IN THE SUPREME COURT OF FLORIDA

CASE NO.SC00-1199

AILEEN C. WUORNOS

Appellant,

v.

STATE OF FLORIDA

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT FOR VOLUSIA COUNTY,
STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Ms. Wuornos's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in the instant case:

"R." -- The record on direct appeal to this Court.

"PC-R." -- The record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Ms. Wuornos lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Ms. Wuornos accordingly requests that this Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY

Appellant was charged by a Volusia County Grand Jury indictment of January 28, 1991, with one count of first-degree murder and one count of armed robbery (R. 5018).

Appellant pleaded not guilty, and was tried by a jury between January 13 and 27, 1992. The jury returned a verdict of guilty. After the penalty phase of the trial, the jury returned a recommendation of death by a vote of 12-0 (R. 3611). On January 31, 1992, the trial court, adopting the jury recommendation, imposed a sentence of death for first-degree murder (R. 4663).

On direct appeal, the Florida Supreme Court affirmed appellant's conviction and sentences. See Wuornos v. State, 644 So. 2d 1060 (Fla. 1994).

On March 21, 1997, the Office of Capital Collateral Representative filed the first motion to vacate judgment with special request for leave to amend(PC-R. 1049). On August 1, 1997, the Office of Capital Collateral Regional Counsel, (hereinafter CCRC,) filed an amended motion to vacate appellant's judgement and sentence of death with special request for leave to amend (PC-R. 1198). On August 15, 1997, the trial court in and of Volusia County denied the various allegations in appellant's motion as either legally insufficient or

procedurally barred. However the court, in response to allegations that certain records had not been received, deferred the issuance of any final order disposing of the appellant's motion for postconviction relief (PC-R. 1336-38).

Appellant filed her final amended motion for postconviction relief with a request for leave to amend on November 1, 1999 (PC-R. 2895). The Court conducted a Huff hearing on January 6, 2000 (PC-R. 205-207). As a result of this hearing, the court granted an evidentiary hearing for Claim One and Claim Eleven, which asserted respectively: trial counsel was ineffective in failing to pursue the defense of voluntary intoxication and; trial counsel was ineffective in failing to present lay witnesses on the issue of mitigation (PC-R. 251). The court summarily denied all other claims.

Evidentiary Hearing

The court conducted a three-day evidentiary hearing beginning on April 5, 2000 and ending on April 7, 2000. (PC-R. 258-816).

Prior to the commencement of the evidentiary hearing, the trial court denied a motion by appellant to keep open the hearing for purposes of retaining an expert to examine the appellant and offer testimony on the court as to claim one, i.e. the condition of the appellant on the night in question and whether voluntary intoxication should have been pursued by the defense. Counsel for appellant had stated that he had visited his client four times since assuming her case and, due to privileged matters within the attorney-client privilege, had been unable to have her evaluated for purposes of prosecuting claim one (PC-R. 3013).

Appellant called a total of nine witnesses at her evidentiary hearing.

Domingo Sanchez, an investigator for the Public Defender who represented the appellant, testified that he was aware that appellant was using alcohol at the time of the incident but did not recall whether or not he investigated it (PC-R.292). He testified that he maintained regular contact with the attorneys who were handling the case (PC-R. 293). Although he

acknowledged that it was his practice and custom to thoroughly investigate a client's background in a case such as appellant's, he could not definitively state whether he spoke to the various mitigation witnesses, who were called at the evidentiary hearing by appellant (PC-R. 295). He only seemed to recall the name and person of Dawn Botkins (PC-R. 297). However, he had no recall of Toni Nazar, Marlene Smith, Cynthia Domage and Sydney Shovan (PC-R. 296)

Sanchez further testified that, in his investigation of Dawn Botkins, he never uncovered information through her that appellant had been struck by a van and injured her head and that, in fact, he had no recall of what Dawn Botkins said concerning appellant (PC-R. 297).

Sydney Shovan, a 39 year-old plumber and resident of Gaylord, Michigan, grew up two blocks away from appellant (PC-R. 312). He testified as to his knowledge that appellant grew up with her grandfather and grandmother, whom he had assumed were her parents, along with her sister/aunt Lori Grody and brother/uncle, Barry Wuornos (PC-R. 312). Mr. Shovan lived in close proximity to the appellant, attended the same school as her, and rode the same school bus (PC-R. 313). He testified as to his knowledge of appellant being severely abused by her grandfather (PC-R.314) According to this witness, appellant

always had bruises on her arms, cheek and chin (PC-R. 314). This witness professed knowledge of appellant being sexually active with her brother, Keith (PC-R. 315-317). Mr. Shovan also testified as to appellant being forced to cut a willow tree switch with which her grandfather would beat her. (PC-R. 317). Further, Mr Shovan also knew of sexual abuse suffered by appellant and how it was common knowledge in the neighborhood that appellant and her brother were sexually active with each other (PC-R. 317). He had heard Keith being teased about having sex with his sister, appellant (PC-R. 318). On this issue, Mr. Shovan further testified that he had heard an admission from Keith Wuornos that both he and his sister had sex after having become extremely drunk (PC-R. 319). According to this witness, appellant's pregnancy, which occurred when she was fifteen, was common knowledge in the neighborhood and he was personally aware of it as well (PC-R. 341). He did not have further contact with appellant until after the onset of her latter teen years (PC-R. 343). Following appellant's arrest for first-degree murder, this witness was contacted by movie producers, yet he was never contacted by any of appellant's lawyers from the public defender's office (PC-R. 345).

Cynthia Jane Dolmage, a nurse from Michigan and the sister of Sydney Shovan, Toni Nazar and Marlene Smith, testified as to

her knowledge of appellant's abusive childhood (PC-R. 346). Ms. Dolmage stated that she lived two houses down from appellant and saw her grow up with what she assumed to be appellant's mother and father but whom she later learned to be appellant's grandfather and grandmother (PC-R. 347). Ms. Dolmage attended school with appellant but was one grade ahead of her (PC-R. 348). She described the character of the neighborhood in which she and appellant grew up as being rural and close-knit, consisting of dirt roads and being located well far from the bustling metropolis of Detroit (PC-R.349). Appellant would often tell her that she was going to get a whipping when she got home and that appellant was required to pick a branch off a willow tree for such purposes (PC-R. 351). Ms. Dolmage recalled appellant as saying that the big branches were preferable because they tended to hurt less than the smaller ones (PC-R. 3501).

Ms. Dolmage, further testified that appellant would frequently exit her house via the bedroom window so as to avoid passing her grandfather whom she apparently feared (PC-R. 352). Ms. Dolmage would actually hear the sounds of the whippings which were administered to appellant by her grandfather (PC-R. 352). She described them as being a "whoosh" sound (PC-R. 352). Ms Dolmage also testified as to an elderly neighbor by the name

of Potlock. (PC-R. 354). Potlock lived in a run-down house and had a reputation for being an unsavory character (PC-R. 355). Ms. Dolmage stated that Mr. Potlock had impregnated appellant (PC-R. 357). This witness further testified as to being at a party at the appellant's house where appellant, in a state of alcohol-induced stupor, confided that her brothers had sex with her (PC-R. 360). According to Ms. Dolmage's testimony, the sister of appellant, Lori Grody, who had testified at the original penalty phase hearing that appellant had come form a normal and stable home, threw water on appellant after she said this (PC-R. 312-345). Ms. Dolmage testified that no one from the public defender's office ever contacted her (PC- R. 363).

Marlene Annette Smith, a sibling of the previous two witnesses, testified that she was a childhood friend of appellant (PC-R. 378). Additionally, Ms. Smith testified that appellant's grandfather would often beat appellant (PC-R. 380). She also testified that Barry Wuornos, a sibling of appellant, who the state called at the first penalty phase to bolster its claim that the appellant grew up in a normal stable household, was seldom present in the Wuornos household at the time appellant was growing up (PC-R. 386). Ms. Smith witnessed the aforementioned disclosure of appellant regarding her brother Keith having sex with her and she recalled the presence of Mr.

Potlock whom she described as “creepy” (PC-R. 391). Further, Ms. Smith recalled appellant frequently staying at Mr. Potlock’s camper (PC-R. 393).

Ms. Smith was two years older than appellant and confirmed accounts of the beatings which her siblings recounted (PC-R. 381). She also corroborated accounts of appellant selecting a tree branch with which she would be beaten and having a preference for the smaller kind because they would tend to hurt less (PC-R. 382). Ms. Smith testified that she, like her sister had heard appellant being whipped and that appellant’s grandfather was a physically-imposing man (PC-R.382). Ms. Smith testified that at the time she witnessed these beatings, appellant was no older than thirteen years-of-age. She also testified that appellant confirmed accounts to her of these beatings as they smoked cigarettes together (PC-R. 385).

Ms. Smith also testified as to the incident at the party where appellant, intoxicated and curled up in a fetal position, blurted out how her brother Keith had sex with her and how Lori Grody, appellant’s aunt/sister, threw water in the face of appellant when she made this assertion (PC-R. 387). As to the Potlock household, Ms. Smith testified that it was a very strange and eerie environment, one which appellant would frequent (PC-R. 393).

Toni Nazar, a sibling to the previous witnesses, who also grew up in the appellant's neighborhood, next testified (PC-R. 409). Ms. Nazar testified that she was employed by the Potlocks as a housekeeper and a care-giver to Mrs. Potlock, who was afflicted with cancer (PC-R. 410). Although her direct contact with appellant was comparatively limited, she did offer valuable insight into the character of the Potlock household by virtue of her employment there (PC-R. 412). Ms. Nazar testified that Mr. Potlock had very strange habits such as hanging semen-filled condoms upon the shower rod in his bathroom (PC-R. 412). She also testified as to seeing hard-core pornography in the Potlock household. It was displayed and shown to all the children in the neighborhood (PC-R. 412).

The witnesses' parents did not have a turntable (record-player) so she would utilize the one owned by the Potlock's (PC-R. 413). Mr. Potlock would encourage her to dance when she played albums at his house and leered at her accordingly (PC-R. 413). This witness would see women go to the back of the home and would hear strange sounds in the nature of moans emanating form the rear of the house, presumably evidencing sexual activity (PC-R. 414).

A. friend of appellant during her teenage years, Dawn Botkins testified that she knew appellant from the age of 15

(PC-R. 430). Ms. Botkins testified that she had been contacted by Trish Jenkins and that she had been ready, willing and able to testify on behalf of Ms. Wuornos but that she was never called as a witness (PC-R. 433).

Ms. Botkins stated that all the kids in Troy, which was where she and appellant grew up, used to congregate at a location known as the "pits" (PC-R. 434). Ms. Botkins recalled an incident where appellant was essentially dumped from a moving van, fell badly on her head and was left with no one attempting to tend to her (PC-R. 435). She also recalled that appellant had been drinking excessively one night while in the company of a gentleman friend and woke up with dried semen on her (PC - R. 436). Appellant had been repeatedly raped (PC - R. 436).

Ms. Botkins testified as to a party that occurred at appellant's house when her grandparents were out of town and a squabble ensued between appellant, Barry Wuornos and Lori Grody. As a result of the argument, appellant was thrown out of the house into the cold snow (PC - R. 438). Appellant remained out of the house and out of sight for at least two days (PC-R. 439).

According to this witness, appellant used to sleep in the woods (PC - R. 440). She would stay at the witnesses' house or, she would stay in cars (PC - R. 440). Eventually, appellant

hitchhiked to Florida because she was tired of freezing and seeking places to stay (PC-R. 441). According to Ms. Botkins, appellant constantly used drugs, specifically downers and THC (PC-R. 442). Ms. Botkins and appellant would hitchhike to a place in Detroit known as Hawthorne Park where they would buy and use drugs (PC-R. 442). This was known as Seven-Mile road, and this witness recalled it as actually being quite dangerous (PC - R. 442).

Attorney William Miller testified that in 1991 he was one of three attorneys appointed to represent appellant in her criminal trial for the Mallory murder (PC - R. 483). He stated that primarily his area of concentration was in the area of mental health experts (PC-R. 486). He stated that he carried an extensive caseload as a felony public defender throughout the time he represented appellant (PC - R. 486). He had picked a jury on another criminal case the Monday preceding the inception of the Wuornos trial (PC-R. 487). It was not until two to three weeks before the trial that Mr. Miller actually took a break from his felony caseload (PC-R. 488). Of the three attorneys, Ms. Jenkins had the most contact with Ms. Wuornos (PC - R. 490). Attorney Miller expressed some misgivings about how well he handled the case in light of its unique status as a highly celebrated and notorious case (PC-R. 491). Mr. Miller testified

that he was wary of the self-defense theory put up by the defense team and that they effectively had no back-up plan (PC-R. 497). In his view, there was no question that appellant drank too much (PC - R. 497). Mr. Miller expressed his opinion that, although he could concede that someone in as dire a situation as appellant might have nothing to lose by asserting as many defenses as possible, he personally did not agree with the voluntary intoxication defense (PC - R. 493). Yet he mentioned that, had he known that the Williams Rule issue was going to go against the defense, he would have certainly re-evaluated such a reservation as to the intoxication defense.[1]

Mr. Miller testified as to the intense pressure created by the publicity of the trial and how it came to bear upon the difficulty of his task (PC-R. 499). He also commented as to how appellant herself appeared to decompensate in the course of the hearing and how this negatively affected the defense team's focus during the trial (PC-R. 499).

