**IN THE SUPREME COURT OF FLORIDA**

**AILEEN C. WUORNOS,**

**Appellant,**

**vs.** **CASE NO. SC00-1199**

**STATE OF FLORIDA,**

**Appellee.**

_____/

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

# ANSWER BRIEF OF THE APPELLEE

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## PRELIMINARY STATEMENT

CITATIONS: Reference to the record on direct appeal will be referred to as “R” followed by the appropriate volume and page numbers. Reference to the supplemental transcript on post-conviction appeal will be cited as “Supp-R” followed by a page number. Citation to the post-conviction record on appeal will be referred to as “PC-R” followed by the appropriate volume and page numbers.

## STATEMENT OF THE CASE AND FACTS

The State generally accepts the Statement of the case and facts set forth in appellant's brief but adds the following.

On direct appeal, this Court affirmed appellant's convictions and sentence. This Court set forth the following summary of the facts in Wuornos v. State, 644 So. 2d 1000, 1003-04 (Fla. 1994):

> On December 1, 1989, a deputy in Volusia County discovered an abandoned vehicle belonging to Richard Mallory. His body was found December 13, several miles away in a wooded area. Mallory had been shot several times, but two bullets to the left lung were found to have caused hemorrhaging and ultimately death. The medical examiner also determined that Mallory had been drinking at the time of his death, though it was not clear whether he was legally intoxicated.
>
> Tyria Moore and Aileen Wuornos lived together as lovers for about four and a half years. Moore worked as a maid, while Wuornos worked as a prostitute along Central Florida highways. Wuornos drank substantial amounts of alcoholic drink while working as a prostitute and at other times, and she also carried a gun for protection.
>
> On December 1, 1989, after several days working along the roadways, Wuornos returned to a Volusia County motel where she and Moore were living. Wuornos was intoxicated and told Moore that she had shot and killed a man early that morning. She said she sorted through the man's things, keeping some, discarding others. Wuornos said she abandoned the man's car near Ormond Beach, and left his body in a wooded area.
>
> Several months later, Moore began seeing media reports that law officers were looking for two women suspected of being involved in a series of murders. Moore became afraid, left Wuornos, and returned to her home up north. Florida law officers later contacted her in Pennsylvania, and Moore agreed to return to Florida in an attempt to clear herself of any

wrongdoing. Moore then tried to extract a confession from Wuornos, ultimately succeeding.

Wuornos gave taped confessions to a Volusia sheriff's investigator. When she first indicated she wanted to talk to law officers, she also expressed a desire to speak with an attorney. A lawyer from the public defender's office was summoned, who strongly advised Wuornos against confessing both before and during her comments to law officers. She stated that she did not want to follow her attorney's advice and then made her confession.

The different statements Wuornos made, however, are inconsistent with each other on major points. In the earliest confession to law officers, Wuornos said that Mallory picked her up while she was hitchhiking, and they later went into a secluded wooded area to engage in an act of prostitution. She and Mallory then began disagreeing because he wanted to have sex after only unzipping his pants. Wuornos said she felt Mallory was going to "roll her" (take her money) and rape her. At this point, she grabbed a bag in which she kept a gun, and the two began struggling over possession of the bag. Wuornos said she prevailed, pointed the gun at Mallory, and said: "You son of a bitch, I knew you were going to rape me."

Wuornos said that Mallory responded: "No, I wasn't. No, I wasn't."

At this point, Wuornos told law officers she shot Mallory at least once while he still was sitting behind the steering wheel. Mallory then crawled out the driver's side and shut the car door. At some point he was able to stand again. Wuornos said she ran around to the front of the car and shot Mallory again, which caused him to fall to the ground. While he was lying there, Wuornos said she shot him twice more, then went through his pockets, and finally concealed the body beneath a scrap of rug. Later, she drove off in the victim's car.

Wuornos also told law officers she had given Moore inconsistent stories about what had happened. In one version, Wuornos stated she told Moore that she had found a dead body hidden under a scrap of rug in the woods. In another, she confessed to the killing.

Wuornos' confession changed considerably in later versions. Wuornos later said she had offered to perform an act of prostitution with Mallory and that

he then drove to an isolated area. There, the two drank, smoked marijuana, and talked for about five hours. Wuornos described herself as "drunk royal."

Around 5 a.m., Wuornos disrobed to perform the act of prostitution. She asked Mallory to remove his clothes, but he said he only wanted to unzip his pants and didn't have enough money to pay her fee. Wuornos said she then went to retrieve her clothes, but Mallory whipped a cord around her neck and threatened to kill her "like the other sluts I've done." He then tied her hands to the steering wheel, Wuornos said.

According to Wuornos's later version of the case, Mallory violently raped her vaginally and anally, and took pleasure from Wuornos' cries of pain. Afterward, she said that Mallory cleaned blood from his penis with rubbing alcohol, then squirted alcohol onto her torn and bloody rectum and vagina.

Wuornos said Mallory eventually untied her and told her to lie down. Believing he intended to kill her, Wuornos said she began to struggle. Mallory, she said, told her, "You're dead, bitch. You're dead." At this juncture, Wuornos said she found her purse and removed her gun. Mallory grabbed her hand, and the two began fighting for the gun's possession. Wuornos won the fight, then shot Mallory. Wuornos said Mallory kept coming at her despite her warnings, so she shot him two more times.

Wuornos also confessed that she took some of Mallory's property and pawned it. Some of his property later was found in a rented warehouse unit used by Wuornos. More than a year later, she took the murder weapon and threw it into Rose Bay south of the motel where she was staying at the time. Moore later showed law officers where to find the gun. Grooves in the gun were similar to markings found on the fatal bullets, though an expert testified that the particular grooves were fairly common and could be found in other weapons.

Wuornos said that she had begun her career as a prostitute at age 16. At about age 20, she settled in Florida, and began working as a highway prostitute at least four days of the week. Her job was dangerous, she said. On some occasions she had been maced, beaten, and raped by customers.

This Court held that similar fact evidence showing additional murders and robberies was admissible. This Court provided the following summary of this evidence:

> Humphreys. On September 12, 1990, officers in Marion County found the body of Charles Richard Humphreys. The body was fully clothed, and had been shot six times in the head and torso. Humphreys' car was found in Suwannee County.
>
> Siems. In June 1990, Peter Siems left Jupiter, Florida, heading for New Jersey. Law officers later found Siems' car in Orange Springs on July 4, 1990. Witnesses identified Tyria Moore and Aileen Wuornos as the two persons seen leaving the car where it ultimately was found. A palm print on the interior door handle matched that of Wuornos. Siems' body has never been found.
>
> Antonio. On November 19, 1990, the body of Walter Jeno Antonio was found near a remote logging road in Dixie County. His body was nearly nude, and had been shot four times in the back and head. Law officers found Antonio's car five days later in Brevard County.
>
> Burress. On August 4, 1990, law officers found the body of Troy Burress in a wooded area along State Road 19 in Marion County. The body was substantially decomposed, but evidence showed it had been shot twice.
>
> Spears. On June 1, 1990, officers discovered the body of David Spears in a remote area in Southwest Citrus County. Except for a baseball cap, Spears was nude. He had died of six bullet wounds to the torso.
>
> Carskaddon. On June 6, 1990, officers discovered the body of Charles Carskaddon in Pasco County. The medical examiner found nine small caliber bullets in his lower chest and upper abdomen.

Appellant generally raised the following allegations of error on direct appeal:

> I--Whether the trial court conducted an adequate Richardson hearing after an alleged discovery violation?

> II--Whether appellant was denied a fair trial by introduction of Williams Rule evidence?
>
> III–-Whether the trial court erred in failing to grant appellant's motion to suppress her confession?
>
> IV–-Whether the trial court erred in restricting voir dire, improperly denying challenges for cause, and denying the request for a change in venue?
>
> V–-Whether the jury's penalty phase verdict was tainted by improper instructions, argument, evidence, and instructions.
>
> VI–-Whether the trial court properly found several aggravators and rejected some of the proffered mitigation?
>
> VII–-Whether the trial court improperly denied appellant's motion for a judgment of acquittal for first degree murder?
>
> VIII–Whether Florida's capital sentencing scheme is unconstitutional on its face and as applied?

This Court affirmed both the convictions and sentences on November 16, 1994. Wuornos, 644 So. 2d at 1000.

After a Huff hearing held on January 6, 2000 on appellant's final amended or second amended motion for post-conviction relief, the trial court ordered a hearing on two claims. The trial court denied a hearing on the remaining claims. (PCR-2, 251; PCR-20, 3016).

Evidentiary Hearing Testimony

1) Testimony Of Appellant's Defense Team

Trish Jenkins testified that she is the Chief Assistant Public Defender of Marion County and has held that position

since 1984 or 1985. (PCR-4, 525). As such, she is responsible for supervising an office which includes seventeen lawyers as well as the support staff. (PCR-4, 526). Jenkins handles all of the capital cases as well as any other high profile cases that the Public Defender asks her to handle. (PCR-4, 526). Jenkins came to represent appellant based upon an allegation of conflict with her earlier attorney, Mr. Cass. (PCR-4, 527). At the time she represented appellant, she also represented as many as five or six capital defendants. (PCR-4, 530). Jenkins had two lawyers assigned with her to work on appellant's case, Bill Miller and Billy Nolas. (PCR-4, 530). Jenkins was also engaged to represent appellant on the Marion-Citrus County murders committed by the appellant: Mr. Spears, Mr. Burress and Mr. Humphreys. (PCR-4,532).

Jenkins testified that they did not have specific designations or assignments among the attorneys: "All of us become involved; it's not one of those situations where I say, All right, you're going to do the penalty phase; I'm going to do the guilt phase. We all work together on it." (PCR-4, 532). Jenkins, however, was the lead attorney and some division of responsibilities was necessary. It was made clear to Mr. Nolas at an early stage that he would be involved in the penalty phase and would present the defense witnesses. (PCR-5, 724). It was

also made clear to Nolas that Jenkins would present the penalty phase closing argument. (PCR-5, 724). They discussed all of the information that Jenkins and investigator Sanchez uncovered concerning possible lay mitigation witnesses, including Dawn Botkins. (PCR-5, 724).

Jenkins testified that she was the one who had the most contact with appellant in jail. (PCR-4, 533). Jenkins testified that she spent a lot of time with appellant, talking about the case for "hours and hours." (PCR-4, 533-34). At some point, Ms. Jenkins had concerns about appellant's competency. (PCR-4, 553). However, she did not feel a formal adjudication of competency was necessary, testifying: "We had her evaluated numerous times." (PCR-5, 740-41). And, when Jenkins had questions about her competency during trial, she had appellant examined again: "Our experts saw her again. Our experts were assuring us that she was competent." (PCR-5, 741).

