IN THE SUPREME COURT OF FLORIDA

DAVID CHARLES CARPENTER,	:	
Appellant,	:	
vs.	:	Case No. 90,349
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender
FLORIDA BAR NUMBER O234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On December 20, 1994, a Pinellas County grand jury returned an indictment charging Appellant, David C. Carpenter, with the premeditated murder of Ann Powell. (Vol. I, pp. 6-7)[1] Powell allegedly was killed "by homicidal violence, including blunt trauma or asphyxiation," on or between November 23 and 24, 1994. (Vol. I, p. 6)

This cause proceeded to a jury trial on February 26-March 1, 1996, with the Honorable Timothy Peters presiding. (Vol. 26, p. 1-Vol. 34, p. 1289) After the State rested its case, Appellant's counsel unsuccessfully moved for a judgment of acquittal, which he renewed after all evidence had been presented, to no avail. (Vol. 33, pp. 1050-1056; Vol. 34, pp. 1130-1131) Appellant's jury returned a general verdict finding him guilty as charged on March 1, 1996. (Vol. 7, pp. 1241, 1281; Vol. 34, pp. 1281-1282)

Penalty phase was conducted on March 5, 1996. (Vol. 35, pp. 1290-1392) After receiving additional evidence from the defense, the jury returned a recommendation that Appellant be sentenced to die in the electric chair, by a vote of seven to five. (Vol. 7, p. 1327; Volume 8, p. 1350; Vol. 35, p. 1385)

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[1] As will be discussed below, another individual, Neilan Pailing, was also charged in the death of Ann Powell. He was indicted for her murder, and charged separately with arson for burning her car. (Vol. 41, p. 2354) Ultimately, Pailing was allowed to plead to murder in the second degree and arson, in return for sentences of 25 years and 15 years in prison, respectively.

On May 3, 1996, Judge Peters sentenced Appellant to die in the electric chair. (Vol. 8, pp. 1382-1386, 1446-1454; Vol. 24, pp. 2173-2199)

Appellant filed a Motion for New Trial on May 14, 1996 (Vol. 8, pp. 1389-1391), which the court granted as to penalty phase only on May 28, 1996. (Vol. 8, p. 1499; Vol. 24, pp. 2142-2148)

Appellant's new penalty trial was conducted on January 21-23, 1997. (Vol. 36, p. 1393-Vol. 41, p. 2469) After receiving evidence from the State and the defense, the jury returned a recommendation, by a vote of ten to two, that Appellant be sentenced to death. (Vol. 10, p. 1864; Vol. 41, p. 2461)

On February 28, 1997, Judge Peters once again sentenced Appellant to death. (Vol. 11, pp. 1925-1942; Vol. 24, pp. 2200-2222) The court found three aggravating circumstances: (1) the capital felony was committed while Appellant was engaged in or an accomplice in the commission of the crime of sexual battery; (2) Appellant had been previously convicted of a felony involving the use of violence to some person; and (3) the capital felony was especially heinous, atrocious, or cruel. (Vol. 11, pp. 1926-1935) With regard to statutory mitigating circumstances, the court found, but gave little weight, to the fact that Appellant's capacity to appreciate the criminality of conduct or to conform his conduct to the requirements of law was substantially impaired. (Vol. 11, pp. 1939-1940) The court specifically rejected, as not having been

reasonably established by the evidence, Appellant's proposed mitigator that he was an accomplice in the capital felony committed by another person and his participation was relatively minor. (Vol. 11, pp. 1935-1938) The court found as nonstatutory mitigation, but gave little weight to, two factors: (1) Appellant's accomplice (Neilan Pailing) was permitted to plead to second degree murder and arson and received concurrent sentences of 25 years and 15 years in prison, respectively, for these offenses; and (2) Appellant cooperated with law enforcement by providing information as to his participation and the participation of his accomplice and by giving law enforcement access to physical evidence. (Vol. 11, pp. 1940-1941)

Appellant takes this appeal from his conviction for murder in the first degree and his sentence of death.

STATEMENT OF THE FACTS

Guilt Phase--State's Case

On Thanksgiving night, 1994, shortly before midnight, officers of the Clearwater Police Department investigated a suspicious vehicle in a field near the Pinellas County Trail. (Vol. 29, pp. 444-445) The exterior of the blue Ford Taurus sedan was in perfect condition, but the interior had been burned. (Vol. 29, pp. 445-446, 464-465, 475) The windows were glazed from the fire, and one could not see into the vehicle from outside. (Vol. 29, pp. 445-446, 465, 515-518) Two Molotov cocktails rested on the back seat. (Vol. 29, pp. 446-447, 465-467)

The officers gained access to the trunk by removing the back seat of the vehicle. (Vol. 29, pp. 448-450, 475-477) In the trunk, they discovered the body of Ann Powell, the owner of the vehicle, covered by a large white blanket. (Vol. 29, pp. 447-450; Vol. 30, pp. 582-584, 591) There was some very light sooting on the blanket, but no actual fire damage in the trunk. (Vol. 29, p. 481)

The vehicle was towed to the Sheriff's Technical Services Building, where the body was removed. (Vol. 29, pp. 479-480, 485-486; Vol. 30, p. 582; Vol. 31, pp. 769-770) There was a bloody towel wrapped around Powell's head. (Vol. 29, p. 484; Vol. 30, pp. 591, 593, 598) She had been beaten and hog-tied, with ropes wrapped several times around her neck, and tying her hands, and twine tying her feet, which was connected to the rope, and her bra

used as a gag and wrapped around her neck. (Vol. 29, pp. 483, 507; Vol. 30, pp. 591-593) Her left eye was completely swollen shut and bruised. (Vol. 30, pp. 593, 598) Her tongue was protruding. (Vol. 30, p. 598) She was naked except for the bra and knee-high hosiery that was still on her feet. (Vol. 30, p. 593)

Ann Powell was 62 years old and lived at the Amberlee Motel, where she was having trouble paying her rent. (Vol. 29, pp. 434, 441; Vol. 31, p. 698) She liked to dance and to go out to dinner. (Vol. 29, p. 434) She had trouble with the retina in one of her eyes, which caused vision problems, but the eye was normal in appearance. (Vol. 29, p. 437; Vol. 31, pp. 716-717, 721) One of her friends, John Post, last spoke with her about 2:00 on the day before Thanksgiving. (Vol. 29, pp. 434-435)[2]

The cause of Ann Powell's death, as ascertained by Associate Medical Examiner Marie Hansen, was "homicidal violence, including neck compression and blunt trauma to the head and neck." (Vol. 33, p. 1017) If force of eight to ten pounds or more were applied continually to the veins and arteries on either side of Powell's neck such that they were totally occluded, she could have become unconscious in 10 to 15 seconds, and death would have occurred in

[2] Post had known Powell for only a few weeks. (Vol. 29, p. 439) Not long after they met, he spent two weekends at her apartment. (Vol. 29, p. 440) They slept in the same bed, but did not have sex. (Vol. 29, p. 440) "She was kind of funny about that[.]" (Vol. 29, p. 440)

up to two to three minutes. (Vol. 33, pp. 1016-1019) The bindings around Powell's neck could have resulted in the neck compression that led to her death. (Vol. 33, p. 1045) Powell had injury to her left eye that was consistent with blunt trauma. (Vol. 33, pp. 1006-1007) She had a bruise on the side of her head, and there were four areas of subgaleal (between the scalp and the scull) hemorrhaging, which could have occurred prior to death or shortly (five to ten minutes) after death. (Vol. 33, pp. 1008-1009, 1013-1015, 1021-1022) There were two small contusions to Powell's vaginal area, as well as a contusion with an overlying laceration; these most likely occurred prior to death. (Vol. 33, pp. 1011, 1015, 1023, 1032)[3] There was nothing about these injuries that was inconsistent with consensual sex. (Vol. 33, p. 1035) They could also be consistent with a forcible rape, depending upon Powell's sexual history. (Vol 33, p. 1046) Powell had blood on her fingers, but there was no injury to that area of her body. (Vol. 30, pp. 592, 599; Vol. 33, pp. 1001-1002, 1020) She had no injuries which Hansen would characterize as defensive wounds. (Vol. 33, pp. 1030-1032)

The rope bindings tying Powell were consistent with being placed after death, while the bra binding was consistent with

