IN THE SUPREME COURT OF FLORIDA

AILEEN CAROL WOURNOS,

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

INITIAL BRIEF OF APPELLANT

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:

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Aileen Wuornos either pled guilty to or was found guilty of murdering six men and sentenced to death. This appeal is her last one, and this court has affirmed four of her convictions and sentences of death. Wuornos v. State, 19 Fla. L. Weekly S215 (Fla. 1994); Wuornos v. State, 19 Fla. L. Weekly S503 (Fla. 1994). Besides this case, she has one other appeal pending, which this court has heard oral arguments.

After Wuornos' first trial, Steven Glazer represented Wuornos in the remaining five cases. In each of them, she pled guilty.

Margaret Baldwin, an Associate Professor of Law at the Florida State University College of Law and member of this courts Gender Bias Study Commission, provided assistance in writing Issues IV and VI.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Dixie County on April 16, 1994 charged the defendant Aileen Wuornos with the first degree murder of Walter Antonio and one count of Robbery with a firearm (R 01-02). She pled not guilty to those offenses (R 4) but later admitted committing them (R 5-6). The court, after conducting a plea hearing, accepted her change of plea (SR 35-36).

She proceeded to the penalty phase portion of the trial before Judge Royce Agner. After hearing evidence in aggravation and mitigation, and the relevant law, the jury returned a death recommendation by a vote of 7-5 (R 32). The court, following that verdict, sentenced Wuornos to death. In aggravation, it found the following:

> 1. She has nine prior convictions for violent felonies:
>
> a. four convictions of first degree murder.
>
> b. five convictions for robbery with a firearm.
>
> 2. The murder was committed during a robbery and for pecuniary gain.
>
> 3. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> 4. The murder was committed to avoid lawful arrest.

(R 45-50).

The court found that none of the statutory mitigation had been established. It did, however, determine she had proven the following non-statutory mitigation:

> 1. She had an anti-social and borderline personality disorder.
>
> 2. She may have been physically abused as a child.
>
> 3. Her natural father and her grandfather had committed suicide.
>
> 4. Her grandmother died an alcoholic.
>
> 5. Her mother abandoned her as an infant.

(R 50-53).

Regarding the armed robbery conviction, the court sentenced her to serve a consecutive term of prison of 17 years with the provision that she serve a minimum mandatory 3 years for using a firearm. The court also imposed the same mandatory sentence for the murder (R 65-67).

This appeal follows.

STATEMENT OF THE FACTS

Walter Antonio, a 62 year old security guard, decided to return to his profession of truck driving (T 515). On the morning of November 18, 1990 he left Cocoa for Montgomery, Alabama where he was to get an 18 wheel truck (T 563). Somewhere along I-95 he picked up Aileen Wuornos. The next day his nude body was found in a wooded area on a road about a quarter mile from highway 19 north of Cross City (T 361-62). He had been shot four times in the back with a .22 caliber gun (T 455).

The police eventually arrested Wuornos for his murder, and they also charged her with robbing him (R 1). She confessed to these crimes, and what she told the police succinctly relates the details leading up to Antonio's death.

> Oh.... now I remember. Okay. I remember. Okay. I remember. Alright. Alright, now I remember. Okay. He was an older fella, a little short guy. Alright. Okay That one. . . okay, I was drunk as could be. I must 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 way 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 out and was starting 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. 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 out the back seat and he 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 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 he...he...after I whipped out my gun, then we struggled. And then I shot him.

(SR 57-59).

Wuornos shot him twice. He "just kinda" looked at her then said, "You cunt. . . . or something." Angry at that, she shot him again. She turned her head and then shot him a fourth time (SR 60).

Naked herself, Wuornos took a ring from him and got into the car and drove away, eventually returning to a motel room she had rented (SR 62-64). She stripped the car of everything in it and threw the items into the woods (SR 62).

Also during November, Bobby Copas was asked to take Wuornos from a truck stop in Haines City to Orlando, ostensibly because her car had broken down, she had two children, and needed to return to Daytona Beach (T 740). He agreed, but once in the car, the defendant propositioned him (T 742). He demurred, but after a few minutes she asked him again, this time being more graphic (T 743). When he again declined, she "got real upset." Copas decided she was a person one could not say no to, so he agreed to her offer, but told her she needed to call her sister in Daytona Beach (T 744). They pulled into

a rest stop, and when she left the car, Copas locked the doors and began rolling up the windows (T 745). Stunned, Wuornos asked him what was happening. When he told her he did not want to have sex with her, she became furious (T 745). She swore at him, and told him "I'll kill you like I did all them other mother fuckers." (T 745) After hearing a final threat from her, Copas drove off, badly shaken (T 745).

Aileen Wuornos had been abandoned with her brother as a child (T 621-22) and raised by their grandparents. She often skipped school and ran away from home (T 635-36). As a teenager she developed a violent temper and rebelled against her grandparents who had adopted her (T 628). She was pregnant at 13 (T 637),[1] on her own at 16 (T 639-40), and a prostitute the next 20 years (T 643). Her mother died an alcoholic after she had left home, and her father committed suicide while either in prison or on a psychiatric ward (T 643, 691-90).

Predictably, Wuornos developed mental problems. She suffers from two diagnosed personality disorders: anti-social personality disorder, and borderline personality disorder (T 676, 682). Of the two the latter was the most pronounced, with her demonstrating every one of the eight defining

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[1]Apparently her parents learned of her condition only when she could hide it no longer (T 637). They then sent her to a home for unwed mothers and forced her to give the child up for adoption (T 637-38). Although Wuornos denied being abused by her grandfather (who had adopted her), her mother said she (the mother) had been sexually and physically abused by him (T 691).

characteristics (T 682). Of particular significance to this case, she exhibited:

> 1. A marked emotional instability. As established by the state when it called Bobby Copas, she could be pleasant one moment, and vicious the next (T 743-44).
>
> 2. Intense inappropriate anger or an inability to control her anger (T 684).
>
> 3. An extreme need for attention, often manifested by hypersexuality (T 685).
>
> 4. A very marked impulsiveness. As the expert who examined her said. "Lee is probably one of the most impulsive individuals I have ever seen." (T 695)

In short, she behaved like a three year old (T 696), and suffered so much from her emotional disorders that they played a dominant role in this murder (T 703).

SUMMARY OF THE ARGUMENTS

Aileen Wuornos pled guilty to the murder and robbery of Walter Antonio. Three of the eight issues raised in this cases focus on the voluntariness of that plea. The remaining five deal with penalty phase arguments.

The first three are interrelated and deal solely with the voluntariness of Wuornos' plea. At the end of what was an otherwise exemplary plea colloquy, Wuornos told the court, in essence, that if she had another lawyer, she would be able to present the case she wanted. Steven Glazer, her attorney, at that point quickly interjected and said that he had no experience trying a capital case, and that if his client had insisted on going to trial, he would have to withdraw. To these latter admissions, the court said only, "Oh."

