IN THE SUPREME COURT OF FLORIDA

AILEEN CAROL WUORNOS,

Appellant,

v. CASE NO. 81,498

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR DIXIE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts subject to the following inclusions and corrections.

The robbery and pecuniary gain aggravating factors were consolidated as one aggravator (R 873).

The aggrgavator that the murder was committed to avoid a lawful arrest was based on Wuornos' videotaped statement that Antonio fell down when they were struggling and then he attempted to run away and she shot him (R 874).

Wuornos has four convictions for first degree murder. She was convicted of the first degree murder of Richard Mallory on December 1, 1989, and robbery with a firearm in Volusia County Case Number 91-257-CF (R 437-438). Mallory was shot multiple times in the torso with a small caliber handgun. He was found along with his personal belongings partly covered in a remote area. His vehicle was taken and abandoned (R 439). She was convicted of the first degree murder of Troy Burress and robbery with a firearm between July 30, and August 4, 1990, in Marion County Case Number 91-463-CF. Burress was also found with multiple gunshot wounds to the torso from a small caliber handgun and was dumped in a remote area of Marion County (R 441-442). Personal effects, as in this case, were not found on or near the body but were located later in other remote wooded areas (R 442). She was convicted of the September 11, 1990, first degree murder of Charles Humphrey and robbery with a firearm in Marion County Case Number 91-304-W. Humphrey was also found with multiple gunshot wounds to his body in a remote area of Marion County (R

440-441). She was also convicted of the first degree murder of David Spears and robbery with a firearm in Citrus County Case Number 91-112-CF. Spears was shot several times with a small caliber firearm to his body, which was dumped in a remote wooded area. His pickup truck was not at the scene where the body was later found along the highway in Citrus County (R 443). The murder of Walter Gino Antonio was the last (R 444). Wuornos was also convicted in 1981 of the armed robbery of a convenience store (R 415).

As to mitigating circumstances, the sentencing judge indicated that "The mitigating circumstances in this court's conclusion are not supported or established by the greater weight of the evidence. However, if they were, they deserve only the slightest of weight." (R 874).

When Walter Gino Antonio left on the morning of November 18, 1990, for Montgomery, Alabama, he was not carrying any firearms (R 564). He was carrying one hundred and forty dollars in cash and credit cards (R 391). When Antonio's body was found the next day he was clad only in a pair of socks (R 352). His body was found on Barrow Pit Road which is in a remote wooded area (R 352; 363). He was found laying on his left side (R 363). He had been shot three times in the back with hollow point bullets from a .22 caliber gun (R 383). There was also a gunshot wound to the back of the neck at the base of the hairline (R 363). The shot to the midline of the back injured the spinal cord and would have caused immediate paralysis. The remaining two shots to the back were fatal as they went through the lungs

and major vessels and caused massive internal bleeding (R 458). He would have been conscious for a period of time after these shots and would have died within thirty seconds or a minute (R 459). The three back wounds were at close range, the gun being about four inches from the skin (R 464; 377). A paper dinner napkin and a section of a penny wrapper were found near the body (R 375). There were no personal effects (R 377). Antonio used dentures but they were not found in his mouth (R 460). They may have been removed after he was dead. It is possible he could have been identified by the teeth. Some dentures have social security numbers or the names of the owners engraved on them (R 461).

In a telephone call to Tyria Moore prior to Wuornos' arrest Wuornos indicated that she was going to go down in history (R 770). She told Moore why she did it: "Because I fell so fucking in love with you that I was so worried about us not having an apartment and shit. That I was scared that we were going to lose our place, believing we wouldn't be together. I know it sounds crazy but its the truth." (R 771; SR 50).

The police eventually arrested Wuornos for the murder of Antonio and also charged her with robbing him (R 1). She confessed to these crimes. The relevant portion of the videotaped confession to the murder of Antonio is set out below (SR 56-66).

> O'NEIL: I told her that...the only thing I can say is she is totally focused on her friend and her friend not getting in trouble and trying to -- (inaudible)...

WUORNOS: She doesn't. (Inaudible)...I mean, she...wasn't involved in anything.

O'NEIL: ...about being drunk and raped and stuff. She just insists that she wants to continue talking.

HORZEPA: Okay.

MUNSTER: All right. Okay. Now, you told me about, uh, about the guy that worked for HRS and what you did and all. Now, the last one, and that's when Ty went...

WUORNOS: When Ty left and I got constantly drunk and everything 'cause I was bummed out that she was up there and I...I was lonely, and I went hitchhiking to make some money. I cannot remember this --(inaudible)...

MUNSTER: What if I -- (inaudible)?

WUORNOS: I know it's a Grand Prix. I don't know where I picked him up at or anything.

MUNSTER: What happened when he did pick you up?

WUORNOS: I don't remember. I was drunk as shit. This one I don't remember. This is a blackout, man. I do no...not remember anything.

MUNSTER: Well, do you remember having the ring afterwards? The ring? Man's ring? You gave it to the pawnshop.

WUORNOS: Okay, I remember a man's ring...I can't remember his face. I can't remember nothin'.

MUNSTER: Nice, big flashlight? Badge?

WUORNOS: Oh...now I remember. Okay. I remember. Okay. I remember. All right. All right. Now, I remember. Okay. He was an older fella, a little short guy. All right. Okay. That one...okay, I was drunk as could be. I

musta had a case of beer on this one. I was drunk as could be. And again, this guy, I'm askin' if I can make some money. And he said, Sure, you know, and we get out in the woods. Now I remember. Okay. We were WAY out in the woods...some, oh, God, I don't know where. Somewhere way, way, WAY out in the woods. And uh, we stripped on that one. And then he got his pants and was startin' to come toward me to do my little deed that I'm supposed to do, hustling and everything. He got out his little...his, uh, he had his wallet out of his back pants pocket, and he said he was a cop. Uh-huh. Now I remember. Same thing. You know, like, I'm a cop, he said. And he said, if you...I could arrest you and everything like this. But if you want to, you can have sex with me for free, and I'm gonna let you go and all this other jazz and shit like this. I said, I am sick and tired of people comin' up to me and tellin' me they're a cop, and I don't think you're a cop. He said, Yes, I am a Cop. I said, No. You can get a badge like that in a detective magazine. So anyway, I started to get outta the back seat, and he got outta the back seat and ran around in front of me, and he said, Listen, man, you are going to suck my dick or you're gonna have sex with me. You're gonna do something. I said, No, I'm not. And I...and that's when he...forget the struggle, we didn't even struggle. I whipped out my gun on that one. He said -- and then after I whipped out my gun, then we struggled. And then I shot him.

MUNSTER: How many times did you shoot him?

WUORNOS: Twice, I think.

MUNSTER: Okay. Now, how did you feel when you thought he was a cop?

WUORNOS: At first, I... 'cause that one guy, that HRS guy tellin' me he was a cop, I said to myself, this...he's a...that guy was an HRS guy. So this is

another faker. He's just tryin' to get a free piece of ass. And that's all I thought.

MUNSTER: This job?

WUORNOS: Right.

MUNSTER: Okay.

WUORNOS: Yeah, it pissed me off 'cause he...he...I said, this guy's a faker. He's tryin' to get a free piece of ass.

MUNSTER: Yeah.

WUORNOS: Yeah.

MUNSTER: Well, when you shot him the first time, what did he do?

WUORNOS: Mmmm, well, when we were struggling with the gun and everything else, again, he fell on the ground and he started to run back...run away. And I shot'em in the back...right in the back. And then I...

MUNSTER: What did he do then, after you shot him in the back?

WUORNOS: He just kinda looked at me for a second, and he said...he said somethin' like, uh...shit. What did he say? I think he said, You cunt...or something like that. Some...some...you cunt or somethin' like that. And I said, You bastard, and I shot him again.

MUNSTER: And then what happened?

WUORNOS: Then I just got in the car and took off.

MUNSTER: Did he say anything more after you shot at him?

WUORNOS: No.

MUNSTER: Did you shoot him in the back again?

WUORNOS: Mmmm.

