IN THE SUPREME COURT OF FLORIDA

AILEEN CAROL WUORNOS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 79,484

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

AMENDED

INITIAL BRIEF OF APPELLANT

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AILEEN CAROL WUORNOS, Appellant,	)	
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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On January 9, 1991, police arrested Aileen Carol Wuornos[1], the Appellant, on an active warrant charging her with carrying a concealed firearm. (R4028-29) On January 28, 1991, the Volusia County, fall term, grand jury indicted Wuornos for the first-degree murder[2] and armed robbery[3] of Richard Mallory. (R5018-19) Wuornos was also charged with possession of a firearm by a convicted felon.[4] On February 1, 1991, Appellant filed her notice of intent to participate in discovery. (R4048) On February 8, 1991, Appellant requested the criminal history of the victim, Richard Mallory. (R4065)

Due to the pervasive pretrial publicity, Appellant sought a change of venue which the trial court ultimately denied. (R4425-

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[1] In this brief, counsel will use Appellant, Wuornos, and Lee (her nickname) interchangeably.

[2] § 782.04(1)(a)1 and/or 2, Fla. Stat

[3] §§ 812.13(1) and (2)(a); 775.087(2)(a), Fla. Stat.

[4] § 790.23, Fla. Stat.

4513) The trial court also denied Appellant's motion to seal her videotaped statement to law enforcement. (R4324-29)

On August 5, 1991, the State filed notice of its intent to use similar fact evidence.[5] (R4142-47,4393-95) On January 3, 1992, Appellant moved in limine to exclude any and all purported "similar fact evidence." (R4416-24) During the trial, the court overruled numerous objections, and the State presented a plethora of "similar fact evidence." (R1138-85)

Appellant filed numerous motions attacking the constitutionality of various aspects of Florida's capital sentencing scheme. (R4176-79,4180-83,4188-99,4200-23) Following a hearing on August 19, 1991, the trial court denied all of the constitutional attacks. (R4244-47)

Appellant filed a motion to suppress statements that she made to law enforcement. Appellant also sought to suppress any and all fruits resulting from said statements. (R4248-55) Following a hearing, the court denied the motion and allowed the evidence at trial over objection. (R1065,2264-3107,4380-83)

On January 10, 1992, the Appellant filed a motion to compel discovery pursuant to Brady v. Maryland, 373 U.S. 83 (1963). (R4530-32) On that same date, Appellant filed a motion for continuance based on two last-minute witness lists filed by the State. (R4535-58)

This case proceeded to a jury trial on January 13, 1992.

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[5] §90.404(2)(b)1, Fla.Stat.; Williams v. State, 110 So. 2d 654 (Fla. 1959).

(R1-2263) Immediately before jury selection began, the trial court considered Appellant's motion to continue, heard argument, denied the motion, and began jury selection. (R10-28) The trial court denied Appellant's renewed motion for change of venue. (R27-28) The trial court also denied Appellant's request for individual and sequestered voir dire. (R22-23) The court did agree to sever the count charging the Appellant with possession of a firearm by a convicted felon. (R23-28) During jury selection, the trial court denied several of Appellant's cause challenges of several jurors. (R318,359-60,403-4,545-49,567-68, 607)

Throughout the trial Appellant alleged numerous discovery violations. (R1187,1193-94,1202,1258,1261-62,1364,1368,1381-90,1605-16) Evidence of collateral crimes and Appellant's confession were admitted over defense objection. (R1138-85, et seq.)

At the conclusion of the State's case-in-chief, Appellant's motion for judgment of acquittal was denied. (R1903-7) Appellant testified in her defense and the State called one rebuttal witness. (R1913-2106) Appellant requested several modifications in the standard jury instructions and requested two special instructions in writing. Most of these requests were denied. (R2112-32,4589-90) Based on numerous comments during the prosecutor's final summation, Appellant objected and moved for a mistrial. Most of the objections were overruled and the motion for mistrial was denied. (R2167-69, 2172-73,2251-57)

Following deliberations, the jury found Appellant guilty as charged of first-degree murder and armed robbery with a firearm. (R2258,4621-22)

The penalty phase began on January 28, 1992. (R3131-35) The State presented two witnesses, the defense -- three, and two rebuttal witnesses for the State. The trial court denied numerous requests by the Appellant for special jury instructions. (R4631-46) The trial court denied all motions for mistrial that were based on the State's improper final argument. (R3604-9) Following deliberations, the jury returned with an advisory verdict recommending the death sentence (12-0). (R3611-14,4647) The trial court sentenced Appellant to death finding five aggravating circumstances and one mitigating circumstance. (R4663-69) The trial court sentenced Wuornos to ten years imprisonment on the armed robbery. (R4679-82) Appellant's motion for new trial (R4690-95) was denied by the trial court following a hearing. (R4007-24,4699) Appellant filed a notice of appeal on March 5, 1992. (R4705-6) This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

Guilt Phase

A. The Death of Richard Mallory

On December 1, 1989, Deputy John Bonnevier discovered Richard Mallory's abandoned vehicle in a wooded area in north Volusia County. (R700-708) A half-empty quart bottle of vodka, an empty beer bottle, and a wire coat hanger were among the items

strewn about the area. (R723-27,736-40) Two driver's licenses belonging to Mallory were also found at the scene. (R730) On December 13, police found Mallory's body in a wooded area several miles away. (R717,770-71) Mallory was last seen alive in Clearwater on November 30, 1989. (R785-98)

Two bullets that struck Mallory's left lung resulted in hemorrhaging and ultimately death. (R854-64) The medical examiner also found a wound to Mallory's right arm. (R857-60) Dr. Botting removed three bullets from Mallory's body and found a fourth bullet lying free in the body bag. (R857-60,867) The bullets were CCI brand .22 caliber, hollow-point, stinger cartridges. (R909-11) They were fired from a weapon (rifle, revolver, or pistol) rifled with six grooves[6] with right-hand twist. The firearms expert admitted that this particular style of rifling was popular, with many different weapons and different brands having this same class characteristic. (R911-12,915) Authorities could not determine the assailant's position relative to Mallory when the shots were fired, only that most were inflicted from a distance of less than six feet. (R873-74,921-28) They also could not determine the sequence of shots or what happened between each shot. (R874) Mallory had definitely been drinking and was probably under the influence at the time of his death. At the time of the autopsy, Mallory's blood alcohol level was .05. (R875)

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[6] Although the transcript repeatedly refers to "screws," gun enthusiasts say that "grooves" is the appropriate term. The court reporter obviously used phonics, resulting in this error.

Tyria Moore met Aileen Wuornos in a Florida bar. The two became lesbian lovers and had a relationship that lasted approximately four and one-half years. (R933-36) Moore worked sporadically as a hotel maid, while Appellant made most of the money working as a prostitute on Florida's highways. (R935)

Moore generally did not discuss Lee's job or her road trips. (R967-68) Moore knew that Lee's line of work was very dangerous, and that Wuornos carried a gun for protection. (R954,968) Moore knew that Lee had been raped and beaten on more than one occasion and was verbally abused almost every day. (R968-69)

Wuornos drank substantial amounts of alcohol almost every night, sometimes a case of beer each night. (R969-70) When she drank, she would get "kind of moody." (R970) On more than one occasion, Wuornos would go on drinking binges where she would consume a case of beer a day, several days at a time, with only a minimal amount of sleep. (R970)

On the evening of December 1, 1989, Moore and Wuornos were watching television at the Volusia County motel where they were living. Wuornos had returned home after plying her trade for several days on the road. An intoxicated Wuornos told Moore that she had shot and killed a man early that morning. (R937-47,976) She then sorted through the man's property, keeping some, and throwing some items away. (R948-49) Wuornos never explained the circumstances of the shooting. (R947,952) Wuornos explained that she left the body in the woods and abandoned the man's car in Ormond Beach. (R944-47)

Several months later, Moore began seeing media reports indicating that police were looking for two women who were suspects in a series of murders[7]. (R977) Afraid of being arrested, Moore left Wuornos and returned to her home up north in December, 1990. (R977-78) Less than one month later, Florida law enforcement contacted her in Pennsylvania. (R978) In an attempt to clear herself, Moore agreed to return to Daytona Beach and attempt to extract a confession from Wuornos. (R978-86) In accomplishing this goal, Moore exploited their prior relationship and the tremendous love that Wuornos still harbored for Moore. (R971,981-86) During numerous phone calls over several days, Moore, acting as an undercover agent for the police, repeatedly lied to Wuornos, threatened suicide at least once, and constantly exhorted her to take the entire blame for the murders. (R982-86) Wuornos eventually broke down and agreed to confess.

On January 16, 1991, Investigator Lawrence Horzepa of the Volusia County Sheriff's Department took a videotaped statement of Aileen Wuornos at the Volusia County Branch Jail. (R1060-65) Although her alcoholism caused some memory loss (R1124), Wuornos recalled that one evening in early December, 1989, she had been hitchhiking from Tampa on I-4, when Richard Mallory picked her up. They drove to Volusia County where Wuornos offered to perform an act of prostitution. They drove to an isolated area near U.S. 1 and I-95. (R1069-70) Both had been drinking and

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[7] Witnesses saw Wuornos and Moore abandon a murder victim's car. (R1493-1501,1511)

Mallory had been smoking marijuana when he parked the car about midnight. (R1070,1108-9) For the next five hours, the couple continued to drink, talk, and enjoy each other's company. (R1070) Wuornos had been drinking all day and was "drunk royal." (R1107)

At approximately 5:00 a.m., the ill-fated act of prostitution commenced. Mallory handed Wuornos some cash and, as was her usual habit to help put the customer at ease, she began to disrobe first. (R1070-71) Mallory remained behind the steering wheel. With Mallory still dressed, the couple began to kiss and hug. Wuornos asked Mallory to get undressed, but Mallory refused. (R1072-73) Mallory wanted to merely unzip his jeans. (R1072) Although she had been accommodating up to that point, Wuornos took issue with Mallory's refusal to remove his jeans. A struggle ensued and Mallory became violent. (R1120) Wuornos, fearful that Mallory was intent on raping and robbing her, grabbed the gun from her nearby purse. Mallory also grabbed her gun and a tug of war began. Wuornos won the struggle and shot Mallory. After being hit with the first shot, Mallory got out of the car and shut the driver's door. Despite her warnings, Mallory kept coming toward her. Wuornos shot. Mallory fell to the ground, and Wuornos shot him two more times. (R1075-76,1121-22) Wuornos told the detective that she killed Mallory in retaliation and that he deserved to die. (R1072-80) She took his property as "final revenge." (R1080)

Wuornos described how she removed Mallory's property, pawned

some items[8], and abandoned the car off a fire trail. (R1076, 1080-82) Over a year later, Wuornos threw her weapon into the water of Rose Bay just south of the Fairview Motel where she was staying. (R1083) Tyria Moore showed police where to find the gun. (R843-50) The class characteristics of the bullets recovered from Mallory's body matched those of the recovered weapon, as well as many other firearms. (R918-19)

B. Williams Rule Evidence

Over strenuous defense objection, the State was allowed to present evidence that Aileen Wuornos was accused of numerous other murders, that she allegedly committed after Mallory's death.

Charles Richard Humphreys' fully clothed body was found in Marion County on September 12, 1990. (R1259-60) Humphreys died as a result of multiple gun shot wounds inflicted by six bullets fired at his head and torso. (R1298) Police found Humphreys' car in Suwanee County. (R1193-1201,1233-34)

In June 1990 Peter Siems left Jupiter, Florida heading for New Jersey. (R1523-25) Police found Siems' car in Orange Springs on July 4, 1990. Witnesses had seen two people, subsequently identified as Tyria Moore and Aileen Wuornos, leaving the car. (R1493-1501,1511-14) A palm print found on Siems' driver's interior door handle matched the palm print of

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[8] Records from the OK Pawn Shop indicated that Appellant pawned a camera and a radar detector on December 6, 1986. (R813-39) More of Mallory's property was recovered from a storage unit at Jack's Mini-Warehouse used by Wuornos and Moore. (R878-901)

Appellant. (R1318-19,1329-30,1334) Siems' body has never been found. (R4582)

Police found Walter Jeno Antonio's nearly nude body on November 19, 1990, near a remote logging road in Dixie County. Antonio had three bullet wounds in his back and one to the base of his head. (R1575-79) Police found Antonio's car five days later in Brevard County. (R1581)

On August 4, 1990, police found the body of Troy Burress in a wooded area on State Road 19 in Marion County. The body was in advanced stages of decomposition. (R1335-37) Burress had been shot twice. (R1353)

Police found David Spears' body in a very remote area in southwest Citrus County. (R1425,1430) He died of multiple gun shot wounds inflicted by six bullets fired into his torso. (R1298-1305,1365-66) Spears was totally nude except for a baseball cap. (R1425)

Police found the decomposed body of Charles Carskaddon covered with a green, electric blanket in Pasco County. They later found his stripped 1975 Cadillac in a junkyard with the license plate removed. (R1466-68) The chief medical examiner removed nine small caliber bullets from Carskaddon's lower chest and upper abdomen. (R1469-79)

Police retrieved bullets with similar class characteristics from all five of the recovered bodies[9]. (R1368-69,1550-51,1371-72) The State expert admitted that there were numerous weapons

[9] Siems' body was never recovered. (R4582)

with these same class characteristics. Barrels with six grooves and a right-hand twist are relatively common. The expert could not say within a reasonable degree of scientific certainty that any of the projectiles had been fired from the gun recovered from Rose Bay. (R1375-76)

Appellant's Case

Lee Wuornos, 35, was born in Troy, Michigan and found herself living on the streets at a very young age. (R1914) When she was approximately fourteen, she hitchhiked to Florida for the warmer climate. (R1914) At that young age, Wuornos was reduced to working for 75¢ an hour. She began her career as a prostitute at age sixteen. (R1915) She hitchhiked across the country plying her trade for the next four years. She settled in Florida when she was about twenty. (R1915) During the five years before her trial, Wuornos had worked as a prostitute on the interstates. At least four days out of the week, she would hitchhike from exit to exit. She propositioned most of the men who picked her up. If they were not interested, she would get off at the next exit and try again. (R1916-17)

Lee met Tyria Moore at the Zodiac Lounge in Daytona Beach in 1986. They fell deeply in love and began a sexual relationship. After a year, their relationship became more sisterly and less physical. (R1917)

Lee used alcohol as a tranquilizer while she worked on the road. (R1921) She had been maced, beaten, and raped by violent customers. (R1922-23) She could get no other work, so she kept

working as a prostitute. (R1924) She tried to join the police force and attempted to work as a corrections officer. (R1924) She also repeatedly took the aptitude tests in a vain attempt to join the armed forces. (R1924-25)

Wuornos had been carrying a gun for protection approximately six months, when Mallory picked her up that fateful day. (R1926-27) Mallory was mixing vodka and orange juice and drinking heavily on his trip. Mallory was also smoking marijuana. (R1928) He bragged that he owned a video store and asked Wuornos if she knew any women who would be willing to appear in pornographic videos. (R1928) During the trip, Mallory complained bitterly about a woman who was attempting to relieve him of all of his worldly possessions. (R1930) Mallory insisted on parking in a remote area so that he could smoke pot, while he and Wuornos discussed his crumbling love life. (R1931-34) Wuornos' work as a prostitute eventually came up in the conversation. Mallory asked how much she charged. (R1934-35) They drove to an even more secluded spot, Wuornos disrobed, and Mallory went to retrieve a blanket from the trunk. (R1937-38) Mallory refused to undress and announced that he had insufficient funds to pay for her services. Wuornos then began to retrieve her clothes from the back seat in order to get dressed. Before she had a chance to turn back around, Mallory whipped a cord around her neck and commanded her to follow his orders. (R1938-40) Mallory threatened to kill Wuornos, "Just like the other sluts I've done." (R1940-41) Mallory tied Lee's hands to the

steering wheel and began violently raping her. (R1941-42) Mallory alternated between Wuornos' anus and vagina during the rape. (R1942) Wuornos began to cry loudly in pain which gave Mallory perverse sexual pleasure. (R1942)

After the brutal rape, Mallory cleaned the blood from his penis with rubbing alcohol. He talked of other diseased "sluts." (R1943-44) After dressing, Mallory squirted rubbing alcohol up Wuornos' torn and bloodied rectum and vagina. (R1945) He then squirted some down her nose and told her that he was saving her eyes for the grand finale. (R1945) Mallory then sat on the hood of his car, smoked some more pot, and listened to a portable radio. (R1945-46) A freezing, nude Wuornos unsuccessfully attempted to free herself from the restraints. (R1946)

