IN THE FLORIDA SUPREME COURT

ROBERT EARL DUBOISE, :

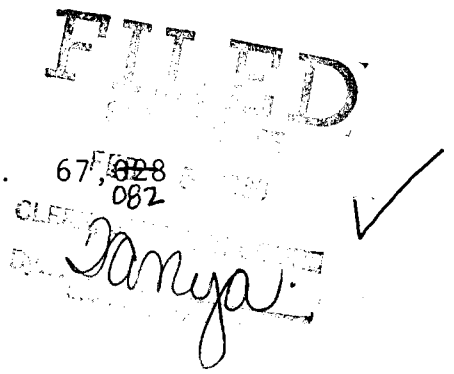
Appellant, :

vs. : Case No. 67,~~828~~ 082

STATE OF FLORIDA, :

Appellee. :

_____ :



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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

1. The Case

On November 23, 1983, a Hillsborough County grand jury indicted Robert DuBoise for first degree murder and sexual battery. (R1966-1967) He pleaded not guilty, and the court set his case for a jury trial. (R1975) Prior to trial, three probation revocation proceedings were consolidated with the murder and sexual battery trial. DuBoise was on probation for burglary of a conveyance (Cir.Ct.No. 82-11670)(R1864) and two grand thefts (Cir.Ct.No. 82-11925 & 82-11926)(R1900). All three affidavits for violation of probation alleged as grounds the commission of the murder and sexual battery and DuBoise's changing his address with notification and approval. (R1865-1866,1901-1902,1934-1935)

The trial began on February 25, 1985. (R3) On March 7, 1985 the jury returned verdicts finding DuBoise guilty of first degree murder and of attempted sexual battery as a lesser offense of the sexual battery charged. (R1658-1660,2141-2142) The penalty phase of the trial commenced immediately. (R1662) After hearing additional evidence, the jury recommended a life sentence for the murder by a vote of 12 to 0. (R1696,2143)

Without hesitation, Circuit Judge Harry Lee Coe, III, overrode the jury's recommendation and sentenced DuBoise to death for the murder. (R1698-1699) Judge Coe orally announced his finding of four aggravating circumstances: (1) previous conviction for a violent felony; (2) the homicide occurred during the commission of a robbery; (3) the homicide was com-

mitted to avoid arrest; and (4) the homicide was especially heinous, atrocious or cruel. (R1699-1700)(A1-2) The court found no mitigating circumstances. (R1700) Judge Coe also sentenced DuBoise to five years for the attempted sexual battery. (R1700-1701) Judgments and sentences for each offense were filed on March 11, 1985. (R2144-2149)

The court also revoked DuBoise's probation in the burglary case (Cir.Ct.No. 82-11670) and in both grand theft cases (Cir.Ct.No. 82-11925 & 82-11926). (R1876,1912,1945) He was adjudged guilty and received a five year sentence for each offense. (R1700-1701,1871-1875,1907-1911,1940-1944)

DuBoise filed a motion for new trial on March 13, 1985 (R2150-2153), which was denied on May 10, 1985. (R1812) A motion for arrest of judgment regarding the attempted sexual battery was filed on March 19, 1985. (R2155-2156) The court granted the motion on June 7, 1985, on the ground that Count II of the indictment failed to charge an offense. (R2217)

On May 23, 1985, DuBoise filed his notice of appeal to this Court seeking review of his judgments and sentences. (R2231) The Public Defender for the Tenth Judicial Circuit was appointed to pursue the appeal. (R2237)

2. The Facts

Barbara Grahams left her home for work at the Hot Potato Restaurant at Tampa Bay Center around 8:30 a.m. on August 18, 1983. (R371) The restaurant was two miles away and she walked or rode the bus. (R371) She lived at the McLemore's residence where her boyfriend, John McLemore, lived with his mother and two brothers, Mark and Alan. (R357-358) John

McLemore and two of his friends saw Barbara at the restaurant between 7:30 and 8:30 p.m. (R362-363) They left, and John did not return home until around 1:00 a.m. (R364) Barbara left work shortly after 9:00 p.m. (R423) Pamela Campbell and Marco Diequez, who were friends and neighbors of Barbara's, saw Barbara walking about five blocks from her house at 9:30 p.m. (R381-384,572) She refused their offer to drive her home. (R384)

Around 8:00 a.m. the next morning Barbara Graham's body was discovered behind a dentist's office on North Boulevard. (R338-340,347) She was nude except for a tube top which was pulled above her chest. (R351) Some clothing, a purse and what appeared to be its contents were scattered around the body. (R339,351,471-474) Four pieces of lumber, 2 x 4's, were found in the area. (R455-456) Two of the boards proved to have human blood of the same type as Graham's. (R581-589) The medical examiner concluded that she died from two or more blows to the face and forehead. (R533,554) Sperm cells were found in her vagina, but there were no injuries to the sexual organs. (R542-547) Furthermore, the sexual intercourse could have occurred as much as three days prior to her death. (R565-566)

During the autopsy, the medical examiner also discovered a human bite mark on Graham's face. (R536,556-557) It appeared to have been made either at the time of death or within five hours before death occurred. (R557-565) Technicians photographed the mark. Dr. Richard Powell, a local dentist who serves as a consultant for the medical examiner's office, examined the bite mark. (R826) He made a rubber impression of the mark and a mold of the negative from that impression. (State's Exhibits

83 and 84). (R826-828) Powell concluded that the person who made the bite mark may have had a missing upper left tooth. (R830) He told the detectives to look for potential suspects with missing teeth. (R832)

After receiving Powell's advice, Detective Saladino developed Raymond Fletcher as a suspect. (R929) Fletcher had bite marks on his own body which were possibly inflicted by his girlfriend. (R929-931) Powell made molds of Fletcher's teeth and compared them to the bite mark on Graham's cheek. (R834-844,930-931) Powell concluded that there was a better than average possibility that Fletcher's teeth made the mark. (R842-843) Powell then conferred with forensic odontologist, Dr. Richard Souviron, who also examined the molds of Fletcher's teeth and the bite mark. (R849,933-936,1178-1188) Souviron concluded that Fletcher's teeth did not make the mark (R1185-1188), and Detective Saladino eliminated Fletcher as a suspect. (R936)

Souviron instructed Saladino and Powell in how to improve their investigative techniques regarding bite marks and teeth impressions. (R850-856,936-939,1187-1189) The detective began taking teeth impressions of suspects in bees wax. (R936-938) Dr. Powell would then cast the impressions in dental stone materials. (R850-856,861-877) The result would be a stone mold of the biting edges of the persons teeth as left in the bees wax. (R854-855) Because of the soft character of the bees wax, Powell stated that he would never use such impressions for making dentures since more accuracy would be required. (R858-860) Souviron stated that he would not use such impressions for making positive bite mark comparisons, but the process could be used

to eliminate suspects. (R1187-1189,1279-1282) More accurate impressions from a dental material called Alginan would be required for more accurate comparison impressions. (R859-860,1279-1282) Detective Saladino collected numerous impressions of potential suspects using the bees wax method. (R938-939) The stone molds of these impressions were then examined by Powell and Souviron.

On September 20, 1983, Saladino obtained bees wax impressions of Robert DuBoise's teeth. (R942) Powell poured stone molds from the impressions. (R884-887) These molds, along with molds of the bite impressions of suspects Campbell, Cooksey and Setliff, were mailed to Souviron to be compared with photographs of the bite mark. (R941) Souviron received the items on October 21, 1983. (R1190-1191) After his examination, Souviron telephoned Detective Saladino or Detective Burke and advised them of his findings. (R1209-1210) He had excluded Campbell, Cooksey and Setliff, but had found preliminarily that DuBoise's teeth were consistent with the bite mark. (R1209-1210) Souviron requested further information--regular, more accurate dental impressions of DuBoise's teeth (R1209-1210)--before he would express an opinion to a dental certainty. (R1209-1210)

Based on Souviron's finding the bees wax impressions of DuBoise's teeth to be consistent with the bite mark, Detective Saladino arrested Robert DuBoise on October 22, 1983. (R954) The arrest occurred at 4:30 a.m. (R1870) DuBoise was taken to Powell's dental office, and after five hours, accurate dental molds of DuBoise's teeth were made. (R888-902) Powell noted that DuBoise had no missing teeth or gaps between his teeth.

