IN THE SUPREME COURT OF FLORIDA

AILEEN CAROL WUORNOS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 81,059

APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Aileen Carol Wuornos, was the Defendant in the lower court and will be referred to in this case as Appellant or by her proper name. Appellee, the State of Florida, was the prosecuting authority.

The record on appeal will be referred to using the following symbols:

"R" -- Volumes I through V, consisting of the pleadings (R1-488); the evidence (R489-652); the transcript of the hearing held on May 31, 1992, when Appellant pled to the outstanding charges (R653-747); and the May 15, 1992, sentencing hearing (R747-87).

"T" -- Volumes VI through X, which contain the May, 1992, penalty phase, jury trial (T1-906).

STATEMENT OF THE CASE

On February 20, 1991, the State of Florida indicted Aileen Carol Wuornos, the Appellant, for the September 9, 1990, first-degree murders[1] and armed robberies[2] of Charles Humphreys and Troy Burress. (R1-2,142-43) On February 22, 1991, the State indicted Appellant for the Citrus County first-degree murder and armed robbery of David Spears. (R314-15)

On March 26, 1992, the previously appointed Office of the Public Defender, Fifth Judicial Circuit, moved to withdraw as counsel. (R247) Private counsel filed a notice of appearance, and the trial court granted the Public Defender's motion to withdraw. (R248-49,655-59) On March 31, 1992, with her new lawyer at her side, Wuornos waived all of her rights and tendered nolo contendere pleas to all three murder charges and all three armed robbery charges. (R655-746) She completed and signed a waiver of rights and plea sheet. (R250-51)

Following a plea colloquy, the Honorable Thomas D. Sawaya accepted the pleas and found Appellant's action intelligent and voluntary. (R740-41) The court also determined that a factual basis existed for the pleas. (R742) Since Wuornos received no promises or benefits in exchange for her pleas, the court concluded that Wuornos believed the pleas were in her best interest. (R742) The judge adjudicated Appellant guilty of each

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[1] § 782.04(1)(a)1, Fla. Stat.

[2] § 812.13(2)(a), Fla. Stat.

and every offense. (R127-28,294-95,466-67,741)

On May 4, 1992, Wuornos waived her presence at the penalty phase which began that day. (T1-91) After jury selection, the State presented seven witnesses. (T527-645) During the testimony of David Taylor, the trial court overruled Appellant's objection. (T532) During the State's examination of David Strickland, Appellant's objection was also overruled. (T574) Similarly, the trial court overruled another objection interposed by the Appellant during the testimony of Lawrence Horzepa. (T625)

After the State rested (T645), Appellant introduced into evidence and published a videotape of the confession she made to police following her arrest. (T645-58;R550-652) The only other evidence presented by the Appellant at the penalty phase was the testimony of Arlene Pralle, Appellant's adoptive mother. (T659-708) Over Appellant's objections (T766-72,776,791,799,804), the State presented five witnesses in rebuttal (T772-810), and Appellant presented more testimony from Arlene Pralle in surrebuttal. (T813-20)

The State also introduced the notice of appeal filed by Appellant in her Volusia County case in which she had previously been sentenced to death. (T810-11) The trial court denied Appellant's request that the jury be instructed that the Volusia County convictions and death sentence are presumed to be correct on appeal. (T740-43)

Over Appellant's objection, the court instructed the jury on

witness elimination as an aggravating circumstance[3]. (T688-93, 712-18,731-40,756-57) Appellant also objected to the applicability of the pecuniary gain factor[4] as well as the "heightened premeditation"[5] circumstance. (T744-55) Appellant also objected to the HAC[6] instruction that applied only to Humphreys' murder. (T755-64) The trial court overruled Appellant's objections to the instructions and read them to the jury. (T812-13,881-84)

Following deliberations, the jury returned with recommendations in each case (10-2) that Aileen Wuornos be sentenced to die in Florida's electric chair. (T900-901) On May 15, 1992, Wuornos was present when the trial court followed the jury's recommendations and sentenced her to the ultimate sanction on each of the three murders. (R747-87) The trial court entered written findings of fact in support of each death sentence. (R300-309,456-65;SR1-10) The court found four aggravating circumstances in support of the death sentences imposed for the

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[3] The capital felony was committed for the purpose of avoiding or preventing a lawful arrest...§ 921.141(5)(e).

[4] The capital felony was committed for pecuniary gain. § 921.141(5)(f), Fla. Stat.

[5] The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. § 921.141(5)(i), Fla. Stat.

[6] The capital felony was especially heinous, atrocious or cruel. § 921.141(5)(h), Fla. Stat.

murders of Troy Burress and David Spears.[7] (R300-304,456-60) In imposing the death sentence for the murder of Charles Humphreys, the court found the same four aggravating circumstances applicable and one additional aggravating factor.[8] (SR1-6) The trial court rejected all of the statutory mitigating circumstances. (R305-7,461-63;SR6-8) The court concluded that the evidence established, at best, only two nonstatutory mitigating circumstances that deserved only slight weight.[9] (R307-8,463-65;SR9-10) The trial court concluded that the aggravating circumstances outweighed the mitigating factors and imposed the death penalty on all three murders. This Court has jurisdiction.[10]

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[7] The court found: (1) Prior violent felony conviction; (2) pecuniary gain; (3) witness elimination; (4) heightened premeditation.

[8] The murder of Charles Humphreys was especially heinous, atrocious or cruel.

[9] Appellant presented evidence of remorse, a religious conversion, and a abusive, deprived childhood.

[10] Art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

The Death of Charles Humphreys

Charles Humphreys' family reported him missing on September 11th. (T531-32) On September 12, 1990, two young boys riding bicycles in southwest Marion County discovered the clothed body of Charles Humphreys. (T527-30) Police responded to the area, an isolated, undeveloped subdivision on the north side of County Road 484. (T527-30) Humphreys' pockets were turned inside out. (T534-35) His wallet and car were missing. (T535) Authorities later located Humphreys' wallet and other identification fifty miles away in a remote area in Lake County, just north of the Polk County line near Highway 27. (T536-539) Police also collected a spent .22 casing at that scene. (T537-38) On September 25th, authorities found Humphreys' car with the license plate removed, parked behind an abandoned gas station on U.S. 90 at I-10. (T539-41)

An autopsy indicated that Humphreys died as a result of seven gunshot wounds. (T582-84) None of the wounds were instantly fatal, but one to the back of the head would have incapacitated Humphreys quickly. (T588-89) The various locations of the bullet wounds (one in the chest, one in the abdomen, two in the back, one in the back of the head, and two in his arm) were consistent with someone twisting and turning while either standing or lying on the ground. (T589-90) Humphreys also suffered some minor bruises and scrapes near the time of his death. (T591-93) The bruises on Humphreys' arm could have been

inflicted as much as forty-eight hours prior to his death. (T596-97)

The Death of Troy Burress

Troy Burress, an employee of Gilchrist Sausage Company, was last seen alive when he was driving his delivery route on July 30, 1990. Burress was reported missing the next day. (T545-46) Burress' scheduled delivery route took him through Daytona Beach and several other small communities in central Florida. He was last seen around 2:00 p.m. making a delivery at a small grocery store in Seville. (T546) Burress failed to appear at his next scheduled stop in Salt Springs. Prior to his disappearance, Burress had collected approximately $200.00 in cash from customers along his route. (T547) Police found Burress' truck at approximately 3:00 a.m. on July 31st at the intersection of State Roads 40 and 19. (T548) The keys were missing and the primary gas tank was empty. (T549) Burress' receipts were also missing. (T549)

On August 4th, police found Burress' clothed body in a remote wooded area near a small dirt road off of State Road 19 approximately eight miles north of his truck's location. (T549-50,552) Burress had been dead approximately four to five days. (T550) Some palm fronds had been placed on and around the body. (T551) A search of the area turned up Burress' wallet, credit cards and receipts. The cash was missing. (T553-54) Burress died from two gunshot wounds, one in the middle of his chest and the second near the middle of his back. (T554-55) Police sent

the .22 projectiles recovered from Burress' body to FDLE in Tallahassee. (T555-57)

The Death of David Spears

In June, 1990, police found the decomposed body of David Spears in a remote, wooded area in southwest Citrus County just north of the Hernando County line near Highway 19. (T564-68) A co-worker at Universal Concrete Company in Sarasota was the last person to see Spears alive on May 19th. Spears was heading back to Ocoee, Florida in Orange County. (T569)

Despite the advanced decomposition of the body, Dr. Maples, a forensic anthropologist, concluded that Spears died as a result of six gunshot wounds, two of which were possibly through the back. (T569-70) Other than a hat, Spears' body was nude when found. (T570-71) Although Spears had been paid on the day of his disappearance, authorities did not recover any personal property whatsoever. (T571) Spears' 1983 Dodge pickup was discovered parked near the entrance ramp to I-75 and County Road 318 in Marion County. A toolbox, clothing, a ceramic panther, the tag, and the keys were missing from the truck. (T571-72) The truck had a flat tire when found. (T572)

Within a few feet of Spears' body, police found a used condom and one Trojan brand wrapper. An autopsy indicated that David Spears died from multiple (at least six) gunshot wounds. (T595-96) One and possibly two of the shots were to the back. (T573) There was no way to determine whether the shots to the back were the first inflicted. (T573-74)

Wuornos' Arrest

On December 4, 1989, police found Richard Mallory's car parked off a fire trail in Ormond Beach, Volusia County, Florida. (T599-601) Mallory's car was locked and police could not find the ignition keys. Police found some of Mallory's personal property, including his wallet and driver's license, in a small sand depression about thirty feet behind his car. (T608) Police concluded that Mallory's car had been wiped down. (T608) On December 13, 1989, police discovered Richard Mallory's body in a wooded area off of U.S. 1 near I-95, approximately five miles from his car. (T601) When found, Mallory's body was covered with carpet and other debris in an apparent attempt to hide the body. (T602) Mallory's body was clothed and already somewhat decomposed. (T602-3) Mallory's front, pants' pockets were turned out slightly. (T604)

Police arrested Aileen Wuornos in January, 1991. (T608-9) A search of a storage unit rented by Wuornos using an alias, turned up a camera and property belonging to Richard Mallory and the other men. (T609-11) Police later recovered Wuornos' corroded gun from Rose Bay, a body of brackish water located approximately 150 yards from the motel where Wuornos had been living. (T611-13,615) The defense stipulated that the projectiles recovered from the bodies of Humphreys, Spears, Burress, and Mallory were fired from Appellant's gun that was recovered from Rose Bay. (T629)

Initially, police believed that two women may have been

involved in the killings. Wuornos voluntarily confessed to police that she alone was responsible for the men's deaths. (T616-17) In taking sole responsibility, Wuornos cleared Tyria Moore, her lesbian lover. (T617) Although Wuornos implicated herself in a total of seven deaths, she repeatedly told police that she acted in self-defense. (T613,617-18)

Wuornos' Confession

Authorities videotaped the entire statement that Wuornos provided on January 16th. (T616) Wuornos explained that she plied her trade as a hitchhiking prostitute for approximately eight years. (T618) Prior to questioning, authorities arranged for a lawyer from the Public Defender's Office to consult with Wuornos. While waiting for the lawyer to arrive, Ms. Wuornos ignored Investigator Horzepa's warnings and voluntarily talked about the killings before being questioned. In that preamble, Wuornos told the detectives that she acted in self-defense. After conferring with her lawyer, Wuornos consented to questioning and maintained that she acted in self-defense. (T618-20)

Wuornos admitted that she had a problem with alcohol and was usually drunk on the days of the killings. (T620-21) Police found numerous beer cans near the spot where Richard Mallory's body was found.[11] Investigator Horzepa primarily discussed the Richard Mallory case with Wuornos during the interview. (T622)

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[11] The area was used as a dump site and police could not determine who left the beer cans at the scene.