After about one hour, Mallory got back into the car and untied her. He put a wire around her neck, using it like a leash. Mallory told Wuornos to lie down and spread her legs. Believing that he would eventually kill her, Wuornos began to struggle. Mallory enjoyed the physical confrontation until Wuornos spit in his face, at which point, Mallory proclaimed, "You're dead bitch. You're dead." (R1946-49) As Mallory came toward her in earnest, Wuornos finally found her purse, grabbed her pistol, and shot twice quickly. (R1949) Mallory kept coming at her and she shot again. (R1949) Wuornos got out of the car and ran around to the driver's door. When Mallory started to get out of the car, Wuornos warned him a final time. (R1950) Mallory kept coming. Wuornos shot him again and Mallory fell

dead to the ground. (R1950)

Penalty Phase

Lee Wuornos had a prior conviction for robbery with a deadly weapon. (R3151-54) The chain of events leading to Appellant's prior, violent, felony[10] conviction began when she had a fight with her boyfriend, who had rejected her. She had been drinking and taking drugs, when she decided to commit suicide in an attempt to get the attention of her boyfriend. (R3336-37,3499) After consuming a case of beer, a half-pint of liquor, and four librium, Lee, wearing a G-string bikini, headed to the beach. She stopped at a convenience store and placed her purse on the counter. Although she had no prior intent to rob the store, the clerk saw the gun in her purse and became frightened. (R3337-38) Realizing this would be a good method to get attention, Lee robbed the clerk at gunpoint and was apprehended shortly thereafter. (R3338)

Drs. McMahon, Krop, and Toomer were all qualified as experts without objection. All three conducted in-depth examinations of Wuornos and reviewed voluminous documentation of her life, her case, and material and tests from other doctors who examined her. (R3173-87,3309-17,3406-11) All three psychologists' primary diagnosis was that Lee suffered from a borderline personality disorder. (R3192-94,3317-19,3411,3426-27) All three agreed that she was suffering from this particular disorder at the time of the crime, as she had throughout her life. All three classified

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[10] § 921.141(5)(b), Fla. Stat.

the disorder as an extreme mental or emotional disturbance. (R3222,3319-22,3403-4,3426-27) All three agreed that, at the time of the crime, Lee's capacity to conform her conduct to the requirements of the law was substantially impaired. (R3217-21,3403,3425-26) All three found some evidence of brain damage. (R3192-94,3204-7,3216-17,3347,3395,3411,3423)

Dr. Krop described Wuornos' borderline personality disorder as, so classic that it essentially dominated her functioning. (R3394-95) The disorder was characterized by unstable relationships, manic-depressive behavior, self-destructive behavior, lack of impulse control, identity disturbance, impaired cognition, and alienation. (R3193-94) During Dr. Krop's testimony, Wuornos exhibited symptoms of her disorder by laughing inappropriately during the trial. (R3392) Dr. McMahon observed, "Ms. Wuornos is probably one of the most primitive people I've seen outside an institution." (R3208) McMahon explained that most of Lee's time was spent trying to meet her very basic needs, i.e., food, shelter, clothing, and security. As a result, Lee had neither the time nor the ability to seek more subtle goals, for example, interpersonal relationships. (R3208)

Dr. Toomer called borderline personalities, "constantly hypervigilant." Due to their past abuse, they're constantly fearful of being abandoned once again. As a result of this underlying anxiety, they experience conflict, lack of control, and self-destructive or aggressive behavior. (R3421) Dr. McMahon pointed out that, at the time of the murder, Wuornos

perceived that, whether true or not, she was being threatened and was in severe, imminent danger. (R3217-19)

As far as nonstatutory mitigating circumstances, Dr. Toomer found lack of nurturance; a dysfunctional family unit; and drug and alcohol abuse. (R3428) Wuornos' ability to establish "quality" interpersonal relationships was definitely impaired. (R3429) Based on Appellant's remorse, Dr. Toomer ruled out a diagnosis of antisocial personality disorder. Individuals suffering from this particular disorder have no conscience and have constant violation of societal norms throughout their lifetimes. Dr. Toomer noted that there were periods of Wuornos' life where she made a conscious effort to be a productive citizen. (R3443-45)

When Aileen Wuornos was born, her parents were already divorced. Lee was ignorant of her father's true identity until after her arrest. (R3195) Lee's promiscuous teenage mother abandoned Lee and her brother. (R3195) Lee was nearly ten years old, when she found out that she had been adopted by her grandparents. (R3196)

Although Lee never knew her biological father, he was a very violent individual with sexually deviant characteristics. Following rape and kidnapping convictions, he was sent to a mental institution and eventually prison, where he hanged himself. (R3325-28)

Lee's grandparents, who raised her as their own child, were also dysfunctional. Her grandfather was a severe alcoholic.

(R3533) When her grandfather drank, he became extremely angry. (R3196) He subsequently committed suicide. (R3209,3532-33) Lee's mother described him as "the meanest man in town." (R3196) Her grandmother was an extremely passive individual who also drank a great deal. She died of a liver disorder. (R3532) Lee was closest to her brother Keith who tragically died of cancer when he was only twenty-one. (R3325-28)

One childhood incident that had quite an effect on Lee occurred when she was nine. Lee's face and hands were severely burned while playing with a combustible chemical. She was hospitalized for several days and missed several months of school. (R3197-98)

Lee began having trouble with her studies during junior high school. Hearing loss and vision problems caused her great difficulty. School officials repeatedly urged her family to get professional help, but her mother refused. (R3198-3200) A 1970 school report ended with, "It is vital for this girl's welfare that she receive counseling immediately." (R3352) The school unsuccessfully attempted to improve Lee's behavior through the administration of a mild tranquilizer. (R3352) When she began struggling in school, Wuornos' IQ score of 81 placed her in the low dull-normal range, only one point from a borderline retarded score. (R3390-91)

When she was approximately fourteen, Lee was raped by a friend of her father. Afraid of her family's reaction, Lee waited six months before revealing that she was pregnant.

(R3201) Lee's grandparents were sexually repressed and they blamed the rape on her. (R3331) Her grandfather forced her to give up the child for adoption. (R1301-2) She never received any treatment for the sexual abuse. (R3333-34)

Physical and verbal abuse ultimately drove Lee from her home. When she returned for her grandmother's funeral, she was incarcerated in a juvenile facility for almost eight months. (R3202) When she was released and attempted to return home, her grandfather kicked her out of the house. She was forced to live on the streets. (R3202) She slept in the woods, abandoned cars, whatever she could find. (R3203) She eventually left town, hitchhiked around the country, and became heavily involved in alcohol and drugs. (R3203) She began using alcohol at age twelve and was a regular drinker by age seventeen. (R3497)

As a sexual abuse victim, Lee became extremely promiscuous. (R3334) Being so young with only a ninth-grade education, she made money hustling pool, working odd jobs, and prostituting her body. (R3203-4) She was attacked and beaten by "Johns" on twelve occasions. (R3496-97) She attempted suicide at least twice and maybe six times. (R3209,3468-69,3496-97) At one point, Wuornos' aunt/sister considered committing her to a hospital because of her behavior. (R3468)

During the penalty phase the State presented rebuttal in the form of the testimony of Dr. Barnard, an expert in forensic psychology. (R3483-85) Dr. Barnard had conducted a court-appointed psychiatric evaluation for the 1981 robbery. (R3488)

Dr. Barnard agreed with defense experts that Ms. Wuornos suffered from a borderline personality disorder. (R3490) Dr. Barnard further agreed that she had an identity disturbance, affective instability, deficiencies in judgment and insight, suicidal gestures, and cortical impairment. (R3491-93) Dr. Barnard also diagnosed an antisocial personality disorder. (R3499)

Dr. Barnard agreed that, at the time of the offense, Wuornos did suffer from an emotional and/or mental disturbance and that her capacity to conform her conduct to the requirements of law was impaired. However, Dr. Barnard opined that Wuornos' impairment was not substantial and that her disturbance was not extreme. Thus, Barnard did not find either statutory mitigating circumstance, but considered the disturbance and the impairment as nonstatutory mitigating circumstances. (R3487-88,3500,3505-6) Dr. Barnard found evidence of twelve nonstatutory mitigating circumstances: (1) mental or emotional disturbance; (2) impaired capacity to conform her conduct to the requirements of law; (3) cerebral dysfunction; (4) borderline personality disorder; (5) dysfunctional family; (6) history of alcohol abuse; (7) inability to cope; (8) lack of judgment; (9) lack of insight; (10) emotional lability; (11) impulsiveness; and (12) genetic and/or environmental deficits. (R3510-12)

Barry Wuornos, Appellant's uncle/brother, testified that he and his siblings had a "normal lifestyle....pretty straight, straight and narrow family." (R3513) Barry did acknowledge that his father was "kind of a disciplinarian....he laid down strong

rules but a man you could really look up to." (R3514) Barry never saw his father beat Lee. (R3514) Barry did acknowledge that he received a few "spankings." (R3515) Barry claimed that Lee and his father had a very good relationship until she was approximately ten and things began to "get a little tight with Aileen discipline-wise." (R3515) Barry conceded that he left the home and entered military service when Lee was about ten. (R3513-16) Barry had not attempted to speak to Lee since her arrest. He had been contacted and cooperated with law enforcement. Barry did ask if she were incarcerated, but "there was no reason for me to talk to her." He never asked how his sister was doing. (R3520-22) Barry did not recall receiving a phone call from the defense team's investigator. (R3519-20,3522)

Barry did provide some insight into Appellant's biological father. He was "quite a rousty individual" who was "pretty abusive." (R3524) Once he threw Barry down and threatened to choke him. Barry described him as "generally a criminal-type." (R3524)

SUMMARY OF ARGUMENT

Throughout the trial, Appellant alleged numerous discovery violations. The trial court never conducted an adequate Richardson hearing. The State improperly used evidence of six collateral murders which ultimately became a feature of the trial. Any slight relevance is substantially outweighed by the prejudicial effect. The State exploited Wuornos' love and for Moore, a police agent, in extracting an involuntary confession.

The police action in this case violated due process. The trial court's denial of individual voir dire hampered Appellant's ability to uncover prejudice. In light of the massive publicity, the requested change of venue should have been granted. The court also should have granted several valid challenges for cause. At the penalty phase, inadequate instructions failed to channel the jury's discretion. Additionally, the State presented evidence and argued several nonstatutory aggravating factors and engaged in otherwise improper argument. Furthermore, the trial court improperly found three aggravating circumstances which were not supported by the evidence, and the court ignored valid mitigating circumstances. Additionally, the evidence is insufficient to support the convictions; the evidence established self-defense and force did not accompany the theft. Additionally, Florida's death sentencing scheme is unconstitutional for a variety of reasons.

ARGUMENT

Aileen Wuornos discusses below the reasons which, she respectfully submits, compel the reversal of her conviction and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

APPELLANT WAS DENIED HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE COUNSEL REPEATEDLY ALLEGED NUMEROUS DISCOVERY VIOLATIONS AND THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE RICHARDSON[11] HEARING.

There was never any doubt that Appellant intended to participate in discovery. (R4048) There was frequent argument at several pretrial hearings on each side's failure to comply fully with discovery rules. At one such hearing, defense counsel claims to have received only nine pages of discovery on the Citrus County case. (R4960-61) Counsel has learned from a Citrus County investigator that he has "volumes" of material. (R4960-61) Discovery or lack thereof was also a hot topic at hearings held on June 3, 1991, November 22, 1991, and January 3, 1992. (R3689-3709,3807-53,3916-37)

The first discovery violation alleged by Appellant occurred right before jury selection which began on Monday, January 13, 1992. (R1) Defense counsel pointed out that, on the previous Friday afternoon, the State provided a statement of Jacqueline Davis, Mr. Mallory's girlfriend. The statement was taken on December 18, 1989, by the lead investigator in the case and contained information critical to the defense, i.e., Mallory's history of sexual abuse pertaining to women. (R12-13) Defense counsel requested a continuance so they could further investigate this critical aspect of their defense. (R13-15) Defense counsel

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[11] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

also pointed out that the State provided a list of twenty-one additional witnesses only last week and moved to exclude them. (R15-16)

The State assumed that all discovery had been completed. The State claimed that defense counsel had been invited to the prosecutor's office on three occasions to review discovery materials in order to be sure that discovery was complete. (R16) The State claimed that defense counsel never showed up for any of the appointments. (R16) Defense counsel denied any knowledge of the appointments, the trial court said the issue would be addressed later, and announced that jury selection would begin. (R21) Regarding the statement of Jacqueline Davis, the prosecutor claimed to have recently become aware that Investigator Horzepa had a taped statement from Davis in his possession. (R16-17) As soon as he became aware of that fact, the prosecutor had the statement transcribed and provided it to the defense on the morning of trial. (R17) The prosecutor claimed that the "pertinent incident" [that when Mallory was eighteen, he was charged with burglary] was inadmissible, unsubstantiated hearsay. (R17-18) The trial court denied Appellant's requested continuance, stating that further investigation could be done during the evening recesses. (R14-15,20)

Defense counsel next made allegations of the State's failure to comply with discovery rules during the testimony of Lawrence Horzepa. On direct examination, Horzepa referred to some type of

documents in an attempt to refresh his memory. Defense counsel asked if the documents had been provided in discovery. The prosecutor promised to give the document to defense counsel "in just a moment before cross-examination." (R1091) Counsel formally requested a Richardson ruling as to each of the documents that the witness referred to while testifying. (R1091-92) The State denied that a discovery violation had occurred. The trial court ruled:

> I've reviewed what's here and I'm satisfied that there's been no violation. And I don't know what's in the other instrument. We may have to have some hearing on that.
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> * * * *
>
> DEFENSE COUNSEL: Your Honor made the ruling for the record. And for the record, it's not in our hands yet.
>
> * * * *
>
> PROSECUTOR: I just recovered it from --
>
> DEFENSE COUNSEL: For the record, it's now in my left hand.
>
> PROSECUTOR: No further questions of the witness, Your Honor.
>
> THE COURT: Just a minute. Are you prepared to proceed to cross now that you have the item?
>
> DEFENSE COUNSEL: No, Your Honor, since it was just put in my hand a few seconds ago.
>
> THE COURT: You can have a couple of minutes to look at it, sir.
>
> DEFENSE COUNSEL: May we take a recess, Your Honor --
>
> THE COURT: No. We'll just wait for you to look at it.
>
> DEFENSE COUNSEL: Judge, there's another one we haven't gotten yet.
>
> THE COURT: As soon as it gets here, it will be delivered to you.

(R92-94) The prosecutor stated, for the record, that the

documents provided to defense counsel, were the officer's notes made in preparation to testify. (R1094) Defense counsel later blamed a blunder they committed during cross-examination on the short time they had to review the documents. (R1103-7) When the State called Deputy Tony Cameron of the Suwannee County Sheriff's Department, defense counsel made a "Richardson Motion." (R1193) Defense counsel moved to exclude the witness and the trial court overruled his objection and denied his request. (R1193-94) As in the previous instance, the court failed to conduct any type of hearing. When the State called the next witness, Deputy Alan Brooks, defense counsel again requested a Richardson hearing. (R1202) The trial court perfunctorily denied Appellant's "ongoing objection." (R1202) The State requested an opportunity to respond to Appellant's accusations on the record and the trial court promised that the lunch break would be used for that purpose. (R1202)

During the testimony of Detective David Taylor of the Marion County Sheriff's Office, the State offered some physical evidence relating to the murder of Humphreys.

> DEFENSE COUNSEL: To tell you the truth, a lot of this Marion County stuff we've never had access to. If we can take a few moments.
>
> THE COURT: Has it been available --
>
> DEFENSE COUNSEL: ....Maybe you can take a few minutes.
>
> THE COURT: Has it been available -- I'm not going to take any recess. You've had all the opportunity on that one. Is there an objection?
>
> DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: The objection is noted and overruled. Let the items be received and marked into evidence by their proper number --

DEFENSE COUNSEL: As to all of them?

THE COURT: Yes, sir.

DEFENSE COUNSEL: Will Your Honor entertain argument?

THE COURT: No. Each of these items will be received and marked by its proper number.

(R1242-43) Defense counsel also objected to the next witness, Ken Jones, a friend of Humphreys. (R1258-60) The State again asked for an opportunity to be heard on the issue and the trial court assured, "You'll be heard on it in good time,...." (R1259) Appellant renewed her objection to the next witness also. (R1261-62)

Eventually, defense counsel began cross-examination with a request for the witness' reports. Counsel would then examine the reports (presumably for the first time) and then attempt an effective cross-examination. (R1324-25,1365-66) Appellant renewed her Richardson objection when the State recalled Donald Champagne. (R1367-68)

The issue was finally discussed at some length on the record.

MR. NOLAS [DEFENSE COUNSEL]: Yes, Your Honor. We've -- as some of the witnesses testified, we have recognized that the reports from some of the witnesses -- one obvious example is the report, the synopsis that Detective Horzepo (sic) was using, were -- had not been previously provided to the defense.

