IN THE SUPREME COURT OF FLORIDA

DOMINICK DEANGELO,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NUMBER 78,499

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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DOMINICK DEANGELO, Appellant, vs. STATE OF FLORIDA, Appellee.	)	**CASE NO.** 78,499

INITIAL BRIEF OF APPELLANT

Dominick Deangelo discusses herein the reasons which, he respectfully submits, compel the reversal of his conviction and death sentence. Each issue is predicated on the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I of the Florida Constitution, and such other authority as is set forth.

STATEMENT OF THE CASE

On April **22, 1990**, the Orange County Sheriff's Office arrested Dominick Deangelo, the Appellant, and charged him with the second-degree murder of Mary Price.[1] (R785-6) On May **11, 1990**, the State filed an information charging Deangelo with second-degree murder. (R789) On June 5, 1990, the Orange County grand jury indicted Deangelo for the first-degree murder of Price. (R793)

Defense counsel filed numerous pre-trial motions. Only some

[1] Section 782.04, Florida Statutes **(1989).**

of these are pertinent to this appeal and will be addressed individually in the argument portion of the brief. Just before the trial commenced, Deangelo rejected a plea offer that would have netted him a life sentence. (R5-6)

On April 15, 1991, the case was tried by jury before the Honorable Richard F. Conrad, Ninth Judicial Circuit in and for Orange County, Florida. (R907-910) The guilt phase including jury selection, lasted only three days.

At the conclusion of the State's case-in-chief, defense counsel moved for a judgment of acquittal contending that the evidence established, at most, second-degree murder. (R462) The trial court denied the motion at that time (R462) and again when the motion was renewed. (R477)

During deliberations, the trial court granted the jury's request to rehear the testimony of Joy Deangelo. (R541-78) After resuming deliberations, the jury returned w th a verdict finding Dominick Deangelo guilty of murder in the first degree as charged in the indictment. (R1034) The trial court subsequently denied Deangelo's motion for new trial. (R1035-37)

A penalty phase was held on May 28, 1991. (R59-780,1055-56) The State relied on the evidence presented at the guilt phase and presented no further testimony or evidence. (R596) Deangelo presented three witnesses in mitigation. (R597-731) The State presented no rebuttal evidence. (R732)

Deangelo requested numerous special penalty phase jury instructions, all of which the trial court denied. (R733-

37,1063-92) Following deliberations, the jury returned with a recommendation (7 to 5) that Dominick Deangelo be executed. (R774,1093)

On July 23, 1991, the trial court sentenced Dominick Deangelo to death by electrocution. The trial court found only one aggravating circumstance (heightened premeditation).[2] The trial court considered sixteen mitigating circumstances proposed by the defense. The court found that Dominick Deangelo suffered from organic personality syndrome, organic mood disturbance, and a bipolar disorder. The trial court also concluded that the testimony of Dr. Berland substantially supported a finding that Deangelo's ability to conform his conduct to the requirements of law was substantially impaired at the time of the offense, and that Deangelo was under the influence of an extreme mental or emotional disturbance at that time. However, the trial court found that the "totality of the evidence" did not seem to support Dr. Berland's conclusion that his ability to conform his conduct was substantially impaired or that he was under the influence of an extreme mental or emotional disturbance at the time of the murder. The trial court did find in mitigation that Deangelo's mental health disorders were treatable. The trial court also found that the murder was not committed for financial gain, that Deangelo did not create a great risk of death to many people, that the murder did not occur during the commission of another crime, that Dominick Deangelo was not a drifter, and that the

[2] Section 921.141(5)(i), Florida Statutes.

victim was neither a stranger nor a child. However, the trial court concluded that these particular elements in mitigation were entitled to little or no weight. The trial court did find in mitigation that Deangelo had served as a volunteer fireman; that he served his country in the military; and that he cooperated with police and confessed to the killing. Additionally, the trial court found that the evidence supported the conclusion that conflict existed between Deangelo and the victim[3] over her failure to make rent payments as well as her hedonistic lifestyle. The trial court concluded that the one aggravating circumstance outweighed the numerous mitigating circumstances and ordered that Dominick Deangelo be electrocuted until dead. (R1133-46)

On August 13, 1991, Appellant filed a timely Notice of Appeal. (R1150) On August 22, 1991, the State filed a Notice of Cross-Appeal. (R1160)

[3] The trial court noted that the fact that the victim rented a room in a trailer owned by the defendant did not, in and of itself, create a domestic situation, but acknowledged conflict.

STATEMENT OF THE FACTS

GUILT PHASE

In 1989, Dominick Deangelo managed Playmates bar in Orlando. Playmates featured "live nude girls" dancing for the enjoyment of patrons. Joy Dalene Mason went to work at Playmates as a dancer and, in the process, met Dominick. Joy and Dominick married on July 10, and Joy gave birth to Dominick's son, Michael, on March 9, 1990. (R303-5) During the spring of 1990, Joy befriended Mary Price, another dancer at Playmates. (R305-8) Mary left Playmates and became a dancer at House of Babes.[4] **(R307-8)**

During the spring of 1990, Joy, Dominick and Michael began to visit Mary Price at her home everyday. (R306-7) The Deangelos came to know Mary's husband and five small daughters. (R305-8) Shortly thereafter, Mary's husband and children left the Orlando area. Dominick, Joy and Michael moved into Mary's house and helped with the rent. During the middle of April, 1990, the Deangelos and Mary all moved into a trailer. **(R308-9)**

Dominick and Joy Deangelo knew Mary Price for only three months before Price's death. (R328) Even though they all lived together, the Deangelos did not know Mary Price by her real name. They knew her only as "Chris" and were unaware of her last name. **(R327-8,360-1)**

Dominick Deangelo and Mary Price had a stormy relationship.

There were numerous discrepancies as to when and where each woman plied her trade. Needless to say, each made the "rounds" of the numerous adult-oriented bars in central Florida.

He had problems with her from the beginning. Mary drank to excess and was probably an alcoholic. She smoked marijuana and imbibed in cocaine on a regular basis. Dominick particularly objected that Mary was frequently drunk and used drugs in the presence of his wife and son. (R394) Another sore point between the two of them was Mary's inability to pay her portion of the rent in a timely fashion. (R331) Dominick also objected to Mary's sexual promiscuity. She had a habit of bringing home a different man every night. (R332) At least one of Mary's "dates" was an armed fugitive. (R393) Dominick did not appreciate Mary bringing these unsavory characters into his home.

Things got progressively worse between Dominick and Mary. Sexual tension developed. One evening, about a week before the murder, Joy Deangelo woke up, realized that Dominick was not in bed, got up, and caught Dominick making sexual advances upon intoxicated Mary Price. (R310-11,316)[5]

When Joy told Dominick to leave Mary alone, Dominick became angry and told Joy to "shut up." (R311-14) After Joy went back to bed, Dominick later woke her up. He had socks on his hands and, at knife-point, forced Joy to go into Mary's room and hold a blanket over her head as she slept. Dominick told Joy that he wanted to choke Mary but could not go through with it. (R314-16,408) Dominick told Joy to go back to bed and warned her to tell no one of the incident. (R316)

Approximately four days later, Dominick left Orlando and

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[5] This was apparently not an isolated incident. (R338)

went to New Jersey for three days. (R316-17) Joy picked Dominick up from the train station early Saturday afternoon. After stopping by the trailer, Dominick dropped Joy off at the House of Babes where she was then working. (R316-18) Joy's shift ran from 4:00 p.m. Saturday afternoon until 4:00 a.m. Sunday morning. (R318) Dominick returned to the trailer about 5:30 p.m. Saturday afternoon. (R392) Mary had been in Daytona Beach all day with three men. (R317,392-3) Dominick particularly wanted to scold Mary for leaving a window open and screens unlatched. (R393) Dominick was worried about the security of the trailer. He also wanted to discuss Mary's habit of smoking dope and bringing fugitives to the house. (R393)