Wuornos told Horzepa that she and Mallory had been arguing and fighting. (T622) The shooting was precipitated by Mallory "coming at her." (T622) Ms. Wuornos expressed remorse and told Horzepa that she deserved the death penalty. (T623)

Police never located a seventh body[12] connected to Ms. Wuornos. (T558) Shortly before her trial, Ms. Wuornos cooperated with Marion County law enforcement and volunteered to show police on a map where they might find the seventh body. (T558-59) Ms. Wuornos told police that the body might be in South Carolina and offered to drive them to it. (T559) Investigator Tilley told Ms. Wuornos that Florida authorities could not offer her any type of deal or promise her anything if the crime occurred outside the jurisdiction of Florida. (T559) Despite the potential for another murder charge, Ms. Wuornos persisted in her offer to aid police in locating the seventh body. (T560) Ms. Wuornos had previously rebuffed Investigator Tilley's attempts to enlist her aid in this regard only a week before. (T561) In an attempt to gain her cooperation, Investigator Tilley spoke with Wuornos' lawyer and her adoptive mother. (T561-62) Tilley also arranged for Wuornos' special treatment at the Marion County Jail, i.e., providing her reading material, access to the telephone, and a cup of coffee. (T562)

Mitigating Evidence

Wuornos' mother abandoned Lee[13] and her slightly older

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[12] The missing body was that of Peter Siems. (T561)

[13] Aileen Wuornos' nickname is Lee. (R660)

brother, Keith, when Lee was only six months old. (T666) The grandparents found both children in the attic covered with feces and flies. (T666) The grandparents adopted Lee and Keith. (T666) Although their grandmother wanted to care for the children, the grandfather was an alcoholic who resented and abused them. (T666-7) When drunk, the grandfather would accuse Lee of imagined transgressions. These situations usually resulted in severe beatings. (T667)

Lee's grandfather resented the financial burden of raising Lee and her brother Keith. Lee reminded the grandfather of Diane, Lee and Keith's biological mother and the grandfather's daughter. Since Diane had abandoned her family, the grandfather focused his wrath on Lee. The grandfather clearly favored his biological children, Barry and Lori. (T669-70)

When Lee was seven, she failed to eat her baked potato at dinner one night. When her grandfather later found the potato in the garbage, he forced Lee to eat it, even though it was covered with garbage. He then took Lee into the bathroom, stripped her from the waist down, and beat her with a belt so severely that she was unable to attend school the next day. (T668)

At the age of thirteen, Lee was raped, impregnated, and forced to live at a home for unwed mothers. The baby was put up for adoption and, at the grandmother's insistence, the grandfather reluctantly allowed Lee to return home. Lee ran away from home when the abuse continued. Her grandmother died shortly thereafter and her grandfather placed her in a juvenile home.

(T670) Lee was very close to her brother Keith. When Keith died of cancer at age twenty-one, Lee was shattered. (T673)

By age fourteen, Lee was deeply involved in substance abuse. (T671) At the age of fifteen, Lee was homeless and lived in the woods. She lived in abandoned cars and took showers at friends' houses. She was able to stay in school for almost a year, but eventually had to drop out. (T670-71) When she was sixteen, Lee swore off drugs for good. (T671) The only substance that she abused from that point forward was alcohol, primarily beer. (T671) Wuornos was probably an alcoholic for most of her life. (T671-72)

Lee began prostituting her body by the age of sixteen. (T671) During her career as a prostitute, Wuornos was attacked many times by her clients. On three occasions, she attempted to fend off her attacker using mace. All three times, the men used the mace on Wuornos, raped her, and left her in the woods for dead. (T672) Once, Wuornos was actually gang-raped. (T672)

After her arrest, Lee studied theology and psychology and took many self-help courses. (T673-74) Although she never took lessons, Lee became quite an artist. (T674) She also wrote poetry. (T674) Although Lee finally found Jesus Christ, she is still no angel.

Arlene Pralle followed Lee's plight in the media. Through divine intervention, Pralle wrote Lee following her arrest. Pralle and her husband developed a relationship with Lee that became closer every day. (T682-83) Eventually, the Pralle's

adopted Lee. Pralle found Lee a loving, caring, and very sensitive human being. (T705-6) Pralle accepted the fact that Wuornos killed the men, but under extenuating circumstances. (T706) Pralle admitted that, as a Christian, she was steadfastly opposed to the death penalty in all cases. (T706) Pralle also admitted that she had attained a certain amount of notoriety as a result of her relationship with Lee Wuornos. (T706-7) She had appeared on several television shows and was paid only for one interview in the amount of $7,500.00. (T707)

Arlene Pralle had observed great changes in Lee since their first meeting. If Ms. Pralle had approached Lee a year before the trial and requested her aid in locating Siems' body, Lee would have cursed her and refused. (T674-75) Right before trial, Lee voluntarily offered to show Officer Tilley where to find Siems' body. Since she was unsure of Tilley's credentials, Pralle expressed her concern. Lee reassured Pralle saying:

> Arlene, he has an honest face. I want to help the Siems family. John, you go out and get the map and I'll do as best I can to show you where the body was.

(T675-76)

Pralle also noted Lee's willingness to listen to criticism without losing her temper as she had in the past. Pralle perceived a significant change in Lee's attitude in a few short months. (T676-77) Pralle noticed that Lee had become verbally and physically aggressive less often. Additionally, Pralle noticed that it took much more to provoke Lee. (T697-98) Pralle saw "great growth" in Lee. (T677) Wuornos took total

responsibility for her actions. Lee told Pralle that she could not handle the guilt anymore. She had frequent nightmares. (T677) During almost every jail visit, Lee would cry and say:

> I don't know how I can go on like this. I am so sorry for what I have done. I hate myself.

(T678) Lee asked Pralle how she could love her after what she had done. Pralle reassured Lee that Jesus had forgiven her, but Lee could not forgive herself. (T678) Pralle explained that she and her husband planned to seek professional, Christian counseling for Lee, if she received a life sentence. Lee was receptive to this idea, as was the prison. (T685)

Mental health experts called Wuornos a reactor, that is she responded well to positive stimuli, but if someone provoked her, she attacked. (T679) Arlene Pralle had observed a gradual deterioration and depression of Wuornos after her incarceration. The reality of the situation was finally beginning to dawn on Lee. She realized that she would never be able to take a walk on the beach again or be able to drive a car. But Pralle also observed Lee's spiritual growth. Although extremely depressed about her predicament, Lee was also excited about her spiritual rebirth. Realizing that Jesus had forgiven her, Lee thought that, in time, she might be able to forgive herself. (T684)

Pralle discussed Lee's early years with Dawn Neiman, Lee's childhood friend. (T693-94) Dawn would frequently accompany Lee, Lee's brother Keith, and Lee's aunt/sister, Lori Grody home from school. Lee's grandfather was usually drunk when they

arrived. He treated Lori with exceptional favor and cursed Lee. If Lee did not immediately comply with his orders, the grandfather ordered Lee to her room where he beat her with a belt. Dawn usually left before the actual beating but saw the marks the next day at school. (T694) Pralle admitted that, at Wuornos' prior, Volusia County, trial, she heard Barry Wuornos, Lee's uncle/brother, deny that Lee was abused as a child. Pralle pointed out that Barry was serving in the military during much of Lee's formative years. Additionally, Pralle had some indication that Barry had lied under oath. (T695-96)

State's Rebuttal

The State presented six witnesses in rebuttal. (T772-806) On November 4, 1990, Wuornos approached Bobby Lee Copas, a truck driver, at a truck stop in Haines City. (T772-74) Wuornos explained that she was having car trouble. She needed to get to Daytona Beach to pick up her two children from a day-care center before 6:00 p.m. (T774) When Copas explained he was only going as far as Orlando, Wuornos suggested that her sister could meet her in Orlando to drive her the rest of the way. Copas agreed to give her a lift. (T775) After Wuornos got in Copas' car, he immediately drove to a bank where he cashed a $2,000.00 check at a drive-through window. (T775) Copas then took State Road 27 north. (T775) Shortly after they began their journey, Wuornos proposed sex in exchange for money. (T775-76) After Copas rejected her offer, he glimpsed a pistol, when she opened her purse to retrieve a comb. (T776-77) Wuornos aggressively

repeated her proposition and Copas became concerned. (T777-78) He decided to extricate himself from the developing situation, but was concerned for his safety. He offered to take Wuornos all the way to Daytona Beach and pulled into a gas station so that she could call her sister. He handed her a five-dollar bill to make the call and, when she got out of the car, he locked his doors and quickly drove away. (T778) As he drove away, Wuornos attempted to open her purse. She cursed Copas and threatened to kill him. (T779) Following her arrest several months later, Copas recognized Wuornos from her photograph in the newspaper. (T779-80)

Marvin Padgett, a homicide investigator with the Citrus County Sheriff's Department, investigated Wuornos' background, particularly her childhood. (T784-85) Padgett interviewed relatives and associates of Wuornos in Michigan and Texas. (T785) Padgett also interviewed Barry Wuornos, Lee's uncle/brother. (T785) Barry left the Wuornos household in 1967, when Lee was approximately ten years old. (T785-86) Barry claimed that there was never any physical abuse directed at Lee or any other children in the home. (T786) Lori Grody, Lee's aunt/sister, supported Barry's claims. (T786) Padgett found only one "friend" of Lee's, Dawn Neiman. (T790) According to Padgett, Neiman had no reason to suspect any physical abuse of Lee during her formative years. (T786-8)[14] Neiman never claimed

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[14] On cross-examination, Padgett did not recall specifically if Dawn Neiman "specifically" called Barry or Lori a "liar," or "if she did" exactly what she would have been talking about.

that Lee Wuornos had a particularly satisfying and nurturing upbringing. (T788) Padgett's investigation turned up other names of potential interviewees whom he was unable to locate. (T789-90)

On March 30, 1992, Lieutenant Paul Laxton of the Marion County Sheriff's Department, was transporting Lee Wuornos from Broward Correctional Institution to Marion County for her court proceeding. (T792) Wuornos talked for much of the four and one-half hour drive. She threatened to kill Lieutenant Laxton "if it took her ten years to do so." (T793) She talked of shooting the lieutenant in the back of his head and, "cutting off [his] dick and sticking it in [his] mouth." (T793)[15] Wuornos claimed to have previously thrashed a man the same size as Lieutenant Laxton. (T793) Wuornos also expressed her desire to start a revolution during which society would "turn against police officers...[and] shoot police officers between the eyes and...the police would have to walk around with bulletproof helmets...." (T794) Wuornos told Lieutenant Laxton that her verbal attacks had been provoked by his harassment of her during the trip, namely his failure to converse. (T794) Laxton admitted that other defendants had also threatened him in the past. (T795) He was of the opinion that Wuornos had no ability to carry out the threats when she made them. (T795-96) He was not intimidated by

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(T788)

[15] The State offered this evidence apparently to "rebut" evidence that, since her incarceration, Wuornos had undergone a spiritual rebirth and become a Christian. (T678-82)

her statements. (T796) After Wuornos entered her pleas to the three murders, she was calm and subdued during three subsequent trips with Laxton. (T794-98)

Corporal Ora Berry of the Marion County Sheriff's Department accompanied Laxton on the March 30th transport of Wuornos from BCI to the Marion County Jail. (T798-99) Wuornos warned Berry at the beginning of the trip that she "wasn't going to take any of [his] shit." (T799) When Berry was removing her restraints at the Marion County Jail at the conclusion of the transport, Wuornos called Berry a "bitch" who didn't care about anybody but himself. She warned Berry that she would never forget his face. (T800) Berry believed that an incident near the end of the trip had angered Wuornos resulting in a change in attitude toward him. At a refueling stop, Wuornos asked for a soft drink. When Berry returned and explained that the gas station had no cold drinks, Wuornos reportedly became enraged. (T800) Corporal Berry had also noticed a change in Wuornos' attitude after she entered her pleas. (T801-2) On subsequent trips, she was docile and compliant.

During a prison interview at the time of her 1982 incarceration, Wuornos told prison officials that she had found religion and, with the help of God, intended to turn her life around and become a better person. (T804)

Appellant's Surrebuttal

In surrebuttal, Arlene Pralle read a letter from Dawn Neiman. Although Investigator Padgett claimed that Dawn reported

no evidence of abuse in Lee's childhood, Dawn's letter to Arlene painted quite a different picture.

> ...Her life has been one tragedy after another. All she ever wanted was to be loved and to be at peace and to not have anyone hurt her anymore....I really wanted it said that Barry Wuornos, her family member, lied so much....I would have loved...to show Barry and Lori that they can't get away with treating her like this and lying.
>
> I have excused some of the ways that they treated her when she was growing up...I don't think it's fair they got the last word, which were all lies....I just wish the truth had been said....

(T816-17) Although Dawn's letter failed to expressly mention it, Pralle explained that she and Dawn had discussed by phone on many occasions the grandfather's abuse of Lee. (T818-20)

SUMMARY OF THE ARGUMENT

Wuornos contends that her pleas were improperly accepted, where the trial court never explained to Wuornos that she had an absolute right to be tried in absentia. The trial court also failed to inform Wuornos of the minimum sentence. Additionally, Wuornos never admitted her guilt nor acknowledged that the plea was in her best interest. Furthermore, certain statements made by Wuornos should have alerted the trial court that sufficient grounds existed to order a competency hearing.

Wuornos also contends that the trial court inappropriately restricted defense counsel's scope of voir dire during jury selection. The jury's death recommendation was tainted by the improper admission of incompetent and prejudicial rebuttal testimony. The testimony was a general character attack which rebutted nothing offered in mitigation. The jury's verdict was also tainted by: (1) hearsay evidence that was not fairly rebuttable; (2) nonstatutory aggravating evidence relating to the personal characteristics of one of the victims; and (3) the pending appeal of Wuornos' Volusia County death sentence.

