IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,914

LAVARITY ROBERTSON,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

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APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from a judgment of conviction of two counts of first degree murder and sentences of death. Appellant Lavarity Robertson was the defendant, and in this brief he will be referred to by name or as he **stood** below.

The symbol "R." refers to the record on appeal, and the symbol "T." refers to the separately bound transcripts of proceedings before the trial court. Robertson's copy of the transcripts has been renumbered to conform to the clerk's pagination in the index to the record on appeal.

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STATEMENT OF THE CASE

Lavarity Robertson was charged by indictment returned on December 7, 1988 with first degree murder of Frank Ernesto Najarro Rivas (Frank Najarro) (Count I); first degree murder of Isilia Leticia Paguada Martinez (Leticia Paguada) (Count II); armed robbery of Rivas (Najarro) (Count III); armed robbery of Martinez (Paguada) (Count IV); armed burglary of a conveyance with an assault (Count V); and possession of a firearm while engaged in a criminal offense (Count VI). (R. 1-4A). A superseding four-count indictment, returned July 19, 1989, omitted the charges of armed robbery of Frank Najarro and unlawful possession of a firearm. (R. 5-7A).

Prior to the commencement of Robertson's trial by jury on July 24, 1989, the trial court heard and denied his motion to suppress statements. (T. 228-82). The trial court denied the defendant's "renewed objection" to the statements, which objection was made after the admission of the statements through the testimony of the lead detective. (T. 916).

The trial court also denied Robertson's motions for mistrial (T. 685, 1073-77, 1125-27, 1215, 1233-35, 1237), as well as his motions for judgment of acquittal made on the ground that the "State has failed to prove each and every count of the Indictment." (T. 1159).

At the conclusion of trial, on July 28, 1989, the jury found the defendant guilty as charged. (T. 1298-99; R. 153-56). The trial court adjudicated the defendant in accordance with the verdicts (R.

157-58), granted the defendant's request for a presentence investigation (T. 1304), and scheduled sentencing for mid-August.

Advisory sentencing proceedings were had on August 18, 1989. The jury recommended the imposition of the death penalty for the murder of Frank Najarro by a vote of eight to four and for the murder of Leticia Paguada by a vote of twelve to zero. (T. 1435-36; R. 165-66). After additional expert testimony was presented to the trial court (T. 1438-70), the court followed the jury's recommendation, entering its written sentencing order on August 21, 1989. (T. 1488-1503; R. 191-205).

Notice of appeal **was** filed October **4,** 1989 (R. 209), and the state's notice of cross-appeal was filed October 18, 1989. (R. 210). **This** appeal follows.

STATEMENT OF THE FACTS

A. A Double Homicide.

Anthony (Ty) Williams, who was thirteen years old at the time of trial, is the brother of Lavarity Robertson's girlfriend. (T. 692, 706). 1/

In November, 1988, Ty went fishing with Lavarity, C.J., and Gerald. **He** went with Lavarity in his mother's car. 2/ [Lavarity placed his gun and their fishing poles in the trunk of the car. (T. 967)]. Their friends went in C.J.'s car. (T. 692-93).

They first went fishing on 79th Street, (T. 692). Afterwards, they went to the store, and C.J. bought some beer. [They bought two six-packs of Budweiser. 3/ (T. 970)]. They went to a bait store and bought bait. Then they went to the Julia Tuttle Causeway, where they fished by a construction sight. (T. 693-94).

After they all played in the water, Lavarity went to the car and brought out a rifle; State's Exhibit 3. **They** shot into the water. It was dark outside. (T. 695-96, 706).

1/ Ty's prior consistent statements (T. 956-91) and that of his sister (T. 992-1009), admitted in evidence without objection (T. 956-59), are included in brackets in order to fill-in "gaps" in their testimony.

2/ The police retrieved tires from Mrs. Williams's car. (T. 730-31). Over defense objections, two criminalists in the field of firearms and toolmarks identification were also qualified as experts in the area of tire marks identification. (T. 1081-87, 1101, 1110-12). They opined that tire tracks from the scene were consistent with tires from Mrs. Williams's car. (T. 1102, 1113-16).

3/ A Budweiser can, State's Exhibit 34, was recovered from the scene near the left front tire of the vehicle. No fingerprints were obtained from the can, (T. 817-18, 840). Lavarity Robertson testified that they had purchased Schlitz Malt Liguor that night, and four cans of Schlitz were retrieved from the scene. No fingerprints were taken off those cans. (T. 840).

[Ty drank two cans of beer and got dizzy. Lavarity drank two or three cans. The other boys drank more than him and Lavarity. All the beer was consumed. (T. 975-76)].

When they decided to go home, they went to the cars. Lavarity and Ty put the gun in the front seat of their car. Ty heard Lavarity say to C.J., "Let's go jack," ["Jack" means to take money from somebody. Lavarity meant the people in a car nearby. (T. 976-77)]. C.J. answered "No", and he and Gerald drove away. (T. 697-98).

Lavarity and Ty drove down the dirt road. Lavarity passed the car and turned around. (T. 697-99). Lavarity stopped his car near the other car. [Lavarity took the gun from the car. He stood at the driver's door. The passenger door was open. (T. 979-80)]. Ty heard Lavarity say to the driver, "Give me the money." He did not hear the people in the car say anything. (T. 700-02).

[Lavarity shot the man in the side. The man laid down on the seat. Lavarity ran around to the other side of the car. The girl was crying. She said, "We don't have any money. (T. 980-82)]. Ty heard Lavarity say, "Give me the rings." Ty heard the girl answer, but he did not know what she said. (T. 703). [Somehow, Lavarity got the girl's rings. He shot the gun about four more times. The girl fell outside the car. Lavarity did not stoop down before he ran back to his car, and Ty did not see Lavarity touch the girl. (T. 983-84, 991)].

Lavarity brought the gun with him and some rings. They rode away to Ty's house. Lavarity told Ty not to tell anyone. (T. 704). [Lavarity also said, "Why you ain't try to stop me? Well you shoulda tried to stop me." (T. 985)].