[3] Dr. Hansen did not note the laceration at the time she performed the autopsy upon Ann Powell, but only identified it later, approximately two weeks before she testified at Appellant's trial, from a photograph. (Vol. 33, pp. 1033-1035, 1046-1048)

either before or around the time of death. (Vol. 33, pp. 1024-1025) It was possible the bra was placed there after death, but it was much more likely that it was placed before death. (Vol. 33, p. 1027, 1043-1044)

Robert Penn was Appellant's neighbor in a triplex in Dunedin; Penn lived in one end of the triplex, and Appellant lived in the other, with the landlord's apartment in between. (Vol. 29, pp. 536, 539) When Penn was coming home from work after Thanksgiving weekend, Appellant, who was on his front porch, called him over and said that he (Appellant) might be in a little trouble because somebody he had set up on a date might have been involved in some problems. (Vol. 29, p. 537) Appellant saw on the news that her car had been burned up. (Vol. 29, p. 541) The person he set the woman up with, whom Penn knew to be Neilan Pailing, had left town. (Vol. 29, pp. 540, 544) When Appellant was talking to Penn, he was a little nervous and agitated, which was normal for Appellant; he was talking normally. (Vol. 29, p. 537)

Penn remembered seeing the car in Appellant' driveway on the evening before Thanksgiving; it was there when he came home between 5:00 and 6:00, and was still there when Penn left about 8:30. (Vol. 29, pp. 538-539) While Penn was home, he did not hear any unusual noises or struggles or banging or screaming or anything of that sort. (Vol. 29, p. 543)

Appellant told Penn he thought he should leave town, because he thought something bad had happened to the woman, and he asked Penn for his opinion. (Vol. 29, p. 540) Penn advised that if he was not involved, Appellant should go see the police immediately, and if he was involved, he should go see an attorney. (Vol. 29, p. 540)

On November 29, 1994, at approximately 6:44 p.m., the Clearwater Police Department received a telephone call from an individual identifying himself as David Carpenter. (Vol. 29, pp. 548-549) The caller asked to speak to Detective Dick Howard, but he was on the road and unavailable to take the call. (Supplemental Vol., p. 2) The caller said that he did some work on the car in which the person had been found in the trunk. (Supplemental Vol., pp. 2-3) He left a number where he could be reached. (Supplemental Vol., p. 3) Detective James Steffens called the number and spoke with Appellant. (Vol. 30, pp. 601-602) Appellant spoke to him in a nervous, kind of hushed fashion, and it appeared there were people in the background. (Vol. 30, p. 602) He stated that he had been with the lady and worked on her car, which he saw on television. (Vol. 30, pp. 602-603) He replaced the fuse in the trunk light. (Vol. 30, p. 603) Appellant explained that he and a friend named Neil Pailing had had a threesome sexual encounter with the woman. (Vol. 30, p. 604) Appellant said that Pailing was a violent person, and he feared the lady may have come to harm with him, but

they left Appellant's house after dinner, and he did not know where they had gone. (Vol. 30, p. 605)

Steffens made contact with Appellant at his sister's house, and he agreed to accompany Steffens and Sergeant Mark Teunis to the station to provide information. (Vol. 30, pp. 605-606) During the drive, Steffens sat in the back seat and took notes. (Vol. 30, p. 607) Appellant stated again that he was a handyman and had worked on the car. (Vol. 30, p. 607) He said that he and Ann Powell had engaged in sexual foreplay, and that she left with Neil Pailing thereafter, and Appellant had not seen them since. (Vol. 30, pp. 607-608) It was Appellant's understanding that Pailing had left the state the next day. (Vol. 30, p. 608)

During the ride to the station, Appellant looked straight ahead through the windshield, except when they drove near the place where the car was found; at that point, Appellant looked to the right, which was away from the scene. (Vol. 30, pp. 608-609; Vol. 31, pp. 746-747)

When they were near the station, Appellant volunteered that he did not have any weapons on him, in case they were wondering. (Vol. 30, p. 608)

It was 8:00 p.m. when Steffens and Teunis began speaking with Appellant in an interview room at the Criminal Investigations Division of the Clearwater Police Department. (Vol. 30, p. 610) Detective Howard was also present. (Vol. 30, p. 610)

Appellant told the police officers that he first met Ann Powell at a laundromat. (Vol. 30, p. 612) He was having a party with his friend, Neil Pailing, and invited Powell to the party. (Vol. 30, p. 612) It was originally scheduled for Tuesday, November 22, but Powell cancelled because she was going to a church service, and it was rescheduled for Wednesday, November 23. (Vol. 30, p. 612) Appellant called Powell and made arrangements to meet her at the laundromat;[4] he walked there, and Powell drove him home in her car. (Vol. 30, pp. 612-613) Appellant said that he prepared pasta and beans for dinner, which Powell ate, and she drank tea. (Vol. 30, p. 613)[5] He stated that he and Powell began to have foreplay by fondling one another, whereupon Neil Pailing walked in and became embarrassed at the scene. (Vol. 30, p. 613) Appellant explained that he and Pailing had been with another woman together, and they each had a sexual type of dysfunction. (Vol. 30, p. 614)

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[4] Powell had two telephone messages from a person named "Dave." The first, from November 22 [1994] was: "Hi. Ann, this is Dave. How about dinner tonight, dinner and dance? If you want to, you can meet me here at--or by the--it's the same place where I met you, at 6:00 o'clock [sic], and I'll call you back later." The second, from November 23, was: "Hi. Ann, this is Dave. Are you there? I just want to know if we're still on for tonight. I'll check back at about a quarter 'til. Thank you." (Vol. 31, pp. 673-674; Supplemental Vol., pp. 9-10) There was also a notation in a red notebook found in Powell's residence: "5:33 Dave." (Vol 30, pp. 584-588)

[5] Dr. Hansen described Powell's stomach contents as she found them at the time of autopsy as "about a half cup of tan, opaque fluid and you could see identifiable fragments of potato and green vegetable, but I could not further identify at that point in time."

Pailing was a "premature ejector" (ejaculator), while Appellant took a long time to get erect, and was sometimes impotent. (Vol. 30, p. 614)

Powell asked Appellant to leave, to go out and fix the fuse for the trunk light in her car; she liked Neil and wanted to spend some time with him. (Vol. 30, p. 614) When Appellant went to work in the trunk, there were various boxes in which Powell kept her belongings, which he had to move. (Vol. 30, p. 615) Thus, he was concerned that the police might find his fingerprints there. (Vol. 30, p. 615)

While he was working on the car, Appellant heard loud rock music coming from his apartment. (Vol. 30, p. 615) His stereo had been turned to a different station that the one to which he usually listened. (Vol. 30, p. 615) A little while later, Powell and Pailing left in Powell's car, with Pailing driving. (Vol. 30, p. 615) Appellant initially told the officers that Pailing left [the State] on Thursday, but then said he left on Saturday, which would have been the 26th. (Vol. 30, pp. 617-618, 640)[6]

The officers asked Appellant if they could look through his house, and he agreed. (Vol. 30, p. 616) Appellant gave them a tour of his efficiency apartment, pointing out that he was a collector of Star Trek memorabilia, and showing them a couple of toy guns,

[6] Pailing was in Anchorage, Alaska on December 2. (Vol. 31, pp. 680-681)

which Appellant referred to as "nonguns." (Vol. 30, pp. 618-619) One was a rifle type of BB gun that was above one of the exit doors, and another was a replica of a semiautomatic pistol that had a scope on it, which Appellant produced from a desk drawer. (Vol. 30, pp. 623-624) Appellant showed the officers a package of cigarettes which he said Ann Powell had left behind. (Vol. 30, p. 623) There was discolored area of carpet, which Appellant "just kind of referred to it real quick and moved on to continue to show" the officers the apartment. (Vol. 30, p. 624; Vol. 31, p. 751) Sergeant Teunis asked him if he had spilled something, and Appellant said he did. (Vol.31, p. 751)

Appellant also showed them a shed at the back of his residence. (Vol. 30, p. 625; Vol. 31, p. 752)

Sergeant Teunis asked Appellant for permission to let a forensic science unit from the sheriff's department to conduct a thorough search of his apartment for any evidence, and Appellant agreed. (Vol. 30, p. 625)

Detective Steffens asked Appellant to return to the station for more questioning, and he agreed. (Vol. 30, p. 626) This second round of conversation at the station began around midnight. (Vol. 30, p. 626) Appellant said that he met Ann Powell on the 20th [of November, 1994] at the laundromat, and the party involving Neil Pailing was not planned, but was spontaneous, a surprise for Pailing. (Vol. 30, p. 627) Appellant picked her up on the 23rd.