MUNSTER: Or did you shoot him some place else?

WUORNOS: I think I shot'em in the back one more time. Mmm...mmm. Shot him...near the head or somethin' like that. I just kinda randomly shot. I kinda turned my head and shot.

MUNSTER: Did he ask you how -- (inaudible)?

WUORNOS: No.

MUNSTER: Uh...all right, now...

WUORNOS: Did he survive?

MUNSTER: No.

WUORNOS: Awww.

MUNSTER: Now, where did you go in his car after that, when you drove outta there?

WUORNOS: I drove away...nude. I'm drivin' away nude and I stop, got some of my clothes on and I proceeded to go further. And then the damn car stopped, and I said, What the hell's wrong with this car. And then I started it up again, and it just started up. I don't know why it stopped, but it started back up and I just started down the road. And I went back to that Fairview Motel while Ty was in Ohio, and I don't know...I don't even remember anything about -- hardly about that one. I don't know if I got anything outta the car or what. I don't even remember that. I don't hardly even remember. Oh, yeah, I got a suitcase out. That's right. Okay.

MUNSTER: What happened to that suitcase?

WUORNOS: I think I kept the suitcase, too. (Inaudible.)

MUNSTER: Did you keep anything else that belonged to him, like the badge?

WUORNOS: Oh, I threw all that stuff out. I threw everything out.

MUNSTER: Okay. You know...

WUORNOS: What was he?

MUNSTER: Uh, he...he had been a reserve cop down in Brevard County. What happened to his teeth?

WUORNOS: Oh. I took evrything outta the car and just threw everything in the woods.

MUNSTER: His teeth?

WUORNOS: Yeah, everything. I mean, I took...

MUNSTER: You know he still had sex with you, and he didn't have his teeth in?

WUORNOS: His...no, he didn't have his teeth in at all. They were in his glove box.

MUNSTER: So you went in his glove box lookin' for stuff?

WUORNOS: Yeah, and I took everything out and I threw it out in the woods.

MUNSTER: Near where his body is or someplace else?

WUORNOS: Oh, miles and miles away. I couldn't even tell you where.

MUNSTER: All right. Now there was a penny wrapper that was found near there.

WUORNOS: Penny...

MUNSTER: A penny wrapper, yeah. Do you remember rippin' open a penny wrap or anything? Did he have any pennies in his pocket?

WUORNOS: No, I don't recall anything...it probably was in the glove box or somethin'.

MUNSTER: And do you remember taking that out or takin' out some pennies or anything like that?

WUORNOS: Uh-uh.

MUNSTER: Right near where his body was?

WUORNOS: No.

MUNSTER: Okay. Uh, is this the guy whose ring you took to pawn? You don't remember?

WUORNOS: No, I don't remember that.

MUNSTER: Okay.

WUORNOS: I don't remember at all.

MUNSTER: All right.

WUORNOS: I don't know whose ring it was.

MUNSTER: I'm sorry?

WUORNOS: I don't know whose ring it was.

MUNSTER: Okay. All right. Now how about -- (inaudible)...

WUORNOS: Oh!

MUNSTER: Oh, what?

WUORNOS: There was. Yeah, it was...yeah, okay, he had a gold chain and stuck it on the seat. Yeah.

MUNSTER: He took it off and stuck it on the seat? Why'd he do that?

WUORNOS: Because...I mean, I took the ring off his finger, but he took his gold chain and stuck it on the seat. Yeah.

MUNSTER: All right. You took the ring off while he was alive or dead?

WUORNOS: Uh...my God...I think he was...not dead. I don't think he was dead when I did it. I...

MUNSTER: Had you already shot him when you took the ring off?

WUORNOS: I don't think so.

MUNSTER: Okay.

WUORNOS: And I said, like...I probably said somethin' back there as drunk as I was in my mind, I would probably say somethin' like this...why, you fuckin' bastard. Let me get somethin' outta this. You know, somethin' like that.

In regard to witness elimination, Wuornos told Detective Horzepa that she had killed the men to silence them because she knew that if she got caught she would be backtracked and they would find out about her and she would not be able to hustle. She also indicated she used the same gun in each killing that she had stolen from an old boyfriend (R 501). Wuornos indicated that she took the victims' property out of pure hatred and also revenge and she wanted to get her money's worth. She admitted to using aliases and pawning numerous items and throwing the pistol, handcuffs and flashlights into Rose Bay (R 502). She flipped-flopped as to the reasons why she killed the men: in self-defense; witness elimination; one thing and then another (R 507). She gave two different versions as to the murder of Richard Mallory. One reason was because she thought he was not going to pay and the other was that he would not take his clothes off (R 509).

After Antonio's murder Wuornos was seen near her hotel room driving a car similar to Antonio's. She parked it behind the motel. It had no tag (R 419). Wuornos stripped the car of everything in it and threw the items into the woods (SR 62). Antonio's wallet, eyeglasses, clothing and personal effects were found on a fire break dirt road off Highway 27 between Perry and Mayo on November 27, 1990 (R 393-396). Denture powder and pieces of a plastic Grand Prix emblem were also found (R 399). The abandoned car was found in the Scottsmore area of Brevard County on November 24, 1990 (R 391). All identifying decals and bumper stickers were removed. There was evidence that fingerprints had been wiped down (R 392). Budweiser cans and Marlboro light cigarette butts were found with the car (R 392; 469). A piece of paper concealed the VIN number (R 469). The doors were locked (R 470). A few pennies and factory change holder were found in the car. The tag was in the trunk (R 472).

Wuornos pawned Antonio's diamond ring at the Okay Pawn Shop in Daytona under the name Cammie Green. Items relating to other unsolved homicides had also been pawned (R 404-409). Antonio's mechanics wrench, Igloo cooler, billy club, key to handcuffs he had been carrying, flashlight and Remington shaver were found in a locker rented by Wuornos at Jack's Mini Warehouse in Daytona (R 429-433). Antonio's pocket knife, handcuffs and two flashlights, along with the murder weapon were retrieved from Rose Bay near where Wuornos had lived. Tyria Moore showed police where Wuornos had disposed of the weapon (R 435; 449; 452; 480-81).

Prior to Wuornos propositioning Bobby Copas he had gone to a drive-in window at the bank and cashed a couple of checks to pay his insurance (R 741). When Copas rejected Wuornos' first proposition he could tell it upset her. She started combing her hair. He saw a gun handle in her purse (R 472). The way Wuornos was acting scared him (R 744). Wuornos told Copas with a tag like "Copas" she would remember him (R 745). She told him "I'll kill you like I did all them other old mother fuckers." (R 745).

It was Wuornos' grandmother/mother who died an alcoholic after Wuornos had left home, not Wuornos' biological mother. It was her biological father who committed suicide while in prison or on a psychiatric ward (R 643; 690-91). Wuornos' aunt/sister Lori Grody testified that there were no complications at Wuornos' birth (R 622). Wuornos had no developmental problems as a child. Six people lived in their house, Wuornos' grandparents/parents, Lori Grody, and Wuornos' two brothers, Barry and Keith Wuornos (R 623). The house was large enough to comfortably house them and had adequate water, heat and utilities. It was located in the suburbs of Troy, Michigan (R 624). Wuornos got along with the parents when she was young but became rebellious as a teenager (R 624). Wuornos was adequately cared for. She was not inappropriately or excessively disciplined. The children were all punished the same (R 626). The siblings were grounded or got spankings. Wuornos was never severely beaten or burned. Grody knew of no sexual abuse of Wuornos by the parents (R 625). Wuornos' biological mother claimed she was physically and sexually abused by her father but Wuornos has always denied being

