IN THE SUPREME COURT OF FLORIDA

RONALD CORKER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC06-2140
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

CONTENTS PAGE

AUTHORITIES CITED

CASES
PAGES

FLORIDA CONSTITUTION

FLORIDA STATUTES

PRELIMINARY STATEMENT

Petitioner, Ronald Corker, was the defendant in the trial court and the Appellant in the Fourth District Court of Appeal. He will be referred to by name or as Petitioner in this brief. Respondent was the prosecution in the trial court and the Appellee in the Fourth District Court of Appeal.

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 documents

"T" = Record on Appeal transcripts

STATEMENT OF THE CASE AND FACTS

Petitioner, RONALD CORKER, was charged, in lower tribunal case number 03-21132CF10A, filed in the 17th Judicial Circuit, in and for Broward County, with Count I, attempted robbery with a deadly weapon/firearm and a hood/mask; Count II, possession of a firearm by a convicted felon; Count III, high speed fleeing and eluding with lights and sirens and wanton disregard; Count IV, driving without a valid driver's license; and, Count V, aggravated assault on a law enforcement officer with a deadly weapon. (R 1-2).

The date of the alleged incident was April 25, 2002. (R 1-2). Petitioner pled no contest to Count II. (R 37-39). Petitioner went to trial on Count I. The firearm felony reclassification, under section 775.087, *Florida Statutes*, (2002), leads to a second degree felony being reclassified to a first degree felony. (R 1-2). The jury made findings in this respect, and Petitioner was sentenced in this regard. (R 27-28, 66-72, 75-79; T 541).

At trial, gas station clerk Faroque Kabir testified that Petitioner first came in to buy a cigar, and then came back with "the gun and jacket and everything." (T 192). Kabir opened the register, when Petitioner pulled out the gun. (T 193). Petitioner put the gun to Kabir's head, and said, "[G]ive me the money." (T 193). Customers came in the store. (T 194). The photographs of the scene were admitted into evidence. (T 194-98). *See Evidence Envelope*. Kabir identified Petitioner. (T 205).

On cross, Kabir denied buying crack cocaine from Petitioner. (T 206). He denied using crack cocaine. (T 206). He denied owing Petitioner any money. (T 206). He

explained that he was supposed to change the tape in the video recorder, but he forgot that morning, so it was not working. (T 215-16).

Outside the gas station store, concerned citizen Russell Odom came to buy gas. (T 219). He went up to the gas pump, but it did not work. (T 220). He waved to the clerk, spotting a man putting a gun to the clerk's head. (T 220-21). He thought it was a robbery, because the black man was wearing a cap and jacket. (T 221). He got back in his van, pulled up to the police department, and told an undercover officer. (T 222-24). He identified Petitioner. (T 225-26). Lynette Odom testified to the same facts. (T 235-41).

Commander Gregory Kirk testified he was told of the robbery, and hurried to the gas station. (T 258-61). He saw a light blue car creeping out of the gas station. (T 258-61). He noticed the occupants did not want to make eye contact with him, so he circled and checked the tag, which was covered with paper. (T 264-65). Then, he participated in the car chase. (T 266). He also identified Petitioner. (T 272).

Officer Christopher Fulcher also chased the car, down residential streets, until he hit the car with his vehicle, finally stopping it. (T 245-49). He grabbed Petitioner and pulled him out of the passenger seat. (T 249). He handcuffed Petitioner. (T 249). He saw the gun, and the cap with the currency, on the passenger side floorboard. (T 249). He described it as a black wool skull cap. (T 257).

Sergeant Ryan Zenelovic took control of the driver at the stop. (T 284-90). He too identified Petitioner. (T 284-90).

Detective Tommy Garrison collected the evidence at the scene, including the bullet left on the gas station counter. (T 292-305).

Officer John Robinson testified to removing the paper from the tag, and also regarding the Beretta Model 92F, 9mm semi-automatic hand gun found in the car. (T 311-27). The gun came into evidence. (T 319).

