (EH III 367) Blount-Powell acknowledged that Dr. Buchanan was correct in noting (in defense Exhibit 25) the discouraging effect this evidence had on the defense team. (EH III 368) The defense team tried to suppress the confessions to no avail. (EH III 369, 370) Since the defense was going to rely heavily on mitigating evidence from medical/mental health experts, "it was felt that we needed an intelligent and open-minded jury." (EH III 372) Although she was aware of and concerned about "publicity," Blount-Powell had picked juries in other locations and she "like[ed] the venire in Alachua County." (EH III 373)

Blount-Powell stated that Binstead testified against Rolling at the suppression hearing and at the penalty phase trial. (EH III 376) She said that when he testified at trial, he was not cross-examined. (EH III 377) She was not aware prior to trial that Binstead had been a client of the Public Defender's office. (EH III 378)

In deciding to keep the trial in Alachua County, Blount-Powell and the defense team relied on the Herkov Report which she felt:

> . . . had discussed the fact that one group that was not affected as other groups had been in the community were African-Americans, by this particular case, and by the facts in this case. It was discussed that a goal would be to seek out African-Americans on the jury panel, to attempt to seat African-Americans on the jury.

(EH III 379) She acknowledged that her office commissioned no studies of its own in this regard. (EH III 382)

Chief Assistant Public Defender Johnny Kearns was a witness for the prosecution in the postconviction evidentiary hearing. (EH X 412) He was in charge of the penalty phase of the trial. (EH X 437)

Kearns acknowledged that "[t]here was extensive pretrial publicity" about the student homicides and Rolling and that "[i]t was probably the most pretrial publicity that I have seen in this area." (EH X 434) He indicated, however, that he understood the pretrial publicity to be "pervasive statewide." (EH X 435) Thus, with regard to the venue issue, Kearns felt:

> . . . there was extraordinary publicity here in Alachua County. There's no getting around that. And certainly as a defense attorney, almost your first reaction is to change the venue. When you say that, you also have to ask another question: If we change venue, where do we go?

(EH X 450)

One of the reasons Kearns wanted to keep the case in Alachua County was that it had only one major newspaper, The Gainesville Sun, which had consistently taken an anti-death penalty editorial position. (EH X 451) Another reason was the Herkov Report (state's exhibit 7) which reported a "dissipation of feelings" about the case due to the passage of time. (EH X 454) Moreover, since the defendant's penalty phase mitigation case was to be based upon testimony from three mental health experts, he felt that Alachua County jurors would be a good place to find people with ". . . high

education, people who at least have an understanding or appreciation or high esteem for people with a medical background." (EH X 465) He, like Blount-Powell, also wanted to get "as many African-Americans jurors, as I said before, based upon our findings from the Herkoff (sic) report." (EH X 465)

When Judge Morris denied the motion to suppress Rolling's admissions of guilt, Kearns realized that the guilt/innocence phase of the trial was virtually hopeless. (EH X 448)

SUMMARY OF THE ARGUMENT

The Florida Constitution guarantees that the "accused shall upon demand . . . have the right to trial by impartial jury in the county where the crime was committed .

. ." Art. I, ¤16, Fla. Const. (Emphasis supplied). Like its federal constitutional counterpart, the two-fold historical purpose of the guarantee is to prevent a citizen from being whisked by the government to another county and tried in an atmosphere of hostility and bias. On rare occasions, however, the right to an impartial jury and to be tried where the crime was committed conflict with each other. This occurs when the facts of the case are especially grisly and media coverage is pervasive in the forum where the crime occurred.

> [L]egal trials are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper. (Citation omitted)
>
> . . .
>
> [T]he court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free from prejudice, passion, excitement, and tyrannical power.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). In those circumstances, Florida and federal law recognize the defendant's right to a change of venue to an indifferent, impartial county. See ¤ 910.03, Fla. Stat.; Manning v. State, 378 So. 2d 274 (Fla. 1979). This appeal addresses defense counsels' utter failure to acknowledge and effectively act upon that prejudicial conflict.

Rolling effectively invaded Gainesville and committed some of the most horrific crimes in the history of Florida. By all accounts, the gruesome murders generated a blizzard of adverse media coverage which rivaled that generated in Leon County with the Ted Bundy murders. Bundy v. State, 455 So. 2d 330 (Fla. 1984).

Rolling's lawyers were seriously deficient for failing to take very simple but necessary steps to insure that their client was not tried in a hostile venue. All the evidence shows that defense counsel knew that the vast majority of the potential jurors, with good reason, despised Rolling. Instead, defense counsel recklessly demanded, even after jury selection was under way, that Rolling's "right" under section 16 of Article I of the Florida Constitution to be tried in Alachua County be honored. This dangerous, unsupported and indefensible legal posture effectively tied the trial court's hands. About halfway through the voir dire process, when defense counsel could no longer maintain the obvious fiction of an impartial Alachua County venire pool, they added insult to injury by being totally unprepared to protect their client in terms of presenting a competent and effective case for a venue change. Thus, their paltry,

belated venue change motion was denied by the trial court. The result was that Rolling never had a chance for a life recommendation. It is this chance, denied him by his own lawyers, that mandates a new penalty phase trial.

The Supreme Court of Ohio, when describing the circumstances under which Dr. Sam Sheppard was tried for the murder of his wife, noted:

> Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the pre-indictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . .0In this atmosphere of a "Roman holiday" for the news media, Sam Sheppard stood trial for his life. 165 Ohio St. at 294, 135 N.E. 2d at 342.

Sheppard v. Maxwell, 384 U.S. 333, 356 (1966). Rolling stood trial for his life in an even more hostile venue due to his lawyers' deficient conduct. The adverse pretrial publicity was at least as massive, adverse and inflammatory as in the Sheppard case. Of even more importance, however, was the palpable climate of sheer terror Rolling generated among the residents of Alachua County that they could be his next victims. Once he was apprehended, the fear turned into a community hatred of him for the unspeakable acts he committed against young people dear to their collective hearts. The lawyers' deficiencies regarding the mishandling of the venue issue were well documented during the proceedings below, and it was reversible error for the trial court not to acknowledge that they rose to the level of constitutional ineffective assistance of counsel.

The trial court also committed reversible error regarding the test it applied in determining whether prejudice resulted from defense counsels' deficient handling of the venue issue. The trial court incorrectly used an outcome determinative analysis, opining that, even if there had been a showing of ineffectiveness, Rolling had not proven prejudice since:

> [t]he inquiry in a capital post-conviction proceeding is "whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence --

would have concluded that

> the balance of aggravating and mitigating circumstances did not warrant death . . .

(quoting from Strickland, 466 U.S. at 695). (V 655) The trial court was wrong to apply this test because Strickland does not apply to venue. The Eleventh Circuit Court of Appeals, conversely, reviewing a Florida capital case, identified what constitutes prejudice when the alleged deficient performance is failure to protect the defendant's right to a venue change. In Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000), the court held:

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

(Emphasis added). Had the correct test for prejudice been applied, it is clear that the trial court would have been compelled as a matter of law to grant the postconviction motion.

Compounding the deficient performance of Rolling's trial counsel, and most certain to be a part of the state's answer brief, is the question of whether the venue issue has already been raised on direct appeal and ruled upon by this Court. The trial court seemed to be of the view that it had been. (V 655) The state should not prevail on that argument. Perhaps the worst thing Rolling's defense team did was to marginally raise the venue issue in the trial court just barely enough so that it would pass the test of not being procedurally barred for appellate review. They then failed to substantiate and effectively prosecute the motion thereby causing it to be denied in the trial court and on appeal. Our purpose during the postconviction litigation of the venue issue was to strip away the facade manufactured by defense counsel that Alachua County was the proper place to try the defendant, to demonstrate that a venue change was mandated in this case in order for the original penalty phase proceeding to be considered fair and the outcome reliable -- and to show that, but for defense counsels' deficient performance, a venue change most certainly would have been

granted. If we did that, the order denying Rolling's 3.850 motion must be reversed.

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE DEFENDANT'S POSTCONVICTION MOTION TO VACATE AND SET ASIDE ROLLING'S DEATH SENTENCES BASED UPON THE CLAIM OF CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL REGARDING VENUE.

In Strickland v. Washington, 466 U. S. 668 (1984), the court held that, to establish a case of ineffective assistance of counsel, a petitioner must satisfy a two-prong test. First:

> . . . the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

Strickland, supra, 466 U.S. at 687. In State v. Cottell, 733 So. 2d 963, 966 (Fla. 1999), the Florida Supreme Court stated that the appropriate standard for ascertaining the alleged deficiency of trial counsel in a criminal case is ". . . reasonableness under prevailing professional norms." The burden of proving the unreasonableness and the extent of that burden was mentioned in Chandler v. U. S., 218 F.3d 1305, 2000 W. L. 1010 248 (11th Cir. July 21, 2000):

> The burden is on the petitioner to prove by a preponderance of competent evidence that counsel's performance was unreasonable.