Jenkins thought that appellant was an alcoholic. (PCR-4, 534). Appellant discussed her level of drinking at the time of the offense. (PCR-4, 535). Jenkins acknowledged that appellant told her she had been drinking prior to Mallory picking her up and that she also drank in his car. (PCR-4, 536). Jenkins also vaguely recalled that a half consumed bottle of vodka was found at the crime scene. (PCR-4, 536). Jenkins agreed that she did

not address appellant's state of intoxication during appellant's testimony on direct examination. (PCR-4, 537). Jenkins did mention in opening statement that appellant's judgment may have been clouded or affected by alcohol. (PCR-4, 536). Jenkins agreed that several of the doctors that the defense had examine appellant mentioned appellant's consumption of alcohol. (PCR-4, 539).

Despite agreeing that she was overwhelmed[1] by this case, Jenkins disagreed that a shotgun approach to defense would have been preferable. Jenkins testified: "We didn't think so at that time and I don't think so now." (PCR-4, 541). The defense team made a conscious decision not to pursue a defense of voluntary intoxication. (PCR-4, 539). Jenkins explained:

> My feeling about the voluntary intoxication defense at that time was that, one, it was not in keeping with what my client wanted to do; two, it was not consistent with her ability to remember what I considered to be very specific details as to what had occurred between her and Mr. Mallory. I thought it would be inconsistent with our defense.
>
> Additionally, it's been my experience that a voluntary intoxication defense is not effective.

(PCR-4, 540). All members of the defense team developed a common strategy which included an agreement not to push hard on voluntary intoxication. (PCR-4, 563).

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[1] By overwhelmed, Jenkins testified that she did not believe she was ineffective, simply that she "was very busy." (PCR-4, 585).

In Jenkins' experience, voluntary intoxication has never been an effective defense: "On any case that I've ever seen or had the misfortune of running that defense." (PCR-4, 540). Such a defense was also inconsistent with the facts known to her and specifically, the facts related to her by the appellant. (PCR-4, 541-42). Appellant never led Jenkins to believe that she did not know what she was doing when she killed Mr. Mallory. (PCR-4, 570). Appellant was vehement in her desire to present a claim of self-defense to the jury. (PCR-4, 570). Even with the benefit of hindsight, Jenkins testified that "I still don't think I would have run a voluntary intoxication defense." (PCR-4, 543).

Jenkins believes that an instruction on voluntary intoxication was provided, but that part of their strategy was to only present appellant's testimony to retain opening and closing argument. (PCR-4, 563). Given her view of voluntary intoxication in general and in this case, Jenkins did not believe that she wanted an expert to testify on the issue of voluntary intoxication. (PCR-4, 563). And, again, she did not believe the available facts supported such a defense. (PCR-4, 564). In fact, Jenkins testified: "She never told me she was drunk." (PCR-4, 580).

As for resources committed to the case, in retrospect,

Jenkins testified that she should have had more investigators working on the case. (PCR-4, 545). Jenkins testified that she only had one investigator, and that "he did the best job he could given the resources that we had available and he performed the tasks that I asked him to perform." (PCR-4, 545). Jenkins testified that she spent an extraordinary amount of time working on appellant's case.[2] (PCR-4, 561). In fact, her office went to the extraordinary step of assigning three defense attorneys to represent the appellant. (PCR-4, 561-62). In addition to Jenkins, with capital trial experience, and Mr. Miller, an experienced felony trial attorney, appellant had the services of Billy Nolas who was previously employed by CCR. (PCR-4, 562).

As for investigating potential mitigation, Jenkins testified that she went to Michigan with Sanchez. (PCR-4, 547). When she was up there she spoke with appellant's sister, Lori Grody, and other individuals, including, she thought, appellant's former neighbor. (PCR-4, 547). Jenkins did not have her notes, but stated that after talking with appellant, they spoke to everybody, or "at least attempted to speak to everyone that we knew lived up there." (PCR-4, 548). She recalled hearing about

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[2] Although the judge did not finally rule prior to trial on the admissibility of the other murders as Williams Rule evidence, she testified that she was investigating those cases and was "preparing for it." (PCR-4, 588).

or speaking to Dawn Botkins, but Jenkins "wasn't certain that her testimony would help more than hurt, because there were some aspects about her that I thought were questionable." (PCR-4, 551). In fact, she was concerned that Ms. Botkins had signed a contract with a Hollywood producer for several thousand dollars and felt that she had a personal agenda "that could be perceived to be negative by the jury." (PCR-4, 555). While Botkins was apparently able to discuss the alleged abuse inflicted upon appellant by her grandfather, Botkins had only seen the grandfather on one occasion and she was also a long term drug user. Consequently, Jenkins testified: "I thought that may have a negative impact on the jury and her ability to perceive and recollect." (PCR-4, 556). Nonetheless, Jenkins testified that she thought that the defense team was going to present the testimony of Ms. Botkins. (PCR-4, 572). That she was not called was probably due to a malfunction or mis-communication among members of the defense team. (PCR-4, 572).

Jenkins thought that any evidence that could have been received through lay mitigation witnesses was covered by the experts. (PCR-4, 552). Jenkins disagreed with collateral counsel's assertion that the defense presented no witnesses to "humanize" the appellant in eyes of the jury. (PCR-4, 576). She testified that they used the experts to talk about

appellant's background, and, in particular, Jenkins testified: "I thought that, most particularly, Dr. McMahon humanized Ms. Wuornos. She had spent more time with Ms. Wuornos than any of the other experts, either state or defense. I felt like she humanized her." (PCR-4, 577). Jenkins also testified that through the experts she was able to bring out much about appellant's childhood, her leaving home at the age of fifteen, her hooking, her being beaten, and getting pregnant at fifteen. (PCR-4, 584).

Of the potential mitigation witnesses named by the appellant, Jenkins testified that she attempted to talk to those witnesses. (PCR-4, 561). Jenkins stated that they did talk to other potential lay mitigation witnesses, including a neighbor of appellant's, but could not recall the name of the people they contacted. (PCR-4, 572). Jenkins recalled that they had difficulty locating lay mitigation witnesses but also that "some people that we located that (sic) didn't have anything positive at all to say about Aileen." (PCR-4, 726). And, Jenkins believed that Nolas' testimony that the defense did not attempt to locate any teachers was not correct. (PCR-4, 727). There were ongoing discussions between defense team members, including Mr. Nolas, about which lay mitigation witnesses, if any, were to be called during the penalty phase. (PCR-5, 725). There was no

void in terms of the defense team being cognizant of the possibility of calling lay witnesses:

> No. there was no void. It was important for us to ... in dealing with our experts, also, to be able to discuss the lay witnesses with each other.

(PCR-5, 725-26).

Jenkins testified that all of the lawyers were involved in the penalty phase as far as witness strategy, but she thought that Mr. Nolas might have been more involved as far as presenting the experts during the penalty phase. (PCR-4, 549-550). But again, Jenkins stressed that "[w]e all worked the penalty phase; all three of us." (PCR-5, 733).

As for not calling truck driver Tom Evans, Jenkins testified that she thought about calling him as a witness but found he was not very credible. Also, Jenkins testified, he made unrealistic demands upon the defense:

> ...And we found him to be fairly incredible and, at that point, he said that he would not be willing to provide testimony unless he was provided with a condo on the beach here in Daytona; that he wanted in excess of a hundred dollars a day, plus expenses, for himself and I believe two others, and he wanted a chauffeur and a limousine.

(PCR-5, 730). And, finally, Jenkins testified that appellant claimed not to know him. (PCR-5, 730).

Among potential mitigation witnesses, it was thought that appellant was not the kind of person "you wanted to hang

around." (PCR-4, 557). And, some of the lay mitigation witnesses from Michigan could have provided negative information in terms of an antisocial personality diagnosis. Under the DSM III-R, one of the qualifications or criteria is that you exhibit certain conduct by the age of 15. (PCR-4, 559). One such indication of antisocial personality is truancy from school. Ms. Jenkins did not dispute the possibility that a defense mental health expert rejected the diagnosis of antisocial personality disorder because he or she did not find any evidence of truancy. (PCR-4, 560). It certainly factored into her evaluation of whether or not to present a witness. It might not be good to have a witness from Michigan testify that appellant was absent from school all the time. (PCR-4, 560).

William Miller testified that he was admitted to the Florida Bar in 1986 and is currently employed as an assistant public defender in the Fifth Judicial Circuit. (PCR-4, 483). In 1991, Miller was employed with the same office and shared the capital case load with Ms. Jenkins and Mr. Nolas. (PCR-4, 484). There was no formal division of responsibility among the three defense attorneys. Each attempted to become familiar with the case in order to participate in each phase of the trial. (PCR-4, 485). However, because Mr. Miller came to the case relatively late, he testified that he had little to do with the penalty phase.

(PCR-4, 485).

Miller did recall speaking to some of the mental health experts and was assigned certain witnesses to examine or cross-examine. He also was assigned closing arguments in the guilt phase. (PCR-4, 486). While he had a large case load, Miller testified that two or three weeks prior to trial in this case he had someone cover his caseload so he could devote the necessary time to prepare this case. (PCR-4, 486-87). For a period of four to six weeks, including the time it took to prepare the case and try it, Miller worked on "nothing but Aileen Wuornos." (PCR-4, 488-89). In preparation, Miller testified that he had extensive contact with appellant, seven or eight hours. (PCR-4, 490). Miller testified that he thought Ms. Jenkins had even more contact with appellant than he did. (PCR-4, 491).

Miller was aware that a police sergeant testified at trial that half consumed alcohol "tumblers" were found at the crime scene. (PCR-4, 492). With regard to voluntary intoxication, Miller testified: "It's certainly something that you would consider, because, at that time, voluntary intoxication was a defense available in the state of Florida. I certainly don't believe that it was the appropriate defense to take in this case." (PCR-4, 493). He thought that such a defense was "somewhat" inconsistent with a claim of self-defense. (PCR-4,

493). While her drinking may have been relevant to a self-defense claim, Miller testified:

> I think the fact that she had been drinking was relevant to the self-defense issue and her perceptions, but to argue that she couldn't form the intent to do anything and at the same time argue that she could perceive that there was a threat on her life and she was reacting, that seems inconsistent to me; do you see what I'm saying?

(PCR-4, 493). Further, Miller testified that he did not think that voluntary intoxication is a good defense in general: "I don't like it. I've used it before but with very little success." (PCR-4, 493).

When asked if some type of "kitchen sink" approach to a defense would have been preferable, Miller disagreed, stating that he could "not honestly agree that that would have been the way to go, no, sir." (PCR-4, 495). While appellant indicated she had one shot and a number of beers on the date of the murder, there was no evidence that she consumed a half bottle of liquor. (PCR-4, 508). Further, Miller acknowledged that the number of statements appellant made to the police and her apparently good recall of what happened with victim Mallory would have made a voluntary intoxication defense tough to present. (PCR-4, 508-09). And, Miller testified that he made a tactical decision not to rely on that defense in this case. (PCR-4, 511). He did not feel that an expert on the issue of

intoxication was necessary. (PCR-4, 522).