The evidence did not support the trial court's factual findings regarding the aggravating circumstances, and the trial court failed to consider or give weight to unrebutted mitigating evidence. The court also erred by instructing the jury on inapplicable and vague aggravating circumstances. Additionally, Section 921.141, Florida Statutes is unconstitutional.

ARGUMENT

Aileen Wuornos discusses below the reasons which, she respectfully submits, compel the reversal of her convictions and death sentences. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I of the Florida Constitution, and such other authorities as is set forth.

POINT I

AILEEN WUORNOS' PLEAS ARE INVALID UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The record conclusively shows that, as a matter of state and federal constitutional law, Wuornos' pleas of nolo contendere are invalid. Wuornos' guilt of the substantive crimes has not been adequately established where she unequivocally stated that she was not guilty and was entering the pleas based on her belief that, otherwise, she would have to sit through an unfair trial. Additionally, the trial court failed to comply with Florida Rule of Criminal Procedure 3.172. Specifically, the record fails to reflect a sufficient factual basis. No one told Wuornos she had the right to be tried in absentia or the minimum mandatory sentence. Wuornos never acknowledged her guilt or explained how the pleas were in her best interest. The totality of the

circumstances reflects that Appellant's pleas were involuntary.

THE PLEAS WERE NOT INTELLIGENT OR VOLUNTARY

Aileen Wuornos' primary motivation in pleading nolo contendere to all outstanding charges was her dread of having to participate in another blatantly unfair trial. (R682) Wuornos made this abundantly clear at every opportunity. The trial court conducted a thorough and extensive plea colloquy. (R653-746) The trial court explained the right to a jury trial, the right to put the State to their burden of proof, the right to confront witnesses, the right to present witnesses, etc. Unfortunately, the trial court failed to explain the right most important to Aileen Wuornos, i.e., her right to waive her presence at trial.

This Court first addressed the issue of whether a defendant can voluntarily waive his presence at a capital trial in Peede v. State, 474 So.2d 808 (Fla. 1985). This Court stated without equivocation:

> We now hold that just as in noncapital cases, the presence requirement is for the defendant's protection and, just as he can knowingly and voluntarily waive any other constitutional right, a defendant can waive his right to be present at stages of his capital trial if he personally chooses to voluntarily absent himself.
>
> * * *
>
> In this case, the trial court took every precaution to ensure that Peede's waiver was knowing and voluntary and not due to illness or coercion of any nature. It carefully instructed the jury as to Peede's absence so as to avoid any prejudice to Peede for his having made the voluntary decision to absent himself from the courtroom. We find that the trial court did not exceed its authority or abuse its discretion.

Peede, 474 So.2d at 814-15.

At the first opportunity, Wuornos explained why she was waiving her right to trial and pleading nolo contendere.

> The way I saw the law enforcement work and the system work, I am not very happy with it at all. I am not going to get a fair trial and I am not -- I just don't want to go through anymore trials. (R682)
>
> * * *
>
> ...I just hope I get sent back because Marion County has been doing a lot of abusing me at the County Jail, and I just want to get back to death row. (R711)
>
> * * *
>
> I will seek to be electrocuted as soon as possible. There's no sense in me suffering for something that I shouldn't suffer for. I hope -- I hope I get the electric chair as soon as possible.
>
> I want to get off this crooked, evil planet. (R735)
>
> * * *
>
> ...I'd rather find new evidence somewhere down the road and have a new -- totally new trial for all this stuff -- even Volusia and everything. (R737)

Immediately prior to the commencement of jury selection, Wuornos appeared in order waive her presence at the penalty phase. (T1-90) Initially, the trial court agreed that Wuornos could absent herself from the proceedings but wanted her to remain housed at the Marion County Jail. When Wuornos heard that she might have to spend several days in the county jail, she reiterated her desire to return to Broward Correctional Institute. (T9-10)

> In the event that you need to consult with your attorney, or in the event that your attorney needs to consult with you, you'll be here in Marion County, and that procedure will be available to Mr. Glazer and it will be available to you.

And regardless of whether you like it or not, you've got certain rights that are going to be protected. And those are one of those rights that I think need to be protected, regardless of whether you want to be sent back or not.

Also I am also concerned about making sure that this is done properly and the record is preserved. And, Ms. Wuornos, if you want to absent yourself, I'm going to let you do it. And I want you --

THE DEFENDANT: Do you want to pay for a whole trial? Do want to pay a half -- a -- million dollars for a trial? I might as well go through the whole trial then.

THE COURT: If you want to absent yourself you can.

THE DEFENDANT: All I want to do is go back to the prison and get out of this damn courtroom.

(T10-11) Wuornos and her defense counsel both complained bitterly about the judge's announced intention to keep Wuornos housed in the county jail during the penalty phase trial. (T11-12)

THE DEFENDANT: I flatly don't want to be here.

MR. GLAZER: She doesn't want to be here.

* * *

THE DEFENDANT: I want to be back at the prison. I don't care what the sentence is. I'm already on Death Row. I'm going to see the chair....I'm trying to save taxpayers money. You people don't care. You want to press on with the jury and everything else and try to impress the public.

And all I want to do is to go back to prison.... (T13-14)

* * *

...You want to just put me through living hell at the Marion County Jail when I just want to go...

(T17) When it became clear that the trial court would force

Wuornos to remain at the county jail during her trial, she announced her desire to withdraw her plea and go to trial to determine guilt or innocence.

> MR. GLAZER: Yes, Your Honor. But at this point Ms. Wuornos would like to say she wants to go to trial now.
>
> THE DEFENDANT: Take it to trial.
>
> MR. GLAZER: Which means that we have to withdraw our plea.
>
> * * *
>
> Your Honor, is there any way that I can -- she can go to Broward and I can call down there every morning?
>
> THE COURT: Well, if she's going to use the withdrawal of her no contest plea as a threat to try and threaten me to get her to go -- force her to go back to Broward, it's not going to work.
>
> I told you I'm going to think about it....

(T20-21) After a discussion among the lawyers and the trial court, everyone seemed satisfied that Wuornos could be returned to Broward Correctional Institute and her attorney could communicate with her on a daily basis, so that she could reiterate her waiver of presence for trial. (T27-36) After Wuornos read a portion of a statement into the record (T36-87), the trial court excused her from further participation in the trial and she was returned to Broward Correctional Institute. (T87-90) The trial then proceeded in her absence.

It is abundantly clear from the record that Appellant's prime motivation in pleading was her desire to leave Marion County and return to her prison in cell on death row. Above all,

Wuornos did not want to sit through another trial. She did not have to. Unfortunately, no one, neither the trial court nor defense counsel informed her that she had a right to be tried in absentia. As a result, Wuornos did not have sufficient information to intelligently enter her pleas. Therefore, her pleas were not voluntary, since she was never informed of, in this case, essential right.

Appellant's situation can be analogized to a trial judge failing to determine that a defendant understands the maximum possible penalty for the offense. In that situation, the defendant's plea is involuntary. See, e.g., Garza v. State, 519 So.2d 727 (Fla. 2d DCA 1988). The court and the State tried to be thorough in advising Wuornos of all conceivable rights that she was waiving in pleading. At the prosecutor's suggestion, the trial court explained that Appellant could face deportation as a result of her pleas if she were not an American citizen. (R713-16) The court also explained that her pleas would result in convictions that could be used as aggravating factors in subsequent capital prosecutions. (R713-17) But no one informed Wuornos of the right most important to her in this case, i.e., her right to be tried in absentia. If anyone had explained this critical right to Wuornos, it is highly unlikely that she would have entered her pleas. It is therefore abundantly clear that Appellant's pleas were involuntary. The convictions and sentences must be vacated.

FAILURE TO INFORM WUORNOS OF THE MANDATORY MINIMUM SENTENCE

While there is no question that the trial court repeatedly warned Wuornos that she could be sentenced to death on the murders, no one ever informed Wuornos that, at the very minimum, she would be required to serve at least 25 years before she was eligible for parole.[16] On a couple of occasions, the trial court told Wuornos that there were only two possible sentences, death or life imprisonment. (R660,686) The trial court did explain the minimum sentence (three years) that could be imposed on the armed robbery counts. However, the court mistakenly thought that he had already informed Wuornos of the minimum sentence for first-degree murder. (R684-85)

Since the trial court omitted a critical piece of information in the plea colloquy, Wuornos' pleas were uninformed and therefore not intelligently entered. Simmons v. State, 489 So.2d 43 (Fla. 4th DCA 1986). The pleas were therefore involuntary for the same reasons argued in the prior section. Florida Rule of Criminal Procedure 3.172(c), plainly provides that, before accepting a plea, the trial court **shall** determine that the defendant understands, inter alia, "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty...." Even the written "waiver of rights and agreement to enter plea" executed by Wuornos fails to reflect this pertinent information.

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[16] The written "waiver of rights and agreement to enter plea" also omits this pertinent information. (R250-51)

INSUFFICIENT FACTUAL BASIS

Prior to accepting a plea of no contest, the trial judge must receive in the record factual information to establish the offense to which the defendant has entered his plea. Williams v. State, 316 So.2d 267, 271 (Fla. 1975). Counsel's stipulation that a factual basis exists, without more, is insufficient. Dydek v. State, 400 So.2d 1255, 1257 (Fla. 2d DCA 1981). Generally, the rule "may be complied with by receiving evidence, testimony, a proffer of evidence, statements by counsel or the defendant, or reference to the record sufficient to satisfy the court that there is evidence to convict on each element of the charge." Williams v. State, 534 So.2d 929, 930 (Fla. 4th DCA 1988). The purpose of the factual basis requirement is to insure "that the facts of the case fit the offense with which the defendant is charged." Williams, 316 So.2d at 271. In other words, "a plea may meet the test of voluntariness, knowledge and understanding of the consequences, yet still be inaccurate." Id., at 272. Moreover, where a defendant claims a defense during the plea proceeding, such as lack of criminal defense or self-defense, "the plea is subject to attack unless the defendant specifically and understandingly waives that defense." Id. at 273. See also State v. Kendrick, 336 So.2d 353 (Fla. 1976); State v. Lyles, 316 So.2d 277 (Fla. 1975).

In Kendrick, the court noted:

> Where a defendant raises the possibility of a defense to his guilty plea, the potential prejudice is apparent. In such circumstances, a trial judge should make

> **extensive** inquiry into factual basis before accepting the guilty plea.

336 So.2d at 355. Additionally, Florida Rule of Criminal Procedure 3.172(d), requires:

> Before the trial judge accepts a guilty or nolo contendere plea, the judge must determine that the defendant either (1) acknowledges his or her guilt or (2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence.

Appellant contends that the trial court's inquiry regarding the factual basis and Rule 3.172(d) was insufficient in this particular case. Wuornos maintained her innocence throughout the plea colloquy. The factual basis set forth at the plea colloquy covers eighteen pages. (R689-707) Wuornos repeatedly explains that she acted in self-defense.

> ...There was no robbery....He attempted to rape me, and so I shot him. And we fought for the weapon on that one,...I killed in self defense but I still can't live with myself...I took a life so it's time for me to go....He had a lead pipe and attempted to rape me, and I shot him immediately....

(R693-700) When Wuornos reiterated her claims of self-defense, the trial court very carefully explained that Wuornos had the absolute right to present that affirmative offense to the jury. This was insufficient.

In the face of Wuornos' assertions that she acted in self-defense, Appellant submits that the requirement of Rule 3.172(d) becomes even more critical. Wuornos never acknowledged her guilt and never explained **how** the plea was in her best interest. All she really wanted to do was get out of the Marion County Jail and

return to death row. See Point I, § A. Wuornos told the trial court, "I'm entering this no contest no matter what,..." (R693) Wuornos never acknowledged her guilt. When asked why she was entering her pleas, Wuornos replied, "Because I love the Lord, God. And I just feel that I took a life so it's time for me to go...." (R697) Additionally, Wuornos read a long, rambling letter in which she reiterated her innocence and blamed a corrupt system for her plight. (R717-735) "So I plead today no contest in self defense...I still want to plead no contest and end all this 'jazz' because I'm sick of it." (R734-35) The trial court responded, "you will get your wish." (R735) Wuornos expressed her desire to be electrocuted as soon as possible. (R735)

The trial court ultimately found a factual basis for the plea. The court also found, "she feels it is in her best interests to enter this plea rather than go through the jury trial process." (R742) The trial court never explained what those "best interests" were. This was not an Alford[17] plea. Wuornos received absolutely no benefit in pleading. Under the circumstances, the inquiry by the trial court was insufficient. Appellant's pleas must be vacated.

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[17] A defendant does not admit guilt or the factual basis for the charge, but pleads in order to take advantage of favorable terms offered by the prosecution. Alford v. North Carolina, 400 U.S. 25 (1971).