Defense counsel argued that there was no way the jury could reasonably find that Petitioner was wearing a mask, citing to *Fletcher v. State*, 472 So. 2d 537 (Fla. 5th DCA 1985). (T 338). The trial court denied the motion for judgment of acquittal, as to the mask. (T 343).

During the charge conference, the prosecutor explained he had drafted the interrogatory, regarding a mask/disguise, as follows:

> And then the next interrogatory - - because I believe the mask enhances every one of offenses if I'm not misreading that, the mask or device statute - - if you find the Defendant guilty of any of the above offenses, during the course of the offense, did the Defendant wear a mask or device that concealed his identity - - which I was tracking from the mask statute.

(T 365). Despite this explanation and phrasing, defense counsel voiced no objection. (T 365).

Petitioner agreed, under oath, to concede to aggravated assault with a firearm, a third degree felony, punishable by five years in prison. (T 379).

Petitioner testified in his own defense. (T 398). He went to the gas station to receive $150.00 the clerk owed him for drugs. (T 400-01). He sold the clerk drugs

about twelve or thirteen times prior. (T 402). The clerk paid him out of the cash register. (T 403). That morning, "[The clerk] said he couldn't open the cash register. He said he'll be getting fired or something like that he quoted." (T 403). Petitioner pulled out the gun. (T 400, 404).

On cross, he said he bought the gun for $250.00 from the same gas station clerk, and he was going to sell it for $500.00. (T 409). He did not know how to take the clip out, so he could not say whether or not it was loaded. (T 410). He did not eject a round. (T 411). He did want to scare the clerk. (T 415). He did not hurt anybody. (T 417). He left when the store got crowded. (T 417).

Defense counsel argued, in closing, that Petitioner was not wearing the wool hat as a disguise, but rather like a person wears a do-rag. (T 444-45).

The trial court instructed the jury, as follows, "If you find the Defendant wore a mask or device that concealed his identity in the course of committing the robbery, you should indicate that in your verdict by answering the interrogatory." (T 497). Defense counsel again voiced no objection. (T 528).

The first jury question submitted was, "Could you better define device for concealing identity?" (T 531). The second jury question asked, "Is it possible for the defendant to put coat on with collar up to visualize." (T 531).

The trial court looked up *Fletcher v. State*, 472 So. 2d 537 (Fla. 5th DCA 1985), and the definition of "conceal" in *Webster's Dictionary*. (T 532-33). Defense counsel objected that the jury did not ask for a definition of conceal, but rather the definition of

device. (T 534). The trial court thought through it out loud, and concluded, "It's just going to simply be a device may be used to make the witnesses' identification of an individual difficult or to otherwise facilitate the commission of a crime." (T 536). Defense counsel did not express any further objection. (T 536).

The jury then was instructed:

> Ladies and gentlemen, you've asked the question could you better define device for concealing identity.
> I will tell you the device may be used to make witnesses' identification of an individual difficult or to otherwise facilitate the commission of a crime.
> The second question you said: Is it possible for a Defendant to put - - is it possible for Defendant to put coat on with collar up to visualize?
> No. That's not possible. You must rely upon the evidence as presented in trial, the argument of counsel, and the instructions of law as I gave it to you.

(T 538-39). The trial court did not look up or instruct the jury on the standard jury instruction, 3.05(e) *Aggravation of a Felony by Wearing a Hood, Mask or Other Device to Conceal Identity*, that reads, as follows:

> If you find that (defendant) committed (crime charged) and you also find that (defendant) was wearing a hood, mask or other device that concealed [his][her] identity, you should find (defendant) guilty of (crime charged) while wearing a device that concealed [his][her] identity.
>
> If you find only that the defendant committed (crime charged) but did not wear a hood, mask or other device that concealed [his][her] identity, then you should find the defendant guilty only of (crime charged).

Standard Jury Instructions in Criminal Cases, 697 So. 2d 84 (Fla. 1997).