Mr. Miller also felt that the appellant could have been better served by their investigator, Domingo Sanchez.

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[1]As elucidated in Argument III-A, the issue of whether or not to admit evidence of the other crimes to which appellant had confessed was not decided until after the trial was underway.

> There were times when Mr. Sanchez disappointed me subsequent to that. I was not as familiar with his investigation of that particulars case in terms of like all he assignments he had before I got there, which would have been most of the work up, so to speak, and finding witnesses and when things were done. But the bottom line is, he had too much work to do as does everybody in our office. I mean, there's no question about that.

(PC-R. 502)

Mr. Miller expressed no familiarity with the list of mitigation witnesses whom appellant called to testify at the evidentiary hearing (PC-R. 507). Mr. Miller conceded that the three attorneys who served appellant in the trial had no formal system of meeting and their efforts could have been better coordinated and organized (PC-R. 516). No expert was ever retained for the purpose of presenting the defense of voluntary intoxication (PC-R. 522).

Appellant next called Patricia Jenkins, who was appellant's lead attorney during the trial (PC-R. 525). Ms. Jenkins was, at the time of the evidentiary hearing and at the time of appellant's initial trial, the Chief Assistant Public Defender for the Ocala, Marion County office of the Fifth Judicial Circuit (PC-R. 526). Her duties were the hiring and firing of personnel and the overall management of the Ocala office (PC-R. 526). She was also handling an active felony caseload at the

time of her representation of Ms. Wuornos (PC-R. 526).

Ms. Jenkins also testified that an attorney who was originally assigned to the case, Ed Bonett, was removed from the case in favor of Billy Nolas (PC-R. 529). Ms. Jenkins also stated that during the pendency of appellant's case, she was busy with yet another capital case, that of John Barrett which had been transferred from Marion County to Pinellas County (PC-R. 530). In addition to Mr. Barrett's case, Ms. Jenkins also had five other capital murder cases during the time she was representing appellant (PC-R. 530).

Ms. Jenkins testified that there was no formal system of meeting or task organization between the three lawyers (PC-R. 532). It was an integrated endeavor (PC-R. 532). The attorneys had no designated areas of concentration and no scheduled meetings (PC-R. 533). Attorney Jenkins testified that there was some degree of dissension within her team (PC-R. 536). She felt, for example, that attorney Billy Nolas, her colleague, was talking to members of the press to the detriment of appellant's cause (PC-R. 537).

Ms. Jenkins stated that she knew from talking to Tyria Moore that appellant was an alcoholic but that she declined pursuing it because: it was not consistent with her client's version of the incident; it was not what her client desired and; such a

defense was, in her experience, rarely an effective strategy in a criminal trial (PC-R. 540). Yet Ms. Jenkins conceded that the assertion of the voluntary intoxication defense could have thwarted the assignment of specific intent, which is a requisite for a conviction of first-degree murder (PC-R. 542).

Ms. Jenkins also conceded that her client always drank while on the road hitchhiking and that she was aware of the specific evidence in this case that Ms. Wuornos was drinking during the fateful encounter with Mr. Mallory (PC-R. 535). Although Ms. Jenkins acknowledged having told the jury in her opening statement that her client's actions were blurred by alcohol on the night in question, she did not develop the voluntary intoxication defense (PC-R. 535).

Ms. Jenkins stated that she did travel to Michigan to search for and talk to mitigation witnesses but she could not recall the people to whom she spoke (PC-R. 547). She did not recall the names of the mitigation witnesses whom appellant called at the evidentiary hearing (PC-R. 547). She stated that she went to Michigan with her investigator, Domingo Sanchez who was, in her words, "overwhelmed" by the case (PC- R.548). Ms. Jenkins testified that it was, as she recalled, her intent to call Dawn Botkins as a lay mitigation witness but due to some degree of "dysfunction" in her defense team, this was never done (PC-

R.572). Overall, Ms. Jenkins did concede that her defense team was overwhelmed by the task of representing Ms. Wuornos (PC-R.574). Ms. Jenkins also admitted that the only lay witnesses who were called in the penalty phase were Barry Wuornos and Lori Grody, who who were both called by the state. They were siblings of the appellant and offered testimony adverse to appellant's interests (PC-R. 576). These witnesses testified that life in appellant's home was normal (R. 3513). This testimony was only rebutted, according to Ms. Jenkins, by the expert witnesses called by the defense(R. 3173). Ms. Jenkins also admitted that she had doubts at times as to appellant's competence to proceed but that she did decide not to pursue voluntary intoxication, in part, based on input from the same client (PC-R. 577).

Billy Nolas, appellant's third attorney, testified at the evidentiary hearing that, as he understood it, he was the lawyer on the team who would be responsible for all legal issues (PC-R. 547). Mr. Nolas had to also handle, in addition to appellant's trial, a regular felony caseload as an assistant public defender (PC-R. 598-99). As far as the formal organization of duties and labor, Mr. Nolas testified that "it wasn't as if it was a sort of planned out kind of thing in advance of who would do what; to a certain extent, we kind of winged it" (PC-R. 601).

Mr. Nolas was familiar with the general body of evidence suggesting appellant's drinking problem and the amount of alcohol she had been drinking on the night of the incident (PC-R. 605). However, he did not recall there ever having been any discussion nor specific consensus among the three of the attorneys to pursuing intoxication as an issue (PC-R. 604). Mr. Nolas also expressed his opinion that the assertion of a voluntary intoxication defense would not have been inconsistent with what appellant's defense team was trying to do (PC-R. 606). He also opined that such a defense does not necessarily carry less merit simply because it is put forth by an alcoholic (PC-R. 606).

According to Mr. Nolas, appellant visibly and unmistakably de-compensated during the trial to the point of being incoherent. (PC-R. 608). Although he was generally aware of Sanchez and Jenkins having gone to Michigan for purpose of finding mitigation lay witnesses, Nolas felt he should have done his own investigation of mitigation witnesses (PC-R. 609). He felt that, although Mr. Sanchez was a "nice guy", he did not render an acceptable level of thoroughness in his investigative work (PC-R. 610). Mr. Nolas stated that the team was never formally organized and there did arise form time to time some tension (PC-R. 611).

Mr. Nolas testified that some dissonance might have been created by his having conducted the presentation of mitigation witnesses and Ms. Jenkins having done the closing argument (PC-R. 614). He felt that the inferences which he had been attempting to create in the course of presenting his witnesses would not necessarily be followed through in an effective manner by another attorney (PC-R. 614). Ms. Jenkins had apparently decided that she wanted to do the closing argument on the penalty phase (PC-R. 614).

Mr. Nolas testified as to tension within the defense team and the detriment it came to bring to the quality of the defense (PC-R. 619).

Following the testimony by the trial attorneys, appellant next called at the evidentiary hearing a trucker by the name of Tom Evans (PC-R. 691). Mr. Evans, who offered to testify for the defense at the time of trial but was never called, stated that in 1991 he had picked up appellant in Mobile, Alabama and spent approximately seven days in her company (PC-R. 693). He had been fighting with his own wife at the time and found appellant to be a warm, considerate and caring person (PC-R. 700). There was no sex or money exchanged between the two (PC-R. 694). Appellant had sought assurances from this witness, however, 'that he not harm her. "I'm not in the hurting business" was the

reply from Tom Evans (PC-R. 693-95).

In the course of their some seven days together, appellant was quiet and showed particular concern for Mr. Evans' dog. Appellant and Mr. Evans would never spend the night together but rather one would sleep in the hotel room and one in the truck van (PC-R. 701). Mr. Evans further testified that he appeared on a segment on NBC's Dateline entitled "What the Jury Never Heard" in which he recounted his story to a national television audience (PC-R. 705).

The state proceeded to call Trish Jenkins. Through her, the state elicited the opinion that using an expert can be tactically wise because of the hearsay testimony of others which can be admitted through them (PC-R. 715). Ms. Jenkins further testified that Tom Evans had made money demands as a pre-condition of his testimony and that she attempted to find people in the appellant's neighborhood (PC-R. 717).

The trial court recessed upon the conclusion of the evidentiary hearing for approximately fifty minutes (PC-R. 799). Court resumed, and the Trial Judge announced that he was prepared to rule, which he did, denying appellant's motion (PC-R. 800).

The trial court subsequently rendered a written order on April 11, 2000, in which it incorporated by reference the oral

findings it made in open court on April 7, 2000 (PC-R. 727).

The trial court made no findings as to the balance of appellant's fifteen claims, II, III, IV, V, VI, VII, VIII, IX, X, XII, XIII, XIV, XV, XVI, XVI and XVII all of which were summarily denied without a hearing.

Appellant filed a motion for rehearing on April 25, 2000 (PC-R. 3018). The trial court denied this motion on May 17, 2000. (PC-R. 302). This appeal ensues.

Summary of Argument

1. The trial court erred in denying the claims presented at the postconviction hearing.

2. Appellant was denied the effective assistance of counsel in violation Sixth, Eight and Fourteenth Amendments when her trial counsel failed to develop and present the defense of voluntary intoxication.

3. Appellant was denied when her trial counsel failed to locate and present lay witnesses to testify in mitigation at the penalty phase.

4. The trial court erred in summarily denying without a hearing the claim that Ms. Wuornos was denied the effective assistance of counsel at the guilt phase of her trial in violation of the Sixth, Eighth, and Fourteenth amendments to

the United States Constitution.

5. Appellant was denied the effective assistance of counsel by trial counsel’s failure to; timely attack and challenge the state’s use of similar fact evidence also known as ”Williams rule” evidence; uncover and present to the jury the relevant criminal past of murder victim Richard Mallory; move for an evaluation of appellant prior to and during trial so as to determine appellant’s competency to proceed.

6. The lower court prevented appellant from presenting her case during the postconviction evidentiary hearing by refusing to keep the evidentiary hearing open so that her counsel could obtain and present expert testimony on the issue of voluntary intoxication not being pursued by his trial counsel.

7. The trial court erred in summarily denying without a hearing the claim that a breakdown in the adversary system, per United States v. Cronic, 466 U.S. 648 (1984), prevented counsel from rendering effective assistance and denied Ms. Wuornos her rights under the Sixth, Eighth and Fourteenth amendments to the United States Constitution as well as her rights to a reliable adversarial testing of the state’s case.

8. Ms. Wuornos' trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a

whole, since the combination of errors deprived her of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

9. The trial court erred in summarily denying without a hearing the claim that Ms. Wuornos was denied her rights under Ake v. Oklahoma 105 S. Ct. 1087 (1985) when counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the mental health consultant in violation of Ms. Wuornos' rights to Due Process and Equal protection under the Fourteenth amendment, as well as her rights under the Fifth, Sixth, and Eighth amendments to the United States Constitution.

10. Newly discovered evidence in regards to the criminal past of Richard Mallory and law enforcement participation in book and movie deals establishes that Ms. Wuornos's conviction and sentence were in violation of the Eighth and Fourteenth Amendments to the United States Constitution. .

11. Ms. Wuornos was deprived of his rights to due process under the Fourteenth Amendment as well as her rights under the Fifth, Sixth, and Eighth amendments to the United States Constitution, because the State withheld evidence which was material and exculpatory in nature.

ARGUMENT I

THE LOWER COURT'S RULING DENYING THE TWO CLAIMS PRESENTED AT THE POST CONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

At the evidentiary hearing, Ms. Wuornos presented evidence substantiating her claims regarding ineffective assistance of counsel at the guilt and penalty phases of her trial. Based on the testimony presented, Ms. Wuornos was entitled to relief.

In Stephens v. State, 748 So. 2d 1028 (Fla. 1999), this Court reiterated the proper standard of review to be applied when assessing ineffective assistance of counsel claims following an evidentiary hearing. While normally a trial court's factual finding must be based upon competent substantial evidence, an appellate court is not required to accord particular deference to a legal conclusion of constitutional deficiency or prejudice under the Strickland test for evaluating the effectiveness of counsel. Stephens, 748 at 1028.

As this court stated in Stephens :

> Yet despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle. This obligation stems from the appellate court's responsibilities to ensure that the law is applied uniformly in decisions based on similar facts and that the appellant's

> representation is within constitutionally acceptable parameters. That is especially critical because the Sixth Amendment right to assistance of counsel is predicated on the assumption that counsel "plays the role necessary to ensure that the trial is fair"

Stephens, 748 So.2d at 1034

A. MS. WUORNOS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE IN VIOLATION OF HER SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

1. Failure to develop the defense of voluntary intoxication

A plain reading of the pertinent portions of the trial transcript, which is contained on the record of appeal (R. 2250), clearly indicates that the interaction between appellant and Mr. Richard Mallory, of whom she was convicted of murdering, was oriented to consumption of alcoholic beverages.