sexually abused by the grandfather/father (R 691). State's Exhibit #50 is an admission summary from Florida Correctional Institution dated June, 1982. It contains statements by Wuornos. She indicated that her father was a wino but never became violent. Wuornos never complained to Grody of any abuse (R 626). The children got along normally growing up (R 626). Both Wuornos and her brother Keith were adopted by the grandparents (R 626). Grody and Wuornos did not learn that Wuornos was not Grody's real sister until Grody was around ten years old and Wuornos was seven (R 635). The grandparents did not treat Wuornos and Keith any differently than the natural children. Wuornos got along fine with other adults when she was growing up (R 627). Wuornos had arguments with her friends every day but she still kept those friends. Grody did not recall Wuornos having any head injuries as a child. As a teenager Wuornos became rebellious and developed a very bad temper. She did not want to follow the rules of the house (R 628). Wuornos never suffered any serious medical problems (R 629). She was never evaluated by mental health professionals while she lived at home (R 630). To Grody's knowledge no one in the family has been diagnosed or treated for any mental or emotional problems. Neither the grandparents nor Grody were ever arrested or had trouble with the law (R 632). Wuornos ended up in a girls' reformatory. She was truant in school. She ran away at age twelve (R 637). Wuornos and Keith had caused trouble and run away many times. They again said that they were going to run away. The parents told them that they had a choice. They could stay or leave but if they left this time it

was for good and they could not come back because the parents couldn't take any more. Wuornos left for good when she was fifteen or sixteen years old (R 633; 635-636). Wuornos became pregnant at age thirteen and had a son. She hid her pregnancy from the parents for seven months (R 637). She was sent to a home and the baby was given up for adoption immediately (R 638). Grody denied that Wuornos had intercourse with her brother Keith (R 638). Grody did not recall the father ever beating Wuornos with a belt (R 638). The grandmother eventually died of complications from alcohol. She did not drink, however, while the children were growing up (R 648). Shortly after the grandfather/father killed himself. Wuornos was already on the streets by then (R 643). When Wuornos was around nineteen or twenty years old she told Grody she had been a prostitute. Wuornos drank beer on weekends and smoked marijuana (R 644). She tried LSD once or twice but didn't like it (R 645). She also took downers. Wuornos once made a trail out of a fort with oil and gas and lit it, burning her face and Grody's leg (R 645). Wuornos has light scarring on her forehead as a result (R 646).

Forensic Psychologist Dr. Donald Delbeato evaluated Wuornos on August 7, 1992, at the request of the Pasco County court at the New Port Richie Detention Center (R 575). He was to evaluate her as to her capacity to appreciate the nature of the decision to waive her rights to future court appearances. As part and parcel of that he examined her on such things as her competency, sanity, and whether or not she had mental illnesses (R 576). Dr. Delbeato found that Wuornos was not psychotic. Wuornos wanted to

waive her right to appear at trial and told Dr. Delbeato "I am point-blank guilty. I killed them in cold blood. I know what I'm doing." (R 579). Wuornos said "Give me the death penalty or give me life. But going through all of this is killing me. Just let me die in peace. I'm guilty, anyway." (R 596). Wuornos understood the difference between right and wrong. She was able to disclose facts and relate to her attorney. Dr. Delbeato found her competent to proceed and to waive her appearance. Dr. Delbeato diagnosed Wuornos as having an antisocial borderline personality disorder (R 580). She is immature, impulsive, demanding, irritable, disruptive, provocative, emotionally explosive, has defects in conscience and has antisocial features (R 581). Such traits do not affect a person's ability to deal with right or wrong, to stop their behavior or not know the consequences (R 581). A person suffering from borderline personality disorder knows what they are doing and either knows the consequences of their actions or doesn't care. Assaultive behavior is common (R 582). Dr. Delbeato did not believe Wuornos' capacity to conform her conduct to the requirements of law was substantially impaired (R 604). He also did not feel that her capacity to understand the nature and consequences of her actions was substantially impaired (R 605). Wuornos has the ability to choose to do wrong (R 606). Not all of the borderline or antisocial types commit crimes or harm people (R 607).

Borderline personality disorder is a very common condition. In the past such a person was called a sociopath, psychopath, antisocial personality or said to suffer from a character

disorder. Dr. Delbeato felt that Wuornos suffered from extreme emotional disturbance but did not suffer from mental illness (R 503). When a person has an impairment of conscience or history of criminal activity borderline personality disorder takes on an antisocial aspect and the term of art becomes "borderline antisocial personality disorder." (R 584).

Wuornos' mental health expert did not say that she behaved like a three-year-old. A previous psychologist testified that Wuornos had extremely primitive coping mechanisms, like a three-year old child (R 696).

Dr. Krop was unable to determine if Wuornos' capacity to conform her conduct to the requirements of the law was substantially impaired because Wuornos would not discuss the circumstances of the Antonio homicide with him (R 702-703). In regard to whether Wuornos suffered from an extreme mental or emotional disturbance Dr. Krop opined that she is seriously emotionally impaired (R 708).

SUMMARY OF ARGUMENT

1. Where the formalities for properly accepting a plea of guilty are complied with and Wuornos indicated she had fully discussed the charges and defenses with counsel and was satisfied with her attorney's services further inquiry was not required simply because Wuornos evidenced an intent to utilize post conviction remedies and where counsel performed effectively and received a close 7 to 5 vote for death further inquiry was unwarranted based on counsel's belief he was inexperienced and would not have represented Wuornos had she chosen to go to trial, and counsel was not thereby rendered ineffective in his performance.

2. Wuornos hitchhiked, posed as a damsel in distress, and lured older men to remote areas to rob and murder them. That she was incidentally a prostitute, who would also transact business in a remote area, does not preclude the finding of the coldness factor for a heightenedly premeditated robbery/witness elimination murder. The coldness of the crime is apparent from Wuornos shooting of the victim four times in the back and her disdain of the victim, referring to Antonio and other victims simply as "old motherfuckers." That Wuornos calculatedly and premeditatedly killed is apparent from the fact that she armed herself in advance, lured the victim to a remote area and shot multiple times to the back and neck, and continued to shoot despite lack of resistance as a matter of course.

3. Wuornos failed to object to the cold, calculated and premeditated instruction and aggravator and any challenge on the

basis of vagueness or overbreadth is procedurally barred. The murder was CCP under any definition. Even eliminating the CCP factor death is the appropriate penalty considering the remaining aggravating factors and absence of mitigation.

4. There was too much purposeful conduct on the part of Wuornos in this and previous murders for the court to have found or given significance to intoxication as a possible mitigator. Since Wuornos' motive was robbery/witness elimination, she knew the difference between right and wrong, knew the consequences of her behavior and could stop it and admitted to Dr. Delbeato she had killed the men in cold blood, affects of a borderline personality disorder had no causal relationship to the homicide and was not mitigating. Any error in not finding mitigation is harmless considering the overwhelming number of aggravators.

5. Testimony of psychiatrists that Wuornos was suffering from some emotional impairment did not warrant a finding that she acted under extreme mental or emotional disturbance at the time of the murder.

6. The victim was killed while running from Wuornos and hardly participated in the acts leading to his death.

ARGUMENT

I, II & III. THE TRIAL COURT PROPERLY DETERMINED THAT WUORNOS' PLEA WAS BEING ENTERED INTELLIGENTLY AND VOLUNTARILY; THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT BE RAISED ON DIRECT APPEAL IN THE ABSENCE OF THE ISSUE BEING DECIDED BELOW AND RECORD SUPPORT FOR THE CLAIM AS TO ALLOW PROPER APPELLATE REVIEW.

