IN THE SUPREME COURT OF FLORIDA

AILEEN CAROL WUORNOS,

Appellant,

v.

CASE NO. 81,466

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Arraignment

Aileen Wuornos was arraigned in the Sixth Judicial Circuit in and for Pasco County on May 10, 1991, for the first degree murder of Charles Carskaddon. She was represented by the Public Defender's Office of Dade City, Florida. She entered a plea of not guilty. She complained of receiving bad treatment at the Pasco County Jail and indicated she was thinking of filing a lawsuit against them. She stated that the conditions were unsanitary in that there was urine and feces on the floor. She said she slept on a mattress on the floor with one sheet and blanket and no pillow. She indicated they told her they would like to shoot her and electrocute her right there. She asked to return to Volusia County as soon as possible. The court informed her she would be brought back to Volusia as quickly as possible (R 223-224). At the conclusion of the hearing she told Judge Swanson to "have a nice day." (R 225).

Pre-Trial Conference

A pretrial conference was had on April 23, 1992. Mr. Glazer, Wuornos' newly appointed attorney, indicated that Wuornos had given him specific instructions to enter a plea as she did not want to fight this case (R 274). She also wanted to waive the penalty phase. Wuornos thought that at one time there was negotiations for life sentences. The prosecutor confirmed that some months ago when Wuornos was represented by Mr. Eble, State Attorney Tanner's Office attempted to negotiate with Wuornos for life sentences in all counties (R 275). The deal was struck by

all of the state attorneys except for Mr. Russell. The state indicated it was still seeking the death penalty in this case (R 275-276). The prosecutor noted that while Wuornos had received one death penalty in Volusia County, after the trial she had expressed a great deal of displeasure with her lawyer, Ms. Jenkins, indicating she had not called a witness she wanted. The prosecutor saw on the horizon a "3.850 big time." (R 276). Defense counsel advised the court that there was case law allowing a defendant to waive mitigation but then indicated "But the fact that I do intend to present some sort of mitigation--in other words, Ms. Wuornos has instructed me to not try to close all the holes for 3.850." (R 277-278).

Plea Hearing

When counsel indicated at the plea hearing that he had discussed Wuornos' concerns with her at great length he also stated that he had done so several times, and at the change of plea in Marion County, as well (R 201). The court determined that Wuornos understood she could not challenge the actions of the police in taking her statement in this case although she could challenge it in the case in which she had a guilt phase (R 202).

Wuornos was more than pleased with her attorney, Mr. Glazer. She even indicated "I think he's a wonderful, honest, true-grit with integrity lawyer here." (R 210).

When the court scheduled the penalty phase for July 14, Wuornos sought to waive her presence. The court explained to her that at the penalty phase the state and defense would have an

opportunity to present aggravating and mitigating witnesses. Wuornos indicated she did not wish to be present. The court asked if she understood she had an absolute right to be present. Wuornos stated "I absolutely understand all of this. I do not want to be present for any of this. I just prefer to go back to BCI and send me a letter that I got death row." (R 217). The judge indicated that counsel was to work out a form of communication with the jail so that it could be confirmed each day that she wished to waive her presence (R 218).

Competency/Mental Health

Psychologist Harry Krop evaluated Wuornos on January 9, 1992. He diagnosed her as having Borderline Personality Disorder with paranoid features. She was subsequently incarcerated on death row. Dr. Krop saw her again on July 10, 1992, and felt that she had decompensated. In a July 13, 1992, letter to Wuornos' attorney, Steven Glazer, Dr. Krop indicated that as the session progressed she became increasingly paranoid and manifested a full-blown delusional system. He also indicated that "at this time, she is exhibiting a fixed delusional system which suggests that she perceives her former attorneys as well as her present lawyer as part of a conspiracy." It was Dr. Krop's opinion that she was suffering from Delusional Disorder, Persecutory type. He felt that she was incompetent to proceed and her ability to rationally participate in plea bargaining was significantly impaired (R 176). This is the letter defense counsel presented to the court on July 14, 1992, which resulted in the appointment of additional experts, Dr. Donald Del Beato

and Dr. Joel Epstein, to evaluate Wuornos' competence to stand trial.

In a report dated August 11, 1992, psychologist Don Del Beato reported that he evaluated Wuornos in a clinical interview and also administered a MMPI-2. He observed some religiosity but indicated that was not unusual in inmates who have been in serious trouble. He found that she was not psychotic. Although he found some paranoid ideation, suspiciousness and cynicism this was mainly aimed at correctional officers whom she felt had mistreated her in Pasco and Volusia County. She spoke highly of her attorney, Mr. Glazer, who she felt was honest and a great person. She believed that her previous defense attorneys had rolled over from the pressure. She was planning to sue unnamed persons who had embellished stories about her to make money. She felt this was unnecessary since she plead guilty. She told Dr. Del Beato quite frankly, "I am guilty. I killed them in cold blood. All I care about is salvation." She further indicated she was tired of being paraded in the limelight like a freak. She disliked being referred to as the first female serial killer as she feels she is not. She did not complain of unfair trials. She did complain of having to go through the process when she was quite willing to plead guilty. She felt it was a waste of taxpayers' money. Dr. Del Beato did not observe Wuornos to be delusional. The MMPI-2 revealed a profile associated with emotionally unstable persons who are seen as delinquent, anti-social, egocentric, immature, impulsive and demanding with a poorly integrated conscience. Such persons "are manipulative in

trying to get out of stressful situations, and are seen as disruptive, provocative and irritable. They do not learn well from mistakes." Dr. Del Beato's diagnostic impression was that of Antisocial/Borderline Personality. Wuornos appeared quite able to disclose pertinent facts to her attorney. Without probing she readily admitted to Dr. Del Beato "Waiving my rights to trial is all I need. There's no way. I am point blank guilty. I killed them in cold blood. I know what I'm doing." Wuornos did not feel the need to challenge the prosecution in light of the fact that she had already been convicted and sentenced to death. She stated "Just let me die in peace, I'm guilty anyway." Dr. Del Beato felt that "While tragic, the statement is not delusional or psychotic but quite realistic." Wuornos admitted that she had behaved inappropriately in Judge Tepper's court because she was frustrated and blowing off steam because she felt she was being paraded around like a freak. Dr. Del Beato further indicated that "Ms. Wuornos was capable of convincing this experienced examiner that her wanting to waive her rights for trial appearance was reasoned." Dr. Del Beato concluded that Wuornos was competent to proceed with trial and to waive her right to personally appear (R 177).

Psychologist Joel J. Epstein evaluated Wuornos on August 6, 1992. He found Wuornos competent to enter a plea and waive any rights to future appearances or appeals. He determined that her reasoning and judgment were not significantly compromised by any organic mental defect, insufficiency, illness or transient emotional state. She displayed a satisfactory understanding of

the legal process and the ramifications of her actions. Wuornos stated that the probability of her being able to appeal and reverse all murder charges against her was very low. With the number of charges against her she felt that she will, in all likelihood, end up being executed at some time in the future. She decided it was not worth her effort and energy to try to defend herself against the charges as it would only postpone the inevitable. Dr. Epstein found that her reasoning and thinking appeared logical, purposeful, and goal-oriented. There was no indication of a thought disorder. She stated that it was her belief that she had done wrong by killing other human beings. She felt that there was an element of self-defense in all of her actions, nevertheless. Because of the nature of her situation she felt that she will be forgiven and eventually go to Heaven. Dr. Epstein noted that Dr. Barnard did not feel that Wuornos was at any time psychotic during her offenses. She was able to recall events to Dr. Epstein in detail and he noted that her consciousness did not appear clouded during the time of the murders. Her score on the MMPI-2 was consistent with some type of personality disorder. Similar individuals have problems with impulse control, often develop addiction problems, and are often affectively unstable. "The items endorsed by Ms. Wuornos indicated that she has a great deal of difficulty with authority figures. She presents as a very alienated individual both socially and emotionally." Dr. Epstein found there was no evidence of an underlying schizophrenic disorder. She is able to see the world in a realistic manner. The Rorschach responses

indicate she is a narcissistic individual with a tendency to over-value her own personal worth. She is self-focused and very self-centered. "In many ways she can be seen as very naive and simplistic. At times her ideational activity may be marked by some faulty logic and judgment. Her thinking and reasoning abilities, however, do not appear to reflect any pathological processes but are seen as that of an immature or unsophisticated individual." By her own reasoning, Wuornos did not feel that there was much of a probability that she would not end up being executed. It is for this reason that she does not have any desire to go through with appeals or future trials. Dr. Epstein noted that "she feels that by taking others lives she has done something wrong and should be punished. She apparently would be motivated to defend herself and help herself in the legal process if she were convinced that there was at least some possibility of acquittal on all the charges that are against her." Dr. Epstein concluded: "Interview and test results would indicate that Ms. Wuornos is competent to make any plea decisions of her choosing. There is no evidence of any significant mental defect or organic deterioration at this time. Thinking and reasoning are logical, purposeful, and goal-oriented. Emotionally, she is under satisfactory control. Her psychological test data indicated that diagnostically she is best characterized as having a personality disorder. There appears to be no on-going psychotic process or thought disturbance which would mitigate her responsibility to control her own behavior (R 178).

On December 10, 1992, the court granted a state motion to have Wuornos examined by mental health experts for the purpose of presenting penalty phase evidence and ordered examinations by Dr. Sydney Merin and Dr. Daniel Sprehe (R 78-79).