Trial counsel represented to the jury in her opening statement that the defense would present this very type of evidence. Assistant Public Defender, Trish Jenkins, appellant's attorney, in her opening statement to the jury, stated as follows:

> During the time she was out in the woods with Mr. Mallory, her constant knowledge of impending danger was blurred by alcohol. She was really drunk. And she apologizes to law enforcement. I'm confused. I can't remember everything. I was just so drunk.

(R.689).

The testimony of state witness Tyria Moore, who was appellant's roommate and lover, similarly established that appellant was not only significantly impaired at the time of the incident but that her (Moore) roommate had an extensive history of alcohol abuse (R-969).

The testimony of state witness John Bonnevier, the deputy who discovered Richard Mallory's abandoned vehicle, established the presence of drinking tumblers and a half-consumed bottle of vodka (R-708).

Additionally Appellant testified at trial that she accepted a drink offered to her by Richard Mallory (R. 1928) in the course of her ride with him. Appellant also testified that prior to getting into Mr. Mallory's vehicle she had been drinking beer in Ft. Myers, from where she was hitchhiking (R. 1928).

Appellant further testified that Mr. Mallory bought her a six pack of beer once they had arrived in Orlando (R. 1929). During the course of the evening she had been drinking that beer (R. 1933).

Despite her opening statement as to the continuous drinking of vodka and beer in the course of the ride with Mr. Mallory (R. 691). Trial counsel failed to elicit on direct examination any testimony from appellant that her actions were influenced by the amount of alcohol she had consumed.

Trial counsel's sole strategy of defense, was simply to have

appellant take the stand and testify. Counsel failed to elicit any testimony about appellant's state of mind; failed to support the intoxication issue with any expert testimony; and then simply requested an instruction on voluntary intoxication.

Such an omission on the part of trial counsel was clearly deficient and well below the standard of reasonable competence as contemplated by Strickland. Trial counsel failed to bring to the attention of the jury the aforementioned evidence concerning the tumblers and half consumed bottle of vodka; the confession and trial testimony of the appellant in regards to the amount of alcohol she drank on the night in question and; the testimony of appellant's roommate's Tyria Moore on the issue of appellant's drinking. This evidence was never amplified or emphasized in closing argument, never followed up with the use of an expert witness on the issue of intoxication and the effects it would wield on the mental process, particularly as concerns the forming of a specific intent.

Trial counsel limited her effort in this regard to mentioning this issue in her opening statement and requesting and offering of an instruction to the jury.

The trial court found that the omission of appellant's trial counsel to further pursue the voluntary intoxication defense was a tactical decision (PC-R. 818). However, there was no joint tactical decision not to pursue it; otherwise an

instruction on same and the mention of it in opening argument would never have occurred.

A careful review of the testimony of the three trial attorneys reveals that the organization and management of the case was at best haphazard and informal. A review of such testimony further reveals that nothing close to a consensus coalesced on this issue. The testimony of Attorney Trish Jenkins at the evidentiary hearing served to reinforce the lack of any possible consensus necessary for a tactical decision. While conceding that appellant was at the time of the crime an alcoholic, "absolutely" (PC-R. 534), Attorney Jenkins testified that she opted against this defense because, in her experience, this was not an effective defense (PC-R. 542). Attorney Jenkins further voiced suspicion about her team colleague Billy Nolas having "another agenda" (PC-R. 538). At a later point in her testimony, she alludes to "dysfunction in the defense team" (PC-R. 572).

Although she stated clearly her reasons for not aggressively asserting the voluntary intoxication defense (PC-R. 540), Miss Jenkins, when questioned on this issue, testified as follows:

> Q. Okay Would you agree, Ms. Jenkins, that she had talked quite a bit about how much she was drinking not only on the night in question, but throughout her life?
>
> A. I would say she talked about the fact that

she consumed alcohol over her lifetime, yes

Q. Do you think she had a problem with alcohol?

A. Well, she was an alcoholic, if thats what you mean.

Q. You think she was an alcoholic?

A. Absolutely

(PC-R. 534).

* * *

Q. So bearing that in mind, Ms. Jenkins, your concession that this was a different case and a case you were overwhelmed by, would it perhaps not have been prudent to deploy a more broad-based approach in terms of the defenses you availed yourself of?

A. We didn't think so at that time and I don't think so now.

Q. Is it your opinion that asserting the defense of self-defense would have been inconsistent with voluntary intoxication?

A. I think it was inconsistent with the facts that I had available to me and the conversations that I had with Ms. Wuornos.

Q. But could not have somebody just have been acting in broad self-defense, because of intoxication, lack the specific intent to be guilty of first-degree murder?

A. I guess that's possible.

Q. Or is it also possible or arguable that the fact that she had three different versions meant the alcohol contributed to her diffuse idea formation? But still the basic idea was there that he attacked her?

A. I think that's possible, yes.

(PC-R. 542).

The attorneys did not testify that they jointly decided not to pursue this defense; rather they expressed their reservations to such a defense. They conceded that voluntary intoxication was not incompatible with self defense and that given appellant's dire plight made more so by the admission of Williams' Rule evidence she would have been better served with a battery of defenses.

Attorney Miller flatly stated that he did not like self defense (PC-R 493) and that there was no question that appellant drank too much (PC-R.497). Miller further conceded, somewhat wistfully, that the team had no backup defense (PC-R. 497) and that they could have been better organized (PC-R. 517). He also conceded that appellant's having offered various versions of the crime could itself be evidence of intoxication (PC-R.497). Mr. Miller, while stating that he did not like the voluntary intoxication defense (PC-R. 493), acknowledged that there was evidence of it (PC-R. 497) and that it probably would have been better to have asserted it especially given that the ruling on Williams Rule evidence went against appellant (PC-R.495). Mr. Miller, when questioned, testified as follows at the evidentiary hearing:

> Q. So your testimony today would be that Ms. Wuornos in her dire plight was in a position to narrow her issues; that she had nothing to gain by trying as many possible issues as possible
>
> A. That's a different question. I mean, I think in light of the fact that the decision on the William's Rule evidence was not decided until the middle of the trial, had I known at the onset hat there was going to be...all that came in was going to be features of that trial, I might have...I might, with more confidence, agree with your statement.

(PC-R. 495)

Mr. Nolas' testimony on the dynamic of how the defense team strongly impeaches any finding that the decision not to have pursued voluntary intoxication could have been the product of a consensus.

> We did not strategize and plan alternatively for what would happen if the Judge admitted the other crimes that Ms. Wuornos was accused of. Similarly we didn't sit down and discuss the interplay between the penalty phase evidence and the trial phase evidence. We didn't designate in advance who would be responsible for what specific item of evidence. Obviously, we had myself eventually being involved with the evidence at the penalty phase and Ms. Jenkins and Mr. Miller primarily for the evidence of the trial phase with myself doing some legal issues. But in terms of the witnesses themselves, many of those decisions and I would say most of those decisions were made either the night before or the morning that a specific witness

> testified in terms of who would cross-examine and in terms of who would actually be addressing whatever the next witness was that the prosecution put on. So there was not that...what I would view as the necessary planning that needs to go on in advance in any serious case, much more so in a case of this magnitude; it was seven...seven murders is what we're talking about.

(PC-R. 613).

Mr. Nolas' testimony suggests that all decisions facing the defense, team were made on an ad hoc basis. Mr. Nolas stated there was no discussion among the three defense attorneys on the issue of intoxication and that, but for his efforts, there would not have even been a jury instruction requested on voluntary intoxication (PC-R. 605).

The aforementioned testimony shows that Mr. Miller and Miss Jenkins recognized that not only was voluntary intoxication a valid defense it was, given the dire plight of appellant's case, even more appropriate. Both attorneys also acknowledge the strong evidence there was of appellant's having been intoxicated at the time of the incident.

There is no testimony by any of appellant's three trial attorneys that they conferred and jointly agreed not to pursue voluntary intoxication. The evidence supports a more likely scenario that Ms. Jenkins, who seems to admit the efficacy of such a defense, unilaterally decided to forego the defense even though she mentioned

it in her opening statement (R.689) and requested an instruction on it. This omission was hardly the product of a consensus but rather the byproduct of confusion.

As a matter of law, the failure to more fully explore and develop the defense of voluntary intoxication is a facially sufficient claim where, as here, there is independent evidence of intoxication to the crimes charged, which are specific intent offenses. See Johnston v. Dugger, 583 So. 2d 657 (Fla 1991); Flores v. State, 662 So. 2d 1350 (Fla 2d DCA 1995).

According to Linehan v. State, 476 So. 2d 1262 (1985), voluntary intoxication is an affirmative defense which requires appellant to come forward with evidence of intoxication at the time of the offense sufficient to establish that he or she was unable to form intent necessary to commit the crime charged. Trial counsel failed to introduce actual evidence of intoxication at the time of the offense. An inference or suggestion of intoxication is certainly not sufficient to establish a voluntary intoxication defense. Trial counsel was ineffective because, as demonstrated through the testimony of the numerous witnesses at the evidentiary hearing, trial counsel had, or should have had, this evidence at their disposal and failed to utilize it.

The prejudice of this omission is additionally strong

because the defense team was faced with a ruling by the trial court that evidence of the other crimes could be admitted. Accordingly, it found that its sole affirmative defense - that of self defense - was accordingly destroyed. Because her defense team had no alternative defense, appellant's chances for either acquittal or a life sentence were effectively dashed.

Counsel failed to investigate or present the available evidence of actual alcohol consumption and intoxication on the night of the offense, and therefore failed to effectively argue that defense. Considering the fact that there was no other viable defense available based on the information in trial counsel's possession, counsel's failure to investigate the voluntary intoxication defense was simply inexcusable. See Middleton v. Dugger, 849 F.2d 491, 494 (11th Cir. 1988) (no strategic reason for failure to investigate was "contrary to prevailing professional norms.") Kimmelman v. Morrison, 477 U.S. 365, 385 (1986); Cunningham v. Zant, 928 F.2d 1006, 1016. Where, as here, counsel unreasonably fails to investigate and prepare, the appellant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence);

Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

Had counsel performed effectively, there is a reasonable probability that the outcome would have been different -- that is, that Mr. Wuornos would have been convicted of a lesser offense, rather than first-degree murder, and would not now be facing execution. Accordingly it is evident that trial counsel was ineffective in failing to assert voluntary intoxication and that such a failure prejudiced appellant. Ms. Wuornos is entitled to Relief.

B. MS. WUORNOS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HER TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Failure to present lay mitigation witnesses

Appellant was denied the effective assistance of counsel at the sentencing phase of her capital trial. Counsel's failure to investigate and prepare directly resulted in appellant’s death sentence. Further, counsel failed to discover and use significant mitigation evidence without which no individualized consideration of appellant could occur. Had counsel adequately prepared and discharged their Sixth

Amendment duties, overwhelming mitigation evidence would have been presented and would have precluded a sentence of death.

Proper investigation and preparation would have resulted in evidence establishing an overwhelming case for life on behalf of Ms. Wuornos and would have, at a minimum, delivered the six necessary votes for a jury recommendation of life. The difference between the crazed, female serial-killer caricature presented at trial and the fully fleshed and humanized Aileen Carol Wuornos, a woman with a tragic life story, whose mental health problems would have come to light had counsel properly prepared, is startling. Had counsel properly prepared, the judge and jury could have known the real person. Had counsel provided the mental health experts who testified at the penalty phase with this critical information, and with the overwhelming evidence of her abusive and harsh upbringing, appellant would have been spared the death sentence.

In Strickland, 446 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688. Strickland requires a appellant to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice. Ms. Wuornos has satisfied each.

Defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a appellant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190, (1976) (plurality opinion). In Gregg and its companion cases, the court emphasized the importance of focusing the jury's attention on the "particularized characteristics of the individual appellant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985). Trial counsel here did not meet these rudimentary

constitutional standards. Testimony was presented at the evidentiary hearing regarding trial counsel's failure to call lay witnesses at the penalty phase.

Sydney Shovan, a 39 year-old plumber and resident of Gaylord, Michigan, grew up two blocks away from appellant (PC-R. 312). He testified as to his knowledge that appellant grew up with her grandfather and grandmother, whom he had assumed were her parents, along with her sister/aunt Lori Grody and brother/uncle, Barry Wuornos (PC-R. 312). Mr. Shovan lived in close proximity to appellant, attended the same school as her, and rode the same school bus (PC-R. 313). He testified as to his knowledge of appellant being severely abused by her grandfather (PC-R.314) According to this witness, appellant always had bruises on her arms, cheek and chin (PC-R. 314). This witness professed knowledge of appellant being sexually active with her brother, Keith (PC-R. 315-317). Mr. Shovan also testified as to appellant being forced to cut a willow tree switch with which her grandfather would beat her. (PC-R. 317). Further, Mr. Shovan also knew of sexual abuse suffered by appellant and how it was common knowledge in the neighborhood that appellant and her brother were sexually active with each other (PC-R. 317). He had heard Keith being teased about having sex with his sister, appellant (PC-R. 318).

