IN THE SUPREME COURT OF FLORIDA

AILEEN CAROL WUORNOS,

Appellant,

v. CASE NO. 79,484

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The state accepts appellant's factual recital as a general statement of the case and facts which will be supplemented herein, where appropriate, with additional facts and argument and subject to the following disputed facts.

The wire coat hanger that was found among the items strewn about the area of the car (R 723-27, 736-40) was never shown to have any relevance to this case. There was a trail from the rear of the car to the dunes (R 708; State's Exhibit 5). Items were found thirty yards behind the vehicle buried in a small hole and covered with a piece of cloth with sand over it (R 708). Among the items concealed was two clear plastic drinking tumblers, brown bag, half bottle of Smirnoff vodka, a wallet with driver's licenses and credit cars in the name of Richard Mallory, miscellaneous papers and Mallory's red car caddie (R 708).

The bullets that were recovered were of the same caliber and model and make and manufacturer as the bullets that were found in Wuornos' discarded .22 in Rose Bay (R 847; 907). While the medical examiner could not determine the assailant's position when the shots were fired, or the sequence of shots, that is not to say that the jury could not make such determinations based on Wuornos' confession, trial testimony and forensic evidence concerning the number and type of bullet holes found in Mallory's shirt (R 921-932). Dr. Botting testified that it was debatable whether Richard Mallory would have been under the influence of alcohol at the time of his death. He could have been at the lower limits where influence would be recognized (R 876).

Tyria Moore worked quite a bit. She did hotel work and went to work on a daily basis when she could find employment and used her paychecks to support herself and Wuornos (R 936). Wuornos never told Moore that she had been beaten or raped during the time from when they met to Mallory's death (R 954).

Appellee takes issue with the statement that in trying to get Wuornos to confess "Moore exploited their prior relationship and the tremendous love Wuornos still harbored for Moore." Such was not decided by Judge Graziano below and is an issue herein and belongs in the argument section. Wuornos was not exhorted to "take the entire blame for the murders" but was asked to absolve an innocent party, Moore from blame, which Wuornos did (R 982-86; 3057; 1831).

Williams Rule evidence and how it relates to the details of Wuornos' Mallory confession is fully discussed in Point II. Contradictions in her trial testimony are also fully discussed. No purpose would be served by repeating it here.

In the penalty phase defense experts testified that Wuornos knew the difference between right and wrong and the nature and consequences of her actions (R 3232-3443; 3465). A borderline personality disorder does not make one kill or render the person not legally responsible (R 3235; 3374). Dr. Toomer felt she was capable of conforming her conduct to the requirements of the law (R 3443).

Testimony concerning Wuornos' background is fully discussed in Point VI.

SUMMARY OF ARGUMENT

Point I: There was no discovery violation with regard to the expected testimony of witness Jacqueline Davis therefore, no *Richardson v. State,* 246 So. 2d 771 (Fla. 1971), inquiry was required. Ms. Davis was made available to defense counsel during the trial and a proffer of her entire testimony was put into the record. Despite the fact that her testimony would have been clearly inadmissible the trial judge permitted defense counsel to call Ms. Davis as a witness. It was the choice of defense counsel not to call her. Alternatively, it can hardly be said that a *Richardson* inquiry was not had from the extensive argument entertained. The trial court indicated that it did not believe that defense counsel did not have this information. Nevertheless, the court took remedial action. After the defense chose not to call Ms. Davis as a witness no further request for a *Richardson* hearing was made to challenge the decision not to use Ms. Davis or the inability to call any other witness, thereby waiving such discovery violation. An adequate *Richardson* hearing was held as to similar fact witnesses and the trial judge determined that they should not be excluded because the state had provided notice of intent to use similar fact evidence at least five months before trial. Defense counsel actually was provided the reports of these officers even where they did not testify from them and was able to cross examine them extensively. Counsel was also provided with a synopsis of Wuornos' confession which Detective Horzepa had referred to while testifying and counsel was able to challenge and cross examine Detective Horzepa at great lengths.

Point II: Wuornos was not denied a fair trial by the introduction of evidence of collateral crimes. Evidence of such crimes was before the jury by the cross examining of defense counsel and by Wuornos' own testimony on cross examination. In final argument, defense counsel stated that such evidence was admissible. This issue has been waived. In any event, the evidence was properly admitted to establish a pattern of conduct similar to the pattern of conduct in the crime. Similar incidents took place in the same type of isolated area, involved the same weapon, the same modus operandi, i.e., hitching a ride, soliciting an act of prostitution, driving to a secluded area, robbing, and ultimately shooting the victim several times in the torso and abandoning their vehicles in another location, the same type of victim, a middle aged man, and the same type of offense. Such evidence did not become a feature of the trial. Incidents that did not culminate in robberies and murders were relevant to show identity and modus operandi. No victim impact evidence was introduced at trial. The testimony was geared only to establish identity through the circumstances of the crime. If there was error, it was harmless, in view of Wuornos' own confession and the testimony of Tyria Moore and the medical examiner.

Point III: The trial court did not err in denying Wuornos' motion to suppress. Tyria Moore voluntarily chose to cooperate with law enforcement in their investigation. Her motivation was not only to prove her innocence but to avoid future harm to others. Prior to the taped telephone conversations Moore had made it clear to Wuornos that the relationship was over. Wuornos

was in control during the telephone conversations and tried to manipulate Moore into not testifying against her suggesting that it was a case of mistaken identity and that Moore could prove her whereabouts during the murders. She also asked her to forget things she had told her about murdering Richard Mallory. Wuornos' motivation in confessing was not to protect Tyria Moore. She had failed to manipulate Moore and chose to voluntarily implicate herself rather than having Moore do so. She also recognized that Moore was an innocent party. Although Wuornos had been arrested for another charge the Sixth Amendment right to counsel cannot be invoked once for all future prosecutions because the right does not attach until a prosecution has commenced. Wuornos was provided counsel and was advised not to speak to the authorities. Her subsequent confession was wholly voluntary. No delusion or confusion was visited upon Wuornos by her interrogators. Any stress was caused by the predicament in which she found herself and was not induced by extraneous pressures. Neither concern for a girlfriend nor the desire to clear an innocent party amounts to sufficient coercion to characterize the confession as involuntary. Nothing in the audio and video tapes in this case reflected that Wuornos' concern for Moore was so overpowering as to deprive her of rational thought.

Point IV: The trial court did not abuse its discretion in declining to grant individual and sequestered voir dire as jurors were not tainted by the statements of other jurors and indicated that they could render a fair and impartial verdict putting aside everything they had heard about the case. All the jurors

selected indicated that they could lay aside their impressions or opinion and render a verdict based on the evidence presented in court. No showing was made that Wuornos was prejudiced to the extent that a fair trial was impossible so as to find error in failing to change venue.

Point V: The trial court did not give the pecuniary gain circumstance and the felony murder factor with robbery as the stated felony double consideration or weight in its sentencing order. The prospective *Castro v. State,* 597 So. 2d 259, 261 (Fla. 1992), decision was not available at the time the jury was instructed. The jury was not tainted in any event as pecuniary gain is a constituent element of the aggravating factor that the murder occurred during the course of a robbery and separate consideration wouldn't result in double weighing because pecuniary gain provides only a motive for the robbery murder. The instructions on the cold, calculated and premeditated factor are not unconstitutionally vague. Any error is harmless as the CCP factor was properly found. The prosecutor did not urge the jury to find the cold, calculated and premedicated factor on the basis that premeditation had already been established by the verdict. The jury was properly instructed on this factor by the judge. The heinous, atrocious and cruel instruction given was approved by the United States Supreme Court in *Proffitt v. Florida,* 428 U.S. 242 (1976). The prosecutor did not argue lack of remorse. The issue of a lack of conscience was brought up by mental health experts in regard to ruling out a diagnosis of an antisocial personality. The defense failed to contemporaneously

object in the penalty phase as to evidence about other crimes. Both the prosecutor and the sentencing judge properly advised the jury that their recommendation carried great weight. Defense counsel failed to contemporaneously object and request curative instructions regarding statements made by the prosecutor in closing argument and any right to complain thereof is waived. Knowing right from wrong is clearly relevant to the statutory mental health mitigators.

Point VI: The sentencing court properly found that the crime was committed during the commission of a robbery. Her modus operandi was to pose as a damsel in distress and solicit a ride, then offer to have sex for money, and when in an isolated area for such purpose to rob the victims after first shooting them in facilitation thereof, and then to finish them off so as to eliminate witnesses. By Wuornos' own words the murder was committed for the purpose of avoiding or preventing a lawful arrest and to continue in her chosen career of prostitution. The murder was cold, calculated and premeditated. The evidence reflects that Wuornos carried a gun for the purpose of robbery. Even in the event that there had been a struggle with Mallory the evidence reflects that she coolly and deliberately finished him off with heightened premeditation. The murder was especially heinous, atrocious or cruel. Mallory was shot as he attempted to explain to Wuornos he had no intent to rape her, under her version. From that point on the victim felt a great fear of impending death as he tried to escape and more shots were fired. As he lie dying he was taunted and then shot execution style.

The trial court did not unjustifiably reject mitigating evidence. The sentencing judge found, in accordance with the testimony of the defense experts, that Wuornos had a borderline personality disorder. It was properly rejected as a statutory mitigating factor because the evidence reflected that the existence of such disorder did not cause Wuornos to rob and murder the victim.

Point VII: The trial court properly denied the motion for judgment of acquittal. Premeditation was conclusively established. The state presented evidence inconsistent with Wuornos' theory that the victim was murdered during an argument. Such theory is also refuted by Wuornos' initial confession. Even accepting Wuornos' story of a struggle, premeditation is still established. After she shot Mallory as he sat behind the steering wheel she continued to coolly position herself in order to deliver mortal wounds to the victim for the explicit purpose of eliminating him as a witness. The circumstances of the murder reflect that a robbery of the victim occurred. He was found dead from gunshot wounds, the pockets of his pants were pulled inside out, and his wallet, personal belongings, and automobile had been removed from his person or the immediate area. The evidence reflects that the victim was required to die in order to facilitate the robbery and eliminate a witness. There is no evidence that the robbery was an afterthought of the murder.

Point VIII: The claim that the Florida Capital Sentencing Statute is unconstitutional on its face and as applied is waived.

I APPELLANT WAS NOT DENIED A FAIR TRIAL AND THE TRIAL COURT CONDUCTED AN ADEQUATE *RICHARDSON* HEARING.

Prior to jury selection Mr. Nolas indicated to the judge that he had not been before him before and had some questions. Judge Blount responded that Mr. Nolas had four weeks to ask necessary questions instead of waiting for the jury, nevertheless, he indicated that he would answer them. Judge Blount also noted that he had been appointed on the case three or four weeks ago before but defense counsel had not bothered to call him for hearing time or for a status conference. Defense counsel then recited that on Friday afternoon he had received the statement of Jacqueline Davis from the state. She was Richard Mallory's girlfriend (R 12). The statement was taken on September 18, 1989 by Detective Horzepa. Defense counsel did not ask that the statement be excluded but indicated that it was critical to the defense ability to prepare in that Ms. Davis allegedly said in the statement that Mallory had a history of sexual abuse of women and had received experimental treatment. Mr. Nolas also alleged that Ms. Davis described Mallory's violence toward women when drunk. Mr. Nolas claimed that "We had no idea. We asked about, we telephoned Jacqueline Davis. We tried to track her down. Nobody told us anything. It's been in the State's possession for a year. We need to get the psychological history because this guy did ten years for -- ." (R 13-14). Mr. Nolas further argued that "This witness is critical to the defense. This guy raped women in the past. He acted with them in the same way as he did with Lee."