Dr. Sprehe concluded in his report that it was his opinion within a reasonable medical probability, based on his review of materials, that Wuornos was not suffering from any major demonstrable mental or emotional problems at the time of the charge and though she had a long standing personality problem, this would not qualify as being under the influence of extreme mental or emotional disturbance. It was his opinion that she had the capacity to appreciate the criminality of her conduct and to conform that conduct to the requirements of the law (R 179).

At the telephonic competency hearing defense counsel also moved for a continuance. Although counsel had previously indicated Wuornos wanted to waive the penalty phase (R 274-275) he now informed the court that Wuornos had been communicating with a childhood friend and told him about a week ago that she wanted her as a witness, which was a new development. She had never asked for it before. Counsel stated that she would be raising an ineffective assistance of counsel claim against her public defenders in the Volusia County case because they failed to call that witness, Dawn Botkins. Defense counsel felt compelled to call her this time. The penalty phase was continued (R 284-285).

Penalty Phase

Wuornos' first victim was Richard Mallory in Volusia County. In her statements she indicated that she killed him in self-defense because he was attempting to rape her (R P.P. 5). Defense counsel did not attempt to introduce evidence of a rape that a person by the name of Mallory attempted to commit in Rockville, Maryland in 1957 in order to bolster the self-defense aspect of the case because he could not prove that that Richard Mallory was actually the victim in this case (R P.P. 6).

In regard to the waiver of mitigating evidence by Wuornos, when defense counsel stated what evidence would have been presented, he also stated "I think approximately seven or eight doctors have talked to Ms. Wuornos over the last two years. Not one of them said that she was incompetent at the time. All doctors say that she knew right from wrong. The issue of insanity at the time of the offense will not arise." (R P.P. 16).

Dr. Harry Krop had found Wuornos competent to make the decision to waive her presence during the penalty phase (R P.P. 19).

Wuornos stated on the record that she wanted to waive her right to present any evidence in mitigation (R 19). She had been through the sentencing phase before and understood its purpose. She knew that there would be an automatic appeal to the Supreme Court of Florida (R P.P. 21).

When Wuornos was questioned by the court as to whether she wanted counsel to present mitigating evidence she also responded that she did not care about the court system because she planned on telling the truth through a book before she died (R P.P. 24).

Wuornos was advised by the judge, on the record, that she had the right to have a jury recommend whether she should be sentenced to life or death (R P.P. 25). Wuornos also responded "The jury has heard so many lies, they're not going to be eligible to determine anything." (R P.P. 25). The court corrected her, stating: "This jury hasn't heard any--" Wuornos indicated that she had discussed this very carefully many times with Mr. Glazer. She understood he thought she ought to have a jury and she was acting against his recommendation (R P.P. 26). The state had no objection to proceeding to the penalty phase without a jury (R P.P. 27).

The court also explained to Wuornos that she had a constitutional right to be present for these proceedings. She reiterated that she wanted to waive her presence. She stated that she had also discussed this with counsel (R P.P. 27).

Wuornos indicated that she read the written waiver forms for the right to be present, to present mitigating evidence, and to have a jury, before signing the forms (R P.P. 28).

After Wuornos responded that it did not matter that she could present evidence of her belief she acted in self-defense because the public had been told so many lies, the judge informed her "The public is not going to make this decision." (R P.P. 30). Wuornos responded "I think that people finally made an opinion after five death sentences that they could care less about one more. Anybody." (R P.P. 30).

The court allowed Wuornos to waive her right to present evidence in mitigation and the right to a jury and her presence at the hearing (R P.P. 31).

State's Exhibits 1 through 4 were admitted into evidence without objection (R P.P. 33-34).

The area near Pittman Pond is overgrown. It is a lover's lane, fishing hole and dumping area. Weeds and brush had been pulled and cut and strewn over the top of the green electric blanket to camouflage it and the nude body underneath it (R P.P. 36).

The victim found in Citrus County on June 1st was sitting, had a cap and socks on but was otherwise nude (R P.P. 37).

Detective Muck and Jerry Thompson of Citrus County went to Tallahassee to the profilers. They found that several other counties had similar homicides. They determined that one and the same person or persons had committed them (R P.P. 37). Most of the cars were southbound in direction when they were recovered from the murdered individuals (R P.P. 38).

Charles Carskaddon's Cadillac was not discovered on June 13th. It was actually found on June 7th by the Highway Patrol at the interstate in Marion County and it was red-tagged. It was towed on June 13th. The Florida Highway Patrol took it to a junkyard. The sheriff's office retrieved it (R P.P. 38).

The task force worked every day out of Marion County. They set up a lead sheet program in the computer. Cammie Green, Aileen Wuornos and Tyria Moore kept cropping up. Detective Muck searched Pasco County files and found Wuornos had lived in New Port Richey around 1985 and in a motel in Zephyrhills (R 39).

On January 9th Wuornos had been under surveillance for twenty-four hours or more. They used undercover people inside

the bar with her, mostly from Citrus County. She was taken into custody at the Last Resort in Daytona Beach based on a warrant for violation of probation out of Volusia County under the name Lori Groddy. At the time she was taken into custody she had a key to a storage room that she was worried about. She referred to it as "the key to her life." (R P.P. 40; 85). Some of the personal property of the other victims found in the storage room included unique rings, billy clubs, flashlights, and a briefcase, possibly belonging to Mr. Humphries (R P.P. 40).

State's Exhibit 6, a photo of Mr. Carskaddon's Indian blanket and personal property of other victims was admitted into evidence without objection (R P.P. 41). State's exhibit 7, a pawn ticket with Wuornos' fingerprint on it from Labosca Investments Pawn Shop and State's Exhibit 8, Mr. Carskaddon's .45 automatic pistol were admitted into evidence without objection (R P.P. 43). State's Exhibit 9, a federal firearm transaction record reflecting that Carskaddon had purchased the gun in Kentucky was admitted without objection, as well (R P.P. 44).

Wuornos' videotaped confession was made to Detectives Horzepa and Munster. She said in the confession that she had shot and killed Carskaddon (R P.P. 44). She confessed, as well, to the homicide of David Spears. She recalled the pickup truck and that it occurred on Fling Lane, off of U.S. 19 (R P.P. 86).

State's Exhibit 10, a photograph of the green electric blanket which covered Carskaddon's body, and was in bad shape, was admitted without objection (R P.P. 47). Aerial photos of the scene, State's Exhibits 11 and 12; photos of the area around the

body before it was uncovered, then after it was uncovered, depicting the electric blanket with an arm protruding from the top of it, State's Exhibits 13 and 14, were all admitted without objection (R P.P. 49).

Charles Carskaddon's 1975 Cadillac was brown in color (R P.P. 54).

Defense counsel, in order to eliminate any possible issue before this court, stated on the record that he did not object to the victim's mother identifying the property of the victim because he trusted the court, which was hearing the evidence, rather than a jury (R P.P. 54).

Charles Carskaddon's girlfriend was Peggy Hood (R 56).

The medical examiner described the body at the scene as she observed it. She found the body of a white person of undetermined sex, face down, covered by a green or turquoise electric blanket which was covered by a large amount of uprooted tall grass. The body was very badly decomposing (R P.P. 59).

She was able to discern a pattern from the bullets. They were fired in a general fashion of anterior/posterior and left to right in a fairly tight pattern, involving the midline and right side both above and below the diaphragm, the muscle separating the chest organs from the organs of the abdomen (R P.P. 60-61). She could not determine how far from the body the muzzle of the gun was at the time of firing due to the decomposition. She also could not determine the order in which the bullets entered the body. She further testified that all eight of the bullets were in regions where they could have caused death but she could not

specifically tell which ones did cause the death (R P.P. 61). She could not tell the height and weight of Charles Carskaddon because of the decomposition of the body (R 62).

The defense indicated for the record that it waived an opening argument. It also had Williams Rule notice and waived any objections to the same, as well as a hearing, in accordance with the wishes of Wuornos (R 63).

When Bobby Lee Copas gave Wuornos a ride on November 4, 1990, he was on his way to pay the insurance on his rig in Orlando. He went through a drive-in at a bank and cashed a check with Wuornos in the car. Just as they pulled back out on 27 she started propositioning him.

When found, the body of David Spears was very decomposed. Both Busch and Budweiser cans were found around the body (R P.P. 73). The shots that killed Spears were fired from CCI brand cartridges in a .22 caliber weapon (R P.P. 75). There were a number of homicides in Florida occurring close to interstates or well-trafficked roads (R P.P. 80). The Marion County Sheriff's Office prepared composites of the suspected females involved in the homicides (R P.P. 81). When Wuornos lived in a lodge in 1989, in Chassahowitzka, the area where the body was found, she used the alias Susan Blahovick (R P.P. 82).

When found, the body of Charles Humphries was not in a bad state of decomposition and an identification of him was made (R P.P. 89). Humphries had been driving a blue, 1985 Oldsmobile Forenza. He was last seen alone at the Journey's End Motel in Wildwood (R P.P. 89). He had been travelling alone on the

interstate (R P.P. 90). The beer cans that were found in the Green Swamp area of Lake County were Miller and Bud (R P.P. 96). The briefcase Wuornos gave to Tyria Moore was identified as Humphries' by his wife. Additionally, the combination that opened the briefcase lock was the first six numbers of Humphries' social security number (R P.P. 99). Other than the briefcase none of Mr. Humphries personal property or cash was recovered (R P.P. 100).