Gerald Griffin was one of the fishing companions on Sunday, November 6, 1988. (T. 752). He drank about three of the beers. He cleaned the fish while the others played around in the water. (T. 755). He did not see who got the gun, and he did not shoot it. (T. 756). He saw a car parked further back. State's Exhibit 2 looks like the car he saw. (T. 757-58).

Lavarity was acting normal when he left. Lavarity and Ty were getting in their car. (T. 757-58).

Gerald did not hear Lavarity say anything about robbing the people in the car. Lavarity never said anything to him about the offenses. (T. 760).

Gerald had also seen a blue van parked in the vicinity. It was still there when they left. (T. 760-61).

The testimony of Gerald Griffin's fishing companion, C.J. Williams, was consistent with that of Griffin and Ty. Unlike his friend, however, C.J. did not see another car that night, and C.J. heard Lavarity suggest "jacking" some people. C.J. told him he did not do that anymore. (T. 734-41, 746-47).

The next time C.J. saw Lavarity Robertson, Robertson admitted that he shot the couple. (T. 742).

B. The Investigation.

1. Crime Scene Evidence and Autopsies.

In the late morning hours of November 7, 1988, Dr. Bruce Hyma, an expert in the field of forensic pathology, became involved in the investigation of the double homicide at the Julia Tuttle Causeway. (T. 1024-26).

The scene was on the south shoulder of the causeway between two large bridges. There was a late model grey Chrysler car parked in the dirt, and tire tracks and four casings were by the driver's door. There was a casing inside the car, as well. [4/] (T. **1026-27).**

The car, a 1984 Plymouth Reliant, belonged to Frank Najarro, the male victim. **(T. 774, 779).** His fingerprints were the only ones of value obtained from the exterior and the apparently ransacked interior of the car. (T. **815-16,** 820, **837-39, 843, 863,** 866). **The** only print of Lavarity Robertson obtained was the standard processed from the rifle. (T. 868-69).

The medical examiner saw that the male victim was lying on the front seat of the car, and the female victim was lying outside the car on the passenger side. (T. **1027).**

He examined the woman first. **She** was lying face down. Her body had a minimum amount of rigor mortis which was easily broken, indicating that the time of death was probably longer than twelve hours. (T. **1027-28).**

She was clothed in a blouse, a black skirt, and a pair of fishnet tights. **All** the clothing was intact, including the crotch of the tights and the underpants. (T. 1028).

Beneath her body, around her face, was a pool of vomit. Beneath her feet, in the dirt and weeds, were what appeared to be fresh ground marks. (T. **1028-29).**

[4/] **The casings found** at **the scene and the projectiles found by the medical examiner during his autopsies were fired from State's Exhibit 3, Lavarity Robertson's weapon.** (T. **1091-95). The firearms powder pattern testing on Najarro's shirt indicated that the weapon was fired** one to **six inches from Najarro's shoulder and twelve** to **twenty-four inches from his back.** (T. **1096-98).**

The medical examiner observed a number of gunshot wounds to her head, neck, back, chest, hands and arms. (T. 1029).

The male victim's head and shoulders were partially hanging out of the open passenger door. He was wearing a white shirt and trousers. (T. 1029).

His rigor mortis was fully developed. Because his body had been shaded from the sun, the examiner opined that the victims might have died around the same time. (T. 1029).

The man had a number of gunshot wounds. **One** wound was to the left shoulder; it went through his shirt, and there was **s** significant amount of grey sparkling residue on it. Another wound went to the left side of his back which seemed to graze the left side of his **body.** He also had two gunshot wounds in the right buttock. (T. 1029-30).

The male victim did not have a wallet. The only personal property found was **a** black watch on his wrist. He had a quarter, twenty-five cents, in his pocket. There **was** no jewelry on the female victim's hands. (T. 820, 1030). **A** ring, State's Exhibit 23, was found on the ground, in a grassy area that had bloodstains, just below the male victim's head. (T. 795, 797). Another ring was found inside the glove compartment under several papers. (T. 814).

Autopsies were performed the following day.

Frank Najarro appeared to be age nineteen. His gunshot wounds were labeled and photographed. (T. 1032-33).

Wound **A** was on the left shoulder. The projectile traveled through the large blood vessels of the armpit, into the chest and left lung, **and** through the large vessels that bring blood into the heart

and then into the right lung. (T. 1033). Stippling, burning gunpowder, was present on the shoulder, meaning that the muzzle of the gun must have been at close proximity to the skin. (T. 1036).

Wound **A** was a fatal wound; it caused significant internal bleeding in both chest cavities, and death occurred within minutes. (T. 1037-38).

Wound B was to the left side of the back. (T. 1037). It was a flesh wound which would cause some bleeding. (T. 1040).

Wound C was located in the right buttock. The projectile traveled upwards through the pelvis, the intestines, the liver, and the lung. (T. 1040). Wound D had a similar path. (T. 1041). Both wounds were potentially fatal. (T. 1042).

The medical examiner recovered projectiles from wounds **A,** C, **and** D. (T. 1044).

The gunshot wounds to the body of Leticia Paguada, the female victim, were also photographed and labeled.

The projectile in wound **A** entered the right side of her neck and exited by the chin. There was no stippling, and it did not injure any major structures that would immediately **be** life-threatening. **A** tiny fragment of the bullet was recovered from the back of the throat. (T. 1054).

Wound B was a perforating wound to her face. The projectile entered the left cheek, traveled through the structures beneath the skin, and exited in front. It would not have caused a real serious injury. (T. 1055).

The projectile in wound C entered above **her** left breast and went through the soft tissue of the chest. It did not injure any of

the major vessels of the armpit, and it was of no immediate consequence. (T. 1055-56).

The projectile in wound D traveled through her left arm without fracturing any bones. There was no stippling, and it was consistent with a "defensive type of wound." (T. 1058-59).

The bullet in wound E entered and reentered her left hand. The wounds were "consistent with the hand being in a defensive posture." (T. 1060-61).

Wound F was a flesh wound to the right arm. The bullet touched underneath the skin, and it did not damage any bone. There was no stippling, and it was "consistent with the arm being in a defensive type posture." (T. 1062-63).

The projectile in wound G entered the right upper back and exited above her chest through the right lung. There was no stippling, and the wound was potentially, but not immediately, fatal. (T. 1064).