It should have said more, because it has the primary responsibility to ensure the defendant intelligently and voluntarily is pleading guilty to the charged crimes. Because of the finality inherent in pleas and the large number of significant rights waived, the court should, but failed in this case to, give the defendant the "utmost solicitude" to insure she understands the full consequences of what a plea means. Here the trial judge failed to do that because it is clear Wuornos had no intelligent understanding that the full hearing on her defense would never be heard if she pled guilty. The trial court should have repeated the plea colloquy if necessary to fully ensure she knew what she was doing by pleading guilty.

But from her responses, the record clearly demonstrates she never fully comprehended that her guilty plea precluded her from raising the defenses she wanted to argue. That she viewed the plea hearing as nothing more than another court appearance clearly indicates she did not intelligently and voluntarily plead guilty.

That the court erred and that Wuornos failed to understand what was going on can, in large part, be ascribed to her lawyer's incompetence. Not only did he admit his inability to represent her in a capital case, he demonstrated his bumbling incompetence in the plea hearing. For example, he never told her what punishment she could face for the robbery conviction, and when he did, it was wrong. Similarly, when Wuornos talked with him about the finality of the plea colloquy, he apparently gave her wrong advice because she persisted in her claim that she could prove the police lied in her case. Such demonstrated incompetence, apparent from the face of the record, render any plea Wuornos entered invalid.

In sentencing Wuornos to death, the court found she had committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The facts the court relied on, however, were common to the situations prostitutes uniformly find themselves in. The typical man who uses a prostitute is a white and middle aged. Likewise, they typically isolate the woman. Finally, given the high level of violence prostitutes faces, that Wuornos carried a gun, like the violence itself, was normal.

Finally, as to this issue, she had at least a pretense of legal justification for killing Antonio because when Wuornos said she would not have sex with him he virtually demanded that she would. That she then killed him in an "execution style" reflects more her intention to prevent him from further attacking her than a cold blooded determination to kill.

Regarding the cold, calculated, and premeditated aggravating factor, the court also instructed the jury using the guidance this court in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. 1994) declared unconstitutional.

The court failed to recognize some of the valid mitigation Wuornos presented. Specifically, it never mentioned her childhood pregnancy and her life of prostitution since she had been 16. It also never included in its order her admission that she had probably drunk a case of beer the day she killed Antonio, and was "drunk as could be." It also completely ignored Dr. Krop's explanation of Wuornos' mental condition. She had, at times of stress, the maturity of a three year old, she had an extremely unstable personality, and was "one of the most impulsive" persons he had ever seen.

The trial court also never discussed Dr. Delbeato's testimony that he found she qualified for the statutory mitigating circumstance that at the time of the murder, Wuornos "was under the influence of extreme mental or emotional disturbance."

Finally, the trial court should have found that Antonio participated in the acts leading to his death, also a statutory

mitigating factor. Surely a man of his age and experience as a police officer, should have recognized the inherent violence in prostitution. That he tried to get free sex from Wuornos by using the ploy that he was a policeman and could arrest her certainly would aggravate her. Afterall, no one likes to be cheated out of their money, regardless of how it is earned. Antonio participated in his own death when he accepted Wuornos' offer of sex and his demand that she perform for free. This conclusion must follow because during the year from the first murder to the last, Wuornos must have had hundreds of men. Yet she killed only six of them. A reasonable likelihood arises that these few men, of which Antonio was one, provoked her to violence.

ARGUMENT

ISSUE I

THE COURT ERRED IN FULLY DETERMINING THE VOLUNTARINESS OF WUORNOS' PLEA WHEN HER TRIAL ATTORNEY CONFESSED THAT HE LACKED THE EXPERIENCE TO TRY A CAPITAL CASE, AND THAT IF WUORNOS HAD INSISTED ON GOING TO TRIAL HE WOULD HAVE MOVED TO WITHDRAW AS HER COUNSEL, A VIOLATION OF HER FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

This issue and the following two points focus on a remarkable admission Steven Glazer, Wuornos' attorney, made at the end of the plea colloquy in which Wuornos pled guilty to the first degree murder of Antonio and robbing him with a gun. The court had accepted her plea and had conducted what, to all appearances, appeared to be a thorough inquiry to determine if the defendant intelligently and voluntarily was pleading guilty to the charged crimes. Then, just as he was about to accept her plea, the proceeding unraveled.

> THE COURT: I don't mean to disappoint you, but I'm just trying to bring you to an awareness that this Court would be dedicated to your receiving a fair trial. And your attorney has the right to, if he can show that because of the location you couldn't receive a fair trial here, then he has the right to move for what we term 'a change of venue,' to try it some other place.
>
> DEFENDANT WUORNOS: That's the thing. At the Mallory trial there was a change of venue brought up many, many times. It was denied.
>
> THE COURT: But it's a point on appeal. That may be corrected on appeal. This is why--
>
> DEFENDANT WUORNOS: Well, you people, there's--the public defenders, how am I -- I'm not even ready for trial here. If

you were to, quote, here 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.

(SR 33-34).

As argued in this issue and the next two, 1) the court, when it learned of Glazer's inexperience in capital cases should have inquired further about the counsel he provided his client, 2) Wuornos' plea, in light of Glazer's admission, was not knowingly and voluntarily made, and 3) Glazer provided ineffective assistance of counsel.

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969) provides the necessary guidance trial courts must follow in accepting a defendant's decision to plead guilty. Because such a plea is "itself a conviction" for which "nothing remains but to give judgment and determine punishment" Id. at

242, the trial judge must give the defendant "the utmost solicitude" possible to make sure "he has a full understanding of what the plea connotes and of its consequence." Id. at 243-44. Boykin also required the record to affirmatively show that the defendant intelligently and voluntarily pled guilty. Id. 242.

Rule 3.172 Fla. R. Crim. P. provides an implementing procedure for accepting guilty pleas. Significantly for this issue, the burden of determining the legitimacy of the plea rests with the trial court although the prosecutor and defense counsel "shall assist the trial judge in this function."

> 3.172(a) Voluntariness; Factual Basis. Before accepting a plea of guilty or nolo contendere, the trial judge shall be satisfied that the pleas is voluntarily entered and that there is is a factual basis for it. Counsel for the prosecution and the defense shall assist the trial judge in this function.

See, Robinson v. State, 373 So. 2d 898, 903 (Fla. 1979). To aid the court determine the voluntariness of the plea, the rule lists eight specific areas of inquiry ranging from the defendant's knowledge of the charges, the mandatory penalties, the rights the defendant is waiving by avoiding a trial, and that no further legal proceeding will occur because of the plea. Significantly, the court has no discretion regarding the scope of the inquiry but "shall address the defendant personally and shall determine [what] he or she understands" regarding the plea. Rule 3.172(c) Fla. R. Crim. P.

Plea colloquies thus deserve a close scrutiny by appellate courts because of the large number of significant constitutional and procedural rights forfeited, and because Boykin requires the trial court to give the defendant "the utmost solicitude which courts are capable of canvassing." Such careful appellate scrutiny is even more deserved where the defendant's plea of guilty moves the defendant one giant step closer to receiving a death sentence. In this case, that step may have been the final one to the electric chair because Wuornos had four prior convictions for first degree murder and five for robbery with a firearm. Death, while not automatically assured, was a distinct and strong possibility almost regardless of any mitigation she could have presented.