(R896) The new dental molds were delivered to Souviron, and based on an examination of these molds, Souviron concluded to a reasonable dental certainty that DuBoise made the bite mark. (R1217-1254)

Dr. Norman Sperber, a forensic odontologist hired by the defense, examined the teeth molds and bite mark photographs and disagreed with Souviron's conclusions. (R1392-1393,1464) He said that DuBoise could not have made the bite mark on Graham's face. (R1392-1393,1464) Sperber, who was the past chairman of the national committee to establish bite mark comparison guidelines and standards (R1385-1388), was critical of Souviron's technique. (R1384-1464) He said that he would never use bees wax to make impressions for stone models of a person's teeth because the wax is too soft. (R1423-1424) Stone models made from bees wax impressions were not, in his opinion, an acceptable method for bite mark comparison. (R1423-1424) Sperber also concluded that Souviron had not lined up the stone models accurately on the bite mark; his positioning was one tooth off resulting in inaccurate comparisons of teeth to marks. (R1438-1440) Sperber also found several unexplainable discrepancies between Robert DuBoise's teeth and the bite mark (R1392-1422), and concluded that DuBoise could not have made the bite mark. (R1461-1464)

Physical evidence the State produced did not provide any link between DuBoise and the crime. Latent fingerprints of comparable quality were lifted from an air conditioning guard and from papers inside Graham's wallet. (R474-476,517-527) Five prints from the papers were those of the victim's, and two were

not identified. (R504-507) Four prints from the air conditioner guard were not identified. (R518-522) Hairs recovered from the evidence were either the victim's or not identified. (R619-627) None were consistent with DuBoise's. (R631-637) The type O blood which was recovered could not be linked to DuBoise. (R577-610) Both DuBoise and the victim had type O blood and both were secretors. (R588-589) Finally, a cast of a shoe print found at the scene proved to be of insufficient quality for comparison. (R477-478,614-617)

Three witnesses testified to alleged incriminating admissions DuBoise made to them. Joanne Suarez said she met DuBoise in a bar in July of 1983. (R754) She met DuBoise's friend, Ray Garcia, at the same time. (R755) Suarez gave DuBoise her telephone number, and she went out with him several times before his arrest in October of 1983. (R755-784) During this time, Suarez had difficulty with her memory because of injuries she received in an accident. (R789) She also took pain medication and drank alcohol daily. (R789-790) While with DuBoise, she was intoxicated on two or more occasions. (R790) Twice during their relationship, Suarez remembers DuBoise stating that he had killed someone. (R761,770-797) She believed that he was merely boasting because he was always talking about fighting or killing people. (R785-786) He did not identify whom he claimed to have killed. (R790) In September or October 1983, while DuBoise spent the night with her, Suarez saw scratches on DuBoise's chest and back. (R758-759,787) Also, on October 14, 1983, Suarez saw what appeared to be a woman's ring on DuBoise's finger. (R764,788) The ring had an opal or pearl

surrounded by diamonds or rubies. (R765,791) When shown a sketch of the ring missing from Barbara Graham's finger (R427-428), Suarez stated that it was not like the ring she saw. (R764-765,793)

Prior to DuBoise's arrest, Jack Andruskiewiecz had a conversation with DuBoise during which DuBoise said that he was wanted for murder. (R1377-1380) Andruskiewiecz lived at the Peter Pan Motel and met DuBoise at a party in a neighboring room. (R1379) While sitting beside DuBoise, Andruskiewiecz noted that DuBoise had a certain look on his face and appeared to be staring at Andruskiewiecz. (R1379) When asked why he was looking in that manner, DuBoise said, "I am bad" and that he was wanted for murder. (R1379-1380) Andruskiewiecz did not believe him. (R1983) This conversation occurred in October 1983 about one week before DuBoise's arrest. (R1382)

Robert DuBoise was arrested on October 22, 1983. (R1965) He was incarcerated in the Hillsborough County Jail where he shared a 16-man cell with Claude Wesley Butler. (R1034) Butler testified that he had met DuBoise once in 1982 (R1033) and recognized him a couple of days after DuBoise was placed in the cell. (R1035) Butler said he had conversations with DuBoise regarding his charges on three or four occasions. (R1035) DuBoise said that he was charged with a crime, killing a girl, which he had not committed. (R1034) He admitted having had sex with the girl, but his two companions were responsible for her death. (R1036-1041) Butler said DuBoise was depressed during one of their conversations and kept stating that he was being wrongly charged with the crime. (R1038)

DuBoise allegedly told Butler that he, his brother, Victor, and Ray Garcia were riding around together one night in Garcia's car. (R1038-1039) They needed money. (R1038) A plan to snatch a purse was devised which involved Robert actually grabbing the purse while Victor and Ray remained in the car. (R1038) They passed a girl walking. (R1039) Robert got out of the car and attempted to grab the purse. (R1039) The girl resisted, and Victor and Ray came to assist. (R1039) Ray grabbed the girl from behind, she turned, looked at Ray and yelled his name. (R1039) They put the girl in the car, drove to a business district downtown where all three men had sex with her. (R1040) Robert attempted to have sex with her first, and during that time, Ray Garcia hit her with a stick. (R1040) Robert got up at that time. (R1040) Ray and Victor both had sex with the girl and both struck her again. (R1040) Robert ran to the car when his brother struck the girl. (R1040-1041) DuBoise was depressed and crying as he related these events to Butler. (R1041)

Butler's credibility was seriously questioned. He denied having been promised any benefit in exchange for his testimony. (R1045-1047) He said that he ultimately received a five year sentence on his pending charges. (R1046) The charges included kidnapping, armed robbery, battery on a law enforcement officer and a probation violation for grand theft. (R1065) Butler had a total of nine or ten prior convictions. (R1064) Butler also suffered psychiatric problems. (R1050-1062) He was taking psychotropic medication while in jail. (R1050-1062) Moreover, he was a drug abuser and had flashbacks. (R1063-1064)

He admitted seeing the walls of the stockade melt and hearing voices. (R1053-1054,1064)

John Parkhill, an attorney who represented DuBoise during the early stages of the case, testified about a discussion he had with Claude Butler. (R1468-1469) During the interview, Parkhill confronted Butler with the alleged statement he made implicating DuBoise in the kidnapping, rape and murder. (R1470) Butler said DuBoise did not make such a statement. (R1470) He told the detective that DuBoise had done so out of fear that the detective would implicate him in the murder. (R1470) On rebuttal, Butler said that he told Parkhill that DuBoise denied the killing but had made other admissions. (R1484-1488)

Myra DuBoise, Robert DuBoise's mother, testified that Robert was at her home on the evening of August 18, 1983. (R1145) Early in the evening she sent Robert out to look for her daughter. (R1145) Ray Garcia drove Robert over in order to look. (R1152-1153) Robert returned and went to bed by 11:00 p.m. (R1152) Myra DuBoise remembers because Ray Garcia returned and tried to awaken Robert at the bedroom window, and she told him to leave. (R1152)

3. Motion to Suppress Evidence

DuBoise filed a motion to suppress the impressions of his teeth made after his arrest and all evidence and testimony based on those impressions. (R2091-2094) The basis for the motion was that DuBoise had been arrested without probable cause and that the stone models were made after this illegal arrest without a warrant and without DuBoise's voluntary consent.

(R2091-2093) The trial court agreed to hear evidence pertaining to the motion during the trial. (R724-725) Circuit Judge Coe stated that he would not make a final ruling on the motion until it was raised on a motion for new trial so that the State could appeal any adverse ruling. (R724-725)

The evidence established that Detective Saladino gathered numerous bees wax impressions of the teeth of suspects. (R938-939) Models made from these impressions were sent to Dr. Souviron for initial comparison purposes. Souviron testified that bees wax impressions were suitable for general comparison purposes but were not suitable for more accurate identification of bite marks. (R1187-1189,1279-1282) He would exclude a person from having made a bite mark based on these impressions, but he would not identify a person as having made a mark. (R1187-1189,1279-1282) Dr. Sperber said bees wax impressions were inadequate for any comparison because the wax was too soft to make accurate impressions. (R1423-1424)

On October 21, 1983, Souviron received molds of DuBoise's teeth made from bees wax impressions. (R1190)(State's Exhibit 85A & B) After a preliminary examination of these molds, Souviron concluded they were consistent with the bite mark--he could not exclude DuBoise from having made the bite. (R1204,1282) He related this information via telephone to the detective (R1209-1210), and later sent a letter. (R1283-1285) (Court's Exhibit 11) Souviron requested additional information, specifically complete, accurate stone models of DuBoise's teeth. (R1209-1211) He denied having told Detective Saladino that a positive identification was made on the bees wax molds. (R1282)

Detective Saladino had DuBoise brought to the police station for questioning on October 21, 1983. (R1003-1007) DuBoise denied his involvement. (R955) He was arrested solely on the basis of the information Souviron telephoned to the detectives. (R1320-1323) The arrest occurred at 4:00 a.m. on October 22, 1983. (R1965) DuBoise was upset, angry and beligerant. (R955-956) Officer Vincent Rodriquez handcuffed DuBoise and used a restraining rope since DuBoise was kicking and fighting. (R1003-1005) The officer transported DuBoise to the booking area at 5:00 a.m., and DuBoise's demeanor had not changed. (R1012-1015) He was still angry and yelling when Rodriquez left the jail. (R1014)

At 6:20 a.m., medical personnel at the jail injected DuBoise with Haldol, a tranquilizer. (R1538-1541,2859)(Court's Exhibit 12) That afternoon, Detective Saladino took DuBoise to Dr. Powell's office for the purpose of having accurate stone models of DuBoise's teeth made. (R943) Saladino had a search warrant but did not serve it. (R1541,2603-2606,2674) The warrant had been signed by Judge Griffen at 3:00 p.m. (R2677) Saladino checked DuBoise out of the jail at 4:00 p.m., explained his purpose and advised DuBoise that he was being taken to a dentist to have molds of his teeth made. (R2675,2683) Saladino had the warrant in hand but did not serve it. (R2604-2605,2674-2676) Powell said that DuBoise and the officers were in his office about five hours. (R897) The actual procedure required about one hour and forty-five minutes. (R898) During that time, Powell said that DuBoise was cooperative and did not seem angry.

(R897-898) The stone models Powell made were used by Souviron for comparison purposes. (R1209-1212) These models were the basis of Souviron's opinion that DuBoise made the bite mark. (R1209-1254)

The trial judge found that DuBoise was illegally arrested without probable cause. (R1791-1794) However, he also concluded that DuBoise consented to the making of the models of his teeth after his arrest. (R1995-1803) Consequently, the court denied the motion to suppress.