Admittedly, the defendant's burden is heavier than merely proving unreasonableness or the equivalent of what would constitute negligence in a civil tort case. The unreason- ableness must be very serious and the acts and omissions of counsel significantly below the standard of care that

competent defense counsel owes a client. Strickland, supra. That is not difficult to do in the case at bar since defense counsels' errors regarding venue were reckless and

obvious. They were so deficient, so illogical, so self-serving as to enter the realm of the bizarre that the Ohio Supreme Court referenced in the Sheppard case.

A. The trial court erred in not finding that defense counsel rendered constitutionally ineffective assistance within the context of Strickland v. Washington by not properly preparing for and litigating a change of venue from Alachua County.

Rolling's trial counsel owed him a solemn legal duty, per the provisions of Amendments VI and XIV, United States Constitution, and Article I, Sections 2, 9 and 16, Florida Constitution, to protect their client's right to avoid the incredibly hostile environment that prevailed in Alachua County, to insure a fair trial by a panel of impartial, indifferent jurors regarding the penalty phase of his capital trial, and to do all things reasonable, proper and necessary to obtain a change of venue. This included trial counsels' duty to:

¤ Understand and appreciate the obvious need for a change of venue well before trial when that need became self-evident.

¤ Then proceed to pursue a venue change in a timely, professional, effective manner by:

¥ thoroughly researching and understanding the law regarding the defendant's right to a change of venue in appropriate circumstances including the importance of establishing presumed prejudice based upon inflammatory pretrial publicity,

¥ gathering the ample available evidence to prove the need for a change of venue,

¥ formally moving the trial court for a change of venue in a proper and timely manner,

¥ introducing in the record testimony, docu- ments, surveys, and other evidence sufficient to establish proof of the need for a venue change, and

¥ arguing convincingly for the venue change to the trial court, citing the appropriate evidence and legal authority.

Failure to perform these duties amounts to consti- tutionally ineffective assistance of trial counsel as a matter of fact and law. See Oakley v. State, 677 So. 2d 879 (Fla. 2d DCA 1996) which held that a properly pled claim of ". . . ineffective assistance of counsel for failing to move for a change of venue. . . " was an appropriate subject for a postconviction motion filed per the provisions of Florida Rule of Criminal Procedure 3.850. In Miller v. State, 750 So. 2d 137 (Fla. 2d DCA 2000), the defendant, in a 3.850 motion, asserted that "his case received an 'enormous' amount of media coverage by the local newspapers and television stations, which portrayed him negatively as a previously convicted sex offender." The court noted

that:

[Miller] contends that his counsel accordingly was ineffective for failing to file a pretrial motion for change of venue. Such a claim is cognizable in a rule 3.850 motion.

Id., (citing Provenzano v. Dugger, 561 So. 2d 541, 544 (Fla. 1990). While the appellate court determined that Provenzano did not prove his ineffective assistance of counsel claim, since the record did not support a need for the change, it did allow the defendant to raise the issue even though defense counsel moved for a change of venue right before trial. This is what happened in Rolling's case. Defense counsels' obligation to obtain a venue change was especially critical in the case at bar since:

¤ As Justice Anstead stated in his dissent in Rolling v. State, 695 So. 2d at 297:

[W]e have held that a change of venue is mandated when a record contains "evidence that a substantial number of the venire men had lived in fear during a defendant's reign of terror."

¤ Rolling had a fundamental right per the provisions of Amendments VI and XIV, United States Constitution, Article I, Sections 2, 9 and 16, Florida Constitution, Section 921.141, Florida Statutes, and Florida Rule of Criminal Procedure 3.251, to a fair trial by a panel of impartial, indifferent jurors. "The Due Process Clause of the Fourteenth Amendment incorporates the Sixth Amendment and thus guarantees the right of state criminal defendants to be tried 'by a panel of "impartial", indifferent jurors. . . [whose] verdict must be based upon the evidence developed at trial.'" Mills. v. Singletary, 63 F.3d 999, 1009 (11th Cir. 1995) (quoting in part from Irvin v. Dowd, 366 U.S. 717 (1961)). Failure to accord Rolling a fair trial by a panel of impartial, indifferent jurors denied him due process of law. See, e.g., Irvin v. Dowd, supra, and Sheppard v. Maxwell, 384 U.S. 333 (1966). If juror prejudice in Alachua County would make it unlikely that he would obtain a fair trial by an impartial, indifferent jury there, Rolling was entitled, as a matter of state and federal law, to have the penalty phase of his trial held in a different, impartial county. ¤ 910.03, Fla. Stat.; Mills. v. Singletary, supra; Irvin v. Dowd, supra. The existence of such prejudice would require a change of venue when the widespread public knowledge of the case in Alachua County and the resulting community terror would cause prospective jurors to pre-judge the defendant with disfavor because of his character and the nature of the offenses. When that prejudice is shown, the remedy is a change of venue, moving the trial from the proper but partial county to an impartial one. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979), where the court held:

A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias and preconceived opinions are the natural result.

See also Murphy v. Florida, 421 U.S. 794 (1975), and Oakley v. State, supra.

¤ This was a capital case, and as defense counsel well knew, death cases require different handling. In Strickland, the Supreme Court emphasized the fact that trial counsel owes the client facing the ultimate penalty the very highest duty of competence and commitment. Strickland makes it clear that vigilant defense counsel is an essential condition precedent to a fair trial:

The Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.

Strickland, 466 U.S. at 684. The court added:

The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.

Id. at 685. Pointedly relevant to Rolling and this case, a fair trial,

> is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Id. at 685.

Notwithstanding defense counsels' obligation to their client, for three long years they did absolutely nothing to prepare for, seek and obtain a venue change. On the contrary, as the record shows, they forced Judge Morris to hold the proceedings in Alachua County. It was not until February 25, 1994, which was after Rolling had pled guilty as charged to all counts of the indictment, after the national and local media had once again inundated the Alachua County community with hundreds of horrific, detailed television, radio and press accounts of the homicides and Rolling's previous criminal record, after jury selection for the penalty phase of the trial was about halfway finished and after the time for filing a motion for change of venue had long expired, that defense counsel filed a belated, utterly insufficient illusion of a venue change motion (defense Exhibit 6; R. 02388-02399) which was so poorly drafted, supported

and argued, that it was dead on arrival.

If defense had worked as hard to obtain a venue change for their client prior to trial as they did to convince the trial court during the 3.850 hearing that they were not ineffective in mishandling that matter, we would not be making this argument today. But try as they did during the 3.850 hearing, the facts refute their self-serving testimony.

Defense counsel incorrectly testified at the 3.850 hearing that it was only when they were deep into jury selection that they suddenly realized that they had made a serious constitutional "miscalculation." Until then, they claim, contrary to the facts, they had every reason to believe that Alachua County was an advantageous place for the trial due to the well-educated, open-minded people residing there. Incredibly, they go on to say that they wanted to keep the case in Alachua County to take advantage of African-American jurors who they claim were not overly affected by what Rolling had done. Blount-Powell testified:

> Q. Upon what did you base your assessment that Alachua County would be a good place to keep this case?
>
> A. Historically, we have good juries. They're intelligent, they're open-minded, they tend to be more liberal.

(EH IX 373) Blount-Powell also stated:

> A. It was felt that our case was primarily based on issues of mitigation involving mental health, childhood. They were very sophisticated issues. We were going to be presenting psychiatrists' and psychologists' testimony and it was felt that we needed an intelligent and open-minded jury.

(EH IX 372) In addition, she testified:

> Q. What were some of the issues, if you recall that you were looking for in selecting a jury for the Rolling case?
>
> A. The Herkoff [sic] study had discussed the fact

> that one group that was not affected as other groups had been in the community were African-Americans, by this particular case, and by the facts in this case. It was discussed that a goal would be to seek out African-Americans on the jury panel, to attempt to seat African-Americans on the jury.

(EH IX 379) Defense counsels' reliance on the Herkov Report (state's exhibit 7) was misplaced for several reasons. First, the study does not support the proposition that African-Americans were in any way less affected by the homicides than other racial groups. The only mention of African-Americans in the entire report is on page 9. Under the heading, "Sampling Procedures," a table indicates that 1 percent of those who returned the sample questionnaire were from "Black" community members. See the State's Exhibit 7, Table 1, page 9. The Herkov Report then specifically warns:

> The demographic differences between the sample and community population appear to be relatively small with the exception of race and education. Thus, caution is advised in applying these results to the underrepresented groups.

