2-6

IN THE SUPREME COURT OF FLORIDA

CHRISTIAN DANIEL MASSARD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 69,173

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(305) 820-2150

JEFFREY L. ANDERSON
Assistant Public Defender

Counsel for Petitioner

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United States Constitution

PRELIMINARY STATEMENT

Petitioner was the Appellant in the court below and the defendant in the trial court. Respondent was the Appellee in the court below and the prosecution in the trial court. A copy of the district court opinion is attached to this brief (A1-4). In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"T"	Trial Transcript
"A"	Appendix
"SR"	Supplemental Record

STATEMENT OF THE CASE

On July 6, 1984, Petitioner, Christian D. Massard, was charged by amended information with two counts of attempted first degree murder and two counts of armed robbery (R1). On July 12, 1984, Petitioner was found guilty by a jury on all four counts as charged (R39-40). On July 27, 1984, the trial court adjudicated Petitioner guilty and classified all four counts as life felonies (R44). A guideline scoresheet was completed by the trial court (SR). Petitioner was sentenced to forty (40) years incarceration on each of the counts (I and III) of attempted first degree murder (R46,48). Petitioner was sentenced to forty (40) years incarceration on each of the counts (II and IV) of robbery which were to run concurrent to the counts of attempted first degree murder (R47,49). The trial court retained jurisdiction over one-third of Petitioner's total sentence (R46-49,52-53).

The trial court indicated that it was departing from the guidelines for the following reasons: (1) to deter others who might be inclined to commit similar offenses; (2) the defendant poses a clear and present danger to any community in which he might live; (3) the crime was committed in a cold and calculated manner without any justification resulting in permanent and disabling injuries (T509-510). The trial court also found Petitioner to be an habitual offender (T509). Petitioner appealed his convictions and sentences (R54). The Fourth District Court

of Appeal affirmed the conviction.[1] The Fourth District affirmed the classification of the attempted first degree murder convictions as life felonies and reversed the classification of the robbery convictions (A2). The District Court vacated the retention of jurisdiction over the guideline sentence and remanded the cause for resentencing because of the possibility that the trial court may not have imposed the lengthy sentence had it known that Petitioner would not be eligible for parole (A3). The District Court also held that points for victim injury could not be scored in computing the guidelines, but held that two of the reasons for departure from the guidelines were proper (A3-4).

On August 11, 1986, Petitioner timely filed his Notice of Invocation of Discretionary Jurisdiction. This Honorable Court accepted jurisdiction, dispensing with oral argument, by its order issued December 19, 1986.

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1 The Fourth District Court of Appeal originally filed its decision on May 7, 1986. On July 16, 1986, the Fourth District filed another decision in substitution of the May 7, 1986 decision (A1-4).

STATEMENT OF THE FACTS

On October 13, 1983, Robert Carl Gillen, Jr., [henceforth knows as R. Carl Gillen] on leave from the Navy, was driving from Richmond, Virginia to Port St. Lucie to visit his father, Robert Lee Gillen Sr. [henceforth known as R. Lee Gillen] (T166-167). R. Carl Gillen was driving his 1975 Pontiac Trans Am bearing the identification number 2W87S5N531559 (T167). On his way, R. Carl Gillen picked up Petitioner who was hitchhiking (T167). R. Carl Gillen told Petitioner that he would give him a ride to St. Lucie County (T169). During the trip the two men stopped in Jacksonville to visit some of R. Carl Gillen's friends in the navy (T321). They attended a beer and whiskey party with these friends for four to five hours (T322). Later, the two men left Jacksonville and drove to Daytona where they shared a hotel room (T168).

The next day the men arrived at St. Lucie around 2:30 in the afternoon. Up to this point, the two men had spent thirty hours together and R. Carl Gillen considered Petitioner to be a friend (T169). R. Carl Gillen asked his father if Petitioner could stay for the night (T171). R. Lee Gillen went to take his mother shopping and told the two men that he would bring a pizza on his way back home (T171).