4. Motion to Suppress Statements

DuBoise challenged the admissibility of the statement he allegedly made to his cellmate, Claude Wesley Butler. (R1026-1031,1804-1812,2121-2124) The challenge rested on two grounds: (1) that detectives had solicited Butler to obtain information from DuBoise making Butler an agent of law enforcement; and (2) that the statements were elicited while DuBoise was incarcerated pursuant to an illegal arrest.

Robert DuBoise was arrested for the murder charge on October 22, 1983. (R1965) He was incarcerated in the Hillsborough County Jail and shared a cell with Claude Butler. (R1034) During this time, Butler met with Detective Saladino on three occasions. (R1071,2689) At the first meeting, Detectives Saladino and Counsman came to interview Butler concerning his own charges. (R1043,2689) DuBoise's name came up during the meeting, and Butler noted that he was in the same cell with DuBoise. (R2687) Saladino asked Butler if DuBoise talked about his case and what Butler heard. (R2687) According to Saladino,

Butler was vague about having heard anything. (R2687) Saladino then told Butler, "If you hear anything, hear a conversation, call us. See what you can do for us or whatever." (R2687)

Butler talked to DuBoise about his case three separate times. (R1035) DuBoise said little about the circumstances of the case during the first two. (R1035-1037) The third conversation occurred in December during the Christmas holidays. (R1037-1043) At that time DuBoise allegedly told Butler the details of his involvement. (R1037-1043) On January 25, 1984, Butler met with Saladino and related this to him. (R2687-2689)

The trial court rejected both of DuBoise's challenges to the admissibility of Butler's testimony. First, the court concluded that Butler was not an agent of law enforcement at the time he obtained the admissions. (R1026-1031) Second, the court found that DuBoise's illegal arrest for murder did not taint the admissibility of the statements. (R1804-1812) Relying on inevitable discovery principles, the court reasoned that at the time of the statement in December 1983, DuBoise was in legal custody because of the November arrest for violation of probation on unrelated charges. (R1867,1903,1927) The basis for the violation of probation was DuBoise's arrest for the murder and an allegation that he changed his residence without permission. (R1865,1901,1934)

5. The Jury and Jury Selection

During the selection of alternate jurors, one juror, Laura Niswonger, was excused for cause because of her beliefs against capital punishment. (R256) She responded affirmatively

when asked if her beliefs would lead her to automatically vote for life in the penalty phase regardless of the evidence which might be presented. (R256) She was not asked the impact her beliefs would have in deciding guilt or innocence. (R256)

After the jury was selected and before any evidence was presented, Juror Robert Goodyear reported a conversation which he had inadvertantly overheard in the hallway. (R267) The juror heard a man in the hallway state that someone other than Robert DuBoise had admitted to the killing. (R267,297-298) Ancel King was the man speaking in the hallway. (R299-301) He testified before the court that Ray Garcia had come into his shop and admitted to the killing. (R299-301) The court excused Goodyear from the jury and replaced him with an alternate. (R276)

State witness Claude Butler, after his testimony, told a bailiff that he recognized one of the jurors. (R1329) The bailiff reported the comment to the court. (R1329) An inquiry of the jurors collectively was made asking if any of them knew any of the witnesses. (R1332) Each gave a negative response. (R1332) Counsel deposed Claude Butler on this question. (R1345-1346,2836-2840) He said the juror was the young black male and would have known Butler by the name "C.C." (R1345-1346,2836-2837) Butler said the juror looked at him and seemed to be trying to speak to him. (R1346,2837) The juror appeared to recognize him. (R1346,2837) The court made no further inquiry of the juror and denied DuBoise's motion for mistrial. (R1331,1349-1350)

6. Closing Arguments

In his closing argument during the guilt phase of the trial, the prosecutor twice made comments prompting a motion for mistrial. (R1552,1591,1608,1636-1637) First, he referred to the body having been mutilated and characterized DuBoise's actions as "animalistic violence." (R1552,1591) Second, he asked the jury to evaluate the evidence from his point of view; to consider what he would have thought or said:

> Ladies and gentlemen, I have said enough. You have heard the evidence. I ask that you go back and if I missed something--invariably I have missed something, go back in the tone and tenure of what I have suggested to you and among each other say, what would Ober have done? How would he respond to that?

(R1608) The court denied both motions for mistrial. (R1591, 1636-1637)

7. Penalty Phase Evidence and Sentencing

The State and the defense introduced additional evidence at the penalty phase. (R1671-1676) Through the pathologist, Lee Miller, the prosecution presented additional photographs detailing the injury to the victim. (R1671-1674) Victor DuBoise, Sr., Robert's father, testified in mitigation. (R1674-1676) He described Robert's family background. Robert was the fourth of seven children and was born in 1964. (R1675-1676) His father said Robert was a good son and tried to help the family even when he was young. (R1676) The family lived in Georgia, Florida and South Carolina while Robert was growing up. (R1675) At one time, the entire family had to live in the family's automobile. (R1676) The State and the defense also stipulated to the fact that Robert DuBoise had an I.Q. of 79 or 80. (R1677)

After hearing arguments and jury instructions, the jury returned a life recommendation by a vote of 12 to 0. (R1696) Circuit Judge Harry Lee Coe, III, immediately sentenced DuBoise to death. (R1698-1700) The court orally announced his findings of four aggravating circumstances and no mitigating ones. (R1699-1700)(A1-2) No written order was prepared or filed.

SUMMARY OF ARGUMENT

1. Robert DuBoise was arrested without probable cause, and the trial court found the arrest to be illegal. Nevertheless, the court admitted into evidence dental models of DuBoise's teeth made within hours of the arrest on the ground that DuBoise consented to the making of the models. The court's ruling violates the Fourth Amendment, since the State did not prove by clear and convincing evidence that the consent was voluntarily given after an unequivocal break from the taint of the illegal arrest.

2. The alleged confession DuBoise made to his cell-mate, Claude Butler, was inadmissible as a violation of the Fourth Amendment. An unbroken chain of continued improper police activity connected the illegal arrest and the giving of the statement. The State could not prove that intervening events purged the taint of the illegal arrest from the statement.

3. Claude Butler's testimony regarding the alleged statements DuBoise made to him was also admitted in violation of DuBoise's Sixth Amendment right to counsel. Detectives had secured Butler's cooperation as a State agent before he obtained the statements from DuBoise. DuBoise had been indicted and was represented by counsel at the time of the statements. The detectives, through Butler, improperly confronted DuBoise about the crime without the presence of counsel.

4. The trial court violated due process of law in refusing to rule upon DuBoise's motions to suppress evidence and statements until the issues were reraised on a motion for

new trial. These rulings should have been made prior to or during trial. By delaying the rulings until after the verdict, the court's decision may have been improperly prejudiced by the jury's verdict.

5. A mistrial should have been granted after the prosecutor's improper closing argument during the guilt phase of the trial. The argument requested the jury to consider the prosecutor as another juror during its deliberations; to evaluate the evidence from his point of view. In essence, the argument inserted a thirteenth juror into the jury room.

6. The trial court should have granted a mistrial when it was revealed that key prosecution witness, Claude Butler, was acquainted with one of the jurors. Butler testified to alleged statements DuBoise made to him while they were cellmates. Butler's credibility was a critical issue at trial. Allowing Butler's acquaintance to remain on the jury created the risk that credibility issues would be decided on information gained outside of the courtroom.

7. Prospective jurors were excused for cause because of their beliefs in opposition to capital punishment. This method of selecting jurors results in a jury which is not representative of a cross section of the community and is more prone to convict. This question is currently pending decision in the United States Supreme Court in Lockhart v. McCree.

8. DuBoise's probation for burglary and grand theft was erroneously revoked. The court considered evidence which had been unconstitutionally obtained and should have been ex-

cluded. Furthermore, evidence that DuBoise changed his address without permission was insufficiently proven.

9. The jury recommended a life sentence by a vote of 12 to 0. Imposing a death sentence over that recommendation violated the standard announced in Tedder v. State. DuBoise's minor participation in the homicide coupled with other mitigating factors constituted a reasonable basis for a life sentence.

10. Evidence at trial demonstrated that Robert DuBoise's uncharged accomplices, Ray Garcia and Victor DuBoise, actually killed the victim. At best, Robert DuBoise's culpability extended only to the other felonies committed during the homicide. There had been no plan to kill. Robert DuBoise did not kill, attempt to kill or intend to kill, and his death sentence violates the Eighth and Fourteenth Amendments.

11. Robert DuBoise's death sentence is unconstitutional because the trial court improperly found and considered three aggravating circumstances and failed to consider valid mitigating circumstances. First, the court erroneously relied upon a vacated conviction to find a previous conviction for a violent felony. Second, a finding that the homicide was committed to avoid arrest was not substantiated by the evidence. Third, since manner of death produced little or no suffering, the heinous, atrocious or cruel factor was not appropriately found. Fourth, the statutory mitigating circumstance regarding minor participation should have been found, since the unplanned homicide was committed by an accomplice. Fifth, DuBoise's age and dull normal intelligence should have been a factor at sen-

tence. Finally, evidence of his deprived family background should have been considered as a nonstatutory mitigating circumstance.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE MODELS OF DUBOISE'S TEETH AND ALL TESTIMONY BASED UPON THE COMPARISON OF THOSE MODELS TO THE BITEMARK, SINCE THE MODELS WERE OBTAINED AFTER DUBOISE'S ILLEGAL ARREST, WITHOUT A SEARCH WARRANT AND WITHOUT HIS VOLUNTARY CONSENT IN VIOLATION OF THE FOURTH AMENDMENT.