At plea proceedings held on October 28, 1992, Wuornos pled straight-up. Her plea was reduced to writing and tendered to the court (SR 2). Wuornos indicated under oath that she had signed the Offer of Plea after her attorney had explained it to her, that there were no questions in her mind about it, and that she was satisfied with Mr. Glazer as her defense attorney. She indicated that "due to the circumstances" he had done all that she felt any capable attorney would have done in defending her against these charges (SR 5). She further indicated "he has done right" and could not recount an instance where she has questioned why he had done something. It was Wuornos who had contacted Glazer (SR 6). Mr. Glazer was not court appointed. Wuornos understood that she was entering a plea of guilty to the charges of murder in the first degree and robbery while armed with a firearm. Wuornos was aware that the highest possible penalty that could be imposed on her for first degree murder is death by electrocution. Wuornos indicated that Mr. Glazer had not informed her of the maximum penalty for robbery while armed with a firearm. There was an off-the-record discussion between Wuornos and her attorney (SR 7). Wuornos indicated that Mr. Glazer informed her the maximum penalty could be "fifteen or thirty, habitual, something like that." The court informed Wuornos that "it could be as much as thirty years of imprisonment

and if you are sentenced as an habitual felony offender, it probably would be even more." Wuornos indicated that she understood. The State Attorney then interjected that the robbery as charged in the indictment carries a penalty of up to life. Since it is with a firearm it is a first degree punishable by life. The trial judge indicated that "that was the Court's thinking" but he thought there might be something special about this case. The State Attorney indicated that there wasn't. Wuornos indicated that she now understood that the maximum penalty for robbery while armed with a firearm could be life imprisonment (SR 8). Wuornos understood that pursuant to the Offer of Plea the only obligation she would incur would be to submit to the lawful orders, judgment and sentences of the court and that there were no other agreements about the penalty (SR 9). The court inquired as to Wuornos' education and she indicated that she had attended school until the ninth grade, was self-educated and did her own reading. She read the provisions in the Offer of Plea. The court inquired about the statement that no one had threatened or scared her into making the plea or promised her anything in order to induce her into making the plea. Wuornos responded that "they did in my confessions, but not in this court right here today, no." (SR 9). Wuornos indicated that her attorney had discussed with her whether or not the court would permit her confessions to be heard by a jury, whether they would be admissible in evidence. Wuornos was satisfied with his counsel concerning that. Wuornos indicated that she understood that by pleading guilty she gave up constitutional rights to

trial by judge or jury, to remain silent, to confront witnesses, to the assistance of counsel during trial, and to compel witnesses to testify (SR 10). She further understood that by entering a plea she was giving up the right to appeal the issue of guilt but was not giving up any of her rights with respect to the penalty phase (SR 11-12). Wuornos understood that paragraph five of the Offer of Plea indicated that she has had sufficient time to consider the charges against her, the possible defenses, the advice of her attorney, the waiver of her rights upon pleading guilty, and to reflect upon the consequences of her plea. She understood that she was indicating that she did not need more time to consider her plea, wanted to proceed with the plea and was offering herself to the court for other questions (SR 12). She understood there were no agreements about the death penalty. The court inquired as to whether Wuornos knew the victim Walter Gino Antonio. She responded "Oh, he just picked me up, hitchhiking. I never knew him before." She remembered what happened between her and Antonio. The judge explained to Wuornos why he had asked her about the victim.

> Sometimes, when I am inquiring into a plea, I ask a person in your circumstances, "What did you do that makes you willing to plead guilty to murder in the first degree?" And sometimes folks such as you, in the circumstances you are in, really either are not able to do it because they might have been either partially intoxicated or very mad, or for some reason they don't really clearly remember. I can also ask the state attorney to recite aloud what the State would expect to be able to prove were your trial being held before a jury as to whether you are

> guilty of murder in the first degree or not. And I'll let the state attorney make that recitation. And then, when he finishes, I will ask you, "Do you agree that if a jury were to hear your case, beginning today and, say, the rest of this week, would you expect the kind of evidence the State has spoken of to be brought before the jury?"

(SR 13-14).

The state then set forth the factual basis for the plea.

> Back on November the 18th of 1990, the victim, Mr. Walter Gino Antonio, left his home in Cocoa en route to Birmingham, Alabama. The following day, November 19th, 1990, his body was found approximately eight and a half miles north of Cross City off of highway 19. Further investigation revealed he had been shot three times in the back and one time in the back of the head with a .22-caliber firearm, using hollow-point ammunition. An extensive investigation was done. I won't go through all of the details of it. Mr. Glazer and Ms. Wuornos both have been through pleas before in this same -- not in this case, but in related cases. But suffice it to say, the victim's gold nugget ring, which had been removed from him by Ms. Wuornos at the scene, was recovered down in a Volusia County pawnshop where she had pawned it under the name of Cammie Green. Other items belonging to Mr. Antonio were subsequently found in the search of a mini-warehouse locker that belonged to Mr. Antonio (sic), to include an electric shaver, a light, an Igloo cooler, some tools, and some handcuff keys. Also found in the river, that she admitted she had put these items and other evidence suggests that she put some items, was the murder weapon itself, a .22-caliber revolver; a Mag light, a set of cuffs, and another light belonging to the victim, Mr. Antonio. Ms. Wuornos did give a confession in this case wherein she admitted that she did kill Mr. Antonio. That is a brief recital of the facts.

> There is far more to it, but I think that would suffice for purposes of this plea.

(SR 14-15).

Defense counsel indicated that the State Attorney's recitation was consistent with what his own investigation of his client's case had shown (SR 15). Wuornos indicated that the state could bring such evidence before the jury by means of live witnesses, papers and documents (SR 18). She first opined that it may not be truthful. She also indicated that "I have an attorney here that can also prove some -- possibly some various statements and articles and everything they are lying in. That's all they have been doing anyway." (SR 17). Mr. Glazer then agreed that the court's inquiry was thorough and that there was nothing more that ought to be asked bearing on the voluntariness (SR 18). Wuornos admitted that she had pled guilty to similar crimes in other courts (SR 20). The court then made an inquiry into Wuornos' mental status to make sure that she was not under any medication and was not suffering from any mental illnesses (SR 20). Wuornos indicated that she doesn't take anything, doesn't believe in drugs, had not had any medications in the last twenty-four hours, not even as much as an aspirin tablet. She indicated she has never been treated for mental illnesses of any kind and has never been on a psychiatric ward (SR 21). Defenses counsel indicated and Wuornos agreed that she had recently been psychologically evaluated by two doctors in Pasco County in July and August and both doctors found her competent to proceed. Wuornos indicated that it was her desire that the court accept her plea of guilty

as offered. The court accepted her plea finding it to have been freely and voluntarily made with knowledge of the charges against her and with an understanding of the consequences of her plea. The court found the plea was supported by a factual basis. The court concluded that Wuornos was under no mind-altering medications and had recently been found by competent experts to be in complete control of her faculties with an understanding of what was going on about her (SR 22-23).

Wuornos waived her right to be present at any further proceedings except for sentencing (SR 23-27). Defense counsel asked the judge to permit Wuornos to speak to the court about "the sentence, adjudication and things like that." (SR 28). Wuornos then made a statement.

> Okay. The reason I'm not going to take this through trial is it is going to cost the county millions of dollars, and I feel that the county -- this would create a prejudice through the county. And for me to get a jury that would not hate my guts, through the million of dollars where people are being laid off, lose their jobs, whatever, I don't want to hurt anybody in their lifestyle. And there is no way I would get a fair trial in this county because you-all can't afford it. I have already heard that there would be a whole lot of state workers laid off and everything in order to try me. I don't want that to happen. So I'm just going to waive this off and -- because I know I would never get a fair trial, and it would just cost too much money, and therefore I'd never receive a fair trial because the money wouldn't be available and everything else. I would prefer to just waive it off, like I did with Marion, and save everybody their jobs and everything else. That's all.

(SR 28-29).

The judge then asked Wuornos what her reason for making the statement was (SR 29). Wuornos responded:

> For Mallory's trial as everybody has seen now, finally realizing, I never received a fair trial. I was railroaded, and it was for the movie "Overkill." And the cops did a lot of covering of what really happened and -- about self-defense and everything else. I'm never going to receive a fair trial in the state of Florida. They are going to continue to use a conspiracy and a frame-up and a setup against me for their movie "Overkill." And also they will not admit their guilt, what they have done, although I'm sure, within the future, we'll find evidence to prove what they have done. I'm just not going to receive a fair trial at this time through the county systems because of what happened at Mallory's trial.

(SR 29-30).