The state responded that it had assumed that all discovery had been completed. On Friday it was served with a motion to compel for the first time asking for the statement of Jacqueline Davis. Mr. Damore indicated that on three occasions he verbally invited Ms. Jenkins to his office to review discovery materials. He also advised her by letter on June 7th. He stated that in response to the letter Ms. Jenkins contacted his office and scheduled a meeting for herself and Investigator Don Sanchez. Mr. Damore set aside a date to meet with them and go over discovery. On the day that they were supposed to arrive they did not. At 10:30 they were notified by her office that she would have to reschedule. Mr. Damore stated that she never came to his office to go over the discovery materials. In Detective Horzepa's report is a reference that he spoke with Jacqueline Davis. Mr. Damore was not aware that the informal statement had been taken of Ms. Davis until he received the motion to compel from defense counsel (R 16). He then contacted Detective Horzepa and was advised that there was a *taped* statement which had not been transcribed. He asked him to have it transcribed. He sent the transcript immediately upon being notified that they did not have it. The state argued that none of the information in the transcription would be admissible as it is strictly hearsay. The state disputed Mr. Nolas' recitation of the facts as represented by Ms. Davis. Ms. Davis said that Mr. Mallory was totally nonviolent in his sexual conduct toward women. She always initiated any sex between them. She knew him for a year and a half. The incident that counsel was referring to occurred when

Mallory was eighteen years of age, a juvenile, and charged with some type of burglary offense. There is no record that substantiates that other than a hearsay statement of Ms. Davis since Ms. Davis received that information from Mr. Mallory (R 17). Detective Horzepa's original report was furnished in discovery in January. The defense filed a motion to compel that led to this further discovery. Because they indicated that they did not have Ms. Davis' statement the Assistant State Attorney went back and read the report. There was nothing to indicate that there was a tape recording and the report indicated that he was interviewing Ms. Davis for identification purposes, to see if she knew Mallory's whereabouts and if she knew of any property that may have been missing from his apartment (R 18). The report was provided to defense counsel at least ten months before. They waited until the day before trial to indicate that they did not have it, in spite of repeated requests to come into the state attorney's office and go over materials. Mr. Damore further indicated that thousands of documents were provided to defense counsel over the course of a year and he made sure that they had everything that he had. He also noted that many of the materials they complain of not having had been supplied to them in cases in which they represented Ms. Wuornos in Marion and Citrus County (R 19). The court denied the motion to continue indicating that defense counsel would have ample opportunity to investigate. Judge Blount also indicated that he believed that Mr. Nolas *knew all about it before he filed the motion* (R 20). Later, the state indicated that this was the first request it had ever had by

defense counsel to locate Jacqueline Davis. Ms. Davis' name was provided to defense counsel in the initial answer to demand for discovery. The report or synopsis of the statements by Detective Horzepa was provided to defense counsel ten months before (R 1387). The state further indicated that a taped statement *was* provided to the original defense attorneys in the case, Mr. Cass and Mr. Jacobson (R 1388). The state agreed to provide the defense with the address and phone number of Ms. Davis as was provided by Jeff Davis who had testified (R 1389). A proffer of Jacqueline Davis was then taken (R 2079). She indicated that she recalled speaking to two detectives in reference to Mallory's disappearance (R 2081). They taped the interview. They discussed Mallory's history in Maryland (R 2081). Mr. Mallory had said that when he was a young man he had been charged with burglary for entering someone's house. She was asked whether she recalled telling the detective that Mallory had told her that he had been *incarcerated* for some time in Maryland. She indicated that Mallory told her that he had been in a rehabilitative program. He had entered a lady's house who had been washing her hair and walked behind her and put his hand out in front of her. He didn't touch her but she screamed (R 2082). He told her about a rehabilitative or experimental program. It was a new program. They didn't discuss it more than that. She said that Mallory had also told her that he had a relationship with a woman which had ended. She was an ambassador's wife or something like that (R 2083). They were divorced. Mallory told her that he thought he had seen this woman dancing in a topless bar. He said that he

went to nude bars as he had insomnia and it was something that would be available (R 2084). He also told her that he wanted to have plastic surgery to have his nose and the top of his ear fixed. He felt that he had a nose disfiguration. She indicated that she had talked to the detectives about Mallory's being apprehensive that people were following him or being paranoid (R 2085). She further recalled talking to the detectives about what she perceived as the two personalities that Mallory had. One personality was very easy going but there was another personality in which he withdrew into himself (R 2086). She did not remember Mallory telling her that he had been in jail. He told her that he was in a rehabilitative program. It was for ten years (R 2087). He indicated that it was as a result of the burglary. He told her that he went to court on it (R 2088). She indicated that Mallory bathed everyday after work (R 2089). She was aware that he had pornographic tapes (R 2090). She also indicated that he had lost his security clearance. She remembered discussing Mallory's drinking with Detective Horzepa. She also recalled discussing Mallory's smoking of marijuana. She sometimes wondered if when he smoked marijuana it made his personality change (R 2091). She recalled telling the detective that Mallory did not have male friends. She indicated that because of the fact that she had an accident a few years ago that sometimes there were memories that she did not have (R 2093).

On cross examination she indicated that Mallory was a gentle, kind and caring person in their relationship. He was never sexually aggressive toward her or any female and that such

acts would be out of his character. She never saw him so much as get a speeding ticket. She indicated that he was just a gentle, laid-back man (R 2094). The state objected to the defense presenting reputation evidence as to the violence of the victim since there was no evidence that Wuornos knew of such prior acts of violence. Nevertheless, the court allowed the defense to call Jacqueline Davis as a witness (R 2096). The defense *chose* not to call her.

It is clear from the circumstances of this case that defense counsel sought to not only require the state to do its job for it but also to lead the trial judge around by the nose. The real complaint before the court is that such endeavor was not successful. In *Richardson v. State,* 246 So. 2d 771 (Fla. 1971), this court set forth a mandatory procedure to be followed by the trial court in the event of a discovery violation. In assessing the extent to which sanctions should be imposed for violation of the discovery rules, the trial court must specifically determine whether, and to what degree, the violation has prejudiced the other party. *State v. Hall,* 509 So. 2d 193 (Fla. 1987). Although the court has broad discretion in making this determination, such discretion may only be exercised after the trial judge has made a formal inquiry -- commonly referred to as a *Richardson* hearing -- into all of the circumstances surrounding a party's noncompliance with the discovery rule. *Lucas v. State,* 376 So. 2d 1149 (Fla. 1979). Where the trial court determines that no discovery violation has occurred, a *Richardson* hearing is not required. *Matheson v. State,* 500 So. 2d 1341 (Fla. 1987). In the record in

this case a reasonable inference from the entire colloquy could be drawn that Judge Blount found that there was no discovery violation. Judge Blount indicated that he believed Mr. Nolas knew all about it before he filed the motion (R 20). The state indicated that it had given the tape to previous defense counsel. Mr. Nolas claimed that he was unable to contact Jacqueline Davis because he did not have her address. No mention was made that information about the tape was given to Mr. Nolas through Detective Horzepa. Yet, somehow Mr. Nolas knew about the tape and filed a motion to compel. It can only be assumed that he was in possession of such information from some source prior to requesting it, the probable source being the previous public defenders. Jacqueline Davis' name was listed as a witness and Mr. Nolas could well have asked the state for her address at any time prior to the hearing. Thus, it is clear that the information was readily available to the defense by the exercise of due diligence through deposition, subpoena or other means. The evidence was not even discoverable in the first instance. Evidence as to character alone may be introduced under appropriate circumstances to help show the actions or intentions of a victim with respect to the defendant. Such evidence may not be used to explain a defendant's action unless the proper foundation of prior knowledge has been established. *Hodge v. State,* 315 So. 2d 507 (Fla. 1st DCA 1975). The viciousness of the character of the deceased can only be shown where a plea of self-defense is interposed. *Williams v. State,* 238 So. 2d 137 (Fla. 1st DCA 1970). While evidence of specific prior acts of violence by

the deceased, known to the defendant at the time of the slaying, may be admissible on behalf of the defendant on the issue of self-defense to prove the reasonableness of the defendant's fear at the time of an alleged murder, evidence of such specific acts of violence is not admissible to show proof of the deceased's violent and dangerous character. Proof of the deceased's violent character may be shown only by his general reputation in the community, i.e., what is reported or understood to be the community's estimate of the person's character. *Rolle v. State,* 314 So. 2d 167 (Fla. 3d DCA 1975). Pursuant to Wuornos' own testimony she had only met Mallory by virtue of being picked up on the highway and therefore had no evidence of specific prior acts of violence by him. The state has no duty to turn over inadmissible evidence. Such evidence would not even have led to discoverable evidence since documentation of such criminal history would have been no more admissible than the testimony sought to be introduced by Jacqueline Davis. Even though there was no discovery violation, the sage trial judge in this case wished to eliminate any possible controversy on appeal. Ms. Davis was made available to counsel. A proffer of her testimony was put on the record. The court then allowed the defense to call Jacqueline Davis as a witness even though the crux of her testimony would not be admissible (R 2096). It was the *defense* that chose not to call her as a witness. After such decision was made no objection was made for the record as to the propriety of the law in regard to prior violent acts. No further request was made for a *Richardson* hearing to apprise the trial judge that the

defense viewed his remedial measures as inadequate. Such argument is now waived. Counsel chose only to inappropriately cast the occurrences below into a *Richardson* bouillabaisse. The defendant should hardly be heard to complain of the fact that she made a tactical decision not to call a witness who would have testified that despite evidence of one prior bad act as a youth that the deceased victim was a gentle, laid back man. There are no *Richardson* implications in this scenario. Even if there were, it is clear that *Richardson* was satisfied since the judge heard extensive argument and determined that remedial steps would eliminate any prejudice to the defendant.

Reports or summaries made by agents of the prosecution condensing a witness testimony for use at trial is an example of work product to which the accused is not ordinarily entitled except as may be made available at trial for the purposes of effective cross examination within the scope of the right of confrontation. *State v. Gillespie,* 227 So. 2d 550 (Fla. 1969). In the present case, defense counsel had access to the notes of Detective Horzepa and was able to cross examine him so that, again, there was no need for a *Richardson* hearing to determine whether there was a discovery violation, whether it was willful, or whether it prejudiced the defense. As to the witnesses concerning the similar fact evidence, the court properly determined that notice of similar fact evidence was given some five months prior to the trial. Defense counsel agreed that the state indicated what *Williams* Rule evidence it intended to introduce. The state indicated that it had provided every

document that it had in its possession (R 1381-83). Counsel was provided reports nevertheless and cross examined the witnesses (R 1324-25, 1365-66; 1604-5). Again, this is a bogus *Richardson* claim. *See, Justus v. State,* 438 So. 2d 358 (Fla. 1983). The discovery rule, in any event, does not create a duty on the prosecutor's part to conduct investigations on the defendant's behalf or actively assist the defense in investigating the case. *Hansbrough v. State,* 509 So. 2d 1081 (Fla. 1987).