(Vol. 30, p. 627) He initially stated that Powell had pasta and beans, but then said she did not eat or did not want to, and she only drank tea. (Vol. 30, pp. 627-628) Appellant stated that there was consensual foreplay with Powell, whereupon Pailing came over, and Powell asked if she could spend some time with him, and Appellant went out to do the trunk work. (Vol. 30, p. 628) Pailing and Powell left (he believed they were going to a motel), after which Appellant lost control of his bowels in his apartment, and went to seek medical attention. (Vol. 30, p. 628-629)

After a break, the officers began speaking with Appellant again around 1:00 a.m. (Vol. 30, p. 632) He then gave them a version which "changed pretty dramatically from what he had told [them] previously." (Vol. 30, p. 632) Appellant said that Neil Pailing had a problem with little children, and was into Dungeons and Dragons, a science fiction type game where people assume characters and play out scenarios and fantasies. (Vol. 30, pp. 632-633) He wanted to help Pailing achieve manhood by having a lady come over for a "threesome." (Vol. 30, p. 633) He described how he fondled Powell's vagina through her pants in order "to get her warmed up for Neil." (Vol. 30, p. 633) When Pailing came in, Powell wanted to spend some time with him, and Appellant went outside and took up a position where he could see them through a window. (Vol. 30, pp. 634-635) He observed the two engage in "doggy style intercourse," but it appeared to him that Pailing had

a premature ejaculation, which Powell was not happy about; she belittled and made fun of him. (Vol. 30, pp. 635-636) Appellant turned away, but then heard a loud thump, which drew his attention back inside. (Vol. 30, p. 636) He saw Powell on the floor, and his music had been turned from blues music to a hard rock station; he thought maybe one of his speakers blew out because it was so loud. (Vol. 30, p. 636) Pailing was on top of Powell "choking her out" and laughing (Vol. 30, p. 636-637) Appellant was "freaking out." (Vol. 30, p. 637) He entered the apartment, whereupon Pailing started making fun of him and calling him a coward. (Vol. 30, p. 637) Powell was lying motionless, with rope and twine lying next to her on the floor. (Vol. 30, p. 637) Pailing said the police could not do anything to him because he was 17. (Vol. 30, p. 638) Appellant said he wanted to call the police, but he told Pailing that he was going to go to the laundromat and walk around, and that Pailing and Powell had better not be there when Appellant returned. (Vol. 30, p. 638) When Appellant came back, Pailing was in the process of trying to drive Powell's car away, and was having trouble getting the headlights on; he drove away with the head-lights off. (Vol. 30, pp. 638-639) Inside his apartment, Appellant noted a bloody area on the carpet where Powell had been and tried to clean it up. (Vol. 30, p. 639) He then went to bed and tried to sleep, but he had a lung problem, which he took care of. (Vol. 30, p. 639)

Appellant then gave another version, in which he mentioned Dungeons and Dragons again, and said that Pailing assumed a character which was very evil and roamed the world. (Vol. 30, pp. 641-642) Appellant said that when Powell was at his apartment, all three persons were naked on the living room floor, and Appellant was having consensual sexual intercourse with her in a regular fashion, while wearing a condom. (Vol. 30, p. 642; Vol.32, p. 924) He finished, but did not ejaculate, and went to the bathroom to clean up, while Pailing "started in the doggy style fashion intercourse with her." (Vol. 30, p. 642) It appeared that Pailing, who was not wearing a condom, "had a premature ejector," and there was loud thump, and Powell was belittling Pailing, asking why could he not be like Appellant. (Vol. 30, p. 643; Vol. 32, p. 925) Appellant ran out of the bathroom quickly, and found Pailing choking Powell. (Vol. 30, pp. 643-644) He believed Pailing had hit her with a "nongun" that was lying on the floor. (Vol. 30, 644) Appellant was yelling at Pailing, "what have you done?" (Vol. 30, p. 644) He said to Pailing, "You bagged it, you tagged it," and instructed him to bring some rope and twine that was in the apartment. (Vol. 30, p. 645) Appellant instructed Pailing on how to hog-tie Powell, "like you would do in a rodeo." (Vol. 30, pp. 645-646) They then rolled her up in a blanket, and Appellant backed her car up to a boardwalk that ran along the length of the

efficiency to the driveway, and Appellant "gently put her in the trunk." (Vol. 30, pp. 646-647) Pailing prepared two Molotov cocktails; Appellant was telling him to get rid of her, and it was his understanding that Pailing was going to burn her up. (Vol. 30, p. 648) Appellant tried to scrub the bloodied area on the carpet, then sprayed over it with black enamel spray paint. (Vol. 30, pp. 648, 650) He put a pack of Powell's Capri cigarettes in a box, and put the "nongun" back in the drawer. (Vol. 30, pp. 648-649) He put some of the boxes of Powell's belongings from the trunk of her car into the shed behind the apartment, as well as some of Pailing's belongings. (Vol. 30, p. 649) He gathered up Powell's blouse, pants, and panties so that Pailing could dispose of them with the body. (Vol. 30, p. 649) Appellant told the officers that Powell's bra was still on her body, but she had one breast exposed. (Vol. 30, p. 650) Appellant washed his clothes at the laundromat. (Vol. 30, p. 651) He spent Thanksgiving with his parents. (Vol. 30, p. 651)

Appellant explained that he contacted the police after seeing Powell's car profiled on television, as he wanted them to know that he had worked on the car, and they could therefore expect to find his fingerprints. (Vol. 30, pp. 651-652)

At around 3:00 a.m., after advising Appellant of his Miranda warnings, the officers took a taped statement from him, which was played at Appellant's trial. (Vol. 30, pp. 652-656; Vol. 31, pp.

671-672; Supplemental Vol., pp. 15-39) On tape, Appellant reiterated what he had said about inviting Powell to a party, and engaging in a "threesome." (Supplemental Vol., p. 17) He said that Pailing was nervous at first, but Powell talked him into taking his off his clothes. (Supplemental Vol., p. 22) After Appellant finished, he went into the bathroom, heard a commotion, and came out to see Pailing smacking Powell on the head or in the face with Appellant's gun. (Supplemental Vol., pp. 17-18) [Later on the tape, Appellant said that he did not actually see Pailing hitting Powell, but heard blows being struck when he was in the bathroom. (Supplemental Vol., p. 25)] Pailing was strangling her and she was turning purple, and Appellant was "not doing anything except for freaking out." (Supplemental Vol., p. 18) Her head was bleeding, and Appellant gave Pailing a towel so she would not bleed on the carpet. (Supplemental Vol., p. 18) Pailing wanted to know how to tie her up, and Appellant instructed him "to tie her up like you would do a critter, an animal, and he proceeded to do so." (Supplemental Vol., p. 18) Pailing produced some sort of blanket type of material, and Appellant put her in the blanket and wrapped her up. (Supplemental Vol., p. 18) Pailing proceeded to drag her outside and down the boardwalk. (Supplemental Vol., p. 18) Appellant picked her up and put her in the trunk, then began to clean up the mess on the carpet. (Supplemental Vol., pp. 18-19) Pailing "had gasoline and an apparatus...to dispose of Ann in the

car[,]" and he had her clothes in a bag to dispose of them as well, and he drove away. (Supplemental Vol., p. 19)

Appellant said that what happened was not a "planned thing," and "was not supposed to happen." (Supplemental Vol., p. 19) They were to have a good time. (Supplemental Vol., p. 19) If he had known Powell was going to get hurt, she would not have been there. (Supplemental Vol., p. 19)

A fingerprint made by Appellant's left little finger was found on a can of black spray paint retrieved from his garbage. (Vol. 32, p. 904) A print lifted from the right front fender door of Powell's car matched Appellant's left thumb. (Vol. 32, pp. 9054-905) A print from the right rear passenger door frame of the vehicle was identified to the right ring finger of Neilan Pailing. (Vol. 32, p. 908)

A sample from Appellant's carpet, the toy gun, and fingernail scrapings from Ann Powell were all presumptively positive for the presence of blood. (Vol. 32, pp. 914-915) Semen was detected on a comforter removed from Powell's vehicle, but it did not go back to either Appellant or Pailing. (Vol. 32, pp. 912, 915-916, 923) Semen was not found on swabs taken from Powell, her bra and stockings, or the towel covering her head. (Vol. 32, p. 916) DNA testing on the rug was consistent with Powell, and not consistent with Appellant or Pailing. (Vol. 32, pp. 932-934) DNA testing on blood on a pair of Appellant's jeans was consistent with Appellant,

but also consistent with Pailing, or could have been a combination of Appellant, Pailing, and Powell. (Vol. 32, pp. 932-934)