The determinative question here presented is the validity of DuBoise's consent to have stone models of his teeth made after his illegal arrest. The trial judge found the arrest illegal for lack of probable cause. (R1791-1794) Although the detectives secured a search warrant to obtain the models after DuBoise's arrest, the warrant was never served. (R2605,2674-2677) In arguing the motion to suppress, the prosecutor did not attempt to rely upon the search warrant. (R1541, 1795-1812) Consequently, the models of DuBoise's teeth, and any evidence based upon them, are inadmissible as the product of an illegal arrest, unless DuBoise voluntarily consented to the making of the models. No such consent exists in this case. The evidence was admitted in violation of the Fourth Amendment to the United States Constitution. DuBoise urges this Court to reverse his convictions.

Any consent to search given after police illegal activity, such as the illegal arrest in this case, is presumptively tainted and involuntary. E.g., Florida v. Royer, 460 U.S. 491 (1983); Norman v. State, 379 So.2d 643 (Fla.1980); Bailey v.

State, 319 So.2d 22 (Fla.1975). Such a taint can be overcome only if the State proves, by clear and convincing evidence, that the consent was voluntarily given after an unequivocal break between the illegal police activity and the consent. Ibid.

> There may be a few rare instances in which a valid consent could be made after an illegal arrest, provided the circumstances were so strong, clear and convincing as to remove any doubt of a truly voluntary waiver. However, ordinarily consent given after an illegal arrest will not lose its unconstitutional taint.

Bailey, at 27-28.

This case does not present one of those "rare instances in which a valid consent [has been] made after an illegal arrest." Ibid. The State did not prove the existence of a voluntary consent after an unequivocal break between the police illegal activity and the alleged consent. Nothing occurred to give DuBoise the impression that he had the right to refuse. See, Howard v. State, 394 So.2d 440 (Fla.3d DCA 1981); St. John v. State, 363 So.2d 862 (Fla.4th DCA 1978), disapproved on other grounds, Hetland v. State, 387 So.2d 963 (Fla.1980). Indeed, after his arrest, he was handcuffed and tied with a rope; transported to jail; given an injection of a major tranquilizer, Haldol;[1/] and finally, told that molds of his teeth were going to be made. No one advised him that he could refuse; no one ever asked for his consent. He remained in illegal custody. He experienced nothing but a show of force by the police.

1/ Physicians' Desk Reference, 39th Ed., 1985, at p.1201.

The fact that detectives acquired a search warrant just before transporting DuBoise to the dentist does not break the chain of illegal police conduct. First, the warrant was not used to justify the search and seizure of DuBoise's mouth. Even if used, it was invalidly issued without probable cause, since the police had no additional evidence at the issuance of the warrant than at the time of the arrest.

> A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was a warrant at all. [Footnote omitted.]

Bumper v. North Carolina, 391 U.S. 543,549-550 (1968). Moreover, the existence of the warrant would have further tainted the consent. In Bumper, the Supreme Court held that the defendant's grandmother did not voluntarily consent to search after being told of the existence of a warrant; she merely acquieced to the officer's apparent authority. Just as in this case, the warrant in Bumper was not executed or relied upon to justify the search.

Finally, statements DuBoise made after being told that molds were going to be made of his teeth which suggested his agreement do not evidence a voluntary consent. First, DuBoise's statements must be considered in view of his intelligence level; he had an I.Q. of 79. (R1677) Second, his statements were made immediately after the officers told him what would happen. He said, "Fine, go ahead and do it. I'll prove to you that I didn't bite the girl. I didn't have anything to do with it."

These statements were nothing more than DuBoise's submission to police authority. He was still illegally in custody. "[T]here [was] no evidence which disassociates appellant's 'consent' from his illegal detention." Tennyson v. State, 469 So.2d 133, 136 (Fla.5th DCA 1985). He had no choice but to agree with the officer's announced plan. He had already experienced the officers' methods for subduing him when he protested his arrest. No doubt, DuBoise realized that he could again be handcuffed, tied with a rope and injected with drugs to secure his "consent."

DuBoise did not consent to the making of the models of his teeth. The State could not prove a valid consent by clear and convincing evidence. This Court must reverse this case for a new trial in which evidence relating to models of DuBoise's teeth is excluded.

ISSUE II.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF CLAUDE BUTLER REGARDING ADMISSIONS DUBOISE ALLEGEDLY MADE WHILE INCARCERATED, BECAUSE ANY SUCH ADMISSIONS WERE THE PRODUCT OF AN ILLEGAL ARREST IN VIOLATION OF THE FOURTH AMENDMENT.

Confessions secured as the result of an illegal arrest are inadmissible as violative of the Fourth Amendment, Wong Sun v. United States, 371 U.S. 471 (1963), unless the State can prove that intervening events have broken the causal link between the illegal arrest and the confession. Taylor v. Alabama, 457 U.S. 687 (1982); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975). In this case, the trial judge found DuBoise's arrest for murder to be illegal. (R1791-1794) However, the court concluded that his intervening arrest for violation of probation was sufficient to purge the taint of the illegal arrest from the statements. (R1804-1812) The court reasoned that DuBoise's custody was transformed from illegal to legal with the probation arrest on November 5, 1983, thereby rendering DuBoise's December statements admissible.[2/]

[2/] The trial judge actually concluded that the doctrine of "inevitable discovery" applied to this situation. (R1804-1812) This conclusion was incorrect since that doctrine requires an investigation independent of the police illegality which would have led to the same evidence. Nix v. Williams, __U.S.__, 81 L.Ed.2d 377 (1984). The inevitable discovery doctrine's cousin, the "independent source doctrine," is also inapplicable since it requires not only an independent investigation, but also a totally separate source of the evidence. Kastigar v. United States, 406 U.S. 441,460-461 (1972); Murphy v. Waterfront Comm'n. of New York Harbor, 378 U.S. 52,79 (1964); see, also Nix, 81 L.Ed. 2d at 387. No investigation independent of the illegal arrest existed in this case. Consequently, the "attenuated taint" doctrine of Brown v. Illinois, 422 U.S. 590 (1975) is the only applicable theory.

(R1809-1812) This simplistic analysis is, however, insufficient. One factor cannot be determinative of the question of whether the taint of the illegality persists. As the Supreme Court in Brown noted,

> The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. the workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test.

Brown, 422 U.S. at 603. All of the circumstances from the illegal arrest to the making of the statements must be evaluated.

Initially, the arrest for violation of probation itself was not free from the taint of the illegal arrest for murder. The affidavit for the violation alleged the arrest for murder as the primary ground for revocation. (R1865-1866,1901-1902,1934-1935) A technical violation, changing residence without permission, was the second ground, but it alone would not have prompted an arrest. (R1810-1812) Even if a single intervening event could break the link of the initial illegal arrest for murder, this probation arrest would not qualify. It, too, was a direct product of the illegal arrest.

Looking at all circumstances subsequent to the illegal arrest and preceding the statements reveals an unbroken chain from illegal arrest to the statements:

> (1) DuBoise was arrested for murder without probable cause on October 22, 1983. (R1791-1794,1965)
>
> (2) When DuBoise protested his arrest, he was handcuffed, tied with a rope, and in-

jected with a major tranquilizer. (R955-956,1003-1005,1012-1014,1538-1541,2859)

(3) Later on the day of his arrest, molds of DuBoise's teeth were made without a warrant and without his voluntary consent. (See, Issue I, supra.)

(4) Within a few days of the arrest, detectives secured the assistance of DuBoise's cellmate, Claude Butler, in obtaining statements from DuBoise. (See, Issue III, infra.)

(5) Butler engages DuBoise in conversation about his charges in October and November without acquiring incriminating statements. (R1035-1037)

(6) On November 5, 1983, a warrant for violation of probation based primarily on the murder arrest is served on DuBoise. (R1865-1866,1901-1902,1934-1935)

(7) During the Christmas holidays, Butler finally obtains incriminating admissions from DuBoise. (R1037-1043)

Far from breaking the nexus of illegal arrest, these circumstances show the continued exploitation of the arrest and additional police misconduct as well.

DuBoise's statements were the direct product of his illegal arrest. They should have been suppressed. This Court must reverse this case for a new trial.

ISSUE III.

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF CLAUDE BUTLER REGARDING ADMISSIONS DUBOISE ALLEGEDLY MADE TO HIM WHILE BUTLER'S CELLMATE, BECAUSE BUTLER WAS ACTING AS AN AGENT OF LAW ENFORCEMENT AT THE TIME HE OBTAINED THE STATEMENTS THUS VIOLATING DUBOISE'S RIGHT TO COUNSEL.

Robert DuBoise was arrested for murder on October 22, 1983 (R1965), and the grand jury indicted him on November 23. (R1966-1967) He was incarcerated in the Hillsborough County Jail. (R1034) Claude Butler was one of his cellmates. (R1034) Shortly after DuBoise's incarceration, Detectives Saladino and Counsman interviewed Butler about his charges. (R1043,2689) Butler had been acquainted with Counsman for some time. (R1072) During the interview DuBoise's name was mentioned, and Saladino asked if DuBoise talked about his case. (R2687) According to Saladino, Butler was vague about having heard anything. (R2687) Saladino then asked Butler to obtain information from DuBoise about his case. (R2687) Saladino's exact words were:

> If you hear anything, hear a conversation, call us. See what you can do for us or whatever.

