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

# REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE COURT ERRED IN NOT FULLY DETERMINING THE VOLUNTARINESS OF WUORNOS' PLEA WHEN HER TRIAL ATTORNEY CONFESSED THAT HE LACKED THE EXPERIENCE TO TRY A CAPITAL CASE, 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.

The state's argument on this issue begins on page 29 of its brief by noting that "Wuornos is no novice at entering pleas." While that may be true 1) it is not particularly compelling evidence that she intelligently and voluntarily did so in those other cases or that she did so here, See, Koenig v. State, 597 So. 2d 256 (Fla. 1992) (signed plea agreement without more does not indicate an intelligent and voluntary plea) and 2) it is irrelevant to this case. See, Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994) (This court will not

take judicial notice of mitigation presented in Wuornos' other cases.)[1]

Wuornos is also confused about the repeated references to Glazer's closing argument. This issue concerns what the trial judge did at the change of plea hearing, not what counsel argued to the jury. Did the court give the defendant the "utmost solicitude" in accepting her plea? Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Until the last four pages of the plea colloquy, it had conducted a model inquiry into her understanding of the consequences of what she was doing. But, as asked in the Initial Brief at p. 17, "What do we do with that final dialog" the court had with Wuornos and Glazer? It should have done more than it did. That counsel was aware "of Wuornos' imperfect defense of self-defense and what her defenses were if she proceeded to trial" (Appellee's Brief at pp. 29-30) misses the point. Was Wuornos aware of them, and more importantly, did she understand her guilty plea forever foreclosed any claims of innocence? Obviously she did not, otherwise she would have stopped talking about new evidence and opening up "each and every case." (SR 31) When the defendant indicated that she wanted a "real" attorney to

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[1]On page 29, the state makes several references to the record, i.e. (R 42, 44-45, 48). Those page numbers do not correspond with Appellate counsel's record. Instead the quote that the state cited at (R 42) in its record was found at (R 795-96) in his. The record support for its other points was likewise found in (R 798 and R 801).

"take care of the case" and Glazer admitted he was incapable of defending "her in the way she needs to be defended" (SR 33-34), the court should have made sure she really understood that her plea silenced any further question of her guilt and prevented her from presenting any defense.

That Glazer recognized Wuornos had one is obvious from his closing argument.

> Why did this happen? I suppose we all want to know why, what turned her into a killer. She perceived that harm was imminent, so she says she acted in self defense. Larry Horzepa, the detective in Volusia County, told you that in three and a half hours of confessions, over-- it took a while--but he said at least over forty times she said, `I acted in self defense.'

(R 797).

She also had a voluntary intoxication claim because when she killed Antonio "I was drunk as could be. I must had a case of beer on this one." (SR 57-59)

The state on page 30 of its brief then notes that "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)." Of course it does, and Wuornos admitted as much in her Initial Brief at pp. 16-17. "But what do we do with that final dialog?" For the state, nothing. Nothing because nothing in this record showed that the court gave this woman the "utmost solicitude" to insure she understood what her plea to first degree murder meant. Instead the state on appeal confuses the issue of the adequacy of the court's inquiry by focusing on Glazer's closing

argument and what had happened in Wuornos' other cases (Appellee's brief at p. 30).

If the defendant's self defense argument had failed in her other trial, 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." (Appellee's brief at p. 30) That's a defense? If so, Glazer is per-se ineffective for allowing Wuornos to plead guilty so he could save her life with such an incredible argument, especially when at least two viable defenses existed: self-defense and voluntary intoxication. Saving the taxpayers a buck as a defense is laughable. If Glazer had had any capital experience (SR 33-34), or any experience at all, he would have realized that just because trial strategies did not "fly as to the first victim," (Appellee's brief at p. 30), other juries may have gotten them off the ground.

On page 31 of its brief the state argues that Wuornos, at her change of plea hearing, "is in preparatory stages of collateral attack and investigation." But why is she preparing a post-conviction motion when she could have had a trial and presented the evidence she wanted? The state's contention makes no sense. The court should have realized she had no idea that her plea largely foreclosed the very investigation she believed someone other than Glazer could do. It should have halted the proceeding until it was assured she knew this.

On page 32 the state says, Rule 3.172(i) Fla. R. Crim. P. requires the defendant to show prejudice if the trial court ignored the proper procedures. "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." Because the court never clarified Wuornos' statements or inquired about Glazer's incompetence in capital matters, neither the trial judge nor this court can say she knowingly and voluntarily pled to the charged crimes. That is the prejudice she suffered.