About 7:30 p.m. Saturday, Mary arrived at the trailer. Three men in a 1984 Aries waited for her outside. (R395) Dominick attempted to discuss the security problem, but Mary complained that she was late for work. (R395) Promising that she would pay him her half of the rent that night, she left for work. (R395)

Shortly before Dominick left the trailer to pick up Joy from work, Mary arrived home from work alone. (R396-98) Before leaving, Dominick told Mary that he wanted to talk to her and asked her to please stay awake. (R398) On the ride back home, Dominick and Joy discussed their financial problems and the necessity for Mary to pay her fair share. (R334,399) Once they arrived at the trailer, Joy went into Mary's bedroom and talked with her for approximately thirty minutes. (R335,399) Joy then

went to bed around 5:30 a.m. and Dominick stayed up, watched T.V., and pondered his financial plight. (R399)

Dominick eventually went into Mary's room intending to discuss the situation. She slept in a sleeping bag on the floor and Dominick woke her. (R400) Mary "copped an attitude right away." Dominick asked her about her share of the rent which was due on Monday. Mary claimed she had made no money that night. Dominick accused her of lying. (R401) The argument escalated, and Dominick began discussing extraneous matters. He brought up her promiscuity, her drunkenness, and her dope-smoking. Dominick attempted to speak softly in order to avoid waking his wife and baby. (R401) Mary tried to stand up so that she could slap Dominick. (R401,404) He grabbed her arm and slapped her face. (R401,404) Mary started yelling louder. (R401) At this point, Dominick just wanted her to "shut up." (R402) He remembered grabbing Mary's face by the chin in an attempt to close her mouth and quiet her. (R402) The next thing he knew, Mary was lying there, dead on the floor. (R402)

Dominick returned to his bedroom and, intending to take a walk, got out a pair of socks. (R403) Dominick became very scared. Joy woke up and asked Dominick what he was doing with his socks. (R403) Dominick told Joy, "The bitch has lied to me for the last time." (R321) He then told Joy that Mary was dead. (R321-22,404)

Later that morning, the Deangelo family went to the flea market. (R324,405) At this point, Dominick explained that he

still was unsure of his plan of action. (R405) Joy knew that she had to inform the police. (R324) While Dominick was otherwise occupied at the flea market, Joy drove down Orange Blossom Trail, flagged down a deputy sheriff's car, and told him the entire story. **(R325-26,354-59,364-66)**

Deputy Gonzalez picked up Dominick Deangelo near the flea market. Deangelo readily identified himself and voluntarily accompanied Detective Gonzalez to the closest police station. (R359-62) Deputy Gonzalez transported Deangelo to the station, where he was interviewed by Detective Riggs-Gay. (R381-86) After being advised of his constitutional rights, Dominick Deangelo freely waived those rights, and gave a voluntary statement to the police. In the tape-recorded statement played to the jury **(R386-407)**, Deangelo admitted that he got into an argument with Mary that escalated into a physical confrontation. The next thing Deangelo remembered, Mary Price was dead. "I didn't mean to do it. You hear that a million times....It's a situation that shouldn't have happened." **(R406-7)**

An autopsy of Mary Price revealed a substantial amount of marijuana in her system. **(R431-33)** The medical examiner testified that the cause of death was asphyxiation as a result of combined manual and ligature strangulation. (R427) Several bruises and abrasions found on Price's face could have been caused by a slap or some other kind of blow to the head. **(R423-26,445,451)**

PENALTY PHASE

At the penalty phase, the State chose to rely entirely on the evidence presented at the guilt phase. They presented no other evidence in aggravation and did not present any rebuttal evidence. (R596,732)

Dennis Deangelo, Appellant's younger brother, told of his own ministry in the area jails. Dennis had been involved in such work for approximately three years. (R597-99) Since Dominick's arrest, Dennis had had a chance to minister with Dominick in the Orange County Jail. (R599) Dennis was using Dominick's unfortunate set of circumstances in his ministry. Dennis testified that Dominick was, at this point, very open to the gospel. (R603) Since his arrest, Dominick had calmed down and "mellowed out." (R602) His brother opined that Dominick now realized that life is serious, and one cannot continue on the road of destruction and sin. (R602)

All five of the Deangelo children were born in Long Island, where their parents lived. (R599) While attending school, Dominick had some difficulties with alcohol and general misconduct. (R605) At one point he went with his parents to seek counseling. (R605) In Long Island Dominick was a volunteer fireman for the West Sable Fire Department. (R599-600; Defense Exhibit #2) He donated his time for at least two years in this manner. (R600) When Dominick was sixteen, the family relocated to Orlando. Dominick attempted to catch on with a fire department. Due to the shortage of volunteer departments in

Florida, Dominick was unsuccessful in locating a position. (R600)

In the early 1980's, Dominick volunteered for the Army. He served four years, some in Ft. Bragg and some in Germany. (R600) Dominick married a German woman and moved back to Florida where they lived with his parents for a year or two. His wife became pregnant, divorced Dominick, and moved back to Germany. (R601, 606) His ex-wife still keeps in touch with Dominick and his family. (R601) However, Dominick has never had a chance to see his seven-year-old son in person. (R601,606)

Dominick's employment history was admittedly sporadic. (R608-9) Dennis explained that his brother was a hard worker who would keep a job for a while before moving on. (R602) When Dominick left the adult entertainment business, he completed trucking school, returned to Orlando, and got a driving job. (R603)

After his arrest, Dominick Deangelo completed numerous classes offered at the county jail. He attended 720 hours in one program. He worked his way through a twenty-five chapter automotive book and completed that course in approximately 450 hours. He also completed a series of computer courses, and scored 100% in seven areas. (R617; Defense Exhibit #1) After completing courses, Deangelo volunteered to assist in administrative and clerical work. (R616) His teacher testified that he was very helpful. (R617) The teacher explained that Deangelo was always willing to participate. (R617)

Dr. Robert Berland, a licensed psychologist, testified for the defense. There are approximately 24,000 psychologists in Florida. (R626) Dr. Berland is one of only a dozen board-certified forensic psychologists in the state of Florida. (R620-28) Dr. Berland is also an expert in malingering and is able to ferret out individuals who are faking mental disorders. (R627,632) The State accepted Dr. Berland as an expert witness without objection. (R629) Dr. Berland conducted a clinical chorodiagnostic evaluation on Dominick Deangelo. He also conducted a clinical/legal evaluation. Dr. Berland also gave Deangelo several tests including the MMPI[6] and most of the subtests contained in the Wechsler Adult Intelligence Scale. (R633-42)

The MMPI showed clear indications that Deangelo suffered from a paranoid disturbance that he was making a concerted effort to hide from the doctor. (R642-43) Deangelo also suffered from a significant amount of depression. (R644) The tests also revealed a significant amount of anti-social thinking. (R644) Dr. Berland admitted that he would routinely refer patients for treatment, if their scores mirrored those of Deangelo. (R645) Dr. Berland found no evidence of malingering. (R645-46)

The Wechsler test revealed an IQ of 113. (R647) This placed Deangelo in the average range. The test also revealed evidence of significant impairment, specifically bilateral brain damage. (R649-50) Dr. Berland explained that, at some point in

[6] Minnesota Multi-Phasic Personality Inventory.