When R. Lee Gillen returned the three men ate pizza in the family room. R. Lee Gillen pulled out his wallet and offered his son some money, but the son didn't take any because he already

had money (T173). Later, Petitioner and R. Carl Gillen drove to a couple of night spots in Ft. Pierce and then proceeded to beach where they spend most of the evening drinking beer (T334).

The two men returned home some time after 2:00 in the morning (T335). They entered the house through an unlocked garage door and then through a kitchen door (T174-175). R. Carl Gillen locked both doors after entering the house (T174-175). R. Lee Gillen had gone to bed about midnight (T207). R. Carl Gillen testified that he turned on his stereo, and went to bed without undressing (T174,176-177). According to R. Carl Gillen, the keys to his car were in his pocket and there were no other keys to the car in the house (T176). Petitioner went to sleep on a hide-a-bed, outside R. Carl Gillen's bedroom, twenty feet away from R. Carl Gillen (T177,209).

R. Lee Gillen awoke at approximately 8:00 o'clock in the morning (T208). He noticed that his pillow was covered with blood (T209). Befuddled, he staggered to the bathroom and noticed blood on his face and a puncture wound in his forehead (T209). He had also noticed that his bedroom door was closed (T211). It had not been closed the night before (T211). Returning to his bedroom, R. Lee Gillen saw Petitioner lying on the hide-a-bed although he did not know whether he was sleeping (T209).

R. Lee Gillen then sat down on his bed (T209). The next thing he remembered was waking up around noon the same day (T209,210). At this time he noticed wounds to the side of his head (T210). He didn't know whether or not he had these wounds

when he woke up at eight o'clock in the morning (T232). He had not looked for these wounds earlier in the morning (T232). Not knowing what had happened to him. R. Lee Gillen went to the Florida room to ask his son and Petitioner if they were aware of anything that had happened in the house (T211). He then noticed that Petitioner was not in the hide-a-bed (T211). He opened the door to his son's bedroom and noticed blood all over the wall and carpets and saw his son lying across the bed face down (T212). The entire side of R. Carl Gillen's temple area above the ear looked like "raw steak" (T212). Thinking his son was dead, R. Lee Gillen shook his son until he opened his eyes (T212). R. Lee Gillen attempted to get his son into the bathroom, but was unable to hold him any longer and his son collapsed to the floor (T212). R. Lee Gillen testified that he immediately called the 911 number for aid (T213). The call was made sometime after 2:40 in the afternoon (T212). R. Lee Gillen then showered and dressed (T212). Police arrived shortly after the 911 call was made (T212).

As R. Lee Gillen was leaving for the hospital he reached for his car keys and wallet, which out of habit he usually put on his dresser before he undressed at night, and noticed that they were not there (T214). On his way out of the house with the paramedics, R. Lee Gillen noticed that his hammer was lying in a stationary tub underneath some water (T221). The previous night, before R. Lee Gillen went to sleep, the hammer was located in a tool box on the other side of the garage (T224).

R. Lee Gillen testified that he did not see anyone hit him nor did he have any recollection of being hit with a blunt instrument (T239). R. Lee Gillen did not see anyone take his wallet (T239). R. Lee Gillen also testified that the only person who had a key to the house, other than himself, was his daughter (T216). R. Carl Gillen remembered waking up and being told by his father that he would have to go to the hospital (T197). R. Carl Gillen did not remember what else happened in the house after he woke up (T177). Dr. Salinkas testified that the injuries to the Gillens were consistent with injuries that would have been levied by the use of an ordinary hammer (T298-299). Detective Fonda Cook testified that R. Carl Gillen indicated on the night of the incident that his father was responsible for him being hit with a hammer (T156,160). Later, R. Carl Gillen indicated to Detective Cook that Petitioner had hit him (T162). At trial, R. Carl Gillen testified that he did not see who had hit him (T196).

On a Saturday in mid-October of 1983, Petitioner pulled up to John Guyten's house in Miami in a red firebird (T258). Petitioner told Guyten that he had come down from New Jersey (T259). Petitioner had mentioned passing through Ft. Pierce or St. Lucie (T259).