And there were certain other Richardson related issues that we bought (sic) up. We objected to those. Your Honor denied the objection.

I don't know what else needs to be done on the record. At some point Your Honor may entertain a

hearing in that record (sic) but --

THE COURT: You asked for the hearing, I'm giving it to you. I was perfectly satisfied. My understanding of the law is that a Richardson Hearing is only required when the state does not comply with the ten day notice provisions of similar fact.

It appears notice was given some five months prior to the trial. Therefore, no Richardson Hearing was required. If I'm in error, Erhart (sic) is in error, and he'll have to revise his book.

MR. NOLAS: I'm sorry, Judge.

THE COURT: That's the reason I ruled the way I did.

MR. NOLAS: Not as to the specific issue of Williams. Obviously the state did indicate sometime in the past what Williams' Rule evidence the state intended to introduce, but it's the particular reports that had been prepared by the witnesses.

There were a number of such items as we were going through, it appeared those items had not be (sic) provided.

THE COURT: Again, if you're going to make a motion, be specific about it. I don't know what you're hinting at now.

I have tried to give you full swing of everything, I'll still give you full swing. I want to know what it is you're talking about rather than some shotgun attack.

MR. NOLAS: Deputy -- we can just give Your Honor a list. Deputy Cameron we had no reports provided.

MR. TANNER [PROSECUTOR]: Deputy who?

MR. NOLAS: Cameron. We had the name but no reports.

THE COURT: Were they available, Mr. Tanner?

MR. DAMORE [PROSECUTOR]: Judge, the state has provided every document that it has in its possession. With regard to Deputy Cameron, who I believe is a Swannee (sic) County deputy who located an automobile.

I'm not aware that Deputy Cameron provided or produced any reports. I don't believe on the witness stand he was referring to any reports.

And I'm not aware of any such reports as to the recovery of the vehicle by Deputy Cameron, if I'm talking about the right witness. I have never had any

reports from Deputy Cameron.
Your Honor, and he is also listed as a witness. He could have been deposed by defense had he chosen to do so.

THE COURT: What's your next one?

(R1381-83) Defense counsel then listed five witnesses who had testified over Appellant's Richardson objection. (R1383-85) The prosecutor denied that any discovery violation had occurred and, in the alternative, demanded that defense counsel show some type of prejudice. (R1383-87) There were accusations from both sides that the other party was misstating the facts. The trial court's input, for the most part, consisted of the following:

THE COURT: Were they [Deputy Cameron's reports] available, Mr. Tanner [the prosecutor]?

* * * *

What's your next one?

* * * *

What's your next one?

* * * *

(R1382-83,1387) There was further discussion of Jacqueline Davis, whose name was allegedly provided to the defense on the eve of trial. (R1387-89) The State claimed that they had provided the defense with Davis' name at least ten months ago. (R1387) All parties agreed that efforts would be made to put defense counsel in touch with Ms. Davis. (R1387-89) Following this brief and entirely unsatisfying "Richardson hearing," the trial continued. (R1390-91)

Detective Jimmy Pinner testified concerning the investigation of Antonio's murder. (R1575-98) At the beginning of cross-examination, defense counsel asked Detective Pinner if he brought his reports referencing this case. Detective Pinner

stated that the reports were in his car outside. (R1598-99) At this point, defense counsel requested that the detective provide the defense with copies of his reports. Counsel stated that Appellant had received no reports relating to Antonio's murder in Dixie County. (R1599) The prosecutor claimed that the defense had been provided with all reports within the "possession of the state attorney's office of Volusia County." (R1599)

> THE COURT: That's all right. If he wants what this man has, let's go get it right now. We'll sit and wait right here.
>
> DEFENSE COUNSEL: Thanks, Judge.
>
> THE COURT: You may stand down and go get your reports, sir.
>
> PROSECUTOR: May the record reflect, Your Honor, that reports have in fact been submitted to defense counsel from this office and I have my discovery receipts to prove that.
>
> DEFENSE COUNSEL: Your Honor, that's an issue we can take up at a later time. I'm telling you, we don't have anything from Dixie County.
>
> THE COURT: Go get your reports, sir.

(R1600) After Detective Pinner returned to the witness stand with his reports, defense counsel requested a brief recess to examine the reports. Court remained in session while counsel hastily examined the evidence. (R1604-5) Counsel then attempted cross-examination:

> Q: Detective, I have tried to keep it, and so has Ms. Jenkins, in order, including your clips. We put a couple of tabs on the side...and those are just in case something comes up so that you know what we're referring to, <u>because we have not seen these before</u>.
>
> PROSECUTOR: Objection, Your Honor.

DEFENSE COUNSEL: Withdrawn, Your Honor.

PROSECUTOR: Your Honor, I'd ask that the jury be instructed that counsel has had the right to full discovery in this case. Every item that he has --

DEFENSE COUNSEL: That's nonsense, Your Honor. Let's have a hearing on it right now, because we have not.

THE COURT: I don't think we need to do this.

(R1605-6) (emphasis added) Defense counsel then received permission from the judge to copy the four or five volumes (the court's description) that Detective Pinner had. (R1606-7) When defense counsel attempted to resume cross-examination, the State objected, contending that Appellant was asking Pinner to testify from other witnesses' reports which Pinner had in his possession. (R1607-11) The State also contended that all of the documents had previously been supplied to defense counsel. (R1610) Defense counsel denied this assertion:

> And if Your Honor wants, we can put Miss Jenkins, Mr. Miller, myself [the defense team], you can have a hearing on it. Those reports have never been provided.

(R1611) The trial court declined Appellant's request for a hearing.

Defense counsel had attempted to ask Detective Pinner about Phillip Williams, when the State objected. (R1607) Defense counsel pointed out that, after looking through Detective Pinner's files, counsel had formulated some questions regarding Phillip Williams. (R1611) Appellant contended that the questions related to the investigation of the Dixie County case (Antonio's murder). Counsel contended that the questions went directly to the issue of whether Ms. Wuornos was responsible for

Antonio's murder. (R1612) The court responded:

> I have heard enough. It's obvious you gentlemen don't have your acts together....It is not very polite...to inconvenience this jury with this continuing agony over evidentiary matters...I'm going to give you one hour to get your act together....We're not going to discuss it anymore.

(R1612) Defense counsel attempted to explain his line of questioning and its relevance.

> ...it's not a fishing expedition. I think I have an idea what the officer will say.
>
> THE COURT: You're speaking with fork in (sic) tongue, sir.
>
> DEFENSE COUNSEL: With all due respect, I don't think so, Judge.
>
> THE COURT: When you say you haven't seen it and now all of a sudden you have all this knowledge about it --
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> DEFENSE COUNSEL: Judge, we read it right before you. We read it right here.
>
> THE COURT: I still say that's fork in (sic) tongue.
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> DEFENSE COUNSEL: Well, then we would request a hearing, Your Honor, and let's have Miss Jenkins, Mr. Miller, all of us testify. Because seriously, Judge, it's --
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> THE COURT: I don't need to hear what you all have to say at this stage of the trial.

(R1613-14) More accusations from both sides followed before cross-examination continued without an adequate hearing. (R1614-16) The trial court restricted the cross-examination of Detective Pinner regarding reports that he received from other agencies and that he utilized in his investigation. (R1621-24)

Where a trial court is reasonably apprised of a discovery violation, the court must conduct a full inquiry into all of the

surrounding circumstances. Raffone v. State, 483 So. 2d 761 (Fla. 4th DCA 1986). There is no question that defense counsel repeatedly objected, asserted numerous discovery violations, requested hearings, and offered to testify. There can be no question that this issue is preserved. Failure to conduct a full hearing in accordance with Richardson v. State, 246 So. 2d 771 (Fla. 1971), constitutes per se reversible error. Cumbie v. State, 345 So. 2d 1061 (Fla. 1977).

The purpose of a Richardson inquiry is to ferret out procedural, rather than substantive, prejudice. In that regard, this Court has observed two areas that must be focused on during the hearing. First, the judge must decide whether the discovery violation prevented the defendant from properly preparing for trial. Second, the judge must decide on which sanction to invoke for the discovery violation, "raging from an order to comply, to exclusion of evidence, or even a mistrial." Wilcox v. State, 367 So. 2d 1020, 1022 (Fla. 1979). The "sanction" inquiry does not only entail what to do with the evidence, but as importantly, what to do with wilfulness conduct by an attorney who intentionally failed to disclose relevant information. The determination concerning the prejudice suffered by the surprised party cannot be made post trial, by either the trial court, Smith v. State, 372 So. 2d 86 (Fla. 1979), or an appellate court. Smith v. State, 500 So. 2d 125 (Fla. 1986).

Here, the trial court failed to conduct an adequate Richardson hearing. The extent of the trial court's "hearing"

consisted of counsel for both sides trading accusations with the trial court a disinterested observer. (R1381-91,1604-16) The trial judge was obviously attempting to avoid inconveniencing the jury by pushing the lawsuit forward. (R1612) Unfortunately, as a result, the trial court completely shirked its duty in determining: (1) if in fact a discovery violation had occurred; (2) if the defendant was prejudiced; and (3) what if any remedy should apply. Instead, the record is replete with bald assertions by counsel for both sides with no resolution of the issues. From the record before this Court, it is impossible to tell if a discovery violation occurred or not. There is at least a prima facie case that a violation did occur. This conclusion is contradicted by the naked claim of the prosecutor who insisted that no violation occurred and, in the next breath, maintained that the defense could not show any prejudice. (R1383-84)

Although not necessary at this juncture, prejudice is obvious on the face of the record. Defense counsel was constantly examining reports that he had just received in an attempt to formulate a competent cross-examination. The trial court denied requests for recess to allow Appellant to examine documents. Defense counsel was forced to hastily peruse the newly discovered reports and documents while the judge and the jury waited, undoubtedly impatiently.

The alleged discovery violation regarding the statement of Jacqueline Davis presents a special situation. Defense counsel had sought a continuance prior to jury selection based on this

allegation. (R1-21) At first, the trial court ruled Davis' testimony inadmissible. After a proffer in which Davis testified about Mallory's background, a prior burglary and resulting incarceration, and his penchant for marijuana and pornography, the trial court reversed its previous ruling and announced that he would allow the evidence. (R2070-98) Appellant also changed her mind and rested her case without calling Davis as a witness. (R2098)

Despite the trial court's ruling regarding Davis, the court still failed to conduct an adequate Richardson hearing regarding this alleged discovery violation. For one thing, Appellant requested a continuance, prior to trial, to further investigate additional issues that were raised by Davis' statement.[12] The Richardson procedural safeguard is especially important when a Brady[13] violation is claimed. This is because the prosecution has a continuing duty to disclose to the defendant any evidence favorable to the defendant. Failure to do so results in a due process violation of constitutional proportions when the suppressed evidence is material to the defendant's guilt or punishment. State v. Hall, 509 So. 2d 1093 (Fla. 1987). Jacqueline Davis' statement can be classified as Brady evidence which the State should have disclosed much earlier than they did.

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[12] Perhaps if the continuance had been granted, Appellant would have discovered the exculpatory evidence regarding Mallory's 1957 Maryland conviction for assault with intent to rape. See attached Appendix.

[13] Brady v. Maryland, 373 U.S. 83 (1963).

The trial court's failure to conduct any semblance of an adequate Richardson inquiry requires reversal for a new trial. Defense counsel repeatedly objected, alleged numerous discovery violations, and repeatedly requested a full hearing. Unfortunately, the trial court allowed both sides to swap accusations and never made a ruling. As a result of the trial court's abdication of his duty, per se reversible error occurred.

POINT II

APPELLANT WAS DENIED A FAIR TRIAL WHEN THE STATE INTRODUCED EXTENSIVE EVIDENCE OF SIX COLLATERAL MURDERS WHICH BECAME A FEATURE OF THE TRIAL.

On August 5, 1991, the State filed notice of its intent to use similar fact evidence. (R4142-47,4393-95) Appellant subsequently moved in limine to exclude any and all such evidence. (R4416-24) After hearing argument in the middle of trial, the trial court eventually allowed the jury to hear extensive testimony and to view voluminous evidence that revealed Wuornos' involvement in the murder of six other men. (R1138-85)

"Similar fact evidence in 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.

The State's case against Wuornos for the murder and robbery of Richard Mallory took only two days. (R671-1130) Over the

next four days of trial the jury heard testimony and documentary evidence about six unrelated murders that Wuornos allegedly committed after the shooting of Mallory. (R1131-1900) On the seventh day of testimony, the jury heard Ms. Wuornos testify in her own behalf. (R1913-58) A lengthy cross-examination followed, too much of which dwelt on the collateral murders. (R1958-2063) The prosecutor continued to harp on the collateral murders during final summation. (R2157-86) As she did at trial, Appellant contends that the evidence was inadmissible under any theory. At the very least, any slight probative value was outweighed by the substantial prejudicial effect. Ultimately, the evidence became a feature of the trial.

Over repeated strenuous objections by defense counsel, State witnesses recounted finding the body of Charles Richard Humphreys in a remote area of Marion County. Humphreys had been shot six times. (R1193-1226,1283-98) The State was allowed to admit over objection four autopsy photographs of Humphreys, even though the medical examiner indicated that she did not need the photographs to aid her testimony. (R1292-94,1309-12) Humphreys' briefcase was admitted over objection. (R1444-45)

The jury heard how police found the decomposed body of Troy Burress covered with palm fronds. (R1335-37) Burress had been shot twice. (R1353) The State introduced a photograph of Burress' body as it was found. (R1350-51) Thankfully, the trial court did exclude one photo of Burress' markedly decomposed body with maggots covering it. The trial court also excluded another

photograph of Burress' body on the autopsy table with this scalp decomposed and his skull exposed. (R1394-95) The jury was apprised of the fact that Burress' body was so decomposed police had to resort to dental records to identify him. (R1397)

The State also presented evidence concerning the investigation of the murder of David Spears. (R1416-35) A Citrus County sheriff's deputy found Spears' nude, badly decomposed body in southwest Citrus County. (R1423-25) Spears had been shot six times. (R1298-1305) Several pictures of Spears, his body, and his truck were admitted over defense objection. (R1416-18)

The jury also heard about the recovery of Charles Carskaddon's decomposed body in Pasco County. (R1454-68) Carskaddon died of multiple gunshot wounds to the chest and abdomen. (R1478) The medical examiner told the jury that she found a total of nine bullets in Carskaddon's body. It was impossible to trace the bullets' paths due to the decomposition and insect activity. (R1472-73) The jury also heard about the murder of Peter Siems (R1492-1532), the murder of Walter Jeno Antonio (R1550-51,1575-1680). Antonio had been shot four times, once to the back of the head and, among other things, his dentures were missing. (R1652-76) Much documentary and physical evidence was admitted as to each of the six murders.

The jury also heard from two men who "escaped" from Wuornos. Robert Copas picked up Wuornos at a truck stop. Copas claimed that he rebuffed Appellant's prostitution proposal which seemed

to anger Wuornos. (R1693-99) When Copas noticed Wuornos' small-caliber gun in her purse, he pulled off at the next exit and, using a ruse, got Wuornos out of his truck and drove away. (R1699-1701) After he locked her out of his truck, Copas claimed that Wuornos cursed and threatened him as he drove away. Copas told the jury that Wuornos was attempting to retrieve her gun from her purse as he fled. (R1701) James Delarosa also picked up Wuornos near Daytona Beach. Wuornos quoted Delarosa some prices for sex, but Delarosa declined. When Delarosa dropped Wuornos off, she slammed his car door and did not thank him for the ride. (R1713-23)

Investigator Horzepa relayed to the jury Wuornos' confessions to the six collateral murders. (R729-1900) The jury heard how Wuornos gunned down Spears as he stood next to his truck. Spears attempted to run to his truck and drive away, but Wuornos chased him down and shot him again. As Spears backed away from her, Wuornos shot him again. Wuornos admitted that she might have shot Spears once more to "make sure" that he died. (R1734-36) The jury heard how Wuornos shot Carskaddon nine times, reloaded, and shot him again. (R1736) The jury heard details of Wuornos' murder of Peter Siems, "the christian guy." (R1738-39) Wuornos told Horzepa that she always aimed for the victim's center mass area of the torso. (R1739) Horzepa explained how Wuornos shot Troy Burress after she became insulted at his offer of a ten dollar payment. (R1742) After arguing with Burress, Wuornos shot him as he backed away. Burress turned

and attempted to run, so Wuornos shot him in the back. (R1742) Wuornos shot Humphreys twice in the torso causing him to stagger and fall. When he got back up, Wuornos shot him again. She delivered the coup de gras out of pity, when she heard him gurgling. (R1744) Walter Antonio did not want to pay Wuornos, so she pulled out her gun. A struggle ensued resulting in Wuornos shooting Antonio. When he got up and attempted to run away, Wuornos shot him once in the back and twice more as he lay on the ground. (R1745) Horzepa testified that Wuornos rationalized the killings by pointing out that the victims were older, and their parents were probably dead. (R1747) Horzepa also described how Wuornos stole the victims' property following the murders.