Deangelo's life, something happened to the tissue on both sides of his brain. Such damage has an obvious effect on brain functioning. (R650) Dr. Berland explained that people with this type of damage tend to become paranoid, manic or depressive, even where the injury is not severe. (R650)

Deangelo admitted to a number of hallucinations. (R650-1) The doctor also found that Deangelo had delusional paranoid beliefs and mood disturbance, all of which are characteristic and suggestive of psychotic disturbance. (R652) Deangelo admitted to a number of auditory hallucinations that began when he was seventeen. (R652) Deangelo also suffers from visual and tactile (feeling things biting your skin) hallucinations. (R652-3) He also had bouts of manic episodes. (R653-4) Dr. Berland explained that Deangelo's illness effected his perception. He exhibited distorted judgment in everything he attempted in life. (R655-6)

Dr. Berland concluded that Deangelo suffered a psychotic disturbance which was initiated by an apparent injury to brain tissue when he was quite young. In addition to two severe bouts of pneumoni , Deangelo consumed an entire bottle of aspirin at age three. Pneumonia can result in a reduction of oxygen to the brain. As a result, he was hospitalized for seven to ten days. An overdose of aspirin creates a toxic result which affects the oxygen supply to the brain. Additionally, Deangelo experienced an estimated six episodes of extremely high fever as a child. These went undetected for quite some time. (R602,661-2) All of

the evidence indicated that, at a very young age, Dominick suffered from an organic personality syndrome and an organic mood disturbance. Dr. Berland characterized both of these as psychotic disorders caused by brain damage. (R661-2)

Dr. Berland also found evidence that Deangelo was suffering from a latent onset of an inherited disorder, i.e., a bipolar disorder (formerly called a manic-depressive psychosis), (R662-3) This particular mental illness causes unstable moods, paranoid thinking, episodes of depression or mania, intensified hallucinations and delusions, irritability, explosiveness, and chronic anger. (R663-4) All of this resulted in Deangelo exercising poor judgment in many situations. (R664) Slight insults would make him explode in anger. (R664)

Dr. Berland concluded categorily and without equivocation that, at the time of the murder, Dominick Deangelo was under the influence of an extreme mental or emotional disturbance.[7] (R665-6) The doctor also opined (also within a reasonable degree of medical certainty) that, although Deangelo did appreciate the criminality of his conduct during the murder, his ability to conform that conduct to the requirements of the law was substantially impaired.[8] (R666-7) If treated with medication, Deangelo would no longer be a danger to society. (R712)

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[7] Section 921.141(6)(b), Florida Statutes.

[8] Section 921.141(6)(f), Florida Statutes.

SUMMARY OF ARGUMENT

POINT I: The trial court found one aggravating circumstance, i.e., that the murder was committed in a cold, calculated, and premeditated manner. Initially, Deangelo argues that this particular aggravating circumstance is unsupported by the evidence. The evidence is much more consistent that Deangelo killed Price in a fit of passion after the two argued, once again. This Court has disapproved a finding of this aggravating circumstance in cases with much more egregious facts than this one. The State failed to meet its burden of proving this aggravating circumstance beyond a reasonable doubt. Tracking this aggravating factor leaves no aggravation. Price's killing was the culmination of a long-standing domestic dispute. As a result, Deangelo's death sentence cannot stand.

The trial court also erred in rejecting uncontroverted, unrebutted statutory mitigating circumstances. The only psychologist to testify, stated without equivocation that, at the time of the murder, Deangelo was under the influence of an extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of law was substantially impaired. The trial court rejected the unrefuted evidence that the two statutory mental mitigators applied to Deangelo's case. Additionally, Appellant submits that the trial court employed an erroneous standard in doing so.

Additionally, the trial court accepted fourteen nonstatutory mitigating circumstances. However, the trial court concluded

that six of these circumstances were entitled to little if any weight. In so doing, the trial court ignored uncontroverted, valid, mitigating circumstances. This is clear error.

Even if this Court upholds the sole aggravating circumstance found by the trial court, Dominick Deangelo's death sentence is disproportionate in light of the substantial mitigation. This Court has never affirmed a death sentence where the sole aggravating circumstance related to "heightened premeditation." In the five cases where this Court has affirmed a death sentence based on a single valid aggravating circumstance, most involved torture-murders and were void of any mitigation. In comparing Deangelo's crime to other capital murders reviewed by this Court, the ultimate sanction is clearly inappropriate in this case. Mary Price's murder was far from the least mitigated and most aggravated of murders.

POINT 11: Deangelo argues that the jury's death recommendation was tainted where the State elicited and argued nonstatutory aggravation. This testimony was elicited on cross-examination of the psychologist who testified at the penalty phase. On cross-examination the psychologist testified that Deangelo exhibited a significant amount of sociopathic (criminal) thinking. Additionally, Deangelo's lack of remorse was explored. The prosecutor used both of these factors in his final summation to the jury which resulted in a death recommendation.

POINT 111: Deangelo argues that the jury's death recommendation was tainted in light of the fact that they were

instructed on both "heightened premeditation" and "heinous, atrocious or cruel." The trial court later found "heightened premeditation" in aggravation, but rejected all other aggravation. Since the jury was inappropriately instructed on the rejected aggravating circumstance, a new penalty phase is required. Jones V. State, 569 So.2d 1234 (Fla. 1990).

Deangelo also argues that the standard jury instructions on these two aggravating circumstances are unconstitutionally vague. The instructions given fail to adequately channel the jury's discretion in reaching their critical recommendation. Additionally, numerous specially requested instructions filed by Deangelo were denied by the trial court. These would have further clarified the vague and confusing standard instructions. All of the requested instructions were supported by appropriate case law and would have helped the jury immensely.

POINT IV: Deangelo contends that the evidence, at most, established second-degree murder. A defendant's version of what occurred must be accepted as true, unless contradicted by other proof showing the defendant's version to be false. The facts in this case are consistent with Deangelo's confession that he killed the victim in a blind and unreasoning passion.

POINT V: Recognizing that this Court has previously rejected these points, Deangelo nevertheless urges reconsideration of a myriad of constitutional attacks on Florida's death sentencing scheme.

POINT I

THE DEATH PENALTY IN THIS CASE MUST BE REDUCED TO LIFE, BECAUSE IT IS NOT SUPPORTED BY ANY VALID STATUTORY AGGRAVATING FACTOR, THE TRIAL COURT FOUND SUBSTANTIAL MITIGATING CIRCUMSTANCES AND IGNORED UNREFUTED MITIGATION. THE DEATH SENTENCE IS OTHERWISE DISPROPORTIONATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Introduction

Deangelo presented evidence of sixteen mitigating circumstances:

(1) Deangelo suffers from organic personality syndrome;

(2) Deangelo suffers from organic mood disturbance;

(3) Deangelo suffers from bipolar disorder;

(4) Deangelo's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime;

(5) Deangelo was under the influence of extreme mental or emotional disturbance at the time of the killing;

(6) Deangelo's mental health disorders are treatable;

(7) The murder was not committed for pecuniary gain;

(8) The murder did not create a great risk to many people;

(9) The murder did not occur during the commission of another felony;

(10) Dominick Deangelo lived in the community and was not a drifter;

(11) Deangelo knew the victim;

(12) The victim was not a child;

(13) The murder was the culmination of a heated domestic dispute;

(14) Dominick Deangelo served as volunteer fireman;

(15) Deangelo served his country overseas in the military for four years; and,

(16) Deangelo freely confessed to the murder and cooperated with the police.

(R1140-41) The trial court wrote in its sentencing order that nonstatutory mitigating circumstances would be given weight equal to statutory mitigating circumstances. (R9)

Although the State argued that two aggravating circumstances were applicable, the trial court found the existence of only one statutory aggravating factor, that being that the murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R1139-40)

The trial court agreed that the evidence supported several nonstatutory mitigating circumstances. The court found that Deangelo:

(1) Suffered from organic personality syndrome;

(2) Suffered from organic mood disturbance;

(3) Suffered from a bipolar disorder;

(4) Could be treated for these mental disorders;

(5) Had served as a volunteer fireman;

(6) Had served his country in the military;

(7) Had cooperated with police and confessed to the killing; and

(8) Conflict existed between Deangelo and the victim over her failure to make rent payments and her hedonistic lifestyle.

(R1141-43) The trial court also found that the evidence established six other nonmitigating circumstances:

(1) The killing was not for financial gain;

(2) The murder did not create a great risk of death to many people;

(3) The murder did not occur during the commission of another felony;

(4) Deangelo is a member of the community and not a drifter;

(5) The victim was not a stranger; and

(6) The victim was not a child.

(R1142) However, the trial court concluded that these elements in mitigation were entitled to little or no weight whatsoever. (R1142-43)

The Lone Aggravating Circumstance Is Not Supported BY The Evidence.