Several cases show how this nitpicking attention to details works.

In Williams v. State, 316 So. 2d 267 (Fla. 1975), Justice Overton, speaking for the court, held that when a defendant asserts a defense during the plea colloquy the court must make a detailed inquiry to insure the defendant "specifically and understandingly waives that defense." Id. at 273. Accord., Davis v. State, 605 So. 2d 936 (Fla. 1st DCA 1992). In fact, if the court makes no inquiry about the factual basis for the plea, the defendant has not intelligently and voluntarily entered her plea. State v. Kendrick, 336 So. 2d 353 (Fla. 1976).

If the record shows that the defendant was confused about what he was pleading to, then the court has failed to give him

the "utmost solicitude," and the resulting plea will be involuntarily given Kiehl v. State, 363 So. 2d 1100 (Fla. 2d DCA 1978); Williams v. State, 365 So. 2d 460 (Fla. 1st DCA 1978). If the defendant pleads guilty relying on bad advice from his lawyer, the plea may, likewise, be involuntary. Young v. State, 604 So. 2d 925 (Fla. 2d DCA 1992).

Finally, in Koenig v. State, 597 So. 2d 256 (Fla. 1992), the trial court in a capital case accepted the defendant's plea to first degree murder by simply relying on a signed rights waiver form Koenig's attorney had discussed with the defendant. In rejecting the trial court's finding that his plea was voluntarily given, this court recognized the careful inquiry required by Boykin and the need for an affirmative showing on the record that the defendant knowingly and intelligently pled guilty. Simply relying on a form without any direct inquiry about Koenig's level of understanding of what he was forfeiting was inadequate: "there is nothing in the record to demonstrate that he could understand the form he signed or what his attorney told him about it." Koenig at 258.

In this case, the trial court evidently wanted to insure that Wuornos intelligently and voluntarily pled guilty to the murder and robbery. Except for the last four pages of the plea hearing, it would be a model of judicial solicitousness towards the defendant. The court went through the written plea agreement with Wuornos. He covered the factors listed in Rule 3.172 with the defendant, making sure she understood what she was pleading to, what rights she was waiving, and what

punishments she was facing.[2] He made sure there was a factual basis for her plea. Thus, if the above quoted portion of the plea colloquy had never occurred, appellate counsel could not in good faith have challenged the voluntariness of Wuornos' plea.

But what do we do with that final dialog? The trial court, when it heard Glazer admit "I do not have the capital experience necessary to take her case to trial" merely said, "Oh." When counsel continued that "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 should have said, "Uh oh." When Wuornos told it that Glazer was not the attorney she "would look for" because there was still a "whole lot of stuff" that she wanted investigated (SR 31-33), the court should have said, "Oh no." Obviously she never understood that by pleading guilty "there [would] not be a further trial of any kind." Rule 3.172(c)(5) Fla. R. Crim. P. She still believed that if she had the right lawyer, she would be able to present her case with her evidence. She completely missed the import of the court's colloquy with her:

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[2]Glazer initially had not told Wuornos what sentence she could face for the robbery (SR 7). After a short courtroom huddle with him she said "Fifteen or thirty, habitual, something like that." (SR 8) That was incorrect and the Prosecutor corrected her, saying that "the robbery as charged in the indictment carries a penalty of up to life. Since it's with a firearm, it's a first degree punishable by life." (SR 8)

that she could plead not guilty, go to trial, call her witnesses, and present her case.

This last discussion with Wuornos, and Glazer's admission, seriously call into question whether she knew what she was doing in pleading guilty. The court should have stopped the proceedings after hearing her and her attorney, and repeat the plea colloquy it had only minutes earlier easily breezed through. To show Wuornos the "utmost solicitude" the court should have made absolutely sure that she understood that she would have her day in court, but only one day, and this was it.

Earlier Wuornos had told the court that "I'm hoping for eventually--well, I'm hoping eventually there will be new evidence brought out that will open up the case in each and every case. (SR 31). The court tried to deflate that hope. "Well, Mr. Glazer has told you there are definite rules about new evidence. Some new evidence can't be admitted." Evidently, he had not because there was an "off the record discussion between Mr. Glazer and the Defendant." Even after this chat Wuornos persisted in claiming that she could prove the police lied (SR 32), but the court moved on to other matters.

Here, when Wuornos claimed she had a defense, though perhaps unarticulated, the court should have inquired with specificity about it and made sure that if she still wanted to plead guilty she was abandoning it. Williams, supra. Also, the defendant here was confused about the impact her plea would have on future litigation, and it is unclear what her lawyer

had told her and more importantly what she thought she could do after pleading guilty. Kiehl, supra.

One must also question Glazer's advice. Even after he had talked with her about presenting new evidence at some future hearing, she persisted in claiming that she could prove the police lied, a fact which even if true, would have questionable relevance at any post-conviction proceeding. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992); Jones v. State, 591 So. 2d 911 (Fla. 1991). (SR 31). For someone who evidently knew nothing about capital litigation his advice not only should be suspect in general, it was wrong (SR 7-8) and misleading specifically (SR 32). Young, supra.

Finally, despite the flawless plea colloquy earlier, what happened at the end destroys its effectiveness. When Wuornos talked about her new evidence and wanting to get a real lawyer to handle her case and when Glazer admitted he was incompetent in capital matters the court should have started over at the least. Ideally, he should have had Glazer withdraw and either let Wuornos hire one who was familiar with capital case defense, or it should have appointed the Public Defender to represent her. At the least, the court should have reiterated its earlier point that Wuornos' guilty plea would forever forfeit her right to present evidence of her innocence.

As the case now stands, the record lacks the required affirmative showing that Aileen Wuornos intelligently and voluntarily pled guilty. Boykin, Koenig. The court should have inquired further when she discussed her future plans, and

the court this deficiency could have been avoided if the court had given the defendant the "utmost solicitude" in accepting her plead. This court should reverse the trial court's judgment and sentence and remand for further proceedings.

ISSUE II

AILEEN WUORNOS DID NOT INTELLIGENTLY AND VOLUNTARILY PLEAD GUILTY TO FIRST DEGREE MURDER AND ARMED ROBBERY IN VIOLATION OF HER FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The law cited and discussed in the last issue provides the legal foundation for this argument. Specifically, Wuornos could not have intelligently pled guilty to the crimes charged as long as she believed she had viable defenses and that she would some day be able to prove her innocence. Williams v. State, 316 So. 2d 267 (Fla. 1975). Similarly, if she never realized the finality inherent in the guilty plea her plea was not intelligently made. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). At least twice Wuornos raised the possibility of some defense that should have caused the court to inquire deeper and determine that she understood that she was foregoing them if she pled guilty.

In the first instance, after the court's plea colloquy, Wuornos, said: "Well I'm hoping for eventually--well, I'm hoping eventually there will be new evidence brought out that will open up the case in each and every case." (SR 31) The court, rather than exploring what that new evidence might be, merely said "Well, Mr. Glazer has told you there are definite rules about new evidence. Some new evidence can't be admitted."