The jury returned with a verdict of guilty as charged on the attempted robbery with a deadly weapon, specifically answering in the affirmative to the following: "Was the weapon a firearm?"; "During the course of the offense, did the defendant actually possess a firearm?"; "During the course of the offense, did the defendant carry, display, use, threaten to use or attempt to use a firearm?"; and, "During the course of the offense, did the defendant wear a mask or device that concealed his identity?" (R 27-28; T 541).

The trial court adjudicated Petitioner guilty on second degree felony Attempted Robbery with a Deadly Weapon/Firearm, while wearing a mask, and second degree felony possession of a firearm by a convicted felon. (R 67-68).

The Criminal Punishment Code scoresheet reflected 99.9 total sentence points leading to a minimum of 53.925 months and should have reflected a maximum of thirty (30) years, and first degree felony reclassification. (R 1-2, 64-65, 66-67).

Over defense counsel's objections based on hearsay and foundation, Petitioner's prior qualifying offense, and release date of March 11, 2002, was established by a crime and time report. (R 60-63; T 553-569).

The trial court sentenced Petitioner on Count I, to thirty (30) years with a ten (10) year mandatory firearm minimum, day-for-day as a Prison Releasee Reoffender; pursuant to section 775.082, *Florida Statutes*, (2002), and on Count II to fifteen (15) years with a three (3) year firearm mandatory minimum. (R 66-79; T 552-576).

The *pro se* notice of appeal was accepted as a notice of appeal, on February 28, 2005. (R 81, 95).

The 3.800(b)(2) motion is based in combination on the arguments in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and also based on the improper reclassification of the second degree felony, attempted robbery, to a first degree felony, based on the mask/disguise, rather than based on the firearm. (Supp. R, unnumbered pages).

The Fourth District Court of Appeal in a written opinion by Judge Shahood, in which Chief Judge Stevenson and Judge May concurred, *Corker v. State*, 31 Fla. L. Weekly D2309 (Fla. 4th DCA September 6, 2006) [see Appendix], affirmed, only discussing one issue. The District Court concluded the trial court did not err denying defense counsel's hearsay objection to the introduction of a "letter" from the Florida Department of Corrections ("FDOC") reflecting Petitioner's most recent release date from prison. In doing so, the Fourth District certified conflict with *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005), as it had in *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006), as it was unable to distinguish this cases, which was relied on by Petitioner.

On October 13, 2006, the Fourth District issued its mandate.

Timely Notice of Discretionary Review was filed by Petitioner on October 24, 2006. On November 3, 2006, this Court issued its Order postponing a decision on jurisdiction and setting a briefing schedule.

SUMMARY OF THE ARGUMENT

POINT I

The Fourth District Court of Appeal's decision at bar is certified to be in conflict with *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005), as it had in *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006). Thus, this Court has jurisdiction. Petitioner contends that this decision also conflicts with other appellate court decisions, which more narrowly define public records, and would exclude the clemency letter and time and crime report in this case. Therefore, the trial court erred denying Petitioner's hearsay objection to the introduction of a letter reflecting his most recent release date from prison, and the Fourth District erred issuing its opinion affirming the trial court's ruling.

POINT II

The trial court erred doubly reclassifying the offense, based on both attempt and hood/mask, leading to sentencing as a first degree felony, punishable by thirty (30) years imprisonment, and not including the maximum possible sentence on the Criminal Punishment Code scoresheet.

POINT III

The trial court misled the jury instructing them that anything making it difficult to identify Petitioner amounted to a disguise.

ARGUMENT

POINT I

THE TRIAL COURT ERRED DENYING PETITIONER'S HEARSAY OBJECTION TO THE INTRODUCTION OF A LETTER AND TIME AND CRIME REPORT REFLECTING HIS MOST RECENT RELEASE DATE FROM PRISON.

A. This Court has discretionary jurisdiction pursuant to Article V, Section 3(b)(4) of the Florida Constitution, as the Fourth District Court of Appeal has certified conflict with the holding of another District Court of Appeal.