In concluding that the State proved this aggravating circumstance beyond a reasonable doubt, the trial court wrote:

The Court has thoroughly examined the record in this case and does find

> that the State has proved beyond a reasonable doubt that this murder was performed in a cold, calculated and premeditated manner. The testimony of Joy Deangelo is uncontroverted when she told this jury that one to two weeks prior to the murder of Mary Anne Price the Defendant woke her from sleep and had her accompany him into the bedroom of Ms. Price. At that time the Defendant was wearing socks on both of his hands and asked his wife to place a sheet over Price's head while he strangled her. Less than two weeks later, the Defendant wakened his wife, had a pair of socks aver his hands and in effect, admitted to her that he had killed Mary Anne Price.

(R1139-40)

Aggravating circumstances must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). Many times this Court has said that Section 921.141(5)(i) of the Florida Statutes (1989), requires proof beyond a reasonable doubt of "heightened premeditation." See, e.g., Thompson v. State, 565 So.2d 1311,1317 (Fla. 1990). This Court adopted that phrase to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g., Hamblen v. State, 527 So.2d 800,805 (Fla. 1988); Rogers v. State, 511 So.2d 526,533 (Fla. 1987). Heightened premeditation can be demonstrated by the manner of killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began. See, e.g., Hamblen, 527 So.2d at 805; Rogers, 511 So.2d at 533; Koon v. State, 513 So.2d 1253 (Fla. 1987).

The trial court's heavy reliance on the incident one to two

weeks prior to the murder is very similar to the facts in Thompson v. State, 565 So.2d 1311 (Fla. 1990). Thompson's wife learned of his affair with the victim and moved out, When his wife, accompanied by two police officers, returned to the home to retrieve some belongings, a dazed Thompson admitted that he'd killed his mistress. After having an argument with her on the night of February 9, Thompson awoke the next morning, decided to kill her, and then commit suicide. He shot the victim once in the back of the head as she lay sleeping and stabbed her once in the back.

The State argued that Thompson awoke at 8:00 a.m. and killed the victim at 8:30 a.m. thus allowing time to calculate his plan. This Court found no evidence to show that Thompson contemplated the killing for those thirty minutes. To the contrary, the evidence indicated that his mental state was highly emotional rather than contemplative or reflective. This Court concluded that it was an equally reasonable hypothesis that Thompson hit his breaking point close to 8:30 a.m. and killed the victim instantly in a deranged fit of rage. Thompson, 565 So.2d at 1318. "Rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. Mitchell v. State, 527 So.2d 179,182 (Fla. 1988).

While the State did provide evidence that one to two weeks prior to the murder, Deangelo contemplated harming the victim (with his wife's assistance), this plan was abandoned before it

was carried out. There's absolutely no evidence that Deangelo **even** thought about killing Price before the murder occurred. Rather, the evidence is much more consistent with a scenario, where Deangelo strangled Price in a fit of rage following yet another argument. Dominick and Mary **Price** had a stormy relationship. They had a history of arguing. (R309-10) Dominick attempted to take advantage of Mary sexually when she was drunk. **(R310,338)** Dominick did not approve of Mary's lifestyle, including her tendency to drink excessively. (R331) Dominick particularly disapproved of Mary's use of drugs in front of his wife and child. (R331) Dominick and Mary also squabbled about her sexual promiscuity. (R332) Another extremely sore point was money, particularly Mary's share of the perennially late rent payment. **(R333-35)**

The only direct evidence of what actually happened that night comes from Deangelo's voluntary confession to police immediately after his arrest on the day of the murder. Deangelo had been out of the state for several days before returning home the night before the murder. (R391) After taking his wife to work, he waited for Mary to arrive at the trailer. He wanted to talk to her about leaving the trailer unlocked thus making it easy prey for burglars. (R393) He also wanted to discuss numerous other problems, i.e., Mary's habit of bringing armed fugitives home and smoking pot in the trailer. (R393) Dominick admitted that he and **Mary** had argued off and on ever since meeting her two months before. **(R394)** Mary came home that

evening around 7:30 p.m. and was alone with Dominick and his infant child in the trailer before she left for work. (R395) She returned from work about six hours later and he was alone with her again. (R397) If he had the requisite, calculated plan to kill Price, this would have been his perfect opportunity. Instead, he waited until his wife got home, before committing the murder. He obviously had no prearranged plan to dispose of the body, since he went to the flea market the next morning, accompanied by his wife and child, purportedly to buy a chain saw and machete to use in the disposal of the body. **(R323-24)**

Before leaving to fetch Joy, Dominick told Mary to stay up, since he wanted to talk. (R398) On the ride home, Dominick and Joy discussed Mary's need to pay her share of the bills. (R399) Joy went to bed around 5:30 a.m. after talking with Mary for approximately thirty minutes. (R399) Dominick stayed awake and pondered his financial predicament. (R399) About thirty minutes later, Dominick woke up Mary in order to discuss the situation. When Dominick asked about her half of the rent, Mary claimed that she had made no money dancing that night. Dominick accused her of lying and brought up the subjects of her alcoholism, promiscuity, and drug use. The argument escalated, but Dominick tried not to yell so as to avoid waking his wife and infant. Mary attempted to slap Dominick, but he grabbed her arm and slapped her first. Mary began to yell louder and Dominick attempted to get her to "shut up." (R401-2) Dominick remembers grabbing her face by the chin in an effort to close her mouth.

(R402) The next thing he knew, Mary was lying dead on the floor. (R402)

This Court has recognized that a defendant's version of a crime must be accepted as true unless contradicted by other proof showing the defendant's version to be false. Jaramillo V. State, 417 So.2d 257 (Fla. 1982); Sorey V. State, 419 So.2d 810 (Fla. 3d DCA 1982); McArthur V. State, 351 So.2d 972, fn. 12 (Fla. 1977). The physical evidence does not refute Deangelo's version of the murder hence, the trial court should have and, this Court must accept it as gospel. Deangelo's confession is extremely inculpatory and not self-serving in the least. It is a blatant admission to second-degree murder at best and first-degree murder at worst. The statement is a far cry from the usual self-serving "confession" to murder.

This killing clearly arose from a domestic dispute. Deangelo and the victim had a long history (as long as they had known each other) of arguments about a variety of subjects. This fact places the killing in the same light as those in Douglas V. State, 575 So.2d 165 (Fla. 1991), and Santos V. State, 16 FLW 5633 (1991).

In Douslas, this Court recognized that the fact that the killing arose from a domestic dispute tends to negate cold, calculated premeditation. This Court struck that aggravator even though the evidence showed that the assailant had obtained a rifle, tracked down a woman with whom he had been romantically involved, torturously abused her by forcing her to have sex with

her newlywed husband, and then brutally bludgeoned and shot the husband to death as the woman watched. The entire episode lasted some four hours. Douglas, 575 So.2d at 168.

In Santos, this Court also concluded that the State failed to prove beyond a reasonable doubt that the murder was cold, calculated, and premeditated, even though the evidence showed that Santos acquired a gun in advance and had previously made death threats to the victim. Santos, 16 FLW at S634. Additionally, like Santos, the unrebutted expert testimony indicated that, at the time of the murder, Dominick Deangelo was under extreme emotional distress and had an impaired capacity to conform his conduct to the requirements of the law. (R 661-67, 699-703)

A brief look at other cases involving this Court's treatment of this aggravating circumstance is helpful. In Capehart v. State, 583 So.2d 1009 (Fla. 1991), this Court disapproved a finding of this aggravator, where the defendant smothered a sixty-two-year-old woman with a pillow. The State argued, where smothering takes several minutes to kill the victim, the act per se qualifies as cold, calculated, and premeditated murder. This Court concluded otherwise quoting from Hardwick, 461 So.2d at 81 (circumstance not proven where victim died from strangulation). "(T)he fact that it takes the victim a matter of minutes to die once the process begins" does not alone support this finding. Casehart, 583 So.2d at 1015.