Tyria Moore, as well as Aileen Wuornos, gave directions to the Volusia County Sheriff's Office dive team as to where the weapon used in the homicides could be found. They went to the location, dove underwater and recovered the weapon (R P.P. 99). The weapon fired the shell casing found in Lake County (R P.P. 100).

The body of Troy Burress was found on a dirt road off of S.R. 19. It should be noted that S.R. 19 is also a major highway and is sometimes referred to as U.S. 19 (R P.P. 102). Burress' body was found on August 4, 1990, in a rural, deserted, wooded, area of Marion County (R P.P. 102). Burress' body was in an advanced state of decomposition (R P.P. 103). Burress' clipboard and receipts were located approximately a tenth of a mile from his body. His wallet, credit cards and papers had been thrown into the woods (R P.P. 104). The $290.00 Burress was carrying in the bank bag was not found at the scene (R P.P. 106). No property belonging to Mr. Burress was recovered from Wuornos' storage locker or from Tyria Moore. The cash and bank bag were not recovered (R P.P. 109). When Wuornos was interviewed at the

Volusia County Jail she confessed to killing seven men and provided details of how and where she met Mr. Burress and how she killed him (R P.P. 110; 112).

Tyria Moore and Aileen Wuornos lived together in Holly Hill, Florida in June 1990 (R P.P. 116). Wuornos told Moore she lived with her grandparents until her early teens, then she ran away from home. Wuornos also told her that some guy that looked like Elvis got her pregnant. Wuornos never described being beaten, hit or scolded by her father, Lory Wuornos, that Moore recalled (R P.P. 119).

The wooded dirt road on which the body of Walter Antonio was found was a two-rut wooded road used for logging. There are no residences in the area for miles (R P.P. 126). Antonio was en route to Birmingham, Alabama from his home in Cocoa at the time of his death (R P.P. 130).

Wuornos' victims were older white males traveling alone. They were killed by multiple gunshot wounds. Their bodies were found in deserted areas (R P.P. 130).

Lori Groddy testified that her father spanked the children but not severely (R P.P. 140). He quit spanking them as they got older (R P.P. 142). They were grounded if they did something wrong (R P.P. 140).

There was no problem between Wuornos and her mother. The father was the one that enforced the rules (R P.P. 144).

Richard Mallory's car was recovered on December 1, 1989 (R P.P. 150). Portions of Mallory's body were badly decomposed (R P.P. 153). Everything from the collarbone up to the top of the

head was totally decomposed (R P.P. 154). There was a bullet entry wound to the right side of Mallory's chest and three entry wounds in the front (R P.P. 155).

Prior to Detective Horzepa's interview with Wuornos at the Volusia County Jail on January 16th, she had been advised of her constitutional rights and had been afforded an opportunity to speak to a lawyer (R P.P. 161).

SUMMARY OF ARGUMENT

1. Wuornos understandingly waived her spurious defenses of intoxication and self-defense at the plea hearing after discussing them with counsel and the trial court properly ascertained that there was a factual basis for her guilty plea. A second inquiry was not required. Wuornos has demonstrated no manifest injustice to warrant setting aside the plea. Wuornos' guilty plea was voluntary and intelligent and entered with full knowledge of the rights she was waiving.

2. Wuornos knowingly and voluntarily waived her right to an advisory jury in the penalty phase. She also knowingly and voluntarily waived her right to be present in the penalty phase. Her voluntary absence was tactfully preferable to her defense attorney than the certain disruption she would cause if present. Wuornos' waiver of the right to present mitigating evidence was essentially a sham as defense counsel made a case for mitigation and ably argued the same to the judge.

3. Wuornos' behavior at the penalty phase, while vituperative, was not irrational and raised no reasonable grounds to believe that she could not consult with her lawyer with a reasonable degree of rational understanding or lacked a rational as well as factual understanding of the proceedings against her.

4. The CCP aggravating factor was properly found. A careful plan or prearranged design to kill is evident from the fact that the murder was committed in a secluded area, Wuornos came into the victim's car armed, she executed the victim by shooting him eight times in a vital area, and the purpose of the murder to

conceal a robbery so she could continue her trade. No pretense of moral or legal justification was established by the ludicrous portrait of a serial killer continually acting in "self-defense." The capital felony was properly found to have been committed during the commission of a robbery. There was no "after-thought" robbery. The robbery motive is apparent form the taking of property from previous victims. Upon repetition an after-thought becomes a forethought. She also indicated she killed the victims to escape detection. The trial court properly found the aggravating circumstance of previous conviction of a capital felony based on Wuornos' numerous prior death sentences and an armed robbery conviction. Any erroneous finding of aggravating factors was harmless beyond a reasonable doubt.

5. The legislative determination that a first-degree murder that occurs in the course of another dangerous felony is an aggravated felony is reasonable and the fact that there are numerous dangerous felonies does not mean that there is a lack of channeling as to the committed in the course of a felony aggravator.

6. There was no evidence to support a finding in mitigation that Wuornos acted under mental or emotional disturbance and there was psychiatric testimony to the contrary. Wuornos admitted to killing her victims in cold blood. Wuornos' actions in committing the murders were not demonstrated to be significantly influenced by her childhood experience which was not abusive. There was no evidence that Wuornos' control over her behavior at the time of the murder was reduced by alcohol

abuse or that she was even intoxicated at the time. Wuornos knew right from wrong, tried to conceal the crime and appreciated the criminality of her conduct. She was convicted of armed robbery in 1982 and was not arrested again until some seven or eight years later and obviously could conform her conduct to the requirements of law if she chose to. Tyria Moore also directed the police to the murder weapon. No seventh body was ever found. Wuornos' cooperation with the police was not an expression of contrition and not particularly mitigating. Religiosity is common in prisoners. Her violent felonies were properly viewed only in aggravation. A serial killer should not benefit by the sheer number of his victims.

7. Wuornos' death sentence is proportionate to other robbery/murder or multiple aggravation cases with no mitigation or very weak mitigation, especially where there are numerous prior murders.

ARGUMENT

I. THE TRIAL COURT PROPERLY ACCEPTED APPELLANT'S PLEA OF GUILTY AFTER DETERMINING THAT THERE WAS A FACTUAL BASIS FOR IT AND ASCERTAINING THAT IT WAS BEING ENTERED KNOWINGLY AND VOLUNTARILY.

Wuornos attacks her guilty plea as not being intelligently and voluntarily made. She complains that (1) the facts recited by the prosecutor in establishing a factual basis for the plea did not include a refutation of her claims of intoxication and self-defense and the court made no inquiry into the factual basis for the plea at the plea hearing or later at the penalty phase, after she asserted that she should be acquitted because it was justifiable homicide and she was innocent but did not want a trial because prosecutors would continue to lie about her, and again at the sentencing hearing after she insisted she had acted in self-defense. She contends that she entered a guilty plea not because she admitted her guilt but because she was convinced she could not obtain a fair trial and such a plea is not an intelligent admission of guilt; and (2) the plea colloquy was also deficient because the court failed to address her waiver of her constitutional rights i.e., the privilege against compulsory self-incrimination, trial by jury, and the right to confront one's accusers.

Where a defendant claims a defense during the plea proceeding, such as lack of criminal intent or self-defense, the plea is subject to attack unless the defendant specifically and understandingly waives that defense, which is the case here. Williams v. State, 316 So. 2d 267, 273 (Fla. 1975). The judge made extensive inquiry into the factual basis before accepting

the guilty plea. The court explained to Wuornos that intoxication can be a defense and she was waiving it by pleading guilty. Wuornos said she understood (R 199). The court further explained that if Wuornos' plea was accepted she could only appeal the validity of the court's acceptance of her plea and not her guilt or intoxication defense. Wuornos did acknowledge her guilt and subsequently responded "I'm guilty. I killed him..." (R 199-200). She also acknowledged that the issue of self-defense in the Mallory trial was subject to appeal but by entering a guilty plea in this case there was no guilt phase to appeal (R 209). That Wuornos threw in additional complaints while acknowledging she would be giving up these defenses is not dispositive. Wuornos' statements indicate little more than the fact that she felt that she ought to have the defense of self-defense available to her not that she actually believed she had a legal defense of self-defense. As the court may note from her other cases before it, Wuornos is bitter at the legal system and given to rambling in-court statements whenever the opportunity arises. Counsel also indicated that he had discussed Wuornos' concerns at great length, and Wuornos understood she was giving up her defenses of self-defense, intoxication and insanity. He confirmed that she understood exactly what was happening (R 201). A court may satisfy itself as to the existence of a factual basis for a plea by not only the statements and admissions of a defendant but also by his counsel. Williams v. State, 316 So. 2d 267 (Fla. 1975). The evidence in this case is sufficient to establish that Wuornos was aware of possible defenses when she

entered the guilty plea but waived such defenses after discussing them with defense counsel. Cf. Felch v. State, 354 So. 2d 147 (Fla. 1st DCA 1978). Also, Wuornos was no novice. She had previously plead guilty in Marion County (R 201). Since Wuornos did waive her defenses, the prosecutor did not have to put on evidence refuting defenses she had waived. It should also be noted, however, that the factual basis set forth by the prosecutor, actually did refute a claim of self-defense. This victim was shot eight times and his property taken, all pursuant to a robbery plan.