On October 18, 1983, Officer Roger Smith of the City of Miami stopped a red Pontiac Firebird Trans Am bearing identification number TW87S5N531559 (T276). The driver identified himself as John Lang (T277). Officer Smith identified Petitioner as the person who identified himself as John Lang (T278).

On November 12, 1983, Petitioner attempted to turn himself in on a warrant (T280,282). There were no warrants on him in Dade County (T282). Petitioner was introduced to Detective John Skalski because he wanted to speak with someone regarding a homicide (T282). Petitioner told Detective Skalski that he got a ride from a sailor in Virginia (T285). The sailor drove him down to St. Lucie County where they went to the sailor's house and later ate pizza (T286). During the evening, Petitioner went out drinking with the sailor (T286). Petitioner told Detective Skalski that sometime later he woke up and "just snapped" (T287). Detective Skalski asked Petitioner what he meant by that and Petitioner said that sometimes his mind just snaps (T287). Petitioner then said that something happened and that he remembered taking the sailor's car keys and leaving the house (T287). As he was leaving he noticed the sun coming up and that the name on the mailbox read Gillen (T287). Petitioner then drove the Pontiac Firebird back to Miami (T287). Petitioner told Skalski that he was then stopped for not having a valid driver's license (T288).

Petitioner was released, and later was told by his mother that the police were alleging that he had hit someone in the head with a hammer (T288). Petitioner later went to the warrants section of the Metro-Dade headquarters building (T288).

Petitioner testified that in the morning at the Gillens he was woken by a noise (T337). He observed R. Lee Gillen walking past him into his son's bedroom (T337). Petitioner put his head down and attempted to go back to sleep (T337). Petitioner then

heard a door shut and heard some "tussling" (T338). Not knowing what was happening, Petitioner proceeded to grab some keys off a bar and drove to Miami (T339). He reached Miami at 11:30 that same day (T339). Petitioner testified that he never hit either of the Gillens with a hammer (T348).

SUMMARY OF THE ARGUMENT

POINT I

It was error to adjudicate Petitioner guilty of life felonies for his convictions for attempted murder which are first degree felonies. Since there was no requisite specific jury finding that a weapon was used, the offenses could not be reclassified pursuant to § 775.087(1)(a).

POINT II

The trial court erred in sentencing Petitioner on several grounds. It was error to return jurisdiction over the guideline sentence. In addition, none of the reasons given by the trial court would justify a departure from the recommended guideline sentence. After a recomputation of the guideline sentence, Petitioner should be resentenced within the recommended guideline range.

POINT III

Petitioner's credibility was the key to his defense. On cross-examination Petitioner stated that he had two prior convictions. On rebuttal, the state attorney produced evidence of four prior convictions. Although Petitioner could explain or rebut the new evidence introduced at rebuttal, he was not permitted to do so. It was reversible error not to allow Petitioner surrebuttal to the new evidence produced by the state on rebuttal.

POINT IV

The trial court erred in denying Petitioner's motions for judgment of acquittal on the counts of robbery and attempted murder of R. Lee Gillen. There was no evidence presented to show that there had been a taking of R. Lee Gillen's wallet to support a robbery conviction. Additionally, where there is insufficient evidence to prove the underlying felony (i.e. the robbery) beyond a reasonable doubt in an attempted felony-murder prosecution, there can be no conviction for attempted murder.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADJUDICATING PETITIONER GUILTY OF A LIFE FELONY FOR THE OFFENSES OF ATTEMPTED FIRST DEGREE MURDER.

Petitioner was adjudicated guilty of two life felonies for his two convictions for attempted murder in the first degree (R44). To do so was error. Murder in the first degree is a capital felony. Section 782.04(a)(3), Fla. Stat. (1983). Pursuant to § 777.04(4)(b) a person who attempts a capital felony is to be adjudicated guilty of a felony in the first degree. Consequently, the trial court erred in adjudicating Petitioner guilty of life felonies for the attempted murder convictions.