Apparently, he had not, and after a brief session he evidently still had not enlightened his client about the dangers of relying on post-conviction remedies. Wuornos persisted in her claim of police lying, which the court let lie rather than telling her merely because the police lied would not necessarily grant her any relief. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992); Jones v. State, 591 So. 2d 911 (Fla. 1991). The court never explained to her that by pleading guilty, she would give up the right to examine or cross-examine the police, to expose the fabrications. Trial was the place to do that, not some post-conviction proceeding.

Wuornos obviously did not realize the finality of the plea proceeding. She had a notion that if she could hire a private lawyer, he or she would find the evidence which was there to prove her innocence. Glazer was not the one she wanted to do that (which he agreed), but the evidence was there, it just needed to be found (SR 33-34). The plea hearing evidently was a mere nuisance to her, something she needed to do, but had no real understanding why she was pleading guilty or what terrible consequences it had for her ability to establish her story. Under these circumstances, the evidence fails to clearly show Wuornos intelligently and voluntarily pled guilty to first degree murder and armed robbery. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

AILEEN WUORNOS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED HER BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 16 OF THE FLORIDA CONSTITUTION.

The last argument in this trilogy of issues surrounding Wuornos' plea focuses on the quality of Steven Glazer's representation of Wuornos. Admittedly it will be a difficult issue to win, but it is raised now to place the previous two issues in context, and to help convince this court that something definitely was amiss at that plea hearing. Normally, claims of ineffective assistance of counsel cannot be raised on direct appeal. Kelley v. State, 486 So. 2d 578, 585 (Fla. 1986). There are, however, two exceptions to this general rule. The one applicable here provides that the appellant can raise this issue if the record on appeal is sufficient "to allow determination of an ineffectiveness claim." Loren v. State, 601 So. 2d 271 (Fla. 1st DCA 1992).

In this case, Glazer's ineffectiveness shouts from the record. First, and most significant, he admitted it:

> 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.

(SR 34).

If Glazer could not represent her at trial then her plea becomes suspect. His inability to represent her at trial means that rather than frankly discussing with her the possible trial strategies and defenses he would be pushing her to plead. In fact, the admission means that he probably did not know what strategies and defenses were available or arguable.

What little we know about the murder comes exclusively from Wuornos' confession. That statement, however, clearly raised two possible defenses: self-defense and intoxication.

> Oh. . . now I remember. Okay, I remember. Okay. I remember. Alright. Alright, now I remember. Okay. He was an older fella, a little short guy. Alright. Okay. That one. . . Okay, I was drunk as could be. I must have had a case of beer on this one.--I was drunk as could be. . . So anyway, I started to get outta the back seat and he got out the back seat and he ran around in front of men and he said, Listen, man, you are going to such my dick or your're gonna have sex with me. You gonna do something. I said, No, I'm not. And I. . . we didn't even struggle, I whipped out my gun on that one. He said, and then he...he... after I whipped out my gun, then we struggled, And then I shot him.

(SR 57-59) (Emphasis supplied.)

Additionally, the plea hearing shows that Glazer either gave Wuornos no advice, bad advice, or incomplete advice on crucial issues in her change of plea. For example, he apparently never told her what the possible punishment was for robbery with a firearm, the second charged crime, and when he did, it was wrong.

> THE COURT: And for robbery while armed with a firearm, has Mr. Glazer told you the maximum penalty for that offense?

Ms. Wuornos: No.

(Whereupon, there was an off-the-record discussion between Mr. Glazer and the Defendant.)

MS. WUORNOS: Okay. He just told me.

THE COURT: All right. What is it?

MS. WUORNOS: Fifteen or thirty, habitual, something like that.

The prosecutor objected because Glazer had given her the wrong information.

MR. PAGE: I hate to interject, but the robbery as charged in the indictment carries a penalty of up to life. Since it's with a firearm, it's a first degree punishable by life.

(SR 7-8).

Later, after the court told her that by pleading guilty she would give up her right to trial and all the rights associated with it, Wuornos apparently did not understand that. She insisted that if she had had a "real" lawyer all the police lies would be exposed. Glazer was not the "one she would look for" (SR 33), indicating that even the defendant had recognized her counsel's shortcomings. Glazer obviously never told his client that the plea would largely prevent her from raising those issues. What advice he did give her on that point obviously misled her regarding her ability to present her case.

DEFENDANT WUORNOS: Well, I'm hoping for eventually-- well, I'm hoping eventually there will be new evidence brought out that will open up the case in each and every case.

THE COURT: Well, Mr. Glazer has told you there are definite rules about new evidence. Some new evidence can't be admitted.

Apparently he had not because the court reporter noted "Whereupon, there was an off-the-record discussion between Mr. Glazer and the Defendant." (SR 31) Moreover, like the sentencing information on the robbery charge, what he told her was wrong because she persisted in claiming that she could prove the police lied, and impliedly believed that it could be done at some future hearing.

> DEFENDANT WUORNOS: Okay. Evidence of police lying and we can prove it, then--
>
> THE COURT: Well --
>
> DEFENDANT WUORNOS: I'm pretty sure I can get it proved.

(SR 32).

Such bad advice is sufficient to grant Wuornos relief. C.f., Thornburg v. State, 591 So. 2d 1121 (Fla. 1st DCA 1992); Gonzalez v. State, 590 So. 2d 1080 (Fla. 2d DCA 1991) (Misstatements about consequences of guilty plea or gain time sufficient to show ineffectiveness of counsel.)

In effect, Glazer's incompetence raises a collateral issue to the one this court decided in Hamblen v. State, 527 So. 2d 800 (Fla. 1988). In that case, Hamblen waived his right to counsel, pled guilty to a first degree murder, and in essence, asked to be executed. This court, rejecting appellate counsel's argument that some sort of counsel should have had been appointed to present a case for life for Hamblen, said,

> In the field of criminal law, there is no doubt that 'death is different,' but in the final analysis, all competent defendants have a right to control their destinies.

Id. at 804.

What happens, though, in a case like this where a defendant has counsel who apparently does nothing to apprise his client of her defenses, but simply acceded to her wish to plead guilty. Was Glazer merely a Dr. Kevorkian of the the law, who did what he could to facilitate Wuornos' desire to end her life?

The law should condemn lawyers who cannot give reasonable advice to their clients as Glazer manifestly could not and did not do here. An attorney does more than simply stand by his client while she bumbles through a plea hearing. Glazer's incompetence fairly shouts from this record, and this court should recognize it, reverse the trial court's judgment and sentence, and remand for further proceedings.