Twisted twine from the wrists of Ann Powell was consistent in appearance, construction, composition, and microscopic characteristics with a spool of twisted twine from under the shed at Appellant's residence. (Vol. 32, pp. 945-946) Braided rope from the wrist and neck area of Ann Powell was consistent in construction, appearance, generic fiber types, and microscopic characteristics with rope from the roof of Appellant's residence. (Vol. 32, pp. 946-947)

Steven Dakowitz testified that he was in the same pod with Appellant at the Pinellas County Jail for about a month and a half. (Vol. 32, p. 966) Appellant told Dakowitz that his role in this incident was very limited, that he had just helped load the body into a car, and the other individual was pretty much responsible for the rest. (Vol. 32, p. 969) They had talked about how it would be okay for Appellant when they found "this kid," but after a news report stating that Pailing had been located, Appellant was "a little agitated" and "bummed out." (Vol. 32, p. 970) Dakowitz heard Appellant crying on the phone; he was really upset. (Vol. 32, p.970) Appellant said, "'It's all over now. He knows exactly what happened and I'm going to fry.'" (Vol. 32, pp. 970, 975) Later, Dakowitz asked Appellant about why he was upset. (Vol. 32, p. 971) Dakowitz said, "I thought you said your role in it was pretty

limited." (Vol. 32, p. 971) Appellant said something along the lines of: "Let's just say it was just the opposite," and that things were only going to get worse. (Vol. 32, pp. 971-972)

Guilt Phase--Appellant's Case

Appellant wished to call two witnesses, William Robert Shay and Carlos Mendoza, to testify concerning statements they had heard Neil Pailing make when they were in jail together, but the court ruled their proffered testimony inadmissible. (Vol. 34, pp. 1064-1115)[7] As a result, the defense called only one witness to testify, Appellant's mother, Dorothy Carpenter. (Vol. 34, pp. 1116-1128) She described Appellant as being about 6'4" tall and weighing about 220 pounds. (Vol. 34, p. 1117) When he was between the ages of three and four, Appellant suffered from a high fever which left him with slight brain damage. (Vol. 34, p. 1118) As a result, he had coordination problems and limited verbal abilities. (Vol. 34, pp. 1118-1119) He had to learn to walk all over again, and was clumsy and unable to run. (Vol. 34, pp. 1118, 1127) He was mentally slow, and it was hard for him to understand certain instructions, or certain things that were going on around him. (Vol. 34, p. 1119)[8] Appellant was, however, able to do such things

[7] This matter is discussed more fully in Issue III below.

[8] A State hearsay objection was sustained when defense counsel attempted to elicit the results of an IQ test Appellant had taken. (Vol. 34, pp. 1124-1127)

as yard work, ride a bicycle quite a distance, maintain a tidy household, and he had held a job making pizzas. (Vol. 34, pp. 1122-1123) Appellant had also been married for some time, to a nurse. (Vol. 34, p. 1123)

Penalty Phase of January 21-23, 1997

State's Case

The State presented the testimony of four of the same witnesses who had testified at the guilt phase of Appellant's trial: John Post, James Steffens, Dr. Marie Hansen, and Stephen Dackiewicz.[9] (Vol. 38, pp. 1910-Vol. 40, p. 2210, 2256-2268) Among other things, Detective Steffans testified that Neil Pailing left for Alaska the day after Thanksgiving, using a ticket he bought after Ann Powell was killed. (Vol. 40, p. 2087)[10] Steffens went to Alaska and observed a singe on Pailing's hand and one of his eyebrows, which Pailing admitted were caused by the Molotov cocktails. (Vol. 40, pp. 2087-2088) Steffens also took custody of a lighter which Pailing indicated belonged to Ann Powell. (Vol. 40, p. 2088) Pailing told Steffens that he witnessed the killing, but

[9] This is the same witness who appears elsewhere in the record as "Steven Dakowitz."

[10] According to Pailing's father and grandfather, his family had been planning to send him to Alaska for some time. (Vol. 40, p. 2108)

it was committed by Appellant, who also instructed Pailing how to dispose of the car. (Vol. 40, p. 2114)

The State also called a new witness, Ann Demers, who testified over defense objections about an incident that occurred in Nevada. (Vol. 39, pp. 1988-1998; Vol. 41, pp. 2274-2321) On February 17, 1986, Demers was working as a massage therapist in Sparks. (Vol. 41, pp. 2276-2277, 2288) She was called by a David Creps to come to the Circus Circus Hotel that afternoon to give him a message, which Demers told him would be non-sexual. (Vol. 41, pp. 2277-2278, 2288) Demers gave Creps the massage, during which he was acting normally. (Vol. 41, pp. 2281-2282) She went to the bathroom to wash the lotion off her hands, after which Creps put a belt around her neck and tried to choke her. (Vol. 41, p. 2282) He dragged her

over to the bed "like a dog on a leash." (Vol. 41, p. 2282) When she was on the bed, Creps put a pillow hard on top of her face so that she could not breathe. (Vol. 41, p. 2283) He yanked her slacks off and forced her to perform oral sex on him, saying that he had a gun in the drawer and would kill her. (Vol. 41, pp. 2283-2284) He also "put himself inside of [her] vaginally twice[,]" which really hurt. (Vol. 41, p. 2284) Creps got up and went to her purse to look for money, and became enraged when Demers said she was "broke." (Vol. 41, p. 2284) He punched her in the chest and stomach, put a choke hold on her on the bed, threatened to break

her neck if she screamed for help, and said he would use the gun. (Vol. 41, pp. 2284-2285) Demers was scared and thought Creps was going to kill her. (Vol. 41, p. 2285) When her pager went off, she "made a mad dash for [her] clothes." (Vol. 41, p. 2285) When she was at the door, Creps punched her hard in the mouth, breaking three teeth out. (Vol. 41, p. 2285) He punched her in the chin and broke her lip. (Vol. 41, p. 2286) Demers was screaming for help. (Vol. 41, p. 2286) Creps took his hand and slammed her head into the door. (Vol. 41, p. 2286) She was finally able to get out into the hallway. (Vol. 41, p. 2286) After she screamed for help for five minutes, an older couple in the next room let her in. (Vol. 41, p. 2286) Demers reported the incident to the police, and was treated at the hospital. (Vol. 41, p. 2287) As a result of the incident, she had a "temporomandibular joint problem[,]" which affected her day to day life. (Vol. 41, pp. 2287-2288) Appellant was charged with assault and battery with substantial harm in the episode involving Ann Demers. (Vol. 41, pp. 2304-2305) Demers testified that Appellant was a "criminal" and a "rapist." (Vol. 41, p. 2317) In 1983, Demers reported another incident where she claimed someone sexually assaulted her and stole money out of her purse when she went to a hotel room to give a massage. (Vol. 41, p. 2321)

The State also introduced, and the court admitted over defense objections, a certified copy of a judgment showing Appellant's

conviction for battery causing substantial bodily harm [which pertained to the Demers incident]. (Vol. 22, p. 2105; Vol. 41, pp. 2339-2340)

Appellant's Case

Appellant's first witness was Dr. John Feegel, an expert in forensic pathology. (Vol. 40, pp. 2212-2256) Among other things, Dr. Feegel testified that the vaginal injuries in this case were consistent with consensual sex, albeit with "forceful penetration," and discussed the hazards involved in attempting to determine from photographs whether a bruise of laceration was present when it had not been observed at the autopsy. (Vol. 40, pp. 2220, 2226-2236, 2252)

Appellant's only other witness was his mother, Dorothy Carpenter. (Vol. 41, pp. 2340-2351) As at guilt phase, she testified as to Appellant's brain damage, which resulted from a sustained high fever when he had measles as a child. (Vol. 41, pp. 2341-2342) Appellant had to be retrained to walk and to speak. (Vol. 41, p. 2342) His IQ at the age of five was 79, dull normal. (Vol. 41, pp. 2342-2343) He had problems in processing information in a logical and reasonable manner and acting accordingly. (Vol. 41, p. 2343) For example, once when he was attempting to double a recipe for Jello, he did not understand that it was necessary to double all the ingredients. (Vol. 41, p. 2343) Appellant had to

close his bank account because he did not realize that merely because he had checks did not mean he had money in the bank. (Vol. 41, p. 2345) He was, however, able to work at some types of jobs, and cook his own meals, and keep a fairly neat apartment. (Vol. 41, pp. 2345, 2347-2348) And he had been married for a few months to a pediatric nurse. (Vol. 41, p. 2347)

Appellant also introduce into evidence a judgment showing that Neilan Pailing entered a plea of guilty to second degree murder and received a sentence of 25 years, and the court read a stipulation that Pailing also pled guilty in the companion arson case and received a concurrent sentence of 15 years. (Vol. 23, p. 2115; Vol. 41, pp. 2352-2353, 2357-2358)

SUMMARY OF THE ARGUMENT

The evidence the State presented at Appellant's trial was insufficient to establish his guilt of either premeditated or felony murder. There was no proof to contradict Appellant's version of events, in which Neil Pailing killed Ann Powell on his own, with no help, encouragement, or assistance from Appellant. Furthermore, the evidence did not prove that Powell was killed from a premeditated design to effect her death. With regard to felony murder, the prosecution presented no evidence that showed that any sexual activity that took place was other than consensual, and so the underlying felony of sexual battery was not proven.