A second inquiry is not warranted where the requisite inquiry has been made and a factual basis determined, simply because a defendant later takes a position contrary to his statements at a plea hearing. See, Perez v. State, 351 So. 2d 384 (Fla. 3rd DCA 1977). Such a claim can hardly be raised in good faith in this case. Wuornos was examined after the plea hearing by several psychologists because Dr. Krop felt her ability to rationally participate in plea bargaining was impaired (R 176). She told Dr. Del Beato "I am guilty. I killed them in cold blood." She further indicated "Waiving my rights to trial is all I need. There's no way. I am point blank guilty. I killed them in cold blood. I know what I'm doing." (R 177). It is also worth noting that although Wuornos initially planned on pleading nolo contendere and could have checked on the plea form that she was innocent of the charge but felt the plea was in her best interest, the plea form reflects that, instead, she checked the paragraph which indicated that she admitted that she was

guilty of the charge she plead to (R 32). Wuornos realistically assessed her situation and told Dr. Epstein that the probability of her being able to appeal and reverse all murder charges against her was very low. With the number of charges against her she felt that she would, in all likelihood, end up being executed and decided it was not worth her effort and energy to try to defend herself against the charges as it would only postpone the inevitable. Although she felt there was an "element" of self-defense in her actions she believed she had done wrong by killing other human beings (R 178). She indicated she had behaved inappropriately before Judge Tepper because she was blowing off steam because she felt she was being paraded around like a freak (R 177). Defense counsel later indicated to the court that he had found new evidence that the first victim Richard Mallory had been convicted of a sex crime and spent ten years in a prison facility for mental health. Counsel claimed that Mallory had two social security numbers, one that led to a clean record and one that led to the conviction in Maryland (R 135). Counsel stated that "the fact that it was so easily found leads us to believe maybe there was a Brady violation. But now that we do know about it, we are going to put it in our record as far as that's concerned. And Ms. Wuornos, I had her sign a paper waiving her appearance in light of the new evidence." (R 136). Counsel further indicated: "Having that evidence now, I explained to Ms. Wuornos that she should go to trial and try to develop that as her self-defense strategy, and she once again has said that she would like to keep her plea of guilty and move on to the penalty

phase." (R 135). Guilty plea procedures are not designed to provide a procedural technicality to avoid the administration of justice. Hall v. State, 316 So. 2d 279 (Fla. 1975).

In the event that insufficient inquiry was made into the factual basis for the plea, the plea should not be vacated. Failure of a trial judge to establish, on the record, the factual basis for a plea does not require that the plea be set aside unless manifest injustice results. There is no indication from either the record or the arguments on this appeal that Wuornos was prejudiced in any manner which would justify vacating her plea. The purpose of a factual basis is to avoid a defendant mistakenly pleading to the wrong offense. Williams v. State, 316 So. 2d 267 (Fla. 1975). There was little chance of that in this case since Wuornos had previously plead to first degree murder on similar facts in Marion County. In view of her confession and similar fact evidence establishing a unique pattern of robbery/murder she had no viable defense of self defense.

Wuornos had the effective assistance of counsel and the plea was entered by her personally and voluntarily with knowledge of the charge and the sentence that could be imposed. See, Suarez v. State, 616 So. 2d 1067 (Fla. 3rd DCA 1993). It is obvious, in any event, that Wuornos is storing her ammunition and will make her last stand on a Florida Rule of Criminal Procedure 3.850 motion.

Before the plea hearing Wuornos signed a form which described in detail the rights she was waiving (R 30). The court ascertained that her attorney had gone over the form with her

when she signed it (R 196). The court questioned Wuornos and ascertained that she was born in 1956; completed the ninth grade in school; could read and write; was not on medication or under the influence of drugs or alcohol; and had never been adjudged mentally incompetent (R 198). The court also ascertained that four doctors had examined Wuornos and found her competent to go to trial and to meet with her attorney and discuss the facts. Counsel represented that Wuornos understood what was going on and was in full control of her mental faculties (R 202). Wuornos indicated she had discussed this and other cases with her attorney. She was satisfied with her attorney's services. She further indicated she had read the plea form and understood everything (R 203). She initialed each part that had been changed from nolo to guilty. Wuornos indicated she signed the form freely and voluntarily. Counsel again represented that he had gone over the content of the plea form with Wuornos and she appeared to understand it (R 204).

Unlike the situation in Koenig v. State, 597 So. 2d 256 (Fla. 1992), where there was nothing in the record to demonstrate that the defendant could understand the form he signed or what his attorney told him about it, since the record did not reflect the extent of Koenig's education or whether he could even read, the court in this case assured itself that Wuornos' background and mental state was such that she was able to comprehend what she had read and, in fact, did comprehend it. Beyond and above that the court also ascertained that the rights she was waiving had been explained and discussed with her by her attorney. There

was a sufficient basis in the record in this case to determine Wuornos' plea was voluntary and intelligent.

II. THE TRIAL COURT PROPERLY ACCEPTED APPELLANT'S WAIVER OF HER RIGHT TO TRIAL BY JURY, TO BE PRESENT AND TO PRESENT EVIDENCE OF MITIGATING CIRCUMSTANCES.

Section 921.141(1), Florida Statutes (1993), authorizes the waiving of the impaneling of a penalty phase jury after a guilty plea by the defendant. This court has previously acknowledged that a defendant may knowingly and voluntarily decide to waive an advisory jury in the penalty phase. Hunt v. State, 613 So. 2d 893, 899 (Fla. 1992). This court has long held that upon a finding of a voluntary and intelligent waiver a trial judge may proceed to sentence a defendant without an advisory jury recommendation. That the trial judge also has discretion to require an advisory jury recommendation despite a defendant's waiver of the same, points to no error in this case. State v. Carr, 336 So. 2d 358, 359 (Fla. 1976); See also, Palmes v. State, 397 So. 2d 648, 656 (Fla. 1981). Appellant has shown no abuse of discretion in the trial court's acceptance of Wuornos' waiver and the dispensing of an advisory jury. Wuornos' waiver was knowingly and voluntarily made. Wuornos had been through the penalty phase process before. She understood its purpose and knew there would be an automatic appeal to the Supreme Court of Florida (R P.P. 21). She was advised by the court of her right to have a jury recommend whether she should be sentenced to life or death (R P.P. 25). She discussed the waiver of a jury many times with her attorney. She recognized that he thought she ought to have a jury and was acting against his recommendation (R P.P. 26).

In Peede v. State, 474 So. 2d 808, 814-15 (Fla. 1985), this court held 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.." Realistically, there is little choice but to grant a previously convicted capital defendant this option if she insists upon it, especially if she has been disruptive in the past, for someone already sentenced to death will certainly not fear a contempt conviction and acting out or being restrained in front of the sentencer will certainly do such defendant's cause no good. This court recognized as much in Nixon v. State, 572 So. 2d 1336, 1342 (Fla. 1990), where it held that a murder defendant will not be forced to attend his capital trial if his actions or the means used to ensure his presence would prejudice him in the eyes of the jury. The "right" not to attend recognized in Nixon involved the guilt phase at which a defendant's attendance would seem to be even more important. Wuornos had already been uncooperative and disruptive in proceedings before the lower court. In regard to the possibility of it happening again at the penalty phase counsel stated "And if all you need to hear from Ms. Wuornos is that, according to the Nixon case is that she'll disrupt the proceedings if forced to attend, I can guarantee you that will more than likely happen, and I do not want a jury viewing that. So it's a tactical decision." (R 215).

It is clear that Wuornos, herself, did not want to attend the penalty phase. She understood that she had an absolute right to be present (R 217). She previously waived her presence in two prior cases (R P.P. 12). She was found competent to make the decision not to be present for the penalty phase (R P.P. 19). The court addressed Wuornos on the record and ascertained that she did wish to waive her presence (R P.P. 20). She understood the purpose of the sentencing phase (R 21). She was informed that she had a constitutional right to be present at the penalty phase. She was told by the judge that her attorney felt that she should be present and put on evidence (R P.P. 27). The judge made a recommendation to Wuornos that she present some mitigating evidence, allow a jury to make a recommendation, and that she be present during the penalty phase (R P.P. 28). Nevertheless, Wuornos persisted in waiving the right to present evidence, to a jury, and to be present (R P.P. 29).

The present case is distinguishable from the decisions of the Eleventh Circuit Court of Appeals. In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), the defendant did not knowingly or voluntarily waive his right to be present. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), involved an absence for unknown reasons during communications to the jury and it also was not known if Hall knowingly and willingly waived his right to be present. It is clear in any event, that a defendant can waive her right to be present by voluntarily absenting herself from the courtroom. Taylor v. United States, 414 U.S. 17, 19 (1973)(per curiam). No federal case law mandates prior testing of the

ability of one who the state has custodial control of to absent herself by first presenting a spectacle to the jury before ultimately removing such defendant in accordance with her wishes.

This court has consistently held that a defendant may, if done knowingly and voluntarily, waive participation in the penalty phase. E.g., Pettit v. State, 591 So. 2d 618 (Fla. 1992); Henry v. State, 586 So. 2d 1033 (Fla. 1991); Anderson v. State, 574 So. 2d 87 (Fla. 1991); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). This court has refused to recede from this line of cases allowing capital defendants to waive presentation of mitigating evidence in the penalty phase, Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Durocher v. State, 604 So. 2d 810 (Fla. 1992), and further found no inconsistency with the decision in Klokoc v. State, 589 So. 2d 219 (Fla. 1991). Farr, 621 So. 2d at 1369. In Hamblen v. State, 527 So. 2d 800 (Fla. 1988), this court rejected the requirement for special counsel when a defendant waives the presentation of mitigating evidence. In Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993), this court established a prospective rule to be applied when a defendant wishes to waive his right to present mitigating evidence:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has

> discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

619 So. 2d at 250. This court further held in Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993), that the requirement that mitigating evidence be considered and weighed when contained anywhere on the record, to the extent it is believable and uncontroverted, 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.