II APPELLANT WAS NOT DENIED A FAIR TRIAL BY THE INTRODUCTION OF EVIDENCE OF COLLATERAL CRIMES, WHICH EVIDENCE DID NOT BECOME A FEATURE OF THE TRIAL.

Appellee would submit that this issue is waived. While appellant originally sought to exclude evidence of collateral crimes her position thereafter was not consistent with such intent. On cross-examination of Tyria Moore the defense opened the door and brought out the fact that Wuornos and Moore had been driving *another* car and that Moore left when she saw composites of her and Wuornos on television in regard to a crime other than the Mallory case (R 977). The defense also brought out the fact of movie deals based on Wuornos' life and actions (R 1008). Wuornos then took the stand in the defense case and explained inconsistencies by indicating that she was referring to murders other than the murder of Richard Mallory (R 1959-2065; 2061). In closing argument defense counsel stated: "And when you consider that Mr. Spears, that Mr. Carskaddon and the other things that Mr. Tanner talked to you about, he suggested that I somehow argued that it wasn't admissible, *of course, those items are admissible,* you saw them, if they weren't admissible, they wouldn't be here." (R 2194). An adequate objection must be made at trial to such evidence. *Correll v. State,* 523 So. 2d 562, 566 (Fla. 1988); *Crespo v. State,* 379 So. 2d 191 (Fla. 4th DCA 1980). Appellant should not be heard to complain that such evidence was admitted and became a feature when she takes a position inconsistent with her objection, thereby waiving it and focuses the jury's attention on collateral matters herself. *See, Sias v. State,* 416 So. 2d 1213 (Fla. 3rd DCA 1982).

Wuornos is entitled to no relief, even if the claim could be entertained. Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. $ 90.404 (2)(a), Fla. Stat. (1992). Evidence of other crimes is also admissible to prove common scheme or design. *Walker v. State,* 403 So. 2d 1109 (Fla. 2d DCA 1981). These familiar categories stated as a basis of admissibility of similar fact evidence are given by way of example and not by way of limitation. *Cotita v. State,* 381 So. 2d 1146 (Fla. 1st DCA 1980). In a normal trial, evidence revealing other crimes is admissible if it casts light upon the character of acts under investigation by showing motive, intent, absence of mistake, common scheme, identity or system or general pattern of criminality so that evidence of such offenses has a relevant or material bearing on some essential aspect of the offense being tried. *Sireci v. State,* 399 So. 2d 964 (Fla. 1981) Similar fact evidence may be admitted to establish a pattern of conduct similar to the pattern of conduct in the crime. *Jones v. State,* 398 So. 2d 987 (Fla. 4th DCA 1981) While there must be more than a general likeness between the similar act and the crime charged to allow admission of similar fact evidence, absolute factual identity is not required. *Estano v. State,* 595 So. 2d 973 (Fla. 1st DCA 1992) The test for admissibility of evidence of collateral crimes is relevance. *Heiney v. State,* 447 So. 2d 210 (Fla. 1984)

As long as evidence of other crimes is relevant for any purpose, the fact that it is prejudicial does not make it inadmissible. *Sireci, supra*. Evidence which has a reasonable tendency to establish the crime charged is not inadmissible because it points to another crime committed by the defendant. *Yesbick v. State,* 408 So. 2d 1083 (Fla. 1982). Similar fact evidence is generally admissible, even though it reveals the commission of another crime, as long as the evidence is relevant to a material fact in issue and is not admitted solely to show bad character or criminal propensity. *Gore v. State,* 599 So. 2d 978 (Fla. 1992) Evidence of collateral crimes is admissible if it is not intended solely to demonstrate criminal propensity and if the two crimes share some unique feature suggesting the same perpetrator. *State v. Smith,* 586 So. 2d 1237 (Fla. 2d DCA 1991)

In the present case, the collateral crime evidence reflected that similar incidents took place in the same type of wooded or isolated areas; within the course of months of the murder in question; involved the same weapon, a .22 caliber revolver; the same modus operandi, i.e. hitching a ride, soliciting an act of prostitution, driving to a secluded area, robbing, and ultimately shooting the victims several times in the torso and abandoning their vehicles in another location; the same type of victim, a middle-aged or aging man as opposed to a stronger younger male with family ties; same type of offense; and such evidence was clearly admissible as it relates to a material fact in issue in that it demonstrated Wuornos' motive, intent, and state of mind, and the evidence was not geared toward

demonstrating her bad character. *Cf., Randolph v. State,* 463 So. 2d 186 (Fla. 1984).

A similar case is *Gore v. State,* 599 So. 2d 978 (Fla. 1992), in which this court held that the collateral crime in which the defendant had allegedly stabbed a female victim was sufficiently similar to the charged murder to be admissible to establish identity and intent as both victims were transported to the site of the attack in their cars and suffered trauma to the neck area, and the defendant stole both victims' jewelry, pawned it shortly afterwards, fled in their automobiles and represented that he had obtained the automobiles from a friend or relative. The collateral offenses in this case also prove a common scheme or design as evidenced by similarities in the crimes, the fact that they occurred in the central Florida area off of major thoroughfares, which for a hitchhiking prostitute/robber/murderer would be tantamount to a neighborhood, and the locker at the mini warehouse which provides a monetary theme for Wuornos' continuing actions as well as a repository for undisposed of property. *See, also, Buenoano v. State,* 527 So. 2d 194, 197 (Fla. 1988). Evidence of subsequent robbery/murders would also be relevant to negate Wuornos' claim of self-defense.

The collateral murders did not become a feature of the trial. Evidence elicited by the state was confined to establishing that such crimes occurred, that they were committed by Wuornos', and that they were relevant. The prosecution went to great pains not to make the collateral evidence a feature of the trial. The videotape of her confession was condensed and

edited so as to exclude matters not concerning the Mallory case (R 1871).

The prosecutor's cross-examination of Wuornos' was hardly geared toward eliciting evidence of collateral crimes. Such matters were interjected into the proceeding by Wuornos herself in her answers to questions on cross-examination. When caught in a logical contradiction Wuornos would explain away inconsistencies by siphoning off the facts of this case to other murders and claiming hysteria and confusion. (R 2025-26; 2028-29; 2034; 2040).

The prosecutor did not "harp" on collateral murders during final summation. The prosecutor simply stated:

> Well, every case is different. But it's not unusual to have similar fact evidence in the case where there's evidence of other matters that are relevant and material brought up in the trial for the substantive offense ... And so there's nothing extraordinarily unique about what's happened here in this courtroom. I think probably the most unique thing is the woman is the circumstance. That's probably the most unique twist of the whole case. Because this woman set about a pattern of behavior that is unique. You were told by Mr. Miller that other juries in other cases would render verdicts on the other killings. And that's entirely true. You are not here to find her guilty or innocent with regard to the other killings. The only verdict that you are going to be asked to render would be that regarding Mr. Mallory. But at the same time it doesn't mean you should not fully face your responsibility... (R 2167)
>
> Then Mr. Miller said that all of these other cases had absolutely nothing to do with the murder of Richard Mallory.

That's incredible. That's incredible under the law and under the facts and under the circumstances of his case. Similar fact evidence, that is evidence of other crimes, is relevant and material and properly and legally should be considered when ruled admissible by the Court in criminal cases and even in civil cases. The case involving Mr. Mallory is the case on trial. This is the only case in which you are to determine guilt or innocence. But with regard to the second victim, Mr. Spears, the third, Mr. Carskaddon, the fourth, Peter Siems, fifth, Troy Burress, Dick Humphreys, last Walter Antonio in their automobiles in the locations of where the bodies were found and where the cars were found is all relevant and material key issues in this case. The key issues, and an instruction was read to you, I know it was a while ago, you will hear, I think, the same or substantially the same instruction again before you go to the jury room, but basically indicates that similar fact evidence, that's evidence of other crimes, when it's relevant to prove identity, opportunity, preparation, plan, common scheme or plan, patterned incriminality, intent or motive. In this case, we submit the absence of self-defense is relevant, that's relevant. It's relevant to what she did to Mr. Mallory. (R 2169-270).

Richard Mallory was killed in December, December 1st precisely, eleven miles from the downtown Daytona Beach area. He was fifty-one years old. David Spears, killed in June, a hundred and twelve miles. Charles Carskaddon in June, ninety-four miles from Daytona. Peter Siems reported missing in June, body never recovered, this is the one she said she left in Georgia. Troy Burress, sausage man, the way she identified him and by his vehicle, August 4, 1990, sixty-four miles from Daytona. Mr. Humphreys, he was the HRS man, September, 1990, sixty-eight miles. Walter Antonio, November, a hundred and forty-seven miles. What do these men

> have in common? All of them were white males between the age of thirty-nine and sixty years old. They are all traveling major thoroughfares of Florida. They are all traveling alone. Each one of them made a fatal mistake. They picked up Aileen Wuornos. In each of those cases, she propositioned them for sex and she ultimately killed them all in isolated areas where there would be no witnesses. She shot every one of them in the torso, a couple she also shot in the head, multiple gunshot wounds all from a .22 caliber hollow point. You heard the bullets described over and over again, virtually the same bullets, same pistol as admitted by her. Everyone of them's property was stolen and their vehicle was taken. And the vehicle was wiped clean in the case of Mr. Mallory, Mr. Spears. The -- Mr. Carskaddon's vehicle was stripped, it was on the side of the highway, before the police were able to do much with it. Peter Siems, that was the one that turned over on the 4th July and both the women were in that car, both the women were riding around in that car, I say both women, Tyria Moore and Ms. Wuornos. And that's the vehicle in which her, Aileen Wuornos' bloody handprint was found. The other three vehicles were all wiped clean again. The license plate was removed on five of the seven vehicles. All the vehicles were left abandoned and they were left abandoned in a range of from twelve to a hundred seventy miles. And finally, the propery of three of the five men was found in Aileen's warehouse. This evidence demonstrates a pattern and a method of criminality and intent and plan to carry out robberies and murder on the highways of the State of Florida by this woman. And she had picked a selected target-type of individual to kill. (R 2170-2173).

The prosecutor's final summation as recited above reflects only the evidence admitted at trial necessary to show the commission of such other offenses and its relevance to this case.

There was no undue emphasis of such evidence and the prosecutor, himself, even informed the jury that it was not their job to decide guilt or innocence in the collateral cases. The likelihood that the jury would give undue emphasis to such evidence was also diminished by an instruction by the court prior to the admission of such evidence:

> Ladies and Gentlemen of the jury, the evidence that you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, the absence of mistake or accident on the part of the defendant and shall -- and you shall consider it only as it relates to these issues. However, the defendant is not on trial for a crime that is not included in the Indictment that has been read to you. (R 1189).