Billy Nolas testified that prior to joining the Marion County Public Defender's Office, he worked for CCR as a staff attorney, assistant CCR counsel, and finally, chief assistant CCR. As chief assistant, Mr. Nolas had a leadership position "in a state agency whose job was to defend folks sentenced to death in post-conviction proceedings." (PCR-5, 632). As counsel for CCR Nolas testified he handled over a hundred cases. In more than fifty percent of those cases, Nolas admitted that he was attacking the effectiveness of trial counsel. (PCR-5, 635). Even after leaving CCR, Nolas continued his work on capital cases, both as a public defender, a private attorney, and working for an agency in Pennsylvania that challenged capital sentences in post-conviction proceedings. (PCR-5, 638-39).

Nolas acknowledged that Jenkins was the lead attorney and that prior to trial his understanding was that he would "do the legal issues, the penalty phase and some of the trial witnesses as it went along." (PCR-5, 642). Nolas, unlike Miller and Jenkins, thought that intoxication was not inconsistent with self-defense and that evidence suggesting intoxication at the

time of the offense would be helpful during the penalty phase.[3] (PCR-5, 606-07).

Nolas acknowledged that he knew he could subpoena witnesses, he just did not do so in this case. (PCR-5, 636). Nolas also admitted that he was on appellant's case for several months. (PCR-5, 637). Nolas recalled thinking at the time of penalty phase closing argument that he should have called Dawn Botkins to testify on appellant's behalf. (PCR-5, 678-79). Nolas did not review the defense file before testifying. (PCR-5, 666). However, he asserted that the defense was deficient in failing to call lay mitigation witnesses to document appellant's difficult childhood (early and mid-teen years) and home life. (PCR-5, 672-73, 679).

Domingo Sanchez, the defense investigator at the time of trial recalled going to Michigan to investigate appellant's background. Sanchez was accompanied by Ms. Jenkins on the Michigan trip. (PCR-3, 298). He recalled the names of Dawn Botkins, Lori Grody, and Barry Wuornos as individuals he either contacted or were on his list to contact. Sanchez did not recall the family name of Richey, Moss, or Shovan. (PCR-3, 296-

[3] Nolas recalled that there was much debate between the experts at the penalty phase concerning whether or not appellant qualified for an antisocial personality disorder diagnosis. (PCR-5, 681).

297). In other words, Sanchez could not confirm or deny that these names were provided to him to investigate. (PCR-3, 296). Sanchez testified that his investigation was based upon various reports provided to him by the State and information provided by the appellant. (PCR-3, 301). Sanchez found that people in Michigan were for some reason “hesitant to speak to us.” (PCR-3, 303). But, Sanchez testified that if he remembered correctly, he did the best job he could. (PCR-3, 303).

2) Testimony Of Lay Mitigation Witnesses

The defense offered the testimony of six lay mitigation witnesses, four of whom were members of the Shovan family. The Shovan family resided a block or two away from the house appellant lived in with her grandfather and grandmother. Although the Shovans assert that they would have testified on behalf of appellant in 1991, none of them had any contact with appellant since the early 1970's.

Sidney Shovan grew up two blocks away from the appellant’s house in Michigan. Sidney testified that appellant was three years older than him but that they rode the same bus to school. (PCR-3, 313, 315). Sidney observed appellant’s grandfather being verbally abusive to her. He also, on one occasion, observed him grab appellant by the hair at her front door. (PCR-3, 315). Sidney was aware that appellant was often truant

from school. (PCR-3, 336). Sidney also claimed to have heard that Keith Wuornos had sex with his sister. (PCR-3, 319). Sidney moved out of the neighborhood at the age of 15 which was in 1970 and would only see appellant "now and then" after that time. (PCR-3, 334, 335). Sidney stated that he could tell the court very little about appellant's teenage years. (PCR-3, 342). Sidney was a childhood friend of appellant's but did not keep in touch with her after he moved out of the neighborhood and did not know where she was living. (PCR-3, 343).

Cynthia Dolmage (Shovan), testified that she lives in Rochester Hills, Michigan. (PCR-3, 347). Marlene Smith and Toni Nazar are her sisters. (PCR-3, 347). Marlene went to school with appellant who was one grade ahead of her. She also testified, like her brother, that she rode the same school bus as the appellant. (PCR-3, 350). On one occasion, Dolmage testified that appellant told her she was going to get a whipping and had to pick a willow branch out for that purpose. (PCR-3, 350-51). As she continued to walk home she heard appellant cry out in pain, apparently from a beating she received with the willow branch. (PCR-3, 354).

Dolmage was aware from the appellant that she was impregnated in her teens by an older man on the block by the name of Mr. Potlock. (PCR-3, 357). And, Dolmage recalled a

party where appellant was on the floor and claimed that her brothers had "banged her." (PCR-3, 360). Appellant's sister Lori came over and threw water in her face and appellant ran out of the room crying. (PCR-3, 361).

Dolmage had no contact with appellant for approximately thirty years, she lost track of appellant in the early seventies. (PCR-3, 362). Dolmage testified that appellant was a "rough girl" and that they were not "close." (PCR-3, 365).

Dolmage was aware that appellant got into fights but claimed those fights were not with people that she hung out with in the neighborhood. (PCR-3, 371). Dolmage was not contacted by the public defender's office at the time of trial, only later by collateral counsel. (PCR-3, 363).

Marlene Smith, another one of the Shovan sisters, also testified about the one occasion that appellant picked out a Willow tree branch to be used for a beating. (PCR-3, 381-82). Although she never observed any other beatings, it was always "talked" about in the neighborhood. (PCR-3, 384). She was also at the party with her sisters and heard appellant say something about her brothers, but did not hear exactly what was said. (PCR-3, 388). However, she did observe Lori Grody throw water on the appellant. (PCR-3, 388). Smith testified that appellant would hang out in the Potlock home or trailer. (PCR-3, 393).

Mr. Potlock never approached her sexually, but she was always in the home with a girlfriend. The Potlocks were like the grandparents on the block, "he was a nice guy and Mrs. Potlock was nice." (Pcr-3, 394). Smith acknowledged having a hard time with dates: "I mean it's been 30 years; 35 years. I mean it's been a long time." (PCR-3, 397).

Toni Nazar, the youngest Shovan sister, testified that she was employed by the Potlocks. (PCR-3, 411). She helped take care of Mrs. Potlock who was bedridden with cancer. (Pcr-3, 412). Appellant was not even living in her town when she was employed by the Potlocks. (PCR-3, 412). And, in fact, Nazar never knew the appellant personally. (PCR-3, 417). Nonetheless, the trial court allowed her to testify about some unusual habits of Mr. Potlock and the fact that Mr. Potlock asked her for sex. (PCR-3, 412-13, 416). When asked about how many other children who "hung around" the Potlock house ended up killing anyone, Nazar replied: "I'm sure none." (PCR-3, 417).

Dawn Botkins testified that she became friends with appellant at the age of fifteen or sixteen. (PCR-3, 433). Botkins recalled being contacted by the police and Ms. Jenkins a long time ago. (PCR-4, 433). At the time of appellant's trial, she was asked to come down and testify on appellant's behalf. (PCR-3, 433). She was willing, ready, and able to do

that. (PCR-4, 433). At one point she was contacted to come to Florida, but it was during her work shift. Botkins said that she would come down the next morning. However, they called back and said they no longer needed her to come down. (PCR-4, 434).

Botkins recalled observing appellant drinking beer when Botkins' friend drove by in a van and opened the door, slamming appellant to the ground. (PCR-4, 435). Botkins asked the driver to help her friend but he refused to do so. (PCR-4, 435). Botkins claimed to be aware of many instances where appellant had been raped. (PCR-4, 436). On one occasion, appellant told her that her boyfriend, a member of the Hell's Angels, took her to a party and she was tied to a bed for two days, repeatedly raped. (PCR-4, 436).

Botkins claimed that appellant "got along pretty good with her brother and sister a little bit. She really loved her brother and sister very, very much." (PCR-4, 442). Botkins was not aware of any problems that she had with her brother Keith, claiming that she loved her brother "very, very much." (PCR-4, 457). Specifically, she recalled that Keith was a very nice and "sweet person." (PCR-4, 465).

Appellant, like everyone in Botkins' crowd, used marijuana, drank alcohol, and took Quaaludes or downers. (PCR-4, 443-44). And, Botkins stated that appellant was a "tough cookie" and most

of the kids “were scared to death of her.” (PCR-4, 451). Botkins agreed with the prosecutor’s description of the appellant as mean: “She was.” (PCR-4, 454). And, Botkins was not aware of any beatings that appellant received from her grandfather/father. (PCR-4, 467-68).

Tom Evans, the truck driver who claimed that he spent just over a week with appellant, testified that she appeared and acted normal. (PCR-5, 708). Appellant did not appear to have a drinking problem and, in fact, consumed no alcohol while she was with him. (PCR-5, 709). Appellant was kind and took care of his dog when she was with him. (PCR-5, 694-701).

Any additional facts necessary for a disposition of the assigned errors will be discussed in the argument, infra.

## SUMMARY OF THE ARGUMENT

**ISSUE I--**Trial counsel were not ineffective for failing to place additional emphasis on the voluntary intoxication defense. The experienced trial attorneys made a tactical decision not to rely upon a voluntary intoxication defense and, instead, pursued appellant's self-defense claim.

Trial counsel were not ineffective for failing to call lay mitigation witnesses during the penalty phase. Much of the information offered by the lay mitigation witnesses was in fact presented to the jury through the three defense experts called during the penalty phase.

**ISSUE II--**The trial court was under no obligation to keep the evidentiary hearing open so that collateral counsel might retain an expert on voluntary intoxication and have appellant examined. Collateral counsel should have investigated this claim prior to asserting it in the Rule 3.850 motion.

**ISSUE III--**Any allegation of ineffective assistance of counsel based upon the Williams Rule evidence was procedurally barred as admission of this evidence was approved by this Court on direct appeal.

Trial counsel were not deficient for failing to uncover and utilize the thirty year old conviction of victim Richard Mallory. This issue was procedurally barred from review as it

was litigated at trial and on appeal.

The attorneys' alleged failure to have appellant evaluated for competency at the time of trial was properly denied without a hearing. Appellant failed to allege sufficient facts to suggest that she could carry her burden of establishing incompetency at an evidentiary hearing.

**ISSUE IV--**Appellant failed to allege sufficient facts demonstrating any prejudice to support her assertion that the adversarial process broke down in this case.