At the beginning of the penalty phase in this case Wuornos' lawyer informed the court that she did not want to put on any mitigating evidence and all that she wished for was the death penalty (R P.P. 11). Wuornos was brought into the courtroom. Counsel again indicated that she wished to waive presentation of any mitigating evidence. He stated in Wuornos' presence that he had discussed the waiver carefully with her (R P.P. 15). Counsel had previously indicated at a pretrial conference that he did intend to present some sort of mitigation and that Wuornos had instructed him not to close all the holes for 3.850 (R 277-278).

Counsel catalogued the evidence based on his investigation he believed to be mitigating that could be presented. Counsel indicated he would expect Dr. Krop to testify that at the time the offenses were committed that Wuornos suffered from a borderline personality disorder; Dr. Donald Del Beato, appointed by the court, would state that she has signs of anti-social and borderline personality disorder; the capital felony was committed

while Wuornos was under the influence of extreme mental or emotional distress; Wuornos' capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired; that her confession indicated she believed she had acted in self-defense; that signs of an anti-social personality developed in her adolescence, that she had trouble in school and was truant, suffered from a hearing impairment, and despite the fact her parents were informed that she needed counselling, never received any help; she prostituted herself at age 16; she became pregnant at age 13, could not go to her parents for help, was sent to a home and the child was taken from her; she and her brother Keith spent time in a reformatory; she and her brother got into trouble while her parents' natural children had no trouble; Wuornos came from a dysfunctional family; and she suffers from alcohol dependency (R P.P., 15-19).

The judge then addressed Wuornos personally, asking if it was correct that she wanted to waive her right to present any evidence of mitigation in the sentencing phase (R P.P. 19). She indicated that she had five death sentences and this one wouldn't change anything and she wanted to waive off everything (R P.P. 20). She indicated she had been present at a penalty phase before, understood exactly what was going on, and understood the purpose of the sentencing phase. She understood there was an automatic appeal to this court of any death sentence she received (R P.P. 21). She was familiar with the evidence her attorney wanted to present (R P.P. 22). She indicated she did not want

Mr. Glazer to present that mitigation on her behalf and wanted to waive her right to present any evidence in mitigation in the sentencing phase (R P.P. 23). The court informed her that it was her attorney's opinion that she should be present and present some evidence. She indicated that she wanted to give up that right (R P.P. 27). Wuornos had read the waiver forms before signing them. The court recommended that she present some mitigating evidence, allow a jury to make a recommendation and be present during the sentencing phase (R P.P. 28). She again reiterated that she wanted to waive those rights and had no questions about them. She was informed she could present evidence of her belief her actions were in self-defense (R P.P. 29). She acknowledged that counsel had told her that (R P.P. 30).

Subsequently on cross-examination of Bobby Copas in the penalty phase counsel brought out the fact that when he refused Wuornos she started getting out of control, became belligerent and shook Copas up, and that he had never encountered anyone like her (R P.P. 69-70). Counsel also brought out the fact that Wuornos had cooperated with the authorities in trying to locate the body of the seventh victim Peter Siems (R P.P. 111). On cross-examination Tyria Moore confirmed Wuornos had been adopted by her grandparents, took up prostitution in her early teens and had a baby that was put up for adoption (R P.P. 119). She also indicated the grandfather drank wine daily; the grandmother died of liver disease; Wuornos had sex with her brother Keith; had run away from a couple reformatories; didn't get along with her

father and stayed away from the house; ran away from home; left home in her early teens; had burns on her forehead from starting a fire with her sister; would get mad over little things and be happy again two minutes later; got upset over things she shouldn't have; was dependent on alcohol and; was almost always high on alcohol (R P.P. 120-123). Counsel brought out on cross-examination of Investigator Pinner that credit cards were not taken from victim Walter Gino Antonio's wallet; that he had handcuffs, a badge, billy club and a black flashlight and that in her confession Wuornos indicated he told her he was a police officer, flashed his badge and wanted sex for free (R P.P. 135-136). On cross-examination of Lori Groddy counsel brought out the fact that she didn't find out Wuornos was adopted until she was around ten years old and Wuornos was around seven; the father spanked the children when they were young, then grounded them as they got older; Wuornos got into arguments with her friends every day from age eight to twelve; became rebellious as she got older; has a quick temper; sometimes got upset over little things; had a hearing problem; had problems with school and was truant; ran away from home quite a few times, beginning at age twelve; had a bad attitude when she came back from the reformatory and wouldn't follow rules and would yell at her parents; was not evaluated by mental health people except for a psychiatrist at the Adrian School for girls; prostituted herself while she was still living at home; drank beer, experimented with marijuana, and took downers as she got older; traveled around the United States from age fifteen to twenty; told her father she was raped after she

became pregnant; her mother is Groddy's natural sister, Diane; Diane left Wuornos and her brother with a cousin who asked the grandparents to take them (R P.P. 141-148). Counsel also brought out the fact that Wuornos freely confessed despite being advised to wait and see her lawyer and that she indicated she committed the crimes in self-defense and was drunk a lot of the times the crimes were committed (R P.P. 164-166).

At the conclusion of the testimony in the penalty phase defense counsel stated "Judge, while I'm not allowed to present any mitigation, we tried to glean it from the evidence that we did hear." Counsel then extensively argued for mitigation (doctor's reports; behavioral problems consistent with borderline personality or anti-social disorders for which Wuornos received no help; being abandoned by the mother; adopted; bad temper; shifts in emotions; promiscuity; alcoholic father; mother who died of cirrhosis of the liver; runaway; experimentation with drugs, alcohol, and downers; no counselling or help with problems; prostitution at an early age; belief she was raped; had a baby, hid pregnancy at thirteen or fourteen years old; dysfunctional family that sent her to girls' school then kicked her out when she came back; left home for good at age sixteen or seventeen; out of control with Copas; tried to help police find body of Peter Siems after receiving three death sentences in Marion County; tried to help police in her confession; four death sentences with 100 years minimum sentence; no prior record except one armed robbery from 1981 or 1982 if this case was tried first; robbery was an afterthought; engaging in commission of felony not

proven; no stalking, tracking, lying in wait; CCP not applicable if victim threatened Wuornos in her state of mind; no evidence murder was heinous, atrocious or cruel; CCP not proven) (R P.P. 174-179). Counsel concluded his argument by stating:

> And, Judge, I won't bother to argue the death penalty in front of you because it's part of your law. But here's a woman who had three strikes against her from the day she was left by her mother and the day she started life. She had no chance. And I'm asking you to, against her wishes, I'm asking that you consider a life sentence without the possibility of parole because of the mental handicaps she operates under.
>
> Although she knows right from wrong, she can't function and she does not function the way you or I might. And for that reason, there are seven dead people. But also ask the Judge to note that Tyria Moore said that she knew that Richard Mallory had been killed. This was her first victim, Ms. Wuornos' first victim. I suggest had Ms. Moore said something to someone, there would be six people alive today.
> (R P.P. 179).
>
> What I'm saying, sir, is after Ms. Wuornos committed the first murder -- sir, I'm privy to some more information that doctors have told me because a lot of doctors I talked to were trying to find out why she killed and started -- and something happened to her with Richard Mallory that turned her into a monster. And still at that point, her best friend and lover who saw there was something wrong, nobody ever got help for this woman. Nobody turned her in.
> (R P.P. 180).

The issue of appointing special counsel is certainly not before the court in this case. Wuornos' attorney remained on the case and ably argued for mitigation. In fact, he elicited testimony and argued the very mitigation Wuornos supposedly

wanted to waive. Comparing the mitigation offered in Wuornos v. State, No's 79,484 and 81,059 reveals little difference except for the fact that counsel made his case on cross-examination and eliminated a small amount of argument that had not worked before. It can hardly be said that accepting a waiver of the right to present mitigating evidence in this case virtually assured a death sentence. Wuornos is hardly suicidal. She is obviously going to make a tactical frontal-assault on 3.850. Her waiver of the presentation of mitigation in this case was little more than a sham, considering what was presented, argued and considered. Nevertheless, such waiver was knowingly and voluntarily made. The court questioned her about waiving the presentation of mitigating evidence and she made a formal waiver of her right to present evidence at the penalty phase proceeding. Henry v. State, 613 So. 2d 429 (Fla. 1992).

III. APPELLANT'S CONDUCT AT THE PENALTY PHASE WAS NOT IRRATIONAL AND DID NOT RAISE REASONABLE GROUNDS TO BELIEVE SHE WAS NOT COMPETENT TO PROCEED AND THE TRIAL COURT DID NOT ERR IN NOT ORDERING A REEVALUATION OF HER COMPETENCY.

Wuornos' conduct in this case hardly leads to the conclusion that she was incompetent. She waived the right to present evidence in mitigation then had her attorney actually present it. She instructed him not to try to close all the holes for 3.850 (R 277-278). She then complains on appeal about such waiver.

On July 14, 1992, the court granted defense counsel's motion for the appointment of experts to examine Wuornos and determine her competency to proceed (R 56-58, 61-62, 241-48).

Dr. Krop, who initially had concerns about Wuornos' competency to proceed ultimately found her competent to make the decision to waive her presence during the penalty phase (R P.P. 19). Dr. Del Beato also concluded that Wuornos was competent to proceed with trial and to waive her right to personally appear (R 177). Dr. Epstein found her competent to waive any rights to future appearances (R 178).