ISSUE IV

THE COURT ERRED IN FINDING THAT WUORNOS COMMITTED THE MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION BECAUSE IT WAS EITHER NOT SO OR HER CLAIM OF SELF DEFENSE PRESENTED AT LEAST A PRETENSE OF LEGAL JUSTIFICATION, A VIOLATION OF HER EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Walter Antonio was the last of the six men Aileen Wuornos murdered. She killed Richard Mallory in December 1989 and killed the next victim in May, 1990. Then at approximately six to eight week intervals, she killed the other men. The court, in finding that she killed her last victim in a cold, calculated, and premeditated manner, found

> 1. Each victim was a white male, over the age of 40, who traveled alone.
>
> 2. Each was killed in a remote location, shot several times, often in the back of the head, and robbed of their belongings and cars.
>
> 3. Wuornos had an easily accessible gun.
>
> 4. She killed Antonio in an execution style: there were no signs of any struggle.

The court further rejected her version of what happened, namely that the victim, after agreeing to use Wuornos as a prostitute and taking off his clothes told her that he was a policeman, but that if he gave her free sex, he would not arrest her. As she tried to leave the back seat of the car, he struggled with her, and eventually also fought over her gun. The court also refused to believe that she acted in self defense, crediting instead "other testimony in this case." (T47-48).

The court erred in finding this aggravating factor because the state presented insufficient evidence she committed the murder as the court described, and even if it did, it never rebutted her reasonable contention that she shot Antonio in self-defense. Moreover, the court compounded the error by letting the jury consider this aggravator in reaching a recommendation of whether she should live or die.

A. The cold, calculated killing.

For the cold, calculated, and premeditated aggravating factor to apply in a particular case, this Court has required proof of a "careful plan or prearranged design" in effecting the killing. Rogers v. State, 511 So. 2d 526 (Fla. 1987); Amoros v. State, 531 So. 2d 1256 (Fla. 1988). Here the trial judge seems to have inferred the existence of such a plan from certain shared traits among the six victims the defendant killed, as well as certain similarities in the circumstances of the killings. As noted above, it found that each victim was a white male, over the age of 40, who traveled alone. In addition, each was killed in a remote location. However, as explained below, these factors describe the ordinary characteristics of prostitution. Thus, to sustain the lower court's findings that the characteristics common to most street prostitution support a conclusion that the killing was cold and calculated would discriminate against prostituted women by defining the ordinary conditions of their lives as a reason for putting them to death.

Middle aged white men comprise the vast majority of the buyer class in prostitution. See Harold R. Holzman & Sharon Pines, Buying Sex: The Phenomenology of Being a John, 4 Deviant Behav. 89, 89-95 (1982)(includes a survey of existing research on johns). "Car dates" are typically transacted in "remote locations," for obvious reasons and to the disadvantage of the woman's safety. The physical isolation of the woman functions as a means of control and dominance over her, rendering her less capable of resistance and the perpetrator more difficult to identify. See Carlton Smith & Tomas Guillen, The Search for the Green River Killer (1991); see also Crump v. State, 622 So. 2d 963 (Fla. 1993); Long v. State, 610 So. 2d 1268 (Fla. 1992)(defendants sentenced to death for seeking out prostituted women, kidnapping, binding, raping, strangling, and ultimately murdering them). These tactics echo those now more familiar in the context of domestic violence. Women beaten by their husbands and boyfriends are commonly isolated from other family and friends by the perpetrators in order to enhance the perpetrators' control over the women's behavior and to ensure secrecy surrounding the abuse. To infer that a prostituted woman is setting in motion "a prearranged plan" because the men who use her and the mechanics of the transactions look much the same day after day is analogous to inferring that a battered woman plots her own abuse by getting married and going home from work every day.

That the defendant carried a gun, a fact relied upon by the court below, is likewise unremarkable. Johns, i.e. those

who use prostitutes, unfortunately have more in common than race, gender, and age: they routinely beat, mutilate, torture, and murder they women they have "bought." Law enforcement acknowledges that the incidence of such "abuse" to be both high and nearly inevitable. The murder of 48 women in the Seattle area by the so-called "Green River" killer in the early 1980's made headlines around the country. See Carlton Smith & Tomas Guillen, The Search for the Green River Killer (1991). What made these murders so shocking was their number, and not that the victims were prostitutes. Police experts routinely acknowledge that prostituted women face extremely high risks for murder because of their isolation and anonymity, common characteristics these women share. Robert DePue, former administrator of the FBI National Center for the Analysis of Violent Crime, states: "Prostitutes can disappear, and there won't even be a missing person report filed. They're expendable people, unfortunately, in our society." Lisa Faye Kaplan, Someone is Killing U.S. Hookers, Gannett News Service, June 7, 1990. Robert Keppel, chief investigator for the Washington State Attorney General's Office and consultant to the Green River investigation, explains further: "Nobody keeps track of these women, monitors where they are going to be day by day. Often by the time the police get involved, it's a historical research project." Michael Hedges, Prostitutes, Psychopaths Too Often a Deadly Match, Wash. Times, June 12, 1990, at A10.

Explanations for the violent hostility motivating the tortures, mutilations, and murders has been little explored. In interviews with 200 prostituted women conducted in 1981 in San Francisco, the women themselves said that they believed the men were violent because they "got off on it, enjoyed it and thought it was part of the sex" or because the johns hated prostitutes or hated women in general. See Mimi Silbert & Ayala Pines, Occupational Hazards of Street Prostitutes, 8 Crim. Just. & Behav. 395, 397 (1981). See also Deborah Cameron & Elizabeth Frazer, The Lust to Kill: A Feminist Investigation of Sexual Murder 120-162 (1987).

Indeed, in this case, when Wuornos decided not to have sex with Antonio, he became belligerent, insisting that she do something (SR 58-59). The violence lurking just beneath the surface of this incident occurs all to often. The abuse women such as Wuornos receive is uncontested. A 1991 study by the Council for Prostitution Alternatives in Portland, Oregon found that 78% of 55 prostituted women reported being raped an average of 33 times a year. Susan Hunter et al., Council for Prostitution Alternatives, Inc. Annual Report (1991). Beatings ranged from 1 to 400 times in a year. Id. at 3. Fifty-three percent of women were tortured sexually by pimps and johns, with nearly a third mutilated. Id. at 3. According to Phillippa Levine, author of a 1988 study of street prostitution in Florida:

> the same dangers attached to prostitution wherever I looked. In every city and town I heard grim stories of violence and coercion,

> of rape and murder, of non-payment and forced sex, of hunger, pain, disease, and desperation. . . . [W]e should not forget the still unsolved murders of young prostitutes in Pensacola, the crack-addicted streetwalkers of Tallahassee, the heroin -addicted HIV-infected woman whose name made headlines in Tampa and whose name was disclosed by the media with little care for her health or dignity. . . . [T]he . . . [Florida] police confirmed that they knew of no [prostitutes] who had not had bad experiences with customers. Intimate transactions with strangers constitute danger in themselves, all the more so when one considers that almost all street prostitution is conducted in parked cars controlled by those customers. Women spoke of jumping out of moving cars in preference to facing weapons, of being driven to lonely areas against their will, of non-paying clients whose violent behavior forced them to comply with unanticipated desires. One interviewee described one horrific night when three separate clients threatened her with a knife.

Phillippa Levine, Prostitution in Florida--A Report Presented to the Gender Bias Study Commission of the Supreme Court of Florida 34-35 (Sept. 1988).