On pages 32-33, the state, relying on McElvane v. State, 553 So. 2d 321 (Fla. 1st DCA 1989), argues that "Where a defendant has signed an Offer of Plea which indicated that she gave up her right to trial by pleading guilty . . . it is an indication of a full understanding of the significance of the plea and its voluntariness." First, McElvane recognized a possible conflict with a Second District case on the same point. More significant, this court's decision in Koenig v. State, 597 So. 2d 256 (Fla. 1992) casts doubt on the continuing viability of McElvane.

The state, thus, has done nothing to reassure this court that the judge below somehow saved the plea colloquy. Wuornos never knowingly and voluntarily pled to the murder and robbery of Antonio. This court should reverse the trial court's judgment and sentence and remand for a new trial.

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.

Again, until the last four pages of the change of plea hearing, nothing exhibited in the least degree that Wuornos was confused about what was happening. She admits that. But, and that is the crucial word, what do we do with her musings, her talk of plans that would be largely irrelevant in any post-conviction pleading? What we do and what the court should have done is start over again, and it is what the state on appeal has not shown was unnecessary. Merely signing an offer of plea may be 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)" (Appellee's brief at p. 33), but in this case it was insufficient. Koenig v. State, 597 So. 2d 256 (Fla. 1992). That Wuornos persisted in claiming that she could show the police lied, or that if she had the right lawyer she could prove her innocence clearly exhibited that she had no idea what her change of plea meant. She did not knowingly or intelligently plead guilty. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). 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 state makes light of Glazer's announcement that he "did not have the capital experience necessary to take her case to trial. . . . 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) It says this damning admission referred only to the penalty phase portion of a capital case, and it is the "the only crucial aspect of a capital case differing from other criminal cases." (Appellee's Brief at p. 33) Glazer, however, never admitted he was incapable of handling only the penalty phase portion of a capital case. He said he did not have the necessary capital experience. He did not know how to try a capital crime, i.e. first degree murder. He obviously believed he could defend Wuornos in the penalty phase part of the trial because he did so. His admission of incompetence meant he could not try the guilt phase portion of the trial. And because of that, he faced an inherent conflict of interest when he represented Wuornos and allowed (or encouraged) her to plead guilty.

Finally, the state says "Wuornos, herself, however, has indicated satisfaction with her attorney." This is what she said at the end of the plea colloquy. "No, he [Glazer] is not the attorney I would look for. I would look for somebody who would take care of the case. . . ." (SR 33-34)

This court should reverse the trial court's judgment and sentence and remand for a new trial.

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.

Wuornos relies on her Initial Brief to carry her argument on this point, and replies here to specifics of the state's contention.

First, the state seems amazed that Wuornos would carry a gun, and surmises she did so only to murder her clientele. (Appellee's Brief at pp. 35-36) As presented in the Initial Brief, however, a prostitute daily faces the possibility of torture, mutilation, and murder. If police carry guns to protect themselves from the real but relatively remote possibility of violence surely even the most naive woman who had been on the streets for 20 years would have done the same thing.

Then on page 37 of its brief it claims that "Each man whose property was taken was killed." There is no proof of this, and the statement reveals the state's fundamental misconception of this case. Wuornos was a prostitute. She made her living selling her body for men to use. She had done so for at least 18 years. If, over the course of a year, she killed six men who wanted to use her there must have been dozens and perhaps hundreds of others who paid for her services during this same period who were neither robbed or murdered.

Those six, however, did something to trigger Wuornos' impulsiveness that unleashed her "intense anger or lack of control of anger." (T 682-84) Antonio upset the defendant's fragile stability with his threat to arrest her unless he gave her free sex (SR 57-59). That crude extortion started the events that quickly escalated into murder, not some plan to rob and murder.[2]

As to the self-defense claim, the state has failed to realize that Wuornos need not establish it factually. Nor need she prove an imperfect defense of self-defense. She must only have established a "pretense" of legal justification for the cold, calculated, and premeditated aggravator to be inapplicable. In Cannady v. State, 427 So. 2d 723 (Fla. 1983), the trial court improperly found this aggravating factor even though the victim, a quiet, unassuming minister, had been shot five times. The defendant's claim that the man of God had jumped at him established at least a pretense of moral or legal justification. Id. at 730.

So in this case, Wuornos' story that she and Antonio struggled before she shot him, as in Cannady, supports her claim of having at least a "pretense" of legal justification in shooting him. Hence the court should have rejected finding the

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[2]The state also speculates on page 37 of its brief that Wuornos shot Antonio as he tried to flee.

cold, calculated and premeditated aggravator, and this court should remand for a new sentencing proceeding.

