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IN THE SUPREME COURT OF FLORIDA

AILEEN C. WUORNOS, :

Appellant, :

vs. : Case No. 81,466

STATE OF FLORIDA, :

Appellee. :

______________________________ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This appeal is taken from a judgment of guilt for first-degree murder and sentence of death imposed by the Circuit Court for the Sixth Judicial Circuit, Pasco County. The appellant, Aileen Carol Wuornos, has three other capital appeals pending in this Court, case numbers 79,484, 81,059, and 81,498.

References to the record on appeal are designated by "R" and the page number. References to the transcript of the penalty phase trial are designated by "T" and the page number. References to the appendix to this brief are designated by "A" and the page number.

STATEMENT OF THE CASE

On April 16, 1991, the Pasco County Grand Jury indicted the appellant, Aileen Carol Wuornos, for the first-degree murder of Charles E. Carskaddon between May 31 and June 6, 1990. (R 1) On June 22, 1992, Wuornos appeared with counsel before the Honorable Lynn Tepper, Circuit Judge, and pleaded guilty. (R 30-34, 190-211)

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) On September 17, 1992, the court found Wuornos competent. (R 70, 282, 285-86)

On January 25, 1993, the penalty phase trial was conducted before the Honorable Wayne L. Cobb, Circuit Judge. (T 1-182) Wuornos appeared with counsel and waived her rights to have a jury, to present mitigating evidence, and to be present. (R 92-94; T 10-32) On February 5, 1993, the court adjudicated Wuornos guilty of first-degree murder and sentenced her to death. (R 100-12, 119-28) Defense counsel filed a notice of appeal. (R 113)

STATEMENT OF THE FACTS

A. Plea Hearing

Defense counsel first tendered a plea of no contest, which the court rejected. (R 192-96) Wuornos then decided to plead guilty. (R 196) A written plea form signed by Wuornos was modified to reflect the guilty plea. (R 30-34, 196-97)

The court placed Wuornos under oath, (R 197-98) then inquired to determine that she had a ninth grade education, was not taking any medication, was not under the influence of alcohol or drugs, and had never been adjudged incompetent. Wuornos said, "I should have been on my confessional transcripts in videotaping." (R 198) The court then determined that Wuornos was not claiming to be incompetent at the present time, but felt she was incompetent on the date of the offense because "I was drunk and everything else." (R 199) The court explained that intoxication does not make someone incompetent, but it can be a defense, and she was waiving the defense by pleading guilty. Wuornos said she understood, then indicated she wanted to take her case to the Supreme Court because she could not get a fair trial. (R 199)

The court attempted to explain that if Wuornos's plea was accepted, she could only appeal the validity of the court's acceptance of her plea and not her guilt or intoxication defense. (R 199-200) Wuornos responded, "I ain't never going to get a fair trial. I'm pleading guilty in self-defense and I am not going to go through a trial." (R 200) The court told her she was making it difficult for the court to accept her plea. Wuornos answered, "I'm

pleading guilt--I'm guilty. I killed him. But I'm saying self-defense right to my grave." (R 200) The court asked if she understood that she was waiving her right to self-defense and could not argue self-defense to the Supreme Court. (R 200-01) Wuornos responded that she wanted to "get the crooked cops," she did not care about a trial or her own death. (R 201)

The court then asked defense counsel if he had discussed Wuornos's concerns with her. Counsel said he had done so at great length, and Wuornos understood she was giving up her defenses of self-defense, intoxication, and insanity. He asserted that "she understands exactly what is happening here and she is competent to make these decisions." (R 201) The court then determined that Wuornos understood she could not challenge the actions of the police in taking her statement. (R 201-02)

Defense counsel told the court that four doctors had examined Wuornos and reported that she was competent to go to trial and was not insane at the time of the offense. He also stated his personal belief that she was not insane, understood what was going on, and was in full control of her mental faculties. (R 202) The court then questioned Wuornos to learn that she had never been treated for mental illness, had discussed her case with counsel, and was satisfied with his services. (R 202-03) She had read the plea form and said she understood it and signed it freely and voluntarily. (R 203-04) Defense counsel assured the court that he had gone over the form with Wuornos and she understood it. The court had her sign the changes in the form. She also complained about her

treatment at the county jail, claiming they nearly killed her the last time she was there. (R 204)

As a factual basis for the plea, the prosecutor said the State could prove that Carskaddon was last seen alive on May 31, 1990, when he left home on a trip to Tampa in his Cadillac. He possessed a firearm. (R 205) His body was found in Pasco County on June 6, 1990, but his vehicle and its contents were missing. The medical examiner determined that gunshot wounds were the cause of death. Eight ".20 caliber" bullets were recovered from the body. His vehicle was found. Wuornos was arrested and admitted shooting Carskaddon and six others. (R 206) All of the victims had been shot numerous times, and all but one were shot with a .22 caliber revolver. (R 206-07) Wuornos had been seen in possession of Carskaddon's car and had pawned his gun. She indicated that all of the deaths were the result of self-defense. (R 207)

When the court offered Wuornos the opportunity to speak about the facts of the case, she complained about lies in the news accounts of her cases, crooked police officers, the unjust judicial system, a movie portraying her as the first female serial killer, and police officers receiving $500,000 each for the movie contract. (R 207-09) She also asserted that her confession "stated self-defense totally, which they hid from the jury at the Mallory trial, and they have hid from the public eye." (R 208-09) The court explained that this issue was subject to appeal in that case, but there would be no guilt phase to appeal in this case because of her guilty plea. Wuornos agreed that this was what she wanted to do.

(R 209) Wuornos complained about a former defense attorney, but she was pleased with her present attorney. (R 210)

The court found there was a factual basis for the plea, and it was entered knowingly, intelligently, freely, and voluntarily with the assistance of competent counsel. The court accepted the plea. (R 210-11) When the court scheduled the penalty phase trial for July 14, Wuornos sought to waive her presence. (R 212-17)

B. Competency Determination

On July 14, 1992, defense counsel presented a letter from Dr. Harry Krop, who had been appointed to provide confidential advice to the defense, stating that he had re-examined Wuornos on July 10, 1992, and found that she was delusional, perceived her lawyer as part of a conspiracy, was incompetent to proceed, and that her ability to rationally participate in plea bargaining was significantly impaired. (R 49-51, 176, 241-42) Defense counsel explained that he requested the re-evaluation because he had seen a "particularly bizarre" change in Wuornos's behavior over the last 30 days. Counsel questioned whether Wuornos had been competent to waive her presence. (R 242) Counsel asked the court to have another expert evaluate Wuornos. (R 243) The court granted the request and entered orders appointing Dr. Donald DelBeato and Dr. Joel Epstein to evaluate Wuornos's competence to stand trial. (R 56-58, 61-62, 243-48)

Dr. DelBeato reported that he examined Wuornos on August 7, 1992. (R 177, p. 1) He found that she was competent to stand trial, but she suffered from a borderline/antisocial personality

disorder. (R 177, p. 3-5) Dr. Epstein reported that he examined Wuornos on August 6, 1992. (R 178, p. 1) He found that she was competent, but she suffered from a personality disorder. (R 178, p. 2, 5)

On September 17, 1992, the court conducted a competency hearing with defense counsel appearing by telephone. (R 282-86) Defense counsel stipulated that the court could make its finding based on the reports submitted by Dr. DelBeato and Dr. Epstein. The court found Wuornos competent. (R 286)

C. Penalty Phase

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) On January 7, 1993, Dr. Sprehe reported that he attempted to examine Wuornos on January 6, 1993, but she refused to cooperate during a "rather brief" interview in which she explained that she had waived mitigation. Dr. Sprehe concluded that Wuornos was competent and there was a reasonable medical probability, but not a reasonable medical certainty, that she had a personality problem but was not under the influence of extreme mental or emotional disturbance and her capacity was not substantially impaired. (R 179) There is no record of any report filed by Dr. Merin.

The State filed two pretrial motions in limine. The first sought to preclude the defense from presenting a claim of self-defense on the ground that it was foreclosed by Wuornos's guilty

plea. (R 83-84) The second sought to exclude evidence that Richard Mallory, the Volusia County murder victim, had committed or was prosecuted for a prior rape. (R 85-86)

The motions were heard at the beginning of the penalty phase trial on January 25, 1993. (T 5) Defense counsel informed the court that he would not present the contested evidence about Mallory. (T 6) Regarding the first motion, the prosecutor argued that evidence of residual doubt is not admissible. (T 6-7) Defense counsel argued that the State was going to try to prove that the crime was cold, calculated, and premeditated, so the defense was entitled to rebut the claim that there was no pretense of legal justification by showing that Wuornos thought she was acting in self-defense. (T 7-8) When the court asked what evidence he would present, defense counsel stated that he could play Wuornos's 3 1/2 hour confession, in which she said "self-defense" over 40 times, or he could ask Detective Horzepa how many times she mentioned self-defense during the confession. Also, it would come out during the doctors' testimony. (T 8-9) The court ruled that Wuornos could testify she thought it was self-defense, but it was not otherwise admissible. (T 9) Counsel responded that in one or two cases Wuornos explained why she felt threatened and did the only thing she thought possible, and the doctor would explain she felt that way because of her lack of insight and personality disorder. (T 9-10)

Defense counsel then informed the court that Wuornos wanted to waive the jury, presentation of mitigating evidence, and her

presence. (T 10-13) Wuornos was present following a recess. (T 14-15) The court determined that defense counsel had discussed the waiver of mitigating evidence with her, and asked counsel to state what evidence would have been presented. (T 15)

Defense counsel responded that Dr. Krop would have testified Wuornos suffered from a borderline personality disorder, and Dr. DelBeato would say she had signs of both antisocial and borderline personality disorders. (T 16) In Dixie County, the court allowed jury instructions on three mitigating circumstances: extreme mental or emotional distress, impaired capacity, and nonstatutory factors. (T 16-17) The Dixie County court allowed counsel to argue self-defense as her state of mind. Det. Horzepa testified that Wuornos mentioned self-defense over 40 times and explained how the men raped or assaulted her and how she reacted. (T 17)

Defense counsel further stated that Wuornos's sister, Lori Groddy, testified that Wuornos was adopted, and there were signs she was developing an antisocial personality in adolescence. Wuornos had trouble with school and truancy. She had a hearing deficit for which she never received help. Her parents were told she needed counseling, but she never received it. Wuornos became a prostitute at age 16. She became pregnant when she was 13 or 14 and had to hide it from her family. She was sent to a home for runaway mothers, and the child was taken away from her. She spent some time in the Adrian School for Girls reformatory. Her brother was also sent to a reformatory. The two adopted children had trouble, while the family's natural children did not. (T 17-19)

Finally, Dr. Krop would testify that Wuornos's family was dysfunctional, and Wuornos suffers from alcohol dependency. (T 19) The prosecutor asserted that Dr. Krop also found Wuornos was competent to decide not to be present. (T 19)

The court then asked Wuornos if she wanted to waive her right to present mitigating evidence. (T 19) She answered yes and added that she did not want to be present. She explained that she felt it was unnecessary because she already had five death sentences. She complained that male serial killers only receive about two death sentences, while she was being dragged through every case for no reason but "political limelighting and promotional gain or capital gain you can receive off of these." She was tired of it and wanted to waive everything. "I don't care. I just want to go back to death row and be left alone." (T 19-20)

The court asked Wuornos if she had been present in the sentencing phase. (T 20-21) She replied she had been present through all these things. She said,

> I understand exactly what's going on, and I understand, too the conspiracy of trying to find any kind of reaping off of these cases, off of my blood, before I go to the chair.
>
> This is unnecessary. I've got five death sentences. Why one more? How many times do you people want to kill me? You can only kill me once.

(T 21)

The court then determined that Wuornos understood what the sentencing phase was for, and there would be an automatic appeal of any death sentence, while an appeal from a life sentence was optional. (T 21) Wuornos responded that she did not expect a life

sentence, it was too late to change the dirt and conspiracy by the court, prosecutors, and police. If her sentence were overturned to life, she would "tell them I'll kill again." She wanted an acquittal or death, declaring, "I know I'm innocent. God knows I'm innocent. But you people are not innocent in what you're doing to me through these cases." (T 21-22)

The court told Wuornos defense counsel represented her and recommended that she present mitigating evidence, and asked if she were familiar with that evidence. She answered that she knew all about it, adding, "I don't give a shit, do you understand that? I don't care." (T 22) When asked if she wanted counsel to present the evidence, she said the court could sentence her to death right then, it did not matter to her, she would waive an appeal. "All I care about is going to God, because I know I'm innocent. And letting God take care of you people on earth for the dirt that you did to my cases." (T 22) Finally, she said she did not want counsel to present the evidence, stating that she was not afraid to die, and reiterating that God was on her side, and she was innocent. (T 23) Wuornos asserted that she did not want to go through any more trials because the prosecutors would continue to lie about her. She intended to write a book to reveal the truth. (T 23-25)

The court asked Wuornos if she wanted a jury to recommend a sentence. Wuornos replied that she would not accept life. She did not care what the jury said because they had been told so many lies. She preferred to have the court sentence her because she

just wanted to be left alone. (T 25-26) The court determined that Wuornos had discussed this with defense counsel and understood that he recommended having a jury. (T 26-27) The court also determined that Wuornos did not want to be present for the penalty phase trial. (T 27)

The prosecutor provided written waiver forms for the rights to be present, to present mitigating evidence, and to have a jury. Wuornos read and signed the forms. (R 92-94; T 28) The court recommended that Wuornos should be present and should present mitigating evidence to a jury, but Wuornos reasserted her desire to waive those rights. (T 29) She again complained about people seeking promotions and publicity from her cases and that they wanted to kill her and did not care about her innocence. (T 29) The court asked if defense counsel had told her it would allow her to present some evidence of her belief that she acted in self-defense. Wuornos replied yes, but it did not matter because the public had been told so many lies. (T 30)

Wuornos complained that the judge who presided at her trial in another case made a mockery of the trial and was totally on the State's side. She felt she would never get a fair trial, saying she was "spit on, laughed at, mocked at and lied upon." She felt no one cared because of "the number," and because she was a prostitute, a female, and a hitchhiker. (T 31) When the court accepted her waiver of her rights, Wuornos said, "I'm sick of this shit," and, "Let's just get the fucking thing over." (T 31-32)

The court recessed before resuming the proceedings in Wuornos's absence. (T 32-33)

The court admitted four State exhibits without objection. Each exhibit was a certified copy of Wuornos's prior judgments and sentences. Exhibit 1 was for robbery in Volusia County. Exhibit 2 was for first-degree murder and robbery in Marion County. Exhibit 3 was for first-degree murder and armed robbery in Marion County. Exhibit 4 was for first-degree murder and armed robbery in Citrus County. (T 33-34) The prosecutor said Detective Pinner would bring certified copies of Wuornos's first-degree murder judgment and sentence from Dixie County. Defense counsel offered to stipulate to that fact if the prior record was established. The prosecutor asked the court not to consider an additional first-degree murder conviction in Volusia County. (T 34)

Detective Thomas Muck of the Pasco County Sheriff's Office testified that two fishermen found a body near Pittman Pond about two miles west of the I-75 and State Road 52 intersection on June 6, 1990. (T 35-36) Muck went to the scene and saw a nude body under a green electric blanket. (T 36) No personal belongings were found. (T 36-37) Muck learned that another man's body was found in Citrus County on June 1, and there had been similar homicides in other counties. (T 37) Florence Carskaddon called Muck and said her son Charles' Cadillac, shown in State's exhibit 5, had been recovered near the interstate in Marion County on June 13. Charles Carskaddon's body was identified from fingerprints on September 12. (T 38) He was 40 years old. Bullets were recovered

from his body and submitted to the FDLE lab, which determined that they were .22 caliber and were fired from a weapon with a six right twist. (T 137)