The projectile in wound H entered the back of the left arm and exited the front. It did not injure any major vessels of the arm. There was no stippling, and the wound was consistent with a defensive wound. (T. 1065-66).

Wound I was in her mouth. A fragment was recovered from the back of her brain. There was stippling, indicating that it was a close range wound, and there was inflammation, the body's first phase of healing, indicating that Leticia Paguada was alive for a short period of time following this gunshot wound. (There was similar inflammation around wounds B and C. (T. 1072)). The bullet

to the brain was fatal, but not immediately **so;** death would occur within minutes. (T. 1066-67, 1071).

The cause of death of each victim was multiple gunshot wounds. (T. 1072).

Defense counsel conducted no cross-examination of the medical examiner.

2. Robertson's Statements.

On the night of the shooting, Lavarity admitted to C.J. that he had killed the victims, C.J. did not take him seriously and laughed; he knew that Lavarity wouldn't do anything like that. (T. **742).**

Lavarity told C.J. that Ty remained in the car. He also talked about the girl, He said that the girl kept screaming, and he told her, "Bitch, shut up." He said he just shot her, kept shooting her.

Lavarity brought up the topic again the next day in the park. He was with Byron and Willie [Finch]. Lavarity wanted to know what he should do. He did not himself believe what he had done. (T. 743).

Lavarity said that the girl had tried to run. (T. **743).**

On cross-examination, C.J., a convicted felon, acknowledged that he did not tell the police the entire truth when he first give a statement. He skipped certain parts; **he** did not tell them about the gun. (T. **744-46).**

At the time of trial, Willie B. Finch had known Lavarity Robertson for a year. (T. 764). On November 19, 1988, he and his acquaintance, Byron, spoke with Lavarity at Brownsville Park. Lavarity told them that he and Ty had gone fishing. He saw a car, talked to the man, and shot him in the shoulder. Then he approached

the other side of the car and shot the girl. He took the rings. (T. 764-65).

Lavarity told them he and Ty were fishing with C.J. and another fellow. C.J. and the other fellow had left. Ty **was** in the car. Lavarity said he lost the rings. (T. 765-66).

Lavarity seemed concerned at first, and then he kind of shook it off. (T. 766).

Finch had never seen Lavarity with a gun, and he had never known him to take any type of drugs. (T. 768).

Ty's sister, Sheekita Barron, was Lavarity Robertson's girlfriend and the mother of his infant daughter. (T. 717-28). In November, 1988, Lavarity brought a rifle to her house, which she put under her bed, and he gave her some rings. (T. 717). Lavarity told her that he had done something he should not have. He had robbed and shot the driver of a car. (T. 718, 723). He shot him with the rifle that he brought to her house. (T. 724). She gave the police the rifle, which she had removed from under her bed to **a** closet, on the day Lavarity was arrested. (T. 726).

Lavarity did not tell her that he got the four rings from the girl. (T. 723). She wore the four rings for about a week, until Lavarity told her that he needed the rings to pawn. [5/] (T. 724-25). Sheekita recognized two of the seven rings in State's Exhibit 1-E for Identification. (T. 724-25).

5/ An expert in the field of document examination testified that the signature on the pawn slips matched the signatures on Lavarity Robertson's driver's license and the constitutional rights form signed by Robertson at the police station. (T. **899-902). Leticia Paguada's sister identified four of the seven rings pawned by Robertson as belonging to her sister.** (T. **1013-16).**

[Lavarity told Sheekita he did not know why **he** had shot them; he had been drinking. **He** did not think they were dead. (T. 996-98)].

On the day he was arrested, Lavarity Robertson signed a constitutional rights form (R. 80), State's Exhibit 51 (T. 897), and gave a statement to the police. After denying any knowledge of the shooting, he admitted that he had suggested robbing the couple, but he had neither robbed nor shot them. (T. **921-24).**

C. Capital Sentencina Hearing.

In addition to relying on the evidence it adduced during the guilt phase of trial and introducing a certified copy of the judgments of conviction (T.1340-41), the state presented further testimony of Willie Finch. Finch had testified at trial regarding statements that Robertson made to him a day or ***so*** after the murders. (T. 1338). Finch added that Robertson had **also** told him that he touched the female victim in her private area and that she had reacted angrily and moved his hand. (T. 1338).

On cross-examination, Finch stated that Robertson had approached him and told him that something was on his mind; something was wrong with him, and he wanted to talk to somebody about it. (T. 1339).

The defense presented the testimony of Johnny Robertson, the defendant's father.

At the time of trial, Lavarity was twenty years old. **He** had always lived with his parents and brothers and sisters. (T. 1341-42).

Lavarity had a normal childhood. Although his father had to discipline him on occasion, he was never **a** problem to his parents. (T. 1342-43).

Johnny Robertson tried to teach his son right from wrong. He taught him walk away from fights unless he had to defend himself. (T. 1343).

Lavarity was very helpful to his parents. He would cut the lawn without being asked, and he would not accept payment from his father for doing **so.** (T. 1343). Mr. Robertson described his **son** as **serious;** if he was given a job to do, he wanted to finish it. **He** was a responsible person, and his father never saw him take a drink or use drugs. (T. 1348-49).

Defense counsel asked Mr. Robertson about Lavarity having some problems in school. Mr. Robertson had been called by Larmis Paez, a counselor at Miami Springs Junior High, who told him that Lavarity "liked to run in the hall." (T. 1344). He was once called to the school because Lavarity was involved in a disturbance in **a classroom** and hit a girl, causing stitches to her face. (T. 1349-50). Mr. Robertson also spoke about Lavarity with the Vice Principal and other teachers. They all loved him and thought he was a nice kid. (T. 1344).

While Lavarity **was** in high school, he was transferred to an alternative school. His father was told that the transfer was the result of Lavarity cutting classes. (T. 1350).

Defense counsel asked the father what he knew of Lavarity's arrest in connection with a stolen vehicle. (T. 1345).

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Mr. Robertson had heard that somebody else stole the car in which Lavarity was a passenger. Lavarity had to go to court; he was placed in pretrial intervention and ordered to pay a probation officer so much money per month for the cost of supervision and to pay for damages to the car. Mr. Robertson told his son that it was wrong to be in the car even though somebody else stole it. (T. 1345; 1352-53).