The Fourth District indicated that § 775.087(1)(a), Fla. Stat. (1983) could be used to reclassify the attempted murders from first degree felonies to life felonies on the basis that a weapon was used (A1). However, the provisions of § 775.087(1)(a) can not be applied unless there is a specific jury finding that a weapon or firearm was used. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). This specific jury finding is accomplished by either finding the defendant guilty of a crime which involves a weapon or firearm or by answering a specific question of a special verdict form indicating that a weapon or firearm was used. Overfelt, supra at 1387. Inherent in this requirement is that the jury, and not the judge, determine that the object or instrument used fall within the definition of weapon or firearm. See, Clemon v. State, 473 So.2d 271 (Fla. 3d DCA 1985) (where

defendant was charged with robbery while carrying a weapon, namely a knife, and jury found defendant guilty as charged, District Court held that there was no specific jury finding that knife was deadly weapon as required to enhance sentence). In Overfelt, this Court specifically noted the importance that the jury, rather than the judge, make the specific determination that a weapon or firearm was used in determining whether to apply § 775.087:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

457 So.2d at 1387.

In the present case the jury did not make a specific determination that Petitioner had used a weapon as required by § 775.087(1) to permit reclassification of the attempted murder offenses. The counts in the information charging attempted murder alleged that Petitioner attempted to murder the Gillens with a blunt instrument (R1,2). The jury verdicts read "GUILTY OF ATTEMPTED FIRST DEGREE MURDER, as charged" (R39,40). Since

attempted murder in the first degree does not necessarily require proof that a weapon be used, § 775.087 does not apply unless the jury, via a special verdict form, finds that weapons were used.

In its opinion, the Fourth District indicated that § 775.087 was applicable because Petitioner was found guilty as charged. However, to find Petitioner "guilty as charged" the jury need only determine whether the state had proven the elements of an attempted murder (i.e. attempt death, caused by defendant, with premeditated design). The jury was not instructed that they must find that Petitioner used a "blunt instrument" or weapon in order for Petitioner to be found guilty as charged (see, T471-473). Consequently, the description of the blunt instrument was surplusage and immaterial to the jury's finding.

For example, if Petitioner had moved for a judgment of acquittal on the ground of insufficient evidence that a blunt instrument had been used, the motion would be properly denied even if there had been no evidence of the use of a blunt instrument. See, Mas v. State, 222 So.2d 250 (Fla. 3d DCA 1969) (evidence sufficient to convict defendant of throwing missile even though missile described as "fire bomb" in charging document, such description was mere surplusage and state did not have to prove missile was a "fire bomb"). Merely because Petitioner was found "guilty as charged" does not mean that the jury specifically found that a blunt instrument was used.

In addition, assuming arguendo that the jury had specifically found that a blunt instrument had been used, such does not constitute a specific finding that a weapon was used. The trial

court cannot invade the jury's function by making a determination that a certain instrument or object constitutes a weapon. In its decision the Fourth District stated that the giving of the definition of a deadly weapon during instruction on aggravated battery combined with the resultant verdict constituted a specific finding that a weapon had been used in order to reclassify the offense. However, the jury was instructed that they would only consider the aggravated battery charge if Petitioner was acquitted of attempted murder (T471). Since Petitioner was not acquitted of attempted murder, the jury did not have to consider whether he used a deadly weapon in committing an aggravated battery. Again, the jury did not have to decide whether a weapon was used in reaching its verdict on attempted murder.