Law enforcement officers from Citrus, Marion, Volusia, Dixie, and Pasco Counties formed a task force. Wuornos and Tyria Moore became suspects. Muck found that Wuornos had lived in Pasco County in 1985. (T 39) Wuornos was arrested in Daytona Beach on January 9. She had a key to a storage room which was searched pursuant to a warrant. The officers found Carskaddon's Indian blanket and personal property from other victims. (T 40) Exhibit 6 was a photo of the blanket and other items. (T 41) The officers found Carskaddon's .45 automatic pistol, exhibit 8, at the Labosca Investments pawn shop. It had been pawned by Wuornos under the name Cammie Greene. The fingerprint on the pawn ticket, exhibit 7, matched Wuornos's. (T 41-43) The pistol had been purchased by Carskaddon from a gun shop in Kentucky, as shown by exhibit 9, a federal firearm transaction record. (T 42-44)

Wuornos made a videotaped confession in which she admitted shooting Carskaddon. (T 44) On cross-examination, defense counsel asked whether Wuornos mentioned self-defense. Muck believed she did, but he was not certain. (T 45)

Pasco County crime scene technician Brian MacMillan testified that he went to the Pittman Pond scene on June 6, 1990. He photographed the green blanket covering the body, exhibit 10. (T 46-47) He also took aerial photos of the crime scene, exhibits 11 and 12, a photo of the area around the body before it was uncov-

ered, exhibit 13, a photo of the uncovered body, exhibit 14, and a photo of the car in Ocala, exhibit 5. (T 48-50) MacMillan processed the car, but he did not find any items of personal property. (T 50) He compared Carskaddon's known prints from Boise, Idaho, with fingerprints from the body and found they were identical. (T 51) He compared Wuornos's known prints with the print on the pawn ticket, exhibit 8, and found that it matched Wuornos's right thumb. (T 51-52)

Florence Carskaddon testified that she lived in Perryville, Missouri, and was Charles Carskaddon's mother. (T 53) The car shown in exhibit 5 was her son's 1975 "Caddy." Mrs. Carskaddon identified the blanket shown in exhibit 6 as her son's. (T 54) Her son had a pistol just like exhibit 7. (T 55) On May 31, 1990, her son drove his car from her house on his way to Tampa to get his girlfriend and move to Missouri. He had his .45, the Indian blanket, and a green electric blanket. (T 55-56)

Dr. Joan Wood, the Sixth Circuit medical examiner, observed the body at the scene and performed an autopsy on June 6, 1990. (T 58-59) She found eight bullets in the lower chest and upper abdomen and fragments of a ninth in the left arm. The bullets entered the front of the body. (T 59-60) The multiple gunshot wounds of the chest and abdomen were the cause of death. (T 62)

Defense counsel expressly waived any objections to Williams Rule evidence. (T 63) Bobby Lee Copas, a truck broker, testified that he was at a truck stop in Haines City on November 4, 1990, when a truck driver asked if he could drive a lady whose car had

broken down to Daytona Beach. She had two children in daycare. Copas responded that he was only going to Orlando. The lady was Wuornos. She asked if he would drive her to Orlando if she called her sister to meet them there. Copas agreed. (T 64-65)

As they drove away on Highway 27, Wuornos shocked Copas by saying she needed money and propositioning him. (T 65-66) Copas declined because he was married. Wuornos had been real nice, a "sweetheart." But when she opened her purse for a comb, Copas saw the butt of a pistol. Wuornos made another, more graphic offer if he would pull into an orange grove. (T 66) Copas again refused and noticed Wuornos was becoming aggravated. (T 66-67) "Her personality changed. She became more aggressive, meaner." (T 67)

Wuornos made a third, "very derogatory" offer. Copas decided to get her out of his car and pulled into a gas station near I-4. (T 67) He told her to call her sister to tell her he would drive her to Daytona and gave her $5. When she got out of the car, he locked the doors and began closing the window. Wuornos "really got mad...went off the deep end," and said, "Well, I'll just kill you like I did all them other old mother fuckers." (T 68) Wuornos came around the car fumbling in her purse. Copas began to drive away. Wuornos said, "With a tag like Copas, I'll get you one day." (T 68)

On cross-examination, Copas said Wuornos was nice at first, but had a personality change when he turned her down. (T 69) He felt he had to agree with everything she said. He had never met anyone quite like her. (T 70)

Captain Jerry Thompson of the Citrus County Sheriff's Department testified that the body of David Spears was found by a surveyor in a wooded trash dump area near US 19 on June 1, 1990. (T 71-72) The body was nude except for a ball cap. He was lying on his back with his arms and legs spread. The officers found seven .22 casings, beer cans, a used condom, and a Trojan package. (T 73) The medical examiner found six .22 projectiles in the chest and abdomen. Death was caused by the multiple gunshot wounds. (T 74) Two bullets entered the back, and the rest entered the front of the body. The projectiles were fired by a "six right twelve" weapon. (T 75)

Thompson learned that Spears was a heavy equipment operator from Sarasota who disappeared after receiving a $355 pay check. (T 76) No money or personal belongings were found at the scene. Spears left work in Sarasota around 12:10 p.m. on May 19, and was expected home in Ocoee, near Orlando around 3:00. He had tools, clothing, and a black panther sculpture for his ex-wife. (T 77-78) He was driving a Dodge pickup which was found near I-75 in Marion County. (T 78) When found, the truck had no tag, no keys, and no personal belongings. It appeared to have been wiped down for fingerprints. (T 78-80) The seat was pulled forward, indicating someone shorter than Spears had been driving. The radio had been removed from the dash. A condom and a prophylactic package were found in the truck. (T 79) Spears' body was identified from dental x-rays. Thompson learned that Spears had a habit of stopping for disabled motorists. (T 80)

Thompson became involved in the investigation of similar homicides. Wuornos became one of the suspects. She used the names Lee, Cammie Greene, Lori Groddy, and Susan Blahovick. (T 80-81) In 1989, Wuornos had lived in the area where Spears' body was found. (T 82) She had pawned tools similar to Spears' missing tools at Bruce Young's Pawn Shop in Ormond Beach on June 19, 1990, using the name Cammie Greene. (T 82-83) Thompson interviewed the owner of a restaurant who said Wuornos had lived in a room behind the restaurant. She had seen Wuornos with the panther, tools, and other items. (T 83) After Wuornos was arrested, she confessed to the Spears homicide. (T 83-86)

Marion County Sheriff's Investigator David Taylor testified that he investigated the homicide of Charles Humphries. The body was found in an undeveloped subdivision in Marion County less than two miles from I-75 on September 12, 1990. (T 87) No identification was found on the body, which was lying in a fetal position on the ground near a drainage culvert. (T 88) The Sumter County Sheriff's Office had issued a BOLO for Humphries; he was a missing HRS worker traveling alone on I-75. The body was identified by an HRS supervisor from Sumterville. Humphries was 56 years old. (T 88-90) The body was fully clothed and still wearing a wedding ring, watch, and glasses, with a pen and pencil in the shirt pocket. The left front pants pocket was turned inside out. Taylor did not find a wallet or any cash. Several .22 shell casings were found at the scene. (T 90) The medical examiner found that Humphries had been shot seven times in the head, torso, and wrist;

multiple gunshot wounds were the cause of death. Six .22 projectiles were recovered from the body. (T 91-92) The FDLE lab reported that the projectiles were fired form a weapon with a six right-hand twist. (T 92-91)

Several weeks later, Humphries' car was found near I-10 in Live Oak. It had been wiped clean, bumper stickers and the tag had been removed, and the keys and personal belongings were gone. (T 93-94) On October 12, some of Humphries' property was found in the Green Swamp area of Lake County, including an empty ID case, a pipe, a tobacco pouch, and insurance cards. (T 94-95) The officers also found beer cans and a .22 shell casing. (T 95-96) Humphries' briefcase was recovered from Tyria Moore after Wuornos was arrested. Moore said she received it from Wuornos. (T 96-99) Moore and Wuornos gave directions for a dive team to recover a weapon. (T 99-100) The FDLE lab reported that this weapon fired the .22 shell recovered in Lake County. (T 100)

Marion County Sheriff's Investigator John Tilley testified that he investigated the homicide of Troy Burse, age 50, in August, 1990. (T 101) The body was found on a dirt road in a wooded area near US 19. (T 102-03) The body was lying face down, fully clothed, and partly concealed with palm fronds. Burse's clipboard, receipts, and wallet were found, but no cash. (T 104) Burse was a delivery truck driver for a sausage company. He was last seen at the Seville grocery store. (T 105) He had $290 in cash in a bank bag. (T 106) The medical examiner found one entry wound in the front of the body and one in the back. He recovered two .22

projectiles from the body, and determined that the front entry gunshot struck the heart and caused death. (T 106-07) The FDLE lab reported that the projectiles were fired from a .22 revolver with six grooves and a right-hand twist. (T 107) Burse was identified by his wedding band and dental charts. (T 108) Burse's sausage truck had been found at the US 19 and State Road 40 intersection on July 31, 1990. (T 110)

On cross-examination, Tilley said Wuornos accompanied him, other officers, and defense counsel on a trip to South Carolina to try to locate the body of a seventh victim after she was sentenced to death in Marion County. She was cooperative, but they could not find the body. (T 110-11) On re-direct, Tilley said Wuornos confessed to killing Burse. (T 111-12)

Lynn McCutchen testified that he owned Paducah Shooter's Supply, a gun shop in Kentucky. He identified State's exhibit 9, a federal form used to record the sale of a gun, and exhibit 15, a receipt for the sale of a gun. (T 113-14) Defense counsel stipulated that the .45 automatic belonged to Carskaddon and was found in Wuornos's locker. (T 114)

Tyria Moore testified that she met Wuornos in June, 1986. (T 115) They were together until June, 1990. (T 115-16) They were then living in Holly Hill. Moore saw the car shown in exhibit 5 parked outside their apartment. Wuornos had the car for one day. She did not say where she got it or what she did with it. (T 116-17) Exhibit 7 was a weapon Wuornos brought home one day without explanation. She put it in a storage shed when Moore left to go up

north. (T 117) Wuornos never told her anything about Charles Carskaddon's death. (T 118)

On cross-examination, Moore testified that Wuornos told her about her childhood. (T 118) Wuornos was adopted by her grandparents. She became a prostitute in her early teens. She became pregnant, hid her pregnancy from her family, and gave her baby up for adoption. (T 119) Her grandfather drank wine almost daily. Her grandmother died of a liver disease. She said she had sex with her brother Keith. (T 120) Wuornos had burns on her forehead from a fire she and her sister started. (T 121) She had been in a couple of reformatories and ran away. She did not get along with her grandfather, so she stayed away from the house as much as she could. (T 120) She ran away from home in her early teens. (T 119-21)

Moore had observed that Wuornos was easily angered over little things, but would be happy again in a couple of minutes. She displayed a lack of judgment in becoming upset. (T 122) Wuornos was dependent on alcohol. She easily drank a case of beer in a day. (T 122) She drank heavily an a daily basis and was drunk most of the time. (T 123) Regarding the cars and other things she brought home, she told Moore people gave them to her instead of money. (T 123)

Dixie County Sheriff's Investigator Jimmy Pinner testified that he investigated the homicide of Walter Antonio, age 59. (T 125-26) Antonio's body was found on November 19, 1990, on a dirt road in a wooded area near US 19 about eight miles north of Cross

City. (T 126) The body was clothed only in socks, laying on his left side in a curled position. (T 126-27) Part of a coin wrapper and a paper towel were found at the scene, but no clothes, cash, or wallet were found. The autopsy revealed four .22 projectiles in the body, three in the back and one in the head. (T 127) The FDLE lab reported that they were fired from a weapon with a six right twist. The body was identified from fingerprints. Antonio's ring and watch were missing. (T 128) Antonio's Pontiac was found in a deserted area of Brevard County near I-95 on November 24. The identifying emblems, bumper stickers, and tag had been removed from the car. The tag was in the trunk. The ID plate behind the windshield was covered with paper. The car had been wiped to get rid of fingerprints. There were no keys. (T 129) Antonio was a security guard traveling alone from his home in Cocoa. (T 130)

Pinner became involved with the task force investigation of similar homicides. (T 130-31) The homicide of Mr. Mallory occurred in Volusia County. The body was found in November, 1989, in a remote wooded area. It was partially covered and partially clothed. He was the victim of multiple gunshot wounds. No vehicle, personal belongings, or cash were found at the scene. (T 131-32) Wuornos confessed to the Antonio homicide after her arrest. The gun used in the homicide was recovered by a dive team following Wuornos's directions. Antonio's flashlights and handcuffs were recovered with the gun. (T 133-34) Antonio's shaver, wrench, cooler, lantern, and billy club were found in Wuornos's storage locker. (T 134) Antonio's ring was recovered

from a pawn shop where Wuornos pawned it under the name Cammie Greene. (T 135) On cross-examination, Pinner said Antonio had handcuffs, a badge, a billy club, and a long black flashlight. In her confession, Wuornos said she shot Antonio because he said he was a police officer, flashed the badge, and wanted sex for free. (T 135-36)

Lori Groddy testified that she is Wuornos's sister; they grew up together. (T 138) She is three years older than Wuornos. They have a brother named Keith. Wuornos made many attempts at running away. She got into trouble and had to go to a juvenile home. (T 139) Wuornos became pregnant when she was 13 or 14. She attempted to hide the pregnancy because she did not know how their parents would react. (T 140) When their parents did find out, their mother was distraught, and their father was upset and sent Wuornos to an unwed mothers home. The child was put up for adoption. Wuornos came home, got in trouble again, and was sent to Adrian's School for Girls to straighten her out. (T 139, 141) When she came home again, she and Keith got into an argument with their father. He told them they could stay and live by his rules or run away again and not come back. They left. Wuornos was only 14 or 15. (T 139-40)

On cross-examination, Groddy said she was 10 and Wuornos was about 7 when they found out Wuornos was adopted. (T 141-42) Groddy's sister Diane was the biological mother of Keith and Wuornos. Diane was 16 or 17 when Wuornos was born. Diane left

Keith and Wuornos with a cousin who called Groddy's parents and told them to come get the children. (T 147)

As a child, Wuornos frequently argued with her friends and came home mad at them every day because they would not let her have her way. As she got older she became rebellious. She had a quick temper. (T 142) She got upset over little things. She was truant from school on numerous occasions and had problems with school. Wuornos first ran away when she was about 12. (T 143) Wuornos had a bad attitude at home and would not follow their parents' rules. She upset them by yelling at them, arguing with them, and running away so many times they couldn't take it anymore. (T 144)

Wuornos's only contact with mental health professionals was with a psychiatrist at the Adrian School. (T 144) A neighbor boy got Wuornos started in prostitution when she was still quite young. (T 144-45) Wuornos told their father she was raped when she got pregnant. (T 146-147) Wuornos began drinking beer in her mid-teens. She also used marijuana, LSD, and downers. (T 145) After Wuornos left home, she travelled across the United States. She lived in Colorado, Michigan, and other places before settling in Florida. (T 146)

Volusia County Sheriff's Detective Lawrence Horzepa testified that he investigated the Richard Mallory homicide. (T 149) Mallory's Cadillac was found on a fire trail in sand dunes near the beach. No car keys were found. (T 150) The officers found a half full bottle of vodka, tumblers, and a wallet containing Mallory's driver's license buried in the sand about 30 feet behind the car.