With regard to the murders, Mr. Robertson stated:

> . . .(M)y heart goes out to the victims' family. It hurts my family just as much as it hurts theirs, not for just--say for my son's sake but for their kids.. . .I'm sure my son feels the same way, I think I know him well.

(T. 1346).

Mr. Robertson did not discuss the murders with his son. (T. 1354).

Lavarity Robertson testified on his own behalf.

Lavarity was 19 years old when he committed the offenses. (T. 1355). He got along well with his siblings and his parents and with the people in his neighborhood. (T. 1355).

At his attorney's behest, Lavarity explained the stolen car incident.

Lavarity had told a young friend of his to pick him up so he could go to Burger King. After his friend had to crank the car up in order to start it, Lavarity learned that the car was stolen. His friend said that Lavarity had to drive it. The police stopped the car in the parking lot of the restaurant, and his friend ran away. Lavarity was arrested. (T. 1356-57).

The program he **was** placed in by the court required him to pay $600.00 for the damage to the car and $30.00 per month for supervision. Lavarity got a job working in a restaurant, and he made the payments until he was arrested in this case. (T. 1357-58).

Robertson **also** explained the school incident involving the girl.

The girl's name was Mercy, and Lavarity was her boyfriend for two years. They broke up, and Mercy did not like his other girlfriend. One day, Mercy pushed him. Lavarity's leg was hurting because of a football injury, and he reacted by hitting her. (T. 1358-59). He told her he was sorry and she **was** not going to do anything, but **a** friend of hers ran and told the principal. Lavarity **also** apologized to her mother and her sister in front of the principal. (T. **1359).**

Lavarity confirmed his father's testimony that he was sent to an alternative school for cutting classes. Instead of going to class, Lavarity would sit in the lobby and talk to the [school liaison] officer. (T. 1359).

Defense counsel questioned Robertson about the murders.

That day, he awakened and cleaned up the house as usual. His friends, **C.J.** and Gerald, came over about noon, and they decided to go fishing. He asked **Miss** Margaret, his girlfriend's mother, if he could borrow her car. They left around five o'clock and stayed at the 79th Street Causeway for about an hour. (T. 1360-61).

They went to a tackle place and bought hooks and lead, and they went to another store and bought two six-packs of Schlitz Malt Liquor in sixteen ounce cans. (T. 1361).

They did not drink until they arrived at the Julia Tuttle Causeway. It wasn't dark yet. (T. 1362).

Lavarity had not done much drinking before, and he had never consumed malt liquor before that day. He had had nothing to eat, and he drank three or four cans during the hour or **so** they were fishing. (T. 1363).

After they finished drinking and fishing, Lavarity went to the car and got his gun. They shot the gun in the water for **a** while and then packed their stuff and got ready to leave. He made the suggestion to the others that they rob the people in a car parked close to the water; he had seen a car **up** ahead and "hollered going to jack them." He had never done anything like that before. (T. 1364).

C.J. agreed at first but changed his mind. (T. 1365). C.J. and Gerald got in their car, and Lavarity and Ty (his girlfriend's brother) got in the borrowed car. C.J. pulled away. Lavarity backed up and turned right to look for the entrance to the causeway; he had passed it. **As** he spotted the entrance, he saw a white car with two people in it. He "just stopped." He "just jumped out with the gun." (T. **1365-66).**

Lavarity does not know why he jumped out with the gun; just robbing them was on his mind. (T. 1366).

He pointed the gun at the boy and said, "Give me the money." The boy did not say anything; he just looked at him. Lavarity repeated, "Give me the money." The boy continued to look at him, and Lavarity shot him. The girl was screaming. He told her to shut up and be quiet. She got out of the car, and he ran around the car towards her. He told her to shut up and to give him the rings off her finger. (T. 1366).

Lavarity does not remember getting the rings off her finger or her giving the rings to him, but when he reached his car, he noticed that he had the rings. (T. 1366). He never touched any part of her body. (T. 1366).

When asked why he shot the couple, he testified:

> It's just that my hand was on the gun, on the trigger. I wanted her to shut up, she wouldn't shut up and the gun just went off. I just kept pulling the trigger like I couldn't stop, like I had no control, no control in what I was doing.

(T. 1366-67).

He did not realize what he was doing. When he got back to the car, he threw the gun in the back seat. He looked towards Ty. Ty was looking at him like, "Why did you do it." He looked at Ty and said, "Why didn't you stop me, why didn't you stop me from what I did?" Lavarity hit the steering wheel. "Why didn't you stop me, why didn't you stop me?" (T. 1367).

Lavarity put the gun and the rings inside his girlfriend's house. He told Ty not to tell anyone what happened. He took a cab home. Later on that night, he told Sheekita, his girlfriend, about the murders. He did not know what to do. He took the rings home and went to the park. He had to talk about what happened. He tried to speak to Darryn and Willie and Trap, but they would not be serious. (T. 1367-68).

Later, he took the rings to the pawn shop after he took them back from Sheekita. (T. 1368). He wanted to get rid of the rings, and seeing Sheekita with them made him think back to where they came from. (T. 1369).

When the police came to his house to arrest him, he was scared. He was also glad, in **a** way, to see them because he wanted to talk about the crime. He did not say anything to them; he just went with them. (T. 1369). He did not admit his complicity to the officers. He wanted to, but he also wanted to get a lawyer. He was confused. **(T.** 1370).

Lavarity feels remorse for what he did:

> I'm sorry that it happened, you know. **It's** not like a--I always think about this, you know. It's like a dream, like a dream that happened and just sounded like something that wasn't supposed to be true.
>
> **As I** face reality, you know, it's true and I'm very sorry.

(T. 1370).

Lavarity did not talk about the murders to anyone in his family. He told his family that he **was** sorry for putting them through this and for putting the victims' families through this because "they didn't deserve it. Neither family deserves it, I was sorry for what happened." (T. 1371).

Robertson's testimony concluded the defense of the penalty phase.