(State's Exhibit 7, page 10) The author, in explaining the diminishing return rate after 18 months, states, "[a]s noted above, completing the questionnaire was a time consuming process." (State's Exhibit 7, page 11) Thus, the Herkov Report only says that fewer African-Americans who were sent the form wanted to fill in a 17-page questionnaire. Neither defense counsel nor the trial court (V 649) was justified in relying upon the report as a basis for the former's failure to properly seek a venue change.

As far as when the defense team realized that they had misread the community's feelings about their client, Blount-Powell and Parker misstated the facts. Blount-Powell said:

> Q. So Ms. Powell, it's your testimony that up until you were into voir dire rather deeply, until that point in time you were of the opinion that the case should be tried in Alachua County, is that your testimony?
>
> A. Yes it is.

(EH IX 381) She went on to say "[w]e had not changed our viewpoint up until attempting to select the jury in the case." (EH IX 375)

Parker claimed in regard to this allegedly belated enlightenment:

> Q. Now, on February 28th, 1994, after about 8 days of an attempt to seat a jury, you announced to the court, that you had made a mistake, is that fair to say?
>
> A. That I was incorrect in my assessment of the situation, yes sir.

(EH VIII 181)

Blount-Powell and Parker's testimony in this regard was not credible. The truth is that defense counsel knew from the very beginning that Rolling did not stand a chance if he had to be tried in Alachua County. They knew that the vast majority of Alachua County residents were not open-minded about their client at all. On the contrary, they knew well before the trial that the residents were understandably closed-minded about Rolling -- they hated him -- they despised him -- they felt he should be sentenced to death. (EH VII 73, 98, 118, 120, 182, 183)

The proof of their knowledge of the actual situation is reflected in the fact that as early as October 11, 1991, before Rolling was even indicted, the defense team was attempting to "move the grand jury proceeding to another county" due to the adverse pretrial publicity generated against the client, which Kearns had described as "probably the most well-publicized homicide case certainly in Alachua County, probably in the history of the State of Florida." (R. 05192-05197) Kearns demonstrated that he was personally aware of the high degree of fear generated by the killings in the Alachua County community when he provided this observation:

> I can even recall my own church, and it was one of many, on University Avenue that opened the doors of the church and their student centers to allow it as a dormitory for students who were afraid to reside on campus, and that lasted for several weeks.

(R. 05197) Kearns described the effect of the pre-indictment publicity in the case as "so invidious as to cause vindictive and retributive feelings among members of the community." (R. 05192) Kearns went so far as to assert that the community hostility had reached the point that his client's constitutional rights were violated when he insisted, quite correctly, that:

> [T]o deny the relief requested in the motion would violate the defendant's right to due process under the fourteenth amendment of the United States Constitution.

(R. 05192) Almost a year later, after Rolling was indicted in July of 1992, Kearns, while objecting to procedures "utilized by [the trial court] in selecting the grand jurors," attested to the fact that things were only getting worse for Rolling when he averred that those prophylactic procedures were:

> [n]ot sufficient in nature to overcome the enormous pre-indictment publicity that was so invidious as to cause vindictive and retributive feelings among the majority of members of the Alachua County community.

See Kearns' July 2, 1992 Motion to Dismiss Grand Jury Indictment, page 2, defense exhibit 18. As to defense counsels' claim that Alachua County was a better place to try the case than any other county in Florida, Kearns made it clear that the defense team knew that the exact opposite was true when he had requested:

> [T]his honorable court to dismiss the Indictment in this cause and respectfully moves that a new grand jury be impaneled to hear this cause in a county outside the Eighth Judicial Circuit.

Id. Nothing had changed as of July 30, 1992, when Kearns advised the trial court:

> [W]e felt that it [the pretrial publicity] was of such a nature and so invidious as to arouse public vindictiveness and to preclude impartial consideration, that this cause should have been considered by a grand jury in a county outside of Alachua.

(R. 05295) Thus, Kearns renewed the motion to dismiss the indictment and move the case out of Alachua County. (R. 05296) Almost a year later, on April 16, 1993, the defense team was still insisting:

> The crimes with which the Defendant is charged received considerable pre-trial publicity and receives ongoing publicity at this time. The victims in this case were five University students. Their death [sic] provoked

an unprecedented out-
pouring of community outrage over the killings.
A massive and highly publicized manhunt (described
as the largest manhunt in the history of the State
of Florida) resulted in the investigation of a
number of male suspects.

See, the April 15, 1993 Motion for Individual Voir Dire, Sequestered Voir Dire Examination, defense exhibit B. Trial counsel added on page two of that pleading with regard to the community outrage:

[A]n inflammatory atmosphere has been maintained
by the news media by making public details of
the investigation, including the alleged existence
of the results of several scientific and physical
tests conducted in connection with the investi-
gation, and the publishing of certain types
of evidence.

Trial counsel then stated that, unless Rolling was allowed individual voir dire at trial:

[C]ollective voir dire of jurors in panels as to
their attitudes will educate all jurors to pre- judicial and incompetent material, thereby render-
ing it impossible to select a fair and impartial jury
. . .

Id. at 2.

Yet, just six weeks later, on June 23, 1993, Parker announced in a press conference, "my strong opinion is that this case should be tried in Alachua County." (Defense Exhibit 12, WUFT Channel 5 story of June 23, 1993)

Thus, defense counsels' testimony that they did not know how bad things were for their client until they were deep into jury selection was not accurate. They always knew that their client was hated in Alachua County and could not possibly get a fair trial there -- yet they recklessly insisted on keeping the case in Alachua County. Unfortunately, the trial court accepted Blount-Powell and Kearns' incorrect version of events referring to it as "the evolving defense view." (V 650) This was clearly error.

The media coverage could not help but generate contempt and hatred toward Rolling among Alachua County residents when it inundated the community with inflammatory television, radio and newspaper reports of:

¤ Descriptions of the weapons used in the homicides and the blood-soaked crime scenes involving disemboweled; posed bodies,

- ¤ Emaciated body parts;
- ¤ Decapitation of one of the victims and rape and/or torture of others;
- ¤ Alleged Satanic rituals participated in by the defendant;
- ¤ Students, fearing for their lives, withdrawing from school at the insistence of their parents, and pathetically sad funeral services;
- ¤ The alleged use of bizarre sexual paraphernalia by the defendant;
- ¤ The opinions of "experts" that Rolling was a serial killer and that he had attempted to kill his own father;
- ¤ Maps of Rolling's crime sprees;
- ¤ Stories that Rolling had attacked a prison guard, tried to escape and was capable of escaping in the future,
- ¤ Accounts that Rolling was aggressively seeking to benefit financially as a result of the killings;
- ¤ Stories in the early stages of the investigation that another person had committed the crimes -- and the reports which followed which exculpated that falsely accused person;
- ¤ Heart-breaking pictures of and stories about the overwhelming emotional pain and suffering of the families of the victims;
- ¤ The establishment of monuments in the community to the memories of the victims;
- ¤ Repeated vitriolic condemnations of Rolling;
- ¤ Other homicides and crimes committed by the defendant in other states and locations in Florida;
- ¤ Stories that Rolling had already been sentenced to life in prison in other cases and therefore would effectively not be punished at all if he did not receive the death penalty in this case;
- ¤ Rolling taking pleasure in his capital crimes including the torture of the victims before he murdered them, and about some of his court appearances where he seemed to be rude, silly, cavalier and impertinent toward the court and indifferent about his offenses and victims;
- ¤ The high costs of the legal proceedings that had to be paid for by taxpayers;
- ¤ Comparisons of the defendant to Ted Bundy and other serial killers;
- ¤ Rolling faking incompetence and insanity as a means of avoiding the death penalty; and
- ¤ Calls from some of the victims' family members for Rolling's execution.

See the state's exhibit 1 and Defense Exhibits 1, 3, 5, 9, 11, 12, 13A, 13B, 14, 21, 22 and 23 which contain evidence of the massive amount of inflammatory, adverse pretrial

publicity which inundated Alachua County prior to jury selection.

It is clear therefore from the record that defense counsel belatedly filed the venue change motion -- not as a result of some innocent, reasonable "evolving" (V 650) process of protecing their client -- but only after Dr. Buchanan insisted that they do so and created a written record of his concerns stating in defense exhibit 29, page 2:

> So, I went home the first or second night of voir dire and composed a letter, which I think you have seen expressing the need to press for a change of venue motion. Johnny Kearns agreed and quickly prepared such a motion, which as you know was denied more than once.

Defense counsel knew almost from the very beginning that Alachua County did not provide their client with even a glimmer of hope for a life recommendation. They brushed aside, and even kept from Dr. Buchanan, what they knew, and Rolling suffered the consequences. Then, when they were called to account in the postconviction proceedings below, they circled the wagons hiding behind a non-existent "strategy" defense at the expense of their client.