Florida Rule of Criminal Procedure 3.210(b) imposes upon the trial court a duty or responsibility to conduct a hearing on a defendant's competency to stand trial whenever it reasonably appears necessary, whether requested or not. Gibson v. State, 474 So. 2d 1183 (Fla. 1985). In this case it was not necessary. Mr. Glazer represented Wuornos in her Marion County cases and stipulated to her competence. He had known her for about a year. He was present at her Volusia County trial and had read the doctors' reports and communicated with one of the psychologists. Wuornos v. State, No. 81,059, Answer Brief of Appellee, p.55. Counsel was familiar with the opinions of seven or eight doctors who had evaluated Wuornos over the last two years (R P.P. 16). Counsel had asked for the reevaluation because he had noticed bizarre changes in her behavior (R 242-243). This attorney, who was attuned to Wuornos' mental status, expressed no doubts as to her competency to proceed at the penalty phase. Aside from the personality disorder, Wuornos lacked a history of mental illness.

Wuornos' statements at the penalty phase and sentencing hearing hardly demonstrate irrational or bizarre behavior. The average legally unschooled lay person would probably agree with

Wuornos that after five death sentences, another proceeding was unnecessary since she can only be executed once. Bitterness at having to go through the process again and speculation that it is being required for political reasons or to antagonize her, while misguided, is hardly irrational. She is obviously unhappy with her prior death sentences and wishes that her legally insufficient defense of self-defense, which failed in her first trial, was legally sufficient. She is also apparently less than happy with her characterization in books and movies. With five previous death sentences Wuornos obviously feels that at this point in time she has nothing to lose and can say whatever she wants. Her behavior, while vituperative and self-righteous was hardly irrational. The bizarre ideation displayed by the defendant in Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), is not present in this case. Wuornos did not demand that the judge kill her as did the defendant in Pridgen v. State, 531 So. 2d 951 (Fla. 1988). Her "big deal" attitude over this death sentence stemmed from the fact that no matter how many pronouncements were made she knew she could only be executed once. Wuornos was bitter because she felt her confession had condemned her and she certainly harbored no delusions that it would guarantee a life sentence as did the defendant in Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987). She made no threats to kill any specific person. Her behavior was consistent with Dr. Del Beato's report that "such persons are manipulative in trying to get out of stressful situations, and are seen as disruptive, provocative and irritable." (R 177). No less should be expected of someone

already facing execution with little to lose. It is also clear that Wuornos perceives her real battlefield to be the post conviction court and this proceeding meant little to her in her tactical scheme of things.

Appellant now confuses bitter, hostile acting out with bizarre behavior. Even if such behavior could be considered odd in some way it hardly meets the Dusky v. United States, 362 U.S. 402 (1960), test, and reveals no inability to consult with her lawyer with a reasonable degree of rational understanding or lack of rational, as well as, factual understanding of the proceedings against her.

IV. THE TRIAL COURT PROPERLY FOUND AGGRAVATING CIRCUMSTANCES WHICH WERE PROVEN BEYOND A REASONABLE DOUBT.

A. Cold, Calculated and Premeditated

To establish heightened premeditation necessary for finding that a murder was committed in a cold, calculated, and premeditated manner the evidence must show that the defendant had a careful plan or prearranged design to kill. Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Gore v. State, 599 So. 2d 978 (Fla. 1992). The evidence in the present case did reflect such plan or design.

Wuornos' victims were older white males traveling alone. They were killed by multiple gunshot wounds. Their bodies were found in deserted areas (R P.P. 130). Pittman Pond, where Charles Carskaddon's body was found was overgrown. It is a lover's lane, fishing hole and dumping area (R P.P. 36). In Huff v. State, 495 So. 2d 145 (Fla. 1986), this court previously found

that evidence that the murders were committed in a wooded and secluded area, that the defendant knew that he would be riding with the victims in their car on the day of the murders and that he had brought a murder weapon with him into the car supported the finding that the murders were committed in a cold, calculated and premeditated manner. Likewise, Wuornos, a hitchhiking prostitute/highwaywoman knew that she would be in some intended victim's car that day and came armed. In Wickham v. State, 593 So. 2d 191 (Fla. 1991), the defendant hid behind a car while a woman and children lured a passing motorist into stopping, and then shot and robbed the motorist. This court found that the murder was cold, calculated and premeditated, even though it may have begun as a caprice and the victim was picked at random. In the present case Wuornos used prostitution or car trouble as a lure. In Swafford v. State, 533 So. 2d 270 (Fla. 1988), evidence that the defendant shot the victim nine times, including two shots to the head at close range, and that he had to stop and reload his gun to finish carrying out the shooting was found to support the CCP aggravating factor. In the present case Mr. Carskaddon was shot eight times by a .22 caliber revolver in the lower chest and upper abdomen (R P.P. 59-60). The bullets were fired in a tight pattern. All eight of the bullets were fired into a region that could cause death (R P.P. 60-61). Such an excessive number of shots to a vulnerable region of the body makes it abundantly clear that Wuornos intended to leave no live witness. This factor has often been found in execution style murders. See, e.g., McKinney v. State, 579 So. 2d 80, 84-85

(Fla. 1991); Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). In Remeta v. State, 522 So. 2d 825 (Fla. 1988), this court found that evidence that the defendant planned a robbery in advance and planned to leave no witnesses supported the finding of the CCP factor. The robbery motive is apparent from the testimony of Wuornos' roommate, Tyria Moore, who indicated that Wuornos came home with Carskaddon's Cadillac and firearm (R P.P. 115-118). His Indian blanket was taken and put in her storage room along with her collection of property from other victims (R P.P. 40). She took his .45 automatic pistol and pawned it (R P.P. 41-43). Wuornos stated that she had killed the victim(s) to avoid detection so she could continue her trade (R P.P. 167-68). Her intent was made manifest in her admission against interest to Bobby Lee Copas, while fumbling in her purse for her gun, "Well, I'll just kill you like I did all them other old mother fuckers." (R P.P. 68). She also admitted to Dr. Del Beato that she "killed them in cold blood." (R 177). The CCP aggravator in this case was properly applied, even aside from collateral crime evidence.

This case is distinguishable from Power v. State, 605 So. 2d 856, 864 (Fla. 1982), Crump v. State, 622 So. 2d 963, 972 (Fla. 1993), and Gore v. State, 599 So. 2d 978 (Fla. 1992). There is no evidence of a fit of rage in this case. There is no evidence of a plan to rape that went awry. There is no evidence of a robbery that got out of hand. There is evidence that Wuornos was in possession of the property of her victims and that each robbery victim ended up dead. The evidence that Wuornos was a ruthless highwaywoman is admissible to, and does, dispel Wuornos' claim of self-defense or prostitution gone bad.

No pretense of legal or moral justification has been established. There is no pretense of justification where the victim has not threatened the defendant. Williamson v. State, 511 So. 2d 289 (Fla. 1987). Although Wuornos generally discussed self-defense she waived such defense when entering a plea and provided no specific details to even justify any finding of residual doubt of guilt based on such defense in the penalty phase. There may have been a "pretense" with one or two murders but the sheer number of Wuornos' victims presents the ludicrous portrait of a serial killer continually acting in "self-defense."

The testimony of Bobby Copas reflects that Wuornos initially sought simply a ride home to Daytona Beach from Copas. It was after Copas cashed a check that Wuornos began to proposition him so that she could quietly lure him to a remote area (R P.P. 64-68). Her mood was not the result of mental imbalance but an increasing impatience to relieve Copas of his money. There was no evidence of mad acts prompted by wild emotion. Dr. Barnard did not feel that Wuornos was at any time psychotic during her offenses (R 178). Dr. Epstein found no on-going psychotic process or thought disturbance which would mitigate her responsibility to control her own behavior (R 178). Dr. Sprehe found that Wuornos was not suffering from any major demonstrable mental or emotional problems at the time of the charge and though she had a long standing personality problem, this would not qualify as being under the influence of extreme mental or emotional disturbance. It was his opinion that she had the capacity to appreciate the criminality of her conduct and to

conform that conduct to the requirements of the law (R 179). Aside from the absence of mitigating emotional volatility also absent is any hypothesized trigger for "wild emotion."

Contrary to appellant's assertion, witness elimination testimony can be relied upon to defeat Wuornos' claim of a pretense of self-defense. The state may have waived consideration of witness elimination as an aggravating factor but that does not mean that the underlying factual scenario supporting the witness elimination aggravating factor cannot be considered for other purposes. The witness elimination factor and the CCP factor are not incompatible, see, Cooper v. State, 492 So. 2d 1059 (Fla. 1986), and merely because the finding of one factor is not sought does not mean another aggravating circumstance cannot be found.

Wuornos' repeated statements that she acted in self-defense were not even believed by her. The fact that everyone whose property Wuornos came into possession of was found dead in a secluded area and that Wuornos took steps to conceal the crime by covering the bodies and washing the vehicles down to remove prints surely defeats any spurious claim of self-defense and such evidence was admissible for that very purpose.

B. Committed During the Commission of a Robbery

Appellant ignores the fact that Wuornos' claim of self-defense in her tape recorded confession to Detective Horzepa was contradicted by her other statements (R P.P. 166). Wuornos said she killed the victims to avoid detection so she could continue her trade (R P.P. 167-68). She shot Carskaddon eight times in a

vital area, far beyond what was needed to incapacitate a rambunctious "John." She was not so distraught at this "affray" that she could not think to take his .45 to pawn (R P.P. 41-43); his Indian blanket to put in her storage bin (R P.P. 40); and his Cadillac to bring home before abandoning it (R P.P. 116-117).