(R2687)

Butler engaged DuBoise in conversation about his case three different times. (R1035) It was in the third that DuBoise allegedly related the details of the offense. (R1037-1043) The conversation was during the Christmas holidays and DuBoise was depressed about his circumstances. (R1037-1038) On January 25, 1984, Butler met with Detective Saladino and gave him the information he had obtained. (R2687-2689)

According to Butler, he was not promised anything in exchange for his information and testimony. (R1045) The prosecutor did tell him that his help would be appreciated. (R1045) After giving a statement to the State, Butler was sentenced on his pending charges. (R1044-1046,1070) He received a total of five years on his pending charges which included kidnapping, armed robbery, battery on a law enforcement officer and grand theft. (R1046-1047,1065)

The statements Butler obtained were taken in violation of DuBoise's right to counsel. Butler was a State agent who improperly elicited statements from DuBoise while he was in custody and represented by counsel without affording him the right to consult with counsel or obtaining a waiver of counsel. Such a confrontation was unconstitutional. Amend. V, VI, XIV, U.S. Const.; Art. I, §§9,16, Fla. Const.; Maine v. Moulton, __ U.S.__, 38 Cr.L. 3037 (1985); United States v. Henry, 447 U.S. 264 (1980); Malone v. State, 390 So.2d 338 (Fla.1980).

This Court addressed a similar issue in Malone v. State, 390 So.2d 338 (Fla.1980). Malone was arrested and indicted for first degree murder. While incarcerated awaiting trial, Malone met another inmate who, two and one-half weeks later, became an informant for the State. A detective asked the informer to just listen to what Malone said and report anything he heard about the location of a victim's body. The informer suggested a plan to obtain information from Malone. The informer was transferred to another jail but told Malone he was being released. He returned to the jail to visit Malone. Prior to being transferred the informer told Malone that he knew a

lawyer who could help him. Malone confessed to the informer and gave instructions on where to find the body. The directions he gave were inadequate, but the informer testified against Malone at trial. Following United States v. Henry, 447 U.S. 264 (1980), this Court reversed Malone's conviction holding that the informer acted as a State agent and that

> ...it was indirect surreptitious State action which elicited Malone's incriminating statements without assistance of counsel and therefore in violation of Malone's Sixth Amendment right.

Malone, 390 So.2d at 340-341.

In Henry, the defendant was arrested and indicted for bank robbery. Another inmate in the jail where Henry was incarcerated before trial had served as a confidential informant in the past. Federal agents contacted this inmate and asked him to be alert to any statements Henry made about the robbery, but not to question him. After his release, the informer reported the information he heard. The agents paid the informer for the information. Acknowledging the applicability of its earlier decision in Massiah v. United States, 377 U.S. 201 (1964) which held that the Sixth Amendment applies to surreptitious interrogations of a defendant after indictment, the Supreme Court framed the question and factors to consider as follows:

> The question here is whether under the facts of this case, a Government agent "deliberately elicited" incriminating statements from Henry within the meaning of Massiah. Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under in-

> dictment at the time he was engaged in conversation by Nichols.

United States v. Henry, 447 U.S. at 270. The Court then concluded that

> This is not a case where, in Justice Cardozo's words, "the constable...blundered," People v. DeFore, 242 NY 13,21, 150 NE 585,587 (1926); rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel.

Ibid. at 274-275.

The United States Supreme Court recently clarified its holdings in Massiah and Henry in Maine v. Moulton, __U.S.__, 38 Cr.L. 3037 (1985). After Moulton had been indicted and his trial was pending, Colson, his co-defendant, began cooperating with law enforcement. Moulton and Colson had planned to kill a key witness in their case prior to Colson's cooperation with the police. At police direction, Colson continued to discuss these matters with Moulton over the telephone and later in a face to face meeting which Moulton initiated. Colson recorded each of these conversations. The prosecution was allowed to use the recording of the face to face meeting at trial. The Supreme Court of Maine reversed holding that Moulton's right to counsel had been violated. On certiorari, the United States Supreme Court affirmed, agreeing with the Maine Court that Moulton's right to counsel had been violated. The Court also rejected the State's contention that no violation occurred because Moulton initiated the meeting where the recording took place. The governments' knowingly use of an opportunity to confront the defendant without counsel was sufficient to consti-

tute a violation of the Sixth Amendment.

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached. See Henry, 447 U.S., at 276 (Powell, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.[Footnote omitted.]

Moulton, 38 Cr.L. 3042.

The State violated Robert DuBoise's Sixth Amendment right to counsel in this case. Law enforcement used Butler's cellmate status as a vehicle to confront DuBoise about his offenses in an effort to obtain incriminating admissions. Butler was a State agent. He was asked to cooperate with the plan, and did so, ultimately obtaining the incriminating statements. Even though a benefit from the State is not required for an agency relationship, Malone, 390 So.2d at 340, Butler did receive sentencing considerations. Butler elicited the statements at least one month after DuBoise was indicted and while he was

represented by counsel. Butler's testimony should have been suppressed. DuBoise is now entitled to a new trial.

ISSUE IV.

THE TRIAL COURT ERRED IN REFUSING TO RULE ON DUBOISE'S MOTIONS TO SUPPRESS UNTIL THE ISSUES WERE RAISED ON A MOTION FOR NEW TRIAL.

The trial court refused to hear DuBoise's motions to suppress prior to trial. (R724-725) Instead, the court ruled that evidence pertaining to the motions could be developed during the trial as the witnesses testified. (R724-725) Furthermore, the court stated that any rulings on the suppession of the evidence would not be made until the motion for new trial proceedings. (R724-725) This procedure was adopted to insure the State an opportunity to appeal any adverse ruling, since a ruling during the trial could have precluded such an avenue of review.[3/] (R724-725) However, the impact of this procedure on DuBoise was to delay the consideration of his motions to suppress until after the verdict--a time when the trial judge is more likely to have prejudged the merits of the motions. See, Smith v. State, 372 So.2d 86 (Fla.1979); Land v. State, 293 So.2d 704 (Fla.1974).

DuBoise has been denied due process of law in this case. Amend. XIV, U.S. Const.; Art. I, §9, Fla. Const. His challenges to the admissibility of the evidence and statements should have been heard and ruled upon prior to trial. Fla.R. Crim.P. 3.190(h) and (i); e.g., Land, 293 So.2d 86; McDonnell v. State, 336 So.2d 553 (Fla.1976); Bailey v. State, 319 So.2d

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3/ The State's right to appeal could have been preserved by an agreement prior to any motion to suppress at trial. Savoie v. State, 442 So.2d 308,312 n.1 (Fla.1982).

22,28 (Fla.1975). At the very least, they should have been heard and decided during trial. Savoie v. State, 422 So.2d 308,311-312 (Fla.1982); Davis v. State, 226 So.2d 257,259 (Fla. 2d DCA 1969) The court's consideration of DuBoise's challenges in the post-verdict motion for new trial proceedings was totally inadequate.

This Court addressed a similar problem in Land v. State. The trial court in Land refused to permit the defendant to testify regarding the voluntariness of his confession during a trial proffer before admission of the confession into evidence. On a motion for new trial, the court concluded it had erred and deferred ruling on the motion until a post-trial evidentiary hearing on voluntariness could be held. The defendant refused to offer evidence at this hearing, and the court denied the motion for new trial. On appeal, the District Court affirmed the denial of the motion for new trial. On certiorari, this Court reversed the District Court holding that a voluntariness ruling must be made prior to the admission of the confession; a post-trial hearing is insufficient. Later, in McDonnell, 336 So.2d 553 this Court reaffirmed Land and held that such an error could never be harmless. 336 So.2d at 555. The same error has occurred in this case.

By waiting until after the jury's verdict to decide DuBoise's challenges to the admission of evidence, the court increased the likelihood of prejudging the merits of the claims. This Court has acknowledged this problem in the area of discovery violations. Justus v. State, 438 So.2d 358,366 (Fla.

1983); Smith v. State, 372 So.2d 86 (Fla.1979). Certainly, these principles are even more applicable to the situation in the instant case where violations of constitutional rights are in issue. Without doubt a trial judge will be reluctant to set aside a jury's verdict after a lengthy trial because of a post-trial determination that certain evidence was inadmissible. That bias, whether it be conscious or unconscious, will seep into the decision making process in a post-trial hearing. This problem, along with the policy to avoid piecemeal and unnecessary litigation, justifies the strict enforcement of the rule requiring such decisions to be made before or during trial. This Court must enforce it in this case.

ISSUE V.

THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL AFTER THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT WHICH DIRECTED THE JURY TO EVALUATE THE EVIDENCE FROM HIS PERSPECTIVE AS IF HE WERE ANOTHER JUROR.

During his closing argument in the guilt phase of this case, the prosecutor said,

> Ladies and gentlemen, I have said enough. You have heard the evidence. I ask that you go back and if I missed something--invariably I have missed something, go back in the tone and tenure of what I have suggested to you and among each other say, what would Ober have done? How would he respond to that?

(R1608)(Emphasis added)

The import of this argument was a request that the jury consider the prosecutor as another juror. The prosecutor urged the jury to evaluate the evidence from his point of view--to ask what he would have done or said about a given piece of evidence. This argument improperly inserted a "thirteenth juror" into the jury's deliberative process. It is an argument recently condemned by this Court. Hill v. State, __So.2d__, 10 FLW 555 (Fla.1985)(Case No. 63,902, opinion filed Oct. 10). It is an argument which has the same effect as inserting an extra juror in the jury room; an act which would constitute fundamental error. Fischer v. State, 429 So.2d 1309 (Fla.1st DCA 1983); Berry v. State, 298 So.2d 491 (Fla.4th DCA 1974). It is an argument which denied Robert DuBoise due process of law and a fair trial. Amend. XIV, U.S. Const.; Art. I, §9, Fla. Const.