(T 150-51) Mallory was known to carry a briefcase containing cash and other valuables, but no briefcase was found at the scene. (T 151) The wrong tag was on the car. Mallory was 51 or 52 and lived in Clearwater. He came to Daytona alone. (T 152)

Mallory's body was found on December 13, 1989, in a wooded dump site just off US 1 near I-95. The body was covered with debris, cardboard, and red carpet. It was lying face down. (T 153) The body was clothed. Both front pockets were turned inside out. The medical examiner recovered four .22 projectiles from the body. (T 154) There were three entry wounds in the front and one on the side of the body. FDLE found that the projectiles were six landed groove, right hand twist. Powder on the bullet holes in the shirt indicated that the shots were fired at close range. (T 155) The body was identified from fingerprints. (T 155-56)

Horzepa joined the task force investigating similar homicides. (T 156) Composite drawings of two female suspects were identified as Wuornos and Tyria Moore. (T 156-57) On December 6, the officers learned that Wuornos pawned Mallory's camera and radar detector at the OK Pawn Shop under the name Cammie Greene. (T 157) The thumbprint on the pawn ticket matched Wuornos's. There was a 1986 warrant for Wuornos's arrest under the name Lori Groddy for carrying a concealed firearm. On December 8, the officers located Wuornos at the Port Orange Pub. (T 158) She proceeded to the Last Resort, where she was arrested the following day. (T 158-59)

Horzepa interviewed Moore on January 15, 1991. She said Wuornos came home with a Cadillac in December, 1989. (T 159-60)

Her description of the car matched Mallory's car. They used it to move to another apartment. Wuornos then told Moore she had killed a guy that day and covered the body with a red carpet. Wuornos wanted to show her a photo of the man, but Moore refused to look. (T 160) Moore saw some papers with the name Richard. (T 160-61) Wuornos took the car to a secluded area and rode her bicycle home. (T 161)

Horzepa interviewed Wuornos at the Volusia County Jail on January 16. (T 161) She identified a photo of Mallory as one of her victims. She said he was alone and picked her up in the Tampa area near I-4. She shot him in the right side, then he crawled out of the car and shut the door. She ran around the car and shot him three more times. (T 162) She covered the body with red carpet. (T 162-63) She searched his pants pockets and took everything he had. She threw away some items and kept others. She pawned the camera and radar detector. She kept a Polaroid camera, which was found later in her rented storage bin. (T 163) She gave Mallory's shaver to a man who owned a restaurant. (T 164)

On cross-examination, Horzepa said Wuornos's tape recorded confession was 3 1/2 hours long. She volunteered the information and refused the officers' advice to see a lawyer. (T 164-65) She repeatedly said she committed the crimes in self-defense. (T 165-66, 168) She said she was drunk when the crimes were committed, the men attacked her, and she felt she had to kill them. (T 166)

On re-direct, Horzepa said Wuornos's claims of self-defense were contradicted by her other statements. (T 166) Regarding

Mallory, she also said she shot him because she was afraid of being ripped off and because he wouldn't take his clothes off. Horzepa felt that Mallory was no longer a threat to Wuornos after she shot him the first time, but she went around the car and shot him three more times. (T 167) Wuornos said she killed these people to avoid detection so she could continue her trade. (T 167-68)

Defense counsel rested without calling any witnesses, stating, "I guess my hands are tied." (T 169)

The prosecutor urged the court to find three aggravating circumstances: prior convictions for capital or violent felonies, capital felony committed during commission of a robbery, and cold, calculated, and premeditated. (T 169-73) He waived pecuniary gain and witness elimination as aggravating factors. (T 170)

Defense counsel suggested that the court review the doctors' reports in the file. (T 174) He urged the court to consider the evidence of Wuornos's troubled childhood, having been abandoned by her mother and adopted by alcoholics. Wuornos displayed behavioral problems as a child consistent with a borderline or antisocial personality disorder for which she received no help. She was bad-tempered, argumentative, angry, subject to extreme shifts in emotional behavior, and sexually promiscuous. (T 174-75) She ran away several times. She used drugs and alcohol. She became a prostitute at an early age. She was raped and had a baby at age 13 or 14. She felt she had to hide her pregnancy from her family. (T 175) She was sent away to Adrian School for Girls; when she returned home she was told to leave and never return. (T 176)

Defense counsel asked the court to consider Moore's testimony that Wuornos is an alcoholic. Copas testified that she is out of control. Wuornos tried to help the police find Peter Sims' body. She confessed to her crimes. (T 176) She admitted her guilt and wanted to die as soon as possible. Wuornos had four other death sentences and would serve a minimum of 100 years in prison if each was commuted to life. (T 177) She suffered from mental handicaps and did not function normally, but nobody ever tried to help her. (T 179-80) Something happened with Richard Mallory which turned her into a "monster." (T 180)

Defense counsel argued that the robbery of Carskaddon was an afterthought, they went out into the woods to have sex, so the felony murder aggravator was not proved beyond a reasonable doubt. (T 177-78) The evidence did not establish that the murder of Carskaddon was cold, calculated, and premeditated. Wuornos did not stalk or lie in wait for victims. She felt threatened by Carskaddon. (T 178-79)

D. SENTENCING

The sentencing hearing was conducted by Judge Cobb on February 5, 1993. (R 119) Wuornos was present, complaining vehemently and profanely about physical and mental mistreatment and being deprived of her hairbrush and watch. (R 120-22) The court threatened to gag and bind her unless she remained quiet, but permitted her to address the court. (R 122) Wuornos denied that she was a serial killer and asserted that she acted in self-defense. (R 122-23) She complained about her cases being sensationalized. She accused

the court of ordering her mistreatment and of being "pissed-off" because she waived trial and deprived the court of "a limelight in a reelectional thing, and the rest of this county with political capitalization." She threatened to sue and to file a grievance in Tallahassee. (R 123) She complained about being compelled to wear oversized jail clothing. She accused the officers of threatening to shoot or electrocute her. She complained of being deprived of "hygiene material." (R 124) She concluded,

> You're the only county that treated me like shit, worse than a dog. And I'm going to let the whole public know about this. It's not--all the people don't dislike me. A lot of people are on my side. I got a lot of people that believe it was self-defense, and that's just what it was.
>
> And I'm letting the public know about--around the whole world--you will--you want that fame, yeah, you want that limelight. You're going to look like trash, because that's what you are.
>
> That's all I got to say. (R 125)

The court found three aggravating circumstances:[1] prior convictions for five capital felonies and several violent felonies,[2] the murder was committed while engaged in the crime of robbery,[3] and cold, calculated, and premeditated.[4] (R 102-03, 125-26; A 3-4) The court found that none of the statutory mitigating circumstances exist. (R 105, 126; A 6) The court considered and

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[1] The court's sentencing order is reproduced in full in the appendix. (A 1-7)

[2] S. 921.141(5)(b), Fla. Stat. (1991).

[3] S. 921.141(5)(d), Fla. Stat. (1991).

[4] S. 921.141(5)(i), Fla. Stat. (1991).

rejected three nonstatutory mitigating circumstances. The court found that the evidence did not prove that Wuornos believed she was acting in self-defense nor that she demonstrated contrition by confessing and trying to assist the police in locating the body of the seventh victim. The court found that Wuornos's prior death sentences were not mitigating. Finally, the court found that if all three of these factors were considered to be mitigating circumstances, "they were pale in comparison to the aggravating circumstances found to exist." (R 104-05, 126-27; A 5-6) The court found that the appropriate sentence was death, and Wuornos responded, "Big deal." (R 127)

The court adjudicated Wuornos guilty of first-degree murder and sentenced her to death. (R 107-12, 127) The court asked Wuornos if she had any questions, and she answered that she was raped by Mallory, assaulted by the other men, and defended herself. (R 127-28) She concluded:

> You lied, you used conspiracy, you all used to frame--you framed me to the chair for your books and your movies. And you even framed me for 6 death sentences. So, you all can just reap off my blood. But that's, okay. Because you see, I am--I'm going to heaven. I know where I'm going.
>
> I'm deep into the Lord on death row. But you people are going to have to answer to God. And right now, as far as I can see, you're all going to hell.

(R 128)

SUMMARY OF THE ARGUMENT

I. During the plea hearing, the penalty phase trial, and the sentencin hearing, Wuornos repeatedly asserted that she acted in self-defense and was intoxicated at the time of the offense. The prosecutor's statement of the factual basis for the guilty plea did not refute those defenses. The court erred by accepting the plea without conducting a searching inquiry into the factual basis. The court also erred by failing to inquire into Wuornos's understanding of the constitutional rights she waived by entering the plea.

II. The court erred by accepting Wuornos's waiver of her rights to have a jury for the penalty phase trial, to be present during the trial, and to present mitigating evidence because the waivers were not truly voluntary and intelligent. Instead, Wuornos was motivated by her belief that she could not obtain a fair trial or a life sentence, so she preferred to be left alone. Because a jury recommendation, the defendant's presence, and the presentation of mitigating evidence are necessary for a reliable determination of the proper sentence in a capital case, such waivers should not be permitted. At the very least, special counsel should be appointed to present mitigating evidence.

III. Because Wuornos's conduct during the penalty phase trial and the sentencing hearing was irrational, the trial court committed reversible error by failing to order a re-evaluation of her competency.

IV. The State failed to prove beyond a reasonable doubt that the murder was cold, calculated, and premeditated and that robbery

was the primary motivation for the crime. The court erred by finding these aggravating circumstances based upon legally insufficient circumstantial evidence and evidence of prior crimes. The court also erred by considering five prior murder convictions in aggravation when the State proved only three and waived consideration of the Volusia County murder conviction.

V. The felony murder aggravating circumstance is unconstitutional because it does not significantly narrow the class of persons eligible for the death penalty.

VI. The court erred by failing to find and weigh several mitigating circumstances established by the evidence and not refuted by the State: Wuornos's mental or emotional disorder, her history of alcohol and drug abuse, her impaired capacity, her cooperation with the police, her religious belief, and her prior sentences which would protect the public.

VII. Because there is only one valid aggravating circumstance, and there are several substantial mitigating circumstances, the death sentence is disproportionate for this offense.

ARGUMENT

ISSUE I

BECAUSE APPELLANT INSISTED THAT SHE WAS INTOXICATED AND ACTED IN SELF-DEFENSE, THE TRIAL COURT ERRED BY ACCEPTING HER GUILTY PLEA WITHOUT CONDUCTING AN ADEQUATE INQUIRY TO DETERMINE THE FACTUAL BASIS FOR HER PLEA AND THE VOLUNTARY AND UNDERSTANDING WAIVER OF HER CONSTITUTIONAL RIGHTS.

In a capital case, the defendant is entitled to appellate review of the validity of her guilty plea and the correctness of the court's action in accepting the plea. Trawick v State, 473 So. 2d 1235, 1238 (Fla. 1985), cert. denied, 476 U.S. 1143, 106 S. Ct. 2254, 90 L. Ed. 2d 699 (1986). The defendant is entitled to raise a claim that the record fails to show that her guilty plea was intelligent and voluntary on direct appeal in a capital case, despite the absence of a motion to withdraw the plea in the trial court, because this Court is required by section 921.141(4), Florida Statutes (1991), to review the judgment of conviction, and this requires review of the propriety of the plea. Koenig v. State, 597 So. 2d 256, 257 n. 2 (Fla. 1992).

In this case, Judge Tepper was initially reluctant to accept Wuornos's guilty plea because she insisted that she was intoxicated at the time of the offense and that she acted in self-defense. The court questioned both Wuornos and defense counsel to ascertain that Wuornos understood she was waiving her defenses by pleading guilty. (R 198-203) However, when the prosecutor recited the facts which

the State was prepared to prove to establish the factual basis for the plea, he did not address the issue of Wuornos's intoxication and stated that Wuornos admitted shooting Carskaddon and six other people while claiming that all of the deaths were the result of self-defense. (R 205-07) The court allowed Wuornos to speak regarding the facts of the case, but did not make any further inquiry into the facts to determine how the State would refute Wuornos's asserted defenses. (R 207-09)

At the penalty phase trial conducted before Judge Cobb, Wuornos asserted that she should be acquitted because it was justifiable homicide, and she was innocent, but she did not want a trial because the prosecutors would continue to lie about her. Yet the court made no inquiry into the factual basis for the plea. (T 22-25) Again at the sentencing hearing, Wuornos insisted that she had acted in self-defense, but Judge Cobb did not inquire into the factual basis for the plea. (R 122-23, 127-28)

In Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the Court held that a guilty plea entered to avoid a possible death sentence if convicted at trial was not involuntary. However, the Court declared, "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." Id., at 748.

In contrast, in Henderson v. Morgan, 426 U.S. 637, 644-47, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976), the Court ruled that a negotiated plea of guilty to second-degree murder by a defendant

charged with first-degree murder was involuntary because the defendant was never told that intent to kill was an element of second-degree murder. The court noted,

> A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving,...or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.

Id., at 645 n. 13. Moreover, in a concurring opinion joined by three other members of the Court, Justice White declared, "The problem in this case is that the defendant's guilt has been established neither by a finding of guilt after trial nor by the defendant's own admission that he is in fact guilty." Id., at 649.

The same can be said of Wuornos's case. Her guilt has not been established by a finding of guilt after trial nor by her own admission that she is in fact guilty. Instead, she stated, "I ain't never going to get a fair trial. I'm pleading guilty in self-defense and I am not going to go through trial." (R 200) She further stated, "I'm pleading guilt--I'm guilty. I killed him. But I'm saying self-defense right to my grave." (R 200) At the penalty phase trial she said, "[I]t was justifiable homicide....I know I'm innocent. God knows I'm innocent." (T 22) And at the sentencing hearing she said, "It was in self-defense." (R 123) Finally, she said she "was raped by Richard Mallory and was assaulted by the other 6, and defended herself." (R 128) It is abundantly clear from the record that Wuornos entered her guilty plea not because she admitted her guilt, but because she was

convinced she could not obtain a fair trial on her defense. Such a plea cannot stand as an intelligent admission of guilt and does not provide a reliable basis for imposing a judgment of guilt and sentence of death.

In North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), the Supreme Court addressed the problem of defendants like Wuornos who tender pleas of guilty while claiming to be innocent:

> [P]leas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea...and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.

Id., at 38 n. 10.

Similarly, this Court has ruled that when a defendant asserts a defense to a charge to which he is pleading guilty, the trial court must conduct a searching inquiry, not only to determine whether the defendant understands that the plea waives the defense, but also to determine the factual basis for the plea. State v. Kendrick, 336 So. 2d 353, 355 (Fla. 1976); State v. Lyles, 316 So. 2d 277, 278-79 (Fla. 1975). Thus, in Davis v. State, 605 So. 2d 936, 938 (Fla. 1st DCA 1992), the district court found reversible error because the defendant claimed, without contradiction by the State, that he was too intoxicated to know whether he had committed the first-degree murder and kidnapping to which he was pleading guilty, and the trial court failed to inquire further to determine whether the defense existed and was being knowingly waived. Also, in Andrews v. State, 343 So. 2d 844, 846 (Fla. 1976), the district

court found reversible error because the trial court failed to inquire more extensively into the factual basis for a guilty plea to aggravated assault when the defendant raised a possible claim of self-defense.