Unless a defendant announces her intention or confesses there usually is no direct evidence of a plan to rob and kill. There is no reasonable hypothesis that Wuornos planned only prostitution but something triggered the shooting and Wuornos took Carskaddon's property to conceal the crime and his car to get away. She overkilled with eight shots. That is far beyond mere self-defense and consistent with her statement she didn't want to be detected and wanted to continue her trade. Her claim of self-defense also weakens with each robbery murder. If it occurred as an adjunct to prostitution she had a duty to give up the profession. Since a robbery accompanied each murder the only scenario is that she killed the victims to escape detection for the robbery, which is essentially what Wuornos stated. Appellee would submit to the court that the "after-thought robbery" theory is inconsistent with a claim of self-defense and certainly inconsistent in the case of multiple robbery-murders. Wuornos' identity in these robberies could properly be established by evidence of her prior robberies since they involved major highways, isolated areas, the same weapon and bullets, same modus operandi, taking of a getaway automobile and personal property. These factual similarities establish a unique crime pattern. See, State v. Ackers, 599 So. 2d 222 (Fla. 5th DCA 1992).

This case can be distinguished from Clark v. State, 609 So. 2d 513 (Fla. 1992), and Jones v. State, 580 So. 2d 143, 146 (Fla. 1991). In Clark, the clear motive for the murder was to obtain the victim's job. In Jones, the defendant picked up a police officer's weapon after a gun battle. In both cases it is apparent that the taking of property was an after-thought.

C. Prior Capital Felony Convictions

The sentencing judge found the aggravating circumstance of previous conviction of a capital felony or felony involving the use or threat of violence. §921.141(5)(b), Fla. Stat. (1991). This finding was based on five prior convictions for first degree murder and several counts of robbery (R P.P. 102).

It was not improper for the court to include the Volusia County murder conviction in finding this aggravating circumstance even though the state did not seek application of the factor based on this conviction. The judge was specifically advised of the existence of the judgment and sentence for murder in the first degree in Volusia County by the prosecutor, which statement went uncontradicted by the defense (R P.P. 340). Defense counsel had previously filed a motion in limine regarding "new" evidence that the first victim Richard Mallory had been convicted of a sex crime and spent ten years in prison, although at the penalty phase counsel did not have a witness in support of such conviction in order to make the claim in good faith (R 135; P.P. 5-6). The court was made aware of such judgment and it is also a matter of public record. Considerable testimony was also introduced concerning the murder of Mr. Mallory, including

Wuornos' confession to the same (R P.P. 149-168). Defense counsel even argued the Mallory case, claiming that something happened with Mallory, the first murder victim, that turned Wuornos into a monster (R P.P. 180). Such judgment and conviction is also before this court in case number 79,484 and can and should be considered by the court in its review of the instant sentence. See, Cabana v. Bullock, 474 U.S. 376 (1986); Clemons v. Mississippi, 110 S.Ct. 1441, 1446 (1990). Should the Volusia conviction or any other conviction be found infirm, consideration of it in this case is harmless considering the many other convictions and aggravating evidence, Cf. Preston v. State, 564 So. 2d 120 (Fla. 1990), assuming the sentencing judge considered it.

Defense counsel stipulated to the Dixie County conviction for first-degree murder (R P.P. 34; 172). This conviction is before this court in case number 81,498, in any event, and properly should be considered by this court in its review capacity.

Defense counsel acknowledged Wuornos' prior convictions of capital offenses, which are before this court. Counsel used them as mitigation ammunition, arguing that Wuornos had four other death sentences and would serve a minimum of 100 years in prison if each was commuted to life (R P.P. 177). Only criminal activity, not convictions for that activity must occur prior to the murder for which a defendant is being sentenced in order to establish an aggravating circumstance. Pardo v. State, 563 So. 2d 77 (Fla. 1990).

Considering Wuornos' numerous convictions of first-degree murder and robbery, any improper consideration of the above two convictions could only be harmless beyond a reasonable doubt. Bowden v. State, 588 So. 2d 225 (Fla. 1991); Owen v. State, 596 So. 2d 985 (Fla. 1992).

Wuornos stated that she killed the victim(s) to avoid detection so she could continue her trade and such evidence would support a finding of witness elimination. Cf., Remeta v. State, 522 So. 2d 825 (Fla. 1988); Lopez v. State, 536 So. 2d 226 (Fla. 1988). Thus, the sentencing court could have found an additional aggravating factor in this case. Where an aggravator is established on the record this court can consider it even if it is not considered by the trial court. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993).

In the event that any of the above aggravating factors should be overturned, in light of the circumstances of this crime, the numerous remaining aggravators, and lack of mitigation, any erroneous finding of an aggravating factor was harmless error beyond a reasonable doubt. See, State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). If there is no likelihood of a different sentence, a trial court's reliance on an invalid aggravator is harmless. Burns v. State, 609 So. 2d 600 (Fla. 1992).

V. THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IS NOT CONSTITUTIONALLY OVERBROAD.

This court has previously rejected the argument that the felony murder aggravating circumstance renders a finding of

aggravation automatic. This court held that "the legislative determination that a first-degree murder that occurs in the course of another dangerous felony in an aggravated capital felony is reasonable." Mills v. State, 476 So. 2d 172, 178 (Fla. 1985); see also, Breedlove v. State, 413 So. 2d 1 (Fla. 1982). The fact that there are numerous dangerous felonies does not mean that there is a lack of channeling as to this aggravator. In Lowenfield v. Phelps, 484 U.S. 231 (1988), a death sentence was challenged on the grounds that the jury could just repeat one of its findings from the guilt phase. The court upheld the statute, reasoning that the required narrowing function had occurred at the guilt phase. Certiorari has been dismissed in Tennessee v. Middlebrooks as improvidently granted. 126 L.Ed.2d 555 (1993). There are no federal decisions contrary to this court's position.

VI. THE TRIAL COURT DID NOT FAIL TO FIND AND WEIGH MITIGATING CIRCUMSTANCES.

Appellant first complains that the trial court failed to find and weigh the mitigating circumstance that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." §921.141(6)(b), Florida Statutes (1991).

In the penalty phase defense counsel referred the court to doctors' reports in the court file (R P.P. 174). Dr. Krop had been originally appointed to provide confidential advice to the defense. He saw Wuornos on January 9, 1992. He diagnosed her as having Borderline Personality Disorder. That he later found on July 10, 1992, that she had decompensated during incarceration

and diagnosed her as suffering at that time from a delusional disorder, persecutory type (R 176) adds nothing new or relevant to her mental status in June, 1990, at the time of the murder. Thus, the most Dr. Krop had to say about Wuornos at the time of the murder was that she had a Borderline Personality Disorder. Dr. Del Beato's diagnostic impression of Wuornos was that of Antisocial/Borderline Personality (R 177). Dr. Epstein also indicated that she had a personality disorder (R 178). Dr. Sprehe also found that Wuornos had a long standing personality problem (R 179).

Dr. Del Beato found that Wuornos was not psychotic. Wuornos revealed no trigger to him that would have set her off at the time of the murder of Mr. Carskaddon. She never indicated that her action was even the result of a volatile mental or emotional state and, in fact, indicated to the contrary, that she killed "them" in cold blood (R 177).

Dr. Barnard did not feel that Wuornos was at any time psychotic during her offenses (R 178).

Dr. Epstein determined that Wuornos' reasoning and judgment were not significantly compromised by any organic mental defect, insufficiency, illness or transient emotional state. He found no indication of a thought disorder. She recalled events in detail and her consciousness did not appear clouded during the time of the murders. She acknowledged she had done wrong by killing other human beings. There was no evidence of an underlying schizophrenic disorder. Dr. Epstein further reported that Wuornos' "thinking and reasoning abilities do not appear to

reflect any pathological processes but are seen as that of an immature or unsophisticated individual." Dr. Epstein found no evidence of any significant mental defect or organic deterioration. Dr. Epstein concluded that "there appears to be no on-going psychotic process or thought disturbance which would mitigate her responsibility to control her own behavior (R 178).

Based on his review of materials Dr. Sprehe concluded within a reasonable medical probability that Wuornos was not suffering from any major demonstrable mental or emotional problems at the time of the charge and though she had a long standing personality problem, this would not qualify as being under the influence of extreme mental or emotional disturbance (R 179).

It is the trial court's duty to decide if mitigators have been established by competent, substantial evidence and to resolve conflicts in evidence in the punishment phase of a capital murder trial. Johnson v. State, 608 So. 2d 4 (Fla. 1992). A mitigating circumstance against the death penalty must be reasonably established by the greater weight of the evidence. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Mitigating evidence must be weighed in the balance when the record discloses it to be both believable and uncontroverted. Santos v. State, 591 So. 2d 160 (Fla. 1991). The decision as to whether a mitigating circumstance has been established is within the trial court's discretion and reversal is not warranted simply because the appellant draws a different conclusion. Preston v. State, 607 So. 2d 404 (Fla. 1992). The mental or emotional disturbance

mitigator in this case has not been established by competent, substantial evidence. No evidence was presented to demonstrate any causal connection between Wuornos' personality disorder and the murder of Mr. Carskaddon. Nothing in the record demonstrates that such disorder would lead to mental or emotional disturbance or that such disturbance even occurred. That it occurred at all is controverted by Wuornos' statement that she killed her victims in cold blood and by the reports of the psychologists indicating the absence of any on-going psychotic process or thought disturbance which would mitigate her responsibility to control her behavior and that the personality disorder would not qualify her as being under the influence of extreme mental or emotional disturbance. The mitigator is properly not applied where there is equivocation and reservation in testimony concerning a defendant's mental state. Sanchez-Velesco v. State, 570 So. 2d 908 (Fla. 1990). Evidence is only mitigating if in fairness or in the totality of a defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. Wickham v. State, 593 So. 2d 191 (Fla. 1991). No evidence having been established that Wuornos acted under mental or emotional disturbance, the bare existence of a personality disorder unrelated to the act of murder would be worth next to nothing even considered in a nonstatutory manner and would hardly have weighed in the sentencing balance. Any error in not so considering such evidence is harmless beyond a reasonable doubt. See, Stewart v. State, 620 So. 2d 177 (Fla. 1993).