As a threshold matter, in the instant decision of the Fourth District Court of Appeal, the Fourth District certified conflict with the holdings of another district court of appeal, *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005), as it had in *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006). *See Coker v. State*, 31 Fla. L. Weekly D2309 (Fla.4th DCA September 6, 2006). Accordingly, this Court has discretionary jurisdiction pursuant to Article V, Section 3(b)(4) of the Florida Constitution.

Additionally, Petitioner contends that the Fourth District's decision conflicts with appellate court decisions, which more narrowly define public records, and would exclude the letter and time and crime report in this case.

This Court should, thus, exercise its discretionary review jurisdiction and resolve the conflict presented between the other district court and the Fourth District on this frequently recurring sentencing issue. *See Delinger v. State,* 31 Fla. L. Weekly D 2553 (Fla. 4th DCA October 11, 2006) (unpublished opinion); *Rodriguez v. State*, 938 So. 2d

653 (Fla. 4th DCA October 11, 2006); *Brown v. State*, 31 Fla. L. Weekly D2634 (Fla. 4th DCA October 18, 2006) (unpublished opinion); *Larkins v. State*, 939 So. 2d 335 (Fla. 4th DCA October 18, 2006); *Peoples v. State*, 939 So. 2d 335 (Fla. 4th DCA October 18, 2006); *Rivera v. State*, 31 Fla. L. Weekly D2741 (Fla. 4th DCA November 1, 2006) (unpublished opinion) (certified conflict); *Ray v. State*, 2006 WL 3299915 (Fla. 4th DCA November 15, 2006) (unpublished opinion) (certified conflict).

B. The trial court erred denying Petitioner's hearsay objection to the introduction of a letter and time and crime report reflecting his most recent release date from prison.

At sentencing, the trial court accepted the letter and the crime and time report, over defense counsel's objection to hearsay and foundation. (R 60-63; T 558-565). This was error, requiring reversal.

In order to have Petitioner sentenced as a Prison Releasee Reoffender, Respondent was required to prove that he committed the offense within three years of being released from a state correctional facility. § 775.082(9)(a)1., *Fla. Stat.* (2002). To prove that Petitioner was released from prison within the time frame required for Prison Releasee Reoffender sentencing, Respondent introduced a crime and time report from FDOC, certified to be true and correct copy of document as same appears in official records of FDOC, without the testimony of a correctional services assistant administrator. (R 60-63; T 558).

The First District explained, "Where nothing more than inadmissible hearsay received over specific objection is adduced in order to prove a prison release date

necessary for sentence enhancement, the enhanced sentence cannot withstand attack on direct appeal." *Gray v. State*, 910 So. 2d 867, 870 (Fla. 1st DCA 2005).

The crime and time report concerning Petitioner's release date constituted hearsay, *Id.*, and, unlike that which occurred in *DeSue v. State*, 908 So. 2d 1116 (Fla. 1st DCA 2005), Respondent did not establish the predicate for admission of the report as a business record, an exception to the hearsay rule. While certain FDOC's records may be deemed business records, *DeSue*, 908 So. 2d at 1117; *Stabile v. State*, 790 So. 2d 1235, 1238 (Fla. 5th DCA 2001), with the proper predicate, there was no attempt made, in this case, to establish the requisite predicate. (T 558). Because Respondent failed to establish that the crime and time report was a business record, and because the time and crime report is not a public record, its introduction deprived Petitioner of his right to confrontation and, since it was the only item of evidence proving when he was last released from prison, the sole evidence relied upon to establish that he qualified as a Prison Releasee Reoffender constituted hearsay. Accordingly, reversal is required.