At the charge conference, the parties agreed that the aggravating circumstance of heinous, atrocious or cruel did not apply to the murder of Frank Najarro, and the court ***so*** instructed the jury. (T. 1390-92, 1430). The trial court refused, over defense objection, to instruct the jury on the mental mitigating circumstances (T. 1393-96); the court had given a defense requested

instruction on voluntary intoxication during the guilt phase of trial. **(T. 1279).**

After the jury returned its advisory verdicts recommending the death penalty for each murder, the court heard additional evidence in the form of expert testimony.

Dr. Basil Yates, **a** neurological surgeon, examined Lavarity Robertson on August **15, 1989. He** performed electroencephalograms before conducting a neurological examination which included a CAT scan and MRI of the brain. The results of the tests were normal; there was no indication of organic brain damage. (T. **1443-46).**

Dr. Yates opined, however, that the test results probably would have been different if Robertson had consumed the equivalent of two sixteen-ounce cans of malt liquor within a two-hour period beforehand. (T. **1448).**

Dr. Jorge Herrera, a licensed psychiatrist specializing in the field of neuro-psychology, was retained by defense counsel to evaluate Robertson. **He** performed **a** series of neuro-psychological tests "to establish if there were any impairments of the higher cerebral functions that may **be** indicative of any form of brain dysfunction or brain damage." (T. **1449-50).**

Dr. Herrera had recommended the performance of the neurological tests because he found that Robertson had "a significant problem in the area of auditory memory along with other minor, but nonetheless, present signs of brain dysfunction. (T. **1451).** The results of the tests performed by Dr. Yates did not validate Dr. Herrera's suspicion that Robertson suffered from "organic peralt (phonetic) syndrome." (T. **1452-53).** Nevertheless,

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in light of Dr. Yates' acknowledgement that the results would have been different if Robertson had consumed alcohol prior to the testing, Dr. Herrera could not negate the presence of organic brain damage; Robertson would be prone to having a seizure disorder, and studies support the fact that seizure activities can be brought on by the consumption of alcohol. (T. **1454-55)**. Dr. Herrera had no evidence that Robertson ever had seizures, but Robertson did report suffering from dizzy spells. (T. **1458).**

Dr. Leonard Haber, an expert in the field of forensic psychology, saw Lavarity Robertson on July **19** and 20, **1989.** He conducted a psychological interview, a mental status examination, a Bender Gestalt visual motor test, and the House Tree personality test. The results were within normal limits. (T. **1459).**

Robertson's made **a** drawing of **a** male which he titled, "Rombo." Robertson told Dr. Haber that Rombo **is** a picture of himself. Rombo is wearing camouflage clothing. He carries a gun, and he goes around terrorizing people. Rombo is a nice guy *so* long **as** no one bothers him. "Sooner or later, he's going to meet up with the wrong person and he's going to die." (T. **1461-62).**

Dr. Haber explained why Lavarity Robertson associated himself with the character of Rombo. The story of Rombo is the portrayal of a person who, himself, was feeling victimized and who adopted that mean, aggressive posture as a way of defending himself from being attacked. Dr. Haber's opinion was based on Robertson's history of having been picked on and having learned to become aggressive, because of his relatively small stature, to ward off such attacks. **(T. 1464-65).**

At the conclusion of the presentation of additional evidence, the state and defense agreed that the court was not to consider the presentence investigation report in its determination of sentence. (T. **1470).**

On August 21, 1989, the court announced its intention to enter the sentencing order by reading it into the record. Lavarity Robertson's father asked to make a statement before sentencing. He previously had been sworn. (T. **1474).**

Johnny Robertson had reflected on defense counsel's penalty phase question why **he** thought his son should be sentenced to life in prison instead of death. He wanted to tell the court **some** of the good things about his son. (T. **1474).**

First, Mr. Robertson told the court that he and his wife are still proud of their son, and he explained their philosophy.

Mr. and Mrs. Robertson had certain goals: to bring their children up in the best environment that they could; to teach them right from wrong; and to provide them with an education. (T. **1475).**

The Robertsons were strict. Their sons friends called them "home boys" because they could not stay out late like some of the other children. Their sons respected the rules because they respected their parents. (T. 1475-76).

The Robertsons were not the type to leave their kids at home alone. They did not **go** to nightclubs or bar. One parent worked at night, and the other worked during the day to make sure that someone was always at home for the children. (T. **1475-76)**.

Mr. Robertson taught Lavarity to do a good deed for a person at least once a day; to always respect people and to **be** respectable; and to never ask for or demand money for a job he did. (T. 1476).

Lavarity would always go to the store for friends and relatives, and he would volunteer to cut lawns and wash windows. Most of the time, Lavarity would not accept any money or gifts from people for whom he did a good deed. (T. 1476).

Lavarity's second home **was** the park located about one hundred yards from their home. Lavarity was there **as** an assistant to a park director, Alfonso (Peewee) Harrison. Peewee was at least fifteen years older than Lavarity, but they were good buddies. Peewee had said, "I don't know what it is, Mr. Robertson, but somehow I just picked out Lavarity." (T. 1476-77).

Peewee used to entrust Lavarity with the keys to the park because in **case** of an emergency, Lavarity would be able to get there first. Lavarity was always assisting in all types of contests, bike rides, Easter egg hunts, picnics, and fish fries. Lavarity would catch fish and contribute his own money to neighborhood picnics. He used to take children on camping trips, and the kids respected him. (T. 1477).

Lavarity even stood up for one of the neighborhood kids. Lavarity was fifteen years old, and he defended a twelve-year-old from **a** young adult who wanted to whip the boy. (T. 1477).

Lavarity was a great help to his mother and lifted her burdens. Mrs. Robertson worked, and each day Lavarity cleaned the house. He did whatever needed to be done around the house, **and he** did it without having to be asked. Lavarity helped his father in the yard,

and he volunteered to clean all the fish his father taught him how to catch. **(T.** 1478).

Lavarity's parents did not have any problems with him at home. Mr. Robertson knows that on the day of the murders, that was not the real Lavarity. Lavarity was not the selfish, stubborn, mean person that he was made out to be at trial. (T. 1478-79).

Mr. Robertson **also** addressed the conduct of Lavarity in school. Mr. Robertson was called to school on one occasion by the principal. Lavarity was in the principal's office with his instructor, security, and people from two other departments.