It is not true as counsel argues that evidence that Wuornos suffered from a mental or emotional disturbance was not in any way refuted by the evidence at the penalty phase. The testimony of Lori Groddy shows little more than Wuornos was an ungovernable youngster, as does the hearsay testimony of Tyria Moore concerning Wuornos' history. That Wuornos was generally easily angered is not transferable to the ultimate act of murder, without more. It is also clear that Wuornos' annoyance at Bobby Copas stems from the fact that he had thwarted her robbery plan and she would not get her hands on his money. While Moore may know what Wuornos' alcohol consumption was in general and while in Moore's presence no evidence was adduced as to what she consumed while working on the road as a prostitute. That Wuornos had not acted under mental or emotional disturbance is clear from her own statement that she killed the victims in cold blood. Such claim is also refuted by evidence that Wuornos had killed other such victims pursuant to a continuing robbery motive or scheme.

Appellant next complains that the trial court did not consider evidence of her troubled childhood. As on appeal, Wuornos' childhood history was largely offered by the defense to show the early existence of personality disorder. Her childhood history reveals no trauma or abuse that would rise to the level of a mitigating factor. The history, itself, reveals only an ungovernable youth who refused all efforts aimed at reform. Moreover, Wuornos failed to show that any alleged childhood trauma was relevant to her character or the circumstances of the

murder so as to afford some basis for reducing the sentence of death. Cf. Rogers v. State, 511 So. 2d 526 (Fla. 1987). As was the case in Lara v. State, 464 So. 2d 1173 (Fla. 1985), Wuornos' actions in committing the murder were not demonstrated to be significantly influenced by her childhood experience. While her troubled background and lack of education could arguably be said to have led her to prostitution, the same does not hold for robbery/murder when she already had an illegal and fast way to make money. Had this factor been separately considered, the sentencing outcome would hardly have changed. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Appellant also complains of the trial court's failure to consider a history of alcohol and drug abuse. Again, this evidence was largely offered in support of a claim of personality disorder. In any event, the evidence was insufficient to establish beyond mere implication that Wuornos suffered from drug or alcohol dependency. See, Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). There was no evidence at all that Wuornos was drunk at the time of the shooting or that her control over her behavior was reduced by alcohol abuse. Again, separate consideration of such evidence would not mitigate the aggravating circumstances. Cf. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989).

Appellant next complains that the trial court erred in not finding the statutory mitigator that "the capacity of the defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired." The psychological reports and evaluations of Wuornos

are far less than unequivocal as to this mitigating factor and justify the refusal to find it. Cf. Carter v. State, 576 So. 2d 1291 (Fla. 1989). In fact, no testimony or evidence was given that Wuornos lacked the ability to conform her conduct to the requirements of law or that she did not know that killing the victims was wrong and the trial court was not required to find that statutory mitigating circumstance existed. See, Pardo v. State, 563 So. 2d 77 (Fla. 1990). The evidence, to the contrary, supports a refusal to find this mitigator. She indicated to Dr. Epstein that she had done wrong by killing her victims (R 178). Defense counsel indicated that seven or eight doctors talked to Wuornos over the last two years and they all indicated that she knew right from wrong (R P.P. 16). Based on the materials he had reviewed, Dr. Sprehe concluded that Wuornos did have the capacity to appreciate the criminality of her conduct and to conform it to the requirements of the law (R 179). Her efforts at concealment in this case certainly indicate that Wuornos appreciated the criminality of her conduct. The killing was done in a remote area. She covered the body of Mr. Carskaddon with a green electric blanket and pulled and cut weeds and brush to put on top to camouflage it (R P.P. 36). That Wuornos is able to conform her conduct to the requirements of the law is evidenced by the fact that she had previously been convicted of robbery with a deadly weapon in April 1982 and did not engage in such activity again until the robbery/murder of Richard Mallory in 1989. S.Ex. 1.

Defense counsel argued in mitigation that the defendant demonstrated contrition and cooperated by confessing and trying to assist the police in locating the body of her seventh victim. The court found that this circumstance was not proved. The court stated that "confessing to crimes and assisting in the location of the body of a victim does not necessarily demonstrate contrition. The rambling comments of Miss Wuornos at the beginning of this sentencing proceeding on January 25, 1993, indicated affirmatively that she feels no contrition for this crime." (R 104-105). Cooperating with the police standing alone is not in and of itself mitigating for it may be done for a number of reasons, many of which could be self-serving or not at all altruistic. The intent of the defendant must be examined. Wuornos confessed but justified her actions on a legally insufficient claim of self-defense and had nothing to lose, by her way of thinking, in directing police to the murder weapon. Moore also gave such directions. The body of the seventh victim was never found and Wuornos did not have much to lose by getting out of confinement for the day especially when she already had been sentenced to death. As she was given to saying "How many times can they kill me?" The trial court was justified in finding that this evidence was not mitigating and it would have made no difference in the sentencing matrix, in any event .

Religiosity in prisoners who have been in serious trouble is not unusual (R 177). Her belief seems far less than genuine. Although she requested a death sentence she proclaimed her innocence (R P.P. 23). From the record in this case it is clear

that she plans a frontal attack on post conviction. Her attitude is wholly inconsistent with a genuine conversion which would involve at the least confession and repentance. This was not hypothesized in mitigation below for good reason.

Judge Cobb was evidently of the opinion that one should pay for one's misdeeds. He viewed Wuornos' previous capital and violent felonies as aggravating and not mitigating. What Wuornos wants considered in mitigation, her previous murders, would be tantamount to a statement that this victim is less important than the others. This "why-bother" theory is a mini-version of the debate over capital punishment versus incarceration in the first place. Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990), stands only for the proposition that a defendant is entitled to argue that he would be removed from society for a long period should he receive life sentences on multiple murders. Nothing compels the judge to find this as mitigating in the case of numerous serial murders and the failure to find such mitigation is not an abuse of discretion. If this were, indeed, mitigating, the serial killer would benefit by the sheer number of his victims. Since Wuornos plans a 3.850 attack to try to overturn her Volusia County death sentence at the least, depending on such sentences for mitigation is particularly inappropo.

Any and all possible errors in the finding or weighing of mitigating factors is harmless beyond a reasonable doubt considering the weak nature of hypothesized mitigation and the compelling nature of aggravating factors, particularly numerous prior capital felonies. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

VII. THE DEATH SENTENCE IN THIS CASE IS PROPORTIONATE TO OTHER DEATH SENTENCES IMPOSED AND AFFIRMED BY THIS COURT.

This case is among the most aggravated of Florida murder cases. All of the aggravating circumstances found by the trial court were proven beyond a reasonable doubt as separately argued herein. Even assuming that the state proved "only" three prior convictions for capital felonies, not to mention the 1982 armed robbery, as appellant argues, that in no way eliminates or diminishes this aggravator. All that is needed is one prior conviction to establish the aggravator of a prior capital offense. The trial court assigns the relative weight to this factor. See, Slawson v. State, 619 So. 2d 255 (Fla. 1993). Naturally, even three prior capital felonies would make this aggravator extremely weighty, a fact overlooked by appellant in her hypothetical sentencing matrix. The cases cited by appellant are inapposite. The death sentence in this case is supported by more than one aggravating factor. The cited mitigators were either not properly found in this case, as argued elsewhere herein, or not offered. The mitigation argued on appeal is extremely weak in nature and would not offset the aggravating factors in this case, even as limited by appellant's theory.

In Duncan v. State, 619 So. 2d 279 (Fla. 1993), this court found that the death penalty was not disproportionate to the offense where the defendant had fatally stabbed his fiancee, in light of his prior murder conviction and failure to establish the mitigating factors of influence of alcohol and mental disturbance. In Clark v. State, 613 So. 2d 412 (Fla. 1992), this

court found that the death sentence was not disproportionate where there were only two aggravators, including a prior conviction of first degree murder and no mitigators. In Wickham v. State, 593 So. 2d 191 (Fla. 1991), this court held that a death sentence was not disproportionate for a defendant who planned and executed a roadside ambush designed to lure the victim, who believed he was helping a stranded woman and children, despite the presence of some mitigating evidence. See, also, Cook v. State, 581 So. 2d 141 (Fla. 1991). This case is very similar to Pace v. State, 596 So. 2d 1034 (Fla. 1992). In that case there were aggravating circumstances of a previous conviction of a felony involving violence, committed on parole, and committed while engaged in robbery. This court indicated that even if one or more nonstatutory mitigating factors were wrongfully rejected, death was still the appropriate penalty for a defendant convicted of the armed robbery and first-degree murder of a taxicab driver.

CONCLUSION

Based on the foregoing arguments and authorities, appellee request this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida 33830, 25th day of March, 1994.

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