Of course, defense counsel objected to all of the testimony and evidence relating to the collateral crimes. The trial court allowed Appellant to register a continuing objection on the record. In his zealousness to preserve the issue, defense counsel sometimes clearly irritated the judge. At the close of the State's case-in-chief, Appellant moved for a mistrial contending that the similar fact evidence had become a "feature" of the trial. The trial court denied the motion. (R1901-3)

The State's theory of admissibility was based on their contention that Appellant had a common scheme or plan to use her status as a prostitute to lure and trap men in isolated areas so that she could rob and kill them with her .22 handgun. (R4580-82) The State prepared a chart which, they contended,

illustrated the numerous similarities among the six collateral murders. (R4582) Close scrutiny of the chart reveals twenty-two separate categories of "similarities." Seven of those categories relate directly to the gun and ammunition used in the murders. Even the experts conceded the particular brand of ammunition and rifling characteristics of the weapon were not at all unusual. Six other categories listed on the chart related directly to the victims' cars. None of the listed "similarities" are particularly unique, especially when compared to other robbery-murders. The State frequently mentioned that Appellant "specialized" in older men. (R1084-86) Actually, the age of the victims span a quarter century. (R4582) Some of the bodies were clothed, some were nude. Some were shot in the back and/or head, some were shot in the chest. In some cases, personal items of property were left with the body. The geographical area containing the bodies was rather large, i.e., central Florida. Some of the bodies were found in wooded areas, some were not. Some of the victims were traveling on major thoroughfares, others were not. The police have yet to find the body of Peter Siems. The differences in the cases are more numerous than the similarities. The State's proof of the collateral murders merely established Appellant's propensity to kill. It was character assassination, pure and simple. The incidents involving Copas and Delarosa were completely irrelevant. Delarosa's testimony established, at most, that Wuornos could be rude. (R1713-23)

Appellant submits that it is significant that the six

collateral murders occurred after Mallory's death. This refutes the State's theory that Wuornos had the intent to kill Mallory before their encounter. This conclusion logically arises from the fact that, prior to Mallory, Wuornos had killed no one. The State presented no evidence establishing a preconceived plan to kill Mallory or any other "Johns." Hence, the murders committed subsequent to Mallory's death failed to prove the State's theory of Appellant's plan. The evidence of the collateral murders proved simply propensity.

Even assuming relevance, evidence of collateral crimes is not necessarily admissible. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. § 90.403, Fla. Stat. As the Eleventh Circuit Court of Appeal said in construing the equivalent federal rule:

> Probity in this context is not absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference. It is the incremental probity of the evidence that is to be balanced against its potential for undue prejudice. (Citation omitted) Thus, if the Government has a strong issue on the intent issue, the extrinsic evidence may add little and consequently will be excluded more readily. (Citation omitted).

United States v. Beechum, 482 F. 2d 898, 914 (5th Cir. 1978) (en banc).

There is little if any incremental probative value to the evidence at issue, but its damning effect as a raw appeal to juror emotion and bias cannot be denied. From a legal

standpoint, all of the adverse considerations set forth in Section 90.403, Florida Statutes are clearly present. Notwithstanding the limiting instruction given by the trial court, the jury could not reasonably be expected to disregard the extremely potent evidence and apply it solely to prove intent, common scheme or plan, etc. Moreover, the shootings were too dissimilar for the jury to lawfully infer that Appellant's intent was the same in each of the murders.

In addition to hearing details of six collateral murders and, if you believe the State's theory, two aborted abductions and murders, the jury heard irrelevant and highly prejudicial details about the murder victims. Over vehement objections, the jury heard that Humphreys was an HRS investigator for the child protection team. (R1259) Additionally, he was a retired police chief from Alabama. (R1226-27) He carried a badge which Wuornos evidently stole. (R1235,1250) He was a member of the International Association of Police Chiefs. (R1236) He was a member and supporter of the Florida Association of State Troopers. (R1268) He had not imbibed in any alcohol or drugs prior to his death. (R1297) Last, but not least, in his briefcase Humphreys carried a picture of "praying hands." (R1437-38,1444-45)

The jury also learned much about the character of Peter Siems. Over objection, they learned that his profession was "charity church work." (R1524) Siems' son testified that he thought that his father would routinely carry a Bible on trips.

(R1532) Another witness testified that Siems carried many Bibles in his travels in order to hand out to invalids. (R1728) This witness met Siems at an antique shop and developed a rapport with him through their "church affiliation." (R1726) The jury learned that, at the time of his death, Siems had been married for more than twenty-five years and always lived with his wife. (R1533-34,1727) But for his untimely death Siems' trip itinerary would have included a visit to his son in Arkansas, his mother in New Jersey, and a missionary team that the entire family supported. (R1726) Defense counsel specifically objected and moved for a mistrial on this irrelevant and prejudicial information. (R1524,1532-40)

Although Payne v. Tennessee, 501 U.S. ___ (1991), ostensibly now allows victim impact evidence, the evidence, to be admissible, must be relevant to a material fact in issue. The challenged testimony in this case was not. See Bryan v. State, 533 So. 2d 744, 746-47 (Fla. 1988). The inflammatory evidence concerning the victims' character was akin to the evidence presented by the State in Burns v. State, 18 Fla. L. Weekly S35 (Fla. Dec. 24, 1992). The Burns trial court allowed evidence of the police officer/victim's professional training, education and conduct as an officer. This Court held such admission to be error, although harmless in that particular case.[14] Appellant's case (the issue being whether Mallory's shooting was in self-

[14] A number of disinterested eyewitnesses observed Burns shoot the officer in cold blood.

defense) is a much closer case than Burns. The error cannot be termed harmless at the guilt or penalty phases.[15]

Counsel speculates that the State could not find any similar evidence regarding the other four victims that would have evoked jury sympathy. If they had such evidence, the State undoubtedly would have presented it. The State did produce irrelevant testimony concerning Antonio's murder. Although the medical examiner could not determine the sequence of the shots (R1675), she testified that if Antonio had received only the one wound to the lower back, he would have lived, but he would have been paralyzed. (R1665-66) Like Humphreys, Antonio had not been drinking prior to his encounter. (R1672)

The State argued the collateral murders extensively during closing argument. The prosecutor told the jury that they were dealing with "six men's lives." (R2185) The prosecutor also used two large charts as demonstrative aids during final summation. (R2252-53) The charts depicted the locations of the various bodies, cars, and other evidence of the collateral murders. Defense counsel pointed out that the prosecutor's action magnified the Williams[v. State, 110 So. 2d 654 (Fla. 1959)] rule error and, if it were not already, made the collateral murders a feature of the trial. Additionally, the trial court denied Appellant's requested modification of the

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[15] It is interesting to note that while the State sought to canonize the victims and assassinate Appellant's character, the State successfully prevented Appellant's attempts to attack Mallory's character. (R1112-13)

instructions which might have diminished the prejudice. (R2118-19)

If one compares the sheer volume of the testimony and evidence relating to the collateral murders, the inescapable conclusion is that such evidence dominated the trial. Initially, Appellant contends that the evidence was irrelevant to prove any material issue. Even if this Court perceives some slight relevance, it is substantially outweighed by the prejudicial effect on the jury. The State's action in "going that extra mile" by presenting the completely irrelevant but extremely prejudicial evidence regarding Humphreys and Siems personal life removes any doubt whatsoever that Wuornos received an unfair trial. Finally, near the end of the State's case it becomes abundantly clear that the collateral murders become a "feature" of the trial. A new trial is mandated.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS APPELLANT'S CONFESSION WHERE IT WAS INVOLUNTARY AS A RESULT OF IMPROPER INDUCEMENT AND, ADDITIONALLY, WAS OBTAINED IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL.

Facts[16]

During late November or early December of 1990, the Volusia County Sheriff's Department, the Citrus County Sheriff's Department, the Marion County Sheriff's Department and the

[16] The findings of fact relating to Appellant's confession is lifted, practically verbatim from the trial court's order. (R4380-83)

Florida Department of Law Enforcement combined their personnel and began a joint investigation concerning certain homicides that had occurred in the central Florida area. This team of investigators began to focus on two subjects identified to them as Aileen Wuornos and Tyria Moore. Efforts were made to locate Ms. Moore, both in Florida and in Ohio. Efforts were made to locate Wuornos in Volusia County. Ms. Wuornos was located on January 8, 1991 in Volusia County resulting in her subsequent arrest on January 9, 1991 for an outstanding warrant charging her with carrying a concealed firearm and a traffic offense.

At approximately the same time, Ms. Moore was located in the state of Pennsylvania by Pennsylvania authorities. Ms. Moore was not arrested, but was placed in some type of custodial arrangement with the Pennsylvania authorities. Later that custodial situation was assumed by Florida law enforcement authorities, who, on the 10th of January, having learned of Ms. Moore's whereabouts, proceeded to Pennsylvania to make contact. Ms. Moore, at the request of and with the assistance of the Florida law enforcement officials, returned to Florida with law enforcement officials and remained in their custody until January 16 at which time she was allowed to return to Pennsylvania. Though a suspect during this period of time, Ms. Moore was never charged with any criminal offenses and voluntarily cooperated with law enforcement officials. Her primary motivation in doing so was to clear herself of any criminal wrongdoing. In the process, she complied with all requests of police officers,

including those that were specifically directed to elicit statements and information from Ms. Wuornos. These included writing a letter to Ms. Wuornos at the county jail and the taped telephone conversations with Ms. Wuornos, originating from the county jail, collect to Ms. Moore, at the motel room that had been provided by Florida law enforcement officials for Ms. Moore.

Ms. Wuornos remained in custody at the Volusia County Jail throughout this time period charged with carrying a concealed firearm. She remained in custody during the telephone conversations and the videotaped confession on January 16, 1991. Ms. Wuornos had been arrested on the 9th and had been provided with a first appearance hearing on January 10, 1991. Counsel had been appointed to represent her from the Office of the Public Defender of the Seventh Judicial Circuit during the period of the telephone conversations and subsequent videotaped confession.

As a result of the request of the law enforcement authorities and with the consent of Ms. Moore, some ten (10) audiotapes exist reflecting numerous telephone conversations initiated from the Volusia County Jail from Ms. Wuornos to Ms. Moore discussing Ms. Moore and Ms. Wuornos as suspects of the homicides under investigation. On the initial tapes, the first two days of the tapes, Ms. Wuornos indicates that she and Ms. Moore are subjects of mistaken identity and that neither had anything to do with the homicides. During this time period, Ms. Wuornos inquires whether Ms. Moore is alone or whether there are police officers present during these phone conversations. Ms.

Moore lies to Ms. Wuornos and indicates that she is alone. The third day of phone conversations indicates a more emotional Ms. Wuornos and a more emotional Moore. At this time Ms. Wuornos promises to confess, clear Ms. Moore and take care of her. Ms. Wuornos, also during all these tapes, has professed her love for Ms. Moore without such being reciprocated by Ms. Moore. Upon termination of the phone conversations, Ms. Wuornos contacts authorities who make arrangements for Sergeant Munster and Investigator Horzepa to meet with Ms. Wuornos at the Volusia County Jail and videotape any statements that she wishes to make. Upon completion of the arrangements and at the instigation of Ms. Wuornos, she is videotaped in a custodial setting at the county jail. Having been advised of her Miranda[17] rights and having been provided with the services of the Office of the Public Defender of the Seventh Judicial Circuit and against advice of counsel, Mr. O'Neill, Ms. Wuornos makes a lengthy statement of confession to certain homicides.

A. Appellant's Statement was Involuntary in that It was Obtained as a Result of Improper Inducement.

A voluntary confession is one "not...obtained by any direct or implied promises, however slight." Bram v. United States, 168 U.S. 532 (1897). The Supreme Court has more recently pointed out that in Bram "even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too

[17] Miranda v. Arizona, 384 U.S. 436 (1966)

sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady v. United States, 397 U.S. 742, 754 (1970).

The police used Tyria Moore to illegally coerce Wuornos to confess. Wuornos and Tyria Moore were long-time friends and lesbian lovers. (R2334) Tyria ended her relationship with Wuornos and left Florida, leaving a devastated Lee Wuornos behind. (R2361) When police located Tyria in Pennsylvania, they contacted her and convinced her that she was a suspect in all the murders. Actually, police had virtually eliminated Moore as a suspect at that time. (R2370-74) Preying on Moore's fear of being charged, police convinced her to return to Florida with them to help coax a confession from Wuornos. (R2325,2988,3007, 3052) Once police paid for Moore's flight to Florida, they put her up in a motel and helped her compose a letter to Wuornos, who was sitting in jail. (R2331-32) Moore knew that Wuornos still loved her and missed her. (R2972-73) Moore's letter to Wuornos worked and, as soon as she got the letter, Lee called Tyria professing her undying love. (R3013)

Over the next three days, Moore and Wuornos had approximately ten phone conversations, all of which the police recorded with Moore's cooperation. (R2506-2716,3009) During all of the phone conversations, a police agent sat next to Tyria and coached her using written notes. (R3014-18) Rose Giansante, a FDLE special agent who was especially close to Tyria, frequently sat next to Tyria in order to keep her calm and focused. (R2234-

36) During the conversations, Moore lied to Wuornos, accused Wuornos of not loving her anymore, threatened suicide, and told Wuornos that the police were harassing her family. (R2668-69,2689,3031-35,3068) The police coached Moore how to manipulate Wuornos when Lee became emotional and began crying. (R2808-12, 3037) At one point during the phone conversations, Wuornos told Moore that she loved and missed her so much that she would die for her; that she would never do anything to hurt her. (R3066-67) In an attempt to coax incriminating statements, Moore told Wuornos that she must not love her anymore, since Wuornos was allowing Moore to get into legal trouble. (R3066-68) The plan finally worked and an emotionally shaken Wuornos, whose jail guards thought she should be on suicide watch, broke down and agreed to confess. (R2306-7,2790,3019-20)

In extracting the confession, the police improperly exploited Appellant's great love for Tyria Moore. Lee Wuornos had more love for Tyria Moore than any person on this planet. The State's shameless exploitation of that love must be condemned.

In Lynum v. Illinois, 372 U.S. 528 (1963), police told the defendant that she would lose her welfare payments and the custody of her children, unless she cooperated. In Rogers v. Richmond, 365 U.S. 534 (1961), police threatened to take the defendant's wife into custody, unless he confessed. In both cases, the resulting confessions were held to be coerced.

The record in the instant case (especially the unedited

videotape) makes it abundantly clear that Appellant's sole motivation in confessing was to protect Tyria Moore. At several junctures in the tape, the appointed lawyer reveals his futile attempts to silence Wuornos who, the lawyer states, is completely "focused" on clearing "her friend [Moore]." Wuornos was a lost cause by the time the lawyer arrived. Her subsequent waiver of counsel was invalid. Investigator Horzepa conceded that, during her statement, Wuornos repeatedly indicated that she was confessing so that Tyria would not be involved. (R2298) Wuornos reveals her motivation in this regard upon first meeting Horzepa. (R2312) After the emotional wringer Wuornos had been through during Tyria's phone calls, especially in her weakened state,[18]

Appellant recognizes that the detectives' manipulation of Wuornos' love of Moore does not necessarily equal coercion "as a matter of law." Coleman v. State, 245 So. 2d 642 (Fla. 1st DCA 1971). However, Tyria Moore's action as a police agent and Appellant's corresponding motivation is a consideration in determining the involuntariness of her statement[19]. Statements suggesting leniency are only objectionable if they establish an express quid pro quo bargain for the confession. State v. Moore, 530 So. 2d 349 (Fla. 2d DCA 1988). In Bruno v. State, 574 So. 2d

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[18] Wuornos jail guards believed that she was suicidal. (R2306) Additionally, Wuornos, a heavy drinker, was forced to go "cold turkey" in jail. (e.g., R2619)

[19] Another consideration is the extended period of incommunicado interrogation which has been called "inherently coercive." See, e.g, Davis v. North Carolina, 384 U.S. 737 (1966).

76 (Fla. 1991), this Court declined to find the defendant's statement involuntary where the police told him that, if he gave a sworn statement exculpating his son, his son would not be charged. This Court pointed out that the police legitimately believed that Bruno's son was involved. Prior to his confession, police specifically told Bruno that they would not make any promises to either Bruno or his son. This Court found no over reaching by the police. Bruno, 574 So. 2d at 80.