As in Davis and Andrews, the trial court in this case committed reversible error by accepting Wuornos's guilty plea without a searching inquiry into the factual basis to ascertain whether the State could refute Wuornos's claims that she was intoxicated and acted in self-defense. It was not enough that there was a general factual basis for the charge and that Wuornos understood that her plea waived her asserted defenses. Due process of law under the Fourteenth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution required a reliable determination of Wuornos's guilt. Because her plea was accompanied by claims of legal defenses to the charge of first-degree murder, the court was required to ascertain whether there was any factual basis to refute the defenses or to reject the plea and require Wuornos to stand trial on the merits of her claims.

The court's plea colloquy was also deficient because the court failed to expressly address Wuornos's waiver of her constitutional rights by pleading guilty. The entry of a guilty plea waives three important constitutional rights: the privilege against compulsory self-incrimination, trial by jury, and the right to confront one's accusers. Godinez v. Moran, 509 U.S. ___, 113 S. Ct. ___, 125 L. Ed. 2d 321, 331 n. 7 (1993); Boykin v. Alabama, 395 U.S. 238, 243, 89

S. Ct. 1709, 23 L. Ed. 2d 274 (1969). A waiver of these rights cannot be presumed from a silent record. Id. The trial court is constitutionally required to discuss this waiver with the defendant before accepting her plea:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.

Id., at 243-44. The failure to perform this task is reversible error. Id., at 244.

In this case, the trial court never expressly discussed the waiver of her rights with Wuornos. Instead, the court relied upon assurances by Wuornos and her counsel that she had read and understood a written plea form before she signed it. (R 203-04) The five page plea form did recite in one paragraph at the bottom of the first page that Wuornos understood the constitutional rights she would have if she chose to go to trial. (R 30-34) But this procedure did not satisfy the constitutional requirements of Boykin because the court failed to inquire into Wuornos's knowledge, understanding, and voluntary waiver of the specific constitutional rights waived by her plea. See Davis v. State, 468 So. 2d 443 (Fla. 2d DCA 1985) (written plea form was not sufficient to refute claim that plea was not voluntary).

The trial court's failure to conduct a searching inquiry into the factual basis for the plea when Wuornos asserted legal defenses to the charge, coupled with the court's failure to inquire into Wuornos's knowledge, understanding, and waiver of her constitu-

tional rights rendered Wuornos's guilty plea constitutionally invalid. This Court must vacate the judgment and remand this case to the trial court with directions to allow her the opportunity to withdraw her plea.

ISSUE II

THE TRIAL COURT ERRED BY ACCEPTING APPELLANT'S WAIVERS OF HER RIGHTS TO TRIAL BY JURY, TO BE PRESENT, AND TO PRESENT EVIDENCE OF MITIGATING CIRCUMSTANCES.

Generally, a competent defendant may waive her constitutional rights, provided that the waiver is voluntary, knowing, and intelligent. See Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). This Court has ruled that the defendant in a capital case may waive her right to trial by jury during the penalty phase. Hunt v. State, 613 So. 2d 893, 899 (Fla. 1992). Yet this Court has also ruled that it was not error to refuse to accept a capital defendant's waiver of a penalty phase jury at resentencing when the prosecutor objected and the waiver was motivated by the defendant's fear that the jury would be prejudiced by knowledge of his prior death sentence. Sireci v. State, 587 So. 2d 450, 452 (Fla. 1991), cert. denied, __ U.S. __, 112 S. Ct. 1500, 117 L. Ed. 2d 639 (1992).

This Court has also ruled that a capital defendant may knowingly and voluntarily waive the right to be present during trial. Peede v. State, 474 So. 2d 808, 812-14 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S. Ct. 3286, 91 L. Ed. 2d 575 (1986). However, the Eleventh Circuit Court of Appeals has ruled that a capital defendant may never waive the right to be present at any critical stage of trial. Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984), cert. denied, 471 U.S. 1107, 1111, 105 S. Ct. 2344, 2346, 85 L. Ed. 2d 858, 862 (1985). The United States

Supreme Court has never resolved this conflict. The Court has left open the question of whether a capital defendant may waive the right to be present at trial. Drope v. Missouri, 420 U.S. 162, 182, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

This Court has repeatedly ruled that a competent defendant may waive the presentation of mitigating evidence in the penalty phase of a capital trial. Koon v. Dugger, 619 So. 2d 246, 249 (Fla. 1993); Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988). Yet a minority led by Chief Justice Barkett has persisted in disagreeing with this rule on the ground that the need for reliability and proportionality in capital sentencing mandates the appointment of special counsel to investigate and present evidence of mitigating circumstances. Koon, at 251 (Barkett, C.J., and Kogan, J., concurring); Hamblen, at 805-09 (Ehrlich, J., and Barkett, J., dissenting).

Wuornos waived her rights in this case because she did not want to be bothered by going through the process of a complete penalty phase trial with a jury:

> All I want to do is waive off everything. I have five death sentences. This one isn't going to change anything. I don't care. I just want to go back to death row and be left alone.

(T 20)

Wuornos was convinced that it was impossible for her to obtain a fair trial or a life sentence:

> I wouldn't expect a life sentence for the dirt that went on. I'm accepting my death, and you will have to just face God for the dirt and conspiracy that you played in these

> cases and the total technicality and everything that went on with these cases.
>
> It's too late to change the dirt and the conspiracy that the Court and the prosecutors and the cops played in my cases. It's too late to change anything.

(T 21-22)

Although she pled guilty to the murder charge, (R 196-211) Wuornos wanted to be acquitted or killed: "It's either acquittal, because it was justifiable homicide, or it's death in the chair....I know I'm innocent. God knows I'm innocent." (T 22) Wuornos knew about the mitigating evidence defense counsel could present, but she no longer cared because "this case ain't going to change anything. I don't give a shit, do you understand that? I don't care." (T 22)

When the court asked if Wuornos wanted defense counsel to present the mitigating evidence, she replied, "As far as I'm concerned, you can sentence me to death right now and send me back to death row. Because it doesn't matter to me." (T 23) She added, "I will waive off an appeal to the chair. All I care about is going to God, because I know I'm innocent." (T 23) The court persisted in asking whether Wuornos wanted to present any mitigating evidence, and Wuornos continued saying she did not while reasserting her innocence and complaining about "the conspiracy and the dirt that went on in my cases" and prosecutors lying about her. (T 23-25)

When the court asked whether Wuornos understood that she had the right to have a jury recommend a sentence of life or death, she answered,

> Yeah, okay. As far as I'm concerned, like I said, I wouldn't accept life. So death is the way it's going to be. I could care less what the jury is saying, because those people out there have been told so many lies.

(T 25) Wuornos did not want a jury. Instead, she said, "I would be just as happy if you just said: Okay, death row. That's it." (T 26) When asked again, she said, "No, I do not. I would prefer for you to just sentence me and let this get out the window. I just want to be left alone." (T 26) Finally, Wuornos made it clear that she did not want to be present during the proceedings. (T 27)

The prosecutor provided written forms for the waivers, and Wuornos signed them. (R 92-92; T 28) The court recommended that Wuornos should present mitigating evidence, allow a jury to make a recommendation, and be present. (T 28) Wuornos persisted in waiving her rights, while complaining about being transported in and out, "limelighting, political, ladder-climbing, promotion jazz and capital gain off of books and movies and interviews," and that "you people" wanted to kill her and did not care about innocence. (T 29)

When the court told her she could present evidence of her belief that she acted in self-defense, Wuornos said that it didn't matter because the public had been lied to and would not listen to anything she had to say. (T 29-30) Wuornos complained about another judge making a mockery of her prior trial, saying, "I was spit on, laughed at, mocked at and lied upon...I'll never get a fair trial." (T 31) She felt no one cared because of the number

of homicides and because she was a prostitute, a female, and a hitchhiker. She said, "I'm sick of this shit." (T 31) When the court finally accepted her waivers, Wuornos said, "Let's just get the fucking thing over." (T 31-32)

It is clear from this record that Wuornos knew what her rights were and that she was eager to waive them. It is not clear that she was competent to waive her rights, and the question of her competency will be addressed in Issue III, infra. Whether or not she was mentally competent, her waiver was neither intelligent nor constitutionally voluntary. Wuornos gained nothing from her waiver accept to avoid the stress of attending the penalty phase trial and fighting for her life. Because of her prior death sentences, she was convinced that this was a useless endeavor. She was also convinced that it was impossible for her to obtain a fair trial. Although she believed that she was innocent, she volunteered for yet another death sentence because she felt justice was unobtainable, and she preferred to be left alone to face her execution and to make her peace with God. This Court should find that Wuornos's waivers of her rights to be present, to have a jury, and to present mitigating evidence were involuntary, reverse the death sentence, and remand for a new penalty phase trial.

In Koon v. Dugger, 619 So. 2d at 250, this Court sought to alleviate the problem of determining what mitigating circumstances could have been established if the defendant had not waived their presentation by prospectively requiring defense counsel to "indicate whether, based on his investigation, he reasonably

believes there to be mitigating evidence that could be presented and what that evidence would be." While the Koon rule does not apply to this case, defense counsel was aware of it and attempted to comply. (T 11, 16-19) Counsel also argued that the testimony of the State's own witnesses established the existence of mitigating circumstances. (T 174-77) Notwithstanding counsel's commendable efforts, this case illustrates the futility of the Koon rule. This Court should compare the seven mitigating circumstances identified in Issue VI, infra, and their evidentiary support in this record with the evidence of mitigating circumstances developed on Wuornos's behalf in adversary proceedings in Wuornos v. State, Nos. 79,484 and 81,059.

This Court should also compare the result when special counsel was appointed to develop and present mitigating evidence in Klokoc v. State, 589 So. 2d 219 (Fla. 1991) (death sentence vacated as disproportionate), with the results in cases where the defendant waived mitigation and special counsel was not appointed, such as Henry v. State, 613 So. 2d 429 (Fla. 1992) (death sentence affirmed); Clark v. State, 613 So. 2d 412 (Fla. 1992) (death sentence affirmed); Durocher v. State, 604 So. 2d 810 (Fla. 1992), cert. denied, __ U.S. __, 113 S. Ct. 1660, 123 L. Ed. 2d 279 (1993) (death sentence affirmed); Petit v. State, 591 So. 2d 618 (Fla.), cert. denied, __ U.S. __, 113 S. Ct. 110, 121 L. Ed. 2d 68 (1992) (death sentence affirmed); Anderson v. State, 574 So. 2d 87 (Fla.), cert. denied, __ U.S. __, 112 S. Ct. 114, 116 L. Ed. 2d 83 (1991)

(death sentence affirmed); Hamblen v. State, 527 So. 2d at 804 (death sentence affirmed).

In contrast to this Court's willingness to allow capital defendants to waive their rights in the trial courts, the Court has not allowed them to waive their appellate rights. In both Klokoc, at 221-22, and Petit, at 620 n.2, this Court rejected attempts by the defendants to waive their appeals. In Klokoc, this Court ordered appellate counsel to argue the appeal in an adversary manner. In Petit, this court rejected the defendant's request to waive counsel for appeal.

Given this history, it should be obvious by now that accepting a waiver of the right to present mitigating evidence, without appointing special counsel to develop and present mitigating evidence, virtually assures the imposition and affirmance of a death sentence. Notwithstanding this Court's insistence upon adversary appellate proceedings, appellate counsel is so handicapped by the absence of an adequate evidentiary record that he can do little to affect the result. In Hamblen, 527 So. 2d at 802, appellate counsel conceded that cases in which the defendant would manipulate the system to commit suicide were rare. Unfortunately, he was mistaken; since Hamblen was decided such cases have been occurring with increasing frequency. This Court's continued refusal to recede from Hamblen has, in essence, created a right to State-assisted suicide by capital defendants like Wuornos. Surely, this result cannot be what this Court intended, nor should it be allowed to go on.

It has long been recognized that death is different from other punishments both in its severity and in its unalterable finality. Consequently, the Eighth and Fourteenth Amendments to the United States Constitution mandate a greater degree of reliability in determining whether a death sentence should be imposed than in the imposition of other, lesser penalties. Zant v. Stephens, 462 U.S. 862, 884-85, 103 S. Ct. 2733, 72 L. Ed. 2d 235 (1983). Moreover, proportionality review of every death sentence is required by the unusual punishment prohibition of Article I, section 17 of the Florida Constitution. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

These constitutional mandates cannot be satisfied when the courts allow capital defendants like Wuornos to volunteer for the death penalty and waive those procedural safeguards which have been erected to insure that capital punishment is reserved for "only the most aggravated and unmitigated" crimes. See State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974). There is quite simply no reliable way to determine whether a particular murder is among the least mitigated cases when the defendant waives the right to present mitigating evidence. Having defense counsel recite for the court a summary of the evidence he might have presented but for his client's waiver is not an effective and reliable substitute for the examination of witnesses, documents, and other evidence in an adversary proceeding.

> Without a presentation of mitigating evidence, we cannot be assured that the death penalty

> will not be imposed in an arbitrary and capricious manner, since the very facts necessary to that determination will be missing from the record.

Hamblen, 527 So. 2d at 808 (Barkett, J., dissenting).

The defendant's presence during an adversary penalty proceeding is necessary to enable the defendant to confront her accusers. See Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). Her presence is also necessary to assist counsel in making her defense, see Faretta v. California, 422 U.S. 806, 816, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), both in challenging the State's evidence of aggravating circumstances, and in presenting the defense evidence of mitigating circumstances.

The impanelling of a jury to hear the evidence and make a sentencing recommendation to the court is necessary because the jury plays a vital role as co-sentencer in Florida capital cases. See Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 859 (1992). This Court recently described the role of the jury in the penalty phase of a capital trial as "one of great importance" because

> [j]uries are at the very core of our Anglo-American system of justice, which brings the citizens themselves into the decision-making process. We choose juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed.

Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992).

Thus, the presentation of mitigating evidence in an adversary proceeding, the presence of the defendant, and the participation of a jury in hearing the evidence and expressing the will of the

community are all vital components of the capital sentencing process. Allowing the defendant to waive these procedural safeguards undermines the integrity of this process to such an extent that it becomes impossible to make a reliable determination of whether death is the appropriate and proportionate sentence for the offense. This Court should recede from Hunt, Peede, Hamblen, and any other prior decision which allows the defendant to waive the rights to have a jury, to be present, and to present mitigating evidence in the penalty phase of a capital trial. At the very least, this Court should require the appointment of special counsel to develop and present mitigating evidence. Nothing less will satisfy the constitutional requirements of reliability and proportionality in capital sentencing. This Court should reverse Wuornos's death sentence and remand for a new penalty phase trial.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO ORDER A RE-EVALUATION OF APPELLANT'S COMPETENCY WHEN HER CONDUCT AT THE PENALTY PHASE TRIAL AND SENTENCING HEARING WAS SO IRRATIONAL IT RAISED REASONABLE GROUNDS TO BELIEVE SHE WAS NOT COMPETENT TO PROCEED.

Due process of law under the United States and Florida Constitutions prohibits the State from proceeding against a criminal defendant while she is mentally incompetent. Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Nowitzke v. State, 572 So. 2d 1346, 1349 (Fla. 1990); U.S. Const. amend. XIV; Art. I, s. 9, Fla. Const.; Fla. R. Crim. P. 3.210(a). The test for determining competency is whether the accused has sufficient present ability to consult with her lawyer with a reasonable degree of rational understanding and whether she has a rational as well as a factual understanding of the proceedings against her. Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); Pridgen v. State, 531 So. 2d 951, 954 (Fla. 1988); Fla. R. Crim. P. 3.211(a)(1). The same competency test applies when the accused chooses to plead guilty or waive a constitutional right. Godinez v. Moran, 509 U.S. __, 113 S. Ct. __, 125 L. Ed. 2d 321 (1993).