Mr. Robertson was told that Lavarity was supposed to be taking a test in the instructor's class, but he was caught doing homework from another class. Lavarity disobeyed the instructor and opened the book again. The instructor took the book. Lavarity demanded the book and reached for it. The instructor grabbed Lavarity, pinned him against the wall, and placed him in a choke-hold. Lavarity struck the teacher. (T. 1479-80).

After Mr. Robertson heard both sides of the story, he told Lavarity he was wrong. The principal wanted to remove Lavarity from that class, but the instructor said, "No. I am a good instructor. Lavarity is a good student. I want Lavarity in my class." The instructor approved of the approach Mr. Robertson had used. (T. 1481-82).

Mr. Robertson concluded his statement:

> . . .My friends and relative[s]. . .know the man that care, share and love. We loved him and **he** gave it **back** in return.

> To the victim's family. I truly hope you accept my friends and relatives sincere sympathy because we **are** []sensitive to your feelings **also.** We also pray for you just **as** we pray for ourself and Lavarity. I just hope in your heart that you wanted justice not revenge. To me, there **is a** big difference. Lavarity, I know, he has to pay for what he done. I just hope he have to pay in a proper manner. That's life in prison. Two wrongs don't make a right.

(T. 1486).

The trial court responded, ". . .The Court has taken into consideration Lavarity's home life **as** it will be reflected in the Court's order." (T. 1487). The court read its prepared sentencing order into the record.

The court stated that it had received additional evidence in the form of written evaluations by Dr. Herrera and Dr. Haber which it considered and reviewed. (These reports are not in the record or in the circuit court file.) The court also considered the testimony o the medical experts in its determination of sentence. (T. 1489-90 **R.** 197-98).

The court found the following aggravating circumstances:

> [1] The contemporaneous conviction of the defendant for the First-Degree Murder of both Frank Najarro and Leticia Paguada leads the Court to the conclusion that each murder is to the other a previous conviction.
>
> The Court finds this factor **as** to each murder beyond a reasonable doubt.

(T. 1491; R. 199).

> [2] Contemporaneous with **his** convictions for the First-Degree Murders of Frank Najarro and Leticia Paguada, the defendant Lavarity Robertson was also

convicted of the armed robbery of Leticia Paguada and the armed burglary of a vehicle occupied by and in the custody of Leticia Paguada and Frank Najarro respectively.

The murders occurred during the commission of the robbery and the burglary, therefore, this aggravating circumstance has been proved beyond a reasonable doubt.

(T. 1492; R. 199).

[3] **As** to Leticia Paguada notwithstanding the fact that the State did not present this factor for consideration by the jury, the Court finds a reason[able] inference from all the facts and circumstances that because of the close proximity of the defendant to her, Leticia Paguada had a good look at defendant's face.

The Court therefore finds that a reasonable inference to **be** drawn from clear and convincing evidence, beyond a reasonable doubt, is that Leticia Paguada was murdered to prevent her identification and subsequent arrest of Lavarity Robertson for the murder of Frank Najarro.

(T. 1493; R. 200).

[4] While the evidence presented at trial clearly indicated that murder victim, Frank Najarro, had no money with the exception of twenty-five cents found in his pocket, jewelry or other personal property on his person, the evidence **is** equally clear that property was seized from the person of Leticia Paguada in the form of jewelry.

The purpose of the encounter between Lavarity Robertson and the victims according to all of the witnesses, including Robertson, was to rob the victims. The proceeds were pawned and cash received. The fact that the defendant did not gain anything of value from the murder of Frank Najarro does not negate his evil purpose and intent. Therefore, the Court finds this

circumstance was proved beyond a reasonable doubt as to each victim.

(T. **1494; R. 200).**

[5] **As** to murder victim, Leticia Paguada, however, . . .(t)he evidence presented at trial showed that Frank Najarro and Leticia Paguada were young lovers and that they contemplated marriage. The evidence showed that the defendant shot young Najarro multiple times, that he fell over, mortally wounded into the **lap** of his young lover; that the defendant then proceeded around the outside of the car continuing to demand money and possessions from this screaming, hysterical young girl[;] that the defendant continuously demanded that she keep quiet and that when she did not or could not, he, the defendant, started shooting her from six to nine times according to the medical examiner's testimony.

In light of the defendant's testimony, the testimony of the only other eyewitness and the physical evidence, her screaming was most likely stopped or certainly reduced to low groaning sounds by a close-range shot directly into the mouth of Leticia.

The medical evidence indicated that this young girl desperately wanted to live. She struggled against death there in the lonely night while her murderer sped off into the darkness with **a** few gold rings and a terrified little boy. She probably expired somewhere between midnight and day break. Her body gripped in the fangs of death tried to heal itself, but the damage was too great. [6]

6/ Although Robertson does not challenge the court's finding of heinous, atrocious or cruel with respect to the murder of Leticia Paguada, it must be noted that the court's factual finding as to the time of death and its speculation as to the length of time Ms. Paguada suffered is unsupported by the record. The medical examiner testified that Frank Najarro died within minutes of being shot, and the couple probably died at the same time. (T. 1029, 1037-38).

The court's personal belief that the murders were "both cold and without any pretense of any moral or legal justification" similarly is unsupported by the record, and the court was correct in determining that it "cannot so find [that aggravating circumstance on the facts of this case." (T. 1497; R. 202).

This killing is precisely the extremely wicked, shockingly evil, outrageously vile slaying, contemplated within this factor. **A** murder designed to' inflict a high degree of pain with utter indifference to the suffering of others.

The Court finds that this murder **was** consci[ence]less, pitiless, and unnecessarily torturous to the victim.

The Court finds that it was proved beyond **a** reasonable doubt **as** to Leticia Paguada.

(T. 1495-97; R. 201-02).

The trial court found the following mitigating circumstances:

[1] The defendant had **a** previous, auto theft case for which defendant had been placed in a pretrial diversion program.

In addition thereto, the defendant had school-related incidents which could have been classified **as** various degrees of assault and batteries.

However, is such that the Court is reasonably convinced that his criminal history is insignificant. Therefore, the Court finds this [no significant history of prior criminal activity] to be a mitigating circumstance.