On this issue, Mr. Shovan further testified that he had heard an admission from Keith Wuornos that both he and his sister had sex after having become extremely drunk (PC-R. 319).

According to this witness, appellant's pregnancy, which occurred when she was fifteen, was common knowledge in the neighborhood and he was personally aware of it as well (PC-R. 341). He did not have further contact with appellant until after the onset of her latter teen years (PC-R. 343).

Following appellant's arrest for first-degree murder, this witness was contacted by movie producers, yet he was never contacted by any of appellant's lawyers from the public defender's office (PC-R. 345).

Cynthia Jane Dolmage, a nurse from Michigan and the sister of Sydney Shovan, Toni Nazar and Marlene Smith, testified as to her knowledge of appellant's abusive childhood (PC-R. 346). Ms. Dolmage stated that she lived two houses down from appellant and saw her grow up with what she assumed to be appellant's mother and father but whom she later learned to be appellant's grandfather and grandmother (PC-R. 347). She attended school with appellant but was one grade ahead of her (PC-R. 348). She described the character of the neighborhood in which she and appellant grew up as being rural and close-knit, consisting of dirt roads and being located well far from

the bustling metropolis of Detroit (PC-R.349). Appellant would often tell her that she was going to get a whipping when she got home and that appellant was required to pick a branch off a willow tree for such purposes (PC-R. 351). Ms. Dolmage recalled appellant as saying that the big branches were preferable because they tended to hurt less than the smaller ones (PC-R. 3501).

Ms. Dolmage further testified that appellant would frequently exit her house via the bedroom window so as to avoid passing her grandfather whom she apparently feared (PC-R. 352). Ms. Dolmage would actually hear the sounds of the whippings which were administered to appellant by her grandfather (PC-R. 352). She described them as being a "whoosh" sound (PC-R. 352). Ms Dolmage also testified as to an elderly neighbor of the name Potlock. (PC-R. 354). Potlock lived in a run-down house and had a reputation for being an unsavory character (PC-R. 355). Ms. Dolmage stated that Mr. Potlock had impregnated appellant (PC-R. 357). This witness further testified as to being at a party at appellant's house where appellant, in a state of alcohol-induced stupor, confided that her brothers had sex with her (PC-R. 360). According to Ms. Dolmage's testimony, the sister of appellant, Lori Grody, who had testified at the original penalty phase hearing that appellant

had come form a normal and stable home, threw water on appellant after she said this (PC-R. 312-345). Ms. Dolmage testified that no one from the public defender's office ever contacted her (PC- R. 363).

Marlene Annette Smith, a sibling of the previous two witnesses, testified that she was a childhood friend of appellant (PC-R. 378). Additionally, Ms. Smith testified that appellant's grandfather would often beat appellant (PC-R. 380). She also testified that Barry Wuornos, a sibling of appellant, who the state called at the first penalty phase to bolster its claim that appellant grew up in a normal stable household, was seldom present in the Wuornos household at the time appellant was growing up (PC-R. 386). Ms. Smith witnessed the aforementioned disclosure of appellant regarding her brother Keith having sex with her and she recalled the presence of Mr. Potlock whom she described as "creepy" (PC-R. 391). Further, Ms. Smith recalled appellant frequently staying at Mr. Potlock's camper (PC-R. 393).

Ms. Smith was two years older than appellant and confirmed accounts of the beatings which her siblings recounted (PC-R. 381). She also corroborated accounts of appellant selecting a tree branch with which she would be beaten and having a preference for the smaller kind because they would tend to hurt

less (PC-R. 382). Ms. Smith testified that, from her vantage point she would hear appellant being whipped and that appellant's grandfather was a physically-imposing man (PC-R.382). Ms. Smith testified that at the time she witnessed these beatings, appellant was no older than thirteen years-of-age. She also testified that appellant confirmed accounts to her of these beatings as they smoked cigarettes together (PC-R. 385).

Also, Ms. Smith testified as to the incident at the party where appellant, intoxicated and curled up in a fetal position, blurted out how her brother Keith had sex with her and how Lori Grody, appellant's aunt/sister, threw water in the face of appellant when she made this assertion (PC-R. 387). As to the Potlock household, Ms. Smith testified that it was a very strange and eerie environment, one which appellant would frequent (PC-R. 393).

Toni Nazar, a sibling to the previous witnesses, who also grew up in the appellant's neighborhood, next testified (PC-R. 409). Ms. Nazar testified that she was employed by the Potlocks as a housekeeper and a care-giver to Mrs. Potlock, who was afflicted with cancer (PC-R. 410). Although her direct contact with appellant was comparatively limited, Ms. Nazar did offer valuable insight into the character of the Potlock

household by virtue of her employment there (PC-R. 412). She testified that Mr. Potlock had very strange habits such as hanging semen-filled condoms upon the shower rod in his bathroom (PC-R. 412). She also testified as to seeing hard-core pornography in the Potlock household. It was displayed and shown to all the children in the neighborhood (PC-R. 412).

The witness' parents did not have a turntable (record-player) so she would utilize the one owned by the Potlock's (PC-R. 413). Mr. Potlock would encourage her to dance when she played albums at his house and leered at her accordingly (PC-R. 413). This witness would see women go to the back of the home and would hear strange sounds in the nature of moans emanating form the rear of the house, presumably evidencing sexual activity (PC-R. 414).

A friend of appellant during her teenage years, Dawn Botkins testified that she knew appellant from the age of 15 (PC-R. 430). Ms. Botkins testified that she had been contacted by Trish Jenkins and that she had been ready, willing and able to testify on behalf of Ms. Wuornos but that she was never called as a witness (PC-R. 433).

Ms. Botkins stated that all the kids in Troy, which was where she and appellant grew up, used to congregate at a location known as the "pits" (PC-R. 434). Ms. Botkins

recalled an incident where appellant was essentially dumped from a moving van, fell badly on her head and was left with no one attempting to tend to her (PC-R. 435). She also recalled that appellant had been drinking excessively one night while in the company of a gentleman friend and woke up with dried semen on her (PC - R. 436). Appellant had been repeatedly raped (PC - R. 436).

Ms. Botkins testified as to a party that occurred at appellant's house when her grandparents were out of town and a squabble ensued between appellant, Barry Wuornos and Lori Grody, and as a result of the argument, appellant was thrown out of the house into the cold snow (PC - R. 438). Appellant remained out of the house and out of sight for at least two days (PC-R. 439). According to this witness, appellant used to sleep in the woods. (PC - R. 440). She would stay at the witnesses' house or, she would stay in cars (PC - R. 440). Eventually, appellant hitchhiked to Florida because she was tired of freezing and seeking places to stay (PC-R. 441). According to Ms. Botkins, appellant constantly used drugs, specifically downers and THC (PC-R. 442). Ms. Botkins and appellant would hitchhike to a place in Detroit known as Hawthorne Park where they would buy and use drugs (PC-R. 442). This was known as Seven-Mile Road, and this witness recalled it

as actually being quite dangerous (PC - R. 442).

In dismissing Claim XI, the claim that appellant's trial attorneys were ineffective in failing to call lay witnesses, the court noted that appellant's lawyers did call three expert psychiatric witnesses (PC-R. 807).

As to the failure of appellant's attorneys to call the mitigation witnesses who testified at the evidentiary hearing, the court ruled orally as follows:

> Admittedly, it might would not have hurt to have called the brother and the three sisters, but I do find that overwhelming...the aggravation evidence presented to the jury was overwhelming and as to the allegation of ineffective counsel at the penalty phase for failing to call lay witnesses in addition to the three psychiatric type of experts that were called, I do find beyond clear and convincing, to the point of beyond all reasonable doubt, that the defense has failed to show prejudice to the extent that there would have been a reasonable probability and likelihood that the results would have been different if those lay witnesses had been called at the penalty phase.

(PC-R.813)

The trial court ruling further held:

> Addressing the Ground 11 that was raised, that would be the penalty phase argument that the three trial attorneys of Ms. Wuornos were ineffective by not calling lay witnesses, the court does note that three expert psychiatric type of witnesses were called....I believe they were all

> psychologists, but they were psychiatric type of expert witnesses that were called on behalf of Ms. Wuornos and to some extent they did relay some of Ms. Wuornos' childhood background and high school background, though possibly it might have been more dramatic to the jury possibly to have some of her childhood or high school friends come in and testify to her background.

(PC-R. 819)

The trial court, however, ignored the fact that the state attorney presented two lay witnesses, Barry Wuornos and Lori Grody, the uncle and aunt of appellant who testified that her childhood and upbringing were stable and normal (R. 3513). The aforementioned witnesses would have been critical to rebutting this testimony. Aside from applying a nonexistent hybrid standard of "clear and convincing to the point of beyond reasonable doubt," the trial court fails to base its denial on anything other than speculation that the lay witnesses could not have outweighed the aggravation witnesses. It failed to base its denial of this claim upon any evidence adduced at the hearing.

Attorney Trish Jenkins testified as to going to Michigan but could not recall all the people to whom she spoke. She could only recall Dawn Botkins and was unable to call her because of "dysfunction in the defense team" (PC-R. 572).

Attorney Billy Nolas openly stated that he felt the

efforts of appellant's defense team were abjectly deficient in not locating and subpoenaing lay mitigation witnesses. (PC-R. 619).

> I mean as I sit here today, I remember standing before the jury at the penalty phase saying, all we've got here is psychologists opinions about test. What kind of defense is that?

(PC-R. 619).

Appellant would urge this court to find in light the aforementioned testimony, that both prongs of Strickland have been met and that she is entitled to relief on this claim.

ARGUMENT II

THE TRIAL COURT PREVENTED APPELLANT FROM PRESENTING HER CASE DURING THE POSTCONVICTION EVIDENTIARY HEARING BY REFUSING TO KEEP THE EVIDENTIARY HEARING OPEN SO THAT HER COUNSEL COULD OBTAIN AND PRESENT EXPERT TESTIMONY ON THE ISSUE OF VOLUNTARY INTOXICATION NOT BEING PURSUED BY HIS TRIAL COUNSEL.

Prior to the commencement of the evidentiary hearing, the trial court denied a motion by the defense to keep open the hearing for purposes of calling an expert to examine the appellant and offer testimony on the court as to claim one, i.e. the condition of the defendant on the night in question and whether voluntary intoxication might have been a suitable defense (PC-R. 3012). Postconviction Counsel for the defense

had stated that he had visited his client four times since his assuming her case and cited privileged matters as causing the inability to having his client examined prior to this time (PC-R. 3014).

The court's obdurate refusal to grant a continuance denied appellant an adequate evidentiary hearing. The court granted a hearing on the claim that defense counsel was ineffective for not presenting more evidence on the issue of voluntary intoxication

However, the court denied appellant the ability to present evidence regarding these issues because the court refused to keep the hearing open for the presentment of such expert testimony. As a result, appellant was not able to present imperative evidence at his evidentiary hearing.

Because the court denied appellant additional time, she was able to present only a portion of the available evidence her postconviction counsel should have presented at the evidentiary hearing regarding the voluntary intoxication claim.

The court's refusal to grant additional time for the evidentiary hearing denied appellant a full and fair evidentiary hearing because the court denied her the opportunity to present evidence needed to establish Claim IA.

Accordingly, this Court should remand the case for a full and fair evidentiary hearing. *See e.g.* Provenzano v. State, 751 So.2d 37, 40 (Fla. 1999)("the goal of this proceeding is to seek the truth. The mere potential for delay should not divert us from this goal, especially in light of the severity of the punishment in this case.").

Appellant would urge this court to find that an abuse of discretion occurred and remand the cause back to the trial court so as to give her the opportunity to present expert testimony in support of the claim.

ARGUMENT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING WITHOUT A HEARING THE CLAIM THAT MS. WUORNOS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HER TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Although the lower court granted an evidentiary hearing on two claims, the court summarily denied without a hearing the remaining fifteen claims. In so doing, the court erred.

A Rule 3.850 litigant is entitled to an evidentiary hearing on a motion for relief unless (1) the motion, files and records in the case conclusively shows that the prisoner is entitled to no relief or the (2) motion or particular claims are legally insufficient. See Patton v. State, 2000 WL 1424526 (FLA) September 28, 2000.

As shall be argued with particularity in the body of this brief, legally sufficient claims were asserted by appellant in his motion for postconviction relief. Yet the trial court fails to sufficiently explain its reasons for summarily denying each claim without the benefit of a hearing. Consequently its order is far below any threshold of legal acceptability. See Patton v. State, 2000 WL 1424526 (Florida, September 28, 2000).

In Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000), the

Supreme Court of Florida held that in addition to the unnecessary delay and litigation concerning the disclosure of public records, another major cause of delay in postconviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. Id. at page 32.

The Supreme Court of Florida in its proposed amendments to Florida Rules of Criminal Procedure 3.851. 3.852 and 3.993 (no SC96646) (4/14/00) states:

> "Another important feature of our proposal is the provision addressing evidentiary hearings on initial postconviction motions. As previously noted we have identified the denial of evidentiary hearings as the cause of unwarranted delay and we believe that in most cases requiring an evidentiary hearing on initial postconviction motions will avoid that delay" Id at page 9.

See also Mordenti v. State, 711 So.2d 30 (Fla. 1998)

Accordingly, appellant requests this Court to order an evidentiary hearing on her claims. Her claims involve issues requiring full and fair Rule 3.850 evidentiary resolution. See, e.g., Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Mason v. State, 489 So. 2d 734 (Fla. 1986).

Some fact-based postconviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be

conclusively resolved by the record. When a determination has been made that a appellant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-53 (Fla. 1987). "Accepting the allegations. . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla. 1989). (Emphasis added)

Appellant has pleaded substantial, factual allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Because we cannot say that the record conclusively shows appellant is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So.2d 808, 809 (Fla. 1982).

As in Hoffman, this Court has "no choice but to reverse the order under review and remand," 571 So.2d at 450, and order a complete evidentiary hearing on appellant's 3.850 claims.

Here in addition to summarily denying this claim, the trial court failed to provide any explanation for this denial. In its April 7, 2000, oral findings made on the record at the conclusion of the evidentiary hearing, (which findings were incorporated by reference into the subsequently-rendered written order,) the trial court made no mention much less

findings as to the balance of appellant's fifteen claims: II; III; IV; V; VI; VII; VIII; IX; X; XII; XIII; XIV; XV; XVI; XVI;and; XVII, all of which were summarily denied without a hearing. Its order is confined exclusively to stating its reasons for the denial of the two claims upon which a hearing was ordered. On this basis alone, remand of this cause is necessary with directions to the trial court to conduct an evidentiary hearing on the balance of appellant's most meritorious claims.

A. APPELLANT'S RIGHTS UNDER DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED THAT IN TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE STATE'S USE OF SIMILAR FACT EVIDENCE ALSO KNOWN AS "WILLIAMS RULE" EVIDENCE.

On August 5, 1991, the state attorney filed a "Notice of Similar fact Evidence" pursuant to the law set out in Williams v. State 110 So. 2d 654 (Fla. 1959) which case generally provides for enumerated circumstances in which a prosecution of one crime will be permitted to introduce evidence of other bad acts(R. 4142).

In this notice the state announced its intent to introduce evidence of six other crimes confessed to by the appellant; David Spears in Citrus County, June 1990; Charles Carskaddon in Marion County, June 1990; Peter Siems presumably in Florida, June 1990; Troy Burress in Marion County 1990;

Richard Humphreys in Marion County, September 1990; Gino Antonio in Dixie County, November 1990.

Five months later, on January 3, 1992, days before the commencement of actual trial, defense counsel filed a motion in limine seeking to suppress the introduction of this similar fact evidence into the trial(R. 4416). Due to the late filing of this motion in limine, the actual hearing on this matter did not occur until January 17,1992 (R-1138) when the trial was underway.

The late filing of such a significant motion clearly fell below the range of reasonably competent assistance of counsel. The predicament created by trial counsel's late filing of this motion in limine created several serious and harmful consequences which bore adversely upon appellant's prospect for receiving a fair trial.

Appellant was denied a proper pretrial evidentiary hearing and proffer of the actual testimony. Instead, the court - intent on throttling through the trial on a two week time period - hastily accepted second hand summations of what the Assistant State Attorney expected the evidence to be (R. 1138-1171). Defense counsel urged the court to consider that, because the evidence had to be supported by quantum proof, the state should be required to present the actual evidence and

its testimony at a hearing held by the court (R. 1174).

Defense counsel even conceded that a pre-trial hearing would have been appropriate. The transcript provides in pertinent part:

> " We would submit that before Your Honor entertains the Williams Rule issue, Your Honor should conduct a hearing at which Mr. Damore (the assistant state attorney) will be required to prove everything he has told you....about all you have is in an oral proffer and you have not a sufficient quantum of evidence before you on which to rule"

(R.1174-75)

By even his own admission, defense counsel's late filing of the motion in limine forced the court to hear this monumentally important motion in the course of trial and after defense attorneys had already made their opening statement. This delay restricted arguments, if any, to be made against the admission of the similar fact evidence because appellant's attorney had already made her opening argument and had committed to and disclosed her strategy.

Defense counsel also states:

> "Cases usually, since most trial courts, the decisions that they make with regard to that evidence often times has a pretrial hearing on it, most Judges are not in a posture that Your Honor is in, having to decide this in the middle of trial."

(R. 1177)

On December 27, 1991, the state attorney filed, what it entitled, a motion in limine for a ruling as to the admissibility of Williams Rule evidence (R. 4398).

It is noted in the state's motion that the defense had, as of the date of its filing, filed no objection or responsive pleading to the State's Notice of Williams Rule testimony (R. l439). It was ineffective assistance of counsel in failing to have anticipated the likely or attempted use of these other crimes and to have not filed an earlier motion in limine. By failing to have filed and argued the motion in limine in a more timely matter, defense counsel restricted as to effectively determining the most adept defense strategy for the case.

Trial counsel did not investigate more throughly the background information on the victims, the crimes themselves and other matters related thereto. Trial counsel was less than prepared for the task of cross examining a total of 34 witnesses who testified, not on the Mallory murder, but on six other murders. Having not deposed these witness, appellant's trial counsel was essentially discovering this aspect of the case for the first time as the information unfolded at trial.

The Florida Supreme Court in affirming the appellant's judgment and sentence in Wuornos v. State, 644 So. 2d 1000,

(Fla. 1994) strongly inferred defense counsel's of ineffectiveness when it wrote:

> "Wuornos also complains that she was not afforded proper pretrial discovery regarding evidence the State intended to introduce pursuant to the rule of law established in Williams v. State 110 So. 2d (Fla. 1959). This evidence related to some of the other murders with which Wuornos was charged. On this point, the trial court concluded that Wuornos' counsel either had been afforded the discovery in question or had failed to exercise opportunities to review or copy file materials. The record provides sufficient support for this conclusion. While Richardson affords much to the defense, it does not mean the State must perform the defense's discovery for it. In sum we find no discovery violation here that would have required a Richardson hearing in the first instance."

Id. at 1006.

Had a more timely hearing been scheduled and the motion in limine argued in a more timely fashion, at least in advance of the trial, the appellant could have contemplated her trial and defense strategy in a more informed manner. She could have been aware of such vitally important aspects of the state's case such as the nature and extent of the gunshot wounds on the other victims, the testimony concerning the condition in which their abandoned vehicles were found and other prejudicial evidence such as the carrying of Bibles in Siems car.

Because defense counsel was ineffective in failing to obtain a pretrial determination of the Williams Rule Issue, they effectively doomed whatever prospect for success self-defense might have had. Stated another way, the tactical decision by appellant's trial counsel to assert a theory of self defense was made in a vacuum because the defense failed to have first settled the possibility of having to assert this theory amidst the evidence of the other murders.

In its arguments to the court urging the admission of evidence of similar facts, the state attorney argued as follows:

> "Judge, in this particular case what we can establish is a pattern by this appellant of intentional killing along the highways of the State of Florida. It goes specifically to her self-defense argument."

(R. 1147).

In Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), the Florida Supreme Court in affirming on direct appeal appellant's judgment and sentence held:

> The state relied on similar fact evidence to rebut Wuornos' claim regarding her level of intent and whether she acted in self defense. This was a proper purpose under the Williams rule.

Id at 1006-07.

Effectively then the Supreme Court affirmed admission of

the Williams rule evidence on a ground, self defense, which the defense divulged and committed to prior to the argument on whether to admit similar fact evidence.

Unquestionably the delay in filing the motion in limine ceded a major tactical advantage to the state. Had the appellant been able to properly consider her trial strategy with all of the important factors available, she might well have been better advised to decline asserting self defense and instead focus on voluntary intoxication.

Due to trial counsel's failure to resolve the similar fact evidence issue in advance of the trial's commencement, it was forced to commit to the self defense theory and effectively ensured the state's success in presenting to the jury evidence of six murders.

Because of their late filing of a motion in limine on the issue of Williams Rule evidence, the defense was in a position of only having been able to depose five of some 34 state witnesses who testified at trial.

Defense counsel Billy Nolas, in a sidebar stated:

> To tell you the truth a lot of this Marion County stuff we've never had access to.

(R. 1242).

The omission by trial counsel in not deposing these witnesses and discovering the sum and substance of their

testimony prior to trial fell clearly outside the range of reasonably competent professional assistance.

Because appellant's trial attorneys counseled her without the benefit of discovering the Williams rule evidence against her, appellant's decisions and elections in regards to her trial strategy were critically flawed.

The content of the testimony of the aforementioned undeposed witnesses related to critical areas such as the nature of and number of gunshot wounds, the location of their wounds, and the general condition of their bodies and abandoned vehicles. Such information would have been critical to both the appellant and trial attorneys in deciding upon a defense strategy. If such discovery had been known prior to the commencement of trial, this surely would have altered the decision by appellant to center her defense upon the doctrine of self-defense.

Pamela Mills, the foreman of the jury, stated subsequent to the trial that the presence of these other crimes being admitted against the appellant greatly diminished the chances of her keeping an open mind towards the prospect of acquittal or towards the prospect of considering the defenses asserted on behalf of the appellant.

Where, as here, counsel unreasonably fails to investigate

and prepare, the appellant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir.1989)(failure to have obtained transcript witness's testimony at co-appellant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

To produce a just result, effective assistance requires an attorney to investigate all reasonable sources of evidence which may be helpful to the defense. Strickland, 466 U.S, at 691. Counsel’s strategic choices made after thorough investigation of law and facts relevant to plausible options are not usually ineffective. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice to the appellant, counsel’s failure is ineffective assistance. No tactical motive can be attributed

to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. Through disinterest, abdication of duties, and conflict of interest, counsel failed to investigate and prepare for Aileen Wuornos' guilt phase. Aileen Wuornos' death sentence is the resulting prejudice. There is a reasonable probability that the guilt would have resulted in a conviction of a lesser included offense such as manslaughter or second degree murder if the trial strategy had been based on more thorough preparation and had been presented to the jury. Strickland, 466 U.S. at 694.

There is, as a result of trial counsel's omission, certainly a reasonable probability that but for such omissions the outcome of the trial would have been different.

That the jurors - as a result of this omission - were allowed to consider evidence of other crimes indubitably and greatly influenced the verdict and effectively undermined confidence in the outcome. Remand for an evidentiary hearing in this claim is warranted.

B. APPELLANT'S RIGHTS UNDER DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED IN THAT HER TRIAL ATTORNEYS WERE INEFFECTIVE IN FAILING TO UNCOVER AND PRESENT TO THE JURY THE RELEVANT CRIMINAL PAST OF MURDER VICTIM RICHARD MALLORY.

In Strickland v. Washington, 466 U.S. 668 (1984), the United

States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and demonstrate both unreasonable attorney performance and prejudice to prevail on an ineffective assistance of counsel claim. Id. In this claim, Ms. Wuornos has fulfilled each requirement.

"One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

Trial counsel had asserted a theory of self defense to the jury maintaining that Richard Mallory had acted in a violent manner towards the appellant necessitating the use of force. Of critical importance to the viability of such a claim was any evidence that tended to establish Mr. Mallory’s character in this respect.

Trial counsel failed to thoroughly and diligently explore the

past of Mr. Mallory. Although defense counsel did attempt to elicit certain aspects of Mr. Mallory's background through the testimony of his ex-girlfriend Jackie Davis, counsel should have obtained documentation of Mallory's commitment at the Patuxent Institution for sexual offenders in Maryland.

Trial counsel's unprofessional errors in this omission were two fold: first, during the eight month pendency of their representation of appellant, counsel made no effort in obtaining documentation of this for use at trial and; second, when they learned of Mallory's past on the Friday before trial, counsel failed to timely seek a continuance or to acquire whatever records they could in the time remaining.

On the Friday before trial, counsel learned of a statement from Jackie Davis taken by Volusia County Sheriff Detective Peter Horzepa that Mr. Mallory had acknowledged a past stay in a Maryland Institute for sex offenders. Specifically, Mr. Mallory had stated to Ms. Davis that he had been institutionalized at the Patuxent Institution, a maximum security correctional facility which provides remediation to sexual offenders.