As much as possible the trial court judiciously excluded from evidence photos which could be considered to be bordering on the gruesome or were unnecessary. The state was allowed to admit over objection four autopsy photos of Charles Richard Humphreys (R 1292-94). All of the autopsy photos of Humphreys were not offered into evidence. Dr. Janet Pillow carefully selected only those poloroids that would assist in making her testimony more meaningful to the jury (R 1286). The court noted that these photos were "cleaned up pictures." (R 1288). Humphreys suffered gunshot wounds to his left chest, left back, right back, upper back of the right shoulder, left side of the back of the head, right side of the abdomen and on the back of the right wrist (R 1290-1292). The nature of such wounds and trajectory of the

bullet could be more fully comprehended by the jury by virtue of the use of photos. One of the photos, Exhibit 52-4 was only a photograph of the short sleeved white shirt that Humphreys was wearing when he was delivered into the morgue (R 1292). Another photograph, Exhibit 52-3 reflected only the back of the left side of the head where the gunshot wound entered (R 1292). The remainder of the photos portrayed gunshot wounds to the far left side of the back and the right lower quadrant of the abdomen and the exit wound and the right wrist (R 1293). Such photos were clearly an aid to the jury in understanding the nature of Humphrey's wounds. The fact that the doctor would have been able to testify as to the injuries that were sustained by Mr. Humphreys without the use of the photographs was not ascertained by defense counsel until after the witness had fully testified and on cross examination (R 1309). Defense counsel simply failed to voir dire Dr. Pillow as to this fact prior to her testimony and use of the photographs. In comparison, counsel did choose to voir dire Dr. Pillow as to photographs of David Spears and when the doctor admitted that she could testify without photographs the court sustained the objection and did not allow such photos into evidence (R 1304-1305). Appellee would submit that this issue has been waived.

Mr. Humphreys' briefcase was admitted as State's Exhibit 76 over on-going objection by the defense as to similar fact evidence (R 1445). This briefcase was found along with other items in Wuornos' locker at Jack's Mini Warehouse (R 1437; 1445). The briefcase was clearly relevant to establishing a pattern of

criminality whereby Wuornos posing as a damsel in distress accepted rides with men then robbed and killed them in secluded areas and confiscated their belongings to pawn or hold in her storage locker.

Introduction into evidence by the state of a single photograph of Troy Burress' body as it was found hardly amounted to overkill in relation to the similar fact issue. Burress was found lying face down with his hands under his body covered with palm fronds (R 1350). This photo was hardly used to inflame the jury with evidence of Wuornos' other handiwork. When decomposition sets in a victim is already dead so the jury could hardly have been inflamed by the fact that Burress was identified by dental records. Such evidence was admissible so as to establish the identity of the victim.

Contrary to appellant's assertion pictures of David Spears' badly decomposed body were not admitted into evidence. The photographs of x-rays of Spears' body that were taken in the morgue and demonstrated the location of the bullets were admitted into evidence without objection by counsel (R 1301-1302). The state attempted to introduce another group of photographs actually showing the body of the deceased (R 1302). Counsel objected to pictures of a decomposed skeletal body on the basis that the prejudice of the two photographs greatly outweighed their probative value and the doctor had the x-ray photographs from which she could testify (R 1303). Defense counsel voir dired Dr. Pillow and established that she would be able to testify without the photographs. The court then sustained

counsel's objection and the photos were not admitted into evidence (R 1304-1305). It is highly unlikely that the jury would be prompted to pillory Wuornos on the basis of x-rays.

In essence, what the appellant complains of is the fact that the state established the corpus delicti of the similar fact crimes. Had such evidence not been introduced the appellant would be before this court complaining of the lack of evidence of such crimes. The number of victims was within the control of Wuornos. The circumstances of each victim's death established a common scheme or pattern of criminality.

Contrary to appellant's assertion, absolute factual identity is not required, as previously argued above. It is always possible to point to some dissimilarities. In this case, however, as in *Gore, supra,* the similarities are overwhelming. "These points of similarity 'pervade the compared factual situations' and when taken as a whole are 'so unusual as to point to the defendant.'" *Kight v. State,* 512 So. 2d 922, 928 (Fla. 1987)(quoting *Drake v. State,* 400 So. 2d 1217, 1219 (Fla. 1981). None of the murders occurred before the time that Wuornos came into possession of the .22 caliber revolver (R 1830). Each of the men that was murdered by Wuornos was a white male. Each victim was beyond an age that could be described as youthful (R 1747). They were traveling alone on interstate highways. Each victim was picked up by Wuornos while hitchhiking, by her own admission (R 1069). Each had multiple gunshot wounds through their torso with the exception of Mr. Siems whose body has not yet been located (R 859-860; 1224; 1291; 1393; 1473). Wuornos

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said she always aimed for the torso (R 1739). The body of each victim was found in an isolated area (R 747; 1337; 1430; 1577). Personal identification and property was taken (R 1076; 1233; 1338). They were killed with a .22 caliber revolver (R 1300; 1477; 1656-1657). It was loaded with .22 caliber bullets which were recovered from each victim's body with the exception of Mr. Siems (R 865-867). Wuornos admitted to using the same gun and the same bullets to murder Siems. All of the bullets were Stinger brand, CCI manufacturer, with a six right hand twist, .22 caliber hollow point, jacketed (R 910-912; 1368-1375; 1376; 1550; 1563). The bullets were of the same type of caliber and model and make and manufacturer as was the weapon recovered in Rose Bay (R 909-910; 914; 918). The weapon found in Rose Bay was loaded with similar type ammunition (R 847; 907). In each case the car was taken (R 1330). The victims were discovered in locations different from where their vehicles were ultimately found (R 701; 717; 1196; 1203; 1337; 1338; 1424; 1455; 1457; 1493; 1576; 1581). All their personal property had been removed from the cars (R 733; 818; 1080; 1347; 1352; 1580; 1671). Their pockets had been ransacked (R 773; 1248). The cars had been wiped clean of prints by Wuornos (R 1080). What is established by these similarities is a pattern. It is a signature that establishes the motive and intent of Wuornos to rob each of her victims. Many of these victims were shot in the back or the head, which exhibits a fact pattern that Wuornos was not acting in self defense on any of these occasions (R 1291; 1393; 1577; 1593). During the course of Wuornos' confession she described numerous articles that she

910 F.2d at 1528-1530. The police in the present case had no duty to inform Wuornos that Moore had been eliminated as a suspect, as appellant seems to suggest. That is, assuming that she was totally eliminated. Numerous jurisdictions were involved in the investigation. Judge Graziano obviously did not agree with appellant that the police actions in this case were reprehensible. She indicated that the police were "obviously aware of the relationship and the feelings that Defendant Wuornos had for Ms. Moore, but to characterize such knowledge as exploitation or abuse, is unsubstantiated by the facts." (R 3484). The court found Ms. Moore to be an agent of the police and looked at her conduct and attributed it to the police to determine if some fundamental fairness had been violated. The court properly determined that had the same statements or misstatements been made by the police to the defendant they would have been permissible and the fact that they were made by Ms. Moore made them no more less appropriate (R 4386). It should be remembered that at this point in time Wuornos was not in custody on the murder charge and the case was essentially at the investigative stage. Appellee would submit that the police action in this case is no more "reprehensible" than the behavior engaged in in sting operations where a police decoy is used. It was never demonstrated below that Tyria Moore was in any coerced and it is clear she was nothing more than a citizen who wanted to clear herself. The court also examined Wuornos' capacity to resist that pressure and determined that while the relationship had a bearing on Wuornos' choice to confess Wuornos was still

capable of making a rational decision after reflecting on her conduct and chose to confess (R 4386). The lower court viewed the audio and video tapes in this case and determined that while the evidence suggested that Wuornos was concerned about Moore and desired to take care of her there was nothing to indicate that such concern was so overpowering as to deprive Wuornos of rational thought (R 4381). In contrast to the appellant's assertion, the court below properly found that there was no evidence to substantiate the claim that Wuornos' mental state and level of functioning was impaired (R 4383). The record substantiates such finding. It must also be remembered that Wuornos was given *Miranda* warnings prior to the statements and provided counsel who cautioned her against doing so. *Miranda v. Arizona,* 384 U.S. 436 (1966).

IV THE TRIAL COURT DID NOT IMPROPERLY RESTRICT VOIR DIRE OF PROSPECTIVE JURORS AND DID NOT VIOLATE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO AN IMPARTIAL JURY BY IMPROPERLY DENYING CHALLENGES FOR CAUSE, BY DENYING THE REQUEST FOR SEQUESTERED VOIR DIRE, AND BY DENYING A REQUEST FOR CHANGE OF VENUE.

The granting of individual and sequestered voir dire is within the trial court's sound discretion. *Randolph v. State,* 562 So. 2d 331, 337 (Fla. 1990). Wuornos has not shown an abuse of discretion by the trial court that warrants reversal. Appellant has not cited one instance in which the statement of a juror is said to have tainted a juror listening to such statement, or that such juror could not put aside everything, including that, which he had heard about the case and render a fair and impartial verdict. Appellant's argument as to media articles is not based on sound logic. Appellant requested individual voir dire on the theory that it would be arbitrary to expose one juror to the content of publicity heard by another juror. The underlying presumption would be that such juror would be exposed to information he had not previously been exposed to. It makes no sense then to claim that Wuornos is prejudiced by virtue of the fact that individually defense counsel could not explore headlines and himself impart knowledge to that juror in an individual capacity.

While the constitutional standard of fairness requires that a defendant must have a panel of impartial, indifferent jurors, a qualified juror need not be totally ignorant of the facts and issues involved. The mere existence of preconceived notion as to

the guilt or innocence of an accused, without more, is insufficient to rebut the presumption of the juror's impartiality; it is sufficient that the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Murphy v. Florida,* 421 U.S. 794 (1975). The colloquy set out by appellant herself demonstrates that these jurors either were not exposed to publicity, did not pay much attention to it, or could lay aside their impressions or opinions and render a verdict based on the evidence presented in court.

Jury Degayner indicated that his answer would be the same as the preceeding jurors in regard to understanding the concepts of reasonable doubt, burden of proof and presumption of innocence. He indicated that he felt he could give both the state of Florida and the defendant a fair trial (R 595). He further indicated that his answer would be substantially the same, i.e., yes, as the previous juror with regard to not allowing any opinion he formed outside the courtroom to sway him and to judge the case solely upon the facts as he heard it today (R 596). He indicated that he would follow the law as Judge Blount told him. He understood that he was not obligated if he found Wuornos guilty of first-degree murder to automatically recommend the death penalty. He indicated that he would weigh the facts and evidence to make a determination (R 601). He indicated that he rarely read (R 602). He indicated that he had heard news flashes and things of that nature, mostly on the car radio but he did not come to a conclusion about what kind of person she was or anything like that based upon what he heard on

the radio. He indicated only that he had a real sick feeling *for* the person, whoever it was that committed the crime (R 604). He indicated that the fact that Wuornos was a prostitute would not prevent him from being fair and impartial (R 605). He had no personal beliefs against the use of alcohol. It is clear that there was no basis to challenge Juror Degayner for cause. Mr. Pundit had not been exposed to media coverage other than flashes on the news. Nothing came into his mind as to detail. He indicated that he would weigh the facts as he heard from the witness stand and any evidence that was admitted. He agreed that a prostitute as opposed to any other person has a right to defend herself (R 541). He recognized his job as a judge of the facts in the guilt or innocence phase (R 542). He had no opinion for or against the death penalty (R 543). He indicated that he would weigh the facts of the case and apply the law that Judge Blount gave him. He indicated that if he were selected to serve as a juror he could give his time and attention to the testimony that came before him and the instruction of the law to be given to him by the court and arrive at a verdict (R 547). It is also clear that there was no valid challenge for cause as to this juror. Refusal of the motion for change of venue, sought on the ground of adverse publicity does not constitute reversible error where there was no showing that the defendant was prejudiced to the extent that a fair trial was impossible under the circumstances. *McClendon v. State,* 196 So. 2d 905 (Fla. 1967).