**ISSUE V--**Appellant's allegation of cumulative error lacks any specific facts to show error, either individually or cumulatively.

**ISSUE VI--**Appellant's defense team presented the testimony of three competent mental health experts during the penalty phase. As appellant failed to attack either their conclusions or qualifications, the simple fact that additional experts could have been called did not mandate a hearing.

**ISSUE VII--**Appellant's allegations of newly discovered evidence did not require a hearing. The evidence was either not newly discovered and/or would not have led to a different result at trial.

**ISSUE VIII--**Appellant's Brady claim was properly denied without a hearing. The underlying discovery violation was known at

trial and rejected by this Court on direct appeal. As such, it was procedurally barred from review.

## ARGUMENT

## ISSUE I

**WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIMS THAT HER COUNSEL WERE INEFFECTIVE FOR FAILING TO PURSUE A VOLUNTARY INTOXICATION DEFENSE AND FAILING TO DISCOVER AND PRESENT ADDITIONAL MITIGATION WITNESSES DURING THE PENALTY PHASE? (STATED BY APPELLEE).**

Appellant asserts that her trial counsel was ineffective in failing to pursue a voluntary intoxication defense at trial. Appellant also alleges that her trial counsel were deficient in failing to present a number of lay mitigation witnesses during the penalty phase. The trial court properly denied both claims after a full and fair hearing below.

A. Standard Of Review

This Court summarized the appropriate standard of review in State v. Reichmann,777 So. 2d 342 (Fla. 2000):

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

Deference to the circuit judge recognizes the superior position of the trier of fact who has the responsibility of weighing the evidence and determining matters of credibility. Brown v. State, 352 So. 2d 60, 61 (Fla. 4th DCA 1977). And, an appellate

court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 688 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, [e]ven the best criminal defense attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en*

*banc*), cert. denied, 116 S.Ct. 490 (1995)(citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 113 S.Ct. 838 (1993). The Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693. A claim of ineffective assistance fails if either prong is not proven. Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

An unfortunate fact of litigating capital cases at the trial level is that defense counsel's performance will invariably be subject to extensive post-conviction inquiries and hindsight miasma. This Court has stated that ineffective assistance claims should be the exception, rather than the norm:

> Criminal trials resolved unfavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. Although courts have found most of these challenges to be without merit, defense counsel, in many of the cases, have been unjustly subjected to unfounded attacks upon their professional competence. **A claim of ineffective**

> **assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.**

Clark v. State, 460 So. 2d 886, 890 (Fla. 1984)(quoting Downs v. State, 453 So. 2d 102 (Fla. 1984))(emphasis added). Unfortunately, despite this Court's admonition in 1984, it has become the rule, not the exception in capital cases.

With these principles in mind, the State submits the trial court properly denied appellant's claim of ineffective assistance of trial counsel.

C. Appellant's Counsel Were Not Ineffective For Failing To More Vigorously Pursue A Voluntary Intoxication Defense

After hearing the evidence presented by the defense below, the trial court denied this claim, stating, in part:

> ...I further find that the failure to proceed any further on the voluntary intoxication defense was a team decision, at least as far as Mr. Miller and Ms. Jenkins testified. I find that their testimony yesterday, both Mr. Miller and Ms. Jenkins, two of the three assistant public defenders representing Ms. Wuornos in the Volusia County death penalty case testified that they ... that the three of them sat down as a team and discussed the matter and decided not to push voluntary intoxication as a defense.
>
> Mr. Nolas testified, also, as I recall from his testimony yesterday, that though he did not say it was a team decision, he just basically said that it just happened – I think that was almost his words – that it just happened that they did not proceed further on the voluntary intoxication defense.
>
> From the testimony, at least particularly of Mr. Miller and Ms. Jenkins, I find that they did make a tactical decision that a voluntary intoxication defense would at least somewhat be inconsistent with

> the self-defense that they were raising.
>
> Further, there was testimony from Ms. Jenkins that Ms. Wuornos herself did not want to rely on a involuntary (sic) intoxication defense; that she was insistent that she was just defending herself, not only on the case in Volusia County involving Mr. Mallory, the victim, but once Judge Blount allowed in similar-fact evidence on the other six murders she was charged with, that she wanted to tell the jury that she was relying on self-defense in any violence she used towards the alleged victims and did not want to rely on involuntary (sic) intoxication.
>
> So I do find that was a tactical decision by the trial team not to push voluntary intoxication any further than they did by just ... basically just mentioning it in the opening statement and Ms. Wuornos just touching on some drinking and then requesting and obtaining and having the jury instructed on voluntary intoxication.
>
> ...

(PCR-6, 804-05).

In addition to finding no deficiency, the trial court found that the defense failed to establish any prejudice. The trial court stated:

> So as far as the allegations in Ground One of Ms. Wuornos's 3.850, in that the trial counsels were ineffective in not using voluntary intoxication any further than they did, I do find certainly beyond the clear and convincing standard, to the point of almost beyond all reasonable doubt, that it was a reasonable trial strategy and it did not fall below any standard of reasonable legal assistance of her trial attorneys, and even if it did, I do find, even beyond clear and convincing, to the point of beyond all reasonable doubt, that the defense in its 3.850 motion under Ground One failed to show any prejudice to the extent that there would have been a reasonable probability and likelihood that the results would have been different had a voluntary intoxication defense be (sic) pushed more vigorously than the defense did push it.

(PCR-6, 806-07). The trial court's ruling is supported by the record and should be affirmed on appeal.

Appellant was represented by three experienced defense attorneys in this case. The appointment of three attorneys for a single defendant represented an unusual expenditure of scarce attorney resources for the Marion County Public Defender's Office. (PCR-4, 485; 561-62). Appellant's assertion that her defense attorneys conceded below that voluntary intoxication was not incompatible with self-defense and that she would have been better served with a "battery of defenses" (Appellant's Brief at 27), is not supported by the record.[4]

Jenkins, who was leader of the defense team, testified that the attorneys all agreed not to press the issue of voluntary intoxication. Jenkins had the most contact with appellant and testified that the facts related to her by the appellant did not support such a defense. (PCR-4, 541-42, 564). In fact, appellant never told Jenkins that she was drunk at the time of Mr. Mallory's murder. (PCR-4, 580). Such a defense was inconsistent with her claim of self-defense and her apparently

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[4] Similarly, appellant's allegation that Jenkins and Miller ultimately agreed that voluntary intoxication was an appropriate defense given appellant's "dire plight" (Appellant's Brief at 29) is not supported by the record. With the benefit of hindsight, only Billy Nolas thought that additional emphasis should have been placed on the voluntary intoxication defense.

good (if self-serving) recall of the events that occurred at the time of the Mallory murder. (PCR-4, 540). Appellant never led Jenkins to believe that she did not know what she was doing at the time of the Mallory murder. (PCR-4, 570). Appellant was also vehement in her desire to present a self-defense case to the jury. (PCR-4, 541-42).

Aside from the general lack of factual support for such a defense, Jenkins testified that in her experience, voluntary intoxication was not a successful defense. (PCR-4, 540). And, when asked if a shotgun approach to defense, including a claim of voluntary intoxication might be beneficial to the appellant, Jenkins testified: "We didn't think so at the time and I don't think so now." (PCR-4, 541).

Bill Miller also testified that he did not think voluntary intoxication was an appropriate defense in this case: "I certainly don't believe that it was the appropriate defense to take in this case." (PCR-4, 493). Such a defense was at least "somewhat" inconsistent with appellant's claim of self-defense. (PCR-4, 493). While Miller agreed that drinking was relevant to the self-defense claim, to argue that Wuornos had a reasonable fear or apprehension of violence but at the same time arguing she was so intoxicated she could not form specific intent appeared inconsistent. (PCR-4, 493). Although appellant

claimed that she had one shot and a number of beers on the day of the murder, there was no testimony to suggest that she consumed a half-bottle of liquor. (PCR-4, 508). Miller testified it was a tactical decision not to rely upon the voluntary intoxication defense in this case. (PCR-4, 511). And, Miller testified, as did Jenkins, that voluntary intoxication is generally not a good defense: "I don't like it. I've used it before but with very little success." (PCR-4, 493).

Only Billy Nolas, among appellant's three defense attorneys thought that it was advisable to place more emphasis on the voluntary intoxication defense. (PCR-5, 606-07). However, Nolas was not the lead trial attorney and did not have the benefit of extensive contact with appellant as did Jenkins. (PCR-5, 642; PCR-4, 533-34). Nolas, with his extensive prior experience litigating death cases, at one time even serving as Chief Assistant Counsel for CCR, might have shaded his testimony with the goal of being found ineffective in this case. In fact, while the trial court did not find that Nolas provided false testimony, the trial court certainly found reason to question Nolas' motivation for testifying as he did during the evidentiary hearing. (PCR-6, 808-09).

Based upon this record, it is clear that the decision not

to focus on a voluntary intoxication defense was a tactical decision. See United States v. Ortiz Oliveras, 717 F.2d 1, 3 (1st Cir. 1983)("[T]actical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of a claim of ineffective assistance."). Courts have repeatedly acknowledged that highly deferential review of counsel's conduct is warranted in an ineffective assistance challenge especially where strategy is involved; intensive scrutiny and second-guessing of attorney performance are not permitted. Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994); Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994). Within the wide range of reasonable professional assistance, there is room for different strategies, no one of which is "correct" to the exclusion of all others. Felker v. Thomas, 52 F.3d 907 (11th Cir. 1995).

Not only was the decision not to focus upon voluntary intoxication a tactical move, such a decision was based upon appellant's own recollection of the offense and her desire to pursue a different course of action, i.e., a claim of self-defense. Appellant's theory of defense would be largely undermined by the admission and avoidance defense of voluntary intoxication. See Rose v. State, 617 So. 2d 291, 294 (Fla. 1993)("when a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of

ineffectiveness can be made."). And, certainly defense counsel cannot be found ineffective for failing to pursue a defense with little or no chance of success. Jenkins and Miller testified that in general voluntary intoxication is a poor defense. See Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994)(where the court credited the defense attorneys' knowledge that a particular diminished capacity defense would not play well before the local jury). Nothing offered by appellant at the evidentiary hearing below suggests that such a defense would have been successful.

Trial counsel is not ineffective in rejecting an intoxication defense when it is inconsistent with the deliberateness of the defendant's actions. White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992); White v. State, 559 So. 2d 1097, 1099 (Fla. 1990), cert. dismissed, 115 S.Ct. 2008, 131 L.Ed.2d 1008 (1991). In this case, appellant never asserted to her defense attorneys that she did not know what she was doing at the time of the murder. The fact that appellant took items of value from Mr. Mallory, including his car, after the murder (R. 755, 949, 1080-1081), suggests a level of purposeful and deliberate conduct which is inconsistent with a claim of voluntary intoxication.