Records obtained from that institution reflect that from 1958 to 1962, Richard Charles Mallory, the victim in the instant action, was committed for treatment and observation on account of a criminal charge of assault with intent to rape. These records further reflect

an eight year of overall treatment under the institution's guise.

The efforts of trial counsel at documenting and discovering this information was limited to listing Jackie Davis, Mr. Mallory's ex-girlfriend. However, counsel was unsuccessful in attempting to introduce the Patuxent stay through her testimony.

Having received notification of Mallory's institutionalization on a Friday before trial, trial counsel waited until the following Monday to move for a continuance of the pending trial so that it could expend efforts in attempting to locate records of Mr. Mallory's past.

Trial counsel apparently failed to contemplate, and plan accordingly for, the possibility that its motion for continuance would be denied. As a result, counsel failed to initiate efforts as soon as they could, to obtain documentation of same. Trial counsel's motion for continuance was denied due to its failure to initiate any efforts, expedited or otherwise, towards the acquisition of the Patuxent records. As a result, the jury heard or knew nothing of this highly germane evidence.

The trial lasted over five days. Appellant's trial counsel arguably had sufficient time to dispatch an investigator to Maryland to obtain the aforementioned records.

Certainly the document regarding Mallory's stay at Patuxent would have, in all reasonable probability, affected the outcome of

the proceeding. Therefore the omission compromised and undermined the integrity of the verdict.

Such documentation would specifically reflect that Richard C. Mallory was originally confined in the Maryland Penitentiary for a period of four years on a charge of Housebreaking with intent to rape, which occurred in Anne Arundel County, Maryland.

On December 2, 1957, Mallory had entered a plea of insanity. On January 30, 1958, the court ordered that Mr. Mallory be examined.

A mental examination at the time of Mr. Mallory's confinement found that he possessed an extremely strong sex urge along with a number of neurotic manifestations with especially obsessive compulsive elements. The diagnostic impression of Mr. Mallory was personality pattern disturbance and schizoid personality. The examination, which was conducted by Dr. Harold M. Boselow at the request of the court and which led to his commitment, revealed that because of his emotional disturbance and poor control of sexual impulses, Mallory could present a danger to his environment in the future.

While at Patuxent, Mr. Mallory initially exhibited argumentative behavior and engaged in a number of fights before adjusting to institutional life. Mr. Mallory was removed from his in-house prison job as a hospital clerk on August 22, 1960, because of his having made a molesting gesture towards the chart nurse with sexual intent.

Mr. Mallory escaped from the institution on March 14, 1961, and stole a car to facilitate such escape. At that time, it was observed of Mr. Mallory that he possessed strong sociopathic trends which were very close to his service and that his controls against them were weak and porous.

Further witnesses, neither discovered nor presented by trial counsel, existed as to Mr. Mallory's background which included a penchant for topless bars, prostitution and pornography.

Kimberly Guy, a dancer at the 2001 Odyssey nude dancing establishment in Tampa, Florida, made statements in the past which suggested that in addition to having an affinity for prostitution and sex, Mr. Mallory was equally interested in masochistic sex and frequently traveled with a pair of handcuffs in his briefcase. Chastity Marcus, similarly a dancer in the adult entertainment industry, also made statements about Mr. Mallory's crippling obsession with sex. She stated that Mallory would frequently exchange sexual favors for electronic equipment back in his shop.

Because of trial counsel's omissions, appellant's evidence on the issue of self defense consisted solely of her testimony. Counsel's conduct fell below the wide range of reasonable professional assistance. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; therefore confidence in the efficacy and

integrity of the trial's outcome is accordingly undermined. A Remand for an evidentiary hearing on this claim is warranted.

C. APPELLANT'S RIGHTS UNDER DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED IN INEFFECTIVE IN FAILING TO ENSURE A COMPETENCY EVALUATION OF APPELLANT PRIOR TO AND DURING TRIAL.

Appellant's initial trial counsel, Assistant Public Defender Ray Cass had filed on February 13, 1991 a motion for the appointment of an expert to determine appellant's competency to stand trial (R. 4070).

Defense counsel Cass requested the appointment of Harry Krop Ph.D. for purposes of determining appellant's competence or lack thereof to stand trial (R. 4070). In its motion for an appointment of an expert, defense counsel stated that he had grounds to believe that appellant may have been incompetent to stand trial, or that she may have been insane at the time of the trial (R. 4070).

The Honorable Gayle Graziano, the presiding judge at this point, in an order dated February 13, 1991, declined the appointment of Dr. Krop noting that it had already appointed Robert Davis M.D. (R. 4076). In an order dated April 22, 1991, the court withdrew its order appointing Dr. Robert Davis (R. 4141). On March 4, 1991, a new defense team of Assistant Public Defenders Trish Jenkins, William Miller and Billy Nolas, who worked under the Public Defender of the 5th Judicial Circuit, Howard Babb were appointed as

appellant's new trial counsel.

On December 27, 1991, some nine months later, the state filed a motion to either exclude the testimony of defense expert witness Dr. J. Toomer or, in the alternative, to compel the production of the reports upon which his testimony was based (R. 4047). Dr. Toomer had been appointed by the court at defense counsel's request to testify on behalf of guilt or mitigation issues (R. 4047). Yet aside from Ms. Wuornos first trial attorneys requesting a competency hearing, her second and subsequent attorneys failed to request an evaluation to determine appellant's competency to stand trial.

As a result, appellant stood trial for first-degree murder and received a sentence of death with the issue of her competency to stand trial never addressed or adjudicated. Appellant's course of conduct throughout the trial amply and richly demonstrated that she was neither capable of assisting in her own defense nor did she apparently grasp the nature of the proceedings against her.

In several different instances, appellant exhibited behavior that reflected a dubious, at best, competency to stand trial.

She claimed to have been raped and assaulted by correctional officers who were responsible for transporting her from the Volusia County jail to Deland courthouse. During the jury selection phase of her trial, she repeatedly stated to her attorneys that most of the male members were her "johns". i.e. customers of hers in her

prostitution activities.

In the course of the trial, Aileen Berry, the fiancee of victim Troy Burress, one of the men to whom appellant confessed to have killed, testified. She was identifying certain property of sentimental value, i.e. a ring, which she had given to the decedent. When she offered testimony about the value of an item of romantic and sentimental value, appellant in the presence of the jury blurted out "That piece of shit was not worth a fucking thing."

In the course of offering as evidence items taken from appellant storage bin, the state produced a cooler, allegedly belonging to a victim. Appellant, again in profane and non decorous language, exclaimed in front of the jury, "that is not my fucking cooler." When the State next introduced the murder weapon allegedly used in the killings, appellant, in demonstrably indiscreet and prejudicial manner remarked in front of the jury, "Oh yeah that's my gun."

Throughout the trial at least one of the three attorneys, devote their principal attention to monitoring appellant, so as to try to prevent such outbursts. This was to the detriment of the quality of appellant's representation due to the significant and constant distraction this imposed upon her attorneys.

It was necessary in the course of this trial to stabilize and control appellant's erratic and unpredictable behavior by having her adoptive mother, Arlene Pralle, present and nearby.

Throughout the trial, appellant displayed conspicuously inappropriate and non-decorous courtroom behavior. When her team, of lawyers would approach the bench for a sidebar conference, she would group her three middle fingers together and thump them together and yell “Trish” the name of her assistant public defender.

Frequently in the course of the trial, appellant displayed inappropriate facial expressions of gaiety, flippancy or detachment which clearly evinced a less than functional grasp of the nature and seriousness of the ongoing proceedings.

Throughout the trial, appellant offered spontaneous and often sarcastic observations as to the witnesses’ appearance, attire or testimony.

As a result of the aforementioned conduct, appellant was functionally unable to assist her attorneys in the presentation of her defense.

It was discernible that as the trial progressed, these manifestations of appellant’s diminished mental state worsened in a manner suggesting that appellant was decompensating.

This steady deterioration of appellant culminated in her outburst upon the publication of the jury’s verdict in which she lashed out at the court and the jurors calling them “scum”.

It is evident in the aforementioned conduct that appellant was

neither able to appreciate the nature of the proceedings against her by virtue of her obvious inability to conform her behavior to an appropriate mode nor to meaningfully or functionally assist her attorneys in the presentation of her defense. Not to have had appellant initially evaluated for her competency to stand trial was outside the range of reasonably competent professional assistance. Not to have requested in the course of the trial that the court order an evaluation to determine the competency of the appellant to stand trial was equally outside the range of reasonably competent professional assistance.

To have allowed, as apparently was done, the election by appellant to testify in her own behalf without requesting that the court order a competency evaluation to determine the ability to make such a decision, was outside the range of reasonably competent professional assistance.

The results of these omissions in light of the consistently bizarre and inexplicable courtroom behavior of appellant in the full view of the jury, strongly prejudiced the appellant’s cause and undermined the reliability of the result. Counsel's highest duty is the duty to investigate and prepare.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). The United States Supreme

Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984) (emphasis added). The evidence presented in this claim demonstrates that the result of Ms. Wuornos trial is unreliable.

ARGUMENT IV

THE TRIAL COURT ERRED IN SUMMARILY DENYING WITHOUT A HEARING THE CLAIM THAT A BREAKDOWN IN THE ADVERSARY SYSTEM AS DEFINED IN UNITED STATES V. CRONIC, 466 U.S. 648 (1984) PREVENTED COUNSEL FROM RENDERING EFFECTIVE ASSISTANCE AND DENIED MS. WUORNOS HER RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS HER RIGHTS TO A RELIABLE ADVERSARIAL TESTING OF THE STATE'S CASE.

Where circumstances are of a such a magnitude to infer both

breakdown in the adversary process and the small likeliehood that any lawyer, even a fully competent one, could provide effective assistance of counsel, the presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. United States v. Cronic, 466 U.S. 648 (1984).

The investigation, arrest, representation and prosecution of appellant Aileen C. Wuornos occurred in an atmosphere of massive local and national electronic media coverage.

This intense national interest in appellant's trial occurred because of a widely propagated and promoted notion of her being the first female serial killer in American criminal justice history.

The integrity and reliability of the law enforcement investigation, the state attorney investigation, the public

defender representation, the judicial administration of appellant's trial were seriously compromised by the media interest in appellant's story.

The atmosphere of notoriety and media obsessiveness with appellant's story effectively dictated and controlled the flow and character of the investigation, representation and adjudication of appellant's case. It created an atmosphere non-conducive to a reliable adversarial testing of the case and led rather to a breakdown in the adversary process. Because of this breakdown, counsel rendered wholly ineffective assistance of counsel as an inevitable and unavoidable byproduct.

Appellant's first court appointed attorney, arresting and investigating officers and appellant's ex-roommate Tyria Moore the lead State witness all compromised the fairness of the trial and the interests of justice by negotiating with media representatives for commercial media rights it the depiction of appellant's story.

The aforementioned aspects of the investigation, prosecution, representation and adjudication of appellant's case created "external constraints" on trial counsel's performance as contemplated by the United States Supreme Court in United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 657 (1984) and inferred as well the type of breakdown in the adversarial process contemplated by that case.

The judge appointed to preside over appellant's trial was retired, and unprepared to handle a case of this magnitude. He took over the case from Judge Graziano - who recused herself approximately less than a month before the inception of the trial. He steadfastly imposed an arbitrary time period for two weeks to try the case. He subsequently set out to achieve that goal and unreasonably constricted the efforts of defense attorneys so as to realize his goal.

The presiding judge insisted upon trying the case in a small non commodious courtroom in Deland, Florida. This courtroom was abjectly unsuited to handle the crush of media representatives, curious onlookers, activists and a myriad of other parties attracted to a trial of this magnitude. The space limitations created a environment of forced interaction between media representative and jurors that greatly reduced prospect for a fair trial.

The actions of appellant's first appointed attorney, Assistant Public Defender Ray Cass in establishing and accommodating a line of communication between film producer Jackie Giroux and his client, created an external constraint upon the succeeding assistant public defender in the penalty phase of the trial because so many of the lay witnesses were effectively foreclosed from helping the defense. A number of parties from appellant's hometown were paid cash by movie producer Jackie Giroux in exchange for their assistance. These same

parties received the impression that they were somehow obligated to exclusively assist Ms. Giroux and accordingly declined any other involvement in the case including testifying on behalf of appellant in the penalty phase of her trial.

This belief on the part of these individuals rendered them unavailable for the most crucial part of appellant's's trial. As a result, succeeding trial counsel was rendered unavoidably ineffective for not having called these witnesses because of the inability to present the testimony or this case.

As referenced in other portions of this motion, the trial counsel for appellant filed a motion for continuance on January 10, 1992, (R.4535-4538) on the opening day of the trial. The basis for the continuance came into existence on the preceding Friday when the state had provided to the defense a statement taken from Jackie Davis, Richard Mallory's ex-girlfriend by Detective Larry Horzepa. This statement had not been previously provided. This statement had alerted the defense for the first time that Richard Mallory had in the past been institutionalized as a sex offender in the state of Maryland. The court, consistent with its disposition to expedite the trial, denied the motion for continuance (R.10-28).