Wuornos then continued:

> And the Volusia County case was a total mockery. I mean, they just -- the judge was saying, "What shall I do, take out -- should we take our shotguns out and shoot at each other? Let's get the cameras rolling. We've got a movie to make here," and all kinds of stuff. He just did not care. And neither did the jury. The jury knew about -- all about the trial. I mean, my indictments. They read about it in the newspapers, saw it on TV, saw the spliced tapes where self-defense was taken out on the news media. There was nine jury members, and the state attorney, Damore, asked the jury members, "Have you already formed an opinion of her?" And they all said yes, and they were not even excused off the bench.

(SR 30). Glazer was not Wuornos' attorney for the Volusia County case. Wuornos indicated that case was on appeal. The court

asked if Wuornos remembered the judge telling her there wasn't going to be any appeal from this guilty plea. Wuornos responded that she was hoping that "eventually there will be new evidence brought out that will open up the case in each and every case." The court pointed out that there are definite rules about new evidence and some new evidence can't be admitted (SR 31). Wuornos was pretty sure she could prove evidence of police lying. The judge informed Wuornos that the did not know what case he was coming down to hear today, knew nothing about her case, would be dedicated to her receiving a fair trial and that her attorney could move for a change of venue if her attorney could show she couldn't receive a fair trial there. Wuornos responded that a change of venue was not granted in the Mallory trial. The court pointed out any error could be the subject of a point on appeal (SR 33). The following colloquy then took place.

> DEFENDANT WUORNOS: Well, you people, there's -- the public defenders, how am I -- I'm not even ready for a trial here. If you were to, quote, hire me a public defender, he knows nothing about me. I have not seen him. There is a whole lot of stuff involved that he would never be able to expose in a courtroom unless I have a private attorney -- which I'm working on right now, to get a private attorney -- and --
>
> THE COURT: Let me interject. Didn't you tell me Mr. Glazer is a private attorney?
>
> DEFENDANT WUORNOS: No, he is not the attorney I would look for. I would look for somebody who would take care of the case, such as --
>
> MR. GLAZER: Ms. Wuornos understands that I do not have the capital

> experience necessary to take her case to trial.
>
> THE COURT: Oh.
>
> MR. GLAZER: And if this case were to go to trial, I would immediately ask to withdraw because I could not possibly defend her in the way she needs to be defended.
>
> THE COURT: Well, all right. I understand. What, if anything else, ought to be said along this line of subject matter?
>
> MR. GLAZER: Not on this subject.
>
> THE COURT: Have you said all you want to say?
>
> DEFENDANT WUORNOS: Yes, sir.
>
> THE COURT: All right.

(SR 33-34). Wuornos was then adjudged guilty of murder in the first degree as charged in Count I in Case 92-52 and robbery while armed with a firearm as charged in Count II in Case 92-52 (SR 36).

Appellant's first three points on appeal are interrelated and deal solely with the voluntariness of Wuornos' plea (Brief of Appellant p. 8). The interrelated arguments will be addressed in one consolidated point.

Appellant concedes and the record demonstrates that the court conducted a thorough inquiry to determine if Wuornos intelligently and voluntarily was pleading guilty to the charged crimes (Brief of appellant p. 12). Appellant complains, however, that when the court learned of Mr. Glazer's inexperience in capital cases it should have inquired further about the counsel

he provided his client. Appellant speculates that because Wuornos indicated there was still a "whole lot of stuff" she wanted investigated and Glazer was not the attorney she would look for she never understood that by pleading guilty there would not be a further trial of any kind and she believed that if she had the right lawyer she would be able to present her case. Appellant concludes that her plea was not intelligently made because she never realized the finality inherent in the guilty plea. Appellant further speculates that because there was an off-the-record discussion between Glazer and Wuornos after the court explained to her that there were definite rules about new evidence that Mr. Glazer had not told her that some new evidence can't be admitted. Counsel notes that even after the discussion Wuornos persisted in claiming that she could prove the police lied, a fact that would have questionable relevance at any post conviction proceeding, thus counsel's advice must have been misleading. Appellant contends that the court should have inquired with specificity about Wuornos' "unarticulated" defense and made sure that if she still wanted to plead guilty she knew she was abandoning it. Appellant further complains that the court never explained to her that by pleading guilty she would give up the right to cross-examine the police and expose fabrications. Appellant also alleges that Wuornos was confused about the impact her plea would have on future litigation and it is unclear what her lawyer told her and what she thought she could do after pleading guilty. Appellant concludes that the court should have had Glazer withdraw and let Wuornos hire an

attorney familiar with capital case defenses or appointed a public defender or reiterated that a guilty plea would forever forfeit her right to present evidence of her innocence. Wuornos argues that the record lacks an affirmative showing that she intelligently and voluntarily pled guilty.

The state would first point out that Wuornos is no novice at entering pleas. Wuornos admitted that she had pled guilty to similar crimes in other courts (SR 20). See, Wuornos v. State, 644 So. 2d 1012 (Fla. 1994). In closing argument counsel argued that Wuornos was not asking for anything and wants to die for her crimes. Counsel continued:

> In four cases she gave up her right to got to trial, because she was guilty and she just said she's guilty. She's confessed and cooperated with the police to the best of her ability. And she's given up her right to be here. She's given up her right to spend all kinds of Dixie County money on a trial. And she's given up the right to test whether you believe she acted in self defense.

(R 42).

Counsel pointed out that a theme in Wuornos' confessions was self-defense but the police were not interested in giving her a reason to exonerate herself in her confession (R 44-45). Counsel further pointed out that it was Wuornos' opinion and belief that these men had threatened her. She had been raped several times in the past in her life, and she was not going to take it anymore. She carried a gun, because if anybody ever threatened to attack or rape her again she was not going to let it happen (R 48). Counsel was obviously aware of Wuornos'

imperfect defense of self-defense and what her defenses were if she proceeded to trial.

The Offer of Plea indicates Wuornos and her attorney fully discussed all aspects of the case and that counsel had explained any defenses to the charges (R 5). The court went over paragraph five of the Offer and Wuornos understood that provision indicated she had had sufficient time to consider possible defenses and to reflect upon the consequences of her plea. She indicated in court that she did not need more time to consider her plea and wanted to proceed (SR 12). She would have been aware of her possible defenses from her previous capital trial and pleas.

"Inexperienced" counsel's closing argument was well-reasoned, eloquent and resulted in a 7 to 5 vote for death. Counsel was obviously learned and effective in capital sentencing law and procedure despite his claim that he did not have the capital experience necessary to take her case to trial. The argument that the court should have required Mr. Glazer to withdraw is without basis. Wuornos went to trial in Volusia County for the murder of Richard Mallory under similar circumstances and her claim of self-defense and "intoxication" did not fly as to the first victim. Wuornos v. State, 644 So. 2d 1000 (Fla. 1994). The obvious strategy in this case was to admit guilt honestly and openly, thereby enabling Wuornos to argue that she was saving taxpayers money, not blaming anyone, and would be imprisoned for life. Her "unarticulated" defense is readily apparent - a recognition that her confession would likely convict her again based on the facts despite the fact that she

simultaneously made contradictory statements that she had acted in self-defense (SR 29-30). That Wuornos is less than happy with such a state of affairs should not be unexpected.

Nothing in the record supports counsel's speculation that Wuornos believed if she had the right lawyer to investigate she would be able to present her case. It is apparent from her statement that "new evidence will open up each and every case" that Wuornos is in preparatory stages of collateral attack and investigation and such statement does not indicate she is foregoing any viable present defenses. It is apparent from this and Wuornos' prior rambling statements in other cases that Wuornos' ire is directed at her portrayal in the movie "Overkill" and her suspicions the police had an additional monetary reason for doing their job (SR 29-30). It is clear from her statement to Dr. Delbeato and her penalty phase argument that Wuornos is not continuing to assert her innocence. As this court previously pointed out "a plea does not become unallowable merely because the defendant may disagree as to legal conclusions or construction of the facts. It is highly common for defendants to do just that, even after defense counsel has advised that the defendant's interpretation is not a legally valid one." Wuornos v. State, 644 So. 2d 1012, 1016 (Fla. 1994). Appellate counsel even admits that "police lying" would not necessarily grant her any relief. (Brief of Appellant p. 22). That Wuornos hopes some day to impugn the integrity of the police, even though her will was not overborne by any official misconduct in confessing hardly indicates she believes she has a viable defense or invalidates

her plea. See, Wuornos v. State, 644 So. 2d 1000, 1007 (Fla. 1994). She was advised by the court that some new evidence could not be admitted and persisted in her plea. Wuornos also well knew from going to trial in the Mallory case that she would have a right to cross-examine the police. She indicated she understood that by pleading guilty she was giving up the right to confront witnesses (SR 10).