Aside from failing to show any deficiency on the part of her defense team, appellant also failed to establish any prejudice.

Appellant failed to offer any additional evidence at the hearing which could have been utilized in furtherance of her intoxication defense. As noted above, appellant failed to testify at the evidentiary hearing in support of her post-conviction allegation. During the course of her trial, defense counsel argued her actions were clouded somewhat by use of alcohol and both requested and received a voluntary intoxication instruction. Appellant cites no evidence which was not introduced at trial but which was available that could have been used to support her voluntary intoxication defense.[5] Consequently, even aside from the question of any deficiency on the part of her defense team, appellant has completely failed to show any prejudice. Based upon the record developed at the evidentiary hearing, there is no reason to believe a voluntary intoxication defense would have been successful. As such, appellant's claim was properly denied by the trial court below.

D. Appellant's Trial Defense Counsel Did Not Render Ineffective Assistance During The Penalty Phase

Appellant claims that her trial attorneys were ineffective for failing to locate and present certain lay mitigation witnesses during the penalty phase. The trial court denied this

[5] Indeed, appellant cites the original trial record for items or evidence that might support a voluntary intoxication defense. (Appellant's Brief at 22-23). Thus, the jury was already aware of that information at the time of trial.

claim below, stating, in part:

> 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's childhood 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.

(PCR-6, 807)

...

> Now as stated, the defense did call three psychiatric witnesses –- psychologists, I believe all three of them were – that did testify on behalf of Ms. Wuornos. They did relay some childhood background; some high school background; apparently, had some school records.
>
> The defense has argued that the state ... and here at this evidentiary hearing called four members of the Shovan family, the one brother and the three sisters that testified on Wednesday afternoon.
>
> Yesterday, early morning, by telephonic testimony, we had the testimony of Dawn Botkins from Michigan; because of her multiple sclerosis, she was unable to come down here.
>
> And I addressed of course, the defense's motions before and that was a fall-back position, I will concede, about her testifying telephonically.
>
> She did offer testimony regarding her contact with Ms. Wuornos during Ms. Wuornos's early teenage years. From her testimony, she was not a pre-teen friend. I believe around age 13 or so, or at least the early teenage years of Ms. Wuornos, she had contact with Ms. Wuornos and apparently was one of Ms. Wuornos's close teenage friends.
>
> Over the defense's objection, of course, I did allow in what has been marked as State's Exhibit One and Two.

One is a ... I believe a Citrus County police agency – maybe the sheriff's office here in Florida – a transcript of an audio statement that Ms. Botkins had given to them, and then also over the defendant's (sic) objections, allowed in a transcript and police report from the Michigan state police, I believe it was, of their interview of Ms. Botkins.

Had Ms. Botkins testified at the penalty phase, it's certainly clear that at least with her testimony, she would have had a lot of warts, so to speak, on her testimony that had ... the state certainly could have called those police officers or state police officers that interviewed her for impeachment purposes.

So I do find that even if she had testified, there's certainly a lot of areas that her testimony could have been impeached.

Also, the argument was made that they failed to call ... that Ms. Wuornos's trial attorneys failed to call Tom Evans in the penalty phase, also. I've addressed whether or not he should have been called in the guilt phase.

Ms. Jenkins, one of the three trial attorneys, testified about her contact ... I should back up.

Ms. Jenkins, of course, had ... let me back up to Ms. Botkins' testimony.

Ms. Jenkins did testify that she had talked to Ms. Botkins and she did candidly say that she was going to use her and she could not now remember exactly why they did not call her during the penalty phase.

Ms. Jenkins did testify that she did actually talk to Mr. Evans and then did make the decision not to call him during the penalty phase, saying that his testimony was unbelievable and relaying the matters and demands he made that almost could be categorized as extortion of the public defender's office regarding wanting to stay in a fancy beach condo; you know, be able to bring a couple of friends down; have I think a-hundred-dollars-a-day payment, plus expenses over and above the hundred dollars; also wanted a chauffeured limousine to drive him around.

I find Ms. Jenkins' testimony is credible on that and that Mr. Evans ... that she made the tactical decision that Mr. Evans's testimony would be unbelievable and that he would be so subject to cross-examination regarding ... you know, had the public defender's office acceded to those demands and brought

> him down here in a condo; limo; putting up him and friends; paying him a hundred dollars a day, plus expenses.
>
> Admittedly, the defense attorneys did not apparently locate the Shovan family, the one brother that did testify and the three sisters that testified before myself during this 3.850 hearing on Wednesday afternoon.
>
> The investigator for the public defender's office, Mr. Sanchez ... Ms. Jenkins testified that they did go up to Michigan and tried to locate leads that Ms. Wuornos had given them, but they apparently either did not or ... did not know of or at least did not find out about the Shovan family.
>
> Admittedly, it might would not have hurt to have called the brother and the three sisters, but I do find that the overwhelming ... the aggravating 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.

(PCR-6, 809-813). The trial court also found Mr. Nolas' confession of inadequate representation during the penalty phase somewhat less than credible. The trial court stated, in part:

> It's certainly clear that Mr. Nolas was a highly experienced trial attorney. Prior to him going with the Ocala public defender's office and becoming one of the three attorneys representing Ms. Wuornos here in the Volusia County case, along with some of the others, that prior to that time period of his representation of Ms. Wuornos, he had been a CCR attorney in the original statewide CCR setup that there was, even rising to the level of being a chief CCR attorney.
>
> He certainly was an experienced death penalty

> attorney representing persons at the 3.850 stage trying to defend against the death penalty.
>
> He certainly would have been in a position to know the importance of calling lay witnesses if one wanted to and yet, though he was the one that was chiefly responsible for the penalty phase, he did not do so, and in my way of thinking, did not give a real good explanation why; just that he failed to do so.
>
> He's now, of course, a federal appellate public defender doing death penalty cases and so he had prior Florida CCR experience of being a ... handling death penalty cases, even rising to the level of the chief CCR attorney, and he's been fighting for years against the death penalty.
>
> I'm not going to say that Mr. Nolas was, in fact, lying here, but I do find that his opinion was certainly clouded by his legal background and the years that he has been fighting against the imposition of the death penalty both at the trial level, the Florida appellate level through CCR and now apparently at the federal appellate level.

(PCR-6, 808-09).

Collateral counsel only established that appellant's trial attorneys were on notice of two of the six mitigation witnesses presented at the evidentiary hearing. The defense was aware of, and had talked to Dawn Botkins and Tom Evans. However, as the trial court found in its oral ruling, trial counsel had every reason not to present the testimony of Tom Evans. Appellant claimed not even to know Tom Evans. (PCR-5, 730). Moreover, Evans described appellant as appearing normal and not drinking during the approximately ten days they spent together. (PCR-5, 709). With his ridiculous demands for a beach condo and a large amount of spending money, Ms. Jenkins wisely decided not to call

Mr. Evans at trial.

While Ms. Botkins was known to the defense and at some time they planned to call her, her testimony was not entirely favorable. Botkins described appellant as mean, potentially violent, and stated that she never complained of suffering abuse, sexual or otherwise, from her family members. (PCR-4, 457, 467-68). In particular, she recalled that appellant loved her brother Keith very much. (PCR-4, 457).

As for the Shovan family, collateral counsel never presented their own investigator to testify how he or she came to find these witnesses nearly ten years after the trial in this case. Nor did the defense establish that appellant told them to look for members of the Shovan family as potential mitigation witnesses. The defense team could not be expected to canvass appellant's old neighborhood, covering every house within a two block radius, when it had been more than twenty years since appellant lived in that neighborhood at the time of trial. "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent and appropriate, but only what is constitutionally compelled.'" Chandler v. U.S., 218 F.3d 1305, 1312 (11th Cir. 2000)(en banc)(quoting Burger v. Kemp, 483 U.S. 776, 107 S.Ct.

3114, 3126, 97 L.Ed.2d 638 (1987)).

Nonetheless, even if defense counsel had reason to find the Shovans, their testimony, while helpful to the defense, was largely cumulative to the information the defense brought out through their own expert witnesses during the penalty phase. And, the three Shovan sisters only testified about a single act of violence that was allegedly committed against appellant, having to pick out a willow tree branch and later listening to what they thought was a beating. Two of the sisters also heard about appellant admitting that she wished her brothers would stop "banging her." They noted some unusual and sexual proclivities of a neighbor, Mr. Potlock, who was thought to have had a sexual relationship with the appellant.

Through the three experts presented by the defense, the jury was told of a lack of parental nurturance, a dysfunctional family unit, and drug and alcohol abuse. (R. 3428). Appellant's grandparents were described as dysfunctional, her grandfather, in particular, described as an alcoholic, and someone who became very angry when he drank. (R. 3533, 3196). Appellant's mother described him as "the meanest man in town." (R3196). Appellant was closest to her brother Keith who tragically died of cancer, when he was only twenty-one. (R. 3325-28).

Appellant's difficulty in school was also brought out through the experts. As was her rape at the age of approximately fourteen and her family's less than sympathetic reaction. (R. 3201, 3331). Her grandfather forced her to give the child up for adoption and she never received any treatment for sexual abuse. (R. 3333-34). Ultimately, because of her behavior, appellant was kicked out of the home and was forced to live on the streets. (R. 3202-03). She eventually left town and hitch-hiked around the country, becoming heavily involved in alcohol and drugs. (R. 3203). See Maxwell v. State, 490 So. 2d 927, 932 (Fla. 1986)("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient").

While appellant's childhood friends discussed some aspects of appellant's troubled early teen years, appellant was **thirty-five** at the time of trial for the murder and robbery of Mr. Mallory, and thus far removed in time from that period in her life. (R. 1914). See Tompkins v. Moore, 193 F.3d 1327, 1337 (11th Cir. 1999)(finding no prejudice for counsel's failure to present evidence of physical abuse as a child where the defendant was twenty-six at the time of the crime, noting that where a defendant is not young at the time of the offense "'evidence of a deprived and abusive child hood is entitled to

little, if any, mitigating weight.'")(quoting Francis v. Dugger, 908 F.2d 696, 703 (11th Cir. 1990)); Mills v. Singletary, 63 F.3d 999, 1025 (11th Cir. 1995)("We note that evidence of Mills' childhood environment likely would have carried little weight in light of the fact that Mills was twenty-six when he committed the crime.").

In Williams v. Head, 185 F.3d 1223, 1236 (11th Cir. 1999), the Eleventh Circuit addressed an allegation of ineffective assistance for failure of trial counsel to discover and present family members in mitigation:

> Present counsel have proffered affidavits from Williams' father and sister which, if believed, indicate that they could have provided additional mitigating circumstance evidence if they had been called as witnesses. It is not surprising that they could have done so. Sitting *en banc*, we have observed that "[i]t is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." *Waters*, 46 F.3d at 1513-14. **Such affidavits "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.** Id. at 1514. (emphasis added).