Finally, the reclassification of the attempted first degree murders cannot be justified by looking at the robbery counts which allege the use of a weapon. The verdict on one count must stand independent of any other count to support the judgment and sentence of the court. Streeter v. State, 416 So.2d 1203, 1206 (Fla. 3d DCA 1982). Specifically in Blackwelder v. State, 476 So.2d 280 (Fla. 2d DCA 1985), the Second District Court of Appeal held in precisely the same situation:

> Appellant also argues that because the statutory maximum for a first degree felony is thirty years, the trial court erred in sentencing him to ninety-nine years for the first degree felony of attempted murder. We agree. The state's contention that the crime was enhanced to a life felony under section 775.087, Florida Statutes (1983), because of appellant's use of a weapon cannot prevail. The court charging appellant with attempted

> first degree murder lacked the requisite allegation of the use of a weapon or firearm. See, Peck v. State, 425 So.2d 664 (Fla. 2d DCA 1983); cf., Williams v. State, 407 So.2d 223 (Fla. 2d DCA 1981) (crime properly enhanced by nolo contendere plea to information charging commission of crime while in possession of a firearm). The allegation contained in the robbery count that appellant used a weapon cannot be used to supplement the count for attempted first degree murder. Cochenet v. State, 445 So.2d 398 (Fla. 5th DCA), petition for review denied, 453 So.2d 45 (Fla. 1984).

476 So.2d at 281 (emphasis added).

Consequently, classification could not be done on this basis. Petitioner's adjudication for life felonies on his convictions for attempted murder must be reversed.

POINT II

THE TRIAL COURT ERRED IN SENTENCING PETITIONER.

The original guideline scoresheet recommended a sentence of life in prison (SR45). However, without the points scored for victim injury and the additional points scored for the life felony classifications for the robberies and attempted murder, the sentence imposed amounts to a guideline departure. The Fourth District's decision to vacate the retention of jurisdiction by the trial court was correct because such retention serves no purpose where Petitioner was not eligible for parole. The case would then be needed to be remanded for resentencing in order for the trial court to determine whether it would give the same lengthy sentence (A3). The Fourth District interpreted the trial transcript to yield four (4) reasons for departure. (see T509-510).[2]

The purpose of the guidelines is to ensure uniformity and to eliminate unwarranted variation in the sentencing process, and to prevent overcrowding in our prison system. Fla.R.Crim.P. 3.701. § 921.001, Fla. Stat. (1983). Since the purpose of the guidelines is to remedy subjective variations in the sentencing process, any exceptions to the guidelines should be narrowly construed. Cf., Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957). Any departure from the guidelines shall be articulated in writing and made only for clear and convincing reasons. Fla.R.Crim.P.

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2 The reasons given by the trial court were never placed in writing as required by State v. Jackson, 478 So.2d 1054 (Fla. 1985). Consequently the departure would have to be reversed on this ground alone.

3.701(b)(6). While the rule does not eliminate judicial discretion, it does seek to discourage departures from the guidelines. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). The reasons for departure will be discussed below.

1. Petitioner is an habitual offender.

This reason is invalid on two separate grounds. First, the trial court never found that an enhanced sentence was necessary to protect the public in order to satisfy the requirements of the habitual offender statute. See, Eustey v. State, 383 So.2d 219 (Fla. 1980); Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979). Second, an habitual offender finding is an invalid reason for departure. Whitehead v. State, No. 67,053 (Fla. October 30, 1986) [11 FLW 553].

2. Petitioner presents a clear an present danger to society.

The Fourth District indicated that this reason was equivalent to a finding that the term of imprisonment would be insufficient to accomplish reasonable rehabilitation.[3] Such a reason is invalid on its face. See, Wilson v. State, 490 So.2d 1360 (Fla. 5th DCA 1986). The amount of time needed for rehabilitation usually relates to past criminal record. This is already computed in the guidelines. Also, the defendant's danger to society is usually proportionate to the offender's past record

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[3] The appellate court should have only looked at the reasons for departure expressly enumerated by the trial court. Casteel v. State, No. 68,620 (Fla. December 11, 1986) [11 FLW 631].

and the severity of the offenses that he's convicted of. Thus, the danger to society is inherent in the recommended guideline score and cannot be used to justify a departure from the guidelines.[4] In addition, there is no evidence that the lengthy recommendation of the guidelines is not sufficient in the present case.