Unfortunately, the same cannot be said about Appellant's case. Wuornos told police immediately that her sole motivation in confessing was to protect Tyria Moore. (R2312) Despite this fact, other than the usual Miranda warnings, police failed to specifically tell Wuornos that they could make no promises regarding the treatment of Moore. Wuornos had no idea that police no longer considered Moore as a suspect. Hence she felt compelled (as a result of Moore's coercive phone conversations) to confess.

The police conduct in this case was reprehensible. They used Wuornos' considerable love and affection for Tyria Moore and parlayed that emotion into a confession. Appellant submits that the police action in this case transcends the bounds of due process. In State v. Glosson, 462 So. 2d 1082 (Fla. 1985), this Court held that a contingent fee agreement with an informant violates due process under our state constitution. See also, Hunter v. State, 531 So. 2d 239 (Fla. 4th DCA 1989) [using informant whose sentence would be reduced if he made new cases

violated defendant's due process rights]; State v. Banks, 499 So. 2d 894 (Fla. 5th DCA 1986) [utilizing confidential informants who used sex to obtain contraband constituted entrapment]. Appellant submits that the State action in the instant case is as reprehensible as that in the cited cases. The concern is the same. Was Appellant's love for Tyria Moore so great that she would do anything, even lie, to protect her? Therein lies the fault of the police overreaching in this case.

B. The Police Obtained Appellant's Confession in Contravention of Her State and Federal Constitutional Right to Counsel.

Police had focused their attention on the Appellant by January 6, 1991. (R2725-27) The investigation team wanted to gather more evidence against Wuornos before arresting her. They became concerned when one of two undercover cops, who were with Wuornos at a bar, called the investigation team on January 9. The undercover agent informed the team that a "biker party" was scheduled at the bar that evening. He expressed concern that Wuornos might get on the back of a motorcycle with someone and they would lose track of her. (R2730) As a result, police decided to arrest Wuornos on a 1986 warrant for carrying a concealed firearm. (R2297,2732-40) After Wuornos was arrested on January 9, had appeared at a first appearance hearing on January 10, and counsel had been appointed to represent her. (R4382) Police then began implementation of their plan, using Tyria Moore to extract a confession from Appellant.

Appellant contends that the police deliberately circumvented

her right to counsel[20]. The police as much as admitted that they arrested Wuornos on the 1986 warrant to secure her custody and to attempt to develop more evidence against her. The police deliberately refrained from informing Wuornos that she was a prime suspect in the murders. Hence, Appellant's arrest on the warrant was a pretext, so that the police could investigate Wuornos' involvement in the murders without providing the constitutional rights that would normally attach at the time of her arrest. By arresting Wuornos on the warrant, the police accomplished an "end run" around Appellant's Sixth Amendment and Florida Constitution right to counsel as to the murders.

If police had arrested Wuornos on the murder charge, they clearly would have been prohibited from using Tyria Moore to break down Appellant's resistance and convince her to confess. See, Peoples v. State, 17 Fla. L. Weekly S713 (Fla. Nov. 25, 1992) and Traylor v. State, 596 So. 2d 957 (Fla. 1992). As in Peoples, the police "knowingly circumvented the accused's right to have counsel present to act as a 'medium' between himself and the State." See also, Traylor, 596 So. 2d at 96. The fact that the police ultimately provided counsel late in the game is of no consequence. By that point, Wuornos was completely focused on clearing Tyria Moore. Tyria Moore, acting as a police agent, broke down Appellant's resistance over the three days of emotional, phone interrogation. In light of the "pretextual"

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[20] Amends. VI and XIV, U.S. Const.; Art. I, § 16, Fla. Const.

custody of Wuornos on the unrelated charge, the police action in this case cannot be condoned. The State deliberately circumvented Appellant's section 16 right to counsel by affirmatively concealing the actual reason for her custody. As a result, Wuornos' confession was unconstitutionally obtained. Art. I, § 16, Fla. Const.; Amends. VI and XIV, U.S. Const.; Peoples; and Traylor.

POINT IV

THE TRIAL COURT IMPROPERLY RESTRICTED VOIR DIRE OF PROSPECTIVE JURORS AND OTHERWISE VIOLATED STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO AN IMPARTIAL JURY BY IMPROPERLY DENYING VALID CHALLENGES FOR CAUSE, BY DENYING THE REQUESTS FOR SEQUESTERED VOIR DIRE, AND BY DENYING A REQUEST FOR CHANGE OF VENUE.

Florida Rule of Criminal Procedure 3.300 provides, "Counsel for both State and defendant shall have the right to examine jurors orally on their voir dire." The object of voir dire is to ascertain the qualifications and impartiality of persons drawn as jurors, that is, to elicit information as to the existence of partiality, bias, or other legal grounds for a challenge for cause. Cross v. State, 89 Fla. 212, 103 So. 636, 637 (1925); see Morford v. United States, 339 U.S. 258, 70 S.Ct. 586, 94 L.Ed. 815 (1950).

> . . . Actual bias can come to light during voir dire in two ways: by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed. (citations omitted).

By definition, presumed bias depends heavily on

> the surrounding circumstances. Therefore, when a defendant is trying to prove presumed bias, the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of "actual" bias. (citation omitted). This duty cannot be discharged solely by broad, vague questions once some potential area of actual prejudice has emerged. (citations omitted).

United States v. Nell, 526 F.2d 1223, 1229-30 (5th Cir. 1976).

Florida has long recognized a party's right to discover whether a prospective juror has formed an opinion that would prevent that person from being a fair and impartial juror, and to fully examine prospective jurors as to the strength and character of any previously formed or expressed opinion in order to develop information relevant to the meaningful exercise of peremptory challenges and challenges for cause. See Blackwell v. State, 101 Fla. 997, 132 So. 468, 470 (1931) ("The fixedness or strength of the existing opinion is the essential test of a juror's competency").

A meaningful opportunity to discover and, surely once discovered, to explore potential bias through voir dire is an essential component of the rights to due process and an impartial jury. Restriction of questioning which would disclose or explore a juror's bias denies the rights to trial by an impartial jury, to due process and to meaningful, effective assistance of counsel guaranteed by Article I, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Further, the failure to allow a defendant to fully and fairly explore a prospective juror's personal beliefs about the death penalty renders imposition of

the death penalty following a jury recommendation for the death penalty unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

Here, the defense moved for individual and sequestered voir dire to ask questions concerning Ms. Wuornos' confessions which had been published by the media.[21] Counsel argued that individual and sequestered voir dire was essential because any questioning in that area would necessarily inform all other prospective jurors that Ms. Wuornos had confessed and was involved in several murders other than those presently being tried:

> DEFENSE COUNSEL: Your Honor, we're going to be limited because confessions have been printed in the media. We can't ask them if they --
>
> COURT: What, now?
>
> DEFENSE COUNSEL: Our client's statements have been printed in the media. We are very concerned that we don't want to ask a prospective juror have you read about her statements, because we're afraid we'll taint the jury.
>
> COURT: Voir dire is fair game.
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> * * * *
>
> DEFENSE COUNSEL: Under case law, you need to hear whether the statement has tainted a given juror.

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[21] There was much pretrial litigation regarding the public release of, inter alia, Appellant's videotaped confession and a 1981 psychiatric report. The press was an active participant in several hearings. (R3741-3806,4034-44,4047,4852-59) The entire trial was broadcast on Court Television Network. (R4998-5001) Defense counsel was very concerned with the media hoopla surrounding the trial. Fearing extrajudicial influence, he vainly objected to the jury dispersing during recesses. (R799-804)

COURT: You have the right to ask about that. You just ask away all you want to.

DEFENSE COUNSEL: If you ask about the statement and a juror blurts out in front of everybody else, you've tainted the panel.

COURT: I don't think they're wanting to taint the jury, either.

DEFENSE COUNSEL: Right. That's why we're asking for individual --

COURT: If they want to blow their case, that's their function. (sic) I've never tried to alienate a jury, sir. I let counsel do that.

* * * *

DEFENSE COUNSEL: Formally, Your Honor, we would object again with regard to voir dire going forward. You have a change of venue motion before you. It's been litigated --

COURT: I told you I will rule on it on the 14th. And as I'm looking at the calendar, today is the 13th.

DEFENSE COUNSEL: In an abundance of caution, Judge, we would raise the objection again. I don't want to waive it by not stating it.

COURT: I'll cover you on all points on that.

(R25-27).

Thereafter, voir dire commenced. The first twelve prospective jurors were called, and the limited voir dire conducted by defense counsel on the topic of media exposure revealed that eight of the twelve jurors had been exposed to media coverage; of those, seven had formed either an opinion or an "impression" based on what had been seen or read.[22] Defense

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[22] Placed here in summary form, defense question of the first twelve prospective jurors revealed the following: (Names of jurors: R28-29)

Dillard (R86 - has read articles and seen news broadcasts; when asked whether he has formed an opinion, he states, "Not

counsel renewed the request for sequestered voir dire based on the answers of several of the jurors:

> DEFENSE COUNSEL: Judge, before we get into the specific challenges, we would like to renew our request for individual sequestered voir dire, even if it's a couple

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really." R87)

Ferrell (R90-91 has read newspaper articles over the past months and "I would say that I have formed an impression. I have not formed a steadfast opinion."

Roberts (R95 "I had three phone calls this morning telling me that they heard it on the news, they read it in the paper and all this and that. This morning first one, oh, you're going to be on the jury. You know. They knew that I was going to be in DeLand." R 96- "I have an impression. I don't know if it's worth anything.")

Andrews (R91 - "I have been watching this one develop from way back when Ms. Wuornos was picked up." Does not think he could be fair and impartial.)

Dineen (evidently no media exposure)

Hardy (R94 - When asked whether she had talked to anyone about the case, she stated, "You hear it. But I mean you take in what you want to take in.")

McKnight (R85 - "I believe in the innocent until proven guilty. And I've seen news programs that show a lot of evidence that seems to be incriminatory." R86- has formed an opinion)

McDaniels (evidently no media exposure)

Gimzek (R91-92 "From time to time I've seen and read excerpts from what was happening. And I did form an opinion. I don't know if it would have anything to do with proving this.")

Rickert (evidently no media exposure)

Nickell (evidently no media exposure)

Elliott (R88-89 - exposed to information about client from newspapers and television - kept up with Ms. Wuornos' background "relatively well" and has formed an opinion.)

of questions on a couple of the people, because --

COURT: Motion is denied.

DEFENSE COUNSEL: With respect, --

DEFENSE COUNSEL: I understand that you've denied. But so the record will be clear, we're asking for individual voir dire as it relates to the issue of media exposure.

* * * *

DEFENSE COUNSEL: There's both the statements issue and a collateral acts issue.

COURT: I think I've ruled sufficiently on that. This is twice.

DEFENSE COUNSEL: Respectfully object, Your Honor, on state and federal constitutional rights.

(R119-120).

The trial court recognized a continuing objection by defense counsel to collective voir dire. (R129;134-135) Defense challenges for cause as to McKnight, Elliott, and Dillard were denied. (R129-30;132-35). In the next group of seven prospective jurors, five had formed opinions[23], five were struck

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[23] The following is a summary of their voir dire answers: (jurors names R137)

Friend (R149- "I have been reading quite a bit about it and we live here locally." R164 - Does not think she can be fair . . . "Well, I'm uncomfortable and already have an opinion and everything.")

Miles (R165- has seen media coverage, "But I don't pay much attention to it really.")

Whaley (R151 - agrees that strong opinion based on media coverage would not enable him to be a fair and impartial juror; "I'm not sure I could be real fair."

Noll (R151 - states that her opinion based on exposure to media is "pretty strong.")

Hafer (R151 - agrees that she could not be fair based on media

for cause, and one juror was removed peremptorily. (R175-78)

Following voir dire of the next group of prospective jurors, defense counsel again asked for individual voir dire. The request followed the responses summarized below.[24] Thereafter, Murphy and Barrington were struck for cause, and Walters was removed peremptorily by Wuornos when a challenge for cause was

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exposure)

Grabowski (R157 - exposed to both television and newspaper coverage, and she recalls some of it. "I wouldn't be able to take them out of my head. But they would not sway my decision on what I'll weigh, what I hear in court.")

Clapsaddle (R150 - Answered, "I would be on the borderline there myself" when asked whether media exposure may affect his decision. R173- has an opinion based on media exposure that would affect decision as to proper sentence to be imposed.)

[24] (jurors names R178-179)

Staton (R199 - has been exposed to case in media but has not formed an opinion - R201 "But I haven't followed it closely, because there's so much of it.")

Mills (R202 - states he has "certainly" been exposed to media coverage about the Wuornos case in the newspaper and television, but has formed no opinion)

Walters (R204 - has read about Wuornos case in the paper, but has formed no opinions)

Murphy (R206-208 - has read paper and formed opinions based on details contained in media reports, and it might be difficult for him to put opinion aside)

Barrington (R208 - has read paper and formed opinion that would make it difficult for him to be fair and impartial juror in this case)

Polito (R209 - has seen very little of case and, when asked whether he has an opinion, states, "not really, no.")

denied. (R239)

The next three replacement jurors all admitted having been exposed to media coverage of Ms. Wuornos' case, but all professed to have formed no opinion as to her guilt or innocence. (R255) Despite being admonished by defense counsel not to do so, one prospective juror blurted out that he had read the article about Ms. Wuornos having been adopted. (R268) Two jurors were struck peremptorily (R297-298), and those were replaced by Pagliuca and Wiley, neither of whom had formed an opinion (R301-302), nor read much about the Wuornos case. (R306-07;309)

When defense counsel sought to have both Pagliuca and Wiley excused for cause, the following transpired:

> DEFENSE COUNSEL: The reason I would like to add for the record is that I feel the nature of the publicity in these causes is such that any exposure --
>
> COURT: I might add that might be a figment of some imagination because I just left you a note that said terribly frustrating when you don't get the answers you want.
>
> DEFENSE COUNSEL: I understand that. I honestly believe that to be a problem. I also believe that because of the Court's prior ruling to deny the motion, that we're forced to use peremptory challenges because (inaudible) media exposure. Just about every single one of these people --
>
> COURT: Most wonderful. Now just start using peremptory and get down to jury picking. Whichever way you want to do it suits me.

(R318).

Two more prospective jurors were called, those being Herbert and Pittman. (R333) Pittman replied that she had "not really" formed an opinion about Ms. Wuornos' guilt or innocence, whereas

Herbert stated, "I don't see how I could not have one, sir." (R336) Herbert claimed, however, that he could set his opinion aside. (R337) Upon questioning by defense counsel, Herbert admitted having discussed the Wuornos case with others who "very definitely" provided their opinions as to whether Ms. Wuornos was guilty or innocent. (R338) Herbert professed an ability to set those discussions aside. (R337) Defense challenges to Herbert and Pittman were denied. (R359) A separate defense challenge for cause as to Grabowski based on his exposure to the media was also denied. (R360)

Prospective juror Hnyla had been exposed to media coverage about this case but denied any partiality. (R393,395) When asked how many times he had seen television coverage about this case, Hnyla replied, "Well, it's how much money they're spending on this case." (R396) When asked whether he obtained any information about this case, Hnyla replied, "Well, I knew what happened, but none -- I wasn't interested in it." (R397) Hnyla also stated that the amount of money being spent on this case is a concern to every taxpayer. (R399) A defense peremptory challenge was exercised when a challenge for cause as to Hnyla was denied. (R403-404) A defense request for more peremptory challenges was granted, and Ms. Wuornos was allowed six additional challenges. (R405)

Polito, Vasquez, Bullard, McKaig and Hardy were excused for various reasons. (R419,422-26,430-31) Jurors Bugland, Lopez and Sing had seen coverage concerning Ms. Wuornos on television and

read newspaper articles, but they claimed not to remember the specifics of the coverage. (R435-37) Ms. Walters had opinions about the case based on exposure to the media. (R437) Ms. Lopez was excused for cause, because she had formed an opinion after discussing the case with her husband, who had contact with Wuornos at the jail where he worked. (R439,494) Mr. Field was excused for cause because of his opposition to the death penalty. (R499-502)

Juror Ray indicated that he had not been exposed to too much media coverage in the last two months and that he would be able to set aside any formed opinions. (R503,510-11) Ray was struck peremptorily by the defense when a challenge for cause was denied. (R521) Mr. Brown, the replacement juror, was struck for cause due to his opposition to the death penalty. (R525-26) The defense peremptorily struck Holloway, the next juror, who was exposed to both television and newspaper coverage of the Wuornos case. (R530-31)

The next juror, Pundit, recalled seeing news flashes of this case. (R539) A challenge for cause was made by defense counsel based on Mr. Pundit's statements that thoughts of his employment might interfere with his ability to pay attention at trial:

> PROSECUTOR: Would the fact that you're very busy at work, would that cause a problem at work that would distract you from your duties in the courtroom?
>
> MR. PUNDIT: It might.
>
> PROSECUTOR: Might make it difficult for you to keep your mind on what the facts of the case are and with that maybe miss something and ---

MR. PUNDIT: It might.