In accordance with Boykin v. Alabama, 395 U.S. 238 (1969), Wuornos was informed that by pleading guilty she waived the right to appeal. No authority is cited for the proposition that Wuornos had a right to be advised of "collateral" consequences, i.e. the mechanics of a future Florida Rule of Criminal Procedure. Cf. Rosemond v. State, 433 So. 2d 635 (Fla. 1st DCA 1983).

The failure to follow any of the procedures respecting the acceptance by the court of a plea does not render a plea void absent a showing of prejudice. Fla.R.Crim.P. 3.172(i). Wuornos does not ever aver that but for the omissions of the court she would not have pleaded guilty or would even now go to trial.

Where the record demonstrates that the court determined that a plea of guilty was freely and voluntarily made and that the defendant was fully aware of the consequences of the plea, the acceptance of the plea should be upheld. Mikenas v. State, 460 So. 2d 359 (Fla. 1984). Where a defendant has signed an Offer of Plea which indicated that she gave up her right to trial by pleading guilty and discussed and understood the case with the assistance of her attorney and was satisfied with her attorney's

services it is an indication of a full understanding of the significance of the plea and its voluntariness. See, McElvane v. State, 553 So. 2d 321 (Fla. 1st DCA 1989). Here, the trial court, again, went over these issues with Wuornos in court.

Claims of ineffective assistance of counsel cannot be raised on direct appeal. Kelley v. State, 486 So. 2d 578, 585 (Fla. 1986). This case is no exception. The record on appeal is hardly sufficient to allow determination of an ineffectiveness claim simply because Mr. Glazer would have declined to handle this case if it went to trial because he personally did not feel that experienced in capital litigation. The only crucial aspect of a capital case differing from other criminal cases is the penalty phase. Mr. Glazer proved to be very adept in that area, was clearly aware of incomplete, across-the-board defenses, and managed to secure a close 7 to 5 vote with not much to work with. There is not record support for the gross speculation that Wuornos was pushed to plea. Wuornos was properly advised of the punishment for robbery with a firearm, which is of little consequence considering Wuornos' prior sentences and she persisted in her plea. Bad advice on the part of counsel is hardly manifested by off-the-record conferences and subsequent one-sided statements of Wuornos. Wuornos has the vehicle of a Florida Rule of Criminal Procedure 3.850 to develop this claim further. Wuornos, herself, however has indicated satisfaction with her attorney.

IV. THE TRIAL COURT PROPERLY FOUND THAT WUORNOS COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Appellant first complains that the sentencing court's finding that each victim was a white male over the age of forty, who traveled alone and that each was killed in a remote location describes the ordinary characteristics of prostitution and that finding that the killing was cold and calculated on such basis would "discriminate against prostituted women by defining the ordinary conditions of their lives as a reason for putting them to death." (Brief of Appellant p.29). In support thereof appellant offers studies never presented to the court below.

Appellant overlooks the fact that such factual scenario is equally applicable to the highwaywoman posing as a damsel in distress or a prostitute who targets older victims likely to have more money. That Wuornos was additionally or was incidentally a prostitute does not mean that the coldness factor cannot be applied to the robbery/witness elimination murder. That the circumstances surrounding the murder point not to the mechanics of prostitution but to a prearranged plan to rob and murder are obvious. Wuornos revealed her motive for the murders to Tyria Moore: she was in love with Moore and was worried that they would lose their apartment and not be together (R 771; SR 50). That she targeted older men with money is obvious from her encounter with Bobby Copas. Up until the time Copas cashed a couple of checks Wuornos had simply hitched a ride with him. After Copas had money she propositioned him (R 741). She did not take his rejection and move on as a prostitute would. She responded as would a robber whose plans had been thwarted. Like Mr. Antonio, four previous customers were shot multiple times in the torso or

body in remote areas (R 439; 440-43). Their personal effects were disposed of in other remote areas and their vehicles taken and abandoned (R 439; 442-43). Property of value was pawned or stored in a locker (R 404-409; 429-433). That she coldly killed her victims is evident from her statement to Copas referring to them simply as "old motherfuckers" she had killed (R 745). Wuornos' theory is contrary to the facts that could be inferred from the similar crimes evidence and Wuornos' own confession.

That Wuornos calculatedly killed is evident from the fact that she armed herself in advance, lured her victims to an isolated area, shot multiple times to the torso and in the case of Antonio, shot three times in the back at close range as he obviously fled, and administered a coup de grace to the back of the neck, all for the purpose of stealing his belongings (R 383; 363).

That Wuornos premeditated and never intended to let a robbery victim live is evident from her statement to Detective Horzepa that she killed the men to silence them so she could continue to hustle (R 501). Heightened premeditation is also evident from her advance procurement of a weapon and continuing to shoot despite lack of resistance from the victim, and carrying out the killing as though it were a matter of course. Cruse v. State, 588 So. 2d 983 (Fla. 1991).

That the life of a prostitute is a sad one is not surprising. *See Report of the Florida Supreme Court Gender Bias Study Comm'n,* 42 Fla.L.Rev. 803, 892-908 (1990); Wuornos v. State, 644 So. 2d 1000, 1012 (Fla. 1994) (Kogan, J., concurring specially

with an opinion). That prostitutes may be abused by their clients is also not surprising. The fact that Wuornos carried a gun, however, is not unremarkable when one looks further, as the sentencing judge did, to the *use* that was made of that gun. Such use had nothing to do with the "grim realities of a prostituted woman's life."

Andrea Jackson's death sentence was vacated and the case remanded to the trial court with directions to empanel a new jury, to hold a new sentencing proceeding, and to resentence Jackson because the cold, calculated, and premeditated jury instruction was found to be unconstitutionally vague and the form of the instruction was objected to at trial. Jackson v. State, 19 Fla. L. Weekly S215, 217 (Fla. 1994). Despite the concurring opinions that the facts of the case did not reveal the murder to be cold, calculated and premeditated, the per curiam opinion did not preclude the finding of the coldness factor again on resentencing: "Yet, we cannot say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." *Id.* The only similarity between the murder in Jackson and the present case, in any event, is the gunshot wounds to the back. The homicide in Jackson occurred when Jackson was informed that she was under arrest and a struggle ensued. 19 Fla. L. Weekly at S218. According to Wuornos' own confession "...forget the struggle, we didn't even struggle. I whipped out my gun on that one." (SR 56-66). Even according to Wuornos there was no panic

and fear of the victim. She was simply "pissed off because he was trying to get a free piece of ass." (SR 56-66). In Jackson a police officer was killed and unlike this case, he was not one of a group of "old motherfuckers" for whom Wuornos had disdain and whose property she pawned and stored. Wuornos' behavior in repeatedly shooting the victim manifests not "compensatory impulses" due to lack of strength and risk of being killed but is consistent with her avowed intent to silence the victims. A truly similar case, in which the CCP factor was properly found, is Wickham v. State, 593 So. 2d 191 (Fla. 1991), where the defendant hid behind a car while a woman and children lured a passing motorist into stopping, and then shot and robbed the motorist.

Hardwick v. State, 461 So. 2d 79 (Fla. 1984), spoke to the impulsive felony murder situation. Wuornos wanted to continue living with Tyria Moore and robbed the men for money and killed them to silence them so she could continue hustling. Each man whose property was taken was killed. They were shot multiple times in vital areas to ensure their deaths and Antonio was shot in the back while trying to flee. This case embodies the heightened premeditation and prearranged design contemplated in Rogers v. State, 511 So. 2d 526 (Fla. 1987).