There was nothing "strategic" about counsel doing absolutely nothing for more than three years to change venue despite pervasive, incriminating, inflammatory, incendiary pretrial publicity against their client painting him as the most vile and horrible person ever to enter Alachua County, Florida. "Strategy" is often defined in military terms as:

> [T]he science and art of military command aimed at meeting the enemy under conditions advantageous to one's own forces. Or a careful plan or method especially for achieving an end.

The Merriam Webster Dictionary, 712 (Merriam-Webster Inc. 1994.) Rolling's lawyers did just the opposite. They met the enemy, but under conditions of extreme prejudice, hatred, fear and loathing against Rolling, conditions advantageous to the state and conducive to the imposition of the death penalty. As Judge Shevin noted in his dissenting opinion in Lanier v. State, 709 So. 2d 112, 120 (Fla. 3d DCA 1998), the deficient actions of trial counsel cannot be sanitized by merely labeling them "tactical" or "strategic." On the contrary, those actions must be ". . . based on reasonable professional judgment." The judge added:

> While an attorney's tactical and strategic decisions are entitled to deference, these

> decisions must originate from a basis of information, not ignorance.

Id. As Dr. Buchanan stated:

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

(Defendant's exhibit 29, page 1)

Thus, this "strategy" strategy that Rolling's lawyers offered during the postconviction evidentiary hearing -- and that the trial court relied upon to justify their actions (V 653-657) must be rejected as contrary to the record and without legal foundation.

Lest there be any doubt about the sheer recklessness of Rolling's defense team, one has only to consider the way they misled Dr. Buchanan regarding venue. This is an important consideration since the trial court mistakenly justified much of defense counsels' conduct based upon advice supposedly given them by this expert. (V 641-644, 650-653) In fact, it was the other way around. Dr. Buchanan initially warned defense counsel of the extremely negative effects of pretrial publicity upon the defendant's ability to obtain an impartial panel of jurors. A February 25, 1994 memorandum from Dr. Buchanan to the defense team provides:

> As you know, when I first became associated with the Rolling Defense Team, in the summer of 1993, one of my first inquiries concerned a possible change of venue. I looked over the extensive publicity this case had generated and realized that in most cases of this nature, where publicity is extensive and especially where there are reports of confessions, the defense must consider a change of venue. I would say that it would be a rare case where a change of venue would not be appropriate in such a high profile case, given the nature of the crimes.

(State's Exhibit 3, page 1.) Defense counsel's response to Dr. Buchanan's warnings

was not just to ignore his initial advice but to manipulate him into thinking for some time that Alachua County was a good place to hold the trial. Dr. Buchanan notes in his memorandum in this regard:

> I discussed the possibility with Johnny and he began to tell me about the nature of the people in Alachua County. There are many highly educated people available. I consider that a positive. The county is more politically liberal than other areas of the state. I consider that a positive. Experience of the past indicates that one can find many more open minded people in Gainesville than in other areas of the state. That is a definite positive.

Id. at 1. Defense counsel chose to keep their own counsel rather than providing easily accessible funds for Dr. Buchanan to do what he had done in the Bundy case: conduct surveys and studies to determine the necessity for a venue change. Dr. Buchanan testified in this regard:

> Q. . . . At any time did Mr. Parker or Mr. Kearns provide you with some money, with some funds to collect data, by way of a professionally and academically done survey, such as was done in the Bundy case to do--
>
> A. No, Sir. In the Bundy case the funds were provided directly to my colleague and myself . . . If I had requested funds, it would have been to hire some professionals from the University of Florida, of which there are [sic] numerous people who could do this and do it quickly.
>
> . . .
>
> Q. All right, sir. But if you notice down in that paragraph you say, "We did not have the money, and we did not have the time."
>
> A. And I'll tell you why, you know, I felt that way. And at the time--at the time I wrote this letter even, I didn't really realize that money was available for that, for--or could have been available for that purpose, even though it wasn't felt that it was

needed. You know, public defender's offices are notoriously known to be underfunded, and I think that's just a fact.

. . .

And so my assumption was that, you know, money was not readily available for this purpose. However, if you will recall, I made a recommendation for such a--for-- I actually didn't make a recommendation. I referred to the need for such a piece of research from the University of Florida. At the time I made it, I thought it might have the money might come [sic] from the court or who knows where.

Q. . . . Would you be surprised to learn that at the -- at virtually all times when you were involved in assisting the defense team, that the Florida Legislature had allocated to the defense team many hundreds of thousands of dollars which could be spent on such things as surveys; that this money was not ever provided to you and, in fact, the public defender returned to the coffers of the State of Florida in excess of a hundred thousand dollars which had earlier been allocated to the public defender for this very purpose . . .

A. Yes, sir. I did not know, and I did not talk to the attorneys about financial matters . . . I did not -- I assumed that if -- that they – that was their purview, not mine.

(EH IX 288-91) In fact, defense counsel never told Dr. Buchanan that Alachua County had obtained from the Legislature grants in excess of $1,000,000.00 to be used by the court administrator, the state and the defense to pay for expenses related to the Rolling case. See defense exhibits 15-17) None of this money was used by the defense team regarding venue. Instead, "the unused portion of funds" was returned to the state, by all parties, in the respective amounts of $70,000.00 and $217,648.54. See defense exhibit 16.

Mary Weber investigated funds available and funds returned. With specific regard to the $250,000.00 DCA grant, she testified about the portion of funds allotted to defense counsel:

Q. . . . or did in fact, money return from both offices?

A. I know that -- and the way I found this out was through some interrogatories to Mr. Parker -- out of the $250,000.00 grant, he said $150,800.00 was available to the public defender's office, and out of that amount, they used $52,000.00.

(EH VIII 155) With regard to the $900,000.00 grant, Weber stated:

> . . . and then on the $900,000.00, I believe that -- I didn't find a specific allocation, but I believe it was just by request. It had to be approved.

(EH VIII 155, 156) Defense counsel failed to take advantage of the allocations despite the fact that, as Dr. Buchanan noted:

> Q. . . . in the Bundy case there was a specific allocation of funds for a detailed survey to try to come up with something really substantial regarding how the people in Leon County, the potential jurors, might be affected by all of the pretrial publicity. Is that true?
>
> A. . . . this is called quantitative research, meaning it is a scientific method, and you do try to exercise control, and control is exercised in various ways. For example, in survey research, which is descriptive in nature, one carefully designs a questionnaire, and uses some kind of random sampling technique, which hopefully will ensure getting an accurate sample of the population from which to collect data. And then that can be statistically analyzed, it can be reduced to observable phenomena, and thereby give one a view of the population's attitudes at a given time on a given topic.

(EH IX 291-93) Thus, Dr. Buchanan had no choice but to rely only on defense counsel in terms of understanding how potential jurors felt about this case.

The trial court found no fault with the manner in which the defense team handled the grant money noting in part that "the Defendant would punish Parker for being a good steward of the money allotted him..." (V 635) Respectfully, the trial court missed the point. Parker's duty was not to the taxpayers, it was to his client. The fact that he declined to use a dime of these funds regarding venue -- and left Dr. Buchanan with the impression that funds were not available to pay for pre-trial studies which would have revealed the animosity against Rolling in Alachua County cannot be passed off as negligence. It is proof that the Public Defender was utterly negating Dr. Buchanan's usefulness -- and, worse than that, making him dependent upon the lawyers for information about the need for a venue change.

Eventually however, Dr. Buchanan saw through the smoke and mirrors stating:

> I have worked on this case for about nine months. Six months was spent in intensive research of the facts of the case. I examined most available documents in the case; looked at the video tapes and listened to the audio tapes. I asked more questions about the potential jury pool in Alachua County and began

developing jury profiles. Prior to my leaving Gainesville and returning to Pepperdine, I wrote a long memo in which I detailed my contention that Danny ought to really enter a guilty plea. Even with that idea in mind, I still considered Alachua County a suitable place to hold the second phase trial.

Well, to make a long story short, I have "run full circle," and am now back to considering a change of venue again. I am not disappointed in the jury pool in Gainesville. They are what everybody said they would be. They are honest, honorable and sincere people, who, in the usual first degree murder case, would be as open minded as anyone. However, this particular case is presenting the people of Gainesville with a pressure that they have never felt before. This is not the "usual" first degree murder case and the people of Gainesville are not reacting in their "usual" manner. Judge Morris has repeatedly said that he has never faced a case like this before, nor has the court in Alachua County. So, we are having to re-examine what we have done in the past, and make the necessary adjustments as we progress, step by step, through the legal and social maze presented by the Rolling trial.

(State's Exhibit 3, page 2) By that time, however, it was too late.