POINT II

FUNDAMENTAL ERROR OCCURRED WHERE THE TRIAL COURT FAILED TO SUA SPONTE ORDER A HEARING TO DETERMINE APPELLANT'S MENTAL CONDITION. THIS RESULTED IN A VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.210 AND APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

For quite some time now, the Due Process Clause of the Fourteenth Amendment has been interpreted as prohibiting states from trying and convicting a mentally incompetent defendant. See Dusky v. United States, 362 U.S. 402 (1960); Pate v. Robinson, 383 U.S. 375 (1966); Fallada v. Dugger, 819 F.2d 1564, 1568 (11th Cir. 1987). In Drope v. Missouri, 420 U.S. 162, 180-81 (1975), the United States Supreme Court explained:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.
>
> * * *
>
> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

As this Court pointed out in Pridgen v. State, 531 So.2d 951, 954

(Fla. 1988):

> Florida courts have also held that the determination of the defendant's mental condition during trial may require the trial judge to suspend proceedings and order a competency hearing. Scott v. State, 420 So.2d 595 (Fla. 1982); Holmes v. State, 494 So.2d 230 (Fla. 3d DCA 1986); See Lane v. State, 388 So.2d 1022 (Fla. 1980) (finding of competency to stand trial made nine months before does not control in view of evidence of possible incompetency presented by experts at hearing held on eve of trial).

This Court determined that Pridgen who had previously been found competent to stand trial, exhibited behavior that gave the trial court "reasonable ground to believe" that Pridgen was not mentally competent to continue to stand trial during the penalty phase. Id.

Under Pate v. Robinson, 383 U.S. 375 (1966), a defendant may allege that the trial court denied him or her due process by failing sua sponte to hold a competency hearing. James v. Singletary, 957 F.2d 1562, 1571 (11th Cir. 1992). "To put it bluntly, a Pate claim is a substantive incompetency claim with a presumption of incompetency and a resulting reversal of proof burdens on the competency issue." Id. On appeal from a trial court's failure sua sponte to hold a competency hearing, an appellate court may consider only the information before the trial court before and during trial. See, e.g., Tiller v. Esposito, 911 F.2d 575, 576 (11th Cir. 1990). Under a Pate claim, a defendant must establish that the trial judge ignored facts raising a "bona fide doubt" regarding the defendant's competency to stand trial. Fallada v. Dugger, 819 F.2d 1564,

1568 (11th Cir. 1987). Accordingly, Pate claims can and must be raised on direct appeal. James v. Singletary, 957 F.2d at 1572.

Florida Rule of Criminal Procedure 3.210(a) provides in part:

> A person accused of an offense...who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while incompetent.
>
> (1) A "material stage of a criminal proceeding" shall include the trial of the case,...entry of a plea, ...sentencing...or other matters where the mental competence of the defendant is necessary for a just resolution of the issues being considered....

Rule 3.210(b), provides:

> If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing. Attorneys for the State and the defendant may be present at the examination. [Emphasis added.]

The statements of Aileen Wuornos during her plea colloquy, at her court appearance waiving her presence at trial, and at sentencing provide reasonable ground to believe that Wuornos was not competent to proceed. The trial court should have recognized this fact and complied with Rule 3.210.

The record below clearly reflects "reasonable ground to

believe" that Aileen Wuornos was mentally incompetent to proceed. Throughout her plea colloquy, Appellant reiterated that she killed the three men in self-defense. See Point I. In spite of this valid affirmative defense, Wuornos insisted on waiving her right to trial, pleading to the charges, and waiving her presence at the subsequent penalty phase. She received absolutely no benefit for this "bargain."

There were many clues that the trial court should have detected during Appellant's rambling speeches at the plea hearing (R753-747), the waiver of her presence at the penalty phase (T1-90), and sentencing. (R748-87) Of course the record must be read in its entirety, but counsel offers the following excerpts as examples of hints that should have aroused the trial court's suspicion regarding Appellant's mental competence.

> I -- I killed in self defense, but I still can't live with myself -- with it -- and it's just a religious thing I feel that I have to do....Because I love the Lord, God. And I just feel that I took a life so it's time for me to go. And I took a life so -- so I'm paying for it. (R697)
>
> * * *
>
> ...I was a hitchhiking prostitute for six years....these were strangers; these were not my regular customers. My regulars were, basically, in Saudi Arabia. (R700-1)
>
> * * *
>
> -- I just hope I get sent back because Marion County has been doing a lot of abusing me at the County Jail, and I just want to get back to death row. [The trial court asks Appellant if the abuse in the county jail was an attempt to coerce her plea.]...Oh, no. I mean -- I think it's for me to try to kill

> myself or something. I don't know what their problem is. (R711-12)
>
> * * *
>
> I will seek to be electrocuted as soon as possible. There's no sense in me suffering for something that I shouldn't suffer for. I hope -- I hope I get the electric chair as soon as possible.
>
> I want to get off this crooked, evil planet. I mean -- my goodness, if I have to live in a system that's authorized by people who work in a -- in a system that's nothing but like "disciples of Satan."
>
> I don't even want to live in prison. I just want to get off this planet, go to God, go live in heaven where there's peace and harmony. Because I've never seen so much evil. (R735-36)

The above quotes are lifted from Appellant's plea colloquy, at which, Appellant also read a long, rambling statement. (R718-36)

Approximately one month after entering her pleas, Wuornos appeared before the trial court on May 4th to waive her presence at the penalty phase. She addressed the court again with an even longer, more rambling statement, before the trial court eventually cut her off and promised her another forum when he sentenced her. (T36-87) During the May 4th waiver, Appellant detailed the elaborate conspiracy by law enforcement, lawyers, judges, and the "crooked system" that unjustifiably condemned her.

> ...the deceptions of fraud and conspiracy plays they involve themselves in on my cases for greed and political limelighting, and many other things and reasons they did for, in which they staged a great amount of deceit to the public in order to create gain by a crime that really has been all along a

> justifiable one...And then lastly I will be revealing to you statements from my confessions themselves, which were purposely hid from the public eye over the mere reasons of their conspiracy....

(T38) Wuornos then launched into a lengthy, disjointed explanation of how she ended up before the trial court. In addition to lambasting the corrupt system, Wuornos reiterated her innocence, explaining that she acted in self-defense. See, e.g., (T46,60-61,69-71,79-86). Her diatribe also included references to losing her sanity and a prior suicide attempt.

> Still really in love, but slowly realizing my love was going nowhere with him, and feeling down from other occurrences in life that earlier I had experienced, now having temporarily gone insane, which I flew off the handle and, within my mind, decided to go off and kill myself and all the pain...

(T46) Despite her persistence that she acted in self-defense, Wuornos explained that she was pleading nolo contendere, because she had lost all hope.

> No, I will never receive a fair trial with all the crookedness that has gone on. There has to be one hell of a huge investigation done, and send it to the Supreme Court, and only then would I feel fairness would be done.

(T55) She explained that during her incriminating statements to police, she was mentally confused.

> ...during my interview with Mr. Munster and Mr. Larry Horzepa I was going through slight DT's and alcohol withdrawal, leaving me incoherent in stages to occurrences, incompetent to speak clearly, and sound judgment under such questioning.

(T70) At all three court appearances, Wuornos rambled, was

paranoid and delusional, proclaimed her innocence, displayed religious ideation, related a prior suicide attempt, and displayed an irrational fear of the "corrupt system." She pled guilty as charged and expressed her desire to be executed "as soon as possible." (R735) She pled "straight up" with no guarantees. That very act was another suicide attempt; a successful one at that. These were clearly sufficient cues such that the trial court's suspicion should have been aroused. The court should have sua sponte ordered a competency hearing. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17, Fla. Const.

POINT III

THE INTRODUCTION OF IRRELEVANT, COLLATERAL, AND PREJUDICIAL EVIDENCE OVER DEFENSE OBJECTION TAINTED THE JURY'S DEATH RECOMMENDATION.

Since Wuornos had already pled nolo contendere to three counts of first-degree murder and three counts of robbery, the State's job at the penalty phase was relatively simple. Appellant's pleas made the State's case for the aggravating circumstances.[18] As a result of those pleas, the State was able to argue that the murders were committed during the commission of a felony and that the murders were committed for pecuniary gain. The State used testimony from the medical examiner to argue that Humphreys' murder was especially heinous. The State used Appellant's Volusia County conviction and the contemporaneous convictions to prove Wuornos' prior violent felony convictions. The State seemed to rely on Appellant's "modus operandi" in their attempt to establish "heightened premeditation." The State's case-in-chief was very short, taking up approximately 125 pages of transcript. (T527-645)

Wuornos offered little evidence in mitigation. Defense counsel published the videotaped interview of Wuornos by detectives following her arrest. (T652-58;R550-652) The only other evidence presented by the Appellant was the 25 pages of testimony of Arlene Pralle, the adoptive mother of Wuornos.

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[18] The State contended and the trial court agreed that four aggravating factors applied to all three homicides. Additionally, a fifth (HAC) applied to Humphreys' murder. (T517-21)

(T659-85) Ms. Pralle testified about Appellant's deprived childhood and adolescence. Pralle detailed Appellant's career as a prostitute during which she was raped on several occasions. (T671-72) Pralle also described her friendship with Wuornos, her religious conversion, and her subsequent change in attitude. Pralle also testified about Appellant's hate for Marion County law enforcement which explained the difficulty deputies had while transporting Wuornos prior to trial. (T678-82)[19]

Over Appellant's objections, the State presented five witnesses in rebuttal. (T772-806) Bobby Lee Copas testified that, in 1990, Wuornos hitched a ride with him. When he rebuffed her offers of prostitution, she subsequently threatened and tried to kill him with the gun in her purse. He "miraculously" escaped. (T772-80) Investigator Marvin Padgett testified that Appellant's brother and sister refuted her claims of an abusive childhood. (T784-90) Another witness testified that, during her 1982 incarceration, Wuornos told prison officials that she had found religion and, with the help of God, intended to turn her life around. (T802-806)[20]

Finally, a corporal and a lieutenant with the Marion County Sheriff's Office described Appellant's "bad attitude" during her transport from Broward Correctional Institution to the Marion

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[19] Several Marion County lawmen profited financially from their involvement in Appellant's case through the sale of book and film rights.

[20] The State offered this evidence to ostensibly rebut Arlene Pralle's testimony that Wuornos had <u>recently</u> experienced a spiritual rebirth following her arrest.

County Jail. (T792-801) Wuornos threatened to kill one of the officers and threatened both of them. She described her plan to start a revolution wherein police officers would be society's targets.

The general rule in Florida is that evidence of a collateral crime or other bad act is inadmissible where it proves only bad character or propensity to commit a charged crime. The objectionable evidence, admitted over objection, denied Ms. Wuornos due process of law pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. A new penalty phase is required.

Improper admission of collateral crime evidence is presumed to be harmful. See, e.g., Castro v. State, 547 So.2d 111, 115 (Fla. 1989). Even where there is overwhelming evidence of guilt[21], the State bears the burden of proving that the erroneously admitted evidence did not affect or contribute to the verdict. State v. Lee, 531 So.2d 133 (Fla. 1988). Evidence of collateral crimes or bad acts is inherently prejudicial because it creates the risk that a conviction[22] will be based on the defendant's bad character or propensity to commit crimes, rather than on proof that he committed the crimes charged. Straight v. State, 397 So.2d 903 (Fla. 1981). To minimize this risk, the

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[21] Although the error in this case occurred during a penalty phase, Appellant emphasizes that the State's burden is an onerous one.

[22] Or, in this case, three death sentences.

evidence must meet a strict standard of relevance. Heuring v. State, 513 So.2d 122, 124 (Fla. 1987). Evidence of other crimes must be of such a nature that it would tend to prove a material fact at issue. See State v. Sovino, 567 So.2d 892 (Fla. 1990). Even if relevant, such evidence must be excluded if its only relevance is to show bad character or propensity, or its probative value is substantially outweighed by danger of undue prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988). When evidence of collateral crimes or bad acts is so disproportionate that it becomes a feature rather than an incident of the trial, the State has gone too far. The evidence must be excluded, even if relevant. Long v. State, 610 So.2d 1276, 1280-81 (Fla. 1992).

Except for a general character attack, Appellant can perceive no relevance to the evidence presented by the State in "rebuttal." The State's evidence portrayed Wuornos as a psychopathic cop-hater who had a deranged vision of the future. The jury heard of Wuornos' plan to start a revolution with the main goal of shooting police officers in the head. (T792-801) Additionally, State witnesses described Wuornos' generally "bad attitude." The jury undoubtedly concluded that she was not a model prisoner. Additionally, the State's "rebuttal" witnesses portrayed Wuornos as a nomad of the highways preying on good Samaritans who wanted nothing more than to help her out in times of need. (T772-80) Finally, the State's evidence painted a

portrait of Wuornos as one who lies about her childhood and fakes religious conversions. (T784-90,802-6)

In addition to being an improper character attack, the objectionable evidence tended to inappropriately "bury" Appellant's case for mitigation. The evidence rebutted nothing. Dornau v. State, 306 So.2d 167, 170 (Fla. 2d DCA 1975), held that evidence may not be admitted in rebuttal if it does "not really rebut or contradict anything to which the defendant had previously testified." Britton v. State, 414 So.2d 638 (Fla. 5th DCA 1982), held that evidence which was not strictly rebuttal evidence was admissible, only if the evidence would have been admissible during the case-in-chief. The evidence was not competent rebuttal and should have been excluded.