(R545)

* * * *

DEFENSE COUNSEL: Pundit. I just wanted to get it right. Mr. Damore asked you certain questions. You also heard a number of other questions while sitting in the court today observing the proceedings. Some of these jurors have been hearing it for two days. You indicated that your thinking about work might interfere with your ability to be a juror?

MR. PUNDIT: Uh-huh.

DEFENSE COUNSEL: Are there specific things about your employment that you might be thinking about, like what's happening at work, that type of thing? Or is it just a general type of thing?

MR. PUNDIT: Well, there are some specific things. Today in particular my schedule was I should have been running a training class.

DEFENSE COUNSEL: During the course of the trial, would you want it to end quicker because of the situation at work? If you were a juror, would you want the proceedings to finish quicker than they might finish?

STATE ATTORNEY: If Your Honor please, I would object. Virtually every juror in the courtroom wants it to end quicker.

COURT: I think that's true, too, Mr. Tanner. So if there's an objection, it will be sustained.

DEFENSE COUNSEL: Withdrawn, Your Honor. During -- If you were to sit on the jury, during your deliberations would you be thinking about your employment?

MR. PUNDIT: I think so.

DEFENSE COUNSEL: May I have just a moment, Your Honor?

COURT: Yes, sir. Mr. Pundit, if you were selected to serve as a juror, could you give your time and your attention to the testimony that comes before you and the instructions of the law to be given to you by the Court and arrive at a verdict?

MR. PUNDIT: I can.

(R546-547) A defense challenge for cause to Pundit was denied,

and Judge Blount stated, "I heard what he said at the last, that he could give his full attention to the hearing of the testimony and the instruction of the law, he could arrive at a verdict." (R548-549) The defense struck Pundit peremptorily. (R549)

Pundit was replaced by Bashaw, (R551), who had seen some media coverage. (R555) Mr. Mooney stated that he had been exposed to media coverage of this case a hundred times and had discussed it with neighbors and friends. (R563) He admitted to having an opinion about this case, but stated that he would try very hard not to let it influence him. (R564) Defense counsel moved to excuse Mooney, citing Hill v. State, 477 So. 2d 553 (Fla. 1985), Gonzalez v. State, 511 So. 2d 700 (Fla. 3d DCA 1987), and Webber v. State, 501 So. 2d 1379 (Fla. 3d DCA 1987). The challenge was denied, so defense excused Mr. Mooney peremptorily. (R567-568)

Mr. Whatley was next. Whatley, too, had been exposed to media coverage of this case and remembers the details of some of the articles. (R575-76) However, Whatley stated that he had formed no opinions based on what had been read. (R577) At this point, having exhausted the supply of peremptory challenges, defense counsel asked for and was refused additional challenges. (R578-580) The state exercised two peremptory challenges and removed Pagliuca and Sing. (R580) They were replaced by jurors Degayner and Mathis. (R591)

Ms. Mathis was exposed to media coverage, "but very little about this particular case." (R596) Mathis recalled recent

coverage broadcast on CNN and that coverage was aired on channel six when the murder first occurred, but claimed she could put aside any formed opinions, as could Mr. Degayner. (R596) When Mr. Degayner was asked about whether he had come to any conclusions based on what he had heard, he stated, "No. I think I based, I had, I had a real sick feeling for the person, whoever it was that committed the crime." (R604) Defense counsel challenged Degayner for cause, moved for an additional peremptory challenge and a change of venue, but was denied. (R607)

The jury was then sworn, (R608), and selection of the alternate jurors began. (R609) Several of those called as potential alternate jurors had been exposed to extensive media coverage. Jacobson had "very definitely" formed opinions based on video coverage; and he could not be fair. (R618) Anderson had also "drawn a conclusion already." (R620-21) Koon stated, "I have a bias." (R622) Stafford, had also formed an opinion and was excused for cause. (R658) Ms. Shreiner had also formed opinions based on media exposure. (R663) Mrs. Gross had "scanned" the newspaper article that appeared the Sunday preceding trial. (R668) After defense counsel exhausted his peremptory challenges in picking the alternate jurors, he requested additional challenges and also requested that venue be changed. Both requests were denied. (R670-71)

Based on the foregoing synopsis of the facts and law, it is respectfully submitted, initially, that the court's refusal to grant the defense a change of venue denied due process and

produced jurors who were likely biased by pretrial publicity in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution. Further, the arbitrary procedure of requiring defense counsel, in the presence of the entire venire, to explore the content of the media coverage that each juror was exposed to effectively prevented defense counsel from exploring the bias of the potential jurors, which also denied due process and the right to an impartial jury in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, 16 and 22 of the Florida Constitution.

Specifically, under the particular facts presented by this case, the articles published by the media in this case contained such unfairly prejudicial information that defense counsel was effectively prevented from asking questions that would reveal the content of the media coverage. The appendix to the motion for change of venue (R4425-4513) contains several pertinent newspaper articles that conclusively demonstrate why questions addressing the content of what publicity one juror was subjected to, in front of all other jurors, was wholly arbitrary and at odds with a fair manner to select a fair and impartial jury. It was not just the content of the articles that was unfairly prejudicial, but the headlines and captions as well, as shown by the following, only a sampling:

> (R4439) **FLORIDA COPS SAY SEVEN MEN MET DEATH ON THE HIGHWAY WHEN THEY PICKED UP ACCUSED SERIAL KILLER AILEEN WUORNOS.**

(R4443-4444) **MY LOVER IS A KILLER IN BED - & A SERIAL KILLER TOO.**

(R4445) **NO FILM PROFITS, STATE TELLS SLAYINGS SUSPECT: WOMAN ADMITS 2ND KILLING AMONG 7, AFFIDAVIT SHOWS**

(R4447) **ACCUSED MURDERER TALKS TO PRODUCER: WOMAN SAYS KILLINGS WERE IN SELF DEFENSE.**

(R4452) **ARREST MAY OFFER INSIGHT INTO SERIAL KILLER BEHAVIOR**

(R4453) **SERIAL KILLER SUSPECT SPENT LIFE IN PRISON, ON THE LAM**

(R4454) **OFFICIALS: HATRED OF MEN DROVE ALLEGED KILLER** (Article contains graph containing statistics concerning seven central Florida murders, and another headline caption stating "HATRED")

(R4461) **ACCUSED SERIAL KILLER FACES FIGHT OVER PROFITS FROM FILM, BOOK DEAL** (Article has second caption stating, "If they think they're going to make any money off the deal, we're going to be fighting them every step of the way." Pete Antonacci, deputy attorney general)

(R4462) **AILEEN WUORNOS LED ROUGH LIFE ON ROAD** (Second page of article has map showing location where seven murder victims were found in central Florida, with statistics and picture of each victim)

(R4474) **WAS Wuornos CONFESSION FORCED? JUDGE TO RULE ON TAPE'S ADMISSIBILITY** (Article accompanied by picture with caption, "Accused murderer Aileen Wuornos listens to her taped confession Thursday.")

(R4476) **Wuornos' CONFESSION TO BE ALLOWED: TAPE TO BE RELEASED TO MEDIA**

(R4479) **Wuornos TAPES REPLAY CHILLING MURDER TALES** (Second page of article has picture captioned, "'I'm the one that did the killings,' Aileen Wuornos said in a videotaped confession." A second caption stated, "Often during the rambling confession, Miss Wuornos said she considered the killings self defense. If the customer were gentle, calm and paid promptly for her services, no violence would occur." (R4480)

(R4481) **EXCERPTS FROM Wuornos' CONFESSION** (The article included, as sub-headings, the following: "Thoughts on punishment," "The victims," "Upbringing and dreams,"

"Life as a Prostitute," and "The killings." Under the main headline was the secondary quote, "If it was in western days, they'd put me in a noose and watch . . . let the town watch me die." R4481)

(R4484) **ARREST ELATES AREA LAW ENFORCEMENT: INVESTIGATORS SAY DAYTONA BEACH WOMAN IS LINKED TO 7 SLAYINGS**

(R4495) **LEVY COUPLE ADOPTS ROADSIDE KILLER SUSPECT**

(R4498) **ACCUSED KILLER'S CONFESSION RELEASED: Wuornos DETAILS ROADSIDE SLAYINGS**

(R4512) **HIGHWAY HOOKER RECOUNTS 7 KILLINGS** (Secondary headline states, "Wuornos talks freely of victims in just-released confession video")

(R4513) **"HIGHWAY HOOKER" TALKS ABOUT KILLINGS IN VIDEO** (Article has pictures of victims and leading caption, "So I shot him again . . . to get him out of his misery.")

The publicity about Wuornos was pervasive. As shown by the foregoing, even those readers who just perused the headlines obtained unfairly prejudicial information, such as the fact that Ms. Wuornos was charged with seven murders and had confessed. The requirement that Wuornos' attorneys explore these matters in the presence of other jurors was unreasonable and an abuse of discretion that constituted a denial of the rights to an impartial jury, due process and effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 22 of the Florida Constitution. Due to the interference with these rights, the conviction must be reversed and the matter remanded for retrial.

IMPROPER DENIAL OF CHALLENGES FOR CAUSE

A defendant charged with a capital offense is

constitutionally ensured the right to a fair trial by impartial jurors. The constitutional standard of fairness requires that a defendant have "a panel of impartial 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). In Singer v. State, 109 So. 2d 7 (Fla. 1959), the Supreme Court of Florida set forth the following rule:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that State of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

Singer, 109 So.2d at 2324. The foregoing rule has been consistently adhered to by this Court. See Hamilton v. State, 547 So.2d 630 (Fla. 1989)(denial of challenge for cause of juror who had preconceived opinion which would require evidence to displace was reversible error despite juror's assurance that she could hear case with open mind); Moore v. State, 525 So.2d 870 (Fla. 1988)(refusal of trial court to grant challenge for cause to juror who gave equivocal answers concerning his ability to accept insanity as defense was reversible error); Hill v. State, 477 So.2d 553 (Fla. 1985)("a jury is not impartial when one side must overcome a preconceived opinion in order to prevail."); See also Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986)(jurors ability to be fair and impartial must be unequivocally asserted in the record).

Here, when a defense challenge for cause as to prospective juror Degayner was denied, a request for additional peremptory challenges was made and that was denied. (R607) Degayner had

previously indicated the following:

> Defense counsel: How about you? What were you exposed to?
>
> Mr. Degayner: I spend probably, I put about 30 miles or 30,000 miles on my car every year in my profession. And it's a car radio I hear most of my news on. And I guess probably as the investigation and that of the crime that was carried on, I heard news flashes and things of that, mostly on the car radio.
>
> Defense counsel: Did you form an opinion or an impression of my client based on what you were hearing?
>
> Mr. Degayner: Well, I really don't understand what you are saying.
>
> Defense counsel: Did you come to any conclusion about what kind of person she was or anything like that, based on what you were hearing on the radio?
>
> Mr. Degayner: No. I think I based, I had, I had a real sick feeling for the person, whoever it was that committed the crime.

(R604)

It is respectfully submitted that Wuornos was prejudiced by not being able to strike Mr. DeGayner based on his foregoing statements. In that regard, the trial court erred in refusing to strike for cause any and all of the following prospective jurors, all of which were peremptorily excused by Wuornos after a challenge for cause was improperly denied, an erroneous ruling that required defense counsel to expend a precious peremptory challenge that could have been exercised against Mr. DeGayner:

Walters (R239)
Herbert (R359)
Grabowski (R360)
Pittman (R359; 416)
Ray (R521)
Pundit (R548-549)
Mooney (R567-568)

Particularly as to jurors Pundit and Mooney, the trial court erred in refusing to grant defense counsel's challenges for

cause. The court's recollection as to what Pundit had said was incorrect: Pundit was unsure whether he would be a good juror and believed he would be thinking about his job while evidence was being presented. (R544-547) Mooney had been exposed to the media coverage of Wuornos' cases a hundred times, had discussed the case with his neighbors and friends, received his neighbors' and friends' opinions as to the guilt or innocence of Ms. Wuornos, and had himself previously expressed an opinion as to Ms. Wuornos' guilt or innocence. (R563-564) When asked if he would be able to put that opinion aside, he stated, "I would try very hard." (R564;566) Clearly, these two jurors should have been excused for cause.

Although several of the jurors challenged for cause stated that they could set aside their preconceived ideas and be fair and impartial, their inconsistent responses and equivocal assertions establish a reasonable doubt that they could be fair and impartial. Accordingly, the denial of the challenge(s) for cause constituted reversible error due to the violation of the rights to due process and a fair and impartial jury guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution.

A new trial is required because of the deprivation of the foregoing state and federal constitutional rights. The motion for change of venue should have been granted after the vast majority of jurors revealed that they had, in fact, been exposed

to the extensive media coverage that contained such unfairly prejudicial information. So, too, the trial court abused its discretion in requiring defense counsel to ask questions concerning the recollection of the jurors as to what had been read or seen in the media in the presence of the entire venire. Finally, the court erred in failing to grant several valid challenges for cause, forcing defense counsel to expend peremptory challenges. For the foregoing reasons, the conviction should be reversed and the matter remanded for retrial.

POINT V

THE JURY'S PENALTY PHASE VERDICT WAS UNCONSTITUTIONALLY TAINTED AS A RESULT OF IMPROPER INSTRUCTIONS, IMPROPER EVIDENCE, AND IMPROPER ARGUMENT.

A. Improper Jury Instructions

The jury's death recommendation was tainted by erroneous, improper, and vague instructions. These errors were numerous and Appellant will address each one separately.

(1) Over objection, the trial court instructed the jury on the pecuniary gain circumstance [§ 921.141(5)(f), Fla. Stat.] and the felony-murder factor with robbery as the stated felony [§ 921.141(5)(d), Fla. Stat.]. Defense counsel pointed out that the State should either elect or the trial court should instruct on only one. (R3540,3542-43) Alternatively, Appellant requested a limiting instruction. (R3552,4641) The trial court overruled the objections (R3543) and instructed the jury on both circumstances. (R3595-96) Although the trial court recognized

that it could not find both factors in sentencing Appellant to death (R4664-65), the jury was never instructed on this pertinent and critical point of law. Undoubtedly, they considered each factor separately and gave each independent weight. This Court has pointed out that, where consideration to two factors result in doubling, the jury must be instructed that it should consider the two factors as one. Castro v. State, 597 So. 2d 259 (Fla. 1992). The trial court clearly erred and the jury's resulting recommendation was tainted. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17, Fla. Const.

(2) Defense counsel objected on vagueness grounds to several of the jury instructions concerning the aggravating circumstances. It was counsel's contention that the instructions failed to adequately channel the jury's discretion. Specifically, Appellant objected to the "heightened premeditation" instruction and filed a written request for a special jury instruction. (R3545-46, 4633-34) The trial court denied the request and told the jury simply:

> The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R3596) Defense counsel also filed a written request for a special jury instruction defining the final phrase of the above. (R4632) The trial court denied both of Appellant's requests for special instructions that would have clarified this vague, ambiguous, aggravating factor. (R3552,4632-34) This was clearly error. Espinosa v. Florida, 505 U.S. ____ (1992). Espinosa is

not limited to the "heinousness" aggravating factor. See, e.g., Hodges v. Florida, 61 USLW 3254 (1992). The prosecutor compounded the problem by improperly and inaccurately informing the jury that this circumstance applies to all premeditated murders (of which the jury found Appellant guilty). (R3140-41,3568,3604, 3609) Additionally, the evidence does not support an instruction on this factor. See Point VI, C, infra. Sochor v. Florida, 504 U.S. ___ (1992).

(3) Defense counsel also objected on similar grounds to the instruction that the murder was committed while "engaged in the commission of the crime of robbery." [§ 921.141(5)(d), Fla. Stat.] As Appellant argues in the portion of the brief attacking the trial court's finding of this particular factor (See Point VI, A), the evidence does not support this circumstance. The taking of Mallory's property occurred after his death and was merely an afterthought. The jury instruction to the contrary failed to channel their discretion in that it completely failed to define what this circumstance required. Additionally, the evidence does not support the instruction. Espinosa v. Florida, supra; Sochor v. Florida, 504 U.S. ____ (1992). If the trial court misunderstood this factor, surely the jury did also.

(4) Appellant made similar objections to the instruction on the "avoiding arrest/witness elimination" aggravating circumstance. (R3541-42) The trial court overruled the objection and instructed the jury simply, "[the murder]...was committed for the purpose of avoiding or preventing a lawful

arrest or effecting the escape from custody." (R3596) Such vague language, without more, fails to constitutionally channel the jury's discretion. Additionally, the evidence does not support an instruction on this factor. Sochor v. Florida, supra.