The trial court should not have agreed with the State's request to modify the standard jury charge on first degree murder as requested by the State. Amending the instruction to include language regarding "principals" made it too easy for the State to obtain a conviction.

Appellant's jury should have been permitted to hear the testimony of the two witnesses he proffered to show that Neil Pailing had admitted to raping and killing the victim herein. This evidence was admissible under the hearsay exception for statements against interest, and was necessary to vindicate Appellant's right to present witnesses to establish his defense. It went both to whether or not Appellant was guilty of first degree murder, and whether or not he should be sentenced to death.

Appellant's Nevada conviction for a gross misdemeanor did not qualify as a "prior violent felony" which could be used in support of his sentence of death. The battery causing substantial bodily harm to which he pled more closely resembles a misdemeanor than a felony in elements and punishment. Also, the victim of that offense should not have been allowed to give prejudicial testimony regarding conduct for which Appellant was not even charged, much less convicted.

Appellant should not have been sentenced to death when Neil Pailing was not. Pailing was at least as culpable as Appellant, according to the facts that are known. If there is any uncertainty or ambiguity in the respective roles Appellant and Pailing played in the death of Ann Powell, this should support a life sentence for Appellant, not a sentence of death.

ARGUMENT

ISSUE I

THE EVIDENCE ADDUCED BELOW WAS INSUFFICIENT TO ESTABLISH APPELLANT'S GUILT OF EITHER PREMEDITATED OR FELONY MURDER.

The evidence adduced by the State at Appellant's trial was insufficient to show that he committed either a premeditated or a felony murder of Ann Powell, and his motions for judgment of acquittal should have been granted.

Although there was adequate evidence to show that Powell was killed in Appellant's apartment, the only guilt-phase evidence as to what occurred there, and who actually killed Powell, came from Appellant's statements to the police. Those statements showed that it was Neil Pailing, and Neil Pailing alone, who was responsible for Powell's death. Nor could Appellant be convicted on a principal theory pursuant to section 777.011 of the Florida Statutes. "In order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime. [Citations omitted.]" Staten v. State, 519 So. 2d 622, 624 (Fla. 1988). The prosecution presented no evidence to show that Appellant in any way aided or abetted Pailing in his attack on Powell. Where, as here, Appellant's version of what occurred at his apartment, insofar at it established that Pailing alone killed Powell, was reasonable, unrebutted, and unimpeached,

the court and jury were obliged to accept it. Evans v. State, 643 So. 2d 1204 (Fla. 1st DCA 1994).

There was no physical evidence which cast any doubt on Appellant's statements as to what occurred. The only evidence that might even arguably have tended to do this was the testimony of "jailhouse snitch" Steven Dakowitz. However, Appellant's statements to Dakowitz were much too ambiguous to support a reasonable inference that Appellant was responsible for killing Powell.

Appellant's acknowledged role in helping to dispose of the body by placing it in the trunk of the car might qualify him for prosecution as an accessory after the fact pursuant to section 777.03 of the Florida Statutes, but did not make him guilty of murder in the first degree.

Appellant's assertion that it was Pailing who committed the murder is given additional credence by the fact that, after the homicide, Appellant not only remained in his apartment, but actually contacted the police himself, and voluntarily provided information about what occurred, while Pailing, on the other hand, immediately fled the State for the distant reaches of Alaska, thus strongly suggesting that Pailing knew his potential criminal exposure was great, while Appellant's was much less so.

Furthermore, the evidence failed to prove that anyone, either Pailing or Appellant, killed Powell with premeditation. As

Appellant told the police, there certainly was no plan ahead of time that Powell would be harmed in any way.

Premeditation, as an element of first-degree murder,

> is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act. Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned.

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981) (citations omitted), cert. denied, 456 U.S. 984 (1982), overruled on other grounds, Pope v. State, 441 So. 2d 1073 (Fla. 1983); see also Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993) (evidence consistent with unlawful killing insufficient to prove premeditation); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990), cert. denied, 500 U.S. 960 (1991). The premeditation essential for proof of first-degree murder requires "more than a mere intent to kill; it is a fully formed conscious purpose to kill." Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). See also Brown v. State, 444 So. 2d 939 (Fla. 1984); Peavy v. State, 442 So. 2d 200 (Fla. 1983); Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA 1983). There was no direct evidence of premeditation adduced at Appellant's trial;

any evidence of premeditation was purely circumstantial. Where the State seeks to prove premeditation circumstantially, the evidence relied upon must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). And if "the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. [Citation omitted.]" Hoefert, 617 So. 2d at 1048.

The recent capital case of Green v. State, 23 Fla. L. Weekly S281 (Fla. May 21, 1998) is particularly compelling on the question of premeditation. There, the victim was stabbed and suffered blunt trauma, but the cause of death was strangulation. Even though the appellant had made prior threats to kill the victim, this Court found the evidence of premeditation in Green to be insufficient. Here, the evidence did not show any threats to kill Ann Powell, nor was she stabbed, as was the victim in Green. Thus, the evidence of premeditation here was even weaker than in Green.

Hoefert, which was cited by this Court in Green, was another case in which this Court determined that a killing by means of asphyxiation did not establish premeditation. See also, Kirkland v. State, 684 So. 2d 732 (Fla. 1996) (premeditation not established by prolonged attack against victim), as well as two other recent cases, Mungin v. State, 689 So. 2d 1026 (Fla. 1995) and Norton v.

State, 709 So. 2d 87 (Fla. 1997), in which this Court found proof of premeditation to be lacking.

It is significant that Dr. Hansen opined that the bindings around Powell's neck could have caused sufficient compression to asphyxiate her, which could have been an unintended consequence of the tying, rather than an effort to kill.

In a way it is perhaps fitting that Neil Pailing was allowed to plead guilty to second degree murder in that it appears, from Appellant's statements to the police, that Pailing killed Powell in a rage when she belittled him, a scenario which would comport with the definition of second degree murder, but not first degree.

Even if Pailing did kill with premeditation, his mental state cannot be attributed to Appellant where Appellant was not a principal in the homicide. Brumbley v. State, 453 So. 2d 381 (Fla. 1984).

Turning to the issue of felony murder, with sexual battery as the underlying felony, it must first be noted that the State did not charge Appellant with this offense. In addition, the evidence showed that Ann Powell knew Appellant, and, apparently, came to his apartment willingly, completely of her own accord. Most significantly, both the State's expert witness and Appellant's penalty phase expert witness agreed that the minor injuries Powell suffered to her vaginal area were consistent with consensual intercourse, which is what Appellant said took place. Indeed, Dr. Hansen, the

associate medical examiner, did not even discover the small laceration to Powell's vagina during the autopsy, but only noticed it later, in a photograph. Furthermore, the fact that a comforter removed from Powell's car contained semen which was not attributable to either Appellant or Pailing indicated that she was sexually active.

Although the blunt trauma Powell suffered might be suggestive of forced intercourse if there were no other evidence as to what took place, Appellant's statements to the police clearly established that she was struck only after all sexual activity had been completed, by an enraged Neil Pailing, thus negating the inference that might otherwise be drawn.

A case such as this one that relies on circumstantial evidence must exclude all reasonable hypotheses of innocence.

> It is the responsibility of the State to carry its burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be en-

> tirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So. 2d 629, 631-32 (Fla. 1956) (emphasis added). See also McArthur v. State, 351 So. 2d 972 (Fla. 1977) and Heiney v. State, 447 So. 2d 210 (Fla. 1984).