(T. 1497-98; R. 202).

[2] Based on the [trial] testimony of the father, the Court finds that Lavarity Robertson had a reasonably **good** upbringing by his parents, the Court finds that to be a mitigating factor.

(T. 1501; R. 204).

[3] The Court further finds that the defendant **is** remorseful.

(T. 1501; R. **204).**

The court imposed consecutive sentences of death, finding:

> In conclusion, the Court finds that the aggravating circumstances **as** set forth in this order far outweigh the mitigating circumstances as to each of the murders committed.
>
> The Court finds that no mitigating circumstance singularly or collectively outweighs the serious aggravating circumstances of this case.

(T. 1501-02; R. **204-05).**

The court also imposed consecutive life sentences for the felonies (T. 1502-03; R. 205), but no written reasons for departure from the guidelines recommended range (R. 196) were provided.

SUMMARY OF ARGUMENT

The trial court committed serious errors in imposing the sentences of death.

The trial court improperly found the aggravating circumstance of avoiding arrest for the murder of Leticia Paguada by inferring the defendant's intent to eliminate her as a witness from evidence of his close proximity to her.

The trial court improperly considered the commission of the underlying felonies of robbery and burglary and the circumstance of pecuniary gain as separate aggravating factors for each murder, and it improperly found that each murder was committed for pecuniary gain. While the defendant approached the victims in their car for the purpose of robbing them, that purpose was not the aim of the murders. The defendant, who was not charged with the robbery of Frank Najarro, inexplicably shot him. The defendant testified, "he just looked at me and I just shot the gun." The defendant shot Leticia Paguada because she was screaming. The effect of finding both circumstances as to each capital felony rendered the fact-finding process unreliable.

Because the court also found the existence of one statutory and two non-statutory mitigating circumstances, the defendant's sentences of death must be vacated and the cause remanded for a new sentencing hearing.

Additional error was committed in sentencing. The trial court imposed departure sentences for the two non-capital felonies

without providing contemporaneous written reasons for such departure.

ARGUMENT

THE APPLICATION OF FLORIDA'S CAPITAL SENTENCING STATUTE TO LAVARITY ROBERTSON UNDER THE FACTS OF THIS CASE VIOLATES THE EIGHTH **AND** FOURTEENTH AMENDMENTS TO THE CONSTITUTION **OF** THE UNITED STATES.

In Florida, no defendant can be sentenced to death unless the aggravating factors outweigh the mitigating factors. ***Alvord v. State,*** 322 So.2d 533, 540 (Fla. 1975). Since the aggravating circumstances set forth in Section 921.141(5), Florida Statutes, actually define those capital crimes to which the death penalty is applicable, they must be proven beyond a reasonable doubt before being considered by judge or jury. ***State*** *v. Dixon,* 283 So.2d 1, 8-9 (Fla. 1973). The statutory aggravating circumstances are exclusive, and no other circumstances may be used to tip the balance in favor of death. ***Miller v. State,*** 373 So.2d 882, 885 (Fla. 1979).

In imposing the death penalty in this case, the trial court violated these principles by relying on aggravating circumstances not established by the evidence and by improperly doubling up aggravating circumstance. Because the trial court found the existence of mitigating circumstances, the defendant's death sentences must be vacated for a new sentencing hearing. *Elledge v.* ***State,*** 346 So.2d 998 (Fla. 1977).

A. <u>The Trial Court Improperly Found the Aggravating Circumstance of Avoiding Arrest for the Murder</u>

In its sentencing order, the trial court found the evidence insufficient to apply this factor--§921.141(5)(e)--to the murder of Frank Najarro. (R. 199). The court determined, nevertheless:

> . . .As to LETICIA PAGUADA not withstanding the fact that the State did not present this factor for consideration by the jury, the Court finds a reason[able] inference from all the facts and circumstances that ***because*** *of the close proximity of the Defendant* to *her,* ***LETICIA PAGUADA*** *had a* ***good look*** *at Defendant[']s face.* The Court therefore finds that a reasonable inference to be drawn from clear and convincing evidence, beyond a reasonable doubt, **is** that LETICIA PAGUADA was murder[ed] to prevent her identification and subsequent arrest of LAVARITY ROBERTSON for the murder of FRANK NAJARRO.

(R. 200) (emphasis supplied).

Even assuming that the trial court applied the correct burden of proof in finding this factor, the court's determination cannot be sustained.

In *Riley v. State, 366* So.2d 19 at 22 (Fla. 1978), this Court held:

> (T)he mere fact of death is not enough to invoke this factor when the victim **is** not **a** law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.

Further, the mere fact that the victim might be able to identify an assailant is insufficient. It must **be** "clearly shown that

the dominant or only motive for the murder was the elimination of" the witness. ***Bates** v. **State,*** **490** So.2d **490,** 492 (Fla. 1985); ***Menendez v. State, 368*** So.2d 1278 (Fla. 1979); ***see also Cook v. State,*** 542 So.2d **971** (Fla. 1989).

In ***Bates,*** for example, the victim was not a police officer, and she did not know her assailant. This Court found the consideration of the avoid arrest circumstance improper where it was based on mere speculation. 465 So.2d at 493.

In ***Cook,*** the defendant told the police that he had shot the female victim "to keep her quiet because she was yelling and screaming." The Court agreed that this evidence was insufficient to support the finding that the victim was killed to avoid arrest. 542 So.2d at 970. The same conclusion must be drawn, here.

In this case, no showing was made that the dominant or sole motive for the murder of Leticia Paguada was the elimination of a witness. The victim was not a police officer, and although the Robertson testified that the victim was able to **see** him and that she "had to" know what he looked like because she was looking right at him (T. 1375), Robertson denied that he killed her because he did not want her to be able to identify him after killing the young man. **He** testified, without contradiction, that he did not think about that; like the defendant in *Cook,* he killed the female victim because she **was** screaming. (T. 1377).

This factor was based on mere speculation, and it was improperly found. *Scull v.* ***State,*** 533 So.2d 1137, 1141-42 (Fla. 1988).

B. The Trial Court Improperly Considered Circumstances (d) and (f) as Separate Aggravating Factors for Each Capital Felony and Improperly Found that the Murders were Committed for Pecuniary Gain.