Unlike Hill v. State, 10 FLW at 556, the error cannot

be deemed harmless in this case. There were serious questions of fact to be resolved. Every key piece of evidence in the State's case was disputed and contradicted. The bite mark opinion evidence presented through Dr. Souviron was contradicted by Dr. Sperber, a forensic odontologist with more impressive experience and credentials. Claude Butler's testimony, the source of the alleged incriminating admissions, was severely impeached. Not only did he have motive to fabricate, but his mental competence to recall, or even testify at all, was questioned. Furthermore, Butler's testimony was contradicted through a statement he gave DuBoise's first trial lawyer, John Parkhill. The damage the prosecutor's remarks had on the jury cannot be minimized. A different verdict could easily have resulted in this case.

DuBoise's motion for mistrial should have been granted.[4/] He urges this Court to reverse his case for a new trial.

[4/] Although defense counsel did not object immediately to the prejudicial remark, an appropriate objection and motion for mistrial was made before the case was submitted to the jury. (R1636-1637) Consequently, the issue has been preserved for appellate review. State v. Cumbie, 380 So.2d 1031,1033-1034 (Fla.1980).

ISSUE VI.

THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL WHEN IT WAS DISCOVERED THAT A KEY WITNESS AND A JUROR WERE ACQUAINTED.

After Claude Butler testified for the State, he reported to a bailiff that he recognized one of the jurors. (R1329) The court inquired of the jurors collectively, some time after Butler's testimony, if any of them knew any of the witnesses. (R1332) Each juror replied negatively. (R1332) When the trial recessed for the day, counsel deposed Butler regarding this matter. (R1345-1346,2836-2840) Butler said that the juror with whom he was acquainted was the young black male juror and that he would have known Butler by his nickname "C.C." (R1345-1346, 2836-2837) Butler and the man were not friends, but they had seen each other probably at the Trophy Room lounge. (R2837) While testifying, Butler noticed the juror appearing to acknowledge him as if he recognized him. (R1346,2837) The trial court made no further inquiry of the jurors after Butler's deposition and denied DuBoise's motion for mistrial. (R1331,1349-1350)

DuBoise was entitled to a trial by an impartial jury. Amend. VI, XIV, U.S. Const.; Art. I, §16, Fla. Const.

> ...the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors.

Irvin v. Dowd, 366 U.S. 717,722 (1961). This right requires jurors who are not biased by their relationships with the cause or parties, including their association with prosecution witnesses. Turner v. Louisiana, 379 U.S. 466 (1965).

In Turner v. Louisiana, the defendant was convicted of murder and sentenced to death. Two deputy sheriffs who were material witnesses against the accused acted as bailiffs for the sequestered jury. The deputies were in the continuous company of the jurors during the trial, eating meals with them and driving them to their lodgings in the evening. On appeal, the state court affirmed finding that no prejudice had been established. The United States Supreme Court reversed holding that this type of association between witnesses and jurors undermined the right to a trial by jury. The Court stated:

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury. It is to be emphasized that the testimony of Vincent Rispone and Hulon Simmons was not confined to some uncontroverted or merely formal aspect of the case for the prosecution. On the contrary, the credibility which the jury attached to the testimony of these two key witnesses must inevitably have determined whether Wayne Turner was to be sent to his death. To be sure, their credibility was assailed by Turner's counsel through cross-examination in open court. But the potentialities of what went on outside the courtroom during the three days of the trial may well have made these courtroom proceedings little more than a hollow formality. Cf. Rideau v. Louisiana, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417.

Turner, 379 U.S. at 472-473.

A similar relationship outside the courtroom existed in this case. The juror had a basis upon which to judge the credibility of Butler's testimony besides that developed at trial.

The trial court did not make further inquiry of the juror after learning of his identity from Butler's deposition.[5/] However, the relationship, regardless of the scope, had the ability to undermine DuBoise's right to an impartial jury. "The potentialities of what went on outside the courtroom...may well have made these courtroom proceedings little more than a hollow formality." Ibid.

Butler's credibility was a critical issue at trial. Furthermore, his testimony was crucial to the prosecution's case. Just as in Turner, defense counsel's best efforts at impeachment and cross-examination may have been useless because of knowledge the juror had gained outside the courtroom. Moreover, this knowledge may have been improperly shared with the other jurors during deliberations thereby tainting the entire jury. See, Rolle v. State, 449 So.2d 1297 (Fla.4th DCA 1984). A mistrial should have been granted. DuBoise asks this Court to reverse his convictions.

5/ At the time the trial judge inquired of the jurors collectively, this juror apparently replied negatively. Confronting this juror after Butler disclosed his identity would have been the best procedure. However, a juror's withholding of such information in itself "casts grave doubts on [his] ability to render a fair and impartial verdict." Mobil Chemical Co. v. Hawkins, 440 So.2d 378,383 (Fla.1st DCA 1983).

ISSUE VII.

THE TRIAL COURT ERRED IN EXCLUDING PROSPECTIVE JURORS FROM DUBOISE'S TRIAL BECAUSE OF THEIR OPPOSITION TO CAPITAL PUNISHMENT, SINCE A JURY SELECTED IN SUCH A MANNER IS NOT REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY AND IS ALSO MORE PRONE TO CONVICT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

During jury selection, the trial court excused at least one juror for cause because of her opposition to the death penalty. (R256) She was excused because of her inability to consider death as a possible sentencing recommendation. (R256) This method of selecting a jury deprived DuBoise of his right to a jury representative of a cross-section of the community and resulted in a jury unconstitutionally prone to convict.

In Witherspoon v. Illinois, 391 U.S. 510 (1968) the Supreme Court of the United States failed to resolve the question of whether a jury which excludes persons opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. The court rejected Witherspoon's arguments that such a jury was unconstitutional because the data adduced was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." 391 U.S. at 517 (footnote omitted). The court held open the possibility that, if presented with persuasive data, it would find a jury which excluded death-scrupled jurors to be violative of a defendant's rights.

Since Witherspoon was decided, studies have been conducted which show beyond peradventure that death-qualified juries are not as representative of the community as they should be and cannot be considered fair and impartial with respect to the issue of guilt or innocence. This was the conclusion reached by the United States District Court for the Eastern District of Arkansas in Grigsby v. Mabry, 569 F.Supp. 1273 (E. D. Ark. 1983), and affirmed by the United States Court of Appeal for the Eighth Circuit in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985). The United States Supreme Court has recently granted certiorari to review the Grigsby decision. Lockhart v. McCree, __U.S.__, 38 Cr.L. 4014 (Case No. 84-1865)(1985).

Grigsby arose from petitions for writs of habeas corpus filed in federal district court by three state prisoners convicted of capital murder. Petitioner Grigsby was sentenced to life in prison without parole for his crime. In Grigsby v. Mabry, 483 F.Supp. 1372 (E.D. Ark. 1980), the federal district court agreed with Grigsby's contention that the trial court abused its discretion in denying him a continuance so that he could present evidence that exclusion of prospective jurors unalterably opposed to the death penalty might affect the jury's determination on the question of his guilt. The court ordered the case sent back to state circuit court for an evidentiary hearing wherein Grigsby could supply proof of his legal premise. The court noted that the data concerning the conviction-proneness issue was "considerably less fragmentary and tentative" than it was when Witherspoon was decided. 483 F.Supp. at 1388.

Both Grigsby and the State appealed, and in Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980) the federal appeals court modified the order of the district court to provide for the evidentiary hearing to be held in federal district court rather than the State court.

After the evidentiary hearing, the federal district court issued its opinion in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983). The court reviewed at some length the studies and scholarly works with which it had been presented and concluded from the evidence that death-qualified juries are not sufficiently representative of the community and "are not only 'uncommonly', but also unconstitutionally, prone to convict." 569 F.Supp. at 1323. A majority of the en banc United States Court of Appeal for the Eighth Circuit affirmed the holding of the district court. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985). (The appellate court modified the lower court's requirement that a bifurcated trial with two juries was needed to remedy the constitutional problems identified in the opinion by permitting the State to formulate other alternatives that would safeguard defendants' Sixth Amendment rights.) The court of appeals recognized that its holding was in conflict with decisions of other circuits, referring to Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858, cert.denied, 459 U.S. 882 (1982), Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert.denied, 440 U.S. 976 (1979), and Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), and expressed the hope that the United States Supreme Court would grant a writ of

certiorari to resolve this "important issue." (The Eighth Circuit's opinion also conflicts with McCleskey v. Kemp, No. 84-8176 (11th Cir. Jan. 29, 1985), in which the en banc court summarily rejected petitioner's claim, which was based in part on Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), that exclusion of jurors adamantly opposed to capital punishment violated his right to be tried by an impartial and unbiased community-representative jury.)

DuBoise realizes that the Eighth Circuit Court of Appeal's decision in Grigsby is not binding authority on this Court. However, this question is soon to be resolved by the United States Supreme Court. Consequently, DuBoise urges this Court to follow Grigsby and reverse his conviction. Alternatively, he asks this Court to reserve ruling on this question until the matter is resolved in the United States Supreme Court.

ISSUE VIII.

THE TRIAL COURT ERRED IN USING ILLEGALLY OBTAINED EVIDENCE IN THE REVOCATION OF PROBATION PROCEEDINGS AND IN REVOKING DUBOISE'S PROBATION.