(5) Appellant also objected to the "heinousness" factor [§ 921.141(5)(h), Fla. Stat.] on similar grounds. (R3544) Although the jury was instructed using the "new" standard as to this factor, Appellant maintains that the instruction still fails to pass constitutional muster. The last sentence, "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 more readily susceptible to an interpretation that the court is giving an example of a crime. If this sentence is construed by the jury as an "example" rather than a "limitation," the instruction fails to constitutionally channel the jury's discretion. Also, the evidence does not support the giving of this instruction. Sochor v. Florida, supra.

B. Lack of Remorse

At several points during the penalty phase, the State offered evidence indicating that the Appellant had no remorse. This Court has repeatedly pointed out that lack of remorse should have no place in the consideration of any aggravating factors. See, e.g., Pope v. State, 441 So. 2d 1073 (Fla. 1983). The jury's consideration of Appellant's lack of remorse is particularly inappropriate, since Appellant's entire case was

based on a theory of self-defense.

Over objection, the State presented the testimony of Susan Hansen, a corrections officer at the Volusia County Branch Jail. Hansen was assigned to watch Appellant while she was medically segregated. (R3155-56) Hansen described Wuornos' demeanor during a conversation. "She was very animated, very laughing, joking, talking the whole time, she was completely animated the whole time [as she discussed the murder]." (R3157) Appellant's objections (relevance; nonstatutory aggravating factor) were overruled when the prosecutor assured the court that they would "tie it up later." (R3157) Officer Hansen also testified over objection that Appellant told her how "it made her feel to kill" Mallory.

> She stated that after she killed, she sometimes got upset because she killed so many guys that she, like, I feel guilty, you know, other times I'm happy, I feel good like a hero or something because I've done some good.

(R3167)

The improper evidence concerning Appellant's lack of remorse was not limited to the testimony of Officer Hansen. During the cross-examination of Dr. Krop, a defense psychologist, the prosecutor questioned whether or not Appellant had a conscience.

> Q: Did you see evidence of a conscious (sic) in her from your examination?
>
> A: Yes.
>
> Q: Are you -- surely you are aware...that she said it was all right to kill these men because they were all up in years and didn't have parents at home. Didn't she say that?

(Defense Counsel): Objection, Your Honor. Beyond the scope.

* * * *

(Defense Counsel): And beyond the scope of the hearing, eighth amendment.

THE COURT: Objection overruled.

Q: She said that. Didn't she?

A: With regard to the incident itself, she has not expressed guilt or a conscious (sic).

* * * *

Q: Just no guilt or conscious (sic) for killing Mr. Mallory. Is that what you were saying?

(Defense Counsel): Objection, Your Honor.

THE COURT: Overruled.

Q: Is that what you were saying?

A: She felt it was self defense.

Q: And, in fact, I'm sure you are aware she indicated to one of the other persons that she talked to, which I'm sure you have the report, that these men deserved to die because they were cheating on their families. Didn't she say that?

A: She indicated that yes.

Q: Not much conscious (sic) there. Is there?

(R3379-81) The trial court finally sustained a defense objection following the last comment by the prosecutor. (R3381) Even then the prosecutor did not give up completely. On recross, the prosecutor elicited (over objection) that people with antisocial personality disorders kill more people than individuals with borderline personality disorders. (R3399)[25]

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[25] This information was critical because the State's sole expert disagreed with the three defense experts, concluding that Appellant's major problem was that she suffered from an antisocial personality disorder, i.e., lacked a conscience.

The prosecutor capped it all off by arguing Appellant's lack of remorse during final summation.

> 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.

(R3573) Presenting evidence of a defendant's lack of remorse is one thing, arguing it to the jury is quite another. See, e.g., Whike v. State, 596 So. 2d 1020 (Fla. 1992).

C. Collateral Murders

Appellant waived any reliance on the statutory mitigating circumstance that she had no significant prior criminal history [§921.141(6)(a), Fla. Stat.]. (R3547) Nevertheless the evidence in the penalty phase is sprinkled with references to the other murders. The most blatant incident occurred during the prosecutor's cross-examination of Dr. Toomer. Under the guise of testing the "credibility of the witness," the prosecutor repeated irrelevant, inflammatory details of Mr. Carskaddon's murder.

> PROSECUTOR: With regard to the shooting of Mr. Carskaddon for example --
>
> DEFENSE COUNSEL: Objection, Your Honor. Beyond the scope of the physical (sic) hearing, Your Honor.
>
> PROSECUTOR: This goes to the credibility of the witness.
>
> DEFENSE COUNSEL: Not relevant, Your Honor.
>
> THE COURT: Objection overruled. Go ahead.
>
> * * * *
>
> Q: ....With regard to the shooting of one of the victims, Mr. Carskaddon, the first story she told was that she shot him in the back seat of the car. After she shot him several times, she got out and learned for the first time, didn't know it before, that he had a pistol because it was laying on the hood, and then she got mad and reloaded the gun and went in and shot him

> some more.
>
> Then she ultimately told Dr. McMahon....And with that, she grabbed the gun and she shot him over and over again because he was afraid he was going to get her. And she killed him. And she was so mad, she shot him some more. And then the next time she talked to Dr. McMahon about it months later, she said....that she thought she was going to be murdered. And then he got in the backseat and put the gun down and she managed to get her gun and shoot him to death.

(R3449-51) Appellant objected to the form of the question and moved for mistrial, which the court denied. (R3451) Further questioning by the prosecutor prompted Appellant to object, pointing out that the Carskaddon case was not at issue at the hearing. The trial court overruled the objection. (R3451)

The objectionable evidence relating to Carskaddon's murder was improperly admitted. The evidence constituted nonstatutory aggravation and should have been excluded. See, e.g., Provence v. State, 337 So. 2d 783 (Fla. 1976). This is especially true in light of Appellant's waiver of the statutory mitigating circumstance dealing with no significant prior criminal history.

Although the jury heard evidence of the other murders at the guilt phase, "Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase." Castro v. State, 547 So. 2d 111, 115 (Fla. 1989). The irrelevant, prejudicial evidence tended to negate the case for mitigation presented by Wuornos and improperly influenced the jury in its penalty-phase deliberations.

D. Diminishment of the Jury's Responsibility

Appellant repeatedly tried to preclude any instructions,

comments, or argument that tended to diminish the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). (R3538-39,3546,3551,4176-79) Nevertheless, the trial court refused to modify the standard jury instructions. The trial court did inform the jury that their recommendation would be given "great weight." Nevertheless, the standard jury instructions are replete with references to "recommendation", "advisory verdict", and constant reminders that the final decision rests with the judge. (R3135,3594-99) Additionally, the prosecutor reminded the jury, at least twice in summation, that their verdict was purely advisory (R3564), and "....only the Judge imposes the sentence. Juries do not." (R3565) Appellant submits that the combined effect of the instructions and argument resulted in the diminishment of the jury's perception of the importance of their role at the penalty phase. Caldwell; Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9, 16, 17, and 22, Fla. Const.

E. Prosecutorial Misconduct

In addition to diminishing the jury's role at the penalty phase (R3564-65), the prosecutor improperly argued the presence of pecuniary gain and "during the commission of a robbery." (R3567) See Sections A(1) and (3), supra. Also as previously argued, the prosecutor misstated the standard of proof required for the "heightened premeditation" factor. (R3140-41,3568,3604, 3609) The prosecutor also inappropriately argued Appellant's lack of remorse. (R3573); see Section B, supra.

Additionally, the prosecutor improperly diminished the importance of nonstatutory mitigating circumstances. Hitchcock v. Dugger, 481 U.S. 393 (1987). The prosecutor called them:

> ....kitchen sink grounds. Really not a statutory ground but it just covers virtually everything else. It's, in many instances, a plea for sympathy based upon a different packaging.

(R3569) The prosecutor's argument was clearly improper. He went on to state that, "Mental impairment is the defense of last resort [by defense attorneys]." (R3569) Such a comment on "defense tactics" is highly improper and unethical. See, e.g., Wilson v. State, 371 So. 2d 126 (Fla. 1st DCA 1978). Defense counsel objected on these specific grounds. (R3604) The prosecutor similarly dealt with another "defense tactic" when he referred to a psychologist's testimony concerning familial sexual abuse as "dirty little innuendo" (R3572), and an "attempt to smear someone else to get sympathy." (R3573) This argument was also an improper comment on defense tactics and Appellant specifically objected and moved for a mistrial. (R3606-09)

The prosecutor inappropriately limited the jury's consideration of mitigation when he told them, "Mercy is simply another word for sympathy. And that's not what this verdict is to be based on." (R3576) Hitchcock; but see, Dougan v. State, 595 So. 2d 1 (Fla. 1992). Defense counsel again objected and moved for a mistrial. (R3606,3609)

Finally, the prosecutor totally skewed the jury's consideration of the mitigating evidence of Appellant's mental illness. The prosecutor equated the mental mitigating

circumstances with insanity. Although the defense never even implied that Appellant was insane, the prosecutor argued:

> ....But the question is whether she understood what she was doing. Whether she knew what she was doing. Whether she knew what she was doing was wrong....She also went on to say that whether Aileen Wuornos knew right or wrong at the time she killed this man was irrelevant. [It's] very relevant....It's not even about mental illness because every single mental health care expert that testified...they all agreed that she's responsible in every sense of the word legally.

(R3569,3571-72,3576-77) Defense counsel again objected and moved for a mistrial based on the prosecutor's misrepresentation of the law, i.e., confusing mental mitigation with insanity. (R3605,3609) The cumulative affect of the prosecutor's improper arguments certainly justifies a new penalty phase.

F. Other Requested Special Instructions

In addition to the specific arguments concerning improper jury instructions, Appellant requested additional special instructions that accurately stated the law and were not adequately covered by the standards. The need for adequate instructions to channel a jury's discretion in capital cases has been emphasized time and time again. See, e.g., Espinosa v. Florida, supra; Gregg v. Georgia, 428 U.S. 153, 192-93 (1976). Special instructions #8 and #'s 10-12 would have been particularly helpful and pertinent. (R4640,4643-45) All of the specially requested instructions were improvements on the standards. The trial court's perfunctory denial (R3552) of all the requests violated Appellant's constitutional right to a fair trial. Amend. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9,

16, 17, and 22, Fla. Const.

POINT VI

THE TRIAL COURT ERRED IN IMPOSING A DEATH SENTENCE WHICH IS NOT JUSTIFIED IN THAT IT IS BASED ON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, ADDITIONAL MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

Following deliberations, the jury returned an advisory recommendation (12-0) that the trial court sentence Aileen Wuornos to death. (R4647) In following the jury's recommendation, the trial court found five aggravating circumstances: (1) Appellant had a prior conviction of robbery with a deadly weapon in 1982 [§921.141(5)(b), Fla. Stat.]; (2) the crime was committed during the course of a robbery [§921.141(5)(d), Fla. Stat.]; (3) witness elimination [§921.141(5)(e), Fla. Stat.]; (4) the crime was especially heinous, atrocious or cruel [§921.141(5)(h), Fla. Stat.]; and (5) heightened premeditation [§921.141(5)(i), Fla. Stat.]. The trial court rejected all of the applicable statutory mitigating circumstances, but did find that Aileen Wuornos suffered from a borderline personality disorder. (R4663-69)

A. The Trial Court Erred in Finding that the Crime was Committed During the Commission of a Robbery.

In finding this aggravating circumstance, the trial court wrote:

> It was proved beyond a reasonable doubt that the Defendant, AILEEN CAROL WUORNOS, was engaged in the commission of a Robbery at the time of the murder and

> the Jury returned a verdict of Guilty to Armed Robbery with a Firearm of Richard Mallory. The evidence shows that the Defendant, AILEEN CAROL WUORNOS, enticed Richard Mallory to an isolated area and took from him money and other property, to-wit: radar detector, two cameras, luggage, black attache case, an automobile; the property was taken against the will of Richard Mallory and was done with force, violence, assault or putting the victim in fear. After the unlawful taking the victim was permanently deprived of his property as the Defendant, AILEEN CAROL WUORNOS, pawned one of the cameras and the radar detector on December 6, 1989, five (5) days after the homicide. The evidence shows that the Defendant, AILEEN CAROL WUORNOS, shot Richard Mallory to death in the course of committing said Robbery. By the pawning of these items, the fact is proved that the offense was committed for pecuniary gain. The caselaw, as understood by this Court, is that this aggravating factor, F.S. 921.141(5)(f), while established, is merged with the factors set out in this paragraph. Thus, the aggravating circumstance that the Defendant committed the capital felony while she was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit a Robbery, F.S. 921.141(5)(d), has been established beyond a reasonable doubt and has been merged with the aggravating circumstance that the capital felony was committed for pecuniary gain.

(R4664-65)

The pecuniary gain aggravating factor and, when the felony is robbery, the felony-murder circumstance, are limited to situations where the primary motive for the killing is monetary gain. See Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982); State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). This Court has approved the finding of pecuniary gain only in cases where an actual robbery was occurring or at least being attempted, or in which the defendant receives something of value during the crime. See e.g., Bolender v. State, 422 So. 2d 833 (Fla. 1982) [murder during robbery and torture of cocaine dealers]; Ross v. State, 386 So. 2d 1191 (Fla. 1990) [killed burglary victim and ransacked

house for valuables]; Antone v. State, 482 So. 2d 1205 (Fla. 1980) [contract killing]; Hargrave v. State, 366 So. 2d 1 (Fla. 1979) [robbery of a convenience store].

The evidence does not establish beyond a reasonable doubt that Aileen Wuornos killed Richard Mallory in an attempt to obtain property from him. The evidence is just as consistent that Appellant's gathering of Mallory's valuables was merely an afterthought to the murder. In Young v. Zant, 506 F. Supp. 274, 280-81 (M.D.Ga. 1980), the court rejected a finding that the murder was committed during the course of a robbery or for pecuniary reasons in a similar situation. There, the court held:

> Having carefully considered all the evidence presented at trial, the court finds that the evidence was not legally sufficient to support the jury's finding beyond a reasonable doubt that the murder was committed in the course of an armed robbery or for the purpose of obtaining money. The only relevant evidence presented at trial indicated that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck, i.e., after the murder had been committed....Based on the evidence presented at trial, petitioner prior to the commission of the murder had only intent to rob the victim is only speculation. Certainly the evidence does not prove these aggravating factors beyond a reasonable doubt.

The intent to deprive Richard Mallory of his property did not occur until the incident was over. As such, the murder was not committed during the course of a robbery. The taking of Mallory's property was an afterthought. If the felony is committed immediately following the murder, this aggravating circumstance is not applicable. Moody v. State, 418 So. 2d 989 (Fla. 1982) [circumstance improperly found where defendant committed an arson of the victim's home after the killing.] At

no point during Appellant's numerous statements to the police did she ever admit that she killed Mallory in order to facilitate a robbery. In fact, she clearly indicated the contrary. The State's own evidence at the penalty phase revealed:

> Q: I would like to discuss in particular Miss Wuornos' reasons, if any, that she gave you for killing Richard Mallory.
>
> A: Well, she did discuss that at times she didn't do this to rob people....

(R3157-58) Mallory's death arose when the Appellant became convinced that he intended to either rape or rob her. (R1071-78) Appellant contended that she killed Mallory for retaliation and that he deserved it. (R1080) She took "final revenge" by keeping his property. (R1080,1100) Moody v. State, 418 So. 2d 989 (Fla. 1982). The State clearly failed to prove this aggravating circumstance beyond a reasonable doubt.

B. The State Failed to Prove Beyond a Reasonable Doubt that the Murder was Committed for the Purpose of Avoiding or Preventing a Lawful Arrest.

In finding this particular circumstance, the trial court wrote:

> It was proved by the evidence of the crime that the crime was committed for the purpose of avoiding or preventing a lawful arrest by the Defendant's methodology in the commission of the crime and her actions as follows:
>
> (a) The removal of identification from the victim's body.
> (b) The covering up of the body with the rug.
> (c) The removal of the license plate from the victim's automobile and by concealing said automobile in a deserted area.
> (d) The wiping of all fingerprints

> from the victim's automobile.
>
> (e) By washing said automobile to destroy any evidence that would link her to the Robbery.
>
> (f) The defendant's own statement that she had to kill victim or he would tell someone if he lived.

(R4665-66) As in the finding of the previous aggravating circumstance, the trial court's logic is fatally flawed. All of Appellant's actions listed above were clearly done to avoid detection for the murder. After the assignation turned ugly, Appellant shot Mallory to death. Appellant then had a dead body on her hands. She did her best to cover her tracks. The accuracy of this analysis is revealed if one stops the action at any point prior to the shooting. Under any theory presented by the State, a halt in the action immediately before the shooting begs the critical question: For what crime was Appellant seeking to avoid arrest? Mallory was the one smoking marijuana. Wuornos and Mallory were both engaged in an act of prostitution. It is doubtful that Mallory would have reported their activity to the police. The only serious crimes committed by Appellant were the murder and the theft of Mallory's property after the murder. (See preceding argument.)