V THE JURY'S PENALTY PHASE VERDICT WAS NOT UNCONSTITUTIONALLY TAINTED AS A RESULT OF IMPROPER INSTRUCTIONS, EVIDENCE AND ARGUMENT.

The penalty phase in this case took place on January 28th through January 31, 1992 (R 3501). Counsel and the court did not have the benefit of this court's opinion in *Castro v. State*, 597 So. 2d 259, 261 (Fla. 1992). The trial court, therefore, instructed the jury on the pecuniary gain circumstance and the felony murder factor with robbery as the stated felony (R 3596), without a limiting instruction and over the objection of defense counsel (R 3540, 3542-43, 4641). The trial court did not find both aggravators in its sentencing order, however. It found that Wuornos was engaged in the commission of a robbery at the time of the murder and in accordance with *Provence v. State*, 337 So. 2d 783 (Fla. 1976), merged or subsumed the pecuniary gain factor with the felony murder factor to avoid any prohibited doubling. In its opinion this court did not indicate that the *Castro* decision was to apply retrospectively. Appellee would submit it is not a fundamental change of the law requiring retroactive application. It is a mere evolutionary refinement. *See, Witt v. State*, 387 So. 2d 922 (Fla. 1980). The *Castro* decision did not overrule but merely "clarified" the holding in *Suarez v. State*, 481 So. 2d 1201, 1209 (Fla. 1985), which held that it was not reversible error when the jury was instructed on both factors as long as the trial court did not give the factors double weight in its sentencing order, by indicating that where a limiting instruction is requested or objection made the jury should be told that should it find both

aggravating factors present, it must consider the two factors as one. 597 So. 2d at 261. The jury's verdict is not tainted, in any event. Pursuant to *Sochor v. Florida,* 112 S.Ct. 2114, 2122 (1992), jury error cannot be presumed because of instructions on two different legal theories only one of which was supported by the evidence. In this case they are actually both supported by the evidence. A pecuniary gain motive is essential to a robbery. The same facts support both factors. The weighing process is not a numerical tabulation. The jury, thus, considered nothing inappropriate. If we cannot know what the jury relied on because it does not reveal the aggravating factors on which it relies we cannot know what weight it accorded any factor. We cannot presume error. Especially where pecuniary gain is a constituent part of the murder during the course of a robbery factor. Separate consideration wouldn't result in double weighing because pecuniary gain provides only a *motive* for the robbery-murder. This is not reversible error.

As argued elsewhere herein, the evidence does support an instruction on the cold, calculated and premeditated aggravating factor. This court has previously rejected the claim that the instructions on the cold, calculated and premeditated factor are vague. *Smith v. Dugger,* 565 So. 2d 1293, 1295 n. 3 (Fla. 1990); *Brown v. State,* 565 So. 2d 304 (Fla. 1990). The instruction offered by appellant is not accurate as a matter of law. There does not need to be a "series" of events before the cold, calculated and premeditated factor can be found. The last paragraph would not even serve to appropriately apprise the jury

that what is required is "heightened" premeditation pursuant to *Rogers v. State,* 511 So. 2d 526 (Fla. 1987). Assuming that there was error, it was harmless. The CCP factor was properly found by the trial judge based on the facts of this case. With or without this aggravating factor this case will withstand a proportionality analysis. The jury cannot have gone too far afield when the result reached in this case will be similar to similarly situated cases. The death sentence may also be affirmed when an aggravating circumstance is eliminated if the court is convinced that such elimination would not have resulted in a life sentence. *Hamblen v. Dugger,* 546 So. 2d 1039 (Fla. 1989). *Espinosa v. Florida,* 112 So. 2d 2926 (1992), hardly mandates vacation of the death sentence. *Espinosa* is often invoked for the proposition that any error cannot be cured. *Espinosa* does not stand for such a proposition. In *Espinosa,* this court responded to a vagueness challenge with what amounted to a demurrer by citing *Smalley v. State,* 546 So. 2d 720 (Fla. 1989) for the proposition that any error can be cured by the trial judge, the final sentencer. *Espinosa v. State,* 598 So. 2d 887 (Fla. 1991). This court did not address the propriety of the instruction. *Espinosa* determined only that neither the jury nor the judge must be permitted to weigh invalid aggravating circumstances. 112 S.Ct. at 2928. *Espinosa* and subsequent cases were remanded to this court for further proceedings. *Espinosa* does not preclude this court from performing a harmless error analysis and determining that an aggravating factor was properly found pursuant to the narrowing case law of this court even if the jury

may have considered the factor for the wrong reason. This result was reached by the court most recently in *Hodges v. State,* 18 Fla. L. Weekly S255 (Fla. April 15, 1993). *Espinosa* also does not preclude consideration by this court of remaining aggravating factors, after striking the infirm factor, and determining that the death sentence is still appropriate considering also the mitigating circumstances present. The prosecutor merely indicated in closing argument that premeditation had been established in the verdict (R 3568). The prosecutor did not state that any type of "heightened" premeditation had been established by the verdict or that the jury should go ahead and find this factor based on their verdict. In any event, what the prosecutor says is not the law and the court properly instructed the jury that the arguments of counsel are not to be considered as evidence or *instructions on the law* (R 3563). Regardless of what the prosecutor said, CCP is applicable and any misstatement is harmless error.

Appellee has argued elsewhere herein that the aggravating factor that the crime was committed during the commission of a robbery was appropriately found as well as the avoiding arrest/witness elimination aggravating circumstance. Thus, these instructions were properly given and such instructions are understandable by any man of reasonable understanding and mental acuity. The heinous, atrocious and cruel instruction as given has been approved by the United States Supreme Court in *Proffitt v. Florida,* 428 U.S. 242 (1976). The language that "the kind of crime intended to be included as heinous, atrocious or cruel is one

accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim," is quite obviously instructional in nature and it matters little whether the instruction is by "example" or direct statement as such language is still directorial. Such argument is totally without merit.

This case hardly falls within the ambit of *Wike v. State,* 596 So. 2d 1020, 1025 (Fla. 1992). In *Wike,* the prosecutor emphasized the defendant's lack of remorse to the jury in closing argument. That did not occur in this case by virtue of the complained of statement that "He [Dr. Krop] went to say that he would not find her antisocial perhaps because she displayed a conscience and then I cross-examined him on that issue." (R 3573). The prosecution had every right to present evidence and argument that Wuornos was a sociopath or had an antisocial personality disorder as opposed to having a borderline personality disorder. Such distinction is vital in determining the applicability of the statutory mental health mitigators. By definition a sociopath or one with an antisocial personality disorder is one without a conscience. Such person would be unlikely to act under an extreme emotional disturbance and while capable of conforming his/her conduct to the requirements of law is not interested in so doing. Wuornos chose to put her mental condition in issue and the state has every right to present evidence of a differing diagnosis. That such diagnosis may not do much for Wuornos is not a proper consideration. Eliciting testimony concerning the aspects of a mental illness is not the equivalent of blatantly

arguing lack of remorse. This evidence was volunteered by Dr. Toomer, the defense expert, in the first instance. He indicated that an individual suffering from an antisocial personality disorder is often referred to as being without a conscience, which would not apply to Wuornos since she exhibited remorse (R 3443). Even in the event that this court could equate such with arguing lack of remorse or find that there was some type of overkill the state would submit that there is absolutely no way the jury would not have discerned that Wuornos *was* totally without remorse in view of her own confessions in the guilt stage but there is no evidence it was considered in aggravation, and any error, therefore, is harmless under *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986).

Appellee would note that this next issue is somewhat moot. Since the time of the sentencing phase Wuornos has entered guilty pleas for other murders and such appeals are now before this court. Should she be resentenced such other crimes can certainly be considered again. *See Preston v. State,* 564 So. 2d 120 (Fla. 1990); *Stewart v. State,* 558 So. 2d 416 (Fla. 1990). Prior to the colloquy in question the prosecutor had asked Dr. Toomer if he was aware of Wuornos' statement that the men deserved to die because they were cheating on their families without objection. Also without objection the prosecutor asked Dr. Toomer if he was aware that Wuornos had told numerous stories with regard to each killing (R 3447). While defense counsel objected to mention of the shooting of Mr. Carskaddon on the basis that such evidence was beyond the scope of the physical hearing (R 3449) after the

prosecutor brought out the details of the various stories Ms. Wuornos had given concerning the murder of Carskaddon defense counsel only objected to such evidence as being argumentative and not a question. He specifically moved for a *mistrial* on the basis that the information brought out was contained in a *compound question* (R 3451). Defense counsel previously sat silent as this same information was elicited from Dr. McMahon before (R 3257-3258). Appellee would submit that this issue is waived for lack of contemporaneous objection and request for a mistrial on proper grounds. The contemporaneous objection rule has been held by this court to apply to evidence about other crimes and the failure to object properly at the time such evidence is introduced waives the issue for appellate review. *Correll v. State,* 523 So. 2d 562, 566 (Fla. 1988). Appellee would also note that nowhere was it argued that such question elicited nonstatutory aggravation. In any event, the collateral crime evidence was properly admitted in the guilt phase and heard by the jury. The question put to the doctor concerned variations on Wuornos' stories of the death of Carskaddon. The question was designed to determine the basis for the doctor's diagnosis since he did not know the facts of the Mallory murder, did not verify Wuornos' self reporting, and refused to acknowledge that the varying stories told by Wuornos were lies (R 3445-3451). Even if such information was improperly before the jury, such error is harmless. If the jury wanted to find nonstatutory aggravation they could have done it on the basis of the similar fact evidence in the guilt phase alone. This further evidence reflected only

that Wuornos lied, something the jury was already aware of from her testimony from the stand in the guilt phase. The sentencing order did not reflect the presence of any nonstatutory aggravation (R 4663-4678).

Appellant fails to point out that the jury was instructed that the lawyer's evidence is not the law (R 3563). The prosecutor also advised the jury their recommendation carries "great weight" as the judge did ultimately (R 3565; 3595). The instruction went beyond the jury instruction upheld in *Harich v. Dugger,* 844 F.2d 1464, 1475 n.16 (11th Cir. 1988).