An incomplete claim of self-defense can constitute a pretense of moral or legal justification provided it is uncontroverted and believable. Walls v. State, 641 So. 2d 381, 388-89 (Fla. 1994); Christian v. State, 550 So. 2d 450 (Fla. 1989); Cannady v. State, 427 So. 2d 723 (Fla. 1983). Wuornos

flip-flopped in general in her confession as to the reasons why she killed the men, indicating she killed for purposes of witness elimination and also that she killed the men in self-defense (R 507). Her general claim of self-defense as to all the murders is controverted by the facts of the Antonio murder. According to her own confession Antonio pretended to be a cop, she became "pissed off because he was trying to get a free piece of ass" and she "whipped out her gun on that one." At that point she indicated there was a struggle over the gun but she prevailed and Antonio fell on the ground. She shot him in the back as he started to run away. He was an older "little short guy" to begin with (SR 56-66). There was no physical evidence of a struggle. Wuornos' incomplete self-defense claim is also refuted by the similar crimes evidence. Wuornos' trial testimony in the Volusia County trial for the murder of Richard Mallory as to abuse by Mallory and shooting in self-defense was rejected by the finders of fact as unbelievable. See, Wuornos v. State, 644 So. 2d 1000, 1009 (Fla. 1994). That leaves her inconsistent confession standing, in which she admitted to having killed Mallory for one of two reasons, none of which have anything to do with self-defense: he refused to pay or he would not take his clothes off (R 509). There are also the remaining similar murders accomplished by shots to the torso or head. The similar crimes evidence together with the items of property Wuornos had taken from her various victims, including Antonio, refutes any claim of self-defense.

The state's theory of the case prevailed on the coldness aggravator, is more consistent with the facts of the murders and this court must view the record in the light most favorable to the prevailing theory. Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994).

Moreover, even if the cold, calculated premeditation were disallowed the remaining case for aggravation, which includes numerous violent felony convictions, could not do anything but outweigh the case for mitigation and any error in finding the coldness factor was harmless beyond a reasonable doubt. Cf. Wuornos v. State, 644 So. 2d 1000, 1012 (Fla. 1994) (Kogan, J., specially concurring) (remaining aggravators-only one 1982 robbery conviction; committed during a robbery; committed to avoid arrest; and heinous, atrocious or cruel balanced against the mitigator of a borderline personality disorder).

V. THE CLAIM THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED AND PREMEDITATED AND AVOID LAWFUL ARREST AGGRAVATING FACTORS IS PROCEDURALLY BARRED.

In the penalty phase the jury was instructed *without objection* that among the aggravating circumstances that they could consider were that the crime for which the defendant is to be sentenced was "committed for the purpose of avoiding or preventing a lawful arrest" and was "committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R 848-49). Any claim that these instructions were constitutionally inadequate is procedurally barred because Wuornos failed to object to these instructions and aggravators at trial. See, e.g., Espinosa v. State, 626 So. 2d 163 (Fla. 1993); Steinhorst

v. State, 412 So. 2d 332, 338 (Fla. 1982) (except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court); Wuornos v. State, 644 So. 2d 1012, 1020 (Fla. 1991). Appellant cites no authority for the novel proposition that the enforcement of procedural bars depends upon the jury vote.

Any error in instruction not waived is harmless in any event. As argued elsewhere this crime embodies everything that is cold, calculated and premeditated and could only have been cold, calculated, and premeditated without any pretense of moral or legal justification even if the proper instruction had been given and was committed to avoid a lawful arrest under any definition. See, Wuornos v. State, 644 So. 2d 1000, 1009 (Fla. 1994); Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994); Walls v. State, 641 So. 2d 381, 387 (Fla. 1994; State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Wuornos actually made a statement indicating essentially that all her victims were killed so she could continue her trade of prostitution (R 501).

VI. THE TRIAL COURT DID NOT IGNORE EVIDENCE IN MITIGATION BUT MADE A REASONED DETERMINATION THAT THE OFFERED MITIGATION WAS NOT SUPPORTED BY THE GREATER WEIGHT OF THE EVIDENCE AND IF IT WAS THEN THE AGGRAVATING CIRCUMSTANCES OVERWHELMINGLY OUTWEIGHED THE EVIDENCE PRESENTED IN MITIGATION.

As to offered evidence concerning Wuornos' background and mental state the sentencing judge found as follows:

> NON-STATUTORY MITIGATING CIRCUMSTANCES
> The Court has considered other evidence with respect to the Defendant and possible mitigating circumstances. Doctor Krop diagnosed the Defendant's mental state as "anti-social and borderline personality disorder." He

listed eight criteria to support such a finding. He testified that five of the eight would be necessary to conclude that a person suffered from anti-social borderline personality disorder. He found the Defendant Wuornos to have all eight. These criteria are: (1) unstable and intense interpersonal relationships, (2) impulsiveness, (3) unstable mood swings or shifts, (4) inappropriate intense anger, (5) apparent suicidal threats, (6) persistent identity disturbance manifested by problems with sex orientation, (7) chronic feelings of emptiness and boredom, (8) efforts to avoid the real world. With all these however it is admitted that poor judgment, assuming she suffered from it, is no reason to kill another person. It is admitted that she knows right from wrong. There are suggestions in the evidence that the Defendant was physically abused in the homes in which she was raised. Her biological aunt (sister of the Defendant's mother, and adoptive sister) testified at the trial. She negated those claims characterizing the home in which they were reared as strict but fair. The evidence is without conflict that both her real father and her biological grandfather (adoptive father) took their own lives. Her biological grandmother (adoptive mother) died as an alcoholic; her biological mother abandoned her as an infant and left her to be reared by her grandparents who adopted her. The Court simply could not be persuaded that any of her childhood background could possibly serve as a mitigating factor for the commission of the cold blooded murder in this case. The testimony of Doctor Krop is interesting but insufficient to justify the finding of any mitigating circumstance. These possible mitigating factors are not supported by the greater weight of the evidence. Even if they were, the aggravating circumstances overwhelmingly outweigh the evidence presented in mitigation.

(SR 52-54).

In the present case there was no history of childhood abuse. Many young teenagers go to homes for unwed mothers to await birth in private and avoid the stigma attached to bearing a child out of wedlock in their community. That Wuornos' parents/grandparents loved her is no more obvious than in the fact that they took her back into the home after the birth.

Wuornos simply became rebellious as a teenager (R 624). Her sister testified she simply did not want to follow the rules of the house (R 629). She and her brother caused trouble and ran away many times, to the point where the parents could not take it anymore (R 633; 635-636). It is probably true, as counsel speculates, that "no one cried at her high school graduation" and "no father had his hair turn gray as he taught her to drive." (Brief of Appellant p. 42). The mother who managed to refrain from drinking the entire time her children were growing up just drank herself to death after Wuornos left and the father, shortly after, only followed her to the grave by killing himself (R 643; 648). Wuornos deprived them of further minor agonies.

Counsel's further speculation that "the dollar defined intimacy and trust" is also not well-taken. Wuornos' feelings of love and trust were directed not at her customers but at her lover, Tyria Moore. Moreover the dollar was an easy one, not an 8 to 5 dollar.

There is no reason at all why this court should recognize as mitigating, and it was not so argued below, the fact that after years of prostitution "the resiliency of Wuornos' spirit and reserves of dignity had become depleted." (Brief of Appellant

p. 42-43). That Wuornos chose the world's oldest profession rather than lead a law-abiding life, like her sister, was Wuornos' own decision. Bobby Copas' testimony also reveals that her spirit was hardly depleted, she had simply become a highwaywoman strongly intent on relieving her victims of their money. From her own confession and the vain combing of her hair in Copas' presence her dignity seemed to be well intact, too (R 472). Moreover a dull spirit and lack of dignity are hardly recognized mitigators and would not outweigh the numerous aggravators, including nine prior violent felonies, in any event.