Cases defining what is a public record in Florida dates back to 1895. *See Yellow River R. Co. v. Harris*, 35 Fla. 385, 389 (Fla. 1895). In *Yellow River*, this Court wrote, regarding land patents and receipts for land, as follows:

> "[Y]et there is nothing in the law providing for their issuance that makes them self-verifying or selfidentifying; and where a party relies upon such a receipt, in any cause, as evidence of the fact of his entry of land embraced therein, or as evidence for any purpose, the burden is upon him to show, by competent proof, that the paper he offers in evidence as being a receiver's receipt was in fact issued and signed by the

> officer purporting to have signed the same. Were the rule otherwise, a forged receipt in proper form might fraudulently made to answer the same purpose as the genuine article. Although such proof of identification and of proper execution was demanded by the defendant in this cause, the receipt here was admitted without it. This was error."

Id. If a duly certified copy is offered, this Court requires that the party offering the copy be required to produce or account for the original. *See Thomas v. Williamson*, 51 Fla. 332, 333 (Fla. 1906); *State v. Coca-Cola Bottling Co. of Miami, Inc.*, 582 So. 2d 1 (Fla. 4th DCA 1990); Section 119.01, *Fla. Stat*. (2005) (Public Records Act, specifically subsection (2)(a), which provides that automation must not erode the right of access); *And See Woodfaulk v. State*, 935 So. 2d 1225, 1226 (Fla. 5th DCA 2006) (prisoner's right to records); *Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982)(no particular format required for computer records).

Certified copies of judicial records and judgments are admissible. *See Huddleston v. Graham*, 73 Fla. 350, 354 (Fla. 1917); *Keith v. State*, 844 So. 2d 715 (Fla. 2d DCA 2003) (admissible judgment, defined by the Legislature, as writing with fingerprints affixed, and matched to fingerprints of defendant); *Slade v. State*, 898 So. 2d 120, 120-121 (Fla. 4th DCA 2005) (certified copies of judgments admissible); *Batista v. State*, 695 So. 2d 20 (Fla. 3d DCA 1996) (same); *But See Napoli v. State*, 596 So. 2d 782 (Fla. 1st DCA 1992) (prior judgment of conviction is not admissible under public record exception to hearsay rule, because the judgment is not a record, report, statement, reduced to writing, or data compilation of public office or agency setting forth activities of office or

agency or matters observed pursuant to duty imposed by law as to matters about which there was a duty to report).

If the public agency is required to maintain records under oath, then the records or certified copies of the records are admissible at a trial court. *See Branch v. State*, 76 Fla. 558, 568 (Fla. 1918); *See Also Conyers v. State*, 98 Fla. 417, 418 (Fla. 1929) (certified copies of land records admissible); *Hall v. Oakley*, 409 So. 2d 93, 97 (Fla. 1st DCA 1982) (because no duty by statute or by administrative rule found, Florida driver's handbook excluded, based on finding of law that it is not a public record, and does not fall into the public records hearsay exception); *Sikes v. Seaboard Coast Line R. C.*, 429 So. 2d 1216 (Fla. 1st DCA 1983)(same).

In addition, official registers or books, "notwithstanding their authenticity is not confirmed by the ordinary test of truth, the obligation of an oath, and an opportunity to cross-examine the person on whose authority the truth of the document depends," may be admissible. *Id*.; *White v. State*, 78 Fla. 52 (Fla. 1919)(same).

Said records would be admissible to show what the record asserts at the time of the recording, but not that the matter is true as of the date of the arrest or trial, because there might be further additions or corrections to the record. *See State v. Harris*, 609 P.2d 798, 806 (Or. 1980). The record is admitted as a continuing and evolving document, rather than as a final document illustrating an ultimate fact. *Id*. Because this is true, the admission of said document creates a rebuttable presumption and shifts the burden of proof to the defendant to disprove said fact, but shifting the burden in this manner

violates a criminal defendant's right to due process and negates the presumption of innocence. *Id*.