In Holton v. State, 573 So.2d 284,292 (Fla. 1991), the

strangulation murder occurred during the commission of a sexual battery. This Court opined that the strangulation could have been a spontaneous act in response to the victim's refusal to participate in consensual sex. Similarly, Mary Price's murder was the culmination of a long-standing domestic feud with Deangelo. It occurred late at night during yet another argument. The evidence supports Deangelo's confession that the verbal argument escalated into a physical confrontation and, in an attempt to keep Price quiet, he strangled her. There's also some support for the hypothesis that, as in Holton, the murder could have been a spontaneous act in response to the victim's refusal to participate in consensual sex. Deangelo had made unwelcome sexual advances upon Mary in the past. (R310-13,338)

The defendant in Reed v. State, 560 So.2d 203 (Fla. 1990), vowed prior to the killing that he would "get even" with her. Since he did not say how he would get even, this Court concluded that the requisite evidence of heightened premeditation was not proven beyond a reasonable doubt, In Farinas v. State, 569 So.2d 425 (Fla. 1990), this Court found the circumstance unproven, even though Farinas approached the victim after firing the first shot and then unjammed his gun three times before firing the fatal shots to the back of the victim's head. In Green v. State, 583 So.2d 647 (Fla. 1991), the factor was stricken even though Green armed himself with a butcher knife before going to his landlord's home to retrieve a rent check, so that he could buy more drugs. Like Deangelo, "the next thing [Green] knew was that Mrs. Nichols

was on the floor, stabbed and bleeding; that he followed Mr. Nichols to the back bedroom; that the next thing he knew was that Mr. Nichols was on the floor stabbed, bleeding and moaning ...." Green, 583 So.2d at 649. See also Campbell v. State, 571 So.2d 415,418 (Fla. 1990) and Dailey v. State, 16 FLW S740 (1991). The State has failed to meet its burden of proving this aggravating circumstance beyond a reasonable doubt. Since this factor was the only aggravating circumstance found by the trial court, Deangelo's death sentence cannot stand. See Banda v. State, 536 So.2d 221,225 (Fla. 1988) ["The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist."]

The Trial Court Improperly Rejected Unrefuted Statutory Mitigating Circumstances.

Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. Hardwick v. State, 521 So.2d 1071,1076 (Fla. 1988). In Rogers v. State, 511 So.2d 526,534 (Fla. 1987), this Court enunciated a three-part test:

> [T]he trial court's first task ... is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing

> the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. (emphasis added). Accord Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990); Chesire v. State, 568 So.2d 908,912 (Fla. 1990); Hardwick, 521 So.2d at 1076.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court quoted prior federal and Florida decisions to remind trial courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. See, e.g., Eddings v. Oklahoma, 455 U.S. 104,114-15 (1982) and Rogers v. State, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or nonstatutory), the trial judge must find that mitigating factor, Although the relative weight given each factor is for the sentencer to decide, once a factor is reasonably established, it cannot be dismissed as having no weight. Campbell, 571 So.2d at 419-20.

In Nibert v. State, 574 So.2d 1063 (Fla. 1990), this Court held that, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Nibert, 574 So.2d at 1066. A trial court may reject a mitigating circumstance as not proved, only where the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922,933 (Fla. 1987); Cook v. State, 542 So.2d 964,971

(Fla. 1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance); see also Pardo v. State, 563 So.2d 77,80 (Fla. 1990) (this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

In dealing with the uncontroverted, unrefuted evidence of Dominick Deangelo's mental problems, the trial court wrote:

> Circumstances in mitigation that the Defendant suffered from Organic Personality Syndrome, Organic Mood Disturbance, Bipolar Disorder, that his ability to conform his conduct to the requirements of law was substantially impaired at the time of the crime and that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the killing were in essence substantially ~~supported~~ by the testimony of Dr. Robert ~~Berland~~. This Court has carefully reviewed Dr. Berland's testimony and in doing so, reviewed it in pari materia with the testimony of the Defendant's wife, Joy, and the Defendant's brother. The totality of the evidence in this case does not support Dr. Berland's conclusion or the Defendant's contention that the Defendant's ability to conform his conduct to the requirements of law was substantially impaired at the time of the crime or that the Defendant was under the influence of extreme mental or emotion (sic) disturbance at the time of the killing. Although the Court has considered and reviewed and weighed the circumstances, ~~the totality of the~~ evidence does not seem to totally ~~support~~ **these conclusions.**

(R1141-42) (emphasis added). By way of the above, the trial

court rejected both statutory mitigating circumstances dealing with Dominick Deangelo's mental state at the time of the murder.

Frankly, counsel is incapable of following the reasoning of the trial court. Initially, the trial judge writes that the evidence that Deangelo suffered from three mental disorders and that both statutory mental mitigators "were in essence substantially supported by the testimony of Dr. Robert Berland." (R1142) The trial court then goes on to review the testimony of Joy Deangelo (at the guilt phase) and Dennis Deangelo (at the penalty phase) and concludes that, "the totality of the evidence does not seem to totally support these conclusions." (R1142) (emphasis added). Read in its entirety, the court appears to agree that Deangelo suffers from three mental disorders, but concludes that the two statutory mental mitigators are not supported by the evidence.

Appellant points out that the trial court used an erroneous standard of proof in dealing with these important statutory mitigating circumstances. A mitigating circumstance need not be proved beyond a reasonable doubt. If one is reasonably convinced that mitigating circumstance exists, it is considered to be established. Fla. Std. Jury Instr. (Crim.) p. 81. A trial court may reject a mitigating circumstance as unproven, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla. 1977).

Appellant strenuously contends that the testimony of Joy and

Dennis Deangelo in no way contradicts the clear, unrefuted testimony of Dr. Berland, Dr. Berland, a board-certified forensic psychologist (of which there are only about a dozen in **Florida)**, was qualified as an expert witness without objection from the State. (R620-29) After substantial investigation of **the** case, **Dr.** Berland conducted numerous tests and a thorough evaluation of Dominick Deangelo. (R629) Dr. Berland concluded, without equivocation that, although not insane, Dominick Deangelo **was** under the influence of extreme mental or emotional disturbance when he killed Mary **Price.** (R65-66) Additionally, Dr. Berland concluded' that while Deangelo did appreciate the criminality of his conduct, his ability to conform that conduct to the requirements of law was substantially impaired at the time of **the** murder. **(R666-67)** Despite a rigorous, sometimes petty, cross-examination of Dr. Berland by the prosecutor, he remained steadfast in his conclusions. The prosecutor did succeed in getting Dr. Berland to admit on several occasions that "anything is possible."

Appellant invites this Court to examine the testimony of Dennis and Joy Deangelo in a futile search for corroboration of the **trial** court's rejection of Dr. Berland's testimony. Joy Deangelo testified about the often stormy relationship that **existed** between Dominick and Mary. The rest of Joy's testimony **dealt** with the night of the murder and its aftermath, as well as

[9] All of Dr. Berland's conclusions and diagnoses were established within **a** reasonable degree of medical certainty. (R666)

an aborted incident where, one week before the murder, Dominick, with Joy's help, may have thought about harming Mary Price while she slept. **(R303-53)**

Dennis Deangelo, Appellant's brother, testified at the penalty phase. **(R597-610)** In these thirteen pages of direct examination, cross-examination, redirect, and recross, Dennis gave a few details about their family life and told of Dominick's careers as **a** soldier and **as** a volunteer fireman. Dennis explained that Dominick overdosed on a bottle of aspirin when he **was** a child. (R602) This corroborated rather than refuted Dr. Berland's finding of bilateral brain damage. **(R649-50,661-62)**

Dennis also explained that Dominick's army wife returned to Germany before the birth of their son. Consequently, Dominick has never met his little boy. (R601) Dennis also testified that, with his help, Dominick had discovered religion after his arrest. (R602-3) On cross-examination, Dennis admitted that he never recognized Dominick's mental problems. (R605) This also corresponds with Dr. Berland's testimony. The doctor pointed out that Dominick's family and friends noticed his behavior but, like many lay people, did not recognize it as mental illness. (R708-9)

In addition to applying an erroneous standard of proof, the record fails to support the trial court's conclusion that "the totality of the evidence does not seem to totally support these conclusions." **(R1142)** (emphasis added). In fact, Deangelo contends that the testimony of Dr. Berland and his diagnostic

conclusions are uncontroverted. Dr. Berland was the only expert witness to testify at either phase of the trial. The State called no witnesses and offered no evidence in rebuttal. (R732)

In Santos v. State, 16 FLW at 633 (1991), this Court pointed out that the requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Duqqer, 111 S.Ct. 731 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. "Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence." Santos, 16 FLW at S634. The Parker Court then reversed and remanded for a new consideration that more fully weighed the available mitigating evidence. "Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.!' Id.