The court denied the motion for continuance notwithstanding the representations of the state that they themselves were not aware of the existence of this particular statement. The State attributed

their tardiness in providing the statement so late to their own unawareness of its existence.

The motion to continue the case was submitted, in good faith and justified. It was denied due to the court's arbitrarily imposed deadline of completing the trial within two weeks.

Similarly on the crucial important issue of similar fact evidence, a breakdown of the adversarial process occurred in the failure of the trial court to resolve the issue of the admissibility of such evidence prior to the commencement of trial.

Despite the fact, as mentioned in other parts of this motion, that the defense failed to file a motion in limine to exclude admission of the similar fact evidence, the court was on notice of this pending issue by virtue of a motion in limine, so styled, by the state attorney on August 5, 1991, which essentially requested a judicial determination of the admissibility of the similar fact evidence (R. 4148 - 4150). The court could have, but did not, act Sua Sponte to resolve this important issue.

The court heard the defense motion in limine while the trial was in progress, because of concerns about the duration of the trial, failed to insist upon a proper proffer of the testimony itself. The Court accepted as a proffer for such evidence, the assistant state attorney's summation of the Williams Rule evidence. When it should have insisted upon a proffer of the actual testimony.

This external constraint upon the effectiveness of trial counsel derived from the trial court's arbitrarily imposed deadline of completing the case in two weeks.

During the pendency of appellant’s trial, allegations surfaced that three or four of the law-enforcement personnel involved in the investigation of Ms. Wuornos case, Marion County Sheriff Captain Stephen Binegar, Marion County Sheriff’s Sergeant Bruce Munster, Marion County Sheriff’s Detective Brian Jarvis and Marion County Sheriff’s Major Dan Henry were actively negotiating with the representatives from the entertainment industry for a movie production of appellant’s story while contemporaneously investigating and processing her case.

As early as November of 1990, prior to the appellant’s identification as a suspect in the series of homicides in which she was convicted, State Attorney, Brad King conducted an internal investigation which revealed that Captain Stephen Binegar was contacted by various entertainment representatives about the possibility of movies or books being produced or the murders and when their investigation was through.

After the arrest of appellant, Binegar, Munster and Dan Henry contracted attorney Robert Bradshaw to receive and review any and all such offers. Some of the callers to attorney Bradshaw inquired as to the possibility of contracting potential co-defendant Tyria Moore.

State Attorney King’s report found that on January 29th 1991, there occurred a meeting between Bradshaw and Munster and Binegar concerning the movie offers.

The report found that on January 30th, 1991, Tyria Moore contacted Bradshaw and she asked him to represent her in negotiations with entertainment industry representatives.

According to the report, Tyria Moore had stated that Sergeant Munster had suggested that she join the three deputies already under Armstrong’s representation rather than pursue her deals individually. He explained to her that each of them would make more money individually than they could acting alone. Munster acknowledged to the state attorney investigators that he had placed her in touch with Bradshaw but did not recall the exact details of the discussion.

Upon receipt from Republic pictures of a concrete offer, Henry and Binegar went to the Sheriff to inform him of the offer. The sheriff's apparent position was that any movie proceeds were to go directly into a trust fund for crime victims. The deputies were to later decide whether or not the payment for personal services would be deducted by them.

The proposed payment scheme was as follows: $2,500.00 -- $5,000.00 for the initial signing; the total amount of $55,000.00 and $60,000.00 upon the movies actual production and an additional $45,000.00 and $60,000.00 in the deputies actually rendered personal

services to the scripts production.

On Feb. 16th, 1991, according to the state attorney investigation, it was decided that due to the repercussions of the movie negotiations on the prosecution of the appellant, the deputies would abandon their efforts. In March 19 1991, Tyria Moore discharged Attorney Bradshaw from her further representation.

The conclusion of the state attorney investigation into this issue, published in August of 1991, was that no acknowledged movie production was underway at that time.

In subsequent deposition testimony given to appellant's trial attorneys, all three law enforcement personnel, Munster, Henry and Binegar, similarly maintained as they had in their internal affairs investigation that aside from initial meetings and consideration the movie production project went no further.

It was also acknowledged by Sergeant Munster in his deposition that State witness Tyria Moore was still considered a suspect at the time of her initial questioning and that she was found to be in possession of some of the murder victim's property (DT. 109,110).

Subsequent to the appellant's trial in the latter part of 1992, there occurred a subsequent investigation with ensuing action taken, which inferred that the previous representations of Moore, Munster, Henry and Binegar to the assistant public defender and to the internal investigation was less than accurate.

A lawsuit filed by Jacquelyn Giroux against Aileen Wuornos centered on the apparent contention that the movie rights she believed she had contractually acquired had been interfered with by a deal between Republic Pictures, Ms. Wuornos, Sergeant Munster, Major Henry, Captain Binegar and Tyria Moore.

As a result of discovery depositions which occurred in the course of that lawsuit, Deputy Dan Henry was forced to resign and Sergeant Munster and Captain Binegar were demoted. The basis of this development was a conversation between Major Henry and Sergeant Munster which was tape recorded by the latter. The clear inference of the tape recorded conversation between Major Henry and Sergeant Munster was that the deposition testimony of Captain Binegar, Sergeant Munster and Major Henry given to the Appellant's trial counsel in 1992 prior to the commencement of trial had been less that candid.

The aforementioned facts lay out the rather unique and novel posture of this case.

The ineffectiveness of trial counsel in failing to procure a continuance so as to obtain the institutional records of Richard Mallory; in not obtaining a ruling on the similar fact evidence derived from State action. i.e. external constraints which flowed from the breakdown of the adversarial process.

The ineffectiveness of counsel in effectively gathering

relevant information on the investigation of appellant by Captain Binegar, Sergeant Munster and Major Henry similarly derived from the State action, specifically the lack of forthright testimony on the issue of movie deals.

The withholding of truthful testimony by these three law enforcement personal deprived defense counsel of a major avenue of attack, the decision not to charge Tyria Moore in the murders.

The actions of Captain Binegar, Major Henry and Sergeant Munster charging Ms. Wuornos while joining forces with an obvious co-defendant in the pursuit of book deals represents a breakdown of the adversary process which rendered trial counsel unavoidably ineffective.

The failure of trial counsel to have effectively discovered this portion of the State's case failed to fall within the wide range of reasonable professional assistance. The failure of trial counsel in this respect was caused by a breakdown in the adversary process which imposed an external constraint on trial counsel.

The failure of trial counsel to obtain Richard Mallory's records and a pretrial ruling on the similar fact evidence also failed to fall within the wide range of reasonable professional assistance. These failures were also caused by a breakdown in the adversary system which imposed an external constraint on trial

counsel.

Throughout the trial, the demeanor and conduct of the newly assigned Judge Uriel Blount reflected the breakdown of the adversarial process which fostered external constraints upon the effectiveness of defense counsel. He consistently displayed disapproval of defense counsel's performance throughout the trial. He forwarded to Trish Jenkins in the course of the trial a cartoon depiction of a Judge depicted as a male genitalia with an inscription saying "Not all Judges are assholes".

The cumulative effects of the aforementioned instances created external constraints upon the effectiveness of trial counsel because of a breakdown in the adversarial process.

The appropriate standard of review for a claim made under United States v. Cronic,466 U.S. 648 (1984) is narrower than the traditional and more familiar two prong test of a deviation and enduing prejudice found in Strickland v. United States 466 U.S. 668 (1984). If certain circumstances are so egregiously prejudicial than ineffective assistance of counsel will be presumed. Stano v Dugger, 921 F. 2d 1125, 11th Cir. 1991) (en banc). Cronic that created an exception to Strickland which defendant feels applies to his case. Mr.Glazer is found in The Supreme Court stated:

> Moreover because we presume that the lawyer is competent to provide the guiding hand that the

> defendant needs, see Michel v. Louisiana,350 U.S. 91, 100-101 (1955) the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is justified.
>
> Most obviously of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage Similarly if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska,415 U.S. 308 (1974) because the petitioner had been "denied the right of effective cross examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'"
> Id., at 318 (citing Smith v. Illinois 390 U.S. 129, 131 (1968) and Brookhart v. Janis, 384 U.S. 1,3 (1966).

Cronic 466 U.S. at 658-59 (emphasis added)

Appellant would submit the aforementioned array of circumstances created such a scenario as contemplated by Cronic, i.e. a breakdown in the adversary process, which warrant a finding that the judgment and sentence of appellant are presumptively unreliable. A remand for an evidentiary hearing in this claim is warranted.

ARGUMENT V

MS. WUORNOS' TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HER OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Ms. Wuornos contends that she did not receive the fundamentally fair trial to which she was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). It is Ms. Wuornos's contention that the process itself failed her. It failed because the sheer number and types of errors involved in her trial, when considered as a whole, virtually dictated the sentence that she would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

The flaws in the system which sentenced Ms. Wuornos to death are many. They have been pointed out throughout not only this pleading, but also in Ms. Wuornos's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not

reliable. Rule 3.850 relief must issue.

ARGUMENT VI

THE TRIAL COURT ERRED IN SUMMARILY DENYING WITHOUT A HEARING THE CLAIM THAT APPELLANT WAS DENIED HER RIGHTS UNDER AKE V. OKLAHOMA WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT IN VIOLATION OF MS. WUORNOS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HER RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

A criminal appellant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the appellant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d 734 (1986) at 736-37.

Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic

disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient.

In Ms. Wuornos's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985).

Both the expert and trial counsel have a duty to perform an adequate background investigation. When such an investigation is not conducted, due process is violated. The judge and jury are deprived of the facts which are necessary to make a reasoned finding. Information which was needed in order to render a professionally competent evaluation was not investigated. Ms. Wuornos's trial judge and jury were not able to "make a sensible and educated determination about the mental condition of the appellant at the time of the offense." Ake, 105 S. Ct. at 1095.

A wealth of compelling mitigation was never presented to the jury charged with the responsibility of whether Ms. Wuornos would be sentenced to life or death. This mitigation

evidence was withheld from the jury, and this deprivation violated Ms. Wuornos's constitutional rights. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Defense Counsel was faced with perhaps the most publicized trial in the history of Volusia County, Florida, which involved exceedingly unique and unprecedented legal, social and psychological issues.

Defense Counsel's client, Ms. Aileen Wuornos, was according to some criminal justice observers the first female serial killer not in a care giver capacity in American criminal history.

Appellant's crime pattern was perceived as novel in that it resembled behavior of male serial killers. Given the unique and novel aspects of this case, trial counsel deployed a grossly inadequate strategy of calling no witnesses at the guilt phase other than the appellant whose own lucidity was dubious and to call two conventional psychiatrists at sentencing which simply failed to adequately address the complexity of the issues involved.

Specifically, trial counsel failed to avail herself of an opportunity to call a team of experts on the issue of prostitution, violence and post traumatic stress disorder. In

as early as May of 1991, seven months before the commencement of the trial, defense counsel was contacted by Phyllis Chesler, Ph.D. a professor of Psychology and Women's studies an expert witness and psychotherapist.

Dr. Chesler had taken an interest in the case and had recognized many parallels between her research and an emerging phenomenon which later came to be known as post traumatic prostitution stress disorder. Specifically this was a post traumatic stress disorder condition which has since emerged in psychological and medical literature which was found to exist in women who had engaged in prostitution.

Dr. Chesler had offered to assemble a panel of prominent psychologists and scholars who would have testified pro bono as to the presence of this in appellant's make up. The idnetity of these experst and the substance of what their tstimony would have been is contained in the denied motion. Dr. Chesler also implored Trish Jenkins, one of appellant's three assistant public defenders to investigate the criminal past of Richard Mallory.

Defense counsel's failure to call Dr. Chesler's panel of experts on this aspect of appellant's psychological makeup fell below the range of reasonable professional assistance. Mental health issues overlooked by counsel in sentencing proceedings can constitute

ineffectiveness. State v. Michael, 530 So. 2d 929 (Fla. 1988)

The prejudice to Ms. Wuornos resulting from her trial attorney's deficient performance is clear. Confidence in the outcome is undermined, and the results of the penalty phase are unreliable. A remand for an evidentiary hearing on this claim is warranted.

ARGUMENT VII

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MS. WUORNOS'S CONVICTION AND SENTENCE WERE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Generally, the test for determining whether to grant a new trial based on newly discovered evidence requires a finding that the evidence was unknown and could not have been known at the time of trial through due diligence and once past that threshold finding a court must find that the newly discovered evidence would probably produce an acquittal on retrial. See Robinson v. State, 770 So 2d. 1167 (Fla. 2000) Jones v. State 709 So 2d 512 (Fla. 1998).

In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial. Once it is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. Jones 709 So 2d at 521.

A. CRIMINAL PAST OF RICHARD MALLORY

Certain evidence pertaining to the criminal past of Richard Mallory was acquired subsequent to the close of trial.