These findings echo earlier studies conducted in Milwaukee, Wisconsin and San Francisco, California. Eleanor Miller's 1986 study of Milwaukee street women revealed that "[t]he beatings and sexual assaults street female hustlers received at the hands of their `men', their `dates,' their wives-in-law, former `women' of their `men,' and other street people as well as the police were numerous and often brutal." Eleanor M. Miller, Street Woman 138 (1986). A 1981 study of San Francisco 200 street prostitutes reported that 70% of the women had been raped by johns, an average of 31 times per

woman, and 65% of the women had been physically abused and beaten by johns. Mimi Silbert & Ayala Pines, supra at 395. Again, the lower court's inference from the fact that the defendant carried a gun to support the conclusion that she planned a killing in a "cold and calculated" manner glibly ignores the grim realities of prostituted women's lives and the routine brutality of the men who buy them.

The remaining factors recited by the court are similarly unconvincing. The nature of the wounds, together with the lack of substantiating evidence of a struggle, do not in themselves support a finding that the killing was of an "execution-type" as the lower court concluded. Indeed, three members of this Court wrote, in concurrence in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. 1994), that Andrea Jackson's killing of a police officer was not cold, calculated or premeditated despite the fact that she had shot him four times in the head and twice in the shoulder.[3] The four wounds to the victim's back in this case instead indicate panic and fear of the victim inconsistent with the "cool and calm reflection" required by this Court to support a finding that the killing was calculated. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). Again, the related context of women's use of violence in defense against batterers is instructive. In that context, women often shoot

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[3]The majority opinion remanded the case for a new sentencing hearing because the instruction on this aggravating factor provided inadequate guidance to the jury.

their victims several times, even when there is no immediate threat of attack. See Hawthorne v. State, 408 So. 2d 801 (Fla. 1982); Borders v. State, 433 So. 2d 1325 (Fla. 3rd DCA 1983). The "excess" wounding has been linked to the same factors which generally compromise women's inability to defend themselves: lack of belief in the effectiveness of any lesser resistance, relative size and strength, lack of training in the use of firearms, belief in the man's ability to "come back" at the woman despite her resistance, and the woman's reasonable prediction that her risk of being killed escalates substantially if she resists at all. See Lenore Walker, Terrifying Love (1990). Likewise, the defendant's behavior in this case in repeatedly shooting the victim manifests the same compensatory impulses, rather than the cool, gratuitous cruelty meant to be comprehended by this aggravating factor.

Finally, the lower court relied on the defendant's robbery of the victim to support its finding that the killing was calculated. This Court clearly disentangled these factors in Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984). There the Court concluded that a planned robbery does not mean that a murder committed during the course of the robbery was also planned. Here, there is no evidence to suggest that even the robbery of Antonio was planned. If, following Hardwick, a planned robbery does not imply a calculated murder, certainly an unplanned robbery can logically do no more.

B. Self-defense

The court below further erred in finding this aggravating factor present in light of the evidence that Ms. Wuornos committed the killing under at least a pretense of moral or legal justification. A pretense of justification, "though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988). See also Christian v. State, 550 So. 2d 450 (Fla. 1989) (defendant brutally stabbed another prison inmate who had assaulted him weeks earlier and had thereafter threatened to kill him); Cannady, 427 So. 2d 723 (Fla. 1983) (defendant asserted that murder of minister occurred when minister attacked defendant after befriending him). Ms. Wournos consistently maintained throughout her statement to the police that she acted in self-defense (SR 57-59). Antonio demanded sex from her: "Listen, man, you are going to suck my dick or you're gonna have sex with me. You're gonna do something." When she refused, they struggled and she shot him (SR 57-59). This unrebutted testimony plainly created a pretense of moral of legal justification sufficient to rebut a finding that the act was cold and calculating Id.

The court below explicitly rejected the defendant's account "of having killed Antonio to prevent rape upon her person." (T 48) However, the court's position is flawed legally, logically, and factually. Legally, the court is held to the high standard of unmistakable clarity in setting forth

the grounds of its sentencing order. Mann v. State, 420 So. 2d 578 (Fla. 1982). The court below fell short of that standard here, leaving the defendant, counsel, and this Court to speculate as to the basis in the record for the court's conclusion. The court refers only vaguely to "the other testimony in this case" supporting its finding against the defendant. At the very least, this case should be remanded for the court to clarify the meaning of this portion of the order so that this Court is provided an effective basis for review.

The "other testimony" to which the court referred may be Detective Horzepa's testimony regarding the defendant's motive for her robbery of Antonio's jewelry and other items. Detective Horzepa asserted that the defendant "took the property out of pure hatred and also revenge, and she wanted to get her money's worth." (T 501-502) (emphasis added) That testimony, even if credited, is logically irrelevant to the issue of the circumstances of the killing and the credibility of the defendant's self-defense claim. Even if the defendant stole out of spite does not mean that she killed him for the same reason. The distinction is consistent with the Court's closely related holding in Hardwick, 461 So. 2d 79, 81 (Fla. 1984). In Hardwick, the Court reasoned that a motive which makes a robbery cold and calculated does not necessarily transfer to the commission of the murder.

Finally, the court's disregard of the defendant's description of the events leading to Antonio's death likewise ignores the overwhelming incidence of sexual assault, beatings,

attempted murder, and murder that prostituted women face daily. The rate of that incidence has been reviewed above. These facts bear directly on Ms. Wuornos' likely subjective perception of threat, as well as the objective reasonableness of her asserted need to employ deadly force in self-defense. Moreover, the extreme violence encountered by prostituted women, taken together with the number of men with whom they come into contact, defines the appropriate context within which the Court should consider the relevance of the other killings committed by the defendant to the credibility of her claim here. On average, street prostitutes have sex between 4 and 7 times per day. See e.g., Matthew Freund et al., Sexual Behavior of Resident Street Prostitutes with their Clients in Camden, New Jersey, 26 J. Sex res. 460, 465 (1989). In the course of the year in which the killings occurred, over 1,000 men may have purported to buy the defendant for sex. That she perceived six of them as immediately dangerous to her is reasonable. In any event the fact of multiple killings, taken alone, should not defeat a showing that the defendants acts were undertaken under a pretense of justification.

Thus, the murder of Antonio was neither cold, calculated, or premeditated, and Wuornos had at least a pretense of moral justification for shooting him. Because the jury recommended death by only the slimmest of margins (7-5), this court must reverse for a new sentencing hearing.

ISSUE V

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AND AVOID LAWFUL ARREST AGGRAVATING FACTORS BECAUSE THE INSTRUCTIONS WERE UNCONSTITUTIONALLY VAGUE, IN VIOLATION OF THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

Without any objection nor with any suggested instruction from Wuornos's counsel, the court gave the jury the instruction on the cold, calculated, and premeditated aggravating factor this court disapproved in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. 1994) (T 830-31). It also provided equally deficient guidance on the void lawful arrest aggravator (T 830). This latter instruction was defective because the court never told them that it applies to the murder of someone other than a policeman only if the state has proven that the dominant motive for the murder was witness elimination. Riley v. State, 366 So. 2d 19 (Fla. 1978). While this court in Jackson declared that the jury need not know every refinement in death penalty sentencing, what the court never told these jurors amounts to a critical, defining part of this latter aggravator. Failure to limit it allowed the jury to exercise its unfettered discretion, a serious constitutional breach that should have been avoided without any regard to defense counsel's failure to bring this breach to the court's attention.