3. The crimes were committed in a cold and calculated manner leaving disabling injuries.

The cold and calculated manner in which the offenses [attempted murder and robbery] were committed is not a clear and convincing reason for departure. This reason reflects that Petitioner had deliberately planned to rob and kill the victims. This reason is an inherent component of the robbery and attempted murder in the first degree and cannot be used as a basis for departure. See, State v. Mischler, 488 So.2d 523 (Fla. 1986); Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984).

4. To deter others inclined to commit a similar type of offense.

This reason is clearly invalid as demonstrated by the reasoning of the Fourth District in Williams v. State, 462 So.2d 23 (Fla. 4th DCA 1984) where the court stated:

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4 This reason has also been rejected in the following cases: Heston v. State, 490 So.2d 157 (Fla. 2d DCA 1986); Martinez-Diaz v. State, 481 So.2d 633 (Fla. 2d DCA 1986); Sabb v. State, 479 So.2d 845 (Fla. 1st DCA 1985); Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985); Brooks v. State, 456 So.2d 1305 (Fla. 1st DCA 1984); Grooms v. State, 490 So.2d 1053 (Fla. 2d DCA 1986).

> ... There is no cause to suppose that a sentence may be enhanced for this reason alone. If that were so, all punishments would automatically be aggravated, the very anti-thesis of what the guidelines were designed to accomplish.

462 So.2d at 24.

As demonstrated above, none of the reasons for departure can be considered clear and convincing. Consequently, Petitioner's sentences should be reversed and this cause remanded with directions to sentence Petitioner within the recommended sentencing guideline range.

POINT III

THE TRIAL COURT ERRED IN DENYING PETITIONER'S REQUEST TO PRESENT SURREBUTTAL EVIDENCE.

During trial, Petitioner testified that he did not attempt to murder or rob either of the Gillens. On cross-examination Petitioner testified that he had two prior felony convictions. The state then produced rebuttal witness Lt. Harrison, as a fingerprint expert, and introduced two certified judgments showing four (4) prior felony convictions (T407,409). The state was producing the convictions to show that Petitioner had lied during the giving of his testimony (T407). Petitioner then requested that he be given the opportunity to explain the discrepancy between his testimony and the evidence of convictions produced by the state on rebuttal. The trial court, unaware of any authority permitting surrebuttal, denied Petitioner's request (T413).

Where the prosecution is permitted to introduce new matter on rebuttal, the defendant should be permitted to introduce evidence in surrebuttal. Moore v. United States, 123 F.2d 207 (5th Cir. 1941). In Moore, supra, the Fifth Circuit ruled that the trial court should have allowed surrebuttal evidence as to the accused's reputation for violating liquor laws where a government rebuttal witness testified that the accused was a persistent liquor law violator.

Similarly in Merrill v. United States, 338 F.2d 763 (5th Cir. 1964) where defendant had introduced evidence of insanity and an expert witness testified that the defendant had earlier

admitted to feigning insanity, the Fifth Circuit held that it was error for the trial court to deny surrebuttal so that the defendant could explain his admission. In the instant case, Petitioner needed to explain to the jury why he testified that he only had two prior convictions. The explanation would probably be that he only thought of two prior criminal sentences or transactions (The New Jersey transaction resulted in three convictions) instead of the four convictions resulting from the two transactions.

Surrebuttal evidence in Florida comes in the form of permitting the defendant to reopen his case. It can be reversible error for the trial court to refuse to permit the defendant to reopen his case. See, Barry v. Walker, 103 Fla. 533, 137 So. 711 (Fla. 1931) (reversible error not to reopen case to hear relevant evidence); but see, Sylvia v. State, 210 So.2d 286 (Fla. 3d DCA 1968) (no error in refusing to reopen defendant's case to present evidence which could have been discovered prior to trial).