Such evidence was that Richard C. Mallory was originally confined in the Maryland Penitentiary for a period of four years on a charge of Housebreaking with intent to rape, which occurred in Anne Arundel County, Maryland in 1957.

On July 21, 1958, Mr. Mallory was committed to Patuxent Institution for confinement as a “defective delinquent” Records from this Institute reflect that Mr. Mallory was diagnosed with personality pattern disturbance and shizoid personality. Records further indicated that Mr. Mallory possessed an extremely strong sex urge along with a number of equally obsessive compulsive elements.

The criminal past of Richard Mallory, the victim in the case, can arguably be said to constitute newly discovered evidence.

It should be noted that appellant’s trial counsel’s efforts in this case were focused upon over one hundred witnesses, law enforcement and by, thousands of pages of discovery reports and documents, complex and technical physical evidence.

Perhaps most importantly defense counsel was also focused immediately upon the intense media coverage of their client's trials and the legal aspects of such issues of fairness and constitutionality.

Under these extraordinary circumstances, it is more than plausible to contend that the specific uncovering of this most significant witness testimony was beyond what would be considered reasonable diligence in this case.

This evidence was unknown to either Ms. Wuornos or her attorneys, was not discoverable by due diligence and would have produced an acquittal or the charge of self defense.

The prejudice to Ms. Wuornos resulting from the deficient performance is clear. Confidence in the outcome is undermined, and the results of the trial are unreliable. An evidentiary hearing must be conducted, relief must issue.

B. BOOK AND MOVIE DEALS

Subsequent to appellant's judgment and sentence being imposed, there occurred further investigation into and relevations regarding the relationship between certain law enforcement personnel involved in appellant's case and the motion picture industry.

In deposition testimony given to appellant's trial attorney, Marion County Sheriff Major Dan Henry who investigated appellant's case claimed that his activity in attempting to procure a

movie production of appellant's story was limited to the initial discussions with representatives of Republic Pictures but that he subsequently abandoned his efforts (DT-17).

Major Henry steadfastly maintained that the only activity he engaged in beyond these initial activities was to have provided public access documents of a public nature such as police reports (DT-93).

Major Henry acknowledged that when he traveled to Ohio to interview Tyria Moore who was a homicide suspect.
(DT 46).

Marion County Sergeant Bruce Munster, in his deposition testimony, similarly insisted that he acted in no way to promote or foster the production of any media account of appellant's story or that he realized any pecuniary gain from such (DT-101).

Sergeant Munster further insisted in his deposition testimony that state witness and appellant's ex-roommate, Tyria Moore had been ordered in seclusion by assistant state attorney David Damore who desired for her not to have any media contact. Sergeant Munster testified that he ensured that Ms. Moore did not grant interviews or otherwise communicate with anyone regarding the case (DT-107).

Sergeant Munster claimed in his deposition that the first time he became aware of any proposed movie deal surrounding the case was in February of 1991 subsequent to appellant's arrest

(DT 105).

Sergeant Munster acknowledged that he, Binegar and Henry had met to discuss the prospects for a movie deal flowing from their involvement in the case but cannot recall whether or not such talks included mention of Ms. Moore(DT 103).

In the same deposition testimony he acknowledged Tyria Moore to be a suspect:

> Q. Okay Tell me what Tyria's state of mind –what is her emotional condition when you first came in contact with her up in Pennsylvania and began to talk to her about Lee?
>
> A. Emotional condition? I think through parts of it she was sorry, sad, frightened. She had expressed–whether it was on tape or off tape–remorse that she hadn't come forward sooner. I seem to recall her saying that eventually she would have. I think she felt responsible. What she was telling me, that had she come forward before after Lee had told her that she had killed the first guy, that all the rest of the guys may have lived.
>
> Q. Okay so if..–
>
> A. She was helpful, cordial.
>
> Q. At any time prior to her giving you this taped statement–
>
> A. Which one?
>
> Q. The one up north
>
> A. Okay.
>
> Q. Okay, the first one.
>
> A. Right

> Q. Did she know that she as not going to be charged?
>
> A. No. No. She was considered a suspect all the way through bringing her back to Marion County. Or not Marion County. I'm sorry: Volusia County
>
> Q. Okay. So she's in – we're back now. You've brought her back on the 12th. You take her to Volusia County.
>
> A. Right
>
> Q. And what is the reason for taking her to Volusia County?
>
> Q. And what is the reason for taking her to Volusia County?
>
> A. Multifaceted. We wanted her to point out the locations whether they had lived to help us with the background. There was discussions of polygraphs. There was a multitude of reasons.
>
> Q. Polygraphs for whom?
>
> A. Tyria
>
> Q. And did she take a polygraph?
>
> A. No. She offered to but we didn't run her.

DT 109-110).

It had been the contention of Marion County Detective Brian Jarvis, who also was a law enforcement officer involved in the criminal investigation of Ms. Wuornos, that the investigation had taken an ill turn based on the eagerness of his colleagues to close a movie deal, their apparent inclusion of Tyria Moore in such efforts and, most seriously, their apparent willingness to overlook her

possible complicity in the crimes committed because of their deal (DT-117).

McCarthy, according to Jarvis, had learned when he commenced his writing efforts that Captain Binegar, Sergeant Munster, Major Henry, and Tyria Moore had all signed a contract with Republic pictures.

It is additionally significant to note that Jarvis was removed from the investigation in December of 1990, shortly after a composite sketch of Wuornos and Moore had been released by the Florida Department of Law Enforcement

Subsequent to the trial in the latter part of 1992, there occurred a subsequent investigation with ensuing action taken which inferred that the substance of the testimony of Moore or Messers? Munster, Henry and Binegar was less than accurate.

A lawsuit filed by Movie Producer Jacquelyn Giroux against Aileen Wuornos centered on the apparent contention that the movie rights she believed she had been contractually acquired had been taken away from her by a deal between Republic Pictures Ms. Wuornos, Sergeant Munster, Major Henry, Captain Binegar and Tyria Moore.

As a result of discovery depositions which occurred in the course of that lawsuit, after appellant’s trial Major Dan Henry was forced to resign and Sergeant Munster and Captain Binegar were demoted.

The basis of this development was a conversation between Major Henry and Sergeant Munster which was tape recorded by the latter.

The clear inference of the tape recorded conversation between Major Henry and Sergeant Munster, which is provided in the appellant's brief was that the deposition testimony of Captain Binegar, Sergeant Munster and Major Henry given to appellant's trial counsel in 1992 prior to the commencement of trial had been less than candid. This excerpt also reflects an intent by Major Henry to conceal and keep secret their conversation as well as to assist Bruce Munster in tailoring his testimony to be consistent with his own.

The newly discovered evidence of this police misconduct clearly pertains to a central issue in appellant's case, namely the credibility and integrity of the police investigation.

The fact that Tyria Moore was in possession from some of the murder victim's property, the fact that she had expressed remorse for giving safe shelter to her roommate cognizant of the string of killings which she later confessed to having committed constitute significant information leads in this case incriminatory of Miss Moore which law enforcement chose to overlook.

The evidence would have resulted in an acquittal of Ms. Wuornos at the newly discovered evidence would definitely have rendered a different outcome in the sentencing phase as it would have imparted to defense counsel a rather compelling basis and reason for

mitigation namely the culpability from the logical un-indicted co conspirator, Tyria Moore. Both the evidence regarding Mr. Mallory's history as a sexual offender and the truthfulness of the law enforcement officer as to movie deals would have been admissible and significant to the merits of the case.

This evidence was unknown to either Ms. Wuornos or her attorneys, was not discoverable by due diligence and would have resulted in an acquittal of the charge of first-degree murder. A remand for an evidentiary hearing on this claim is warranted.

ARGUMENT VIII

MS. WUORNOS WAS DEPRIVED OF HER RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HER RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE.

Under the traditional standard, the State must disclose evidence which impeaches the State's case or which may exculpate the accused "where the evidence is material to either guilt or punishment." Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); Kyles v. Whitley, 514 U.S. 419 (1995). Additionally, ". . . the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

Kyles, 514 U.S. at 437-38; see also Gorham v. State, 597 So. 2d 782 (1995).

More recently it has been held by the United States Supreme Court that there are three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice ensued. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Where evidence has been withheld, the ultimate test under Brady becomes whether the disclosed information is of such a nature and weight that "confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result to proceeding would have been different." Young v. State. 739 So 2d 553-559 (Fla. 1999).

On the opening day of trial, defense counsel moved for a continuance (R. 12). Defense counsel stated to the Judge that on the preceding Friday they had been issued by the State a discovery item which was a statement from a one Jacquelyn Davis, the girlfriend of the victim Richard Mallory.

On July 21, 1958, Mr. Mallory was committed to the Patuxent Institution for confinement as a "defective

delinquent" for an indeterminate period of time without maximum or minimum limits until released by further order of the court. By a court order dated April 16, 1968, Mr. Mallory was relieved of the status of "defective delinquent" and apparently completed his treatment at the Patuxent Institution.

This statement referenced the stay of Mr. Mallory at Patuxent, the Maryland Institution which specialized in the treatment of sexual offenders. The statement referenced as well Mr. Mallory's violent demeanor when drunk (R. 14). The statement was taken by Detective Horzepa in December 18, 1989.

The Assistant State Attorney stated on the record that on the Friday preceding trial he had been served with a Motion To Compel the production of Ms. Davis' Statement (R. 16).

The Assistant State Attorney then contacted Detective Horzepa, discovered that an informal statement of Ms. Davis had been taken but had not yet been transcribed (R. 17). He ordered transcription of same and provided it promptly to the defense (R. 17).

This set of facts in addition to reflecting ineffective assistance of counsel in failing to obtain the reports of Mr. Mallory, also and alternatively for purposes of argument constitute a Brady violation. See Brady v. Maryland, 378 U.S.

83 (1963) (In reviewing the first of the four prongs of Brady, it is indisputable that the State possessed evidence favorable to the appellant. Clearly the history of the victim's institutionalization would have significantly enhanced the viability of appellant's claim of self defense.)

The State's response to defense counsel's Motion To Continue based on this late disclosure was disingenuous. Assistant State Attorney, David Damore stated that he had scheduled a meeting the previous June for Trish Jenkins to review discovery but that Ms. Jenkins failed to appear for said meeting (R. 16).

This representation was apparently relevant to nothing other than the State's desire to divert attention from the fact that they had failed to provide to defense counsel a transcribed copy of Detective Horzepa's interview with Ms. Davis. Says Mr. Damore in relevant portions of the trial transcript:

> "However Judge in Detective Horzepa's report is a reference that he spoke with Jacquelyn Davis. I was not aware that the informal statement had been taken of Jacquelyn Davis until I received the Motion To Compel the woman from Defense Counsel. When I received that Motion To Compel, I contacted Detective Horzepa and asked him if there had been any type of statement taken of this witness. And he advised me that there had been a taped statement which had not been transcribed.

> I asked him to have the statement transcribed".

(R. 16,17).

The state knew of the evidence in so far as the Detective knew of the evidence. There is no functional distinction between Detective Horzepa and Assistant State Attorney David Damore for purposes of this rule's application.

Hence State Attorney's John Tanner's attempts to establish that Mr. Damore personally did not learn of the statement's existence until that preceding Friday are equally disingenuous. Appellant did not possess the evidence nor could she have obtained it with reasonable diligence.

In applying this standard to appellant and the discovery efforts of her attorney, it is to be noted that the efforts in this case were focused upon over one hundred witnesses, thousands of pages of discovery documents, complex and technical physical evidence.

Defense counsel was also focused immediately upon the intense media coverage of their clients trials and the legal aspects of such issues of fairness and constitutionality. Under these extraordinary circumstances it is more than plausible to contend that the specific uncovering of this most significant witness's testimony was beyond what would be considered reasonable diligence in this case.

"A fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, a prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985)(quoting Brady v. Maryland, 373 U.S. 83, 87 (1963); Kyles v. Whitley, 115 S. Ct. 1555 (1995); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Relief is required if the reviewing court concludes that there is a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. To the extent that counsel rendered ineffective assistance at the guilt phase through actions of the state, actions which deprived counsel of the opportunity to put the state's case to a fair and adequate adversarial testing, appellant's trial was constitutionally defective. Kyles; State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Unquestionably, the inference of the evidence suppressed, Mr. Mallory's criminal past as a sexual offender, appreciably

affected the outcome of the trial. It would have rendered more believable appellant’s theory of self defense. Even if it might not have produced an outright acquittal, it would have likely caused the jury to return a verdict of guilty on a lesser included offense of 1st degree murder. A Remand for an evidentiary Hearing on this claim is warranted.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Ms. Wuornos's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the cases for a new trial, an evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief, was generated in a Courier non-proportional, 12 point font, pursuant to Fla. R. App. P. 9.210.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the following has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 30, 2001.

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