Because the jury recommended death by only a one vote majority, this court should ignore counsel's failure to object, the surely to come harmless error cry from the state, and

reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VI

THE COURT ERRED IN IGNORING OR REJECTING THE ABUNDANT MITIGATING EVIDENCE WUORNOS PRESENTED, A VIOLATION OF THE DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The trial court made three errors regarding the mitigating evidence presented. First, it rejected the uncontroverted evidence regarding Wuornos' childhood, particularly her teenage years. Second, it made no mention of the equally unchallenged testimony that when she killed Antonio she had drunk at least a case of beer. Finally, the court dismissed the findings of Dr. Harry Krop as "interesting but insufficient to justify the finding of any mitigating circumstance." (R 54)

To mitigate a death sentence, the evidence the defendant produces must, "in fairness or in the totality of the defendant's life or character, be considered as extenuating or reducing the degree of moral culpability for the crime committed" or "anything in the life of the defendant which might militate against the appropriateness of the death penalty." Maxwell v. State, 603 So. 2d 490, 494 f.n. 2 (Fla. 1992). Accord, Rogers v. State, 511 So. 2d 526 (Fla. 1987); Campbell v. State, 571 So. 2d 415 (Fla. 1990).

A childhood of parental neglect or abuse can mitigate a death sentence. Nibert v. State, 574 So. 2d 1059 (Fla. 1991). In this instance the sins of the parents were not those of commission but omission. Although Wuornos' aunt/sister said she saw no sexual or physical abuse of the defendant, by the time Wuornos was 13 she obviously feared what they might do if

they discovered her pregnancy, itself a shocking (well, perhaps not so shocking in today's society) revelation. Her parents banished her to a home for unwed mothers to wait her child's birth (T 637). Once she returned, life for this teenager, never very pleasant, apparently turned even worse.

She had frequently run away from home before she turned sixteen, itself an indicator of problems.[4] At that age, she made her final break with childhood and entered, ready or not, into the adult world. Obviously ill suited to the demands of society, she had nothing to sell but her body which she did for almost 20 years. She had no first date, no senior prom, no slumber parties. No one cried at her high school graduation, no mother watched her learn to sew, and no father had his hair turn gray as he taught her to drive. No one waited for her to come home at night from a date, no one grounded her for being an hour late, and no one listened to her when she just needed to talk.

Instead, dozens, hundreds, and probably thousands of men had her. The dollar defined intimacy and trust. Her home was the road, and her bedroom the back seat of a car (T 692). If, at the end of years of prostitution, the resiliency of spirit,

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[4]Sam Janus, The Death of Innocence: How our Children are Endangered by the New Sexual Freedom (William Morrow: New York, 1981), p.78 ("Not surprisingly, if we look at the early life of a child who becomes a prostitute or mother at 12,..., we usually find that the roots of deviance reach deep into the family structure."); Wuornos v. State, 19 Fla. L. Weekly S503, 505 (Fla. 1994).

the reserves of any dignity had become depleted, then this court should recognize that exhaustion as mitigation. As she said, "I am sick and tired or people comin' up to me, and tellin' me they're a cop and I don't think you're a cop." (SR 58) This life, beginning when she was 13 and accelerating when she left home at 16 mitigates a death sentence.

Likewise, her drinking and drug taking (T 692-93), particularly on the day of the murder, mitigates a death sentence. See, Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991). When questioned by the police about the Antonio murder she said, "Oh....now I remember. Okay. I remember. Okay. I remember. Alright. Alright, now I remember. Okay. He was an older fella, a little short guy. Alright. 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..." (SR 57-58) The court should have considered her drunkenness in its sentencing order, particularly when the state never challenged or rebutted it.[5]

The court, in refusing to find the defendant acted under the influence of an extreme mental or emotional disturbance, acknowledged that Wuornos said she had drunk "alcoholic beverages at about the same time" she murdered Antonio. It

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[5]Prostitutes often abuse alcohol and drug to deaden the experience and degradation of prostitution. John Briere and Marsha Runtz, Research with Adults molested as Children, in Lasting Effects of Child Sexual Abuse, Gail E. Wyatt and Gloria J. Powell, eds. at pp. 85, 92.

refused, however, to give it any weight because she could recall "the seemingly minutest of detail concerning this murder." (R 51) Even though she may have been drunk, there was no evidence she had lost her memory or even that those who are so have no memory of what they have done.

Moreover, Dr. Krop's testimony was more than "interesting." It explained why Wuornos committed her crimes (T 703). He and Dr. Delbeato, the other psychologist who examined her, both concluded she had a borderline personality 22 (T 580, 681). Krop's diagnosis surprised him because she satisfied all eight of the defining characteristics of this defect, which was very unusual and which made her a disturbingly unique person for him (T 682).[6]

Of those factors, her intense impulsiveness, unstable mood swings, inappropriate anger, and unstable and intense personal relations best explain what drove her to kill Antonio.

Dr. Krop, who is no stranger to this court or death penalty sentencings, noted that "Lee is probably one of the most impulsive individuals I have ever seen." (T 695) This also meant she had an impaired judgment, lacked insight, and

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[6]Prostitutes and strippers have a high incidence of borderline personality disorders. See Colin A. Ross, et. al., Dissociation and Abuse Among Multiple-Personality Patients, Prostitutes, and exotic Dancers, 41 Hosp. & Comm. Psychiatry 328 (1990); Dirk de Schampheleire, MMPI Characteristics of Professional Prostitutes: A Cross-cultural replication, 54 J. of Pers. Assess. 343 (1990) (Prostitutes generally have serious mental health problems.)

had very "primitive" coping mechanisms (T 695-96). She behaved more like a three year old than a mature woman of 34 (T 696).

Feeding this impulsiveness, Wuornos had very unstable mood swings. During Dr. Krop's 8 hour examination of her, he never "knew what was going to set her off." (T 683) Bobby Copas' recounting of his run-in with her confirms this. When Copas refused her offer of sex, she "really got mean. . . . And she turned around and she looked and she just -- a scowl come over her face and she got real upset." (T 744). When he decided to play along with her, however, "she calmed back down then." (T 744). Then when she discovered Copas had tricked her, "she come unloose. She went to calling me all kind of dirty names. . . this lady was something else." (T 745)

Wuornos, as evidenced by the Copas incident, had inappropriate and very intense fits of anger, far out of proportion to that which may have been justified. They were also very typical for her (T 684).