The State contended that some of their rebuttal evidence showed a pattern of "false" religious conversions by Wuornos. The testimony did not refute evidence that Wuornos had undergone a spiritual rebirth since her arrest. The evidence showed only that Wuornos had, on one other occasion, attempted to turn her life around through religion. Ultimately, it did not work. She was unable to pull herself out of the cesspool of sin. Similarly, many recovering alcoholics suffer numerous "slips," before they are able to stay sober for any length of time. Like alcoholism and other addictions, faith in God is a daily battle that many people face. Nor did her verbal attacks on the two officers who transported her to Marion County for court rebut the fact that Wuornos is now a Christian.

"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 presented by the State negated the case for mitigation presented by Wuornos and improperly influenced the jury in its penalty phase deliberations. The State insinuated that the jury should recommend death because Wuornos was a lying, deceitful, trouble-making, cop-killer. The error appears even more egregious, when one considers that the State chose to focus on the improperly admitted "rebuttal" evidence in the final argument to the jury. (T824-26,829,834) The State particularly hammered on the testimony of Bobby Copas. Death sentences should not be based on such insinuations. The State is bound by certain rules in their quest to execute citizens. The State did not play fair during Appellant's trial. The resulting death sentence is constitutionally infirm.

POINT IV

THE STATE'S USE OF HEARSAY EVIDENCE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, CONFRONTATION AND CROSS-EXAMINATION OF ADVERSE WITNESSES.

Other than her videotaped confession to police, the only other evidence presented by the Wuornos was the testimony of Arlene Pralle, her adoptive mother. (T659-708) Pralle testified, inter alia, that Wuornos' childhood was particularly abusive and unloving. On cross-examination, the State quizzed Pralle about the source of her information. (T693-95) Pralle testified that Dawn Neiman, Wuornos' childhood friend, told her about the abuse.

> Q: So Dawn Neiman then supposedly saw this all first hand?
>
> A: Correct.
>
> Q: Now, you're aware, of course, that Barry Wuornos has denied under oath that anything like that ever happened?

(T694-95) The trial court overruled defense counsel's immediate objection. (T695) The prosecutor then continued his line of questioning.

> Q: Okay. You were sitting in a courtroom in Volusia County when Barry Wuornos under oath said that none of that ever happened?
>
> A: Right....he was not even in the home so he didn't know what was happening at any of the time. He wasn't even there. He was in the Service.
>
> Q: Now, you're also aware that Lori Grody has denied that any of that ever happened, too?

A: No....

(T695-96) The State never called Barry Wuornos or Lori Grody as witnesses to testify at Appellant's trial. Defense counsel subsequently complained about his inability to cross-examine Barry Wuornos. (T788)[23]

The introduction of the hearsay testimony over objection constitutes reversible error in this particular case. The State's action, allowed and approved by the trial court, resulted in a denial of Appellant's rights to confrontation of witnesses and due process under Article I, Sections 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Because imposition of the death penalty rests on facts established solely through hearsay, the death sentence is unreliable under the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution.

The language of Section 921.141(1), Florida Statutes (1991) notwithstanding, it is clear that a defendant has the right to cross-examine and to confront witnesses during the penalty phase of a capital trial. It goes without saying that a statute cannot divest a citizen of constitutional rights. In Engle v. State, 438 So.2d 803 (Fla. 1983), this Court clarified any doubt as to whether the Sixth Amendment applies to the penalty phase of a

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[23] The State presented more hearsay evidence during "rebuttal" on the same issue. (T784-89) A state investigator testified that people he interviewed in Michigan denied that Wuornos was abused as a child.

capital trial. It does. See also Watson v. State, 481 So.2d 1197 (Fla. 1986).

Even the statute puts clear restrictions on the use of hearsay evidence.

> ...Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements....(emphasis supplied.)

§ 921.141(1), Fla. Stat. (1991).

The introduction of the objectionable, hearsay evidence cannot be said to be harmless error in this case. The trial court's sentencing orders recite facts that are supported solely by hearsay. The trial court rejects, or gives only slight weight to, the evidence that established Appellant's abusive childhood. (R307-8,463-64;SR9-10) Additionally, in closing argument, the prosecutor argued at least some of the hearsay evidence presented. (T834-35) The introduction of, argument on, and use of hearsay testimony over Appellant's objection calls into question the reliability of the jury's verdict and the trial court's imposition of the death sentences. The death sentences must be vacated.

POINT V

THE JURY'S DEATH VERDICT WAS TAINTED BY EVIDENCE OF NONSTATUTORY AGGRAVATION IN CONTRAVENTION OF THE EIGHTH AMENDMENT.

The Pending Appeal of Appellant's Volusia County Death Sentence.

During voir dire, defense counsel disclosed to the jury panel that Wuornos had already been sentenced to death in a Volusia County case. (T231-32,433-34) The State also presented some evidence relating to the Volusia County murder. (T603-7, 625) The State requested a special instruction that would have told the jury that Appellant's Volusia County death sentence would be automatically reviewed by this Court. (T740-43) Apparently, the State's requested instruction was never read to the jury. (T880-92) Defense counsel requested that the trial court instruct the jury that Appellant's Volusia County death sentence was presumed to be correct on appeal. The trial court declined Appellant's requested instruction. (T740-43) Nevertheless, the State introduced the notice of appeal that Appellant's lawyer had filed on her behalf in the Volusia County case. (T810-11) The prosecutor emphasized this evidence during closing.

> Now, Mr. Glazer also made reference to, and will argue to you, that: Well, she already has the death penalty, she already is on Death Row. Y'all don't need to give her another one.
>
> Well, two things in response to that. Another one of the documents in evidence that you haven't seen is the Notice of Appeal from that death penalty. (emphasis supplied.)

(T836-37) As fate would have it, defense counsel did not argue as the prosecutor predicted. (T842-79)

The prosecutor's argument regarding Appellant's pending appeal was improper. The evidence and argument were absolutely irrelevant. By introducing the evidence and emphasizing it in closing argument, the State presented impermissible evidence of a nonstatutory aggravating circumstance. As a result, Aileen Wuornos was denied a fair trial. The subsequent death verdict rendered by the jury is constitutionally infirm under the Fifth, Eighth and Fourteenth Amendments and Article I, Sections 9, 16 and 17 of the Florida Constitution.

In essence, the prosecutor was telling the jury that they should recommend the death penalty, because this Court might reverse Wuornos' conviction and death sentence in the pending Volusia County appeal. This clearly constituted argument on a nonstatutory aggravating circumstance. This is improper. Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242 (1976); Elledge v. State, 346 So.2d 998 (Fla. 1977). The improper evidence and argument served only to inflame the jury and unconstitutionally taint their advisory sentence. The State was essentially arguing that Wuornos might be successful on appeal and, unless faced with another death sentence, could one day kill again. This is an improper consideration. See, e.g., Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

Nonstatutory Aggravating Evidence Relating to Personal Characteristics of the Victim.

Marion County Sheriff's Investigator David Taylor was the first witness called by the State. (T527) Taylor testified that the department received a report that "Dick" Humphreys had been reported missing. (T531-32)

> Q: And who had reported Mr. Humphreys missing?
>
> A: The report was made to the Sumter County Sheriff's Department by his family.
>
> Q: What were you able to establish as to Mr. Humphreys' family situation and his marital status?
>
> A: After Mr. Humphreys was identified, I subsequently made contact with Mrs. Humphreys, his wife. He had been married for -- well, they just had celebrated their thirty-fifth wedding anniversary two days prior to him being found.
>
> He had a son. I met the family and the family --

(T532) Defense counsel interrupted with an objection, correctly pointing out that the evidence was irrelevant to prove any statutory aggravating factor. The trial court overruled the objection. (T532)

Defense counsel was right. Although evidence relating to personal characteristics of the victim may be admissible if it is directly related to the circumstances of the crime, see, e.g., Booth v. Maryland, 482 U.S. 496 (1987), the inflammatory testimony elicited by the prosecutor from the witness in this instance went far beyond the permissible bounds. Burns v. State, 609 So.2d 600 (Fla. 1992). Appellant can discern absolutely no

probative value in the objectionable testimony. Even if the testimony had slight probative value, it would be outweighed by the extreme prejudice. See, e.g., Elledge v. State, 613 So.2d 434 (Fla. 1993). The testimony undoubtedly had the effect of improperly inflaming the jury, thus tainting their death verdict. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17, Fla. Const.

POINT VI

THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION DURING JURY SELECTION, RESULTING IN A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

During jury selection, the trial court inappropriately restricted defense counsel's attempts to voir dire the jury. At one point, defense counsel attempted to explain to the venire his client's wish for an impartial jury.

> But if she were sitting here, she would want to find 12 people who are free from opinion as to her fate. And if any one of you were sitting here, you would probably want the same thing.

(T199) The prosecutor immediately objected, calling the above "blatant Golden Rule." (T199) The trial court sustained the objection and instructed the jury to disregard defense counsel's statements.

On another occasion, defense counsel was attempting to explain the jury's duty of weighing the aggravating and the mitigating evidence.

> ...The important thing for you to realize is that you never ever have to vote for Death if the Defense can show you any bit of mitigation....

(T306) The prosecutor objected, calling the above a "misstatement" and "not voir dire." (T306) The trial court sustained the State's objection.

A short time later, defense counsel attempted to apply the "presumption of innocence" theory to the penalty phase.

> Because there is something called the presumption of innocence here...usually we talk about that in the guilt phase....She admits she killed these people.
>
> But there is still something in the presumption of innocence that I need to talk to you about....
>
> ...But I would like you to presume that she is innocent of the death sentence at this point, if you will.

(T316-17) The trial court sustained the prosecutor's general objection and defense counsel ended his questioning at that point. (T317)

Defense counsel subsequently broached the "presumption of innocence" application to the penalty phase. (T376) The prosecutor eventually objected again.

> The state has to prove that she deserves it....By a showing of hands, can you all begin this case here, can you begin your deliberations, if you are chosen, presuming that Life with 25-years is --
>
> [Prosecutor]: Judge, I would object. I let it go by. Now, I'm objecting to it again. That's not an accurate statement.
>
> THE COURT: It's not. I sustain the objection.

(T377) Defense counsel explained the jury instructions for another couple of transcript pages when the prosecutor interrupted again.

> You can base your decision on the evidence, the lack of evidence, or the conflict in the evidence. So, whatever evidence comes out of that chair from the State, you can determine from your own points of view what is relevant and what is valid and what should be taken into consideration and what should not be taken into

consideration.

That is the power of the jury: to weigh --

[Prosecutor]: Judge, it's getting to be a lecture.

THE COURT: Sustain the objection.

(T379)

Voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b). Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1980). The purpose of voir dire, "Is to obtain a fair and impartial jury to try the issues in the cause." Keene v. State, 390 So.2d 315, 319 (Fla. 1980). "Subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors which will not yield to the law as charged by the court, or to the evidence." Jones, 378 So.2d at 798.

Wide latitude should be allowed during the examination of jurors during voir dire. Cross v. State, 103 So. 636, 89 Fla. 212 (1925). Voir dire examination should be as varied and elaborate as is necessary to obtain fair and impartial jurors whose minds are free of all interests, bias or prejudice. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967).

The trial court's restriction of defense counsel's reasonable questioning and correct statements during voir dire resulted in a denial of Appellant's constitutional rights to Due Process of law. Defense counsel's questions did not violate the

"Golden Rule." See, e.g., Bertolotti v. State, 476 So.2d 130 (Fla. 1985); Jennings v. State, 453 So.2d 1109 (Fla. 1984); and Barnes v. State, 58 So.2d 157 (Fla. 1951). Counsel's questions dealing with the weighing of mitigating evidence was a correct statement of the law. State v. Dixon, 283 So.2d 1 (Fla. 1973). Furthermore, prior to hearing any evidence of aggravating circumstances, life is the presumed sentence. See, e.g., Banda v. State, 536 So.2d 221 (Fla. 1988). The resulting death verdict is constitutionally infirm. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17.

POINT VII

THE DEATH SENTENCES ARE NOT JUSTIFIED WHERE THE TRIAL COURT BASED THE SENTENCES ON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES AND, IN EFFECT, IGNORED VALID MITIGATING CIRCUMSTANCES.