The evidence adduced below was inadequate because it did not lead to a reasonable and moral certainty that only Appellant and no one else committed the charged offense, and created "nothing more than a strong suspicion that the defendant committed the crime...." Cox v. State, 555 So. 2d 352, 353 (Fla. 1990). Where the State did not meet its threshold burden of preventing competent evidence that was inconsistent with Appellant's theory of innocence, he was entitled to a judgment of acquittal. Dellecchiae v. State, 23 Fla. L. Weekly D2052 (Fla. 2d DCA Sept. 4, 1998).

A first-degree murder conviction that rests on such equivocal evidence as that presented below violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, the conviction must be reversed.[11]

[11] Appellant's argument regarding the insufficiency of the evidence as to sexual battery should also be applied to one of the

ISSUE II

THE COURT BELOW ERRED IN GIVING TO APPELLANT'S JURY A NON-STANDARD INSTRUCTION ON FIRST-DEGREE FELONY MURDER WHICH EASED THE STATE'S BURDEN OF PROOF.

At the jury charge conference below, the State requested, and the court agreed to give, a modified version of the usual jury instruction on felony murder in the first degree, over Appellant's objections. (Vol. 34, pp. 1143-1149) The court charge the jury as follows (Vol. 34, p. 1255):

> Felony murder first degree. Before you can find the defendant guilty of first degree felony murder, the state must prove the following three elements beyond a reasonable doubt: One, Ann Powell id dead. Two, the death occurred as a consequence of and while David C. Carpenter or his principal was en gaged in the commission of sexual battery, or the death occurred as a consequence of and while David C. Carpenter or his principal was attempting to commit sexual battery. Three, David C. Carpenter was the person who actually killed Ann Powell, or Ann Powell was killed by a person other than David C. Carpenter, but both David C. Carpenter and the person who killed Ann Powell were principals in the commission of sexual battery.

By adding the language on principals, the above instruction deviated from the law as contained in the standard jury instruction on first degree felony murder and made it easier for the State to obtain a conviction.

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aggravating circumstances submitted to Appellant's penalty phase jury and found by the trial court, that the homicide was committed while Appellant was engaged in or an accomplice in sexual battery.

The standard jury instructions generally should be adhered to. Moody v. State, 359 So. 2d 557 (Fla. 4th DCA 1978). Florida Rule of Criminal Procedure 3.985 indicates that the standard charges should be used unless the trial judge indicates on the record or in a separate order why the applicable form of instruction is erroneous or inadequate. [But see Yohn v. State, 476 So. 2d 123 (Fla. 1985) (standard instructions are a guideline to be modified or amplified depending on the facts of each case).] Here the court did not express why he felt the need to modify the standards.

In Smith v. Mogelvang, 432 So. 2d 119 (Fla. 2d DCA 1983) the court noted that "deviation from the standard jury instructions risks error." The court went on to explain:

> Unnecessary departures from the standard jury instructions may undermine the unquestionable beneficial effect of those forms on the Florida trial system as a whole. That system depends in large part for its fairness and effective functioning upon reasonably predictable rules and rulings in the conduct of trials. Those instructions "state as accurately as a group of experienced lawyers and judges could state the law of Florida in simple understandable language." In re: Use by the Trial Courts of the Standard Jury Instructions, 198 So. 2d 319, 319 (Fla. 1967).

432 So. 2d at 125. [Although Mogelvang was a civil case, the court quoted the above paragraph from that case with approval in the criminal case of Hurtado v. State, 546 So. 2d 1176 (Fla. 2d DCA 1989).]

Although the State may well have needed the kind of help the court gave it, in light of the weakness of the evidence against Appellant, as discussed in Issue I above, it was nevertheless error for the court to give it.

Appellant was denied his rights to a fair trial and due process of law. Amend. XIV, U.S. Const.; Art. I, § 9, Fla. Const. He must be granted a new trial.

ISSUE III

THE TRIAL COURT ERRED IN PREVENTING APPELLANT'S JURY FROM HEARING TESTIMONY REGARDING STATEMENTS APPELLANT'S CODEFENDANT, NEILAN PAILING, MADE TO TWO PEOPLE, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND BY ARTICLE I, SECTIONS 16 AND 22 OF THE CONSTITUTION OF THE STATE OF FLORIDA, TO PRESENT EVIDENCE AND WITNESSES ON HIS OWN BEHALF TO ESTABLISH A DEFENSE.

The sole witness to testify for the defense at the guilt phase of Appellant's trial was his mother, Dorothy Carpenter. (Vol. 34, pp. 1116-1128) Appellant wished to have his jury hear the testimony of two additional witnesses, William Robert Shay and Carlos Mendoza, but the trial court ruled their testimony inadmissible, thus preventing Appellant from presenting two-thirds of his case. (Vol. 34, pp. 1064-1113)

In a proffer of his testimony, Shay stated that, in the early part of 1995, he and Neil Pailing were in a program together at the Pinellas County Jail called "Changing Criminal Thoughts," and he discussed Pailing's case with him. (Vol. 34, pp. 1076-1077, 1079) One day, when Shay "got him upset," Pailing "said that he did it." (Vol. 34, p. 1079) Pailing explained that "David set him up with this woman, and they were at Dave's house....And Neil and this woman were in the bedroom and Dave heard a bunch of noise. Dave went into the bedroom, and...the woman was dead because Neil said then...they didn't know what to do, so Dave helped him get the body out of the house. That's when they...tried to torch the car or something with the body in it." (Vol. 34, p. 1080) Pailing said that he did "the actual murder with a gun or something, and it was in the third drawer of the dresser." (Vol. 34, p. 1081) He hit the woman in the head with it. (Vol. 34, p. 1087) Pailing also said, "'I killed her, I raped her, I burned her up.'" (Vol. 34, p. 1081)

Mendoza was also in the Pinellas County Jail with Pailing; they were in the same pod together for about a month in 1995. (Vol. 34, p. 1089) One day, Mendoza and his roommate were talking together in their cell when Pailing entered and said that "he raped her, he put her in the trunk of the car and burned her." (Vol. 34, p. 1090) Mendoza acknowledged that he was friendly with Appellant but did not get along with Pailing. (Vol. 34, pp. 1091-1092)

The State proffered the testimony of Detective Stefans,[12] who spoke with Mendoza and Shay regarding what they heard Pailing say. (Vol. 34, pp. 1094-1097) According to Stefans, Shay told him that Pailing "said he was with the victim Ann Powell and they were in the bedroom and something happened, at which time Neil hit her over the head and called David Carpenter into the room and she was killed." (Vol. 34, p. 1095) Stefans testified, and Shay acknowledged, that Shay did not initially tell Stefans about the exact quote from Pailing ("'I killed her, I raped her, I burned her up.'") (Vol. 34, pp. 1081-1082, 1085-1086, 1095-1096) Rather, Shay mentioned this some three days after first speaking with the detective, although he would have told Stefans about it the same day, if the jail had promptly processed Shay's request to speak with Stefans. (Vol. 34, pp. 1081-1082, 1085-1086)

Defense counsel argued that the testimony of Shay and Mendoza was admissible under the exception to the hearsay rule for statements against interest, pursuant to section 90.804(2)(c) of the Florida Statutes. (Vol. 34, pp. 1065-1074) Although the court ruled that the declarant, Pailing, was unavailable by virtue of his right not to incriminate himself (he had not yet entered his pleas to second degree murder and arson), the court ruled that

[12] Presumably, this detective is the same one whose name is spelled S-t-e-f-f-e-n-s elsewhere in the record.