While either defense counsel or the State may request a determination of the defendant's competency, Fla. R. Crim. P. 3.210(b), the court has the ultimate responsibility to insure that the defendant is competent to proceed. Whenever the court has reasonable ground to believe that the defendant may be incompetent,

the court must suspend the proceedings, have the defendant examined by mental health experts, and conduct a hearing to determine competency. Nowitzke, 572 So. 2d at 1349; Pridgen, 531 So. 2d at 954-55; Hill v. State, 473 So. 2d 1253, 1257 (Fla. 1985); Fla. R. Crim. P. 3.210(b).

> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

Drope, 420 U.S. at 181.

The court's duty to order a competency evaluation may be triggered by the defendant's irrational behavior. In Drope, 420 U.S. at 180, the Supreme Court explained that

> evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances be sufficient.

In Nowitzke, the defendant was found competent in a hearing conducted three months before trial. On the Friday before trial, he rejected a plea offer for life sentences for two murder charges, followed by 22 years for attempted murder. He told defense counsel that he believed he would be spiritually released on July 4 because it was Independence Day and because of the number of letters in his three names. He said he obtained this information from a judge in his dreams and laughed at the possibility of a death sentence. Defense counsel conveyed this information to the court and requested a competency hearing, but the court denied the motion.

This Court held that the court erred in failing to conduct a competency hearing, explaining,

> While refusing a plea offer in itself is not evidence of incompetence, here the reasons Nowitzke gave for refusing the offer indicate a lack of rational thought process such that it is doubtful whether Nowitzke had the present ability to assist his attorneys or understand the proceedings against him.

Id., 572 So. 2d at 1349-50.

In Pridgen, the defendant was found competent after pretrial psychiatric evaluations. At the beginning of the penalty phase trial, he waived the right to present mitigating evidence and demanded that the judge kill him. He then made a rambling statement to the jury asking for death while protesting his innocence. A psychiatrist re-examined Pridgen and told the court Pridgen was probably incompetent, but he was not certain. The court completed the penalty phase trial and subsequently ordered a redetermination of competency. Pridgen was then found to be incompetent, and sentencing was delayed for treatment. This Court ruled that the trial court erred by not suspending the penalty phase trial to have Pridgen examined and to conduct a competency hearing. Id., 531 So. 2d at 954-55. Further, this Court found, "If Pridgen was incompetent during the penalty phase of the trial, the tactical decisions made by him to offer no defense to the state's recommendation of death cannot stand." Id., at 955. The Court reversed Pridgen's death sentence and remanded for a hearing to determine his competency, to be followed by a new penalty phase trial with a new jury if he was competent. Id.

In <u>Agan v. Dugger</u>, 835 F.2d 1337 (11th Cir. 1987), <u>cert. denied</u>, 487 U.S. 1205, 108 S. Ct. 2846, 101 L. Ed. 2d 884 (1988), the defendant confessed to a prison murder before a grand jury and the sentencing judge. He told both that he was certain his confession would almost guarantee a life sentence, and that he intended to find and kill his victim's partner when he returned to prison. On appeal from the denial of a federal habeas corpus petition attacking his death sentence, the Eleventh Circuit found that Agan's "bizarre and misguided" conduct "raises serious questions about Agan's reasoning ability." <u>Id</u>., at 1339. The court held that this conduct, coupled with an extensive history of mental problems, presented a sufficient issue regarding Agan's competency to require an evidentiary hearing. <u>Id</u>. Concerning a related claim of ineffective assistance of counsel, the court noted, "Agan's self-defeating behavior should also have alerted [defense counsel] to the possibility that Agan was incompetent to enter his guilty plea." <u>Id</u>., at 1340.

Similarly, Wuornos's irrational and self-defeating behavior when she appeared at the penalty phase trial to waive her rights to a jury, to be present, and to present mitigating evidence (T 20-32) and when she appeared at the sentencing hearing (R 120-25, 127-28) should have alerted both defense counsel and the court that her competency to proceed needed to be re-evaluated. Counsel had requested an evaluation of Wuornos's competency on July 14, 1992, because he had observed a "particularly bizarre" change in Wuornos's behavior and because Dr. Krop examined her on July 13,

1992, and found that "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," and that "her ability to rationally participate in plea bargaining is significantly impaired." (R 176, 241-43) In August, 1992, both Dr. Epstein and Dr. DelBeato examined Wuornos and found her competent. (R 177-78) And on September 17, 1992, defense counsel stipulated that the court could find Wuornos competent based on the doctors' reports. (R 282, 285-86) But the court's pretrial competency determination was no longer controlling when Wuornos exhibited bizarre and irrational conduct at the penalty phase trial on January 25, 1993, (T 1) and at the sentencing hearing on February 5, 1993. (R 119)

Wuornos's statements at the penalty phase trial demonstrated that she was not thinking rationally, that she believed herself to be the victim of a conspiracy, and that she was not acting in her own best interest. She began by saying she did not want to be present because she already had five death sentences and felt this proceeding was unnecessary. She complained that male serial killers only receive two death sentences. She believed she was being treated differently "for nothing but political limelighting and for any kind of ladder-climbing and promotional gain or capital gain you can receive off of these." (T 20) She wanted to waive everything because, "I just want to go back to death row and be left alone." (T 20)

Wuornos said she understood "exactly what's going on, and I understand, too, the conspiracy of trying to find any kind of

raking-in, some kind of reaping off of these cases, off of my blood, before I go to the chair." (T 21) She repeated that this proceeding was unnecessary and asked, "How many times do you people want to kill me? You can only kill me once." (T 21) When the court explained her appellate rights, she responded:

> I wouldn't expect a life sentence for the dirt that went on. I'm accepting my death, and you all will have to just face God for the dirt and the conspiracy that you played in these cases and the total technicality and everything that went on with these cases.
>
> It's too late to change the dirt and the conspiracy that the Court and the prosecutors and the cops played in my cases. It's too late to change anything. And I would never expect a life sentence.
>
> If they overturn it to life, I would tell them I'll kill again then. Because I'm not going to expect a life sentence from anybody, the dirt that they put on me and say: Oh, we're sorry. We made a mistake, so we'll overturn it to life.
>
> No. It's either acquittal, because it was justifiable homicide, or it's death in the chair. And you all will just have to face God and your own dirt with the Lord. I know I'm innocent. God knows I'm innocent. But you people are not innocent in what you're doing to me through these cases. I have been lied about--

(T 21-22)

Wuornos said she knew about defense counsel's mitigating evidence, but, "I don't give a shit, do you understand that? I don't care." (T 22) When the court asked if she wanted counsel to present the evidence, she replied that the court could sentence her to death right now and she would waive an appeal. (T 22) She continued saying that she was innocent, God was on her side, she was not afraid to die, and she would write a book to expose the

conspiracy and dirt in her cases. (T 23-24) She would not go through trial and have prosecutors continue to lie about her, "to blacken my character and get bias and prejudism to the public out there so they can get an easier conviction." She felt, "I have been lied about so bad, it's as vast as the universe up there." (T 24) She repeatedly complained about lies, did not want a jury, would not accept life, and invited the court to sentence her to death. (T 25-26) She wanted to waive her presence. (T 27)

When the court asked if Wuornos had any questions about her waivers, she complained about being transported in and out and court personnel trying to kill her, engaging in "limelighting, political, ladder-climbing, promotion jazz and capital gain," and not caring about innocence. (T 29) She felt that it did not matter whether she had evidence of her innocence, the public would not listen because of lies and her other death sentences. (T 30) She complained that another judge made a mockery of her prior trial and said, "I saw trash on my cases....I was spit on, laughed at, mocked at and lied upon...." (T 31) She thought she could not get a fair trial; no one cared because of "the number," and because she was a prostitute, a female, and a hitchhiker. (T 31) When the court accepted her waivers, she remarked, "I'm sick of this shit," and, "Let's just get the fucking thing over." (T 31-32)

Wuornos's irrational behavior continued at the sentencing hearing. She began by complaining of physical and mental mistreatment, being deprived of her watch and hairbrush, being laughed at and "tantalized," and that her hands had been cut from falling in

the van. (R 120-21) She wanted to file a grievance and a lawsuit. She accused the court of ordering her mistreatment and said, "This shit better stop." (R 121) The court told her to be quiet or he would have her gagged and bound to her chair, then allowed her to speak about the sentence. (R 122)

Wuornos made a lengthy, rambling statement complaining about being the only female with six death sentences although it was self-defense, being treated more harshly than Ted Bundy, being mistreated because she waived trial and the court was "pissed-off," being deprived of her jewelry and hairbrush, being threatened by officers who wanted to shoot or electrocute her in her cell, being deprived of "hygiene material," and being treated "like shit, worse than a dog." She said she would file a grievance and a lawsuit and inform the public in books and interviews. She felt a lot of people were on her side and believed she acted in self-defense. She concluded that the court was "going to look like trash, because that's what you are." (R 122-25)

When the court imposed the death sentence, Wuornos responded, "Big deal." (R 127) She then complained about court personnel framing her for books and movies although she had been raped and assaulted. (R 127-28) She concluded,

> So, you all can just reap off my blood. But that's, okay. Because you see, I am--I'm going to heaven. I know where I'm going.
>
> I'm deep into the Lord on death row. But you people are going to have to answer to God. And right now, as far as I can see, you're all going to hell.

(R 128)

This record shows that Wuornos's conduct before the court during both the penalty phase trial and the sentencing hearing was completely bizarre and irrational. She acted against her own self-interest not only by waiving her rights and requesting a death sentence, but also by threatening to kill again and by insulting and threatening the sentencing judge. Her conduct alone gave the court reasonable grounds to believe that she did not have a rational understanding of the proceedings nor the ability to rationally consult with counsel. Moreover, her conduct was consistent with Dr. Krop's earlier evaluation finding her to be delusional and incompetent, and it was inconsistent with the other doctors' reports finding her competent.

Under these circumstances, the court had the duty to suspend the proceedings and order a re-evaluation of Wuornos's competency. The court's failure to do so violated Wuornos's right to due process and invalidated the death sentence. Competency cannot be retroactively determined, so the death sentence must be vacated, and the case must be remanded for a determination of Wuornos's present competency before conducting a new penalty phase trial and sentencing hearing. See Drope, 420 U.S. at 183; Pridgen, 531 So. 2d at 955.

ISSUE IV

THE TRIAL COURT ERRED BY FINDING AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

The existence of aggravating circumstances must be proven by the State beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). "Moreover, even the trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden." Id.

The court found three aggravating circumstances: (1) prior convictions for five capital felonies and several violent felonies; (2) the murder was committed while Wuornos was engaged in a robbery; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R 102-03; A 3-5)

A. Cold, Calculated, and Premeditated

To establish the heightened premeditation necessary to support a finding of the cold, calculated, and premeditated aggravating factor provided by section 921.141(5)(i), Florida Statutes (1991), the State is required to prove that the defendant had a careful plan or prearranged design to kill. Clark v. State, 609 So. 2d 513, 515 (Fla. 1992); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988).

In this case, the trial court concluded, "Miss Wuornos carefully and calculatingly selected this victim, stalked him and lured him to a secluded area with the intent of killing and robbing him." (R 104; A 5) However, the State's evidence did not support this conclusion. There were no eyewitnesses to the crime, and the State presented no evidence of how or where Charles Carskaddon met Wuornos, nor of the events which transpired between them before Carskaddon was shot. (T 33-169) Detective Muck testified that Wuornos admitted shooting and killing Carskaddon in her videotaped confession, but he did not say that she admitted planning to rob and kill Carskaddon. (T 44) Wuornos's roommate, Tyria Moore testified that Wuornos came home with Carskaddon's Cadillac and firearm, but Wuornos never told her anything about his death. (T 115-18)

The court based its conclusion upon its evaluation of the State's evidence of other crimes:

> Charles Carskaddon was not the first of Miss Wuornos' murder victims. The evidence indicates that by the time Miss Wuornos killed Mr. Carskaddon she had a well established pattern of selecting white, middle-aged male victims, luring them to a secluded area with promises of sex, shooting them multiple times in the torso, and stealing their money, car and all other valuable personality in their possession.

(R 103-04; A 4-5) But this Court has ruled that a finding of cold, calculated, and premeditated cannot be based solely on evidence of other crimes:

> Furthermore, even if it were permissible for a judge to rely on the circumstances of previous crimes to support the finding of an aggravat-

> ing factor, such evidence, standing alone, can never establish, beyond a reasonable doubt, that the murder at issue was so aggravated.

Power v. State, 605 So. 2d 856, 864 (Fla. 1992). This Court also rejected a finding of cold, calculated, and premeditated based upon evidence of other crimes in Crump v. State, 622 So. 2d 963, 972 (Fla. 1993).

Moreover, the State's evidence of the prior homicides committed by Wuornos was equally deficient to show that she had a careful plan or prearranged design to kill. As in the present case, there were no eyewitnesses, no evidence of how Wuornos met the victims, no evidence of what happened before the shootings, and no admissions by Wuornos that she planned the killings in advance. (T 71-112, 125-36, 149-69)

This case is factually similar to Gore v. State, 599 So. 2d 978 (Fla.), cert. denied, __ U.S. __, __ S. Ct. __, 121 L. Ed. 2d 545 (1992). Gore met his female victim in Tennessee. They left a party in her car so she could drive him home, but she never returned. Gore arrived in Tampa driving the victim's car and pawned her jewelry. The victim's nude body was discovered in a wooded dumping area of Columbia County. The medical examiner concluded she had suffered a fatal neck injury. The State presented evidence of another incident in which Gore obtained a ride from a girl, then after riding for several hours, he displayed a knife and gained control of her car. Gore drove to a wooded dumping area, forced her to undress, raped her, drug her from the car, hit her head against a rock, strangled her, stabbed her in the

neck, arms, legs, and buttocks, then left her. Gore pawned her jewelry and drove to Kentucky in her car. This Court ruled that the trial court erred by finding the murder cold, calculated, and premeditated because there was no evidence of a calculated plan to kill the murder victim; it was possible that the murder was the result of a robbery that got out of hand, or that Gore spontaneously killed her during an escape attempt or sexual assault. Id., at 987. Similarly, Wuornos may have shot Carskaddon during an act of prostitution that got out of hand.

Even if the State had proven the existence of a prearranged design to kill, the State was also required to prove that Wuornos formed this plan through a process of calm and cool reflection. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Evidence of the defendant's mental or emotional disturbance or alcoholism may negate a finding of cold deliberation. Id. Tyria Moore testified that Wuornos was easily angered over little things, sometimes for no reason, was dependant on alcohol, drank heavily on a daily basis, and was almost always high on alcohol. (T 122-23) Bobby Copas testified that when he gave Wuornos a ride, Wuornos was "a real nice person...a sweetheart" at first, so he was shocked when she propositioned him. (T 65-66) When he rejected her offer, she became more graphic and aggravated. (T 66-67) Her personality changed. She became very mean, very aggressive, and very derogatory. (T 67) Dr. Krop diagnosed Wuornos in January, 1992, as suffering from borderline personality disorder with paranoid features. In July, 1992, he found that she was suffering from a

delusional disorder, persecutory type. (R 176) Dr. Epstein found that she suffered from a personality disorder. (R 178, p. 5) Dr. DelBeato diagnosed Wuornos as suffering from an antisocial or borderline personality disorder. (R 177, p. 3, 5) This evidence of Wuornos's alcoholism and mental or emotional disorder tended to show that "[t]here was no deliberate plan formed through calm and cool reflection, only mad acts prompted by wild emotion." Id.