INTRODUCTION

The trial court imposed three separate death sentences which are now the subject of this appeal. The trial court's findings of fact in support of each death sentence are virtually identical. (R300-309,456-65;SR1-10)[24] The trial court's treatment of the aggravating circumstances and the evidence offered in mitigation is similarly almost identical in each case. Therefore, Appellant will address these issues simultaneously while noting, in brackets, any differences among the cases. The only details concerning the actual commission of the killings came from Wuornos' confession to police following her arrest. (R550-652)

FACTS PERTINENT TO TROY BURRESS' DEATH

Wuornos remembered Troy Burress as the guy in the "sausage truck." (R587)

> ...he physically attacked me...He pulled out a ten dollar bill and said, This is all you fuckin' deserve, you fuckin' whore...He came at me. We were fighting. I mean, we went all the way into the weeds and everything... fighting. And, uh, when I got away from him, I ran back to the truck, and I had my gun in the back, and I ran into the back real quick, and he...now, we're still fighting and he realizes I got a gun....he

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[24] The trial court found one additional aggravating circumstance applicable to the murder of Humphreys, i.e., the homicide was heinous, atrocious or cruel. (SR4)

> backed away and I pulled my gun out and I said, You Bastard, and I...I think I shot him right in the stomach or somethin'....he turned around....and he was gonna start runnin' and so I shot him again in the back.... (R587-88)
>
> * * *
>
> He took me down a road that was way kind of bumpy...and went way into the woods. Way, way out there....That's when...he started grabbing me and we struggled in the woods and we fought and everything else and I ran to the driver's side and I pulled my gun real fast and shot him and then he started runnin' and I shot him in the back, and then when I ran up to him, you fuckin' bastard, boom, I shot him again. I shot him three times. (R617)
>
> * * *
>
> ...he's fightin' me. I got nude and then he started, I'm gonna get a piece of ass offa you, baby, and, you know, you whore and all this other shit. They always like to call you names when they're the ones that are gonna do somethin' to ya. All the other guys never called me a whore or anything. They were really nice, they gave me my money and they went their way....he was running towards me and I shot him, and then he started to go away from me, and I shot him again because I, well, you know, the bastard, he's gonna rape me...he didn't even run very far...he said he was gonna like rape me and stuff... (R637)

FACTS PERTINENT TO CHARLES HUMPHREYS' DEATH

Throughout their discussion concerning the murders, Wuornos and the police referred to Charles Humphreys as the "HRS guy."[25] Humphreys picked Wuornos up on State Road 44 and headed for a remote area.

> ...I asked...if he was interested and he said, Yea. Okay,...when we got to the spot on 484, he took his badge out and he said, I'm gonna have you arrested for Prostitution. I said, Bullshit you are. So he grabbed...my arm, and he said No, better yet, how would

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[25] Humphreys worked for the Department of Health and Rehabilitative Services. (R648)

you like to suck my dick and I won't do anything, but you're not gettin' any money for it....I won't arrest you and you can go scott free. I said,...I don't think you're a Cop....I said I'm not gonna do it. So I sat in the front seat and he grabbed my arm and he pulled me outta the front seat and I pushed him back. And as he pushed...there's like this grill thing on the ground, and I grabbed my gun and that's when I shot him.....he stepped back and he started to stumble and he fell. He got back up and I shot him from there....I think I shot him three times.... 'cause he pissed me off and everything....I knew what he was going to do, you know? (R590-2)

* * *

[After Humphreys again threatens Wuornos with arrest if she refuses free fellatio]...I told him the best thing for you to do is to get me out of here....and leave me alone and so he grabbed my arm and pulled me out we started fighting a little bit and I pushed him...he turned me loose and I got the gun out we struggled with the gun...into the side of the car and I shot him there....He walked back up to me and he started struggling again with me for the gun. He steps back and lost his footing...he got back up and started comin' back at me again so I shot him again, and then when he fell I said, Man, you are an asshole....I would never hurt you or nothin'....I felt sorry for him 'cause he was gurgling...So I shot him in the head and tried to get him out of his misery....I shot him one more time after that. I shot him four times. (R619)[26]

* * *

[After police show her a photograph of Humphreys] ...No, that doesn't even look like him. 'Cause he was really kinda gettin' bitchy and everything and he had a real attitude. (R649)

FACTS PERTINENT TO DAVID SPEARS' DEATH

Wuornos remembered David Spears as the mechanic with the pick-up truck, "kind of a rough dude." (R608) She described him

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[26] One page (38f at R618-19) is missing from the transcript of Appellant's videotaped confession. The first part of this quote was obtained by listening to the videotape. This portion is found at 1:13 to 1:14 p.m. of the videotape.

as a tall guy with a beard. (R609) The two of them ended up near Chaskawiska in Citrus County. (R608)

> ...We were nude...screwin' around...gettin' drunk...he wanted to go in the back of the truck and all I remember is that, I think there was some kind of lead pipe or somethin' like that and we were in the back of the truck...and when I got back there, he started getting vicious with me and I jumped out of the truck and he jumped outta the truck, [I] ran to the...door, opened the door, grabbed my bag, grabbed the gun out, and I shot him quick as possible. I shot him at the tailgate of the truck. And then he ran around to the driver's side tryin' to get in the truck towards me,...and I thought, What the hell you think you're doin', dude,...I am gonna kill you 'cause you were tryin' to do whatever you could with me. And I shot 'em through the door...and I went right through to the driver's side and shot 'em again, and he fell back. And that's all I remember on that one....I just got in the truck and took off. (R609)
>
> * * *
>
> He had a metal pipe in the back of the truck and he asked me to come to the back of the truck and lay on that damn bed that had no blankets or nothin'. Then, uh, was going to start to, when he grabbed the pipe and he was going to fight with me. That's when I...jumped out...ran to the door, grabbed my gun out, and shot him...he ran around to the driver's side and tried to get into the truck. I don't know how, why...But I ran to the...passenger side, and shot 'em through the driver's side....Yea, still naked with the gun in my hand and he was going kinda like back...and I shot 'em again....I mighta shot him one more time to make sure he'd die....He just fell backwards after that and I just got in the truck and drove away....I was pretty drunk then, too. (R642-44)

FACTS PERTINENT TO ALL OF THE CASES

In her lengthy statement to police, Wuornos frequently generalized about facts that were common to all of the cases. The trial court also made certain generalizations in the written findings of fact. The following excerpts from Wuornos' confession are pertinent to the analysis of the evidence as it

relates to the aggravating and mitigating circumstances in all of the killings.

> ...I'm very sorry about this. I didn't mean to do what I did. I just -- I don't think I knew what I was doing ...I'm a good person inside but when I get drunk I don't know what happens when somebody messes with me. ...When somebody hassles me, I mean, I'm like, don't fuck with me. (R553)
>
> * * *
>
> ...if you're a hooker, and you get somebody who starts messin' with you, then you get pissed off. And I'm sorry 'cause I've been raped 9 times in my life. And I wasn't about to let somebody skip out on my money that I'm working for...I wasn't about to let somebody rape me either. So when they got really huffy with me, which I had gone through over 250,000 men, and they got -- (Inaudible) -- I got 6 guys. That's because they got rough with me and I defended myself....Most of the times I was drunk. 'Cause I'll admit, I'm an alcoholic. I mean 24 hours a day I was drunk....I killed 'em because they got violent with me and I decided to defend myself. I wasn't gonna let 'em beat the shit outta me or kill me, either. And I'm sure if they found out I had a weapon...I always had it in plain view...if after the fightin' they found it, they would've shot me. So I just shot them. But I'm glad because I feel very guilty. I don't think I should live. I think I should die....I should die because I killed all those people. Well, I think it was like self defense, myself, but no one can judge that but God. 'Cause nobody was there but me....See, one guy, he was tryin' to screw me in the ass...I might as well just keep on shootin' 'em. Because I gotta kill the guy 'cause [he would]...go and tell somebody if he lives... this dirty bastard deserves to die anyway because of what he was tryin' to do to me. So those three things went in my mind for every guy I shot....I've dealt with 100,000 guys. But these guys are the only guys that gave me a problem...I still say that it was in self defense. Because most of 'em either were gonna start to beat me up or were gonna screw me in the ass,...and they'd get rough with me, so I'd fight 'em and I'd get away from 'em....I'd run to the front of the car or jump over the seat or whatever, grab my gun and just start shootin'. (R555-58)
>
> * * *

...But when I get drunk, like I said, I'd be drinkin' with these guys and...if they messed with me,...I'd get just as violent as they would get on me -- to try to protect myself. (R560)

* * *

...I never woulda hurt anybody unless I had to and I had to at the time. (R564)

* * *

...I was drunk, so they were gonna take advantage of me because I was lit...they would have beat the shit out of me and probably found my gun and shot me or beat the shit outta me and took off -- or beat the shit outta me, rape me and take off. You know, I don't know. Those things were goin' through my head....don't go around killin' somebody unless you have to. I really, in my heart, I would never hurt anybody unless I had to... (R567-68)

* * *

...I killed 'em because they tried to do somethin' to me...I wish I hadn't done it....It's because of hustling, and the guys gonna physically harm me, that I have to harm him back....they were bad 'cause they were gonna hurt me....this person was either gonna physically beat me up, rape me, or kill me. And I don't know which one. And I just turned around and did my fair play before I would get hurt, see? (R572)

* * *

...I was always scared so I'd get rid of everything and I'd try to wipe everything down...I knew I had killed somebody...look what you've done...people just started messin' with me...so -- now, I've been raped nine times but never killed. I've been beat up so bad you couldn't describe me. So I got to the point where I needed a gun and that's why I got this gun. (R593)

* * *

...maybe it was self defense, maybe it was stupid,... maybe I [could've] got away from them... (R604)

* * *

Usually it would be we both got naked and I was gonna do an honest deed but I had a big fight. They were

either gonna physically fight me -- either try to rape me...They just started gettin' radical on me and I had to do what I had to do. (R613)

* * *

[Police ask if she went through Burress' wallet] -- I probably did 'cause I think I went through 'em all to find out who in the hell they were....I would check their pockets for identification and stuff and then I would find maybe like a twenty or somethin' in their wallet... (R617-18)

* * *

They never said anything. They just...I shot so fast. [Police point out that, for the most part, Wuornos always "got the drop" on the men and ask why she didn't then just run.] Because I was always basically totally nude with my shoes off and everything and I wasn't gonna run through the woods...[Police ask why she went ahead and shot the men.] Because they physically fought with me and I was...afraid, 'cause they were physically fightin' with me and I -- what am I supposed to do, you know, hold the gun there until I get dressed and now I'm gonna walk outta here? When the guy...might...run me over with his truck or might come back...have a gun on him, too...I didn't know if they had a gun or not.

* * *

[Police ask what motivated Wuornos to take the men's property.] I guess it was after, it was pure hatred. Yea, I think afterward, it was like, You bastard, you woulda hurt me and, uh, I'll take the stuff and get my money's worth because some of 'em didn't even hardly have any money...some of 'em didn't have ANY money....I think I took 'em just for the fact that, you bastards, you were gonna hurt me, you were gonna rape me, or whatever you were gonna do, well, I'll just, you know, keep these little items so I don't have to buy 'em or somethin'. I don't know. I just... Q. It was like a final revenge? A. Yea. Okay. That would do. (R626-28)

* * *

Q. [D]id you tell them beforehand that you were gonna kill 'em? A. Oh, no. No, I didn't...I had no intentions of killing anybody....it wasn't intentional killing. It wasn't just kill somebody. It was because

they physically attacked me....I was afraid that if I shot 'em one time and they survived, my face and all that, description of me, would be all over the place and the only way I could make money was to hustle. And I knew these guys would probably...rat on me if they survived ...I was hoping...that I wouldn't of had gotten caught for it because I figured that these guys deserved it. Because these guys were gonna either rape, kill -- I don't know what they were gonna do to me. (R628-29)

* * *

Q. ...you had to go ahead and kill these men so that they couldn't testify against you...? A. Oh, no, I didn't even think that either. I shot 'em 'cause it was like to me, a self defending thing because I felt that if I didn't shoot 'em and I didn't kill 'em, first of all, if they survived, my ass would be gettin' in trouble for attempted murder, so I'm up shit creek on that one anyway,...I mean I had to kill 'em -- or it's retaliation, too. It's like, you bastards. You were gonna -- you were gonna hurt me. (R629)

* * *

Q. ...none of this was planned? A. No....I was definitely gonna shoot 'em to let 'em die, because they ...in my head...they were gonna rape me, kill me, strangle me,...they were crossing my line...I don't know if they were gonna strangle me, -- if they had a gun... (R639)

* * *

Oh, God, I was pretty drunk then, too. Uh, every time these guys would get me loaded, that's what it is. They'd get me wiped out so they could have the better end of me...get me so loaded that they could, you know, physically fuck with me. (R644)

* * *

[Discussing what Wuornos did with the men's property...] Wherever I could find to throw the junk at. And I'd keep what, you know, like a camera or something for me. What the heck, if I wanna buy a camera...To me it was like, why not keep this stuff. I don't know. You know, I was always drunk....I just threw the stuff away...and kept what would be worth money...[Police ask if she used stolen items to live on.] I didn't really have that planned. I didn't have

anything like that planned. I more or less, said Oh, what the hell, I don't need to keep this stuff and why not just pawn it off. It was like needed food or whatever. (R645)

* * *

...I got involved with these guys because...it was a physical situation...I'm serious...I'm very sorry. (R652)

A. AS TO EACH DEATH SENTENCE, THE TRIAL COURT ERRED IN FINDING THAT THE CRIME WAS COMMITTED DURING THE COMMISSION OF A ROBBERY/PECUNIARY GAIN.