Appellant's proffered testimony could not come in because there "was no corroborating evidence of the essential fact," and the statements were "inherently unreliable" and did "not necessarily exculpate" Appellant. (Vol. 34, pp. 1067, 1072, 1110-1112)[13]

The hearsay exception for statements against interest, found in section 90.804(2)(c) of the Evidence Code, reads as follows:

> (c) Statement against interest.-A statement which, at the time of its making, was so far contrary to the declarant's pecuniary of proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

Pursuant to this provision, in order for testimony such as that proffered by Appellant to be admissible under the hearsay exception for statements against interest, three requirements must be met: (1) the declarant must be unavailable; (2) the evidence must tend to expose the declarant to criminal liability; and (3) the statement must be corroborated by circumstances showing

[13] The court did state that the testimony he "excluded would be clearly admissible as hearsay in a penalty phase[.]" (Vol. 34, p. 1114)

trustworthiness. § 90.804(2)(c), Fla. Stat. (1995).[14] The proffered evidence met these requirements, and should have been admitted. See Maugeri v. State, 460 So. 2d 975 (Fla. 3d DCA 1984); Brinson v. State, 382 So. 2d 322 (Fla. 2d DCA 1979). Neil Pailing was unavailable as a witness, because he was himself under indictment for the same offense with which Appellant was charged, and had a privilege under the Fifth Amendment not to incriminate himself, and the court below correctly ruled that Pailing was unavailable to testify. His statements unquestionably exposed Pailing to criminal liability. They were corroborated not only by the fact that he made them to two people, using very similar language [see Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994), in which this Court remanded for an evidentiary hearing on Johnson's allegations that another person had confessed to committing the crime for which Johnson was convicted, finding significance in the fact that "not

[14] The civil procedure counterpart to this rule does not require corroboration. See § 90.804(2)(c), Fla. Stat. (1993); Peninsular Fire Insurance Co. v. Wells, 438 So. 2d 46 (Fla. 1st DCA 1983). This distinction irrationally gives civil litigants more protection than criminal defendants. It cannot be constitutionally acceptable to place an obstacle in the path of an accused in a criminal trial who seeks to exculpate himself by showing that another person has confessed to the crime, when no such obstacle would be in the path of a civil litigant who sought to introduce the same evidence. This violates Appellant's Sixth and Fourteenth Amendment right to present evidence to support his defense, which right is discussed in more detail below, as well as violating the equal protection doctrine by affording more protection to civil litigants.

just one but several" people had signed affidavits that they heard the other person confess], but by other evidence possessed by the State indicating that Pailing was involved in killing Powell and burning her car. (The State should not be permitted to argue that there were insufficient corroborating circumstances regarding Pailing's admission that he killed Powell when the State charged Pailing with the very same killing.)

With regard to the court's conclusion that the statements were "inherently unreliable" because both inmates said they did not like Pailing and were friends of Appellant, this is factually erroneous. Although Shay said that he was friendly with Appellant, he also testified that he and Pailing "talked a lot" and "were pretty good friends." (Vol. 34, pp. 1087-1088) Furthermore, the considerations cited by the court would go to the weight to be given to the testimony, rather than its admissibility.

As for the court's comment that the proffered evidence did "not necessarily exculpate" Appellant, this, again, would be something for the jury to decide. The Evidence Code provision in question does not, by its terms, require that the testimony completely exculpate the defendant in order to be admitted. If it tends to exculpate the accused, as the proffered testimony did here, the jury should be allowed to hear it, and to give it whatever weight the jury thinks it deserves. Had Appellant's jury heard from Shay and Mendoza, it is entirely possible that they

would have concluded that Pailing was the primary actor in the events surrounding Ann Powell's death and that, whatever Appellant's involvement, it was not sufficient to justify convicting him of murder in the first degree. In addition, their testimony obviously could have had a great impact upon the jury's sentencing recommendation, if they had been permitted to consider it. Appellant would have been in a much stronger position at penalty to phase to argue the injustice of sentencing him to death in light of the fact that Pailing was allowed to plead to lesser charges if the jury had before it Pailing's own confessions to Shay and Mendoza that it was he who killed and rape Powell and set her car on fire. Apart from whether the proffered evidence was strictly admissible under the hearsay exception discussed above, Appellant was entitled to present the testimony to vindicate his constitutional rights to present witnesses on his own behalf and to establish his defense. "...[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, 530 So. 2d 404, 405 (Fla. 3d DCA 1988), citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L.

Ed. 2d 1019 (1967); Boykins v. Wainwright, 737 F. 2d 1539 (11th Cir. 1984), rehearing denied, 744 F. 2d 97 (11th Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1775, 84 L. Ed. 2d 834 (1985). See also Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994) (defendant was entitled to present testimony relevant to his defense). As the Supreme Court of the United States noted in Washington v. Texas, 388 U.S. at 19:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for
> the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982), the court observed:

> Where a defendant offers evidence which is of substantial probative value and such evidence tends not to confuse or prejudice, all doubt should be resolved in favor of admissibility. [Citations omitted.] Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. [Citations omitted.]

Furthermore, a person accused of a crime has a basic right to introduce evidence in his defense to show that the crime may have been committed by someone else, which is what Appellant was attempting to do below. Chambers v. Mississippi, supra; Pettijohn

v. Hall, 599 F. 2d 476 (1st Cir. 1979); Lindsay v. State, 69 Fla. 641, 68 So. 932 (Fla. 1915); Pahl v. State, 415 So. 2d 42 (Fla. 2d DCA 1982); Moreno ; Siemon v. Stoughton, 440 A. 2d 210 (Conn. 1981); State v. Harman, 270 S.E. 2d 146 (W. Va. 1980); see also Audano v. State, 641 So. 2d 1356 (Fla. 2d DCA 1994). "The purpose [of such evidence] is not to prove the guilt of the other person, but to generate a reasonable doubt of the guilt of the defendant." State v. Hawkins, 260 N.W. 2d 150, 158-159 (Minn. 1977). The testimony need not be absolutely conclusive of the third party's guilt; it need only be probative of it. Pettijohn; Harman; Siemon.

The third party confession is probably the most direct link that can be presented between the third party and the crime. Where another person has made an out-of-court statement admitting his own guilt of the crime for which the defendant is on trial, such a statement is obviously of crucial importance to the accused's defense. See Chambers. In this situation (and especially where the defendant is on trial for his life), the constitutional right to present one's defense must take precedence over exclusionary rules of evidence, and "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers, 35 L. Ed. 2d at 313. See also Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979); Pettijohn; Williams v. State, 611 So. 2d 1337, 1338 (Fla. 2d DCA 1993) ("While a statutory enactment

may provide an exception to the rule against hearsay, such a statute may not waive an accused's constitutional rights.") Appellant was attempting to show that, while he may have been present when Ann Powell was killed, it was Neil Pailing who actually committed the homicide and arson, and the jury should have been permitted to consider the evidence Appellant proffered to establish this.

This Court's admonition in Guzman v. State, 644 So. 2d 966, 1000 (Fla. 1994) is particularly pertinent here:

> We are...concerned about Guzman's contentions that the trial judge erroneously limited the testimony of two of Guzman's witnesses and refused to allow Guzman to recall one of those witnesses. We emphasize that trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life. [Emphasis supplied.]

Appellant was unduly hampered in the presentation of his defense by the trial court's ruling excluding his proffered evidence. As a result, Appellant was deprived of a fair trial, and must be granted a new one.

ISSUE IV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO USE APPELLANT'S CONVICTION OF A MISDEMEANOR IN THE STATE OF NEVADA AS A PRIOR VIOLENT FELONY AND PERMITTING THE ALLEGED VICTIM OF THAT OFFENSE, ANN DEMERS, TO GIVE EXTREMELY PREJUDICIAL

TESTIMONY AT PENALTY PHASE REGARDING CONDUCT FOR WHICH APPELLANT HAD NOT BEEN CONVICTED.

Before Appellant's second penalty trial, the issue arose as to whether the State would be permitted to use Appellant's 1986 conviction in Nevada for the gross misdemeanor of battery causing substantial bodily harm as a "prior violent felony" pursuant to section 921.141(5)(b) of the Florida Statutes. Both the State and defense submitted memoranda on this subject (Vol. 10, pp. 1755-1765, 1797-1842), and the court ultimately ruled in the State's favor. (Vol. 36, p. 1405) The court submitted this aggravator to Appellant's penalty phase jury, instructing them that: "The Nevada crime of battery causing substantial bodily harm is a felony involving the use of violence to another person." (Vol. 41, pp. 2438-2439) The court also found this aggravator to apply in his (second) order sentencing Appellant to die in the electric chair. (Vol. 11, pp. 1930-1932)

As Appellant observed in his memorandum, in Dautel v. State, 658 So. 2d 88, 90 (Fla. 1995), this Court noted, in the context of the sentencing guidelines, that "any uncertainty in the scoring of the defendant's prior record shall be scored in favor of the defendant." (Vol. 10, p. 1756) This principle should be applied even more strongly in a case involving the ultimate criminal sanction. In the capital case of Merck v. State, 664 So. 2d 939, 944 (Fla. 1995) this Court similarly stated that "...penal statutes

must be strictly construed in favor of the one against whom a penalty is imposed." See also, Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990)