The State was also required to prove beyond a reasonable doubt that Wuornos committed the murder "without any pretense of moral or legal justification." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S. Ct. 1548, 103 L. Ed. 2d 852 (1989). "[A] 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Id., at 225. In Cannady v. State, 427 So. 2d 723, 730 (Fla. 1983), this Court held that the trial court erred by finding the murder cold, calculated, and premeditated because the only direct evidence of how the murder occurred consisted of the defendant's statements, and the defendant repeatedly said he did not mean to kill the victim, he shot him because the victim jumped at him.

Similarly, the only direct evidence of how the shooting of Carskaddon occurred consisted of Wuornos's confession (T 44), and Wuornos repeatedly said she acted in self-defense, the men she shot attacked or assaulted her, and she felt she had to kill them. (T 166) While Det. Horzepa testified that Wuornos gave inconsistent

versions of her reasons for shooting Mallory, the State did not present inconsistent motives for the shooting of Carskaddon. (T 167) Horzepa also testified that Wuornos said she "killed these people basically for witness elimination because if it was found out who had done this, that she wouldn't be able to continue her trade." (T 167-68) However, the State expressly waived consideration of witness elimination as an aggravating factor because "I don't believe that witness elimination was, at the time of the commission of the offense, the main reason these offenses occurred." (T 170) Procedural default rules apply to the State as well as defendants, Cannady, 620 So. 2d at 170, so the witness elimination testimony cannot be used to defeat Wuornos's claim of a pretense of self-defense.

The trial court rejected Wuornos's claim of self-defense on other grounds:

> Although in her 3 1/2 hour confession it appears that Miss Wuornos mentioned self-defense several times, the totality of the evidence presented to the court convinces the court beyond any reasonable doubt that this murder was committed without any pretense of moral or legal justification; it was committed to facilitate a robbery.

(R 103; A 4) As argued above, the State's evidence was legally insufficient to establish that Wuornos planned to rob and kill Carskaddon, so the court's reason for rejecting Wuornos's pretense of self-defense is wrong. As in Cannady, 427 So. 2d at 730, Wuornos's repeated statements that she acted in self-defense because the men she shot attacked or assaulted her were sufficient evidence of a pretense of justification.

The trial court erred by finding the cold, calculated, and premeditated aggravating circumstance. The State failed to prove beyond a reasonable doubt that Wuornos had a careful plan or prearranged design to kill, engaged in cool and calm reflection, and acted without any pretense of justification.

B. Committed During the Commission of a Robbery

To establish the felony murder aggravating factor provided by section 921.141(5)(d), Florida Statutes (1991), on the basis of a robbery, the State must prove beyond a reasonable doubt that the robbery motivated the murder and was more than an afterthought. Parker v. State, 458 So. 2d 750, 754 (Fla. 1984), cert. denied, 470 U.S. 1088, 105 S. Ct. 1855, 85 L. Ed. 2d 152 (1985).

In this case, the trial court found:

> This murder was committed while Miss Wuornos was engaged in the crime of Robbery. Mr. Carskaddon's body was found in a secluded, rural area. The body was nude and hidden under a green electric blanket which was covered with grass and other vegetation. There was no identification on or near the body. Mr. Carskaddon had been shot 8 times. His car was stolen and a pistol identified as belonging to Mr. Carskaddon had been pawned by the defendant in Daytona Beach. Those facts, together with the pattern established by Miss Wuornos in other murders, convinces this court beyond any reasonable doubt that Miss Wuornos killed Mr. Carskaddon while the defendant was engaged in robbing him.

(R 102-03; A 3-4)

The trial court relied upon the State's circumstantial evidence to establish this aggravating factor because there was no direct evidence that Wuornos planned to rob and kill Carskaddon. But circumstantial evidence must be inconsistent with any reason-

able hypothesis of innocence to establish an aggravating factor. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). Here, there is a reasonable hypothesis that Wuornos planned nothing more than an act of prostitution with Carskaddon, then something happened which triggered the shooting, and Wuornos took Carskaddon's belongings to help conceal her crime and drove his car to get away from the remote location to which they had gone to have sex. This hypothesis is supported by Wuornos's statements to Det. Horzepa that the men she shot attacked her, and she felt she had to shoot them. (T 166)

Neither logical inferences nor evidence of other crimes can be relied upon to supply deficiencies in the State's proof of an aggravating factor. Robertson, 611 So. 2d at 1232; Power, 605 So. 2d at 864. Since the State's circumstantial evidence was legally insufficient to establish that robbery was the primary motive for the shooting, and there was no direct evidence that Wuornos planned to rob and kill Carskaddon, the court erred by finding the felony murder aggravating factor in this case. See Clark, 609 So. 2d at 515 (no evidence that taking of shooting victim's money and boots was anything but an afterthought to the killing); Jones v. State, 580 So. 2d 143, 146 (Fla. 1991) (taking officer's firearm was only incidental to the killing, not the reason for it).

C. Prior Capital Felony Convictions

At the penalty phase trial the State presented documentary evidence of Wuornos's prior convictions for three capital felonies and four robberies consisting of certified copies of judgments and

sentences for robbery in Volusia County--exhibit 1, first-degree murder and robbery in Marion County--exhibit 2, another first-degree murder and armed robbery in Marion County--exhibit 3, and first-degree murder and armed robbery in Citrus County--exhibit 4. (T 33-34)

The prosecutor told the court that Det. Pinner would bring certified copies of Wuornos's judgment and sentence for first-degree murder in Dixie County. Defense counsel offered to stipulate to that conviction if the record was established. (T 34) The prosecutor also told the court there was another judgment and sentence for first-degree murder from Volusia County, but he was not entering it into evidence and did not want the court to consider it. (T 34)

When Det. Pinner testified, no mention was made of the Dixie County judgment and sentence. (T 125-36) At the conclusion of the penalty phase trial, defense counsel told the court that Wuornos's Dixie County sentencing hearing was scheduled for February 4. (T 181) The sentencing hearing in this case was conducted on February 5, 1993. (R 119) The State presented no evidence at that hearing. (R 120-29)

Section 921.141(5)(b), Florida Statutes (1991), provides an aggravating circumstance for prior convictions for capital felonies and felonies involving the use or threat of violence. In applying this factor to this case, the trial court found:

> Miss Wuornos was previously convicted of five capital felonies and several other felonies involving the use or threat of violence to a person. The testimony and documentary evi-

> dence establishes beyond any doubt that Miss Wuornos has been previously convicted of five first degree murders and several counts of robbery.

(R 102; A 3)

The trial court erred by finding and considering five prior convictions for first-degree murder. The State expressly waived consideration of the Volusia County murder conviction. (T 34) Procedural default rules apply to the State as well as to defendants. Cannady, 620 So. 2d at 170. It is improper to consider an aggravating factor when the State did not seek application of the factor in the trial court. Id. Thus, it was improper for the court to include the Volusia County murder conviction in its finding of this aggravating circumstance.

It was also improper for the court to include the Dixie County first-degree murder conviction in its findings. Defense counsel offered to stipulate to this conviction if the record was established, (T 34) but it does not appear that the State ever established the record of the judgment and sentence in court. The State could not rely upon defense counsel's conditional offer to stipulate because the condition was never satisfied. The State has the burden of proving the existence of aggravating circumstances beyond a reasonable doubt. Robertson, 611 So. 2d at 1232. The State failed to satisfy its burden of proof regarding the Dixie County murder conviction, so the court erred by considering it. Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993).

Under these circumstances, it was proper for the court to consider only three prior murder convictions instead of five.

Since it is obviously worse to kill five people than three, the court's improper consideration of the Volusia and Dixie County murder convictions must have affected the weight given to this aggravating circumstance by the trial court.

Additionally, all of the prior convictions considered by the court except exhibit 1, the Volusia County robbery judgment and sentence entered on April 29, 1982, are presently subject to appellate review in this Court. See Wuornos v. State, Nos. 79,484, 81,059, and 81,498. If all or any of those convictions are reversed, the Eighth Amendment will require reconsideration of Wuornos's death sentence in this case. Johnson v. Mississippi, 486 U.S. 478, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988); U.S. Const. amend. VIII.

The trial court's errors in finding and considering aggravating circumstances which were not proven beyond a reasonable doubt require this Court to reweigh the aggravating and mitigating circumstances or to conduct a harmless error analysis. Parker v. Dugger, 498 U.S. 308, 319, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

The errors in this case cannot be found harmless beyond a reasonable doubt. Two of the trial court's aggravating circumstances must be stricken because they were not proven--cold, calculated, and premeditated, and committed during the commission of a robbery. The only remaining aggravating circumstance--prior convictions for capital and violent felonies--was partially invalidated by the court's consideration of five prior first-degree

murder convictions when the State proved only three and expressly waived consideration of the Volusia County first-degree murder.

Although the trial court found no mitigating circumstances (R 104-05; A 5-6), appellant will show in Issue VI, infra, that the evidence established several mitigating circumstances, including mental or emotional disturbance, troubled childhood, history of drug and alcohol abuse, impaired capacity, cooperation with police, religious belief, and protection of society by Wuornos's prior sentences, and the trial court committed reversible error in rejecting them. This combination of errors, the improper consideration of unproven aggravating factors coupled with the improper rejection of mitigating factors, requires reversal and remand for resentencing. Campbell v. State, 571 So. 2d 415, 418-20 (Fla. 1990). See also Robertson, 611 So. 2d at 1234 (consideration of unproven aggravating factors required reweighing of aggravating and mitigating circumstances by trial court).

ISSUE V

THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

The trial court found as an aggravating circumstance in support of the death sentence that the murder was committed while Wuornos was engaged in the commission of the crime of robbery. (R 102; A 3) Section 921.141(5)(d), Florida Statutes (1991), provides the following aggravating circumstance:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Defense counsel made no objection to the constitutionality of this statutory aggravating circumstance. (T 174-80) However, no objection is required to preserve the question of the facial validity of a statute, including an assertion that the statue is infirm because of overbreadth; the issue can be raised for the first time on appeal. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1982).

The felony murder aggravating circumstance is facially overbroad because it duplicates elements of first-degree murder as defined by section 782.04(1)(a), Florida Statutes (1991). This statute provides twelve ways to commit first-degree murder--premeditated murder and eleven varieties of felony murder. The

felony murder aggravating circumstance covers the seven most common forms of felony murder, omitting only escape, drug trafficking, aggravated child abuse, and distribution of cocaine or opium. Escape has its own separate aggravating circumstance provided by section 921.141(5)(e), Florida Statutes (1991). There is a separate death penalty statute for drug trafficking murders, section 921.142, Florida Statutes (1991). Most aggravated child abuse murders would likely qualify for the heinous, atrocious, or cruel aggravator provided by section 921.141(5)(h), Florida Statutes (1991). Thus, virtually all felony murders in Florida are aggravated and qualify for the death penalty. Furthermore, the felony murder aggravating circumstance applies to many premeditated murders, as found by the trial court in Wuornos's case.

Aggravating circumstances which apply to nearly all first-degree murder cases violate the Eighth and Fourteenth Amendments to the United States Constitution. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1982). "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." Arave v. Creech, 507 U.S. ___, 113 S. Ct. ___, 123 L. Ed. 2d 188, 200 (1993).

In Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), the Supreme Court upheld Louisiana's felony murder aggravating circumstance. But the Court did so only because Louisiana does not rely upon aggravating circumstances to narrow the class of defendants eligible for the death penalty. The Court found that Louisiana's capital sentencing scheme satisfies the Eighth Amendment narrowing requirement by defining first-degree murder much more narrowly than most other states.

The courts of at least three states which rely upon aggravating circumstances to narrow the class of death eligible defendants have ruled that their states' felony murder aggravating circumstances are unconstitutional. State v. Middlebrooks, 840 S.W.2d 317, 341-46 (Tenn. 1992), cert. granted, __ U.S. __, __ S. Ct. __, 123 L. Ed. 2d 466 (1993); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. Cherry, 257 S.E.2d 551 (N.C. 1979). The United States Supreme Court should resolve this issue when it decides Middlebrooks. Meanwhile, the constitutionality of Florida's felony murder aggravating circumstance has been challenged in at least two other capital appeals pending in this Court, Taylor v. State, No. 80,121, and Thompson v. State, No. 81,039.

Because the felony murder aggravating circumstance provided by section 921.141(5)(d), Florida Statutes (1991), fails to sufficiently narrow the class of persons eligible for the death penalty, it fails to provide a principled basis for distinguishing those who deserve capital punishment from those who do not. Therefore, the felony murder aggravator violates the Eighth and Fourteenth

Amendments. Because the statute is facially overbroad, the trial court committed fundamental error in applying it to Wuornos's case as a basis for imposing the death penalty. Since the court also erred by failing to find several mitigating circumstances shown by the evidence, as argued in Issue VI, infra, the error in finding and weighing an invalid aggravating factor was not harmless and requires reversal and remand for resentencing. Campbell v. State, 571 So. 2d 415, 418-20 (Fla. 1990).

ISSUE VI

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY FAILING TO FIND AND WEIGH SEVERAL MITIGATING CIRCUMSTANCES SHOWN BY THE EVIDENCE.

The Eighth and Fourteenth Amendments prohibit the State from precluding the sentencer in a capital case from considering any relevant mitigating factor, and they prohibit the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 U.S. 869, 71 L. Ed. 2d 1 (1982); U.S. Const. amends. VIII and XIV. The sentencer must be allowed to consider and give effect to mitigating evidence relevant to the defendant's background and character precisely because the punishment should be directly related to the personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. 302, 327-28, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

Moreover, the Eighth and Fourteenth Amendments require that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings, 455 U.S. at 114. To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's record and cannot ignore evidence of mitigating circumstances. Parker v. Dugger, 498 U.S. 308, 321, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991).

To insure the proper consideration of evidence of mitigating circumstances this Court has ruled that the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence and whether nonstatutory

factors are truly mitigating in nature. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). The court must find that a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). "Once established, a mitigating circumstance may not be given no weight at all." Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991).

In this case, the trial court's task was complicated by Wuornos's waiver of the right to present mitigating evidence. (T 10-32) Nonetheless, the trial court was still required to consider and weigh any mitigating evidence contained anywhere in the record to the extent that it was believable and uncontroverted. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993).