In Steffanos v. State, 80 Fla. 309, 86 So. 204 (Fla. 1920), the defendant was charged with carnal intercourse with an unmarried female of previous chaste character. After resting his case, the defendant moved the trial court to present some evidence which would support previous evidence introduced as to the victim's unchaste character. The trial court denied the defendant's motion, but on appeal the Florida Supreme Court held that it was error to prohibit the reopening of the case stating:

> [I]t is to sacrifice liberty to a mere form of procedure or courtroom usage, the observance of which is to bring about the orderly introduction of evidence by the respective parties. But such rules ought not to be applied with such technical precision and unbending rigor as to produce injustice. See 38 Cyc. 1353. They should be enforced or relaxed in the furtherance of justice. The motion was to reopen the case, but the case was not technically closed. The judge had not charged the jury; the counsel had not begun the argument; the case had not been submitted. It had only reached that stage where each party announced that it rested; that there was no more evidence to be introduced. The court then took a recess. Upon convening on Monday following, the motion was made. Whatever delay or confusion may have resulted in the trial of the case by permitting witnesses to testify might have been fully requited by the establishment of the defendant's innocence, for it was the province of the jury to weigh the evidence introduced and place a value upon its probative force.
>
> Even if the case had been technically closed, it would have been an abuse of discretion to refuse to open the case and permit the evidence to be introduced, upon proper showing being made as to why it had been previously omitted.
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> * * *
>
> The refusal to allow the evidence to be introduced under the circumstances was an abuse of discretion, which was harmful to the defendant, and was therefore error.
>
> 86 So. at 205-206.

In the present case Petitioner never had a real opportunity to rebut the two judgments. Petitioner could hardly be expected to explain his misapprehension as to the difference between the numbers of judgments and convictions until after he was aware of the misapprehension. When Petitioner testified that he had two prior convictions, when in actuality there were <u>two judgments</u> -- one of which contained three convictions, he was obviously

thinking of the number of judgment forms entered against him.[5] Naturally Petitioner would not be aware of his misapprehension until after the forms were entered into evidence against him. Since the opportunity to explain only arose after the introduction of the judgments, it was error not to allow Petitioner to testify as a surrebuttal witness. The error was devastating to Petitioner's defense.

The prosecutor used the discrepancy, which Petitioner was not allowed to explain, in an attempt to completely destroy Petitioner's credibility. In the prosecutor's closing argument, numerous references were made to the fact that Petitioner testified as to two prior convictions when in fact there were four:

> [State Attorney]: Now Mr. Garland represents an individual who's charged with serious crimes and he's doing his job. And part of his job is to present the testimony of that person in a light most favorable for the defense. And I asked that man three different times if his testimony about his convictions and the number of convictions was just as truthful as all his other testimony and he said yes. And Mr. Garland even got up here and asked him, have you been convicted of a grand theft in Pinellas

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5 Defense counsel even misused the word conviction after the prosecution introduced the two judgment forms:

> MR. GARLAND: Your Honor, my client would like to have an opportunity to explain what was introduced into evidence just then, these two prior convictions. We'd like to have an opportunity to explain that away, evidence is now admitted that wasn't admitted before and he'd like to have that opportunity to explain it. If he's not, he's being denied the opportunity to inspect his -- the evidence against him.
>
> (T412-413).

It's clear that the attorney meant to say that Petitioner wanted to testify concerning the judgment forms -- the two forms showing four convictions.

County and he said no. And I again asked him, are you sure about that, are you testifying truthfully on that just like everything else, he said yes. Well, this man is not a two time convicted felon, he's a four time convicted felon and just because he has a judgment all on one page with a three count information just like this is a four count information, doesn't mean he was only convicted of one felony and there's not a person in this room that believes that he does.

A four time convicted felon I submit to you is not someone to be believed and you may consider the fact that this man got up here and put his left hand on the Bible and his right hand in the air and swore to you that he only had, only, one burglary conviction from Pinellas County and one burglary conviction from New Jersey only.

The only person that's testified in the last three days that has any interest in this case is the defendant.

Now let's very briefly review the testimony of each witness.

(T448-449).

[Mr. Walsh, State Attorney]: And that's what he's asking you to believe, he's asking you to believe the testimony of a four time convicted felon, self-confessed drug addict that gets agitated on some drugs, paranoid on others, nervous on others, against the word of a sworn police officer with fourteen years experience who was sober and working the midnight shift.