After DuBoise's arrest for murder, affidavits for violation of probation were filed in three separate cases. (R1865-1866,1901-1902,1934-1935) DuBoise had been on probation for burglary of a conveyance (Cir.Ct.No. 82-11670) and two grand thefts (Cir.Ct.Nos. 82-11925 and 82-11926). The affidavits alleged as grounds that DuBoise had been arrested for the murder and sexual battery and that he had changed his residence without permission. (R1865-1866,1901-1902,1934-1935) These revocation of probation proceedings were consolidated for hearing with the murder trial. (R1900) Circuit Judge Coe revoked DuBoise's probations at the conclusion of the trial. (R1876,1912,1945) The court erred in revoking DuBoise's probation for two reasons: (1) evidence obtained in violation of the United States and Florida Constitutions was improperly admitted, and (2) there was no evidence regarding the issue of whether DuBoise had permission to change his residence.

(a) Admission of unconstitutionally obtained evidence

The exclusionary rule applies to probation revocation proceedings. Art. I, §12 Fla. Const.; State v. Dodd, 419 So.2d 333 (Fla.1982); Grubbs v. State, 373 So.2d 905 (Fla.1979).[6/]

6/ The applicability of the Florida Constitution's exclusionary rule to probation revocations has been certified to this Court. Mendiola v. State, So.2d , 11 FLW 125 (Fla.3d DCA 1985); Cross v. State, 469 So.2d 226 (Fla.2d DCA 1985); Tanner v. State, 463 So.2d 1236 (Fla.4th DCA 1985).

Consequently, the evidence detectives acquired in violation of the Fourth and Sixth Amendments was inadmissible and improperly relied upon to revoke DuBoise's probation. Dental models made of DuBoise's teeth after his illegal arrest and the opinion evidence based on those models and the bite mark should have been excluded. (See, Issue I, supra.) Additionally, all statements obtained from DuBoise after his arrest were illegally used. (See, Issues II and III, supra.) This Court should reverse the order revoking probation with directions that a new hearing be conducted without the use of the unconstitutionally obtained evidence.

(b) Evidence of changing residence without permission insufficient

Condition (3) of DuBoise's probation required him to secure the consent of his probation officer before changing his residence. (R1864,1900,1933) The second allegation in each affidavit for violation of probation charged that DuBoise changed his residence without his probation officer's consent. (R1865-1866,1901-1902,1934-1935) While the State proved that DuBoise changed his residence from his parent's house to the Peter Pan Motel (R1149-1151), there was no evidence concerning whether the move was done with or without consent. Neither DuBoise nor his probation officer testified concerning this issue. The State failed to carry its burden of proof, and the trial court erred in revoking DuBoise's probation on this ground.

ISSUE IX.

THE TRIAL COURT ERRED IN SENTENCING DUBOISE TO DEATH OVER THE JURY'S UNANIMOUS RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE SENTENCE WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

The jury in this case recommended a life sentence for Robert DuBoise by a vote of 12 to 0. (R1696,2143) A jury's recommendation of life must be given great weight, and

> In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908,910 (Fla.1975). This Court has consistently held that a life sentence should be imposed where there is a reasonable basis for the jury's recommendation. E.g., Hawkins v. State, 436 So.2d 44 (Fla.1983); Cannady v. State, 427 So.2d 723 (Fla.1983); Walsh v. State, 418 So.2d 1000 (Fla. 1982). Such a reasonable basis exists in this case, and the trial court should have imposed a life sentence.

Unlike the trial judge, the jury did not fail to consider DuBoise's relatively minor participation in the homicide. The State's best evidence demonstrated that Ray Garcia and Victor DuBoise actually killed the victim. This fact, alone, is a reasonable basis for the jury's life recommendation. E.g., Hawkins, 436 So.2d 44; Goodwin v. State, 405 So.2d 170 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla.1980); Malloy v. State, 382 So.2d 1190 (Fla.1979). Indeed, DuBoise's statements

show that he did not plan to kill or intend that a killing occur. Consequently, his death sentence was not only unreasonable, but also unconstitutional. (See, Issue X, infra.) Enmund v. Florida, 458 U.S. 782 (1982). Part of the rationale noted in Enmund for holding that death was an inappropriate penalty for murder where the defendant did not kill or intend to kill was that juries were reluctant to impose death for such crimes. Ibid. at 795-796. Juries are the monitor of community standards in that regard. At best, DuBoise's crime was no more than the one for which Enmund held death was not a possible penalty. DuBoise's jury, like others throughout the country, decided that such a crime did not deserve the ultimate penalty of death. The sentencing judge, not the jury, failed to discern the proper penalty.

In addition to DuBoise's minor participation in the murder, the jury reasonably recommended life because the more culpable offenders, Ray Garcia and Victor DuBoise, were never even arrested. Law enforcement stopped its investigation after Robert DuBoise was arrested. (R952) This Court has long held that the law does not countenance unequal treatment for offenders who are equally culpable. E.g., Neary, 384 So.2d 881; Malloy, 382 So.2d 1190; Barfield v. State, 402 So.2d 377 (Fla.1981); Slater v. State, 316 So.2d 539 (Fla.1975). Certainly the imposition of death on the least culpable cannot be condoned. Juries have acknowledged distaste for unequal treatment of offenders by recommending life, and this Court has approved such recommendations as reasonable. Ibid. The jury in this case

could have reasonably based its life recommendation upon the unequal treatment of offenders.

DuBoise's mental capacity and his deprived family background also justify the jury's recommendation. His father testified in mitigation during the penalty phase. (R1674-1676) He described the economically deprived living conditions under which Robert grew up. The State and the defense also stipulated to the fact that Robert DuBoise had an I.Q. of only 79. (R1677) Either of these factors could have reasonably justified the jury's recommendation of life.

Finally, the trial judge's decision to impose death over the life recommendation was skewed by his erroneous findings regarding aggravating circumstances. (See, Issue XI, infra.) The court improperly found three of the four aggravating factors relied upon to support the sentence. Only the circumstance of the homicide occuring during an attempted robbery is supported by the evidence. And, even that factor should be afforded little weight since it was the underlying felony for the felony murder theory of prosecution. (R1549,1609) But for its existence, Robert DuBoise may not have even been convicted of first degree murder.

A life sentence was the only appropriate sentence for the homicide for which Robert DuBoise was convicted. The jury correctly evaluated the case and determined the proper sanction. The trial judge did not. This Court must reverse DuBoise's death sentence.

ISSUE X.

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS IN SENTENCING DUBOISE TO DEATH SINCE THE EVIDENCE PROVED THAT DUBOISE DID NOT ACTUALLY KILL, ATTEMPT TO KILL OR INTEND THAT A KILLING OCCUR.

In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court held that a death sentence could not be constitutionally imposed upon a defendant convicted of felony murder who did not take life, attempt to take life or intend that life be taken during the course of the underlying felony. Emphasizing the need to focus upon the individual culpability of the offender, the Court concluded that a defendant in such circumstances is morally no more culpable than others who commit the same felony where no death occurs. The court drew a parallel to such felony murder circumstances and the question of a death sentence for rape of an adult. Having earlier held that a death sentence for rape is cruel and unusual punishment because the rapist did not take life in Coker v. Georgia, 433 U.S. 584 (1977), the Court likewise concluded that death was a disproportionate punishment for felony murder when the defendant did not kill, attempt to kill or intend to kill. In its analysis, the Court said,

> ...The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio,

> 438 U.S. 586,605 (1978)(footnote omitted), which means that we must focus on 'relevant facets of the character and record of the individual offender.' Woodson v. North Carolina, 428 U.S. 280,304 (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

Enmund, at 798.

Evidence of DuBoise's culpability demonstrates that he, like Enmund, did not take life, attempt to take life or intend to take life. The State's best evidence shows nothing more than DuBoise's participation in a robbery and sexual battery. In his closing argument, the prosecutor conceded that there was no evidence that DuBoise actually killed. (R1548) DuBoise's alleged statements to Claude Butler reveal that he did nothing more than participate in an attempted robbery and attempted sexual battery. (R1038-1041) The entire plan had been a simple purse snatching. (R1038-1039) It was Victor DuBoise and Ray Garcia who escalated the crime. (R1039-1041) It was Ray Garcia who said the victim had to die because she recognized him. (R1039) It was Ray Garcia and Victor DuBoise who actually

bludgeoned the victim to death. (R1038-1041) Robert DuBoise did not plan or participate in the killing and left the immediate scene when that violence began. (R1040-1041)

DuBoise's death sentence is disproportional to his crime and constitutes cruel and unusual punishment. Enmund v. Florida compels a reduction of his death sentence to life imprisonment.

ISSUE XI.

THE TRIAL COURT ERRED IN SENTENCING DUBOISE TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Section 921.141, Florida Statutes was improperly applied in this case. These misapplications reinject into the sentencing process the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972). Florida's statute was designed to cure these ills. Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla.1979). However, a sentence imposed under the statute in an incorrect manner violates the Eighth and Fourteenth Amendments just as much as one imposed before the current law was enacted. Specific misapplications of Section 921.141, Florida Statutes in this case are treated separately in the remainder of this argument.

A.

The Trial Court Erred In Finding As An Aggravating Circumstance That DuBoise Had A Previous Conviction For A Violent Felony.