To alleviate this task in future cases where the defendant waives the right to present mitigating evidence, this Court has ruled that defense counsel must inform the court of the mitigating evidence which he believes could be presented. Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993). While the Koon rule is intended to be prospective only, defense counsel in this case was aware of this Court's original opinion issued on June 4, 1992, reported at 17 Fla. L. Weekly S337, (T 11) and told the court he could present the following evidence: Dr. Harry Krop would testify that Wuornos suffered from a borderline personality disorder. Dr. Donald DelBeato would say she has signs of antisocial and borderline personality disorder. (T 16) Det. Larry Horzepa would testify that Wuornos mentioned self-defense more than 40 times in her

confession and explained that the men either raped or assaulted her. (T 17) Lori Groddy would testify that Wuornos was adopted, had trouble with school, including truancy, but did not receive the recommended counseling, suffered from an untreated hearing impairment, was engaging in prostitution at age 16, became pregnant when she was 13 or 14, was sent to a home for runaway mothers where the child was taken from her, and spent time in a reformatory. (T 17-19) Dr. Krop would testify that Wuornos's family was dysfunctional, and Wuornos suffers from alcohol dependency. (T 19)

Following the presentation of the State's evidence, counsel suggested that the court would find doctors' reports in the court file. (T 174) He argued that Lori Groddy's testimony showed a manifestation of behavioral problems when Wuornos was a child consistent with a borderline or antisocial personality disorder for which she received no help. She was abandoned by her mother and adopted. She was argumentative and angry, displayed extreme shifts in emotional behavior, and was sexually promiscuous. Wuornos was a problem child, a runaway, and experimented with drugs, alcohol, LSD, and downers. She became a prostitute at an early age. She was raped, became pregnant, had to try to hide this from her family, and had a baby at the age of 13 or 14. (T 174-75) Wuornos was sent to Adrian School. When she returned home, she was told to leave permanently and did so at age 16 or 17. (T 176)

Counsel also argued that Tyria Moore's testimony showed that Wuornos grew up with alcoholic parents and became an alcoholic. (T 175-76) Bobby Copas testified that Wuornos was out of control. (T

176) Investigator Tilley testified that Wuornos attempted to help the police locate the body of a seventh victim in South Carolina. Wuornos also cooperated with the police by confessing. (T 176-77) Wuornos had four prior death sentences; even if they were all commuted to life, she would serve a minimum of 100 years. (T 177)

In the sentencing order, the court expressly evaluated three nonstatutory mitigating circumstances:

> (1) The defendant believed that she was acting in self-defense; (2) The defendant demonstrated contrition and cooperated by confessing and trying to assist the police in locating the body of her seventh victim; and (3) her prior convictions and sentences should make society feel safe with a life sentence for this murder.

(R 104; A 5) The court rejected the first two on the ground they were not proven. (R 104-05; A 5-6) The court found that the third was not mitigating. (R 105; A 6) The court found that none of the statutory mitigating factors exist in this case. (R 105; A 6)

The court erred in finding no mitigating circumstances to exist. The record before this Court shows uncontroverted evidence of several mitigating circumstances: A. mental or emotional disturbance, B. Wuornos's troubled childhood, C. a history of drug and alcohol abuse, D. impaired capacity, E. cooperation with police, F. religious belief, and G. Wuornos's prior sentences would protect the public.

A. Mental or Emotional Disturbance

Section 921.141(6)(b), Florida Statutes (1991), establishes as a mitigating circumstance, "The capital felony was committed while the defendant was under the influence of extreme mental or

emotional disturbance." This Court has effectively removed the adjective "extreme" from the statutory circumstance:

> However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say.

Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

Dr. Harry Krop reported that he had evaluated Wuornos on January 9, 1992, and diagnosed her as suffering from a borderline personality disorder with paranoid features. He evaluated her again on July 10, 1992, and found that her condition had worsened so that she was then suffering from a delusional disorder, persecutory type. (R 176) Dr. Joel Epstein reported that he evaluated Wuornos on August 6, 1992, and found that she was suffering from a personality disorder. (R 178, p. 1, 3, 5) Dr. Don DelBeato reported that he evaluated Wuornos on August 7, 1992, and found that she suffered from a borderline/antisocial personality disorder. (R 177, p.1, 3, 5)

Dr. Sprehe's report was inherently unreliable because he formed his opinion on the basis of a "rather brief" conversation in which Wuornos refused to be examined by him, saying she had waived mitigation. (R 179) Furthermore, he did not have an opinion that he could render with reasonable medical certainty, only reasonable medical probability. (R 179) With this weak predicate, he opined that Wuornos had a long standing personality problem, but it would not qualify as an extreme mental or emotional disturbance or

substantial impairment of her capacity. (R 179) Again, this Court has ruled that the mitigating circumstance is not restricted to extreme disturbances. Cheshire, 568 So. 2d at 912.

This evidence that Wuornos suffered from a mental or emotional disturbance was not in any way refuted by the evidence at the penalty phase trial. In fact, the testimony of three State witnesses corroborated the doctors' findings by showing that her behavior, both in childhood and as an adult, displayed symptoms of her personality disorder.

Lori Groddy was Wuornos's aunt by birth and sister by adoption. (T 147) Groddy testified that Wuornos was very argumentative and quick tempered as a child and became rebellious as she got older. (T 142) She got upset over little things. She had problems with school and truancy. She ran away from home several times. (T 143) She had a bad attitude problem and would not follow their parents' rules. (T 144) She became involved in prostitution. (T 144-45) She began drinking and using drugs. (T 145) She became pregnant, tried to hide the pregnancy, and told their father she had been raped. She was sent to an unwed mother's home to have the baby at age 13 or 14. The baby was given up for adoption. (T 140-41, 146-47) Wuornos got in trouble again and was sent to Adrian's School Home for Girls. (T 139, 141) When she returned home, she got into an argument with their father, and was told to abide by his rules or leave for good. Wuornos ran away. (T 139-40) She then wandered across the country, finally settling in Florida. (T 146)

Tyria Moore lived with Wuornos from June, 1986, to June, 1990. (T 115-16) She testified that Wuornos said she was adopted by her grandparents, but did not get along with her grandfather and stayed away from home as much as possible. She began prostitution in her early teens. She had a baby and put it up for adoption. She had sex with her brother. She was sent to reform schools, but she ran away. (T 119-20) She had scars on her forehead from an incident in which she and her sister started a fire. She ran away from home when she was a teenager. (T 121) Wuornos was easily angered over little things, then she was happy again in a few minutes. Sometimes there was no reason for her anger. (T 122) Wuornos was dependent on alcohol and drank heavily on a daily basis. She could easily drink a case of beer in a day and was almost always high on alcohol. (T 122-23)

Bobby Copas testified that he met Wuornos at a truck stop on November 4, 1990, and agreed to give her a ride . (T 64-65) Initially, Wuornos was really nice, then she propositioned Copas. When he rejected her offers, she became increasingly graphic about what she would do. (T 66) "Her personality changed. She became more aggressive, meaner." (T 67) After Copas tricked Wuornos into exiting his car at a gas station, she got really mad and "went off the deep end." She threatened to kill him. (T 68)

The evidence of Wuornos's mental or emotional disturbance was believable and substantially unrefuted, so the trial court erred by failing to find and weigh this mitigating circumstance. Farr, 621 So. 2d at 1369. In Farr, this Court specifically found that the

trial court erred by failing to consider and weigh mitigating evidence contained in psychological evaluations after Farr had waived the presentation of mitigating evidence, and that this error required the death sentence to be vacated and remanded for a new penalty phase hearing. Id. Moreover, the United States Supreme Court ruled that the Eighth Amendment mandated consideration of evidence of the defendant's antisocial personality disorder in mitigation in Eddings, 455 U.S. at 107, 115. And this Court has recognized that evidence of the defendant's borderline personality disorder is mitigating. See Heiny v. State, 620 So. 2d 171 (Fla. 1993) (counsel ineffective for failure to present mitigating evidence including borderline personality disorder).

B. Appellant's Troubled Childhood

The testimony of Lori Groddy and Tyria Moore summarized above to show that Wuornos's childhood behavior displayed symptoms of her personality disorder also established that Wuornos had suffered the ill effects of a troubled childhood, which included an inability to get along with and abide by the rules of her grandparents, trouble with school and truancy, teenaged drug and alcohol abuse, teenaged prostitution, sex with her brother, having an illegitimate child, possibly as the result of a rape, giving the child up for adoption, repeatedly running away, being sent to reform schools, and finally leaving home for good while still in her teens. (T 119-21, 139-47) In addition, Groddy testified that Wuornos's teenaged mother abandoned her and her brother. (T 147) Moore testified that

Wuornos said her grandfather drank almost every day, and her grandmother died of liver disease. (T 120)

The United States Supreme Court specifically required the consideration of evidence of a troubled childhood in mitigation in Eddings, 455 U.S. at 107, 115. This Court has also recognized that evidence of a difficult childhood is mitigating. Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992); Maxwell v. State, 603 So. 2d 490, 491-93 (Fla. 1992). In Maxwell, this Court ruled, "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Id., at 491. Since the State presented no evidence to refute the testimony of its own witnesses about Wuornos's troubled childhood, the court erred by failing to find and weigh this mitigating circumstance.

C. Drug and Alcohol Abuse

As set forth above, Groddy testified that Wuornos began drinking alcohol and using drugs, including marijuana, LSD, and downers, as a teenager. (T 145) Moore testified that Wuornos was dependent upon alcohol, drank heavily on a daily basis, easily consuming a case of beer in a day, and was almost always high on alcohol. (T 122-23) This unrefuted evidence from the State's own witnesses established both a history of alcohol and drug abuse and the likelihood that Wuornos was drinking on the day of the offense. This court has repeatedly found such a history of alcohol and drug abuse to be mitigating. Farr, 621 So. 2d at 1369; Heiney, 620 So. 2d at 173; Kramer v. State, 619 So. 2d 274, 277-78 (Fla. 1993);

Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992). Again, the trial court erred by failing to find and weigh this mitigating circumstance.

D. Impaired Capacity

Section 921.141(6)(f), Florida Statutes (1991), provides as a mitigating circumstance, "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." However, the legislature cannot constitutionally limit consideration of impaired capacity as a mitigating factor solely to those who are "substantially" impaired. See Cheshire, 568 So. 2d at 912 (cannot limit consideration to "extreme" emotional disturbance).

Dr. Epstein's report included a summary of a prior report by Dr. Barnard that "Ms. Wuornos' character structure leads her to be an impulsive and affectively unstable individual. He notes that she is likely to have decreased ability in her ability to control her anger." (R 178, p.3) Dr. Epstein concurred, "She does appear to have fewer internal resources than most individuals and is susceptible to problems in control." (R 178, p.4) On the other hand, Dr. Epstein concluded, "There appears to be no on-going psychotic process or thought disturbance which would mitigate her responsibility to control her own behavior." (R 178, p.5) This apparent self-contradiction most likely reflects Dr. Epstein's misunderstanding of the law regarding mitigating circumstances in capital cases. There is no legal requirement that Wuornos be

medically diagnosed as psychotic before her impaired capacity to control her behavior can be considered.

Dr. DelBeato found that Wuornos suffered from a borderline/antisocial personality disorder and as a result would have "impaired conscience; low stress and frustration tolerance; bitter and suspicious thought; assaultive behavior and sudden mood swings." (R 177, p. 5) In other words, her ability to recognize that her conduct was wrong and to control her wrongful behavior was impaired by her personality disorder.

Again, Dr. Sprehe's opinion that Wuornos's capacity was not substantially impaired was not reliable because it was not based upon an examination of Wuornos and was not given with reasonable medical certainty. (R 179)

Testimony by the State's witnesses confirmed the doctors' findings regarding Wuornos's impaired capacity for self-control. Copas testified that when he rejected Wuornos's offers, her personality changed and she became more aggressive and meaner. (T 67) After he tricked her into exiting his car, she "went off the deep end" and threatened to kill him. (T 68) Moore testified that Wuornos was easily angered by little things, and sometimes there was no reason for her anger. (T 122) Moore's testimony that Wuornos drank heavily on a daily basis and was almost always high on alcohol (T 122-23) established the strong probability that Wuornos was drinking heavily on the day of the offense, so that her capacity to control her behavior was further impaired by her alcohol consumption.

Because the record presents believable and substantially unrefuted evidence that Wuornos's capacity to appreciate the criminality of her conduct and to conform her conduct to the requirements of the law was substantially impaired, the trial court erred by failing to find and weigh this mitigating circumstance. Farr, 621 So. 2d at 1369; Maxwell, 603 So. 2d at 490; Santos v.State, 591 So. 2d 160, 163-64 (Fla. 1991).

E. Appellant's Cooperation with Police

Both the defendant's cooperation with the police and the fact that the defendant confessed have been recognized to be mitigating circumstances in capital cases. Maulden v. State, 617 So. 2d 298, 302 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988). The State's own evidence established that Wuornos cooperated with the police by freely and voluntarily confessing to seven murders, giving the police directions to locate the murder weapon, and by going with them to South Carolina and trying to find the body of the seventh victim. (T 44, 85-86, 99-100, 110-12, 133-34, 161-65)

The trial court considered and rejected this mitigating evidence on the ground that it did not believe Wuornos was truly contrite. (R 104-05; A 5-6) This Court has ruled that lack of remorse cannot be considered as an aggravating factor nor as an enhancement of an aggravating factor. Huff v. State, 495 So. 2d 145, 153 (Fla. 1986); Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983). Similarly, the court should not be permitted to use its perception that Wuornos was not genuinely remorseful to negate an

otherwise valid mitigating factor. Regardless of Wuornos's degree of remorse, the fact remains that she readily cooperated with the police by confessing, giving directions to locate the murder weapon, and attempting to locate the body of the seventh victim. Again, the court erred by failing to find and weigh a mitigating circumstance supported by unrefuted evidence. Farr, 621 So. 2d at 1369; Maxwell, 603 So. 2d at 491.

F. Religious Belief

This Court has recognized that the defendant's genuine religious belief is a positive character trait which must be considered in mitigation. Songer v. State, 544 So. 2d 1010, 1012 (Fla. 1989). Wuornos repeatedly expressed her belief in God and her hope for salvation at the penalty phase trial: "All I care about is going to God, because I know I'm innocent." (T 23) "I know that I have the Lord on my side and that I'm innocent." (T 23) "I am firmly into Lord Jesus Christ. I'm a firm believer in God." (T 24)

While some defendants feign religious belief hoping for some personal benefit in the sentencing process, Wuornos was not seeking more lenient treatment. Her statements were made while she was waiving her rights to a jury, to be present, and to present mitigating evidence (T 15-32) Moreover, she was requesting a death sentence: "As far as I'm concerned, you can sentence me to death right now and send me back to death row." (T 23) "I wouldn't accept life. So death is the way it's going to be." (T

25) "I would be just as happy if you just said: Okay, death row. That's it." (T 26)

Wuornos's religious beliefs were also shown by the doctors' reports. Dr. Epstein stated, "Even though she feels she has done something wrong by killing other human beings, she feels that because of the nature of her situation she will be forgiven and eventually go to Heaven." (R 178, p. 2) Dr. DelBeato noted, "I observe some religiosity as Ms. Wuornos says she has found God and wants salvation. She says she reads the Bible every day." (R 177, p. 2)

Because the record before the court established Wuornos's genuine religious belief, the court erred by failing to find and weigh this mitigating circumstance. Farr, 621 So. 2d at 1369; Maxwell, 603 So. 2d at 491.

G. Appellant's Prior Sentences

The State proved that Wuornos was sentenced by the Fifth Circuit Court on May 15, 1992, to death for each of the three first-degree murders committed in Marion and Citrus counties. (T 33-34; State's exhibits 2, 3, and 4) The State waived consideration of another judgment and sentence for first-degree murder in Volusia County. (T 34) The State told the court, but failed to prove, that Wuornos was also sentenced to death for first-degree murder in Dixie County. (T 34) In fact, Wuornos was not sentenced in Dixie County until February 4, 1993, (T 181) one day before the sentencing hearing in this case. (R 119)

Defense counsel argued that Wuornos's four prior death sentences should be considered in mitigation. If they were all commuted to life, Wuornos would serve a minimum of 100 years and never come out of prison. (T 177) The court rejected this argument, stating, "Her other convictions are an aggravating circumstance and her sentences on those convictions are not considered by this court to be in any way mitigating in this case." (R 105; A 6)

The court erred by ruling that Wuornos's sentences were not in any way mitigating. In Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990), this Court held,

> Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of the 'circumstances of the offense' which the jury may not be prevented from considering.