Even a cursory examination of Deangelo's record reveals substantial, uncontroverted mitigating evidence. The trial court improperly rejected the two statutory mitigating circumstances dealing with Deangelo's mental state at the time of the murder.

The Trial Court Improperly Weighed Valid, Nonstatutory Mitigating Circumstances.

In considering the nonstatutory mitigating evidence, the trial court accepted the fact that Dominick Deangelo suffered from organic personality syndrome, organic mood disturbance, and bipolar disorder. (R1141-42) The court also found in mitigation

that Deangelo served as a volunteer fireman. (R1143) The court agreed that Deangelo's mental disorders were treatable. (R1142) The trial court also found Deangelo's military service as a mitigating factor. (R1143) The trial court also considered Deangelo's confession and cooperation with the police as a mitigating circumstance. (R1143) Finally, the trial court dealt with Deangelo's allegation that the killing was the culmination of a heated domestic dispute. (R1143) The court found that the evidence supported the conclusion that conflicts existed between Deangelo and the victim (a tenant in his trailer) as a result of the victim's lifestyle, as well as her failure to make rental payments. (R1143)

In dealing with the nonstatutory mitigating circumstances purposed by Deangelo's lawyer, the trial court found that the evidence also supported the following:

> (1) The killing was not for financial gain;
>
> (2) The murder did not create a great risk of death to many persons;
>
> (3) The murder did not occur during the commission of a felony;
>
> (4) Dominick Deangelo lived in the community and was not a drifter;
>
> (5) The victim was not a stranger and was, in fact, a member of Deangelo's household; and
>
> (6) The victim was not a child.

(R1142-43) However, the trial court wrote that these circumstances were entitled to little if any weight. The trial

court does not seem to dispute the fact that the defense proved these factors and that they are mitigating. If that is the case, the trial court has ignored uncontroverted, valid, nonstatutory mitigating circumstances. This is clear error in light of Rogers, Campbell, and Parker, as argued in the previous section.

It is clear that the trial court found that the evidence supported eight nonstatutory mitigating circumstances. (R1142-43) It also appears that the trial court inappropriately ignored (by giving little or no weight) six other non-mitigating circumstances. (R1142-43) A proper weighing of the substantial mitigating circumstances, both statutory and nonstatutory, against the one (at best) aggravating circumstance, should have resulted in a life sentence with a minimum mandatory term of twenty-five years without parole.

Even without the improperly rejected statutory mitigators, the defense proved a substantial number of nonstatutory mitigating circumstances. Although the trial court improperly rejected some of these, even the eight circumstances that he did accept should result in a life sentence when compared to the one (again at best) aggravating circumstance relied upon by the trial court. This Court must rectify the trial court's error and sentence Dominick Deangelo to life in prison with at least twenty-five years without possibility of parole.

Deangelo's Death Sentence Is Disproportionate

Even assuming that this Court upholds the single aggravating

circumstance, uncontroverted mitigation exists which renders the death penalty unconstitutionally disproportionate under the Eighth and Fourteenth amendments. This Court has NEVER affirmed a death sentence where the sole aggravating circumstance related to "heightened premeditation." After a diligent search, counsel can point to only five cases where this Court has affirmed a death sentence based on a single valid aggravating circumstance. See Aranqo v. State, 411 So.2d 172 (Fla. 1982); Armstronq v. State, 399 So.2d 953 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douqlas v. State, 328 So.2d 18 (Fla. 1976); and Gardner v. State, 313 So.2d 675 (Fla. 1975).

In all but one of the previously cited cases where death sentences based on a single, valid aggravating factor were affirmed, the crimes involved torture-murders. In Gardner, Douglas, and LeDuc nothing was found in mitigation by the trial court. In Aranqo, the only mitigating factor was that Arango had no significant prior criminal history. In Armstronq (the only non-torturous murder), this Court upheld one valid factor in aggravation, but agreed with the trial court that there were no mitigating circumstances to weigh.

Deangelo's case involves substantial mitigat on that was actually accepted by the trial court. (R1141-43) Additionally, the trial court improperly rejected the unrefuted evidence that both statutory mental mitigators applied to Domin ck Deangelo. Mental mitigation has historically been accorded great weight, and consistency requires that the same weight be given in

Deangelo's case. Furthermore, the trial court improperly found that certain mitigation was entitled to little or no weight. (R1142-43)

In Sonser v. State, 544 So.2d 1010 (Fla. 1989), this Court faced a death penalty imposed by a trial judge based on one statutory aggravating factor, viz, the murder of a highway patrolman committed while Songer was under sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence ~~despite a jury recommendation of death~~. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979)), but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did

> not break out of prison but merely walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer v. State, 544 So.2d at 1011.

In Fitzpatrick v. State, 527 So.2d 809,811 (Fla. 1988), this Court noted that, "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors and three mitigating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence on the premise that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811 (emphasis in original). Fitzpatrick equates with the instant case; neither is the most aggravated and unmitigated of serious crimes.

In Penn v. State, 574 So.2d 1079 (Fla. 1991), this Court approved the trial court's finding that the murder was heinous, atrocious, or cruel. In mitigation, the court found that Penn had no significant history of prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper aggravating factors against established mitigating factors, we remand for reweighing because we

> cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 So.2d 90 (Fla. 1984), receded from on other grounds, Preston v. State, 564 So.2d 120 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So.2d 312,315 (Fla. 1982). On the circumstances of this case, including Penn's heavy drug use and his wife's telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Comsare Smalley v. State, 546 So.2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation; no prior history, extreme disturbance, extreme impairment in mitigation); Songer v. State, 544 So.2d 1010 (Fla. 1989) (under sentence of imprisonment in aggravation; extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (felony murder in aggravation; no prior history in mitigation); Blair v. State, 406 So.2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting a proportionality review, we do not find the death sentence warranted in this case.

Penn, 574 So.2d 1079,1083-4. See also, McKinney v. State, 579 So.2d 80 (Fla. 1981) [Death sentence disproportionate given only one valid aggravator, and mitigation show that defendant had no significant criminal history, had mental deficiencies, and alcohol and drug history].

A comparison of this case to those in which the death

penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded for imposition of a life sentence. Never before has this Court affirmed the death penalty based solely on this aggravating factor. When compelling mitigation exists such as that existing in this case, as found by the trial judge, the death penalty is simply inappropriate under the standard previously set by this Court.

POINT II

THE JURY'S DEATH RECOMMENDATION WAS TAINTED WHEN THE STATE ELICITED AND ARGUED NONSTATUTORY AGGRAVATION.

At the penalty phase, the State made a decision to rely completely upon the testimony and evidence presented at the guilt phase. The State presented no evidence or testimony at the penalty phase. (R596, 732) Deangelo presented the testimony of three witnesses at the penalty phase. The last witness offered in mitigation was Dr. Berland, a board-certified forensic psychologist. (R620-728) Dr. Berland told the jury of at least three mental disorders from which Dominick Deangelo suffered. Dr. Berland testified without equivocation that, at the time of the murder, Deangelo met both statutory mitigating circumstances.[10]

On cross-examination, the prosecutor unsuccessfully attempted to shake the doctor's testimony. Near the **end** of the State's cross-examination, the prosecutor focused on Deangelo's potential for violence. (R708-10) The prosecutor continued questioning:

> Q. One interesting point on this chart that you talked briefly about was a high level of sociopathic personality type. Could you explain to the jurors what that means?
>
> A. Scale four is elevated.
>
> MR. SIMS (defense counsel): I'm going to object. That doesn't go to an

[10] Sections 921.141(6) (b) and (f), Florida Statutes.

aggravator that the State may be hoping to prove. I don't see where we're trying to mitigate, saying that's not going to happen.