Finally, that she had intense but brief personal relationships should be expected. She was married for one month to a man 40 years older than her and more a father than a husband (T 682). Moreover, because she had prostituted herself for years, we should expect she had an aversion to deep, caring feelings for others. Others had used her, and she had used

them. Sexuality or rather a hypersexuality had defined her existence since she was 13 (T 685).[7]

Thus, Dr. Krop's testimony, rather than being merely interesting, revealed a side of Aileen Wuornos that must mitigate a death sentence. Her intense impulsiveness, primitive coping ability, rapid mood swings, extreme and inappropriate anger, and her hypersexuality define her and explain her actions far better than any made for TV movie.[8] They do so because Lee Wuornos is the product of an extremely dysfunctional family (T 691) and 20 years of being on the streets. Failure, rejection, and abuse define her life, and Dr. Krop's testimony describes clinically the real tragedy of this woman. It mitigates a death sentence, but cannot remotely capture the tragedy of her life.

The court, therefore, erred in truncating its analysis of the mitigating evidence as described above. This court should reverse the trial court's sentence and remand for a new sentencing hearing.

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[7]There is a pervasive and high incidence of sexual, physical, and emotional abuse that contributes to a girl's vulnerability to prostitution. Mimi Silbert & Ayala M. Pines, Entrance into Prostitution," 13 Youth & Society 471, 479 (1982).

[8]Hypersexuality is a common consequence of child abuse, and is readily exploited in prostitution. See, David Finkelhor, The Trauma of Child Sexual Abuse, in Lasting Effects of child Sexual Abuse, cited above, pp. 61, 69, 73.

ISSUE VII

THE COURT ERRED IN IGNORING DR. DELBEATO'S TESTIMONY THAT WUORNOS HAD AN EXTREME EMOTIONAL OR MENTAL DISTURBANCE AT THE TIME OF THE MURDER, A VIOLATION OF HER EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Dr. Donald Delbeato, a psychologist, examined Wuornos and largely confirmed Dr. Krop's conclusion that she had a Borderline Personality disorder (T 584). Significantly, he found she also qualified for the statutory mitigating circumstance that at the time of the murder, she "was under the influence of extreme mental or emotional disturbance."

> Q. And when she was with Mr. Antonio did she have an extreme mental or emotional disturbance?
>
> A. I feel she has an emotional disturbance or a personality dysfunction.
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> A. Extreme emotional disturbances, as you said before?
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> Q. I would say a severe form, yes. If you want to use the word "extreme," I would say severe.
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> * * *
>
> Q. To me it's semantics. I'm saying she does have a personality disorder, and borderline types are marginal. I, as an individual who diagnoses these individuals and see them, felt that it is a severe problem because they're going to have very marginal and difficult lives.

(T 605-606).

The court made no mention of this testimony in its sentencing order; instead it focussed only on Wuornos' testimony that she was drunk when she killed Antonio:

"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." (R 51)

The court's order failed to meet the standards this court articulated regarding the mitigation presented at the sentencing hearing. Campbell v. State, 571 So. 2d 415 (Fla. 1990). "The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence, and is mitigating in nature." Id. Here the court ignored Dr. Delbeato's testimony unequivocally finding this statutory mitigator. That was error, and because it failed to find a statutory mental mitigator such error cannot be harmless. This court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VIII

THE COURT ERRED IN FINDING THAT WALTER ANTONIO PARTICIPATED IN THE ACTS LEADING TO HIS DEATH, A VIOLATION OF WUORNOS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This court has considered cases where defendants have been sentenced to death for murdering prostitutes. Crump v. State, 622 So. 2d 963 (Fla. 1993); Long v. State, 610 So. 2d 1268 (Fla. 1992). Until now, however, it has never faced the reverse situation where a prostitute has been sentenced to death for murdering some of the men who used her. While there is a certain symmetrical appeal in treating male and female defendants similarly, the latter case has one distinction the former does not. Men usually seek out women for sex, and they must know that they expose themselves not only to diseases of all sorts, but they face the possibility of violence. In short, prostitution involves an inherent element of danger to them. Accentuating that risk, a victim, particularly an elderly one, who picks up a stranger hitchhiking about the state, as Wuornos probably was, shows a disregard for his safety that boarders on foolish.

One of the statutory mitigating factors is that the "victim was a participant in the defendant's conduct or consented to the act." §921.141(6)(c) Fla. Stats. (1994). Unlike the other statutory mitigators, however, this court has never reviewed a case where the sentencer either found it or rejected it. Justice England in a concurring opinion (in which two other members of the court joined) in the old case of

Chambers v. State, 339 So. 2d 204 (Fla. 1976) came closest to finding it applied. There, the defendant and his girlfriend/victim "shared a long-standing sado masochistic relationship which included severe and disabling beatings." More significantly, on the day of her murder, the girlfriend had bailed her boyfriend out of jail. Showing his appreciation, he beat and drug her through the streets of Sarasota. She died five days later from the injuries she had received.

One consents to his or her own death in cases of Russian roulette, but this mitigator has broader application. A victim who knowingly disregards his personal safety or who follows a course of action leading to his death that a reasonable, prudent person would eschew has participated in the defendant's conduct.

The sentencing court in this case recognized that this mitigator might apply, but for two reasons it refused to find it:

> The victim, Antonio, neither participated in the Defendant's conduct nor consented to her act. The Court is convinced that the defendant's statements that she had already pulled the gun before he attempted to struggle with her for it, that, not succeeding, he had turned to run when and had had fallen down when she began to shoot him. (sic) Thus the Court is convinced that the victim was in the act of attempting escape when he was killed, certainly not participating in her conduct. Even if the Court found that he had, at some prior time of his killing, agreed to engage in prostitution is not a sufficient basis for establishing this statutory mitigating circumstance. (sic)

(R 54).

The court, thus, rejected victim participation because 1) Antonio was not participating in Wuornos' conduct, and 2) even if he was, that provided no basis for finding this mitigator.

But the victim had followed a course of action rife with danger, and it was one that he should have recognized. First, he picked up Wuornos somewhere, most likely at a rest stop or filling station, in central Florida. He obviously wanted sex from her because he was nude when found (T 363). Finally, he was 62 years old and a reserve police officer (T 515, 525). Surely a man that old and who presumably had some police training must have realized the risks he was taking when he picked up this stranger. Thus, by the time he stopped his car, took off his clothes and climbed into the back seat of his car, he was participating in the events that would lead to his death.

Moreover, this conduct, for the reasons discussed, provides a basis for finding the victim participant mitigator. Any reasonable person would have recognized the latent danger in picking up a prostitute, especially a stranger found in a strange place. Violence for the man and the woman lurks just beneath the surface, and Antonio must have realized it.

The court, therefore, erred in rejecting this mitigating factor, and this court should reverse the trial court's sentence and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here, the Appellant, Aileen Wuornos, respectfully asks this honorable court to reverse the trial court's sentence and either remand for a new sentencing hearing before the trial court alone or with a new jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Margene A. Roper, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, and a copy has been mailed to appellant, AILEEN WUORNOS, #150924, Broward Correctional Institution, Post Office Box 8540, Pembroke Pines, Florida 33024, on this 25TH day of November, 1994.

DAVID A. DAVIS