In finding this aggravating circumstance in all three cases, the trial court wrote:

> These circumstances are derived from a single aspect of the case. Therefore, they will be considered as a single aggravating factor. In addition to entering a plea to the murder of [David Spears, Troy Burress, Charles Humphreys] the Defendant at the same time also entered a plea to armed robbery of the same victim. [On the day of his death, Troy Burress collected over $200.00 in cash.] [The evidence establishes that David Spears had just been paid and had cashed his check a short time before he left his employment on the day he disappeared.] The evidence reveals that no money was found on the victim's body or in his vehicle. Furthermore, at the time the Defendant murdered her other six victims, she took items of value, kept some in storage, and pawned others. These facts are sufficient to establish that the murder in this case was committed for pecuniary gain and during the course of a robbery. [Additionally, the vehicle of David Spears (and Charles Humphreys) was not driven solely as a means of escape, but was abandoned many miles from where his body was found. See Scull v. State, 533 So.2d 1137 (Fla. 1988).]

(R301-2,457-58;SR2-3)

The pecuniary gain 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 any of the victims in an attempt to obtain property. The evidence is more consistent that Appellant's gathering of 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.

> 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 only details surrounding the killings come from Wuornos'

confession. The physical evidence does not contradict her version of what occurred out there in the woods with each man. Therefore, the trial court should have and this Court must accept Appellant's version as the truth. See, e.g., Jaramillo v. State, 417 So.2d 257 (Fla. 1982) and Cannady v. State, 427 So.2d 723 (Fla. 1983). Wuornos' confession reveals that robbery was the last thing on her mind. She never even thought of taking the men's property until after the killing.

> ...I think I went through [all of their wallets] to find out who in the hell they were....I would check their pockets for identification...and then I would find maybe like a twenty or somethin'...

(R617-18) When the police asked what motivated her to take the men's property after killing them, Wuornos explained, "it was pure hatred...." (R627) She agreed with the investigator's characterization of the thefts as "final revenge." (R628) One part of her confession made it abundantly clear that keeping the property was merely and afterthought.

> ...To me it was like, why not keep this stuff....I just threw the stuff away...and kept what would be worth money...[police ask if she used stolen items to live on.] I didn't really have that planned. I didn't have anything like that planned. I more or less, said Oh, what the hell, I don't need to keep this stuff and why not just pawn it off.

(R645)

In finding this particular aggravating factor, the trial court attempted to rely on the fact that Spears' and Humphreys' cars were "not driven solely as a means of escape, but [were] abandoned many miles from where [the bodies were] found." (R458; SR3) Counsel fails to see the logic in the trial court's

conclusion. The fact that the cars were abandoned many miles from the bodies is evidence that Wuornos used the cars solely as a means of escape. She did not sell the cars. She did not profit monetarily in any way whatsoever. The trial court relied on Scull v. State, 533 So.2d 1137 (Fla. 1988) in support of its conclusion. Scull also stole his victim's car and this Court concluded, "[I]t is possible that the car was taken to facilitate escape rather than a means of improving his financial worth." Scull, 533 So.2d at 1142. The trial court's reliance on Scull is misplaced. As in Scull, the State failed to prove beyond a reasonable doubt that Wuornos killed any of the men for their vehicles.

The intent to deprive the men of their 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 property was an afterthought. Clark v. State, 609 So.2d 513 (Fla. 1992). 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 the men in order to facilitate a robbery. In fact, she clearly indicated the contrary.

B. IN ALL THREE CASES THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID A LAWFUL ARREST.

In finding this particular circumstance, the trial court wrote:

> The Defendant gave a rather lengthy confession in which she stated several times that the victims were killed to prevent them from identifying her. These admissions are sufficient to establish this factor. Remeta v. State, 522 So.2d 825 (Fla. 1988). This circumstance is further evidenced by the fact that each victim, including [Troy Burress, Charles Humphreys (sic)][27] was shot multiple times, including a shot in the back. This evidences violence toward the victim which is far in excess of that necessary to complete any robbery. The killing of multiple robbery victims in separate robberies is evidence that they were killed to eliminate them as witnesses, Oats v. State, 446 So.2d 90 (Fla. 1984). The absence of any signs of a struggle together with the number of victims negate any claim by the Defendant of self-defense. There is no evidence to support any defense claim that this murder was done out of any motive except to eliminate the possibility that this victim would be able to identify her as the person who had robbed him. The evidence in this case clearly establishes that the elimination of witnesses was at least a dominate motive of the defendant. Green v. State, 583 So.2d 647 (Fla. 1991), citing Caruthers v. State, 465 So.2d 496 (Fla. 1985).

(R302,458-59;SR3-4)

As in the finding of the previous aggravating circumstance,

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[27] The trial court's written findings of fact in support of the death penalty imposed for the murder of David Spears inappropriately, and probably mistakenly, lists Charles Humphreys as the victim rather than David Spears. (R458) Written findings of fact supporting death sentences in this state must be filed contemporaneously with the imposition of sentence. §921.141(3), Fla.Stat. (1991); Bouie v. State, 559 So.2d 1113 (Fla. 1990); Grossman v. State, 525 So.2d 833 (Fla. 1988). Written findings of fact must be precise, not sloppy and shoddy. See, e.g., Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993) [Trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance]. Cf. Mann v. State, 420 So.2d 625, 628 (Fla. 1982). Therefore, Appellant submits that this particular aggravating circumstance must be stricken from the consideration of David Spears's murder.

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 assignations turned ugly, Appellant shot the men 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? Wuornos and the men were all engaged in acts of prostitution. It is doubtful that the men would have reported their activity to the police. The only serious crimes committed by Appellant were the murder and the theft of the men'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 Davis v. State, 604 So.2d 794 (Fla. 1992) [circumstance disapproved even though

victim knew defendant and could identify him as the burglar] and Lawrence v. State, 614 So.2d 1092 (Fla. 1993) [evidence insufficient for murder of store clerk during robbery].

The pertinent portion of Appellant's confession is Wuornos' answer when the police asked why she kept firing after the first shot.

> ...I was afraid that if I shot 'em one time and they survived,...my face...would be all over the place and the only way I could make money was to hustle. And I knew these guys would probably...rat on me if they survived...I was hoping...I wouldn't of had gotten caught for it because I figured that these guys deserved it. Because these guys were gonna either rape, kill...me.

(R629) Investigator Horzepa then asked the pointed question:

> ...you had to go ahead and kill these men so that they couldn't testify against you...?
>
> A. Oh, no, I didn't even think that either. I shot 'em 'cause it was...a self defending thing because I felt that if I didn't shoot 'em and I didn't kill 'em,...if they survived, my ass would be gettin' in trouble for attempted murder...I mean I had to kill 'em...it's retaliation, too. It's like, You bastards ...you were gonna hurt me.

(R629) While certain portions of the statement, taken out of context, would seem to lead to the conclusion that this circumstance applied, the confession must be read in its entirety. It is clear that Wuornos' dominant motive for the killings was rage and revenge; not to avoid arrest. Even the trial court seemed unconvinced that the elimination of witnesses was Appellant's primary motive in the killings. (T812) ["I don't think it has to be the primary number one factor. I think it has to be one of them. Anyway, it's an issue for appeal."]

None of the men had never met Wuornos prior to the fatal encounters. Most importantly, there was no reason to eliminate the men as witnesses since, prior to the murders, no crime had been committed. The State failed to prove this aggravating circumstance beyond a reasonable doubt.

C. AS TO EACH OF THE THREE CASES, THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

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

> The evidence in this case reveals that in a one year period, the Defendant shot and killed seven men. Each of the seven victims, including [Troy Burress, David Spears] was a white male, over the age of 40, who was traveling alone on a major highway in Central Florida. Each one had been taken to a remote location, shot multiple times often in the back and robbed of their belongings and vehicles. The Defendant was armed in advance of each of these murders. This is a fact from which the Court can find this factor. Lamb v. State, 532 So.2d 1051 (Fla. 1988). (See Eutzy v. State, 458 So.2d 755 (Fla. 1984), where procuring the gun in advance, killing the victim execution style with no signs of a struggle was sufficient to prove this factor.) Additional evidence that the Defendant was armed in advance of the murder is provided by the testimony of Don Champagne that each of the murders was committed by a firearm with the same characteristics as the one recovered from Rose Bay which was positively connected with the murder of Charles Humphreys.
>
> As further evidence that the murders were committed from a cold, calculated and premeditated design, the testimony reveals that in some of the cases the Defendant wiped the victim's car to remove her fingerprints. Also, the Defendant removed personal items and identification from the vehicles of some of her victims showing an attempt to avoid detection and arrest. See Jackson v. State, 522 So.2d 802 (Fla. 1988), cf: Lamb v. State, supra.
>
> Taken as a whole, the evidence clearly shows this murder was the result of a cold, calculated and

> premeditated design by the Defendant to locate the victims to rob and then to murder them. This factor is considered appropriate in murders involving the elimination of witnesses. Bates v. State, 465 So.2d 490 (Fla. 1985).
>
> Although the Defendant claimed the murder in this case was committed in self-defense, the court is not required to accept the Defendant's version of how this murder occurred if it is irreconcilable with the other facts proven. Scott v. State, 494 So.2d 1134 (Fla. 1986). The facts outlined in the previous paragraphs of this part clearly show that this death was not the result of the Defendant's acting in self-defense.

(R303-4,459-60;SR4-6)

There is absolutely no evidence that Wuornos had any pre-conceived plan to kill any of the men. Wuornos' statement to police provides the only details as to what actually happened that night. The trial court correctly points out that a defendant's version of a crime need not be accepted, if it is irreconcilable with other facts and evidence. The physical evidence is not inconsistent with Appellant's confession.

The facts in the case at bar are very similar to those in Cannady v. State, 427 So.2d 723 (Fla. 1983), where this Court held:

> We find that the state failed to prove beyond a reasonable doubt that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The only direct evidence of the manner in which the murder was committed was Appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession Appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that Appellant had at least a pretense of a moral or legal justification, protecting his own life.
>
> The trial judge expressed disbelief in Appellant's statements because the victim was a quiet, unassuming

> minister and because Appellant shot him not once but five times. Though these factors may cause one to disbelieve Appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In Mann v. State, 420 So.2d 578 (Fla. 1982), the defendant was convicted of killing a ten-year-old girl who died from a skull fracture and had been stabbed and cut several times. Despite the girl's youth and nature of her injuries, we held that the trial court improperly found the murder to have been committed in a cold, calculated, and premeditated manner. We also held that this aggravating circumstance did not apply in McCray v. State, even though an eyewitness testified that the defendant approached the victim, yelled, "This is for you, mother fucker," and shot the victim three times in the abdomen. Thus, the unlikelihood that the victim threatened or jumped Appellant and the Appellant's shooting the victim five times are insufficient facts to prove premeditation beyond that necessary to sustain a conviction for premeditated murder. We therefore find that the court erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Cannady, 427 So.2d at 730-31. Cannady admitted that after robbing Carrier, the night auditor at the Ramada Inn in Panama City, he kidnapped and drove Carrier to a remote wooded area where he shot him.

The facts in Cannady are directly on point. The case is indistinguishable. As in Cannady, Wuornos' confession was filled with, at the very least, pretenses of moral or legal justification.

> [Burress] physically attacked me...He came at me. We were fighting...when I got away from him...I had my gun ...we're still fighting...and I said, You bastard,...I shot him... (R587-88)
>
> * * *
>
> ...he started grabbing me and we struggled...we

fought... (R617)

* * *

...he's fightin' me....he was running towards me and I shot him,...I shot him again because...the bastard, he's gonna rape me... (R637)

Humphreys threatened Wuornos with arrest if she refused to perform fellatio without compensation. (R590-92) "[H]e grabbed my arm and he pulled me outta the front seat...I grabbed my gun and that's when I shot him...He got back up and I shot him... 'cause he pissed me off..." (R590-92) Wuornos explained that she and Humphreys "started fighting a little bit," when she got the gun out and they "struggled with the gun." (R619) Similarly, Spears had a lead pipe and "started getting vicious." (R609,642-44)

Even if one does not completely accept Appellant's version of what happened to be 100% truthful, the State has failed to prove this circumstance beyond a reasonable doubt. Even if one accepts the conclusion that the killings were the result of a planned felony in a remote location, this circumstance will not apply. See, e.g., Crump v. State, 18 Fla. L. Weekly S331 (Fla. June 10, 1993) [defendant, on two separate occasions, killed women in a criminal pattern in which he picked up prostitutes, bound, beat and strangled them before discarding their nude bodies near cemeteries -- CCP does not apply]; Clark v. State, 609 So.2d 513 (Fla. 1992) [circumstance does not apply even though defendant took victim out to the woods before killing him with two blasts from a sawed-off shotgun].