Another argument suggested by the state during the 3.850 hearing to try to justify defense counsels' ineffectiveness was the incorrect claim that a venue change was moot since all the other counties in Florida were just as infected with prejudicial pretrial publicity as was Alachua County. This argument was not accurate either.

Mary Weber investigated the quantity and quality of the pretrial publicity in this case. She reviewed news articles published around the state and television coverage broadcast from Gainesville and other locations. When asked about the quantity of news coverage in nearby Jacksonville as compared to that in Alachua County, Weber testified that it was

"... [m]uch smaller. I mean there wasn't as much coverage."

(EH VIII 139) Because of the overlap in viewership in Jacksonville and Gainesville, Weber investigated the extent of coverage in the Jacksonville area. When asked to compare the television coverage in Jacksonville and Gainesville, she noted:

. . . What I did to remove any doubt in my mind, I took a copy of . . . for instance the transcripts for TV 20, and I showed them to the person at the station I was working with and I asked him, How did your station's coverage compare to this? and he said, way less than that, because even though they did broadcast into Gainesville, they carried information of interest to Gainesville, their main focus was Jacksonville, and even up into southern Georgia.

(EH VIII 152) The prosecutor tried to get Dave Davis to concede that the "hundreds of articles" printed about the case were published statewide. However, Davis replied:

No, no. These, the ones he's referring to, I would say 95 percent of the articles that were introduced came from the Gainesville Sun. On the day of the motion was heard [sic], he introduced a couple from the Alligator, and the ... TV station. . . . But I believe there was only one or two, there was one article, it was maybe two from the Jacksonville Times Union. There may have been something from the Tampa Bay regarding the robberies down there, but that was about it. It was by and large from the Gainesville Sun.

(EH VII 90)

Dr. Buchanan, although acknowledging that there was state-wide publicity about the case, refuted this argument as well when the communications expert confirmed:

... What I wanted to say is that my feeling was not based just on pretrial publicity. . . Because the pretrial publicity had gone all over the state. If that were the only factor, it wouldn't matter where you took the trial, because everybody knew about it. Everybody had read about it, and it had been on television. It had been everywhere.

But my reasoning involves not just the pretrial publicity, but what happened as this community meshed together, and the feelings, the community feelings that arose: first fear, then anger and disgust, you know, when they were listening to

the antics of Rolling and his so-called girlfriend.

(EH IX 314, 315)

Another argument made by the defense team during the evidentiary hearing was that they "were keeping [their] options open for change of venue . . " (EH X 489) In other words, defense counsel suggested that, while they maintained for over three years that they wanted the trial in Gainesville, they had, as a kind of "plan B," the ability to obtain a venue change if that became necessary. This cavalier attitude is reflected in Parker's February 7, 1994 memorandum to the file (defense exhibit 24) in which he comments on his meeting of January 26 1994 with Rolling. Parker states:

> On change of venue, I explained to Mr. Rolling that my interest in venue remaining in Alachua County was more than simply wanting to stay home during the trial. We talked about the other communities that would be considered by the court for change of venue such as Pensacola, Orlando, and West Palm Beach. Tallahassee probably wouldn't be considered because of the bank robbery trial, Tampa probably would not be considered because of the burglary and theft trials and Dade and Jacksonville were homes to several of the victims. Overall, the defense team feels that an Alachua County jury is more favorable if a jury can be selected that is willing to remain open minded. If no jury can be selected in Alachua County, then other communities will be considered. Mr. Rolling seemed to understand these issues and agreed that Alachua County was a good starting place.

(Emphasis added). Parker did not explain to Rolling what would happen in the event the state and the trial court might not be inclined to agree to change venue just because the defense team asked the trial court to do so. It is obvious that this was another effort by defense counsel to hide their ineffectiveness because, if in fact defense counsel were really keeping their options of a venue change open, they would have been ready to prosecute that motion in February of 1994 when they supposedly first realized the necessity for a venue change. But they were not ready -- even at that late date, they were utterly unprepared to protect Rolling in terms of obtaining a venue change. As Parker acknowledged candidly:

Q. . . . If we can get to the meat of the coconut here, when you finally did file that motion for change of venue, you really weren't prepared to aggressively litigate it, were you?

A. No.

. . .

Q. And because you weren't prepared on that day, that's why you didn't get around to supplementing the evidentiary part of this motion for change of venue for almost twenty days. Isn't it true?

A. Yes.

. . .

Q. Isn't the proper thing to do, when you file a motion, is to have your witnesses ready, to have your evidence ready, to have your documents ready, so that when you file that motion, you make it clear to the court that you're serious about it, and you have the proof of the pudding, so to speak, to back you up? I mean isn't that the way it's supposed to be done?

A. That's is [sic] the way it was supposed to be done, but not doing it that way was not intended by me in any way, nor do I believe it was perceived by the trial judge, to be an indication of my lack of sincerity on my wish to move the venue.

(EH VIII 191-94)

Finally, as stated above, Parker was of the opinion when he filed the motion for change of venue on February 25, 1994, that the client would get the death penalty no matter where he was tried. (EH VIII 251, 252) This may explain why the defense team put so little effort into prevailing on the motion. It may also explain why they supposedly were not aware that Parker's office had previously represented Binstead and Lewis, probably the state's two most damaging witnesses against their client. See V 630-634. The trial court accepted defense counsels' explanation and found no actual conflict of interest (V 634) but, insodoing, missed the point. "The Sixth Amendment . . . guarantees criminal defendants the right to effective assistance of counsel, and effective assistance includes a right to counsel 'unimpaired by conflicting loyalties.'" Reynolds v. Chapman, 2001 U.S. App. LEXIS; 14 Fla. L. Weekly Fed.

C 826 (11th Cir. decided June 15, 2001). Accord, Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990). If defense counsel were so resigned to Rolling receiving the ultimate penalty, the least they could have done was to learn of the prior representation, use the conflict as a basis to withdraw and turn the representation over to counsel who would aggressively seek a fair venue for Rolling's penalty phase trial.

B. The trial court committed reversible error by not applying the proper test and legal analysis to determine whether the defendant suffered prejudice as it relates to defense counsels' deficient performance regarding venue. A proper application of the law would have mandated a finding of prejudice sufficient to require a new penalty phase trial.

The Supreme Court's decision in Strickland v. Washington, 466 U.S. 668 (1984) requires a showing of prejudice before the defendant is entitled to relief when the claim is ineffective assistance of counsel. Generally, prejudice results when the proceedings themselves have the characteristic of unfairness and the outcome of the case cannot be said to be "reliable." Justice O'Conner wrote in Strickland, 466 U.S. at 687:

> . . . [t]he defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as
>
> to deprive the defendant of a fair trial, a trial
>
> whose result is reliable.

Justice O'Connor added that a fair trial ". . . is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceedings." Id. at 685 (emphasis added).

The trial court determined (EH V 655) that, even if there had been a showing of ineffectiveness, Rolling had not proven prejudice since:

> [T]he inquiry in a capital postconviction proceeding is "whether there is a reasonable probability
>
> that, absent the errors, the sentencer -- including
>
> an appellate court, to the extent it independently reweighs the evidence -- would have concluded that
>
> the balance of aggravating and mitigating circumstances did not warrant death.

(quoting from Strickland v. Washington, 466 U.S. at 695) The trial court was wrong to apply this far-too-restrictive test because Strickland did not concern venue. The Eleventh Circuit Court of Appeals, on the other hand, reviewing a Florida capital case, identified what constitutes prejudice when the alleged deficient performance is the

failure to protect the defendant's right to a venue change. In Meeks v. Moore, 216 F.3d 951 (11th Cir. 2000), the court noted that "[t]he law on pretrial publicity as it relates to the necessity for a change of venue is clear. The standards governing the subject matter:

> . . .'derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by a panel of impartial indifferent jurors. The trial court may be unable to seat an impartial jury because of prejudicial pretrial publicity or an inflamed community atmosphere. In such a case, due process requires the trial court to grant defendant's motion for a change of venue . . .

(citing Coleman v. Kemp, 778 F.2d 1487 at 1489 [11th Cir. 1985]). The Meeks court then stated:

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

Meeks, 216 So. 2d at 961 (emphasis added). The decision in Meeks is consistent with an admission (III 373) by the attorney general in its response to the amended 3.850 motion:

> Contrary to what Rolling emphasizes herein, the Strickland standard is not an outcome determinative one. Rather, [sic] standard evaluates whether the proceeding itself was unfair and unreliable.

(Emphasis added). The test is not if defense counsel effectively pursued a venue change and was granted one, the jury would have recommended life sentences for Rolling and the trial court would have concurred in the advisory recommendation.