Besides being denominated a "misdemeanor," the Nevada offense of which Appellant was convicted more closely resembles, in elements and punishment, the Florida offense of battery than any felony. At Appellant's plea hearing on April 3, 1986, the prosecutor informed Appellant that, to obtain a conviction, the State was prepared to prove that Appellant "did willfully and unlawfully use force and violence upon the person of" the victim by striking her with his fist. (Vol. 10, p. 1760) Compare these elements with the elements of simple battery, as found in section 784.03 of the Florida Statutes. A person commits a battery in Florida if he actually and intentionally touches or strikes another person against the will of that person, or intentionally causes someone bodily harm. The Nevada offense and the Florida offense thus contain very similar elements. The maximum penalty for the Nevada offense committed by Appellant, as explained to him by the court, was one year in the county jail, a $2,000 fine, or a combination of these punishments. (Vol. 10, p. 1761) The first degree misdemeanor of battery in Florida is subject to similar punishments, imprisonment not to exceed one year, or a fine of up to $1,000, or a combination. §§ 775.082 and 775.083, Fla. Stat. (1995) The lower court should not have treated Appellant's gross

misdemeanor conviction as a prior violent felony which could support a sentence of death.[15]

Appellant also objected to the alleged victim in the Nevada episode, Ann Demers, being permitted to testify to uncharged crimes that Appellant supposedly committed. (Vol. 39, pp. 1988-1998), and yet Demers was allowed to testify not only about the battery she suffered, but about multiple rapes Appellant allegedly committed against her, and to characterize Appellant as a "rapist," and to suggest that he was trying to kill her. The prosecutor exacerbated the damage by arguing to the jury similarities between the Demers and Powell incidents in closing. (Vol. 41, pp. 2394-2395, 2398-2399)

Only a conviction of a felony involving use or threat of violence will qualify for the aggravating circumstance found in section 921.141(5)(b) of the Florida Statutes. Garron v. State, 528 So. 2d 353 (Fla. 1988). Appellant was not convicted of raping Ann Demers, or attempting to kill her, nor was he even charged with these offenses.

Furthermore, while this Court has held that the State may introduce evide

[15] Appellant would also point out that the record does not reflect that Appellant was placed under oath prior to the plea colloquy in Nevada, as would be required in Florida pursuant to Florida Rule of Criminal Procedure 3.172(c), but this was not raised below. (Vol. 10, pp. 1758-1765)

nce as to the circumstances of a prior violent felony conviction, rather than just the bare fact of that conviction, Stano v. State, 473 So. 2d 1281 (Fla. 1985), the details cannot be emphasized to the point where the other crime becomes the feature of the penalty trial, or the prejudice outweighs the probative value. Stano, 473 So. 2d at 1289; Rhodes v. State, 547 So. 2d 1201, 1204-1205 (Fla. 1989). See also State v. Bey, 610 A. 2d 814, 833-834 (N.J. 1992); State v. Erazo, 594 A. 2d 232, 243-244 (N.J. 1991). Here, the testimony concerning the rapes and attempted murder was extremely prejudicial, and served no legitimate purpose. If it was necessary for the State to introduce details of the battery at all when it had the certified copy of the judgment available as evidence (see Rhodes), this testimony could have been presented without referring to the sexual batteries and Demers' fears that Appellant would kill her. In Finney v. State, 660 So. 2d 674, 684 (Fla. 1995), this Court cautioned against admission of this type of "unnecessary" "highly prejudicial evidence," which "is likely to cause the jury to feel overly sympathetic towards the prior victim." Demers provided the type of "unnecessary and inflammatory" extraneous detail that this Court condemned in Coney v. State, 653 So. 2d 1009, 1014 (Fla. 1995). See also Rhodes, 547 So. 2d at 1205 ("information presented to the jury [which] did not directly relate to the crime for which [the defendant] was on trial, but instead described the physical and emotional trauma and suffering of a

victim of a totally collateral crime" was inadmissible at penalty phase).

The jury's penalty recommendation, and the court's sentencing order, were hopelessly tainted by this inadmissible evidence. Appellant's sentence of death was imposed in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9, 16, 17, and 22 of the Constitution of the State of Florida, and cannot be permitted to stand.

ISSUE V

THE COURT BELOW ERRED IN SENTENCING DAVID CHARLES CARPENTER TO DEATH, PARTICULARLY IN LIGHT OF THE FACT THAT HIS EQUALLY-CULPABLE CODEFENDANT, NEILAN PAILING, WAS ALLOWED TO PLEAD TO SECOND DEGREE MURDER AND ARSON IN RETURN FOR SENTENCES OF 25 AND 15 YEARS, RESPECTIVELY.

Appellant has previously discussed certain evidentiary concerns with the imposition of his sentence: the insufficiency of the evidence to support sexual battery (Issue I) and the admission of irrelevant and prejudicial evidence at his penalty proceeding (Issue IV). This issue will focus upon the illegality of sentencing Appellant to death in light of the sentences received by Neil Pailing.

In Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), this Court addressed the principal of equal punishment for equal culpability in capital cases as follows:

> We pride ourselves in a system of justice that requires
> equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law.

In Slater, the defendant was the accomplice; the triggerman had entered a plea of nolo contendere to the charge of first degree murder and, in exchange, had received a life sentence. This Court reduced the sentence of death to life imprisonment. 316 So. 2d at 543.

In Craig v. State, 510 So. 2d 857, 870 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S. Ct. 732; 98 L. Ed. 2d 680 (1988), the Court explained:

> the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision.

There, because the defendant was the planner and the instigator of the murders, rather than the accomplice, whose help had been solicited by the defendant, the disparate treatment afforded the

accomplice was not a factor that required the court to accord a life sentence.

Since Slater, this Court has, on numerous occasions, reversed death sentences where an equally culpable codefendant received lesser punishment. E.g, Puccio v. State, 701 So. 2d 858 (Fla. 1997); Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989); Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988); Cailler v. State, 523 So. 2d 158 (Fla. 1988); Du Bois v. State, 520 So. 2d 269, 266 (Fla. 1988); Brookings v. State, 495 So. 2d 135, 142-143 (Fla. 1986); Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

The principles expressed in Slater and subsequent opinions of this Court are also consistent with the requirements of the United States Constitution. The Eighth and Fourteenth Amendments require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the roles played by his cohorts. See Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

Here, it is clear that Neil Pailing was just as involved as Appellant in what happened to Ann Powell. Indeed, according to Appellants, it was Pailing who actually killed her, and the State

produced no substantial evidence to disprove what Appellant told the police.

If one discounts Appellant's statements, the most that can be said is that there simply was no evidence as to the respective roles of Appellant and Pailing while Ann Powell was in the apartment. (However, we do know that it was Pailing who torched Powell's car and was convicted of arson.) This ambiguity and uncertainty must redound to Appellant's benefit. See Parker v. State, 643 So. 2d 1032 (Fla. 1994); Wasko v. State, 505 So. 2d 1314 (Fla. 1987).

In Heath v. State, 648 So. 2d 660, 666 (Fla. 1994), this Court noted that it

> has approved the imposition of the death sentence "when the circumstances indicate that
>
> the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime." [Citations omitted.]

Under all the known facts and circumstances of this case, as opposed to conjecture and supposition, it cannot be said that Appellant was "the dominating force behind the homicide" such that it would be appropriate to treat him more harshly than his codefendant. Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986).

As part of its review function in capital cases, this Court must consider "the propriety of disparate sentences in order to determine whether a death sentence is appropriate given the conduct

of all participants in committing the crime. [Citation omitted.]" Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). The Court must conclude that Appellant is no more culpable than his codefendant, and that, pursuant to Slater, his death sentence must be reversed. Any other result will deprive Appellant of the due process of law and equal protection to which he is entitled and subject him to cruel and unusual punishment, in violation of the Eighth and Fourteen
th Amendments to the United States Constitution, and Article I, Sections 9 and 17 of the Florida Constitution.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, David Charles Carpenter, prays this Honorable Court for relief in the alternative as follows:

(1) Reversal of his conviction for murder in the first degree and remand with directions that he be discharged.

(2) Reversal of his conviction for murder in the first degree and remand with directions that he be adjudicated guilty of a lesser offense and resentenced accordingly.

(3) Reversal of his conviction for murder in the first degree and remand with directions that he be afforded a new trial.

(4) Reversal of his death sentence and remand with directions that he be resentenced to life.

(5) Reversal of his death sentence and remand with directions to conduct a new penalty proceeding before a new jury.

(6) Reversal of his death sentence and remand for resentencing by the court.

CERTIFICATE REGARDING FONT

I hereby certify that the size and style of type used in this brief is 12 point Courier, not proportionately spaced.

ROBERT F. MOELLER
Assistant Public Defender

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of March, 2001.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 0234176
P. O. Box 9000-Drawer PD
Bartow, FL 33831