Just as the potential for removing Jones from society for fifty years was mitigating in that case, the fact that Wuornos had already been sentenced to death in other cases was a relevant mitigating factor in this case. If any one of those death sentences is carried out, it will most certainly protect society from any further harm by Wuornos. In Wuornos's own words, "This is unnecessary. I've got five death sentences. Why one more? How many times do you people want to kill me? You can only kill me once." (T 21)

Even if all of Wuornos's death sentences are eventually reduced to life, society would still be protected by the cumulative

effect of the 25 year mandatory minimum portions of those sentences, as in Jones. While the trial court was entitled to determine the weight to be given to this circumstance, it violated the Eighth Amendment by excluding it from consideration. Eddings, 455 U.S. at 113-15.

The court's errors in failing to find and weigh several relevant mitigating factors established by unrefuted evidence cannot be deemed harmless and requires resentencing. Farr, 621 So. 2d at 1370. Although the court stated that the few mitigating circumstances it considered and rejected "pale in comparison to the aggravating circumstances found to exist," (R 105; A 6) the court's aggravating circumstance findings were also erroneous, as argued in Issue IV, supra, and the combination of errors in finding unproven aggravating circumstances and rejecting proven mitigating circumstances rendered the court's decision to impose the death sentence so unreliable that the sentence must be vacated, and the case must be remanded for resentencing. Campbell, 571 So. 2d at 418-20.

ISSUE VII

THE TRIAL COURT VIOLATED THE UNUSUAL PUNISHMENT PROHIBITION OF THE FLORIDA CONSTITUTION BY IMPOSING A DISPROPORTIONATE DEATH SENTENCE.

This Court conducts proportionality review of every death sentence to prevent the imposition of unusual punishment prohibited by Article I, section 17 of the Florida Constitution. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman, at 169. "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional," this Court is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer, at 277. Application of the death penalty is reserved "only for the most aggravated and least mitigated murders." Id., at 278; Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974).

This case is not among the most aggravated murder cases in Florida. As argued in Issue IV, supra, two of the three aggravating circumstances found by the court are invalid because they were not proved beyond a reasonable doubt, thus eliminating the court's findings of cold, calculated, and premeditated and committed during the commission of a robbery. As also argued in Issue IV, the

remaining aggravator, prior convictions for capital and violent felonies, is partly defective because the court considered five prior first-degree murder convictions, while the State expressly waived one of them and proved only three.

This Court has affirmed death sentences supported by only one aggravating factor only in cases involving "either nothing or very little in mitigation." White v. State, 616 So. 2d 21, 26 (Fla. 1993); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). In White, the only valid aggravator was prior convictions for violent felonies. The mitigators included drug use, mental or emotional disturbance, and impaired capacity. This Court found that the death sentence was disproportionate. Id., at 25-26.

Similarly, in DeAngelo v. State, 616 So. 2d 440 (Fla. 1993), the only aggravator was cold, calculated, and premeditated. The mitigators included a history of conflict between DeAngelo and the victim, service in the army and as a firefighter, DeAngelo's confession, brain damage, and mental illness. Again, this Court held that the death sentence was disproportionate. Id., at 443-44.

In Nibert v. State, 574 So. 2d 1059 (Fla. 1990), the only aggravator was heinous, atrocious, or cruel. The mitigators included childhood abuse, remorse, potential for rehabilitation, mental or emotional disturbance, impaired capacity, chronic alcohol abuse, and heavy drinking on the day of the offense. Again, this Court found that the death sentence was disproportionate. Id., at 1061-63.

In Songer, the only aggravator was under sentence of imprisonment. The mitigators were mental or emotional disturbance, impaired capacity, age 23, remorse, drug dependency, adaptation to prison, positive change in character, emotionally impoverished childhood, positive influence on family, and religious belief. This Court ruled that death was disproportionate. Id., 544 So. 2d at 1011-12.

In this case there are a number of mitigating factors similar to those in White, DeAngelo, Nibert, and Songer which render the death sentence disproportionate. As argued in Issue VI, supra, the record before the court established seven factors which should have been found in mitigation: mental or emotional disturbance, a troubled childhood, a history of drug and alcohol abuse with the strong probability that Wuornos was drinking heavily on the day of the offense, impaired capacity, cooperation with the police, genuine religious belief, and Wuornos's prior sentences will protect the public from any further harm by her.

Even if this Court rejects Wuornos's arguments that two of the aggravating factors found by the trial court are invalid, the substantial mitigating circumstances in this case render the death sentence disproportionate. This Court has found other death sentences disproportionate in cases involving multiple aggravating factors and substantial mitigating factors similar to those in this case.

In Kramer, the aggravators were conviction of prior violent felony and heinous, atrocious, or cruel. The mitigators were

alcoholism, mental stress, severe loss of emotional control, and potential to be productive in prison. This Court found the death sentence was not proportional. Id., 619 So. 2d at 277-78.

In Fitzpatrick, the aggravators were conviction of a prior capital or violent felony, great risk of death to many people, committed during a kidnapping, avoid arrest, and pecuniary gain. The mitigating factors were mental or emotional disturbance, impaired capacity, low emotional age, and brain damage. This Court found that the death sentence was disproportionate. Id., 527 So. 2d at 812.

There are also jury life recommendation cases with even more aggravating factors found by the trial court and similar mitigating factors which demonstrate that the death sentence is disproportionate in this case. In Scott v. State, 603 So. 2d 1275 (Fla. 1992), the trial court found five aggravators: committed during a robbery; heinous, atrocious, or cruel; cold, calculated, and premeditated; prior convictions for violent felonies; and avoid arrest. This Court reversed the death sentence because the jury's life recommendation was supported by evidence of several mitigating factors: difficult and abused childhood; mentally impaired with adjustment disorder, brain damage, and borderline intelligence; drug and alcohol abuse; emotionally unstable and immature; and the capacity to form loving relationships.

Also, in Carter v. State, 560 So. 2d 1166 (Fla. 1990), the trial court found five aggravating factors and no mitigating factors. This Court reversed the death sentence because the jury's

life recommendation was supported by evidence of brain damage, mental disturbance, impaired capacity, childhood abuse, and chronic alcohol and drug abuse. Id., at 1168-69.

As shown by comparison to the other cases cited above, Wuornos's crime in this case was not among the most aggravated and least mitigated murders to come before this Court for review. Instead, it is very much like the cases in which this Court has reversed the death sentence and remanded for imposition of a life sentence. Wuornos's crime was the product of her mental or emotional disturbance, troubled childhood, alcohol abuse, and impaired capacity. Her potential for rehabilitation is shown by her cooperation with the police and her development of genuine religious beliefs. Society will be more than amply protected by her sentences in other cases. This Court should rule that the death sentence is disproportionate and remand this case with directions to sentence Wuornos to life.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentence and remand this case to the trial court for the following relief: Issue I, to allow appellant the opportunity to withdraw her guilty plea; Issue II, to conduct a new penalty phase trial with a jury and to appoint special counsel to present mitigating evidence if appellant again waives this right; Issue III, to conduct an evaluation of appellant's present competency to stand trial before conducting a new penalty phase trial or other proceedings; Issues IV, V, and VI, to reweigh the aggravating and mitigating circumstances and resentence appellant; or Issue VII, to resentence appellant to life.

APPENDIX

PAGE NO.

1. The Trial Court's Sentencing Order 1-7

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

STATE OF FLORIDA,

Indictment for

vs. Murder in the First Degree

15225

AILEEN WUORNOS

Defendant

_____________________________/ Case Number 91-1232CFAES

Memorandum of Findings in Support of Sentence

2-8-93

On June 22, 1992, the defendant, Aileen Wuornos, pled guilty to the First Degree Murder of Charles E. Carskaddon. That plea was accepted by Circuit Judge Lynn Tepper.

On January 25, 1993, Miss Wuornos appeared before this court for a sentencing proceeding by a jury pursuant to Section 921.141, Florida Statutes. She was represented at this proceeding by Mr. Steven P. Glazer, Esquire. At this proceeding, Miss Wuornos orally and in writing waived her right to (a) present any mitigating evidence, (b) have a jury recommend a sentence pursuant to Section 921.141, Florida Statutes, and (c) her presence at the sentencing proceeding before the court. Miss Wuornos was quite adamant that

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she wanted no mitigating evidence presented on her behalf and that she wanted to be sentenced to death and have that sentence executed as soon as possible.

After careful inquiry by the court of Miss Wuornos and her attorney, Mr. Glazer, and after Mr. Glazer indicated on the record the mitigating evidence he believed available to the defendant (pursuant to prospective rule enunciated in *Koon v. Dugger*, 17 FLW S337 (June 4, 1992)), the court allowed Miss Wuornos to waive her right to present any mitigating evidence, to have a jury recommend a sentence, and her presence at the sentencing proceeding required by Section 921.141, Florida Statutes.

In preparation for sentencing Miss Wuornos, this court has carefully reviewed the Florida law related to sentencing in capital cases (§921.141, Florida Statutes, and cases construing this statute) and also carefully reviewed the application of the principles of the United States Constitution to sentencing in capital cases. Furman v. Georgia, 408 U.S. 238, 33 L. Ed 2d 346, 92 S.Ct. 2726 (1972); Proffit v. Florida, 428 U.S. 242, 49 L.Ed 2d 913, 96 S.Ct. 2960 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973).

A presentence investigation was not considered by this court to offer any assistance and was not requested. It is not required. Thompson v. State, 328 So.2d 1 (Fla. 1976).

Florida law only allows two choices in imposing sentence for capital murders, those being life imprisonment with a mandatory minimum service of 25 years in prison before being eligible for

parole, or death. (§775.082, Florida Statutes).

The Florida legislature has also established guidelines to control and direct the exercise of the sentencing court's discretion in selecting and imposing the appropriate sentence in capital cases. (§921.141, Florida Statutes). Under these guidelines, the sentencing court must consider and weigh specific aggravating and mitigating circumstances and all other mitigating circumstances that might be established.

From the evidence presented during the sentencing proceeding on January 25, 1993 and the argument to the court by the State and defense counsel, this court finds beyond a reasonable doubt that the following three aggravating circumstances exist:

1. (§921.141(5)(b), Florida Statutes). Miss Wuornos was previously convicted of five capital felonies and several other felonies involving the use or threat of violence to a person. The testimony and documentary evidence establishes beyond any doubt that Miss Wuornos has been previously convicted of five first degree murders and several counts of robbery.

2. (§921.141(5)(d), Florida Statutes). This murder was committed while Miss Wuornos was engaged in the crime of Robbery. Mr. Carskaddon's body was found in a secluded, rural area. The body was nude and hidden under a green electric blanket which was covered with grass and other vegetation. There was no identification on or near the body. Mr. Carskaddon had been shot 8 times. His car was stolen and a pistol identified as belonging

to Mr. Carskaddon had been pawned by the defendant in Daytona Beach. Those facts, together with the pattern established by Miss Wuornos in other murders, convinces this court beyond any reasonable doubt that Miss Wuornos killed Mr. Carskaddon while the defendant was engaged in robbing him.

3. (§921.141(5)(i), Florida Statutes). This murder was committed in a cold, calculated, and premeditated manner and without any pretense of moral or legal justification.

Although in her 3½ hour confession it appears that Miss Wuornos mentioned self-defense several times, the totality of the evidence presented to the court convinces the court beyond any reasonable doubt that this murder was committed without any pretense of moral or legal justification; it was committed to facilitate a robbery.

This aggravating circumstance requires "... some sort of heightened premeditation, something in the perpetrator's state of mind beyond the specific intent required to prove premeditated murder". Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied 457 U.S. 1111, 102 S. Ct. 2916, 73 L.Ed 2d 1322 (1982); McCray v. State, 416 So.2d 804 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981),cert. denied 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed 2d 862 (1982). Charles Carskaddon was not the first of Miss Wuornos' murder victims. The evidence indicates that by the time Miss Wuornos killed Mr. Carskaddon she had a well established pattern of selecting white,

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middle-aged male victims, luring them to a secluded area with promises of sex, shooting them multiple times in the torso, and stealing their money, car and all other valuable personality in their possession. The theft of Mr. Carskaddon's property did not occur spontaneously following his killing. Miss Wuornos carefully and calculatingly selected this victim, stalked him and lured him to a secluded area with the intent of killing and robbing him. This kind of heightened premeditation and cold, calculated execution qualifies the murder of Charles Carskaddon by Miss Wuornos for this aggravating circumstance. Provenzano v. State, 497 So.2d 1177 (Fla. 1986).

Having found aggravating circumstances to apply, this court must determine whether there are any mitigating circumstances to weigh against these aggravating circumstances.

Although Mr. Glazer was prohibited by his client from presenting any evidence of mitigation, he argued ably that the evidence presented by the State demonstrated three non-statutory mitigating circumstances: (1) The defendant believed that she was acting in self-defense; (2) The defendant demonstrated contrition and cooperated by confessing and trying to assist the police in locating the body of her seventh victim; and (3) her prior convictions and sentences should make society feel safe with a life sentence for this murder.

This court finds that circumstances (1) and (2) were not proved. There was no evidence that Miss Wuornos believed she was

acting in self-defense in killing Mr. Carskaddon. Mentioning self-defense several times during a rambling confession is not evidence that this killing was committed under any pretense of self-defense. But even if Miss Wuornos had testified on her own behalf that she believed that she was acting in necessary self-defense in killing Mr. Carskaddon it would not have been believable in light of the other evidence. 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 Miss Wuornos feels no contrition for this crime. Circumstance (3) is not a mitigating circumstance. Her other convictions are an aggravating circumstance and her sentences on those convictions are not considered by this court to be in any way mitigating in this case. However, even if all three circumstances are considered to be mitigating, they pale in comparison to the aggravating circumstances found to exist.

Even though Mr. Glazer did not argue that any of the statutory mitigating circumstances exist, this court carefully considered the existence of all of the mitigating circumstances listed in Section 921.141(6), Florida Statutes. Upon that consideration, this court finds that the record and the evidence presented at the sentencing proceeding clearly establish that none of the seven statutory mitigating circumstances (§921.141(6)(a) - (g)) exist in this case.

Therefore, this court finds that under Florida law the

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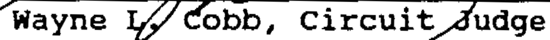
appropriate sentence for Miss Wuornos for the first-degree murder of Charles Carskaddon is death.

DONE AND ORDERED in Dade City, Pasco County, Florida, this 5th day of February, 1993.



Wayne L. Cobb, Circuit Judge

Copy to:

State Attorney
Steven Glazer, Esq.
Aileen Wuornos

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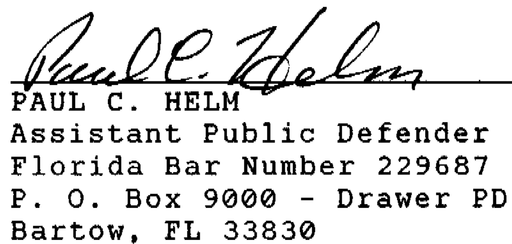
CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Margene A. Roper, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114, (904) 238-4990, on this 20th day of December, 1993.

Respectfully submitted,



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