That would be pure speculation and impossible to prove. Instead, the legal tests to be applied are:

¤ Was trying Rolling for capital murder in Alachua County fair given the incredible amount of adverse pretrial publicity concentrated in that close-knit, student community?

¤ Can the jury's death recommendations be considered reliable given the climate of terror, hatred and loathing among the people of Alachua County focused upon the defendant?

¤ Had defense counsel properly prosecuted the venue change motion, is there a ". . . reasonable probability that the trial court would have or at least should have granted . . ." the motion? Meeks, 216 F.3d at 961.

As far as presumed prejudice is concerned, as the Eleventh Circuit stated in Coleman, 778 F.3d at 1490:

> [P]rejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held.

(citing Rideau v. Louisiana, 373 U.S. 723) The Coleman court added:

> [w]here a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, [jury] prejudice is presumed and there is no further duty to establish bias.

(citing Mayola v. Alabama, 623 F.2d 992, 997 [5th Cir. 1980]). The Coleman case may be contrasted with the Eleventh Circuit's decision in Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998), where the court determined that defense counsel's decision not to seek a venue change was tactical and reasonable and ultimately joined into by the defendant himself.

The penalty phase proceeding was not fair. As the record in this case shows, and as virtually everyone who testified in the 3.850 proceeding acknowledged, the adverse pretrial publicity at Rolling's trial was massive to the extent that it saturated the Alachua County community. See, e.g., defendant's exhibits 3, 5, 9-12, 13 (a) and (b), 14, 21-23 and the state's exhibit 1. In addition, according to Dave Davis, the pretrial publicity was so inflammatory and adverse that it was the first time in his career he saw

media coverage show a "palpable" animosity toward a defendant. (EH I 98)

When that highly inflammatory publicity was combined with the terror Rolling himself created in the community by the very nature of his unspeakable acts, Alachua County became the most unfair place in Florida to try the case. Defense counsel were obligated to not let that happen.

Despite the publicity being statewide, there was something else going on in the Gainesville area specifically, as Dr. Buchanan pointed out:

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

(EH IX 344) He clarified his point:

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

(EH IX 344, 345) Dr. Buchanan was very strong on this point, stating:

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

(EH III 343) Dr. Buchanan admitted:

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

(Defense exhibit 29, see also EH VIII 343)

Parker had the strength of character to also admit the resulting unfairness stating, "I was incorrect in my assessment of the situation, yes sir." (EH VIII 69)

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

Nor was the outcome of the penalty phase proceeding reliable. While it is true that the trial court, within the severe limitations brought about by the defense team itself, tried to protect Rolling's right to impartial, indifferent jurors, defense counsel did not. Thus, when this Court noted that:

> [W]hen the responses of prospective jurors raised even the slightest concern that they perhaps could not sit impartially, the [trial] court liberally granted Rolling's challenges for cause,

it did not address the reliability issue sufficiently because it was referencing persons who did not serve on the jury, not the persons who did.

Mary Weber prepared a schedule and synopsis (IV 618-624; T. I-XIV) of the voir dire as it relates to the jurors (Bass, McDaniel, Kerrick, Sajczuk, Diaz, Staab, Green, Williams, Coleman, Stubbs, Tignor and Brown) and alternate jurors (Smith, Malcolm, Coleman and Wilson) who ultimately actually served on the jury -- and the questions put to them about pretrial publicity and the effect it may have had upon them. It is obvious from this synopsis and the record upon which it is based that, contrary to what the trial court and this Court may have believed, the trial court's efforts to protect Rolling were not sufficient. As Parker admitted, at that point, they were resigned to a death sentence, no matter where the trial was moved to (EH VIII 233). As voir dire dragged on, the defense did not aggressively and effectively question those who actually served on the jury about pretrial publicity and the effect it may have had upon them.

For the most part, these jurors were questioned collectively, not individually. They were asked little of

significance about pretrial publicity. For example, jurors Diaz and Staab, after acknowledging that they had seen photographs of the victims and were aware of news reports regarding the position a group of local ministers had taken regarding the case, were not pressed at all regarding the effect that the publicity may have had upon them. (IV 620, 621; T. III 385-472) Jurors Green and Williams did not respond when asked whether they had read or seen anything in the media which would cause them to vote for death no matter what was presented to them during the trial -- and whether they could put aside what they might have read or seen and rely only on what was presented in the courtroom. (IV 621, 621; T. III 486, IV 606) Juror Bass was aware

of the Rolling case (IV 618; T. I 69), knew Christa Hoyt, one of Rolling's victims (IV 618; T. I 109), "felt frightened" and "victimized" (IV 620; T. II 273) and did not respond when asked (collectively) whether she had made any adjustments in her living arrangements as a result of the homicides. (IV 619; T. I 137) Jurors McDaniel, Kerrick and Sajczuk at first did not respond when asked whether anything they might have read or seen might influence them. (IV 620; T. II 281) Sajczuk and Kerrick then acknowledged that they had seen television reports about the brother of one of the victims insisting on the death sentence for Rolling, but they both indicated it would not affect them. (IV 620; T. II 281) The only specific question responded to by Juror McDaniel was regarding what magazines were regularly received in her home. (IV 622; T. X 1530) Jurors Stubbs, Tignor and Brown had read or seen reports about the case but did not respond when asked whether they had made up their minds about what the appropriate "verdict is, no matter what the evidence is presented by the State or the Defense." (IV 621; T. V 816) When juror Tignor was asked whether Gainesville would be a safer place if Rolling were executed, she responded "probably." (IV 622; T. VI 906) The rest of the jurors were asked only very general questions about how the pretrial publicity might have affected them, and there was no real effort made to identify the jurors who, like so many other residents of Alachua County, were traumatized by the case. (IV 618-624; T. I-XIV) The inquiry was clearly inadequate. This is strong proof of the fact that the outcome of the proceeding was not reliable because there is simply no reliable way to know whether the 12 jurors from Alachua County who ultimately made the death recommendations had been prejudiced by the massive amount of negative pretrial publicity and the community-wide fear and hatred that resulted from Rolling's murders.

In Coleman v. Kemp, 778 F.3d 1487 (11th Cir. 1986), the court addressed the very same situation. That is, the state argued "that the voir dire record in this case rebuts any finding of presumed prejudice." Coleman, supra at 1541. The court then examined the voir dire transcript finding, among other things:

1. There was not individual, sequestered voir dire, which is contrary to ABA Standard for Criminal Justice, ¤ 8-3.5(a)(2d edition, 1980) which provides that:

> If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors.

Coleman, supra, at 1542. One of the obvious reasons for this suggested procedure

is that, if potential jurors are questioned in a group, they are able to "learn" how to answer the lawyers' questions from listening to the other potential jurors. This is exactly what happened in the Rolling case as noted by Dr. Buchanan:

> . . . Of course, they did not openly lie, they simply did not admit verbally to the truth. IN ALL FAIRNESS, THAT IS THE PROBLEM WITH ASKING GROUP QUESTIONS! PEOPLE ARE ABLE TO HIDE BEHIND THE OBSCURITY OF THE GROUP AND CONSEQUENTLY, NOT HAVE TO ADMIT TO ANYTHING. If I had my way, we would never ask group questions, especially on really important issues. People need to feel the individual pressure of speaking the whole truth. Sometimes we allow them the opportunity to avoid a verbal commitment by letting [sic] hide in a group response.

(See the state's exhibit 3.) Dr. Buchanan added:

> First I noted yesterday that as we moved into the afternoon session, jurors began to sound very much alike. They repeated the same kinds of statements over and over. I got the clear impression that the later jurors were significantly influenced by what the earlier jurors had said. They had learned to say the right words to gain acceptance from both the court and the attorneys.
>
> Johnny came over to me in frustration during our second session and indicated that he felt that his efforts were not getting anywhere because the jurors were merely parroting what each other were saying. That was exactly what I felt.
>
> Second, this is a high profile trial and many people want to serve on this trial. There is also probably a financial incentive, as perceived by some. So people are anxious to be accepted and they learn quickly what to say.

(Defense exhibit 30)

2. As indicated above, there were no really penetrating questions put to the actual jurors designed to elicit specific information regarding the extent, if any, to which they were influenced by the pretrial publicity. In Coleman supra at 1542, the court noted:

> [A]nother problem with the voir dire in petitioner Coleman's case is that the prospective jurors were
> not asked questions which were calculated to elicit
> the disclosure of the existence of actual prejudice,
> the degree to which the jurors had been exposed to prejudicial publicity, and how such exposure had affected the jurors' attitudes toward the trial.
> (Citations omitted.) Instead, leading questions
> and conclusory answers were typical of the manner
> in which Coleman's voir dire was conducted.