D. AS TO THE HUMPHREYS, THE TRIAL COURT ERRED IN FINDING THE MURDER ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

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

> The examination of Charles Humphreys' body revealed bruises which indicate that he had been abused before his death. The bruise found on Humphreys' abdomen was caused by the gun barrel being forced into his side so that it abraded the skin even through his shirt. Clearly, Charles Humphreys was aware before he was killed that he was being robbed and was aware of the possible death as a result. See Scott v. State, 494 So.2d 1134 (fla. 1986). He did not die instantly when the Defendant began shooting him. Rather, he attempted to escape but was continually shot by bullets from the Defendant's gun. Even as he lay on the ground moaning, the Defendant walked up and executed him to "put him out of his misery". See Squires v. State, 450 So.2d 208 (Fla. 1984). (SR4)

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, Humphreys' 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 Humphreys from suffering. Wuornos told police that she shot Humphreys three times in quick succession. (R590-92) When he fell down for the final time, Wuornos explained:

...I would never hurt you or nothin'....I felt sorry

> for him 'cause he was gurgling...So I shot him in the head and tried to get him out of his misery....I shot him one more time after that. I shot him four times.

(R619) It is clear from all of the evidence that Appellant attempted to end Humphreys' life as quickly as possible.

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. Humphreys was with Wuornos of his own free will.

Charles Humphreys had seven bullet wounds. (T585-88) Although none of the shots would have been instantly fatal, the shot to the head would have incapacitated him very quickly. (T588-89) The medical examiner could not determine the order of the wounds.

The trial court seemed to place great stock in the "bruises which indicate that [Humphreys] had been abused before his death." It sounds as if Humphreys was severely beaten before his death. Such was not the case. Humphreys had one bruise on the

right side of his abdomen which was consistent with a gun barrel being shoved into his side. (T591-92) Additionally, Humphreys suffered a few, small bruises inside his right, upper arm. (T592) The only other bruise resulted from one of the gunshot wounds. (T592) The medical examiner had no theory as to the cause of the small bruises inside Humphreys' arm. (T596-97) The doctor admitted that they could have been present up to 48 hours prior to his death. (T597) As such, the evidence establishes beyond a reasonable doubt only one bruise to Humphreys' abdomen that was inflicted by Wuornos. Such is not the stuff of "heinous, atrocious or cruel." The State failed to prove this aggravating circumstance beyond a reasonable doubt.

E. TREATMENT OF MITIGATING EVIDENCE.

The trial court rejected all of the statutory mitigating circumstances, concluding that the evidence did not support them. (R305-7,461-63;SR6-8) The trial court's ambiguous treatment of the evidence offered in mitigation is somewhat confusing. The court reports that:

> 1. As a child, the Defendant was allegedly physically abused in the homes in which she was raised. Hearsay testimony from the Defendant's adoptive mother presented evidence that the Defendant's grandfather, characterized as an alcoholic, allegedly inflicted physical abuse on the Defendant. The statements purportedly came from the Defendant and a childhood friend of the Defendant. The State presented rebuttal evidence in the form of hearsay testimony from an investigator in the Citrus County Sheriff's Department. This investigator traveled to Michigan and interviewed the family members of the Defendant who denied that any physical abuse occurred within the home. Additionally, the State presented evidence that the same childhood friend, who allegedly told the adoptive mother of the abuse, denied any such knowledge to law enforcement.

> 2. The Defendant allegedly expresses remorse for the commission of this murder and the murders of other victims. The Defendant's adoptive mother presented hearsay testimony that the Defendant has allegedly experienced a religious conversion and is sorrowful for her past deeds. However, the State presented evidence that, subsequent to the alleged religious conversion, the Defendant, without provocation, threatened the lives of law enforcement officers. Additionally, the Court heard testimony that the Defendant has made similar claims while she was imprisoned in 1982.

(R307-8,463-64;SR9-10) In the trial court's conclusion, the court wrote, "The evidence establishes, at best, only two mitigating circumstances which deserve only slight weight." (R308,464;SR10)

Appellant concedes that the evidence concerning some of the nonstatutory mitigating circumstances is in conflict. Much of Appellant's mitigating evidence was hearsay. All of the State's evidence in rebuttal was hearsay. However, the trial court is incorrect when it concludes that the nonstatutory mitigating factors are not supported by the greater weight of the evidence. Some of the mitigating evidence was uncontroverted.

Although the State did present hearsay evidence that refuted Pralle's testimony that Wuornos was physically abused as a child, the State did <u>not</u> refute the fact that Wuornos was abandoned by her mother when she was an infant. (T666) Nor did the State refute the fact that the first few months of her life were spent in squalor and filth. Nor did the State refute that, at the age of thirteen, Lee was raped, impregnated and forced to live at a home for unwed mothers. (T670) Nor did the State refute evidence that Lee was living on the streets by the age of

fifteen, forced to prostitute her body. (T670-71) The State also failed to refute evidence that Lee's brother Keith, her closest family tie, died at a very young age, leaving Lee shattered. (T673) The State also failed to refute evidence that Wuornos had a history of abusing drugs and was a life-long alcoholic. (T671-72) These facts are uncontroverted.

In dealing with Appellant's intoxication during the killings, the trial court wrote:

> There is nothing in the record to show that the Defendant was under the influence of extreme mental or emotional disturbance when she committed the murder[s]. Though some slight evidence indicates that the Defendant consumed some alcoholic beverages on or about the date of the commission of the offense[s], that evidence is insufficient to establish this factor as a mitigating circumstance.

(R305,461;SR7) The trial court fails to explain why the evidence is insufficient to establish Appellant's intoxication as a nonstatutory mitigating circumstance. Wuornos' confession is replete with references to her drunkenness.

> ...See, most of the times I was drunk as hell. (R551)...I think when I'm drunk I get crazy....(R554) Most of the times I was drunk. 'Cause I'll admit, I'm an alcoholic. I mean 24 hours a day I was drunk.... (R556)...when I get drunk,...I'd be drinkin' with these guys...(R560)...yes, we were drinkin' and yes, we were -- I was drunk...(R567)...alotta times I was drunk,...(R573)...I don't remember. I was drunk as shit. This one I don't remember. This is a blackout, man. I do not remember anything....I was drunk as could be. I musta had a case of beer on this one. I was drunk as could be...(R621) I was pretty drunk then too. Every time these guys would get me loaded,... They'd get me wiped out so they could have the better end of me,...get me so loaded...(R644)...I don't know. You know, I was always drunk....(R645)

Appellant submits that the evidence that she was intoxicated

during all three murders is uncontroverted. The trial court should have accepted this evidence in mitigation.

In Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), this Court stated that the trial court "must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature." "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Campbell, 571 So.2d at 420. In failing to find that Appellant's unhappy (at the very least) childhood was mitigating, the trial court made an error similar to the sentencing judge in Nibert v. State, 574 So.2d 1059 (Fla. 1990). Nibert's trial judge rejected the defendant's abused childhood as mitigation, pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." Nibert, 574 So.2d at 1062. This Court correctly pointed out that psychological and physical abuse during a defendant's formative years is **per se** mitigation. Id.

In light of the unusual procedure pursued by Appellant in this particular case, extraordinary measures are required. This Court has recently pointed out the importance of scrutinizing everything for any evidence of mitigation. Farr v. State, 18 Fla. L. Weekly S380 (Fla. June 24, 1993).

> Second, Farr argues that the trial court was required to consider any evidence of mitigation in the record, including the psychiatric evaluation and presentence investigation. Our law is plain that such

> a requirement in fact exists. We repeatedly have stated that mitigating evidence **must** be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. [Citations omitted] That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

Id. In this regard, Appellant requests that this Court take judicial notice of the court file of Wuornos v. State, Case Number 79,484, now pending on direct appeal before this Court. §§ 90.202(6)(12) and 90.207, Fla.Stat. (1991); Kelley v. Kelley, 75 So.2d 191 (Fla. 1954) and Peterson v. Paoli, 44 So.2d 639 (Fla. 1950). Appellant will file a separate motion formally requesting judicial notice.

In the record on appeal for Appellant's other case, the trial court conclusively found that Wuornos suffered from a borderline personality disorder which "does not rise to an extreme mental or emotional disturbance." (R4669) The trial court accepted same as a nonstatutory mitigating factor. Id. Additionally, the record on appeal in the companion case contains other evidence which, Appellant contends, the trial court inappropriately ignored. Appellant incorporates by reference the argument set forth in the Initial Brief (pp. 96-97) in Wuornos v. State, Case Number 79,484.

The trial court in the case at bar improperly rejected uncontroverted evidence that established numerous nonstatutory mitigating circumstances. Additionally, the record on appeal in the companion case proves that both statutory mental mitigating circumstances were proven. The trial court in the companion case

accepted the evidence and found that Wuornos suffered from a borderline personality disorder. Additionally, both records on appeal establish numerous nonstatutory mitigating factors which the State failed to refute and should have been found by the trial court in this case.

CONCLUSION

The trial court improperly found several aggravating circumstances. The court also improperly rejected uncontroverted nonstatutory mitigating circumstances. Additionally, the entire record of Appellant's cases, including the record on appeal in the companion case, support other mitigating circumstances, both statutory and nonstatutory. A proper weighing of all of the evidence leads to the inescapable conclusion that death is disproportionate and a life sentence is warranted in Appellant's case.

POINT VIII

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

1. The Jury

a. Standard Jury Instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, Atrocious, or Cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The "new" instruction in the present case (T882) violates the Eighth Amendment and Due Process. The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the circumstance only to such crimes. Thus, there is the likelihood that juries, given little

discretion by the instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates Due Process. The instruction relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[28]

ii. Cold, Calculated, and Premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[29] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to similar errors. See Hodges v. Florida, 113 S.Ct. 33 (1992) (applying Espinosa to CCP and acknowledging flaws in CCP instruction). Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in Florida capital sentencing proceedings need not be definite, would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing

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[28] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

[29] The instruction is: "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."

phase of a capital case. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The instruction also unconstitutionally relieves the state of its burden of proving the elements of the circumstance as defined by case law construing the "coldness," "calculated," "heightened premeditation," and "pretense" elements.

iii. Felony Murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process.

Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

c. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through the present. See, e.g., Elledge v. State, 346 So.2d 998

(Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

4. The Florida Judicial System

The sentencer was selected by a system designed to exclude African-Americans from participation as circuit judges, contrary to the Equal Protection of the laws, the right to vote, Due Process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[30] Because

[30] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 16, 17, and

Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[31]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[32] Prior to that time, judges were selected by the governor and confirmed by the senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated 466 U.S. 48, 104 S.Ct.

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21 of the Florida Constitution.

[31] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

[32] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

1577, on remand 748 F.2d 1037 (5th Cir. 1984).[33]

The history of elections of African-American circuit judges in Florida shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven African-American circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In St. Lucie and Indian River Counties, there are circuit judgeships, none of whom are black. Single Member Districts, supra.

Florida's history of racially polarized voting, discrimination[34] and disenfranchisement,[35] and use of at-large election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Fifth Circuit. The results of choosing judges

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[33] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeals so held.

[34] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[35] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

as a whole in Florida, establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in selection of the decision-makers in a criminal trial.[36] These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channelled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death-sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the

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[36] The results in choosing judges in Citrus County (no black judges) and Marion County (no black circuit judges) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

5. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our

aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[37]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government

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[37] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[38] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[39] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth

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[38] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

[39] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxell (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[40] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because

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[40] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida

Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[41] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[42] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary

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[41] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[42] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweigh the aggravating.

sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The prosecutor below, like in Parks, argued that the jury should closely follow the law on finding mitigation. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is Cruel and Unusual.

Electrocution is cruel and unusual punishment in light of

evolving standards of decency and the availability of less cruel, but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio State L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So.2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, as well as those set forth in the initial brief, Appellant requests the following relief:

As to Points I and II, vacate the convictions and sentences and remand for a trial;

As to Points III through VI, reverse and remand for a new penalty phase;

As to Points VII and VIII, vacate the death sentences and remand for imposition of a life sentence or, in the alternative, as to Point VIII, declare Section 921.141, Florida Statutes unconstitutional.

Respectfully submitted,

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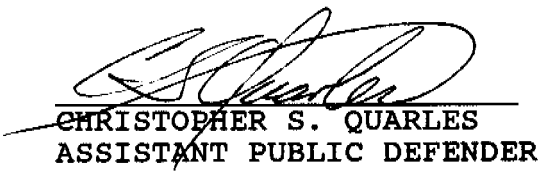
CERTIFICATE OF SERVICE

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 30th day of August, 1993.



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