Based upon this record, the appellant failed to show that her defense counsel were deficient in failing to call the Shovans and Dawn Botkins during the penalty phase. However, as

found by the trial court below, even if appellant had established a deficiency, she did not carry her burden of establishing prejudice. As noted above, the defense experts talked at great length about appellant's difficult childhood and life. See Atwater v. State, 26 Fla. L. Weekly S395, S397-98 (Fla. June 7, 2001) (trial counsel was not prejudicially deficient in failing to present lay mitigation witnesses as to defendant's difficult childhood where most of this information was related to the jury through the defense mental health expert). Given appellant's age at the time she decided to start murdering people (over thirty), appellant's childhood or early teen difficulties would not be given much weight as a non-statutory mitigator. And, given the jury's 12-0 vote, and five strong aggravating factors, including two of the most weighty (HAC and CCP)[6] there is no reasonable probability of a different result if the additional mitigation witnesses had been called to testify. See Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992), receded from on other grounds, Hoffman v. State, 613 So. 2d 405 (Fla. 1992)(asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history

[6] This Court has recognized that the HAC aggravator is among the most weighty aggravators in this State's capital sentencing calculus. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999).

of substance abuse, deprived childhood, and lack of significant prior criminal activity “simply does not constitute the quantum capable of persuading us that it would have made a difference in this case,” given three strong aggravators, and did not even warrant a post-conviction evidentiary hearing); Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991)(additional evidence as to defendant’s difficult childhood and significant educational/behavioral problems did not provide a reasonable probability of life sentence if evidence had been presented).

## II.

**WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO KEEP THE EVIDENTIARY HEARING OPEN FOR A PERIOD OF SIX WEEKS SO THAT DEFENSE COUNSEL MIGHT RETAIN AND PRESENT TESTIMONY OF AN EXPERT ON THE ISSUE OF VOLUNTARY INTOXICATION? (STATED BY APPELLEE).**

Appellant claims the trial court abused its discretion in failing to keep the evidentiary hearing open for the purpose of procuring and presenting the testimony of an expert witness on the issue of voluntary intoxication. (Appellant's Brief at 43). The State disagrees.

The defense counsel below asked the court to keep the hearing open for a period of six weeks so that it might have an expert examine appellant and subsequently present that testimony for the purpose of proving her post-conviction allegations. The trial court denied the defense motion; noting that the evidentiary hearing had been set for months and that the court had been quite liberal in allowing the defense time to prepare and file their post-conviction motion. The trial court stated:

> As far as the defendant's motion to continue or leave open this hearing for a period of maybe up to six weeks or so, I think, gentlemen, I've been I think very liberal in my time frame on these. We've had several delays on some other matters and over the state's objections, I think for the most part, I gave the defense the time they were looking for.
>
> This was scheduled for this three-day slot I think sometime back in January and now it's April 5.
>
> The defendant's motion to continue or leave open

is denied.

(PCR-3, 285-86).

In the State's view, the trial court's decision in this matter should be tested for an abuse of discretion as is the denial of a motion for a continuance. The granting or denying of a continuance is within the discretion of the trial court. "A court's ruling will be sustained absent an abuse of discretion, i.e., it will be sustained unless no reasonable person would take the view adopted by the trial court." Scott v. State, 717 So. 2d 908, 911 (Fla. 1998)(citing Huff v. State, 569 So. 2d 1247 (Fla. 1990)). The trial court's ruling represented an exercise of sound discretion in this case.

The investigation into appellant's claims should have been largely complete at the time appellant filed her motion for post-conviction relief. Indeed, appellant filed her amended motion for post-conviction relief on November 1, 1999. In that motion, appellant alleged that her trial defense counsel were ineffective for failing to obtain an expert to discuss the appellant's level of intoxication during the guilt phase. (PCR-20, 2902-03). As noted by the prosecutor below, a total of five experts were called or retained in this case, including three who testified for the defense in mitigation. (PCR-3, 282). The prosecutor stated:

> ...Now what are we going to have her examined for; something they missed? If that's the case, we need to tell the court and then we need to have explained to us why it wasn't done in the time frame in which it should have been done in the last two years.
>
> Remember, the motion's been sitting out there for years.
>
> Now there should have been a basis for the motion when it was filed; i.e., they should have already talked to the expert, if they're going to have one.
>
> Now, that is absolutely no basis for delaying this case, especially on a few paragraphs in a motion that said, I can't tell you why, but we'd like to delay this case so she can be examined.

(PCR-3, 282-83).

Appellant's motion to continue or leave open the evidentiary hearing was not filed until April 5, 2000, the scheduled starting date of the evidentiary hearing. (PCR-20, 3011). Appellant's motion did not even name the expert; it is therefore apparent that collateral counsel had not even retained an expert to conduct the examination. Since collateral counsel had four months after filing the motion to procure an expert and have appellant examined, the trial court was under no obligation to leave the hearing open. Moreover, given the apparent difficulty counsel had in getting appellant to cooperate in such an examination, holding the hearing open in the hope that appellant might actually assist in such an examination was too tenuous a ground for the requested delay. Under the circumstances presented in this case, appellant has not established that the trial court abused its broad discretion in denying her motion to

keep the evidentiary hearing open.

## III.

**WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT SHE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HER TRIAL? (STATED BY APPELLEE).**

**Preliminary Statement On Standards of Review Applicable To The Summary Denial of Post-Conviction Relief**

In Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993), cert. denied, 502 U.S. 834 (1994), this Court observed that "[t]o support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. However, an evidentiary hearing is not a matter of right, a defendant must present "'apparently substantial meritorious claims'" in order to warrant a hearing. State v. Barber, 301 So. 2d 7, 10 (Fla.), rehearing denied, 701 So. 2d 10 (Fla. 1974)(quoting State v. Weeks, 166 So. 2d 892 (Fla. 1960)). The motion must assert specific facts which, if proven, would warrant relief. As stated recently by this Court in Atwater v. State, 26 Fla. L. Weekly S395, S396 (Fla. June 7, 2001):

> Mere conclusory allegations are not sufficient to meet this burden. See Kennedy v. State, 547 So.2d 912 (Fla. 1989). However, in cases where there has been no evidentiary hearing, we must accept the factual allegations made by the defendant to the extent that they are not refuted by the record. See Peede v. State, 748 So.2d 253 (Fla. 1999); Valle v. State, 705 So.2d 1331 (Fla. 1997). We must examine each claim to determine if it is legally sufficient, and, if so,

determine whether or not the claim is refuted by the record.

And, as for ineffective assistance of counsel, a defendant must allege specific facts that, when considering the totality of circumstances, are not conclusively rebutted by the record, and demonstrate that counsel's performance was so deficient that but for the deficiency, the outcome of the trial would have been different. Kennedy v. State, 547 So. 2d 912, 913-14 (Fla. 1989).

Both the state and federal courts have not hesitated in approving the summary denial of post-conviction relief where the pleadings and record demonstrate that a hearing is unnecessary. See, e.g., Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989); Kennedy v. Dugger, 933 F. 2d 905 (11th Cir. 1991); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988); Puiatti v. Dugger, 589 So. 2d 231 (Fla. 1991).

**Procedural Bar**

Matters which either were raised or could have been raised on direct appeal or previous post-conviction proceedings are procedurally barred on collateral review. It is well settled that a Rule 3.850 motion is not a substitute for, nor does it

constitute a second direct appeal. "[A] Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983)(string citations omitted). See generally Parker v. State, 718 So. 2d 744 (Fla. 1998), cert. denied, 526 U.S. 1101 (1999)(claims procedurally barred on second 3.850 motion for failure to object at trial, for having raised issue on direct appeal, or for having raised issues in prior motions or petitions); Maharaj v. State, 684 So. 2d 726 (Fla. 1996) (Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing). Any attempt by a defendant to avoid the application of a procedural bar by simply recasting a previously raised claim under the guise of ineffective assistance of counsel is not generally successful. See Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985)("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.") "Procedural bars repeatedly have been upheld as valid where properly applied to ensure the finality of cases in which issues were or could have been raised." Atkins v. State, 663 So. 2d 624, 627 (Fla. 1995).

A. The Trial Court Properly Denied Appellant's Claim That Her Trial Counsel Were Ineffective For Failing To Challenge The State's Use Of Similar Fact Evidence.

Although appellant complains that the trial court simply failed to provide any findings for summarily denying the remaining claims, the trial court did state that it agreed with the State's position on those claims (PCR-2, 251) and in the written order, adopted the reasons articulated in the State's "response and argument." (PCR-20, 3016). While appellant now complains that the order adopting the State's argument and rationale was insufficient, he failed to make that argument below. A copy of the proposed order was apparently provided to defense counsel (PCR-6, 813, 815), yet no objection to the form of the order appears below. As this issue could have been brought to the attention of the trial court below, but was not, an argument can be made that any objection to the form of the order denying relief in this case has been waived on appeal.[7] See generally Archer v. State, 673 So. 2d 17, 21 (Fla. 1996).

The State's response in this case noted that the Williams Rule issue was raised at trial and argued on appeal. (Supp-R,

[7] The assistant state attorney below specifically advised counsel to register any objections to the form of the order: "I will include that and I'll provide a copy to counsel in conjunction with submitting it to you so they can raise any objections, if they wish to, of the way I've drafted the proposed order." (PCR-6, 815).

4). [State's Response to Defendant's First Amended Motion To Vacate attached as an Appendix]. Since the issue was litigated at trial and on appeal, it was not appropriate to relitigate the issue under the guise of ineffective assistance. Consequently, the trial court properly denied this claim without a hearing. See Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995)(finding it inappropriate to use a different argument to relitigate the same issue); Sireci, 469 So. 2d at 120 ("[c]laims previously raised on direct appeal will not be heard on a motion for post-conviction relief simply because those claims are raised under the guise of ineffective assistance of counsel.").

On appeal, appellant claims that the failure to obtain an earlier ruling on the similar fact evidence prejudiced appellant by locking her into a claim of self-defense. Once the similar fact evidence of other murders was ruled admissible, appellant argues that her self-defense claim was essentially destroyed. Appellant opines that an earlier ruling would have allowed her defense team time to assess the question of self-defense and focus on voluntary intoxication. According to appellant, such a change in defenses would have undercut the rationale relied upon the State for admission of the collateral crimes evidence, i.e., to rebut the claim of self-defense. (Appellant's Brief at 53-54). Appellant's assertion lacks any merit.