(T452).

Mr. Garland said in his closing statement the defense is simple in this case. Sure it's simple, they don't have a defense, the guy is guilty, it's the simplist thing in the world. But he's real distressed for the certified copy, of course he's distressed, the man committed perjury under oath. He was trying to show that he's this innocent little burglar, that he's done nothing more in two places and he got probation and he's got a drug problem and he lied. Pinellas County convicted him of three different felonies and he knew it.

> Mr. Garland went through several of the inconsistencies, that Mr. Walsh showed the inconsistencies. I submit to you I didn't show you any inconsistencies. All I did was ask him some questions and he showed how much he was lying. An inconsistency is when you've got two people seeing a lady in a red dress and one calling it dark pink. A lie is a difference between two felonies and four, a lie is between what really happened at the Gillen residence and what that man says happened.
>
> (T455).
>
> Defense says that the father is the only one, the only testimony to show that the wallet is missing. Who else would I call to show that the wallet belonging to the father was missing, who else would know that his wallet was missing, who else would you ever call. Is the father a four time convicted felon?
>
> (T456).

Harmful error occurred by not permitting Petitioner to rebut the attack on his credibility. The evidence sub judice was far from overwhelming. Neither of the victims observed their attacker nor could they testify that it was Petitioner who attacked them. In fact, R. Carl Gillen had originally informed the police that his father had hit him with a hammer (T156,160). At trial, R. Carl Gillen testified that he did not know who hit him. No physical evidence ever connected Petitioner with the attacks. The damaging circumstantial evidence was Petitioner's taking of R. Carl Gillen's car keys. R. Carl Gillen claimed that despite drinking heavily that night and falling asleep without undressing, he was sure that he never removed his car keys from his pocket thereby inferring that Petitioner had been in his room the day of the attack. The jury, thinking that Petitioner had deliberately lied under oath, heard Petitioner testify that he

grabbed the keys from the top of the bar and thus came into possession of them without attacking anyone. If Petitioner was permitted to defend against the attack on his credibility, which was so extremely successful, by explaining his inaccurate portrayal as to the number of prior convictions, the jury may have given more credence to his testimony that he didn't rob or attack the Gillens. Failure to permit Petitioner to present surrebuttal testimony denied Petitioner due process and a fair trial. Fifth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution.

POINT IV

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE COUNTS OF ROBBERY AND ATTEMPTED MURDER OF R. LEE GILLEN.

Insufficient evidence was presented to show that Petitioner had robbed R. Lee Gillen. Petitioner was accused of robbing R. Lee Gillen of his wallet (R1). The only evidence presented was that R. Lee Gillen (1) had displayed his wallet to his son and Appellant the previous day; (2) had usually placed his wallet on his dresser before going to bed, and (3) that sometime the next afternoon, after the police had entered the house, he did not know where his wallet was located.

There was not sufficient evidence to prove the corpus delecti of the robbery of R. Lee Gillen (let alone that it was Petitioner who committed the crime). There was a complete lack of proof of a felonious taking which is required to prove corpus delecti. Cf. Cross v. State, 119 So. 389, 76 Fla. 768 (Fla. 1928) (corpus delecti for larceny requires a felonious taking). Regardless of whether the evidence is direct or circumstantial, the corpus delecti must be proven beyond a reasonable doubt. Freeman v. State, 101 So.2d 887 (Fla. 2d DCA 1958). There is also no evidence that a taking was done by force or intimidation.

Because of insufficient evidence of a taking, Petitioner's conviction for robbing R. Lee Gillen must be reversed. In addition, where there is insufficient evidence to prove the underlying felony beyond a reasonable doubt in a felony murder prosecution there can be no conviction for murder. Robles v.

State, 188 So.2d 787 (Fla. 1966); Straughter v. State, 384 So.2d 218 (Fla. 3d DCA 1980). Therefore, in addition to the robbery conviction, the attempted first-degree murder conviction must be reversed.