THE COURT: It's certainly in the cross examination of matters that were discussed on direct. Overruled.

(R710) The prosecutor then had the doctor explain in great detail that Deangelo scored high in the area of anti-social thinking, which used to be called sociopathic thinking. (R710-11) The doctor told the jury that Deangelo had the potential for "criminal thinking." (R710) Sociopaths feel that they are in conflict with authority. They would like to "get what they want" without having to abide by the rules. (R710) The prosecutor pointed out that Deangelo's history of moving from one job to the other and not getting along with people were consistent with an anti-social personality type. (R711-12)

The prosecutor explored objectionable areas again on recross by eliciting general unappealing qualities about Dominick Deangelo, independent of his mental illness. (R726-28) At the prosecutor's request, Dr. Berland reiterated the fact that Deangelo has an anti-social character which causes him to believe that he need not follow the rules and laws of society, When he wants things, he will take whatever action necessary to obtain them. (R727) When the prosecutor asked whether Deangelo cared if he broke rules, the doctor answered:

I didn't do assessment in terms of moral qualities. I don't know if you're asking if he feels remorse. I didn't assess that. I don't know.

Q. Could you have assessed that?

A. I could. It is my understanding that I'm not supposed to.

Q. Who told you that?

A. It's my understanding that remorse is, well, first of all, it's not a mental health issue but I at least have an understanding that that's not supposed to be an issue on which a decision is made.

Q. But that is an aspect of a person's psychological make up?

A. Yes.

Q. And typically anti-social people have very little concern for others as well as no concerns for rules?

A. That's correct.

Q. For their suffering, for their deprivation or anything else, correct?

A. I'm sorry, I didn't --

Q. For their suffering, for their deprivation or anything else?

* * *

Q. In other words, anti-social personality will steal from someone without any particular concern for their victims' loss?

A. Oh. That's correct, that's part of the disorder.

Q. Or they will harm someone without any particular concern for the victim's pain?

A. That's correct.

Q. And Mr. Deangelo does have that aspect in his personality?

A. That is correct.

(R727-28) Deangelo concedes that trial counsel made no objection to the quoted line of questioning. Trial counsel probably realized that an objection would be an useless act, in light of the trial court's previous ruling on this subject matter. (R710)

Not content with merely presenting the evidence of nonstatutory aggravation to the jury, the prosecutor used it well in his final summation.

> ... [T]he tests that he uses were never intended to be used as they are used. ... it's indicated in the test, he tried to down play that the man has sociopathic personality type ...
>
> Finally, he admitted, yes, he does have that aspect to his personality. He doesn't care about the rules we all live by. They don't mean anything to him. It's not me. He doesn't feel bad when he breaks the rules. He doesn't care. And finally, Doctor Berland will admit that.
>
> Let's look at what Dominick Deangelo is now. A man who doesn't care about rules, violating rules; doesn't care about other people. A man who is prone to violence even in his testimony to outburst of violence and murder; still the same way today .... I would submit Dominick Deangelo deserves to be given the death penalty ...

(R750-1)

The prosecutor's presentation and argument on nonstatutory aggravating evidence was highly improper. Evidence that Dominick Deangelo had a sociopathic (criminal) personality constituted evidence of an impermissible nonstatutory aggravating circumstance. Elledge v. State, 346 So.2d 998 (Fla. 1977). Evidence of Deangelo's lack of remorse was also inappropriate and

highly inflammatory. Pope v. State, 441 So.2d 1073 (Fla. 1983); Menendez v. State, 368 So.2d 1278, n.12 (Fla. 1979). In light of defense counsel's timely and specific objection before the prosecutor began his impermissible approach (R710), and considering that the subject was only briefly mentioned during direct examination (R644), Appellant submits that reversible error occurred, especially in light of the close vote (7 to 5). Since the jury's recommendation was tainted by the impermissible evidence and improper argument, this Court must, at the very least, remand for a new penalty phase. See, e.g., Jones v. State, 569 So.2d 1234 (Fla. 1990) [evidence and argument regarding lack of remorse, inappropriate jury instruction, and improper consideration of sexual battery requires new penalty phase].

POINT III

AT THE PENALTY PHASE, THE JURY'S DISCRETION WAS NOT ADEQUATELY CHANNELED WHEN THE INSTRUCTIONS WERE INAPPLICABLE TO THE FACTS, THE TRIAL COURT DENIED NUMEROUS SPECIAL JURY INSTRUCTIONS, THE STANDARD INSTRUCTIONS ARE UN-CONSTITUTIONALLY VAGUE.

The Jury's Recommendation Was Tainted BY Instructions On Two Inapplicable Aggravating Circumstances.

While the trial court instructed the jury on the aggravating circumstance dealing with the heinous nature of the murder" (R769-70), the court ultimately determined that the evidence did not support this aggravating factor. **(R1135-39)** The note contained in the Florida Standard Jury Instructions in Criminal Cases, expressly states, "give only those aggravating circumstances for which evidence has been presented." p. 80 (emphasis added). Since the trial court improperly instructed the jury on an aggravating circumstance which had no applicability to the facts, this Court must remand for a new penalty phase. Jones v. State, **569** So.2d 1234 **(Fla. 1990).**

Even though the trial court erroneously concluded that the evidence did support a finding that the murder was accomplished with "heightened premeditation," this circumstance was not supported by the evidence. See Point I, supra. As a matter of law, the "heightened premeditation" circumstance was not applicable to the facts of this case. The jury should not have been instructed on this factor either. The resulting taint to

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[11] Section 921.141(5)(h), Florida Statutes,

the jury's recommendation requires that this Court order a new penalty phase. Id.

Standard Instructions on the Two Statutory Aggravating Circumstances

The trial court instructed the jury on only two aggravating circumstances.

> One, the crime for which the defendant is to be sentenced was especially heinous, evil, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> This kind of crime intended to be included as heinous, atrocious or control [sic] is one accompanied by additional acts that show that the crime was conscienceless or pitiless, was unnecessarily torturous to the victim.
>
> Two, that the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R769-70,1060) Following deliberation, the jury returned with a close vote (7 to 5) recommending a death sentence. (R774,1093) In sentencing Dominick Deangelo to death, the trial court rejected the State's argument that the murder was especially heinous, atrocious or cruel (R1135-39), but did find heightened premeditation.[12] (R1139-40)

Prior to trial, the court denied Deangelo's motion to declare Section 921.141(5)(h), Florida Statutes (1989)

[12] Section 921.141(5)(i), Florida Statutes.

unconstitutional based on Deangelo's contention that the aggravating circumstance was vague and overbroad. **(R831-42,926)** The court also denied numerous special jury instructions proposed by Deangelo at the penalty phase. **(R734-37,1063-92)**

The instructions gave the jury unrestrained discretion to recommend execution. Capital sentencing instructions which rely on vague and subjective phrases applicable to any first-degree murder do not pass muster under the Eighth Amendment since they allow unguided, unchannelled discretion in imposing the death penalty.

> When the jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Walton v. Arizona, **110** S.Ct. **3047,3057 (1990);** see Maynard v. Cartwright, **486** U.S. **356 (1988).** The following instruction:

> [T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked or vile; and cruel means to inflict a high degree of pain with indifference to even enjoyment of the suffering of others.

results in unchannelled jury discretion, contrary to the Eighth Amendment. Shell v. Mississippi, 111 S.Ct. **313** (1990), quoting Shell v. State, **554** So.2d **887,905-6** (Miss. 1989) **(MARSHALL,** concurring); see Cartwright v. Maynard, **822** F.2d **1477,1488** (10th **Cir. 1987)** (en banc), aff'd. 486 U.S. 356 (1988) (Oklahoma's HAC instruction using same wording unconstitutionally vague.