Appellant ignores that this court approved of the Williams Rule evidence not only to rebut the claim of self-defense, but to establish appellant's level of intent. Moreover, Williams Rule evidence has been held admissible to rebut a claim of voluntary intoxication. See Street v. State, 636 So. 2d 1297 (Fla. 1994)(evidence of collateral crimes admissible to rebut defendant's claim that "he was voluntarily intoxicated through use of cocaine and that as a consequence he was unable to form the specific intent to commit first-degree murder."). As in Street, evidence of similar robberies and murders committed by the appellant were also admissible to rebut the defense contention of intoxication.

B. Whether Defense Counsel Were Deficient For Failing To Uncover And Present Evidence Suggesting A Criminal Conviction For Murder Victim Richard Mallory

Appellant next asserts that a hearing should have been granted on her assertion that trial defense counsel were ineffective for failing to uncover and utilize Mr. Mallory's prior "conviction" and his penchant for topless bars and/or rough sex. The State response below, provided the following analysis of this issue:

> Similarly, the defendant has failed to demonstrate either deficiency and/or actual prejudice in claim IV relating to allegations surrounding the victim's alleged 1957 plea of insanity and later incarceration as a "defective delinquent." In fact, Mallory's prior history was raised in trial. Wuornos v. State, supra

> at 1006, and any attempt to relitigate the issue as an ineffectiveness claim should be rejected. Wuornos has made no showing that any evidence as to the victim's 20 plus year old mental health history and/or criminal record or his "affinity for prosecution (sic) and sex" would have been admissible. Furthermore, any such evidence could not have any impact upon Wuornos' trial in light of the overwhelming evidence of guilt adduced against her including physical evidence, testimony of her confidant Tyria Moore, and the defendant's own confession.

(State's Response at 5).

As noted in the State's response, the defense did discover the allegation of Mr. Mallory's criminal past. This issue was litigated as a discovery violation and rejected as a basis for relief on appeal before this Court. Wuornos, at 1006. Moreover, appellant failed to show in her motion how such "evidence" would even be admissible.

The defendant does not claim that she was aware of Mr. Mallory's criminal past at the time of his murder. Consequently, the fact that Mr. Mallory was charged with a sex offense well over thirty years prior to his fatal encounter with Wuornos is not relevant.

It must be remembered that only two types of evidence can be admitted to establish the victim's character when a defendant claims self-defense. The first method is to present the general reputation for violence the victim has in the community. The second method allows evidence of the specific violent acts of

the victim if known to the defendant. The method by which a defendant establishes each form of character evidence is quite different. The first method, the general reputation of the victim for **violence, does not allow reference to specific violent acts of the** victim. **See** Taylor v. State, 513 So. 2d 1371 (Fla. 2d DCA 1987). As a matter of law, a defendant's testimony, regarding the victim's past acts of violence toward others, is generally admissible when the defendant claims self-defense since the prior acts of violence address the reasonableness of the defendant's claimed apprehension of the victim. State v. Smith, 573 So. 2d 306, 318 (Fla. 1990). Third party testimony regarding such specific acts, however, is generally not relevant because such evidence fails to address the defendant's state of mind, but, instead, shows only a propensity by the victim toward violence. Id. Third party testimony regarding specific acts of violence may be admissible under another basis, however, as corroborating the defendant's claims, if it is first shown that the defendant knew about the same acts of violence. "Such corroborative evidence should be admitted cautiously in light of the need to limit evidence of specific acts because, *inter alia*, a jury may tend to give the evidence too much weight, or it may sidetrack the jury's focus." Id. (citing C. Erhardt, Florida Evidence, s. 405.3 (2d Ed.

1984)).

The defendant has failed to show that the extremely remote in time 'conviction' or incarceration of the victim was relevant and admissible in this case. Thus, counsel's performance in regard to developing this potential evidence was not in any way deficient. In any case, even if Mr. Mallory's stay in a Maryland Institute for Sex Offenders from between 1958 and 1962 for a 1957 offense of housebreaking with intent to rape, was somehow admissible in the Volusia County case, there is no reasonable possibility that this evidence would have resulted in a different outcome.

Given the obvious strength of the State's case against Wuornos, a picture emerges of a serial killer who profited from the victims' murders. It strains credulity to suggest that the outcome in the instant case would have been any different if only trial defense counsel had investigated the background of Mr. Mallory and learned that he had a 'conviction' for an offense that occurred more than thirty years prior to his murder.[8] Based upon this record, Wuornos cannot demonstrate either deficient performance or resulting prejudice from

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[8] Appellant's attempt to rationalize the victims' murders does not survive an analysis of the shear number of murders, which, this Court held was admissible in her trial for the Mallory murder. Wuornos v. State, 644 So. 2d at 1006-1007.

counsel's failure to investigate the background of Mr. Mallory.[9] The trial court's summary denial of this claim was entirely appropriate.

C. Whether Defense Counsel Were Deficient In Failing To Have Appellant Examined For Competency Prior To And During Trial

The State's Response below, observed the following regarding appellant's allegation of ineffective assistance:

> Claim V presents an unsubstantiated assertion that trial counsel was ineffective for failing to question Wuornos' competency to stand trial. Despite the allegations made within the defendant's motion there is no basis for second-guessing the court, the mental health experts utilized, and/or experienced trial counsel. Indeed, nothing within the defendant's allegations supports an assertion that the defendant was unable to understand the nature of the proceeding against her. To the contrary, her testimony at trial and the failure to assert that any expert has in fact evaluated the defendant and determined that she was not competent at the time of trial all serve to undermine this claim. Again, no deficiency in representation and/or actual prejudice has been demonstrated.

(State's Response at 6).

Summary denial of this claim was clearly appropriate where appellant failed to allege any specific facts indicating that

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[9] Indeed, the most recent evidence about Mr. Mallory's character comes from his girlfriend, Ms. Davis, who during a proffer testified that she knew him as a kind, gentle, and caring person. (R. 2094). Ms. Davis did not know Mr. Mallory to be aggressive toward her or any other woman. (R. 2094). It is no wonder that the defense chose not to call Ms. Davis as a witness, notwithstanding Mallory's confession to her that in his late teens he broke into a woman's house and was sent into a criminal rehabilitation program. (R. 2097-98).

collateral counsel could establish that appellant was not competent during an evidentiary hearing. For example, collateral counsel does not allege that he has now had appellant examined and an expert would testify that she was incompetent at the time of trial. Nor does counsel even state that had an examination been conducted, an expert would have found her incompetent to stand trial. Moreover, the record reflects that the defense attorneys did not ignore mental health issues, presenting the testimony of three mental health experts during the penalty phase of appellant's trial. Wuornos, 644 So. 2d at 1005. See Bush v. Wainwright, 505 So. 2d 409, 412 (Fla. 1987)(allegation that mental health professional would testify as to "a *possibility* of incompetence" at the time of trial was insufficient to require an evidentiary hearing on the defendant's competency to stand trial.)(Barkett, J., concurring); Porter v. State, 26 Fla. L. Weekly S321 (Fla. May 3, 2001)(allegation of inadequate mental health evaluation under Ake properly subject to summary denial even though the defense alleges in the motion that a different expert who has examined the defendant found him incompetent, where the motion failed to name the expert nor state where the examination occurred[10]).

[10] Further, this Court in Porter stated: "Moreover, we have held that merely because a defendant presents a new expert who has evaluated a defendant after trial and who renders a different

Collateral counsel in this case failed to allege that he has an expert who will testify as to the possibility of appellant's incompetence. As such, appellant has alleged no facts from which prejudice can be found. Summary denial of this claim was therefore clearly appropriate.

**IV.**

**WHETHER THE TRIAL COURT ERRED IN FAILING TO ORDER A HEARING ON APPELLANT'S ASSERTION THAT THE ADVERSARIAL SYSTEM WAS COMPROMISED AND PREVENTED TRIAL DEFENSE COUNSEL FROM RENDERING EFFECTIVE ASSISTANCE OF COUNSEL? (STATED BY APPELLEE).**

Appellant next asserts that various external influences acted upon her trial counsel to appellant's detriment or that the trial process itself acted to prevent her from receiving a fair trial. Probably recognizing her inability to establish any specific prejudice, appellant maintains that the adversarial process broke down as contemplated by the Supreme Court in United States v. Cronic, 466 U.S. 648 (1984). Appellant's argument lacks any merit.

The State's Response below noted appellant's utter failure to allege how these so called deficiencies affected the outcome

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opinion than prior experts that does not by itself render inadequate a prior thorough examination.")(citing Engle v. Dugger, 576 So. 2d 696 (Fla. 1991)).

of the proceeding:

> ...The claim is nothing more than a hodgepodge of allegations as to facts surrounding the case without any demonstration as to how it actually affected the outcome of the proceeding, i.e., the determination of the defendant's guilt based upon evidence adduced at trial. There is no specific assertion of just what testimony could now be presented which would have affected the outcome of this case in light of the overwhelming [evidence] of Wuornos' guilt. The alleged collateral involvement of various law enforcement officers or Tyria Moore in a movie deal, or claims about the "demeanor and conduct" of Judge Blount which had nothing to do with the trial itself fail to approach the standard required in evaluation of ineffective assistance of counsel claims, i.e., that trial counsel was deficient in some manner which if remed[ied] would probably have produced a different outcome of this case.

(State's Response at 6).

As for the media effects assertion, appellant simply asserts that some of the officers involved in this case, from another county, pursued movie and/or book deals. What is entirely absent from appellant's allegations are any concrete facts showing that any of the evidence against her was compromised. Further, appellant fails to provide any credible theory as to how this so-called media influence, if fully developed, would cast doubt upon appellant's convictions; particularly in light of the overwhelming evidence of appellant's guilt possessed by the State, including appellant's own confession.

Appellant cites United States v. Cronic, 466 U.S. 648 (1984), for the proposition that she need not establish either

specific deficiency or prejudice from counsels' performance. In Cronic the Court recognized that some extremely limited factual scenarios may obviate the need for a defendant to demonstrate prejudice for ineffective assistance of counsel. However, despite the fact that the trial court in Cronic had appointed an inexperienced real estate lawyer who was given only a limited time to prepare the defendant's case against fraud charges, the Court declined to find such a situation per se ineffective. Instead, the Court found in Cronic that the defendant must plead and prove deficient performance and resulting prejudice. Cronic provides no support for appellant's post-conviction claims for relief in this case. See Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990)(prejudice prong required even where counsel advised defendant to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-645 (2d Cir 1990), cert. denied, 498 U.S. 990 (1990)(applying both prongs of Strickland despite defendant's claim that counsel's errors were so serious that it amounted to "no counsel at all.").