This Court has repeatedly held that the "avoiding arrest" aggravating factor is not applicable unless the evidence proves that the only or dominant motive for the killing was to eliminate a witness. See, e.g., Perry v. State, 522 So. 2d 817, 820 (Fla. 1988); Floyd v. State, 497 So. 2d 1211, 1214-15 (Fla. 1986); Riley v. State, 366 So. 2d 19, 21-22 (Fla. 1978). Even if the

victim knew and could identify the defendant, that, without more, is insufficient to prove this factor beyond a reasonable doubt. See, e.g., Perry, 522 So. 2d at 820; Floyd, 497 So. 2d at 1214-15; Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984). See also Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992).

Mallory had never met the Appellant prior to that fatal night. It was Appellant's habit to use an alias while prostituting. Most importantly, there was no reason to eliminate Mallory as a witness since, prior to the murder, no crime had been committed.

C. The State Failed to Prove Beyond a Reasonable Doubt that the Murder was Cold, Calculated, and Premeditated Without Any Pretense of Moral or Legal Justification.

In finding this particular aggravating circumstance, the trial court wrote:

> The evidence before the Jury shows the Defendant's heightened form of premeditation by the manner in which Richard Mallory was selected by the Defendant according to her plan by hitchhiking on an interstate highway and being given a ride by an unsuspecting victim. By the manner she shot the victim from the side by surprise and then went around the vehicle and pulled him out of the car and shot him again to insure the success of her plan. All accomplished by hiding her firearm in her bag until getting the victim in an isolated area and then shooting the victim three (3) times from the side while the Defendant was seated in the front passenger seat and the victim was seated in the front driver's seat facing forward as evidenced by the location and trajectory of the bullets. A cold, calculated, and premeditated manner runs throughout the circumstances of this case, as the Defendant hunted her unsuspecting victim on the highways of this state to take his property and kill him to satisfy her own needs. The Defendant raises the issue of being attacked and/or believing she was being attacked and that she, therefore, killed Richard Mallory in self-defense or

> with some sense of moral or legal justification. The Jury did not accept the Defendant's testimony and the Court cannot accept the testimony due to the many conflicts in her statements....

(R4667-68) If the record on appeal supported the evidence relied upon by the trial court, perhaps this aggravating circumstance could be upheld. The trial court's conclusions are simply unsupported by the record.

The trial court repeatedly refers to Appellant's "plan," e.g., "according to her plan"..."to insure the success of her plan." (R4667) The trial court makes reference to "the manner in which Richard Mallory was selected"..."the Defendant hunted her unsuspecting victim...to take his property and kill him to satisfy her own needs." (R4667-68)

There is absolutely no evidence that the Appellant had any preconceived plan to hunt down and kill Richard Mallory or anyone else. Appellant's statements to police provide the only details as to what actually happened that night. At worst, Appellant's statements establish an "imperfect" self-defense. A defendant's version of what occurred must be accepted as true unless contradicted by other proof showing that version to be false. See, e.g., Jaramillo v. State, 417 So. 2d 257 (Fla. 1982).

Since Mallory was the first of Appellant's victims, the State cannot even rely on the other murders to establish a preconceived, "well-thought-out" plan. Tyria Moore could not aid the State in proving this circumstance. She provided no evidence that Wuornos planned the killing in advance. Contrary to the trial court's assertion regarding the bullets' trajectory and

location, the State could not prove the relative positions of Mallory and Wuornos. (R873-74,921-28)

Although the jury rejected Appellant's case of self-defense, the evidence clearly fails to support any preconceived plan to kill Mallory. Rather, the evidence tends to support the opposite. Mallory's murder was a spontaneous act. Whatever provoked Aileen Wuornos that night, (a rape, a robbery, Mallory's refusal to disrobe, his refusal to pay) legitimate or not, real or imagined; the decision to kill was spontaneous. The State cannot prove otherwise.

Even if the evidence did support "heightened premeditation," the evidence also establishes at least a subjective justification for killing Mallory. This aggravating circumstance is not established, if the defense establishes even a pretense of legal or moral justification. § 921.141(5)(i), Fla. Stat. Appellant's confession certainly contains at least a pretense of moral or legal justification. Her statements and her testimony reveal that she acted in self-defense, whether actually justified or not.

The expert testimony also supports a finding of at least a pretense of justification. All the expert witnesses agreed that Wuornos suffered from a borderline personality disorder. As a result of her early abandonment, Wuornos perceived that she was a victim. (R3193-94) When she was in the woods with Mallory, she believed that her life was threatened and she reacted. (R3219) Her action was consistent with the impulsiveness which

characterizes her illness. (R3221,3321,3343-45) The evidence is certainly consistent with the reasonable hypothesis that Appellant killed Mallory spontaneously. See Geralds v. State, 601 So. 2d 1157 (Fla. 1992).

D. The Trial Court Erred in Finding the Murder Especially Heinous, Atrocious, or Cruel.

In finding this particular aggravating circumstance, the trial court wrote:

> The evidence before the Jury shows that Richard Mallory after being shot three (3) times while seated behind the steering wheel of his automobile was either dragged from the car by the Defendant based on the physical evidence or crawled out. He was alive at that time and was then once again shot by the Defendant directly into his chest. The Medical Examiner, Dr. Botting, testified that Richard Mallory survived at least ten (10) minutes and up to possibly twenty (20) minutes, desperately gasping for breath. The Defendant described drinking a beer while sitting on the hood of the victim's vehicle as he lay on the ground dying. Then the Defendant drug (sic) him into the woods and rifled his pockets for money and car keys as the victim Richard Mallory desperately gasped for breath. Officer Hansen testified that the Defendant on January 18, 1991, told her that after shooting Richard Mallory, he cried out, "I'm dying", to which the Defendant replied, "That's right motherfucker" and shot him again. The victim's knowledge of his impending doom for at least ten (10) minutes, gasping for breath, begging for his life, and the unmerciful manner of taunting, dragging the victim into the woods, going through his pockets and then covering him up to die clearly established that this murder was unnecessarily tortuous, cruel, atrocious and heinous to the victim, Richard Mallory. The Defendant's actions evinced an enjoyment and indifference to the suffering of Richard Mallory, while being wicked, vile and shockingly evil....

(R4666-67)

In Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981), this Court announced the principle that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm

of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." In the realm of first-degree murders, Mallory's shooting was ordinary.

This particular aggravating circumstance also focuses on the intent of the defendant. In Porter v. State, 564 So. 2d 1060 (Fla. 1990), the crime was not meant to be deliberately and extraordinarily painful, even though it probably was. It is abundantly clear that Appellant did her best to prevent Mallory from suffering. Appellant told a guard at the jail that Mallory fell down and said, "I'm going to die...I'm dying." (R3159) Appellant stated that she then quickly shot him again two more times. (R3159) It is clear from all of the evidence that Appellant attempted to end Mallory's life as quickly as possible.

Additionally, once again the trial court's findings are not supported by the record. The court writes that Appellant dragged Mallory into the woods and covered "him up to die." (R4666-67) It is just as reasonable a hypothesis that Appellant dragged the body into the woods to cover it and rifled his pockets after Mallory was dead. Acts done after the killing cannot render the murder especially heinous, atrocious or cruel. Scott v. State, 494 So. 2d 1134 (Fla. 1986); Halliwell v. State, 323 So. 2d 557 (Fla. 1975).

This Court has refused to uphold this aggravating circumstance in other, factually similar cases. Hallman v. State, 560 So. 2d 223 (Fla. 1990) [guard killed with single shot to the chest with death probably occurring within a matter of a

few minutes]; Williams v. State, 574 So. 2d 136 (Fla. 1991) [defendant restrained bank guard, then shot her with little delay]; Amoros v. State, 531 So. 2d 1256 (Fla. 1988) [murderer fired three shots into the victim at close range]; and Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) [victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain, and knew he was facing death]. This is not a case where the victim was abducted and kidnapped prior to the murder. Mallory was with Wuornos for several hours of his own free will.

Other factors militate against the finding of this aggravating circumstance. The medical examiner conceded that, at the time of the shooting, Mallory was legally intoxicated or very close to it. (R875) This Court has recognized the intoxication of the victim as a consideration in rejecting this particular circumstance. See, e.g., Herzog v. State, 439 So. 2d 1372 (Fla. 1983) Additionally, the medical examiner could not rule out the reasonable hypothesis that Mallory suffered a head injury during the melee. (R875) If so, Mallory may have been unconscious during a substantial portion of the attack, brief though it was. If so, he would not have been conscious of his suffering. Scott v. State, 494 So. 2d 1134 (Fla. 1986).

In its consideration of this circumstance, the trial court also neglected to consider the unrefuted evidence that Wuornos suffered from a borderline personality disorder. A defendant's mental defects are an important factor in evaluating the

heinousness of a crime. See, e.g., Huckaby v. State, 343 So. 2d 29, 34 (Fla. 1979). The testimony of the mental health professionals indicate that the murder was committed in an "emotional rage" and was thus not heinous, atrocious, or cruel. Buford v. State, 403 So. 2d 943 (Fla. 1981). See also, Halliwell v. State, 323 So. 2d 557 (Fla. 1975). The State failed to prove the existence of this circumstance beyond a reasonable doubt.

E. The Trial Court's Rejection of the Uncontroverted, Mitigating Evidence was Unjustified.

In dealing with the plethora of mitigating evidence, the trial court wrote simply:

> The Jury of seven (7) women and five (5) men, totally rejected the mitigating circumstances by their vote of twelve (12) to zero (0). The Court cannot accept and therefore, rejects the statutory mitigating circumstance set out in the testimony. The Court finds from the testimony that the Defendant does have a borderline personality disorder but, further from the evidence, this disorder does not rise to an extreme mental or emotional disturbance. The court accepts same as a non-statutory mitigating factor.

(R4669) The trial court clearly gave the jury's verdict undue emphasis. Despite the verdict, it was still the trial court's duty to independently weigh the mitigating evidence. Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). Without elaborating greatly, Appellant points out that even Dr. Barnard, who testified for the State, found evidence of: (1) mental or emotional disturbance; (2) impaired capacity to conform her conduct to the requirements of law; (3) cerebral dysfunction; (4) borderline personality disorder; (5) dysfunctional family; (6) history of alcohol abuse; (7) inability to cope; (8) lack of

judgment; (9) lack of insight; (10) emotional lability; (11) impulsiveness; and (12) genetic and/or environmental deficits. (R3510-12) Of course, the three psychologists who testified for the defense went even further. Drs. McMahon, Krop, and Toomer all agreed that, at the time of the murder, Appellant was suffering from an extreme mental or emotional disturbance and that Appellant's capacity to appreciate the nature and quality of her conduct was substantially impaired; in other words, all three doctors found both statutory mitigating circumstances. (R3217-22,3403-4,3425-27) The overwhelming weight of the evidence supports the conclusion that both statutory mental mitigating circumstances were present. Additionally, numerous nonstatutory mitigating factors were uncontroverted and should have been found.

Conclusion

Only one valid aggravating circumstance exists. Appellant's lone, prior violent felony conviction is not particularly compelling. This is especially true if the facts surrounding the conviction are examined. The trial court recognized one mitigating circumstance but improperly rejected numerous other valid mitigating factors. The trial court placed undue weight on the jury's recommendation. (R4669) A proper weighing of the lone aggravating factor against the plethora of mitigation should result in a life sentence. A proportionality analysis by this Court should result in a life sentence. This is not one of the most aggravated, least mitigated first-degree murders.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

At the conclusion of the evidence, Appellant moved for judgment of acquittal contending, inter alia, that the evidence was insufficient to establish premeditation. Appellant also questioned the sufficiency of the evidence to establish robbery. The trial court denied the motion. (R1903-7,2108) Aileen Wuornos is the only living witness who knows what happened that night. Her testimony at trial established a classic case of self-defense. Her statement to law enforcement did not substantially refute her testimony at trial. A defendant's version of what occurred must be accepted as true unless contradicted by other proof showing the defendant's version to be false. Jaramillo v. State, 417 So. 2d 257 (Fla. 1982).

Appellant's robbery conviction and sentence must also be vacated. The State's evidence reveals that Appellant's theft of Mallory's property was merely an afterthought. One cannot rob a dead man. See, Jones v. State, 569 So. 2d 1234 (Fla. 1990) and Taylor v. State, 138 Fla. 762, 190 So. 262 (1939).

POINT VIII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant filed several constitutional attacks on Florida's death sentencing scheme that are not argued elsewhere in this

brief. The statute eliminates judicial discretion and, in so doing, violates the constitutional prohibition regarding separation of powers. The law allows unbridled prosecutorial discretion. The aggravating circumstances are unconstitutionally vague and overbroad. The statute inhibits the consideration of nonstatutory mitigation. The death penalty is not the least restrictive means available to further a compelling state interest. Roe v. Wade, 410 U.S. 113 (1973). Additionally, the process allows for arbitrary and capricious imposition of death sentences resulting in freakish application. (R4200-6,4207-23,4246-47,4981-4998)

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant requests the following relief:

As to Points I through IV, a new trial;

As to Point VII, reverse and remand for discharge;

As to Points V, VI, and VIII, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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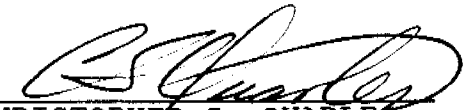
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Ms. Aileen Carol Wuornos, #150924, P.O. Box 8540, Pembroke Pines, FL 33024, this 26th day of January, 1992.



CHRISTOPHER S. QUARLES
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IN THE SUPREME COURT OF FLORIDA

AILEEN CAROL WUORNOS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER 79,484
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

A P P E N D I X

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Wuornos attorneys may seek new trial

DELAND (AP) — Revelations that one of her victims was a convicted sex offender may warrant a new trial for serial killer Aileen Wuornos, said lawyers involved in her case.

Miss Wuornos unsuccessfully pleaded self-defense during her January 1992 trial in DeLand, describing how she repeatedly shot Richard C. Mallory after he beat, raped and sodomized her. She was convicted and sentenced to death.

During the trial, Mallory, 51, was described to jurors as an average guy who probably did nothing to deserve his fate.

But jurors did not hear that in 1957 he pleaded insanity to charges that he tried to rape a Maryland woman, nor did they learn of his 10 years in a psychiatric prison for disturbed offenders.

It was brought out at trial that Mallory was put on a 10-year treatment program for an unspecified crime involving a burglary. Mallory's former girlfriend, Jackie Davis, described him as ordinary, yet somewhat paranoid.

Miss Wuornos' attorney, Steve Glazer of Gainesville, said it was her violent encounter with Mallory that turned Miss Wuornos from prostitute to killer.

"It is critical ... because it was the first murder that turned her into a murderess," said Glazer. "She doesn't deserve the death penalty if her psyche was ignited by Mallory ... if that encounter turned her into another person."

Glazer will meet with Miss Wuornos this week and urge her to withdraw her plea of guilty in two pending murder cases.

During 12 months in 1989 and 1990, Miss Wuornos stalked North Florida's Interstate 75 corridor, where she murdered and robbed six middle-aged men.

Miss Wuornos has admitted to all six killings. She's been sentenced to death in four cases, including Mallory's. She is facing the possibility of death in two pending cases.

Claiming there was no chance that she could get a fair trial in the remaining cases, Miss Wuornos pleaded guilty.

Usually a victim's reputation is irrelevant in a murder trial, but when the accused enters a plea of self-defense, the victim's past may be relevant, said Tricia Jenkins, an Ocala assistant public defender.

The new information on Mallory's past came from a prosecution interview with his former girlfriend which was followed up by the NBC television program "Dateline."

Maryland court records showed that Mallory was a sexually disturbed man who in 1957 slipped into a woman's house, grabbed her from behind, fondled her and tried to rip her blouse off.

He pleaded "not guilty by reason of insanity" to a charge of assault with intent to rape and was sentenced to four years in prison.

But after a psychiatric evaluation he was taken to a Maryland prison mental institution where he spent 10 years. He was let out when the program was terminated by the state in 1968.

Had jurors known about the Maryland attack and the psychiatric evaluations on Mallory, Miss Jenkins said, they might not have convicted Miss Wuornos. They may have at least spared her the electric chair, Miss Jenkins said.

"The events could have happened the way she said they did," Miss Jenkins said. "This is information that the jury should have had in making up its mind about whether she was attacked and killed Mallory in self defense."

State Attorney John Tanner disagreed, saying "She got a fair trial. No evidence was withheld."