The sentencing judge found that DuBoise had a previous conviction for a violent felony for purposes of the aggravating circumstance provided for in Section 921.141(5)(b), Florida Statutes. (R1699)(A1) However, the court did not state what prior conviction DuBoise had to justify this finding. (R1699)(A1) The judge's oral pronouncement of his sentencing findings are inadequate, and on that basis alone, a reversal for a new sentencing order would be appropriate. Cave v. State, 445 So.2d

341 (Fla.1984). This Court need not take that action, however, because the only conceivable conviction which could support the finding is the contemporaneous conviction for attempted sexual battery. (R1658-1660,2141-2142) DuBoise's other convictions for burglary of a conveyance and grand theft would not qualify. (R1700-1701,1871-1875,1907-1911,1940-1941) See, Mann v. State, 420 So.2d 578 (Fla.1982); Lewis v. State, 398 So.2d 432 (Fla. 1981).

Assuming the attempted sexual battery was the previous conviction for a violent felony the court relied upon, it too was insufficient to support the aggravating circumstance. After the trial and imposition of sentence, the trial court granted DuBoise's motion in arrest of judgment which vacated the attempted sexual battery conviction. (R2155-2156,2217) Consequently, the conviction is invalid and will not support the aggravating circumstance. Oats v. State, 446 So.2d 90,95 (Fla.1984)(conviction valid at sentencing but vacated on appeal cannot be used as an aggravating factor).

This aggravating circumstance of a previous conviction for a violent felony should not have been found and considered in sentencing. DuBoise's death sentence should be reversed.

B.

The Trial Court Erred In Finding As An Aggravating Circumstance That The Homicide Was Committed To Avoid Arrest.

In sentencing DuBoise to death the trial court found as an aggravating circumstance that the homicide was committed to avoid arrest. (R1699)(A1) Section 921.141(5)(e), Florida

Statutes. Once again, the court failed to state the factual circumstances upon which this finding was based. (R1699)(A1) The only possible evidence to support this factor is DuBoise's alleged statements to Claude Butler that the victim recognized Ray Garcia. (R1039) However, this evidence is insufficient to prove the existence of this circumstance.

When the homicide victim is not a police officer, the proof of intent to avoid arrest must be very strong and the dominant or only motive for the homicide. Riley v. State, 366 So.2d 19 (Fla.1978); see also, Menendez v. State, 368 So.2d 1278 (Fla.1979). Evidence that the victim recognized the perpetrator is not enough to meet this test. Rembert v. State, 445 So.2d 337 (Fla.1984).

Assuming the victim's recognition of Ray Garcia was sufficient to prove this factor, it did not prove its applicability to Robert DuBoise. It was Ray Garcia who was recognized. It was Ray Garcia who struck the first blow, and it was Ray Garcia and Victor DuBoise who actually killed the victim. Any intent to kill to avoid arrest cannot be attributed to Robert DuBoise. He did not kill, attempt to kill or intend to kill. (See, Issue X, supra.) He cannot be held vicariously liable for the aggravating circumstances created by the independent acts of Ray Garcia.

C.

The Trial Court Erred In Finding That The Homicide Was Especially Heinous, Atrocious Or Cruel.

Initially, this aggravating factor cannot be applied to Robert DuBoise even if the circumstances of the crime support

it. He did not participate in the killing. He did not kill, attempt to kill, plan a killing or intend that a killing take place. (See, Issue X, supra.) Even if this Court concludes that his death sentence was not unconstitutionally imposed under Enmund v. Florida, 458 U.S. 782 (1982), this aggravating factor, like the avoiding arrest factor (See, Issue XI, B, supra), cannot be vicariously applied to Robert DuBoise.

In State v. Dixon, 283 So.2d 1 (Fla.1973), this Court defined the aggravating circumstance of especially heinous, atrocious or cruel and the nature of the crime it was intended to characterize:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Ibid. at 9. The focus of this aggravating circumstance is the degree of suffering which the victim experienced. E.g., Lewis v. State, 377 So.2d 640 (Fla.1979); Cooper v. State, 336 So.2d 1133 (Fla.1976); Dixon, 283 So.2d 1. Killings which are quick and involve little or no pain do not qualify. Ibid. The killing in this case falls into that category and the aggravating circumstance should not have been found. Rembert v. State, 445 So.2d 337 (Fla.1984); Simmons v. State, 419 So.2d 316 (Fla. 1982).

The victim in this case died from two massive blows to the head. (R533) While there was evidence of a struggle, there was no evidence the victim was aware of the blows which caused her death. Due to the extent of the injuries (R533-534) unconscious or death would have promptly followed the blows. In Simmons v. State, this Court rejected the heinous, atrocious or cruel circumstance where the victim had been similarly killed by two blows to the head with a hatchet. Explaining how the circumstance was inapplicable, this Court said

> There was no proof that the victim was aware that he was going to be struck with a hatchet. See Maggard v. State, 399 So.2d 973 (Fla.), cert.denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 508 (1981). There was no evidence that the victim was subjected to repeated blows while living; death was most likely instantaneous or nearly so. The finding that the victim was murdered in his own home offers no support for the finding, nor does the evidence that appellant attempted to conceal the murder by burning the body. See Halliwell v. State, 323 So.2d 557 (Fla.1975). Therefore this aggravating circumstance must also be stricken.

Simmons, 419 So.2d at 319. Like the crime in Simmons, the crime in this case is not properly characterized as especially heinous, atrocious or cruel.

This Court must reverse Robert DuBoise's death sentence. The heinous, atrocious or cruel factor does not fit the crime which occurred, and even if it did, it cannot be vicariously applied to DuBoise.

D.

> The Trial Court Erred In Not Finding And Considering As A Mitigating Circumstance That The Homicide Was Committed By Another And That DuBoise's Participation Was Relatively Minor.

The trial judge should have found the mitigating circumstance provided for in Section 921.141(6)(d), Florida Statutes. Ray Garcia and Victor DuBoise were responsible for the death of the victim in this case. (R1038-1041) Robert DuBoise merely participated in a plan to snatch a purse. (R1038-1039) Ray Garcia and Victor DuBoise escalated the crime. (R1039-1041) Ray Garcia and Victor DuBoise bludgeoned the victim to death. (R1038-1041)

Robert DuBoise did not kill, attempt to kill or intend to kill. (See, Issue X, supra.) The sentencing judge totally ignored this fact in sentencing DuBoise to death. (R1699-1700)(A1-2) This mitigating circumstance of minor participation was, in fact, sufficient to preclude a death sentence in this case. Enmund v. Florida, 458 U.S. 782 (1982). Certainly, the court should have at least considered it in sentencing. Interestingly, the sentencing judge in Enmund also failed to find the minor participation mitigating circumstance because he misconstrued the facts. Enmund v. State, 399 So.2d 1362 (1981). The four dissenting justices in Enmund v. Florida would not have held the sentence unconstitutional but would have reversed for resentencing with directions that proper consideration be given to that mitigating circumstance. Enmund, 458 U.S. at 827-831, Justice O'Conner, dissenting. This Court should do no less in this case.

E.

The Trial Court Erred In Failing To Find That DuBoise's Age Was A Mitigating Circumstance.

Robert DuBoise was 18 years old at the time of his arrest. (R1675,1893) He had an I.Q. of 79. (R1677) His age coupled with his dull normal intelligence level qualified his age for the statutory mitigating circumstance. §921.141(6)(g), Fla.Stat.; e.g., Meeks v. State, 339 So.2d 186 (Fla.1976).

There is no per se age qualifying or disqualifying for this mitigating factor. Peek v. State, 395 So.2d 492 (Fla.1981). Old age as well as youth can qualify. Agan v. State, 445 So.2d 326 (Fla.1983). The defendant's mental capacity or mental age must be considered and can render an age not normally deemed mitigating to be a valid mitigating circumstance. See, Meeks, 339 So.2d 186. The sentencing judge in this case must have applied an erroneous legal standard in order to reject DuBoise's age as mitigating factor. DuBoise urges this Court to reverse the trial court's sentence for proper consideration of his age.

F.

The Trial Court Erred In Refusing To Consider And Weigh Nonstatutory Mitigating Circumstances.

Mitigating circumstances are not limited to those enumerated in Section 921.141, Florida Statutes. Songer v. State, 365 So.2d 969 (Fla.1978). The Eighth and Fourteenth Amendments mandate that all evidence in mitigation be considered and weighed in the sentencing process. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). The sentencing judge failed to comply with this constitutional mandate. (R1699-1700)(A1-2) Evidence of DuBoise's low intelligence level should have been considered even if it did not justify a

statutory circumstance. (R1677) See, Neary v. State, 384 So. 2d 881,886-887 (Fla.1980). Additionally, aspects of DuBoise's deprived family background qualified as mitigation. (R1671-1676) See, Scott v. State, 411 So.2d 866,869 (Fla.1982). The trial judge ignored each of these factors. DuBoise's death sentence must be reversed.

CONCLUSION

Upon the reasons and authorities presented in Issues I through VII, Robert DuBoise asks this Court to reverse his convictions for a new trial. For the arguments presented in Issue VIII, DuBoise asks that the orders revoking his probation be reversed. And, for the reasons expressed in Issues IX through XI, DuBoise urges that his sentence of death be reduced to life imprisonment.

Respectfully submitted,

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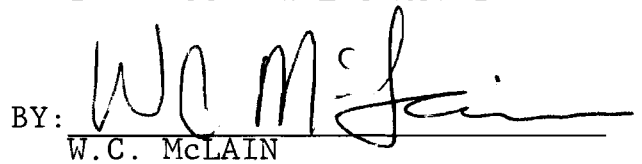
TENTH JUDICIAL CIRCUIT

BY: 
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