As previously argued the jury was instructed on standards and aggravating factors and advised that what the prosecutor said is not law. Any complaint regarding the prosecutor's comments is waived in any event. Prior to closing argument, at the suggestion of the defense a stipulation was entered into whereby counsel agreed not to interrupt each other's closing arguments and to make objections at the conclusion (R 3560). No objection was raised at the end of argument (R 3594). After the jury instructions were given the court specifically asked counsel if there was any request for additional instructions or any matters to bring to the court's attention. Defense counsel relied on previous objections and had no further argument. Defense counsel then suggested a break (R 3600). Forty-five minutes after the jury retired and the alternates were discharged counsel finally made objections (R 3599; 3601; 3603; 3607). Appellee would submit that by setting up this scenario and by not asking for curative instructions at the time the court asked about improper

instructions or prosecutorial comments the defense waived any right to complain of these matters. It was a little late to ask for curative instructions. Evidently the defense tactic was to have wide open argument, benefit from such deal themselves then complain when it was too late to do anything about it and put themselves immediately in a mistrial posture. They should be held to their deal. In view of the facts heard by the jury in Wuornos' confession and in the penalty phase and their 12-0 vote the prosecutor hardly had to unfairly exhort them to recommend the death penalty and any error is harmless. Contrary to appellant's assertion it was Wuornos' counsel who was and is confused about mental health mitigation. Knowing right from wrong is clearly relevant to the statutory mental health mitigators. *See, Gore v. State,* 599 So. 2d 978 (Fla. 1992); *Ponticelli v. State,* 593 So. 2d 483 (Fla. 1992).

As in point VIII herein appellant does not bother to argue the propriety of requested and rejected instructions and such complaints are waived.

VI THE TRIAL COURT PROPERLY IMPOSED A SENTENCE OF DEATH BASED ON APPROPRIATE AGGRAVATING CIRCUMSTANCES AND WEAK MITIGATION.

A. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE CRIME WAS COMMITTED DURING THE COMMISSION OF A ROBBERY.

The primary motive for the murder of Richard Mallory was certainly monetary gain. Wuornos' self-defense theory was rejected by the jury. All the evidence shows Wuornos to be a prostitute/highwaywoman/murderer. That Richard Mallory was the first victim does not mean that the pattern of criminality must necessarily occur afterward. That a robbery occurred in this case is based on more than mere speculation. The constant taking of property of those she had killed certainly presents a robbery motive. That her purpose in picking up men was not simple prostitution is evidenced by the fact that she posed as something other than a prostitute. She told Bobby Lee Copas that she had carburetor trouble with her car and had two children she had to pick up at day care (R 1695-1696). She showed pictures of a little boy and girl to James Delarosa (R 1715). She also told him her car was broken and she needed money, although she did admit to being a professional prostitute (R 1723). She told Copas she wasn't a prostitute but needed the money. She kept glancing at Copas' envelope up over the sun visor which contained money from checks he had cashed at the bank (R 1698). The men who accepted her subsequent propositions after picking her up would naturally drive to isolated areas in order to have sex undisturbed. That the purpose in going there was robbery not sex is evidenced by the fact that the body of Richard Mallory was

found not only clothed but with the zipper on the pants up (R 755; 773). Wuornos claimed there was an argument about "payment" and claims to have said "you're not going to just fuck me, you're going to pay me." (R 1077). In an earlier statement, however, she claimed Mallory had already paid her (R 1071). Even though she won the struggle for her bag and gun in the second statement and could have held him at bay she shot without giving him a chance to respond because she wasn't going to allow him to "skip" out on paying her money." (R 1079). They hadn't had sex under either of the two versions. After he had fallen to the ground after two shots she shot him twice more while he was laying there and then went through his wallet and pockets for ID and money (R 1072). She got all of thirty-eight to forty-eight dollars (R 1956). It would have taken Mallory ten to twenty minutes to die so she had rummaged through his pockets while he was still alive (R 864). When the body was found his pants pockets were turned inside out (R 755). She took his personal property and leisurely went through it, throwing things away and keeping things (R 949). She ultimately pawned his radar detector and camera and put his instamatic camera in her storage bin along with the property of other homicide victims. She gave his electric razor to a gentleman at the Yugoslavian restaurant (R 1081). She used his car to move that day (R 1080). The evidence is not consistent with Wuornos' gathering of Mallory's valuables as an afterthought.[2] From the similar fact evidence in this case it is

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[2] In one of the taped conversations with Tyria Moore she indicated she was scared that they were going to lose their place where they were living together (R 2689).

clear the taking of Mallory's property was the primary motive for the murder. *Cf. Clark v. State,* 17 Fla. L. Weekly S655 (Fla. Oct. 22, 1992).

B. THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST

The dominant motive for the killing in this case was to eliminate a witness and avoid arrest. *See, Perry v. State,* 522 So. 2d 817, 820 (Fla. 1988); *Floyd v. State,* 497 So. 2d 1211 (Fla. 1986). It is not quite accurate to say that prior to the murder no crime had been committed. The evidence, as discussed above, all points to the fact that Wuornos planned to rob Richard Mallory. Even if she didn't the crime of attempted murder had certainly been committed. Thus, there was clearly a reason to eliminate, not only the wounded victim, but the only witness to the crime as well. Wuornos' intent is apparent from her statements. She said she definitely shot him to let him die (R 1080). She had to shoot Mallory to let him die. She couldn't leave him alive because if she was caught she wouldn't be able to ply her trade as a prostitute (R 1083). In generic statements as to all the murders she indicated that some of the victims were killed so she could keep hustling and the victims she killed deserved what they got (R 1748). When she shot the victims she definitely shot them to let them die (R 1749). In describing one of the murders she indicated that "When I shot him the first time, he just backed away. And I thought to myself, well, hell, should I, you know, try to help this guy, or should I just kill him. So I didn't know what to do. So I figured, well, if I help

the guy and he lives, he's going to tell on me and I'm going to -- going to get for attempted murder, all this jazz. And I thought, well, the best thing to do is just keep shooting him (R 1829). On cross-examination she acknowledged a prior statement indicating that one of the reasons she killed Mallory was because she didn't want him to tell on her after she shot him and explained that "When I made that statement I meant in referring to the fact that nobody would have believed that I was raped and that I had to defend myself. They would have said 'you are a prostitute we don't care.'" She again reiterated that no one would believe she had been assaulted as the marks on her neck were very small and looked like hickeys (R 2060-2062). Even if the jury had accepted her version of a struggle, which they did not, that struggle ultimately ceased, leaving Mallory severely wounded and Wuornos in complete control with the gun (R 1075-76). Even under her version on the stand she carefully assessed the situation and reasoned that because of her particular career rape and self-defense would not fly so she eliminated any future controversy by eliminating Mallory as a witness, carefully concealed physical evidence of the crime, and resumed her chosen profession. *Cf. Swafford v. State,* 533 So. 2d 270 (Fla. 1988); *Maharaj v. State,* 597 So. 2d 786, 791 (Fla. 1992).

Unlike the situations in cases cited by the appellant no tenuous inferences need be drawn to infer a motive for the killing. The motive is before the court by virtue of Wuornos' own words. There simply is no other reason for the killing.

C. THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE MURDER WAS COLD, CALCULATED, AND PREMEDITATED WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

Contrary to appellant's assertion the record on appeal supports the evidence relied upon by the trial court in finding this aggravating circumstance.

The killings did not begin until shortly after Wuornos came into possession of the .22 caliber revolver, which she carried in her bag and which was used in all the killings (R 1748). She indicated that she got the gun two days prior to meeting Richard Mallory (R 1083). Up until that time she had engaged in uneventful sex with over two hundred and fifty thousand men, according to her own calculations (R 1083). Her customers were men over thirty-seven years of age. She knew that men in this age group looking for sex were not likely to have parents or anyone to miss or worry about them. Their deaths didn't bother her either, so "why go ahead and worry about it?" (R 1746-1747). Richard Mallory fell into the target group (See State's Exhibit 22). From the testimony of Bobby Copas and James Delarosa we know that Wuornos often hitched rides on some pretext such as car trouble. Once inside she propositioned the victim (R 1692-1723). The unlucky ones who accepted were ultimately found shot to death in isolated areas. She appropriated their money and personal possessions, which she pawned or stored, then abandoned the vehicles in another area (R 1193-1692). This evidence establishes a careful plan or prearranged design to kill. *Rogers v. State,* 511 So. 2d 526, 533 (Fla. 1987). From Wuornos' confessions it is clear that she won the struggle with Mallory,

if indeed there really was a struggle. In both of her two accounts she placed herself outside the passenger door with the gun (R 1074; 1077). At trial she testified that she remained in the car (R 2034). Mallory was sitting behind the steering wheel (R 1074; 1077). In her second account of the crime she simply shot him in the right side (R 1078). In her first account she clearly had the upper hand and she ordered him out of the car. She said "You son of a bitch, I knew you were going to rape me." He responded "No, I wasn't. No, I wasn't." She did not indicate that he was trying to get out of the car and chase her. She shot him at least once as he sat behind the steering wheel. One of the bullets struck the right side of his body (R 1074-1075). In both accounts Richard Mallory then crawled out of the car on the driver's side (R 1075; 1079). Evidently, in a last ditch effort to protect himself he closed the door (R 1076). This did not deter Wuornos. In her two confessional accounts she ran around to the front of the car. He was standing. She shot him again and he fell to the ground (R 1076; 1079). At trial she testified that she actually ran to the driver's side, opened the door and looked at him (R 1950; 2034). While she testified at trial that he then started to come at her so she shot him, under this same version she had already shot him three times inside the car before she jumped out (R 2034). Mallory then fell to the ground (R 1950; 1076; 1079). In her confessional account she then indicated that she shot him twice more as he lay on the ground (R 1076; 1079). Coinciding with her testimony, bullet wounds were found on the right arm and chest (R 858). Another bullet entered

the right side of the chest on front and went into the left chest cavity (R 860). Two bullet holes were found in the right collar (R 923) They appear to be made by one bullet. A projectile could have passed through the arm and up under the armpit (R 927). Such would seem to indicate a raised arm in a defensive posture. There was no tissue on the neck so no bullet wound could be located (R 861). A loose bullet was recovered in the body bag (R 860). Another bullet went through the front of the chest on the left side (R 859). The wounds would be consistent with her having shot him multiple times in the right side as he sat behind the steering wheel then rushing around the front of the car, opening the door and shooting him again in the torso area or finishing him off on the ground. Under any of Wuornos' versions, a cold, calculated and premeditated manner runs throughout the circumstances of the case. She never indicated Mallory made a move toward her as he sat behind the steering wheel. There was no reason for her to shoot him unless she planned to rob him and didn't want to leave witnesses. In finishing him off she exhibited extremely heightened premeditation. She either opened the driver's door to specifically finish him off or shot him on the ground. Her actions were far from spontaneous. She hunted him down as he tried to escape the area of the car because she didn't want him to tell on her (R 2060-2062). A similar case is *Durocher v. State,* 596 So. 2d 997, 1001 (Fla. 1992). Like Wuornos, Durocher shot his victim and made a similar statement "I was going to rob the man but after thinking about it I decided it would probably be

better to go ahead and kill him then that way the police could not pin it on me." He then wiped his fingerprints off things he had touched, then drove away in the victim's car. This court found that such sequence of events demonstrated the calculation and planning necessary to the heightened premeditation required to find the CCP aggravator.

This factor has often been found in execution style murders. *See e.g. McKinney v. State,* 579 So. 2d 80, 84-85 (Fla. 1991); *Porter v. State,* 564 So. 2d 1060, 1064 (Fla. 1990). This was clearly an execution-style murder, as well, as evidenced by her response to Richard Mallory's declaration that he was dying "That's right, mother fucker, so what" and the firing of two more shots (R 3159).