3. As Mary Weber testified, despite the fact that there was a sincere effort to limit public access to the most grisly photographs of the victims, the newspaper, radio and television accounts of the tragedies and Rolling's responsibilities for them which were published and broadcast before trial were themselves often extremely graphic. See defense exhibits 11, 12 and 14.

4. As to the jurors who actually served, there was no challenge to their ability to be objective except by the voir dire. That is, while there was a great deal of pretrial discussion about subjecting the jurors to questionnaires and other mechanical means of culling out venire persons who might harbor bias against Rolling, those methods were not used as to the actual jurors who determined Rolling's fate. See, e.g., V 647.

Finally, there is a distinct likelihood that Judge Morris would have (and certainly should have) granted the venue change motion if defense counsel had handled the venue issue effectively. That is, had defense counsel not invoked Article I, Section 16 of the Florida Constitution demanding that the trial take place in Alachua County, presented the court well prior to trial with the overwhelming evidence (such as defendant's exhibits 11 and 12-14) of inflammatory pretrial publicity that saturated Alachua County to prove presumed prejudice, not misled Dr. Buchanan to believe that Alachua County was a good place to try the case (and instead retained him to conduct surveys, testify and otherwise support the motion for venue change as he did in the Bundy case), and effectively argued the applicable case law regarding the need for the venue change -- then, there a distinct likelihood and a reasonable probability that the trial court would have had no alternative but to grant the venue change motion. This is so, in part, because of the similarity of the facts in the Rolling case to the facts

presented to the Eleventh Circuit Court of Appeals in Coleman v. Kemp, 778 F. 2d 1487 (11th Cir. 1985), some of which are set forth below.

¤ Wayne Coleman and others murdered six members of a prominent Donaldsonville, Georgia family in a disgusting, cold-blooded manner. Coleman supra, at 1488. One of the victims was sexually battered, then shot to death. Id. At the time, Donaldsonville was a small town in lightly populated (around 8,000) Seminole County, Georgia, described as a "very tight knit community." Id. at 1535. The community was appalled by the killings and the majority felt that the defendant deserved the death penalty. Id. at 1536. Admittedly, Alachua County had a significantly larger population in early 1994. That distinction, however, is trumped by the predominantly small-town demographics of Alachua County and what has been clearly documented as the close-knit, familial feelings (see e.g., Dr. Buchanan's testimony, EH VIII 343) that the majority of Alachua County residents had for the five victims in this case, one of whom was from Alachua County.

¤ Seminole County had one major newspaper at the time of the Coleman case, The Donaldsonville News, which published scores of stories about the case. Coleman, supra, 1491-1500. Alachua County had one major newspaper, The Gainesville Sun, which published hundreds of news stories about the case. See the Appendix to defendant's exhibit 3 and the State's exhibit 1. It appears that The Gainesville Sun published many more stories about the Rolling case than The Donaldsonville News published about the homicides committed there.

¤ In both Coleman and Rolling, the media usually reported the facts of the cases accurately. The problem was that those facts were, more often than not, horrific and inflammatory. See Coleman, supra, at 1488, 1491, 1493 and 1495. The same was true in the Rolling case where the grisly details were repeatedly reported in the media over the course of the investigation and up until the time that jury selection began. See, inter alia, defense exhibit 14.

¤ In Coleman and Rolling, the details of the defendants' extensive prior criminal histories and assorted crime sprees were widely and often reported. See Coleman, supra, at 1512; Rolling: defense exhibits 11 and 12. For example, there is a Channel 20 story of October 18, 1991 noting that Rolling was sentenced to life in prison for robbery as an habitual, violent felony offender.

¤ In Coleman and Rolling, the tragic effects of the murders upon the families of the victims were an oft-repeated topic of media coverage. See Coleman, supra, at 1493: Rolling: defendant's exhibits 11, 12. For example, a "TV 20" story of August 22, 1991 was about "Families of Victims Urging Public Not To Forget."

¤ In the Coleman case, there were media reports of citizens arming themselves and of "purchases of handguns . . . skyrocketed." Coleman, supra, at 1531. The same is true in the Rolling case. Rolling: Defendant's Exhibits 11, 12 and

appendix to defense exhibit 3. See for example the September 5, 1990 "TV 20" story entitled "2000 New Guns Sold Since Last Week -- NRA Offers Classes."

¤ In Coleman and Rolling, there was detailed coverage of funerals and memorials dedicated to the victims. Coleman, supra, at 1504; Rolling: Defendant's Exhibits 11 and 12, and the appendix to defense exhibit 3. See for example the August 31, 1990 "TV 20" story: "Funeral Services, Comments of Family and Friends."

¤ In Coleman and Rolling there was extensive media coverage of matters related to the actions of the grand juries. Coleman, supra, at 1505; Rolling: Defendant's exhibits 11 and 12 in evidence and exhibits A and B attached to the amended 3.850 motion and appendix to defense exhibit 3. See for example the October 14, 1991 "TV 20" story entitled "Grand Jury for Gainesville Murders Has Been Chosen." Also see the November 18, 1991 "TV 20" interview with a grand juror who states that a juror cannot concentrate at work after seeing graphic pictures of crime scenes.

¤ In Coleman and Rolling there was significant coverage of the elaborate security arrangements made after the defendants were arrested and in anticipation of the defendants' attendance at pretrial and trial proceedings. Coleman, supra, at 1506; Rolling: Defendant's exhibits 11, 12 and appendix to defense exhibit 3 in evidence. See, e.g., the February 1, 1994 "TV 20" story ". . . Extra Officers On Duty."

¤ In Coleman and Rolling, there was considerable coverage of other murders allegedly committed by the defendants. Coleman, supra, at 1507, 1510; Rolling: Defendant's Exhibits 11 and 12, Exhibits A and B attached to the amended 3.850 motion and the appendix to defense exhibit 3. See, e.g., the May 22, 1991 "TV 20" story "Rolling an Official Suspect in Shreveport Murders."

¤ In Coleman and Rolling, there was a host of emotionally charged media stories about the victims, their lives, families, and hobbies. Coleman, supra, at 1508; Rolling: Defendant's exhibits 11, 12 in evidence and Exhibits A and B attached to the amended 3.850 motion and appendix to defense Exhibit 3 in evidence. See, e.g., the September 6, 1990 Gainesville Sun story regarding family and friends, and University of Florida President John Lombardi noting: "They belonged to us," and the 1/23/91 Gainesville Sun story regarding decapitation.

¤ In Coleman and Rolling, the media repeatedly reported details of the anticipated testimony of key state witnesses who planned to testify about the defendants' guilt, the details of the cases and admissions made by the defendants. These stories included graphic details of the more horrible aspects of the murders. Coleman, supra, at 1509; Rolling: Defendant's exhibits 11, 12 in evidence and Exhibits A and B attached to the amended 3.850 motion and appendix to Defense Exhibit 3. For example, the media reported in some detail statements from state witnesses Binstead and Lewis to the effect that Rolling had confessed to them. Also see the "TV 20" report of September 16, 1991 entitled "Reports say Rolling stated he killed

at least one student and had sex with her after she was dead."

¤ In Coleman and Rolling, the media reported calls by victims' family members and others for the defendants to be sentenced to death and that the defendants deserved no mercy. Coleman, supra, at 1509, 1511, 1513; Rolling: Defendant's exhibits 11, 12 and exhibits A and B attached to the amended 3.850 motion and appendix to defense exhibit 3 in evidence. See, e.g., The Gainesville Sun story of February 16, 1994, "Victim's Brother, Mario Taboda: "I have no pity for the individual. This is a life form gone bad and I don't feel for him."

¤ In Coleman and Rolling, there were stories about the defendants making light of the proceedings, laughing during them and evincing a total lack of remorse for the homicides. Coleman, supra, at 1515, 1531; Rolling: Defendant's Exhibits 11, 12 and Exhibits A and B attached to amended 3.850 motion and appendix to Defense Exhibit 3. See, e.g., The Gainesville Sun story of January 21, 1994, "Letters Reveal Rolling Is Not Afraid of Death Row." What was even worse were the many stories to the effect that Rolling and his lady friend were attempting to profit financially from the murders. See, e.g., The Gainesville Sun story of January 10, 1994: "Rolling Can Profit From 1990 Murders."

¤ In Coleman and Rolling, the homicides were covered and reported extensively by newspaper sources located outside the respective venues of the counties where the trials were held but read in the respective home counties. In the Coleman case, this included stories from The Atlanta Constitution, The Atlanta Journal, The Bainbridge Post Searchlight, Front Page Detective, The Dothan Eagle and The Albany Herald. Coleman, supra, at 1512-1530. The same was true in Rolling as evidenced by extensive coverage by The New York Times, The Orlando Sentinel, The Tampa Tribune, The St. Petersburg Times and The Ocala Star Banner, newspapers which have a significant readership in Alachua County. See State's Exhibit 1.