The trial court found, pursuant to section 921.141(5)(d), Florida Statutes, that the murder of Frank Najarro **was** committed during the armed burglary of his vehicle and that the murder of Leticia Paguada was committed during the armed robbery of her person. **(R.** 199). The court also found, pursuant to section 921.141 (5)(f), that each capital felony was committed for pecuniary gain. (R. 200). This was error.

In ***Provence v.*** *State,* ***337*** So.2d 783 (Fla. 1976), this Court held that in **a** robbery-murder case both subsections refer to the ***same aspect*** of a defendant's crime and that a defendant's pecuniary motive constitutes only one factor which must **be** considered. 337 So.2d at 786 (emphasis in original). The same reasoning holds true in a burglary-murder case, where the facts supporting such two circumstances are the same. ***Richardson*** *v. State,* 437 So.2d 1091 (Fla. 1983).

In this case, both factors found by the trial court **as** to each murder overlap and refer to the same aspect of the defendant's crime. The trial court erred by improperly "doubling up" aggravating circumstances (d) and (f). *Cherry* ***v. State,*** 544 So.2d 184, 187 (Fla. 1989).

The trial court further erred in finding that the murders were committed for pecuniary gain. The wording of this separate aggravating circumstance--"The capital felony was committed for

pecuniary gain" 5921.141(5)(f)--constitutes an inherent limitation. The language evinces a legislative intent to limit application of this circumstance to those capital murders primarily motivated by a desire for pecuniary gain, or "where the murder is an integral step in obtaining some sought-after specific gain". ***See*** *Scull v. State,* 533 So.2d 1137, 1142 (Fla. 1988); *Hardwick* ***v. State,*** 521 So.2d 1071, 1076 (Fla. 1988). Although the state established that the defendant armed himself and approached the victims seated in the car in order to rob them, the evidence was uncontroverted that (a) the defendant, who was not charged with the robbery of Frank Najarro, did not know why he shot him; "He just looked at me and I just shot the gun" (T. 1366), ". . .I told him to give me the money. **He** was looking at me, you know. I just, you know, the gun went off, I started shooting him" (T. 1373) and (b) the defendant shot Leticia Paguada because she began screaming and he became confused: "It's just that my hand was on the gun, on the trigger. I wanted her to shut up, she wouldn't shut up and the gun just went off. I just kept pulling the trigger like I couldn't stop, like I had no control, no control in what I was doing.. . . Screaming, she got me, like confused. The gun started going off, started going off.. . .Killing somebody wasn't on my mind. I just--what happened was--what happened on my mind was robbing, not killing. Killing her wasn't on my mind." (T. 1366-67, 1377-78) Robertson did not remember getting the girl's rings from her. (T. 1366, 1375). Afterwards, the defendant asked Ty, his girlfriend's brother, "Why didn't you stop me, why didn't you stop me?" **(T.** 985, 1367).

This evidence shows that Robertson did not commit the murders "as a means of improving his financial worth." *Scull,* 533 So.2d at **1142.** Robertson pawned Leticia Paguada's rings after he had given them to his girlfriend because "[his girlfriend] with them, it made me think back of where they came from. I just wanted to get rid of them, wanted to get rid of them." (T. 1369). He was current in paying for his costs of supervision and for restitution. (T. 1379). He did not get rid of the rings in order to pay his probation officer; "[He] had a job that [he] was getting paid good." (T. 1379-80).

The state failed to prove, beyond a reasonable doubt, that the primary motivation for the murders was pecuniary gain.

The defendant is entitled to a new sentencing hearing not only because of the invalid findings, but because the effect of finding both circumstances enhanced the quality of the single aggravating circumstance and rendered the fact-finding process unreliable. [7]

C. The Trial Court's Sentencina Order Must be Reversed.

The trial court found the existence of three mitigating factors: the defendant's lack of prior significant criminal activity; his positive family background; and his remorse. (R. 202-04). In light of the serious errors committed by the court in its assessment of aggravating circumstances and the further mitigation testimony of the defendant's father presented after the court had prepared its written sentencing order, the death sentences in this case must **be**

7/ **The state urged the jury to find both aggravating circumstances as to each** victim. **(T. 1411-12).**

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reversed. The unauthorized aggravating factors were part of the equation which might have tipped the scales of the weighing process in favor of death.

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [improperly found aggravating] factor shall not be considered.

Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977).

II

THE TRIAL COURT ERRED IN IMPOSING EXCESSIVE SENTENCES FOR THE NON-CAPITAL FELONIES; THE SENTENCES WERE NOT SUPPORTED BY WRITTEN REASONS FOR DEPARTURE.

> (A) departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

Ree v. ***State,*** 14 FLW 565 (Fla. November 16, 1989).

In ***Ree,*** this Court reaffirmed its prior case law and held that it is reversible **error** for a trial court to depart from the guidelines without providing a contemporaneous written statement of its reasons therefor at the time of sentencing.

In this case, the trial court sentenced Robertson on Count 3, robbery with a firearm, to life imprisonment with a mandatory minimum term of three years, and it imposed the same sentence as to Count **4,** armed burglary of a conveyance with an assault. (R. 193-**94).** The guidelines scoresheet reflects a total of 137 points, resulting in a recommended range of 5 1/2-to-7 years imprisonment. (R. 196-97). [8/] The trial court's written sentencing order provides that all sentences are to be consecutive, but it contains no written reasons for departure. (R. 205). Reversal is required.

In ***Pope*** *v. State,* 15 FLW S243, **S244** (Fla. April 26, 1990), this Court held, "(W)hen an appellate court reverses **a** departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines."

8/ **The permitted range under Category 3 is** 4 1/2-to-9 **years imprisonment.** Ch. **88-131,** Laws *of* **Florida;** Fla. R. **Crim.** P. **3.701 d.8.**

The sentences imposed on Counts 3 and 4 must be reversed with directions to impose terms within the guidelines.

CONCLUSION

For the reasons given and upon the authorities cited, the appellant requests this Court to reverse his sentences and remand this cause for resentencing before a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a **copy** of this brief was delivered by hand this 16th day of July to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

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