No pretense of legal or moral justification has been established. There is no pretense of justification where the victim has not threatened the defendant. *Williamson v. State,* 511 So. 2d 289 (Fla. 1987). Even if she perceived her life to be threatened and initially acted impulsively there was no justification for her subsequent determination to administer the coup de grace other than her desire to deprive Mallory of his property and her own explanation that she did not want to be arrested for attempted murder because she felt she would have no viable defense as a prostitute and she wanted to continue with her lifestyle.

D. THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER TO BE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL

Contrary to appellant's assertion this first-degree murder was out of the ordinary. This crime was meant to be painful. Wuornos indicated that when somebody would hassle her she would respond "Don't fuck with me." "Hassling" her evidently meant not paying her up front or fast enough which she equated with attempted "rape" since her services, although not yet rendered, were not paid for. She would then go ahead and whip out her gun and "give it to them." Their deaths didn't really bother her (R 1746-47).

This aggravating factor has been found in cases where the victim has a fear of impending death. Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous. *Hitchcock v. State*, 578 So. 2d 685, 693 (Fla. 1990). Richard Mallory initially must have had this fear for under Wuornos' version she shot him as he was attempting to avoid being shot by explaining he had no intent to rape her. At some point in time his arm was raised in a defensive motion or shying away as demonstrated by the trajectory of the bullet. He certainly had to have great fear of impending death as she ran around the front of the car to his side to finish him off. He was certainly not unconscious or anesthesized by drink when he told her "Oh my God, I'm dying." (R 3159). He clearly knew of his impending death. She did not graciously dispatch him with two more quick shots. She first responded to his declaration by saying "That's right, mother fucker, so what?" (R 3159). Such action evidenced extreme and outrageous depravity exemplified by utter indifference to or

enjoyment of the suffering of the victim. *State v. Dixon,* 283 So. 2d 1 (Fla. 1973). *See also, Shere v. State,* 579 So. 2d 86 (Fla. 1991). One can only imagine his sense of doom as he lie gasping for breath while she coldly drank her beloved beer then rifled through his pockets (R 1952; 863). By her own account she checked his pockets after she dragged him into the woods (R 1950). It would have taken him ten to twenty minutes to die (R 864). Since he was out of the area of the car she could have a beer. Since she dragged him away it is likely she concealed him with the carpet also at that point in time. She then examined him by turning the headlights on and checking his pulse. When she found no pulse she left (R 1950). The only reasonable explanation is that after shooting him she took his property, concealed him and waited around to make sure he died.

In the cases cited by appellant the victims were shot without delay, with the shots coming out of nowhere, and quickly died. Although in *Teffeteller v. State,* 439 So. 2d 840 (Fla. 1983), the victim lingered with knowledge of impending death and this factor was not found, the victim in that case immediately received a mortal wound. In this case a small caliber revolver, as opposed to a shotgun, was used, necessitating numerous shots, and along with those shots was a glimmer of hope, desire to escape, and a defensive motion before a final sense of doom. The victim was then taunted as he lay dying. While Richard Mallory was not first abducted or kidnapped he was jousted, shot, briefly stalked and then taunted. This was clearly a conscienceless, pitiless crime that was unnecessarily torturous to the victim. *See, Proffitt v. Florida,* 428 U.S. 242 (1976).

While under Wuornos' theory the first shots may have been fired in an emotional rage, what happened thereafter was calculated and coolly deliberate and done in the course of a robbery.

Appellee would submit that even in the event aggravators are found to be inapplicable the evidence of aggravation is overwhelming and upon a reweighing or harmless error analysis this court should affirm the death sentence.

E. THE TRIAL COURT DID NOT UNJUSTIFIABLY REJECT MITIGATING EVIDENCE

The trial court did not give the jury's verdict undue emphasis and independently weighed the mitigating evidence pursuant to *Rogers v. State,* 511 So. 2d 526, 534 (Fla. 1987). Nothing in the sentencing order indicates that the court felt compelled to reject mitigation based solely on the 12-0 vote of the jury in favor of a death sentence. In any event the judge is required to give great weight to the jury recommendation pursuant to *Tedder v. State,* 322 So. 2d 908 (Fla. 1975). But this judge recognized that the final decision as to penalty was his and conscientiously weighed and discussed the aggravating and mitigating evidence and made his decision based on the evidence. *Cf. Hall v. State,* 18 Fla. L. Weekly S63, S64 (Fla. Jan. 14, 1993).

Based on the testimony and record in this cause, there was no error in the sentencing court's rejection of the statutory and nonstatutory mitigating circumstances. Even if there is evidence to support Wuornos' contention that statutory and nonstatutory mitigating circumstances should have been found the sentence

should be upheld where there is also evidence presented by the state that supports the trial judge's rejection of these mitigating circumstances. *See, Thompson v. State,* 18 Fla. L. Weekly S212, S214 (Fla. April 1, 1993). The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. *Preston v. State,* 607 So.2d 404 (Fla. 1992).

Dr. George Barnard, psychiatrist, testifying on behalf of the state, indicated that he concurred with the defense expert's diagnosis of Wuornos as suffering from a borderline personality disorder (R 3490). The sentencing judge found from the testimony that Wuornos did have a borderline personality disorder but accepted it as a nonstatutory mitigating factor (R 4669). The judge did not abuse his discretion in making this determination.

The state presented evidence supporting the trial judge's rejection of this condition as a statutory mental health mitigator. Dr. Barnard testified that Wuornos also suffered from an antisocial personality disorder. "Such people have difficulty with moral values, they have trouble controlling their impulses and oftentimes do things that are against society, against the moral values, a lot of times breaking the law, that they lack the degree of conscience that many people have who do not have this disorder." (R 3499-3500). Dr. Barnard further testified that the crime was not committed while Wuornos was under the influence of an extreme mental or emotional disturbance and that she had the capacity to appreciate the criminality of her conduct and to conform her conduct to the requirements of law (R 3500). On cross-examination he indicated that Wuornos did not have an

impaired capacity to appreciate the criminality of her conduct (R 3505). She had an impairment in conforming her conduct to the requirements of law but not a substantial impairment (R 3505). She had an emotional or mental disturbance but not an extreme one (R 3506). He felt that these two impairments mitigated the case only nonstatutorily (R 3505). He elaborated further that there was no mental disorder or defect that prevented her from knowing the nature and quality of her acts or the wrongfulness of them and that she is legally responsible for her acts (R 358). The defense experts indicated that Wuornos understands the difference between right and wrong and the nature and consequences of her actions (R 3232-3443; 3465). A borderline personality dysfunction does not in and of itself make one a killer (R 3235). There is no suggestion from the fact of a personality disorder that the person is not legally responsible, in the opinion of Dr. Krop (R 3374). Wuornos had the condition since the age of fifteen and had not killed before (R 3236). By her own accounts she drank and used drugs while hitchhiking and it didn't cause her to kill anyone (R 3254). She did not kill anyone until she got the .22 pistol and started carrying it (R 3475) even though she had this personality defect for thirty-four years (R 3476). She was capable of earning a living at unskilled jobs but she said she loved having sex with men, enjoyed her clients, and it was good money. She made between $600 - $1,000 a week. She chose to do it because she liked it. She was free to choose otherwise (R 3262-3289; 3361; 3366). She is not delusional and has no hallucinations (R 3264). There is no structural damage

pointing to organic brain dysfunction (R 3264). Dr. Toomer indicated on cross-examination that he felt she was capable of conforming to lawful conduct (R 3443).

Wuornos' sister/aunt said in a statement that Wuornos' mother had abandoned her at age two and she was raised by her grandparents with the grandfather serving as the father and the grandmother as the mother (R 3435). The brother indicated that Wuornos' biological father was a criminal who hung himself in jail (R 3524). The aunt and uncle were more like brother and sister. The household was described by Lori Grody as a comfortable home, a stable household with a protective father (R 3435-36). Grody, the aunt/sister stated that at age eleven or twelve Wuornos became rebellious (R 3436). The kids were treated even-handedly and the usual discipline was grounding or spanking (R 3437). The father was not a violent or abusive man and there was no report of sexual abuse of Wuornos by him (R 3437-38). Grody considered him to be an alcoholic (R 3469). She claimed the grandmother also drank (R 3469). Her statement indicated Wuornos had tried committing suicide on three occasions (R 3468). She used downers and reds and tried overdosing on drugs (R 3469). She spoke with the brother about having Wuornos committed (R 3468). Barry Wuornos, her brother/uncle described a normal lifestyle (R 3513). Aileen was in very little trouble for the first eleven years that he was in the home until he left for the service (R 3514). He described the father as being a gentle man who laid down strong rules but would not beat a child (R 3514). He witnessed only groundings and spankings (R 3515). The father

was an engineer (R 3517). He wanted all the children to go to school (R 3517). Aileen's biological brother Keith was also raised with them. He and Aileen were never treated differently than the other children (R 3518).

Dr. McMahon relied on Wuornos' self-reporting as to her rape as a teenager. Although Wuornos' sister also indicated that Wuornos had been raped she could have come by such information from Wuornos (R 3240). For all Dr. McMahon knows, it could have been easier for Wuornos to explain her pregnancy at a young age by claiming to have been raped. Wuornos' grandfather let her back in the house after she had the baby (R 3241). Wuornos, herself, told Dr. McMahon that the worst thing her grandfather did was to accidentally hit her in the face with a belt buckle while trying to discipline her for being truant (R 3242). Wuornos told her no one in the family was sexually abusing her (R 3272). Wuornos' siblings reported that when the grandfather drank he would fall asleep in the easy chair and not bother the children (R 3247). In verifying Wuornos' background Dr. McMahon talked only to a distant cousin over the phone and a man who had picked Wuornos up and spent only five days with her. She did not talk to Wuornos' siblings or Ty Moore (R 3252). Dr. Krop did not talk to Wuornos' mother to confirm an account of the mother being raped by the grandfather. Dr. McMahon largely accepted Wuornos' self-reporting of her family history (R 3245-3357). She did not consider her criminal history (R 3256). Wuornos presented a history of manipulation (R 3256). Dr. Toomer did not even think the facts of the Mallory killing were important (R 3434).

Although she always claimed self-defense her stories concerning the murders changed in detail (R 3257-58). She has been deceptive from time to time such as using aliases (R 3283). She never told Dr. McMahon Richard Mallory had raped her for some nine or ten months (R 3261). She only told Dr. Krop nine or ten days before the penalty phase (R 3369). Wuornos threatened to report that the deputy sheriffs who took her to her psychiatric exam in Dr. Barnard's office had raped her (R 3373). Dr. McMahon didn't review autopsies to verify Wuornos' accounts of the murders even though Wuornos told her she had practiced getting her gun out of her purse quickly (R 3268-3290). Wuornos told someone the men deserved to die because they were cheating on their families (R 3381).

The accounts of Wuornos' siblings would tend to rule out the theory that she was a product of her upbringing. She chose to be a prostitute because she perceived it as good money. The robbery motive in this case, supported by the physical evidence, negates the claim that the crimes were committed while she was under the influence of extreme mental or emotional disturbance. She had to have appreciated the criminality of her conduct by virtue of her efforts at concealment of the crime such as wiping prints off the cars, taking the victim's IDs and abandoning the cars elsewhere. Dr. Barnard indicated that she did appreciate the criminality of her conduct. If she had the free will to have chosen not to be a prostitute she could have chosen, as well, not to pillage and kill her johns for even easier money. While as a borderline she may never have lived a life devoid of troubles and

scrapes she was not compelled to choose this path. The sentencing judge could have found that this is what Dr. Barnard meant when he indicated that she had an impairment in conforming her conduct to the requirements of law but not a substantial impairment. The defense experts were forced to concede that she is legally responsible for her actions and Dr. Toomer was forced to acknowledge that she was capable of conforming to lawful conduct. Although Dr. Barnard's report as contrasted to his trial testimony spoke in terms of insubstantial impairment and lack of extreme disturbance, the crux of the matter is that there was little if no causal relationship between her condition and her actions. In view of that, her disorder was properly found to be nonstatutorily mitigating.