There was no evidence that Wuornos took drugs at all, no less on the day of the murder. Earlier in her life she had smoked marijuana, taken downers and tried L.S.D. once or twice but did not like it (R 645). Cf. Hardwick v. State, 521 So. 2d 1071 (Fla. 1988), (evidence insufficient to establish beyond mere implication that murder defendant suffered from drug or alcohol dependency, and such factor was properly not considered in mitigation during the sentencing phase where the only evidence remotely touching on the issue was from several lay witnesses, who testified that on certain occasions the defendant used drugs and alcohol and sold drugs to others). In her confession Wuornos recalled only drinking beer (SR 56-66). This statement, absent any other evidence of impairment, is insufficient to establish the existence of intoxication as a mitigating circumstance. Robinson v. State, 574 So. 2d 108 (Fla. 1991). As the sentencing judge pointed out, "although she testified that she had consumed alcoholic beverages at about the same time of the commission of

the offense she had a recall, after reflection, of the seemingly minutest of detail concerning this murder." (SR 51). Intoxication is simply inconsistent with the cold, calculated and premeditated nature of this murder. It is belied by Wuornos true robbery motive apparent in all the murders. She told Detective Horzepa that she killed the men to silence them because she knew that if she got caught she would be backtracked, they would find out about her, and she would not be able to hustle (R 501). Where there is a lack of any indication that alcohol impaired a defendant's reasoning in constructing a carefully planned confrontation with the victim in order to kill him intoxication may be rejected as mitigation. Koon v. State, 513 So. 2d 1253 (Fla. 1987). There was too much purposeful conduct on the part of Wuornos in committing this and previous murders for the court to have given any significant weight to Wuornos' alleged intoxication, a self-imposed disability. Cf. Johnson v. State, 608 So. 2d 4 (Fla. 1992).

Since Wuornos' motive was robbery/witness elimination, she knew the difference between right and wrong, knew the consequences of her behavior and could stop it and admitted to Dr. Delbeato she had killed the men in cold blood, other incidents and affects of a borderline personality disorder would bear no causal relationship to the homicide and are not statutorily or nonstatutorily mitigating (R 581-582). Since Wuornos would not discuss the circumstances of the Antonio homicide with Dr. Krop, he was unable to determine if she *acted* under an extreme mental or emotional disturbance (R 708). The

known facts demonstrate otherwise. Her behavior with Copas, while certainly revealing an intemperate personality when her robbery plans are thwarted, also demonstrates a modus operandi of targeting older men and luring them to remote areas for the purpose of robbery, which she would have done to Copas anyway if she had been able to immediately retrieve her gun instead of fumbling for it while he managed to drive off. Wuornos had a robbery/murder scheme. That she was less than casual in executing it hardly says anything about her mental state.

The rejection of the offered mitigation should be sustained in the present case as it is supported by competent substantial evidence refuting the existence of the factors. Maxwell v. State, 603 So. 2d 490 (Fla. 1992). Mitigating circumstances against the death penalty must be reasonably established by the greater weight of the evidence. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). A trial court has broad discretion in determining the applicability of mitigating circumstances. Arbelaez v. State, 626 So. 2d 169 (Fla. 1993).

In the event the sentencing judge erred in not finding mitigation, such error is harmless beyond a reasonable doubt. Alcoholism, difficulties in childhood, and some degree of nonstatutory impaired capacity and mental disturbance were found to be of only slight weight in mitigation compared with the case in aggravation in Wuornos' first Volusia County appeal, in which at least seven subsequent violent felony convictions were not even considered. Wuornos v. State, 644 So. 2d 1000 (Fla. 1994).

It should also be pointed out that the sentencing judge did alternatively consider the offered mitigation as established and found it was entitled to little weight and was overwhelmingly outweighed by the aggravating circumstances (SR 54; R 874). The weight to be given mitigators is left to the trial judge's discretion. Mann v. State, 603 So. 2d 1141 (Fla. 1992).

VII. THE SENTENCING COURT DID NOT ERR IN NOT FINDING THE MITIGATING FACTOR OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

No expert testimony was offered by the defense that Wuornos acted under extreme mental or emotional disturbance at the time of Walter Antonio's murder. Wuornos would not discuss the circumstances of the Antonio homicide with Dr. Krop. The most Dr. Krop would opine was that Wuornos was seriously emotionally impaired (R 708). Cf. Muhammed v. State, 494 So. 2d 969 (Fla. 1986). Such testimony standing alone, does not require a finding that Wuornos acted under extreme mental or emotional disturbance at the time of the murder. In Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), this court indicated that the testimony of various psychiatrists that the defendant was suffering from some form of emotional disturbance, standing alone, did not require a finding of extreme mental or emotional disturbance. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986). Dr. Delbeato, the state's expert did opine that Wuornos had an extreme emotional but not mental disturbance (R 583). There is no indication, however, that he was actually referring to the legal terms of art embodied in Florida Statutes section 921.141(6)(b) that the capital felony was committed while the defendant was under the influence of

extreme mental or emotional disturbance. Wuornos' condition of having a borderline antisocial personality disorder is, in general, perceived as an emotional or personality impairment (R 600). This factor is not properly supported by equivocation and reservation. Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990).

The decision as to whether a particular mitigating circumstance is established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion. Sireci v. State, 587 So. 2d 450 (Fla. 1991). Where the state's theory of the case prevails this court views the record in the light most favorable to the prevailing theory. Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994). Even uncontroverted opinion testimony can be rejected, especially where it is hard to square with the other evidence. Walls v. State, 641 So. 2d 381, 390-91 n.8 (Fla. 1994). In Spencer v. State, 645 So. 2d 377 (Fla. 1994), this court indicated that the cold, calculated, and premeditated aggravating factor could not be found where there was emotional impairment. Appellee would suggest that the converse of such proposition must also be true. A proper finding upon the facts of a case that the murder was cold, calculated and premeditated should preclude finding the statutory mitigator of acting under emotional or mental disturbance or else there would be a logical inconsistency in the findings in support of a death sentence. Evidence indicating that a killing is calculated rather than the result of an uncontrollable rage reaction justifies not finding the emotional

disturbance mitigator. Cf. Roberts v. Singletary, 794 F.Supp. 1106 (S.D. Fla. 1992). This murder epitomizes all that is cold, calculated and premeditated.

The trial judge, in any event, found the offered mitigation, in general, to deserve only the slightest of weight (R 874). Furthermore, considering the numerous aggravators, which includes nine prior violent felonies, and the weak mitigation, death is the only appropriate sentence, even adding the emotional disturbance mitigator to the matrix and any possible error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

VIII. THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND IN MITIGATION THAT THE VICTIM PARTICIPATED IN THE ACTS LEADING TO HIS DEATH.

Although some arachnids may, homo sapien males usually have no concern about forfeiting their lives during the act of creating new life. Death is certainly not a normal consequence of sexual activity regardless of whether money changes hands. Had Walter Antonio actually picked Wuornos up for the purpose of sexual activity that he did not expect death to be a consequence thereof is no better established than by the fact that he was trying to avoid the same while shot in the back. Wuornos' modus operandi was to pose as a damsel in distress in order to gain entry into the car of the chivalrous unsuspecting male not looking for sex with a prostitute as is evidenced by her encounter with Bobby Copas. That Antonio did not fit within this group is hardly evidenced by the fact that his body was found nude. Wuornos indicated in a statement that she had killed

Richard Mallory because he had refused to take his clothes off R 509). Removing one's dentures is hardly a romantic prelude to sex. Given the fact that this victim was found without teeth it is highly likely that Antonio's clothes were likewise removed or he was ordered to remove them in an effort to conceal his identity. Suffice it to say that neither the good samaritan nor the highway Romeo would expect to forfeit their lives by indulging in sexual activity with a prostitute. The reasonable expectation would be to the contrary. While prostitutes often rob their customers they seldom kill them for they know that the customer, unless he is willing to be subjected to ridicule, shame, and possible criminal liablity, himself, has no recourse in the law to recoup his losses. While retrospectively Wuornos may properly be viewed as an angel of death, she is hardly a Dr. Kevorkian.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, 4th Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 28th day of March 1995.

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