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.

There are, perhaps, some children who were born mean, and no matter how much love and care their parents give trying to reform their wayward offspring, nothing works. Nothing in this case suggests Aileen Wuornos came into this world predestined to roam the highways of central Florida as a prostitute or murder six men. The state tries to portray Wuornos' family as one that loved her and would have welcomed her if she had not become "rebellious as a teenager." (Appellee's brief at p. 42) If there was so much love at home why did she try to hide her pregnancy? Why was she pregnant at 13? Why did she run away when she was 16? In truth, her home must have been hell (T 691).

On the same page the state says the money she earned as a prostitute "was an easy one, not an 8 to 5 dollar." No woman working "8 to 5" faces rape, mutilation, and death on a daily basis. Wuornos did, and had done so for nearly 20 years. If what she did was not an "8 to 5" job, it had other unenviable distinctions. She had no retirement plan, no medical benefits, no paid vacation, and no affirmative action plan. No state or federal agency protected her workplace. No one told her about sexual harassment. Her dollars hardly came easily.

The state on this page and the next then argues that her "spirit was hardly depleted." Yet, it was. After years of

abuse, the Richard Mallory rape broke her reserve. She simply refused to be beaten, kicked, and laughed at by the men who had used her. As she said, "I'm 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." (SR 58) Bobby Copas never pushed her to the point where Wuornos tried to kill him. Had he done so, like Antonio did, she may have snapped and killed him. As it was, her shallow reserves could not take even his rejection, and she went ballistic.

The Appellee then claims "There was no evidence that Wuornos took drugs at all, no less on the day of the murder." The defendant, however, clearly indicated she had drunk about a case of beer: "Oh. . . now I remember. Okay. I remember. Okay. I rememberer. 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). To defeat this uncontroverted assertion, the state cites Robinson v. State, 574 So. 2d 108 (Fla. 1991) for the proposition that uncorroborated evidence of intoxication is insufficient to establish the existence of intoxication as a mitigating circumstance. Several points in response to that argument must be made. First, Wuornos needed to establish that factor only by the greater weight of the evidence. Second, this court's resolution of the relevant ruling in Robinson, while correct has no application here. There, the defendant wanted to introduce the testimony of Dr. Krop who would have

said that during his interview with Robinson, the defendant told him that he had been intoxicated during the murder. This court agreed that such testimony should have been excluded, but its reasoning has more to do with Dr. Krop than Robinson. That is, the former was allowed to testify solely because he was an expert, not because he had any personal knowledge about the facts of Robinson's case. What the defendant told him was accepted, not so much for its truth, but as another fact to aid in arriving at a diagnosis of Robinson. Thus, self-serving hearsay given during an examination, when objected to, can be excluded.

In this case, we have no objection to Wuornos' statement that at the time of the murder she was as "drunk as could be." That should preclude the state from now complaining about Wuornos' evidence of her drunkenness. State v. DuPree, 20 Fla. L. Weekly S160 (Fla. April 13, 1995); Cannady v. State, 620 So. 2d 165 (Fla. 1993). Additionally, Wuornos never introduced this testimony through Dr. Krop. She confessed to police officers, and they questioned her solely to solve the Antonio murder, not to aid in performing some psychiatric evaluation of her. Thus, the state should not complain if what they solicited from her was not entirely damning. If they did not like the answer, they should not have asked the question.

Finally, if her testimony, without more, could not establish this mitigating fact then Wuornos has been denied the right to testify in her own behalf, and her right to a fair trial has no meaning.

On page 44, the state believes that if one is drunk one cannot engage in "purposeful conduct" while drunk. Apparently, one is impaired by alcohol when he or she is laying in the gutter, head lolling from side to side. Yet, this court need only reflect on the large number of people, including lawyers, who are alcoholic and who seem to function. Alcohol can reduce one to a gibbering old fool, but not necessarily as the large number of drunk drivers on our streets will attest. It does, however, impair one's judgment. Diagnostic and Statistical Manual of Mental Disorders IV p. 197. Thus, Wuornos could have engaged in "purposeful conduct" while drunk. Having consumed a case of beer on the day of the murder could only have caused her other personality defects to come to the surface more readily. That is, she was intensely impulsive, had unstable mood swings, and was prone to an inappropriate anger. Drinking gallons of beer before killing Antonio could only have eliminated what few inhibitions she had.[3]

Finally, the state says the Copas incident "demonstrates a modus operandi of targeting older men and luring them to remote areas for the purpose of robbery." (Appellee's brief at p. 45) There was no evidence how old Copas was. There was no evidence Wuornos had "targeted" him. There was no evidence she was

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[3]Prostitutes often abuse alcohol and drugs 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.

going to lure him to a remote area. And there was no evidence she intended to rob him.