Wuornos received the benefit of the nonstatutory mitigator of borderline personality disorder. What she suggests as additional nonstatutory mitigation is actually evidence offered in support of the diagnoses of such disorder. The disorder encompasses it all. Evidence concerning her background was hardly uncontroverted, in any event.

The mitigating circumstance in this case does not outweigh the factors in aggravation. The death sentence in this case is proportional to death sentences imposed in other cases. *See, Garcia v. State,* 492 So. 2d 360 (Fla. 1986); *Spinkellink v. State,* 313 So. 2d 666 (Fla. 1975); *Gore v. State,* 599 So. 2d 978 (Fla. 1992).

VII THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

At the conclusion of the evidence defense counsel moved for judgment of acquittal, contending that the evidence was insufficient to establish premeditation and to establish robbery. The trial court denied the motion (R 1903-7; 2108; 2099).

Premeditation is the essential element that distinguishes first degree murder from second degree murder. *Wilson v. State,* 493 So. 2d 1019, 1021 (Fla. 1986) Premeditated design is more than a mere intent to kill. It is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation and entertained in the mind both before and at the time of the homicide. *Wilson v. State,* 493 So. 2d 1019, 1021 (Fla. 1986); *Sireci v. State,* 399 So. 2d 964, 967 (Fla. 1981) Premeditation, like the other elements of first degree murder, may be established by circumstantial evidence. *Preston v. State,* 444 So. 2d 939, 944 (Fla. 1984) However, "[w]here the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference." *Cochran v. State,* 547 So. 2d 928, 930 (Fla. 1989) Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by a premeditated design, a verdict of first degree murder cannot be sustained. *Hall v. State,* 403 So. 2d 1319 (Fla. 1981) Whether the state's evidence fails to exclude all reasonable hypotheses of innocence is a question of fact for the jury. *Holton v. State,* 573 So. 2d 284, 289 (Fla. 1990)(citing *Cochran,* 547 So. 2d at 930).

If there is substantial competent evidence to support the jury verdict, the verdict will not be reversed. Id. "'Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted,'" and the accused's actions before and after the homicide. *Holton v. State,* 573 So. 2d 284, 289 (Fla. 1990) (quoting *Larry v. State,* 104 So. 2d 352, 354 (Fla. 1958); *Preston v. State,* 444 So. 2d 939, 944 (Fla. 1984); *Sireci v. State,* 399 So. 2d 964, 967 (Fla. 1981); *Smith v. State,* 568 So. 2d 965, 967-68 (Fla. 1st DCA 1990).

The circumstantial evidence in this case was sufficient to permit a jury to infer premeditation. The state presented evidence which is inconsistent with a theory that the victim was murdered during an argument with the defendant. Wuornos had never met the victim until he picked her up hitchhiking and did not know him. Dr. Botting testified that Richard Mallory was shot in the left side of the chest; in the right side of the chest; in the right arm, with the bullet exiting and entering the right side of the chest. A fourth bullet was recovered lying free in the body bag (R 858-860). Assuming a bullet had gone into the neck area and not hit the bone, the wound would not be visible because of decomposition (R 861). The cause of death was hemorrhaging as a result of two bullets striking the left lung (R 861). FDLE analyst Susan M. Komar examined Richard's shirt for the presence of bullet holes. She found a total of seven holes

(R 928) There were two holes in the right collar; one in the right front of the chest; one in the left front of the chest; two under the right arm; and one in the back of the right arm. One hole to the collar, two holes in the chest and one hole on the back of the right sleeve had powder particles around them (R 923) The two holes under the arm had lead residue. The residue is consistent with a bullet having passed through each hole (R 928). The two holes in the collar appear to have been made by one bullet (R 920) One projectile may have passed through the holes going through the arm and up under the armpit or more than one shot could have been fired (R 927). Assuming the individual was sitting in the car behind the steering wheel the muzzle would have been on the back side of the arm to exit under the armpit. The muzzle would have to be directed toward the front of the shirt to cause the two chest holes. Since the outer surface of the collar had gunpowder residue, the muzzle would have to have been directed at the collar (R 929). The shots were determined to have been fired from a distance less than six feet (R 924). According to Wuornos' videotaped confession, Richard gave her money for sex and she disrobed first, as was her usual practice, to make the customer feel more at ease. The doors were opened on both the passenger and the driver's side. She was on the passenger side and Richard was sitting behind the steering wheel. They started to kiss and hug but he didn't take off his jeans and shirt. According to Wuornos, he just wanted to unzip his pants and have sex (R 1071-72). The zipper to his pants was up, however, when his body was found (R 773). She asked him to

disrobe but he did not want to. She indicated that "we're fighting a little bit" over whether he should take his pants off or just unzip (R 1073). She felt he was going to take his money back or roll her. She thought she was going to be raped. She grabbed her little bag with the gun and after a tussle over it she ended up with the gun. She ordered him out of the car. She said "You son of a bitch, I knew you were going to rape me." Richard responded "No, I wasn't. No, I wasn't." (R 1074-75) Despite the fact that he was now at her mercy and she could easily have escaped if, indeed, any part of the preceding story is true, she nevertheless coldly shot him. Standing outside the car door on the passenger side she shot him at least once as he was sitting behind the steering wheel (R 1074). She did not indicate that he was trying to escape or chase her. One of the bullets struck him in the right side of the body, by her account, which agrees with the physical evidence (R 1075). Richard crawled out of the car on the driver's side and closed the door, in an apparent effort to save himself. It was a futile gesture. She ran around to the front of the car and shot him again while he was standing. He fell to the ground. While he lie helpless on the ground she twice more shot him (R 11076). Her second version of the incident is much the same except that she said to Richard "Why don't you take your clothes off? It will hurt if you don't." He supposedly responded that he was going to have sex with her "right now." She said "No, you're not going to just fuck me, you're going to pay me." (R 1077) She didn't give him a chance to respond. She stated that she "wasn't going to allow

him to skip out on paying her money." She indicated that the killing was for the purpose of witness elimination. She definitely shot him to let him die (R 1080). She had to. If she left him alive she would no longer be able to ply her trade as a prostitute (R 1083-84). She also killed him for retaliation. He "deserved it." (R 1080)

Contrary to the appellant's assertion, Wuornos' testimony did not establish a classic case of self-defense and is substantally refuted by her statement to law enforcement. The bondage scenario of being tied to the steering wheel, anally and vaginally raped and having alcohol poured in orifices was unthought of and unheard of until the time of trial. The wound to the right arm which entered the chest is not consistent with Richard being on top of her in the midst of a struggle. Such a scenario is flatly contradicted by her prior statement. In her confession the term "rape" was employed in the context that a prostitute would use it, as meaning sex without compensation, in essence, a robbing of services. She suspected Richard was going to do this and was not going to allow him to skip out on paying her. Having incapacitated him she had to finish the job so she could continue unhampered in her chosen profession. This is the absolute height of premeditation. Premeditation could even be inferred from her trial testimony. She indicated that she "opened the passenger door, ran around to the driver's side, opened the door real fast, looked at him and he started to come out." (R 1950) The only earthly purpose for her going around to the driver's side was to finish him off, something she admitted

to in her confession. If there was any struggle at all, there was certainly an appreciable time between the struggle and the shooting for Wuornos to reflect upon her actions. *See, Dupree v. State,* 18 FLW D307, 309 (Fla. Jan. 11, 1993). She certainly premeditated when she decided to finish Richard off and shot him several more times. From the discovery of the body on a trail in a wooded area (R 747-748), the jury could have reasonably concluded that the victim was taken to the secluded area at night for the express purpose of facilitating his death. Her actions after the murder are consistent with the overrriding monetary considerations that led to the murder. She took the money from his pockets, his camera, and pawned his radar detector. She abandoned his car and made attempts to conceal evidence (R 1952; 1956-57; 2047; 1956). This scenario was re-enacted with later victims.

"Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with the intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. Fla. Stat. § 812.13 (1) (1992) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission. Subsection (3)(a).

The victim was found dead from gunshot wounds (R 859-860). The pockets on his pants were pulled inside out (R 773). His wallet, personal belongings, and automobile had been removed from

his person or the immediate area (R 733; 701; 717). These circumstances clearly tended to show that a robbery of the victim occurred. *See, Knight v. State,* 402 So. 2d 435 (Fla. 3rd DCA 1981) The corpus delicti, in conjunction with the detailed confession of Wuornos, was more than adequate to prove the guilt of the defendant beyond a reasonable doubt. Her account of attempted rape and self-defense simply does not fly. The victim's pants were zippered when his body was found, belying her story of a struggle because of his desire to have sex with his pants on. She took his money and his property. She clearly took his property through the use of force and that is sufficient under section 812.13. Simply because the victim dies does not mean that a robbery has not been committed, especially when his property has been taken. There is no evidence she robbed a dead man, in any event. Dr. Botting testified that it would have taken Richard ten to twenty minutes to die (R 864).

Jones v. State, 569 So. 2d 1234 (Fla. 1990), actually supports the state's position. In *Jones,* Brock died instantly from two wounds to the head from a high-powered rifle. Perry died from a single shot to the forehead. Their bodies were found in the underbrush. Perry's pay stubs were found in Jones' trailer. A calendar bearing Perry's name was also recovered from the bottom of a nearby dumpster. Jones stole Brock's truck and was ultimately arrested for possession of a stolen motor vehicle. Jones was convicted of armed robbery and the conviction was affirmed by this court on appeal as the court found that it was supported by competent substantial evidence. 569 So. 2d at 1238.

VIII THE CLAIM THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IS WAIVED.

This issue is not properly preserved, briefed or argued. The purpose of an appellate brief is to present arguments in support of points on appeal. Merely setting forth the claim and relying on or making reference to arguments below without further elucidation does not suffice to preserve issues and such claims should be deemed to have been waived *Duest v. State,* 555 So. 2d 849 (Fla. 1990); *Medina v. State,* 573 So. 2d 293 (Fla. 1990). In the face of a shotgun approach it is not the business of the state to set up strawmen, make appellant's arguments for her, and then argue against a hypothetical argument. Appellee would also note that this court has found the majority of these claims to be meritless yet not even one contrary authority is cited or recognized by appellant.

Respectfully submitted,

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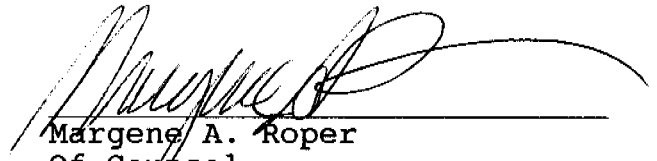
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by delivery to Christopher S. Quarles, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 2nd day of May, 1993.



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