In this case, appellant did not have one trial defense counsel, but three. Each had significant trial experience and two (Jenkins, Nolas) possessed a great deal of experience litigating capital cases. In fact, one attorney, Mr. Nolas, in

addition to felony trial experience, had extensive experience litigating capital cases at the post-conviction level, rising to become Chief Assistant Capital Collateral Counsel. Appellant's attempt to eliminate the prejudice component of Strickland under the facts of this case is a frivolous contention. See Kennedy, 547 So. 2d at 913-14 (a defendant must allege specific facts that, when considering the totality of circumstances, are not conclusively rebutted by the record, and demonstrate that counsel's performance was so deficient that but for the deficiency, the outcome of the trial would have been different). Consequently, summary denial of this claim was entirely appropriate.

**V.**

**WHETHER APPELLANT'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CUMULATIVELY DENIED APPELLANT A FAIR TRIAL? (STATED BY APPELLEE).**

Appellant next asserts a claim of cumulative error; however, appellant does not bother to brief the issue at all and simply states that "[t]he flaws in the system which sentenced Ms. Wuornos to death are many." (Appellant's Brief at 80). As appellant has failed to offer any specific argument in support of this claim, her allegation of error may be deemed waived on appeal. In Shere v. State, 742 So. 2d 215 (Fla. 1999), this

Court addressed similar allegations of error, stating:

> In a heading in his brief, Shere asserts that the trial court erred by summarily denying nineteen of the twenty-three claims raised in his 3.850 motion. However, for most of these claims, Shere did not present any argument or allege on what grounds the trial court erred in denying these claims. We find that these claims are insufficiently presented for review. *See* State v. Mitchell, 719 So.2d 1245, 1247 (Fla. 1st DCA 1998)(finding that issues raised in appellate brief which contain no argument are deemed abandoned), *review denied*, 729 So.2d 393 (Fla. 1999).

As appellant failed to provide specific facts in support of his claim of error, this issue is waived on appeal. Alternatively, appellant has not established error in her individual allegations, much less some type of cumulative error. See Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998)(where claims were either meritless or procedurally barred, there was no cumulative effect to consider); Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996)(no cumulative error where all issues which were not barred were meritless).

**VI.**

> **WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT APPELLANT WAS DENIED HER RIGHTS UNDER AKE V. OKLAHOMA WHERE COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION? (STATED BY APPELLEE).**

Appellant next alleges that she received inadequate mental health evaluations. Despite the fact that appellant's attorneys

had her examined by three mental health experts who subsequently testified during the penalty phase on appellant's behalf, appellant claims that other experts were available to discuss the particular trauma associated with prostitution. Appellant's argument is entirely devoid of merit.

The State's response to this issue stated, as follows:

> Claim XIX asserts that trial counsel was ineffective for not providing Wuornos a "competent psychiatrist." No support for this assertion is presented within the motion. The defendant in fact utilized mental health professionals at trial and presents no basis for challenging their competency or adequacy in her case. To the contrary, she merely asserts that trial counsel could have chosen different "experts" rather that the two "conventional" mental health experts utilized in this case. What is missing from the defendant's assertion, however, is any actual demonstration that any of the other alleged "experts" had examined the defendant or have since examined the defendant and could either then or now offer any admissible and relevant evidence in support of any mitigation on behalf of the defendant. Certainly, there is no assertion within the motion that Wuornos has been diagnosed with "post traumatic prostitution stress disorder" or that any such finding is even accepted in medical science. Nor is there any demonstration that any of the other individuals named within the defendant's motion had ever examined Wuornos or could have met the standard for the presentation of "expert" testimony relating to this case. Certainly, there has been no legal foundation shown for the introduction of any testimony as to "rape trauma" among Minnesota or Canadian prostitutes; or expertise "on pornography and prostitution." Again, the defendant fails to meet the standard for demonstrating either deficient performance by counsel and/or actual prejudice.

(State's Response at 7).

Appellant offered the testimony of three mental health

experts during the penalty phase. As noted by this Court on direct appeal:

> ...Three defense psychologists concluded that Wuornos suffered from borderline personality disorder at the time of her crime, resulting in extreme mental or emotional disturbance. The psychologists said her ability to conform her conduct to the requirements of the law was substantially impaired, and that Wuornos exhibited evidence of brain damage.

Wuornos, 644 So. 2d at 1005. Since the defense presented three experts to testify that the statutory mental mitigators applied in this case, appellant's assertion that they provided inadequate mental health evaluations is clearly refuted by the record. Appellant does not specifically challenge the professional competence of the experts who were utilized by the defense. Appellant's argument appears to rest upon the contention that additional experts might have been available to testify about how traumatic life as a prostitute is. The simple fact that additional experts may have been called to testify does not render the expert assistance provided inadequate. See generally Downs v. State, 740 So. 2d 506 (Fla. 1999) ("The fact that Downs has found experts willing to testify more favorably concerning mental mitigating circumstances is of no consequence and does not entitle him to relief.")(citations omitted); Jones v. State, 732 So. 2d 313, 317-318 (Fla. 1999)(finding no deficient performance for failing to procure Doctors "Crown" and

"Toomer" noting that trial counsel is not "ineffective merely because postconviction counsel is subsequently able to locate experts who are willing to say that the statutory mitigators do exist in the present case."); Engle, 576 So. 2d at 701 ("This is not a case like Mason v. State, 489 So. 2d 734 (Fla. 1986), in which a history of mental retardation and psychiatric hospitalizations had been overlooked.").

As the three experts who were retained by the defense found the statutory mental mitigators to apply, appellant's argument that she received inadequate assistance under Ake is patently without merit. Summary denial of this claim was entirely appropriate.

## VII.

## WHETHER APPELLANT WAS ENTITLED TO A NEW TRIAL BASED UPON HER ALLEGATIONS OF NEWLY DISCOVERED EVIDENCE? (STATED BY APPELLEE).

Appellant next asserts that she is entitled to a hearing on her allegations of newly discovered evidence relating to potential movie deals entered into by investigating officers and the allegation of victim Richard Mallory's criminal past. The State asserts that summary denial of these claims was entirely appropriate.

By definition, newly discovered evidence concerns facts that

were "unknown by the trial court, by the party, or by counsel at the time of trial" and which could not have been discovered by the defendant or counsel through the use of due diligence. Bolender v. State, 658 So. 2d 82, 85 (Fla. 1995), cert. denied, 116 S.Ct. 12, 132 L.Ed.2d 896 (1996). Appellant did not even attempt to show due diligence in raising her claim about the alleged criminal past of Richard Mallory.

The victim's past, as recited by the victim's girlfriend, Jacqueline Davis, was largely known at the time of trial. In fact, the defense was on notice of his stay at a Maryland treatment facility at the time of trial. (R. 12, 2081-82). The defense clearly was on notice to obtain and investigate the victim's background. In fact, this issue as it relates to Jacqueline Davis's knowledge of Mallory's background was raised as a discovery violation on direct appeal. This Court held that no discovery violation occurred with respect to Ms. Davis's testimony. Wuornos, 644 So. 2d at 1006.

The State properly noted the following in its response below:

> Claim XVI presents no newly discovered evidence claim in that the evidence discussed herein was clearly presented to the defense prior to trial, and was litigated at the trial level and appellate levels and is procedurally barred from consideration in the post-conviction context. Wuornos v. State, supra at 1006. Alternatively, the defendant has failed to make any demonstration that the evidence in issue would have

> been deemed admissible or in any way would have affected the outcome of this case.

(State's Response at 9). This issue is procedurally barred and without merit. Appellant has not articulated exactly how or under what circumstance the very remote in time criminal past of victim Mallory would even be admissible. The State again relies upon its response above (Issue III, B.) to show that this type of character assassination would not even be admissible. Further, even if admissible, this evidence could not have had an impact upon the verdict in this case.

The evidence was known at the time of trial and does not qualify as newly discovered evidence. Nor, given the questionable admissibility and impact of this so-called newly discovered evidence, has appellant made any preliminary showing that the 'newly discovered' evidence would "*probably* produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

Next, appellant asserts that the so-called movie deal entered into by officers investigating the murders committed by Wuornos in another county somehow compromised her case. The State's Response below, stated the following:

> ...The potential movie deal specifics were either known to the defense or could have been discovered through the exercise of due diligence. In any event, none of the matters raised could have changed the

> outcome of this case since the Ocala law enforcement officers allegedly involved were not even from Volusia County and were not involved in the investigation of the Mallory killing. Furthermore, there is nothing within the allegations to undermine the overwhelming evidence of Wuornos' guilt of not only Mallory's killing but the other killings demonstrated through similar fact evidence which was presented at trial. Wuornos does nothing to tie the alleged "newly discovered evidence" to any substantial aspects of the evidence presented in this case; any ongoing negotiation about a potential movie deal surrounding Wuornos' life does nothing to impact upon the confession she gave which was introduced at trial; physical evidence in support of that confession; or the other testimony presented.

(State's Response at 8-9).

Appellant completely fails to show how this so-called movie or book deal corrupted the investigation, and, more important, how such an 'evidence' would have altered the outcome of her Volusia County case. Specifically, appellant fails to allege which material piece of evidence linking her to the Mallory murder, her confession[11], or the property of the victim she retained or pawned was corrupted or tainted.

As appellant's allegations, even if true, do not cast any doubt upon her convictions in this case, she has not alleged sufficient facts to warrant a hearing. This claim was properly

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[11] Ms. Wuornos' confession does not implicate Tyria Moore in any of the murders. Nor did Wuornos' trial testimony mention any role of Tyria. Thus, counsel's claim that the defense could have argued the criminal culpability of Tyria Moore during the penalty phase (Appellant's Brief at 92), is entirely devoid of any factual support.

denied without a hearing below.

## VIII.

**WHETHER APPELLANT WAS DEPRIVED OF HER RIGHTS TO DUE PROCESS BECAUSE THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE? (STATED BY APPELLEE).**

Finally, appellant asserts that the State withheld material, exculpatory information from the defense. This is yet another spin on the previously mentioned claims involving the criminal past of Richard Mallory as related by his girlfriend, Ms. Davis. The information which appellant claims was withheld was in fact disclosed at the beginning of her trial and addressed as a claimed discovery violation on direct appeal. Wuornos at 1006. Consequently, this issue is procedurally barred from review in a motion for post-conviction relief. Maharaj, 684 So. 2d at 726 (Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992)(previously raised claim barred from post-conviction motion as "law of the case."). Consequently, this claim was properly denied without a hearing.

## CONCLUSION

Based on the foregoing arguments and authorities, the lower

court’s ruling denying appellant’s motion for post-conviction relief should be affirmed.

Respectfully submitted,

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**COUNSEL FOR STATE OF FLORIDA**

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard Kiley, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this _____ day of June, 2001.

_____
**COUNSEL FOR STATE OF FLORIDA**

## CERTIFICATE OF TYPE SIZE AND STYLE

**I HEREBY CERTIFY** that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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**COUNSEL FOR STATE OF FLORIDA**

# APPENDIX