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.

It seems we are playing word games here. The state, on page 46 of its brief claims "No expert testimony was offered by the defense that Wuornos acted under extreme mental or emotional disturbance of the time of Walter Antonio's murder."

Dr. Krop, as the state acknowledges, believed she was seriously emotionally impaired (R 708), and that was a major contributor to all of the murders (T 703).

Dr. Delbeato agreed and said she had a severe or extreme emotional disturbance (T 605-606). The choice of words mattered little to him: "to me it's semantics."

The state, on the same page and the next, then claims no evidence proved Dr. Delbeato "was actually referring to the legal terms of art embodied in Florida Statutes section 921.141(6)(b). First, unlike insanity, which apparently has no medical meaning and is a legal term only, the "extreme emotional disturbance" mitigator is not a legal term of art. This expert knew what it meant and never sought any clarification. Nor did he ever say he did not know what it meant. If anything, his testimony explained why this mitigator should apply: Wuornos had a severe emotional problem and because of that "they're going to have very marginal and difficult lives." (T 606) He said nothing equivocal and made no reservations about his diagnosis.

Finally, the state argues on page 47 of its brief that the trial court could not logically find Wuornos committed the murder in a cold, calculated and premeditated manner and also find she suffered some sort of emotional impairment. That conclusion, however, does not necessarily follow. If that mitigator applied to situations where there was some sort of explosion of emotions, as when a husband gets mad when his wife burns a steak, the state's contention would make sense. Nevertheless the emotional impairment Wuornos has permeates and defines her life. It controlled how she perceived reality, and that grossly distorted perception could lead her to coldly plan a murder, and it could also cause her to explode in the face of rejection as it did when Bobby Copas refused her offer of sex.

Of course, Wuornos in a sense agrees with the state. If she suffered from an extreme emotional impairment, the court could not find cold, calculated, and premeditated aggravator. This court should, therefore, 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.

The state, on page 48 of its brief, says "Wuornos' modus operandi was to pose as a damsel in distress in order to gain entry into the care of the chivalrous unsuspecting male not looking for sex with a prostitute as is evidenced by her encounter with Bobby Copas." (emphasis in brief.) There is, first, no testimony that was the way she habitually solicited men. Second, the state presented nothing that she used that ploy on Antonio. Third, the meager evidence shows clearer than the state's speculation that Antonio picked up Wuornos so he could have sex with her.

On page 49 of its brief the state then says Wuornos must have taken Antonio's dentures and his clothes to "conceal his identity." Afterall removing "one's dentures is hardly a romantic prelude to sex." But prostitution, almost by definition, precludes romance, and it is hard to understand why taking the victim's false teeth and clothes but leaving a body alongside a dirt road somehow translates into evidence showing a desire to conceal identity. No effort was made to bury the corpse or otherwise hide it. Nor was there any evidence Wuornos tried to obliterate his fingerprints, which would have been the most obvious thing to do if she were trying to hide Antonio's identity.

Of course, as the state notes on page 49 of its brief, "neither the good samaritan nor the highway Romeo would expect to forfeit their lives by indulging in sexual activity with a prostitute." But that misses the point argued by Wuornos that the victim "participated" in the actions leading to his death. Skydivers who are killed when their parachutes fail to open do not expect to die when they jump out of the airplane. Death, however, is a distinct possibility because skydiving is an inherently dangerous activity, and only a blind gopher would not recognize that fact. Thus, while they have not sought out death they have, nevertheless, participated in actions which led to it.

In a similar way, prostitutes and men who use them do not expect to be murdered when they engage in sex for money. Nevertheless, violence is an inherent risk for both people, so that anyone who uses a prostitute must recognize it as a possible product of his illegal activity. In that sense, Antonio "participated" in the actions that led to his death. He obviously never consciously solicited Wuornos with that end in mind, but any reasonable person would have recognized the latent violence of the deal. The trial court erred in failing to find Antonio's participation in the acts leading to his death as mitigation. This court should reverse the trial court's sentence and remand for a new sentencing proceeding.

## CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Margene A. Roper, Assistant Attorney General, Office of Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32114 by U.S. Mail, and a copy has been mailed to appellant, AILEEN CAROL WUORNOS, #150924, Broward Correctional Institution, Post Office Box 8540, Pembroke Pines, Florida 33024, on this 26th day of April, 1995.

DAVID A. DAVIS