Cartwright and Shell show that the words "heinous, atrocious, or cruel," standing alone or defined by vague phrases, limit nothing and cannot be constitutional. The instruction given below allowed unchannelled discretion and resulted in reversible error. See Proffitt v. Florida, 428 U.S. 242 (1976).

~~Specially~~ Requested Instructions

Appellant filed written requests for several special jury instructions at the penalty phase. (R1063-92) After reviewing all of the requested instructions, the trial court denied every single one. (R734-37) Deangelo contends on appeal that the trial court committed reversible error in denying proposed instructions #2 (R1063); #4A (R1066); #5 (R1067); #6 (R1068); #7 (R1069); #9 and #9A (R1071-72); #10A (R1074); #12 (R1077); #14 and #15 (R1080-81); and #18 (R1084).

Due process of law applies "with no less force at the penalty phase of the trial in a capital case" than at the guilt determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14/16-17 (1978). The need for adequate jury instructions to guide the recommendation in capital cases was expressly noticed in Gregg v. Georgia, 428 U.S. 153,192-3 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents

> and fixed rules of law....When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries by carefully and adequately guided in their deliberations.

The instructions given in this case were far from adequate to avoid the constitutional infirmities that inhered in death sentences imposed under the pre-Furman statutes. Furman v. Georgia, 408 U.S. 238 (1972). Deangelo's death sentence rests in part on the inadequately instructed jury's recommendation.

All of the rejected instructions recited in the preamble to this point were correct statements of the law and were applicable to Deangelo's case. The standard instructions did not clearly tell the jury that the State bore the burden to show that the aggravating factors outweighed the mitigating factors. [Proposed instruction #2] The death penalty is reserved for only the most aggravated and unmitigated of cases. [Instruction #4A] The jury never learned that the legislature has established eleven statutory aggravating factors, only two of which were even arguably applicable to Deangelo. [Instruction #6] The jury never found out that they could not "double" a single aspect of the offense to support more than one aggravating circumstance. [Instructions #9 and 9A] Likewise, the jury never learned that a "heightened" premeditation was needed to find the aggravating factor. [Instruction #15] The rest of the requested instructions clarified vague and confusing standard jury instructions. They also would have helped the jury in their analysis and weighing process.

Contrary to the trial court's assertion, the standard jury instructions did not cover most of the specially requested instructions. Florida Rule of Criminal Procedure 3.390 provides that the presiding judge shall charge the jury upon the law of the case. Unfortunately, Deangelo's jury was not adequately instructed. Hence, his death sentence is constitutionally infirm. Amends. VIII and XIV, U.S. Const.

POINT IV

THE TRIAL COURT ERRED IN DENYING DEANGELO'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE STATE'S EVIDENCE ESTABLISHED, AT BEST, SECOND-DEGREE MURDER.

At the conclusion of the State's case-in-chief, Appellant moved for a judgment of acquittal contending that the State had failed to prove premeditation. Counsel argued that the evidence, at most, established second-degree murder. The trial court denied the motion. (R462) Deangelo renewed the motion and the trial court again denied it. (R477)

This Court has the responsibility in this case to determine whether "there is substantial, competent evidence to support the judgment." Tibbs v. State, 397 So.2d 1120,1123 (Fla. 1981). "Premeditation," a necessary element of first-degree murder, is a fully-formed conscious purpose to kill. Appellant recognizes that premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of the act. Assay v. State, 580 So.2d 610 (Fla. 1991). Whether a premeditated design to kill was formed prior to the killing is a question of fact for the jury that may be established by circumstantial evidence. Wilson v. State, 493 So.2d 1019,1021 (Fla. 1986).

In Forehand v. State, 126 Fla. 464, 171 So. 241 (1936), this Court reduced a first-degree murder conviction to second-degree where the evidence supported the conclusion that the defendant

acted upon a "blind and unreasoning passion" in response to being hit by a blackjack by the victim.

Additionally, a defendant's version of what occurred must be accepted as true, unless contradicted by other proof showing the defendant's version to be false. See, e.g., Jaramillo v. State, 417 So.2d 257 (Fla. 1982); Sorey v. State, 419 So.2d 810 (Fla. 3d DCA 1982); McArthur v. State, 351 So.2d 972,976, fn.12 (Fla. 1977). In view of the voluntary confession given to police by Dominick Deangelo and the lack of proof refuting his version, this Court should reduce the conviction to second-degree murder.

POINT V

THE TRIAL COURT ERRED IN DENYING CERTAIN PRETRIAL MOTIONS DEALING, INTER ALIA, WITH THE UNCONSTITUTIONAL MANNER IN WHICH FLORIDA'S CAPITAL SENTENCING SCHEME OPERATES.

The Florida capital sentencing scheme denies Due Process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. These issues are presented in summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute; thus detailed briefing would be futile. However, Appellant urges reconsideration of each of the identified constitutional infirmities.

Deangelo filed a motion to preclude a challenge for cause based on a juror's inability to vote for a death sentence under any circumstances. (R827-28) The trial court denied the motion without a hearing. (R922) The exclusion of jurors who object to the death penalty as unconstitutional. Such a method results in a denial of a fair cross-section of the community. To alleviate the problem, Deangelo filed a motion to empanel a second sentencing jury. (R849-50) The trial court also denied this motion. (R923) Several potential jurors who expressed opposition to the death penalty were excused at the State's request. (R101-10,130-33,259-63)

Death by electrocution is cruel and unusual punishment. Amend. VIII and XIV, U.S. Const.; and Art. I, §§9 and 17, Fla.

Const. The trial court denied Deangelo's requested evidentiary hearing to show this very fact. (R184,845-46,936)

Section 921.141 is unconstitutionally vague and overbroad. Deangelo filed a motion to declare the statute unconstitutional which the trial court denied. (R869-73,929) Appellant incorporates by reference the arguments set forth in the motion filed before the trial court. (R869-73)

The trial court also denied Deangelo's motion for statement of aggravating circumstances. (R865-68,924) Using aggravating circumstances without adequate notice deprives a defendant of essential safeguards "designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible." Provence v. State, 337 So.2d 783 (Fla. 1976).

Section 921.141, Florida Statutes (1989), is unconstitutional on its face and as applied based upon the arbitrary and capricious manner in which various prosecutors decide to seek the ultimate sanction in any given case. See United States of America, ex. rel. Charles Siliqy v. Peters, 713 F.Supp. 1246 (C.D. Ill. 1989) aff'd. in part, rev'd. in Part, Siliqy v. Peters, 905 F.2d 986 (7th Cir. 1990). The State's decision to seek the death penalty in Deangelo's case is clearly arbitrary and capricious. Just before trial began, the State withdrew its previous plea offer that would have insured a life sentence for Dominick Deangelo. (R5-6) The state of Florida is unable to justify the death penalty as the least restrictive means to further its goals where a fundamental right, human life,

is involved. Roe v. Wade, 410 U.S. 113 (1973).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant requests that this Honorable Court grant the following relief:

As to Point 1, vacate the death sentence and remand for the imposition of a life sentence without possibility of parole for a minimum term of twenty-five years;

As to Point 11, vacate the death sentence and remand for a new penalty phase;

As to Point III, vacate the death sentence and remand for imposition of a life sentence or, in the alternative, remand for a new penalty phase;

As to Point IV, vacate the death sentence and conviction and remand with instructions to enter a judgment finding Deangelo guilty of second-degree murder and order sentencing thereon;

As to Point V, vacate the death sentence and remand for the imposition of a life sentence or, in the alternative, declare Section 921.141, Florida Statutes (1989), to be unconstitutional.

Respectfully submitted,

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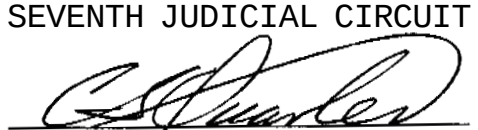
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Dominick Deangelo, #122566, P.O. Box 747, Starke, FL 32091-0747, this 30th day of January, 1992.

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ASSISTANT PUBLIC DEFENDER