¤ In Coleman and Rolling, as indicated above, the media coverage was not limited to newspapers. Instead, there was massive coverage of all aspects of the case by public and commercial television stations which broadcast into Seminole County, Georgia and Alachua County, Florida, respectively. See Coleman at 1531-1533. In the Rolling case, there were innumerable inflammatory television reports broadcast by WCJB, Channel 20, WUFT, Channel 5, and WJXT, Channel 4, among many others which were seen regularly by persons living in Alachua County. See, e.g., defense exhibits 11, 12 and 13 and exhibit A attached to the amended 3.850 motion.

¤ In Coleman and Rolling, the media reported details about successful and unsuccessful escape efforts by the defendants. Coleman, supra, at 1514; Rolling: Defendant's Exhibits 11 and 12 in evidence, and Exhibits A and B attached to the amended 3.850 motion and appendix to Defense Exhibit 3 in evidence. See, e.g., The Gainesville Sun January 28, 1994 article entitled "Rolling Planned Escape From Jail."

Since the penalty phase trial was neither fair nor reliable -- and since there is no question but that Judge Morris would have, or should have, granted the venue change motion had it been presented to him effectively, Rolling suffered prejudice due to his counsels' deficient performance regarding the venue issue. Thus, Rolling was entitled to the relief sought in his amended Florida Rule of Criminal Procedure 3.850 motion, and it was reversible error for the trial court to not to grant it.

CONCLUSION

For the reasons set forth above, this Court is requested to:

1. Reverse the trial court's final order of March 5, 2001, denying the defendant's amended Florida Rule of Criminal Procedure 3.850 motion.
2. Remand the cause to the trial court.
3. Order the trial court to grant the relief sought in the amended 3.850 motion including setting aside the death sentences rendered against Rolling. Or, in the alternative, order the trial court to re-evaluate the question of deficient lawyer conduct and prejudice in the proper context of the law.
4. Order that the defendant be afforded a new penalty phase trial by jury.
5. Require the trial court to transfer venue of the cause to an impartial county in Florida other than Alachua. 6. Grant the defendant such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

_____
Baya Harrison, III, Esq.
Silver Lake Road
Post Office Box 1219
Monticello, FL 32345-1219
Tel: (850) 997-8469
Fax: (850) 997-8468
COUNSEL FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this initial brief was prepared using a Courier 12 point font. I do not have a Courier New font on my Apple Macintosh computer. Because of the type of computer and software that I have available, I had to have this initial brief scanned so that it could be formatted onto a disk compatible with the Supreme Court's requirements.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of appellant has been provided to those persons listed below this 18th day of July, 2001, by United States mail delivery:

Hon. William Cervone, State Attorney
Eighth Judicial Circuit of Florida
Post Office Box 1437

Gainesville, FL 32602

Hon. Carolyn Snurkowski, Chief Deputy
Assistant Attorney General
The Florida Department of Legal Affairs
The Florida Capitol Building, Plaza Level One
Tallahassee, FL 32399-1050

_____
Baya Harrison, III

On May 20, 1994, the trial court entered a written order denying the venue change motion. (V 627; R. 3258-3267)

There is a question as to whether just the death sentences were appealed but the defendant believes that the judgments were appealed as well. However, Rolling has not sought to pursue, and in fact has abandoned, a post- conviction claim contesting the legality of his guilty pleas.

See Amendments to Florida Rules of Criminal Procedure - Capital Postconviction Records Production (Time Tolling), 708 So. 2d 913 (Fla. 1998); In Re. Rules of Criminal Procedure 3.850 and 3.851, 708 So. 2d 912 (Fla. 1998) and In Re. Rule of Criminal Procedure 3.851, 719 So. 2d 869 (Fla. 1998).

Huff v. State, 622 So. 2d 982 (Fla. 1993).

In fact, Binstead was cross-examined to a limited degree but Lewis was not. (V 632)

Amend. VI, U.S. Const.

In the motion for change of venue dated February 25, 1994 (defense exhibit 6), defense counsel asserted:

> [c]ounsel for the Defendant has consistently and steadfastly sought to protect DANNY HAROLD ROLLING'S constitutional right to venue in Alachua County.

As long as defense counsel were asserting Rolling's constitutional right to be tried in the county where the crime was committed, there was little if anything the court could do to change the venue. A defendant has a constitutional right to be tried in the county where the crime allegedly occurred because of the provisions of Article I, Section 16, Florida Constitution.

See Kearns' 3.850 hearing testimony at EH IX 526.

It is troubling to say the least for defense counsel to suggest that African-Americans would be less sensitive than other Alachua County residents to what Rolling did. It should be noted that Parker did not make this undocumented claim, only Kearns and Blount-Powell did.

Defense counsels' reliance on getting "liberal" persons on the jury was misplaced since persons who oppose the death penalty, or who have strong negative feelings about it which would substantially interfere with their ability to recommend imposition of it under the proper circumstances, are not qualified to sit on a capital jury in Florida. See Martin v. State, 717 So. 2d 462 (Fla. 1998).

For defense counsel to suggest that concentrating on Rolling's "childhood" during the penalty phase would work for the client better in Alachua County than in another county belies the fact that the victims in this case were young.

The defense had no empirical data whatsoever to support their claim that Alachua County jurors were more "intelligent" than jurors from any other county in Florida.

The Herkov Report is State's Exhibit 7. But compare defense exhibits 22 and 23 regarding studies published before trial regarding the fear generated by the Rolling killings but apparently never read by defense counsel.

In Florida, neither the state nor the defense may seat jurors based on the color of their skin. State v. Neil, 457 So. 2d 481 (Fla. 1984)

Blount-Powell quickly began retreating from her testimony on direct by noting on cross: "I have to say that I was not the primary decision-maker or one of the decision-makers on that but I did agree with the group decision." See Blount-Powell 3.850 testimony, EH IX 19.

> "I have to swallow my pride and admit that I was incorrect in my original opinion that this case could be fairly tried here."

Rolling v. State, 695 So. 2d at 283.

Defense counsels' decision to keep the case in Alachua County would have credibility if Rolling had some positive ties to that community. But his only connection to Alachua County was that he had robbed a bank there -- and had chosen Gainesville to slaughter five innocent young people.

Note that Dr. Buchanan is referring to "positives" that Kearns told him existed -- not factors that Dr. Buchanan researched and determined to exist. There is no indication that Kearns told Dr. Buchanan about the community anger and invidious nature of the pretrial publicity which Kearns referenced in his pleadings.

There are other memoranda from Dr. Buchanan in evidence marked defense exhibits 25-30 and the state's exhibits 2 and 6. These memoranda reveal the personal struggle that Dr. Buchanan went through as he tried his best to work within the utterly unfair parameters set for him by defense counsel. That is, the memoranda make it clear that he was forced to try to help pick a jury blindfolded. At all times, he tried to be a gentleman about it deferring to defense counsels' claims about the "liberal" Gainesville community.

See Defense Exhibit 28 where on March 13, 1994, Dr. Buchanan is desperately trying to convince defense counsel to do something about the pretrial publicity. As Dr. Buchanan noted:

> The potential for serious pre-trial publicity bias in the Rolling case has been documented. To say the least, there was a pressing need, given the circumstances, to absolutely assure that the pre-trial publicity which occurred IMMEDIATELY before jury selection did not contaminate the jury pool.

Dr. Buchanan then proceeds to blame the situation on the trial court. "In my professional judgment, the Court should have taken the time to order a county-wide, random survey..." Id. That is unfair. It was defense counsels' job to do that given

the fact that the trial was well underway and, until just a few weeks before that, defense counsel were still asserting Mr. Rolling's "right" to be tried in Alachua County.

See State's Exhibit 1 and Defense Exhibits 1, 3, 5, 9, 11, 12, 13A, 13B, 14, 21, 22 and 23, which contain evidence of the massive amount of adverse pretrial publicity in Alachua County prior to jury selection. It is clear that the pretrial publicity in Alachua County was much greater than anywhere else.

One of the victims was from Jacksonville. Even so, the coverage of the case was much less there than in Alachua County.

Blount-Powell characterized Binstead's deposition as "devastating." (V 633) Rolling, 695 So. 2d at 287, 288; V 629.

As early as May of 1993, Dr. Buchanan reported that he did "not see even a faint glimmer of hope that there was any light at the end of this long and dark tunnel . . ." See defense exhibit 25. At the time of voir dire, these were Parker's sentiments as well. See EH VIII 251, 252.

Words in all-caps provided by Dr. Buchanan.

In citing to Coleman v. Kemp, 778 F. 2d 1487 (11th Cir. 1985) here, only the appropriate page number of the opinion is noted.