The definition of a public record admissible at trial thus is limited to those "intended to perpetuate, communicate, or formalize knowledge of some type." *See Rogers v. Hood*, 906 So. 2d 1220, 1223 (Fla. 1st DCA 2005) (the determination of what is a public record is a question of law); *Bryan v. Butterworth*, 692 So. 2d 878, 880 (Fla. 1997)(same). Documents that contain opinions or conclusions of public officials, such as probable cause affidavits, are inadmissible. *See Finchum v. Lyons*, 428 P. 2d 890, 893 (Or. 1967) (pathologist's conclusions inadmissible); *R. H. Williamson v. Union Oil Co. of Cal.*, 125 F.Supp. 570 (U.S.D.C. D.Colorado 1954) (inspector's reports offered for the purpose of proving primary issue of negligence inadmissible).

To be admitted, to protect a criminal defendant's right to due process and the presumption of innocence, thus, testimony is required from the party offering the document into evidence. *See Harris*, 609 P.2d at 807.

In the instant case, the Fourth District affirmed the sentence, concluding that the trial court did not err admitting the release date letter over defense counsel's objection. *See Corker v. State*, 31 Fla. L.Weekly D2309 (Fla. 4th DCA September 6, 2006). In doing so, the Fourth District certified conflict with *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005), as it had in *Yisreal v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006), and it improperly distinguished this case, which was relied on by Petitioner. *Id*. at D1324.

In *Yisrael*, defense counsel argued that the letter from Joyce Hobbs, Correctional

Services Administrator, certifying the last release date, under seal, was hearsay. *See Yisrael*, 938 So. 2d at 547. The Fourth District found, "FDOC has a statutory duty to 'obtain and place in its records information as complete as practicable on every person who may be sentenced to supervision or incarceration under the jurisdiction of the department.'" *See Yisrael*, 938 So. 2d at 548. The statute on which *Yisrael* relies, however, does not require FDOC to maintain records on actual release dates. *See Yisrael*, 938 So. 2d at 549; section 945.25, *Fla. Stat*. (2005). FDOC is only required to inform the trial courts of anticipated release dates. *Id*.; section 944.605, *Fla. Stat*. (2005).

Actual release dates are subject to change, prior to a person's release from prison. Because of this fact, the date on FDOC document may be inaccurate, reflecting a later or earlier release date than the actual release date. An incorrect later release date, when a defendant was actually released earlier, could well put an offense within the Prison Releasee Reoffender ("PRR") qualifying period of time, three (3) years, when the offense date actually fell outside this period, resulting in an incorrect PRR qualification and an illegal PRR sentence. For this reason, the Fourth District is wrong in concluding that FDOC's records about commitment, sentence and release date of every offender should be presumed comprehensive, complete and accurate. *See Yisrael*, 938 So. 2d at 549.

Furthermore, *Yisrael* adopts too broad a definition of public record. The records relied upon in this case are a clemency letter and a time and crime report. (R 58-63). While the clemency letter is signed, certified and under seal, the time and crime report is

only signed and certified by a staff assistant, without any oath or seal. (R 58-63). Furthermore, it is not in final form designed to perpetuate, communicate, and formalize knowledge, as Florida law requires. *See Rogers*, 906 So. 2d at 1223; *Bryan v. Butterworth*, 692 So. 2d at 880.

Incomplete computer entries are not formalized, and, therefore, can not be considered admissible public records. For this reason, the Fourth District was incorrect and did not follow Florida law, concluding, "we do not perceive any necessity to read into the public records exception, a requirement that a statement under seal also attach copies or identify such physical papers or electronic data from which the declarant derived the criminal history information contained in the statement, namely a release date on a specific conviction." *See Yisrael*, 938 So. 2d at 549.

Based on records seen by appellate counsel, FDOC submits not only certified copies, but also letters on FDOC letterhead; printouts of blank screens, except for an area filled in with the release date; printouts of completely filled out computer screens; and printouts of the Inmate Release Detail from the FDOC's web site, which in its own text on the screen admits to being inaccurate. *See Perkins v. State*, 31 Fla. L. Weekly D2443 (Fla. 4th DCA September 28, 2006) (example of affidavit); *Ragin v. State*, 939 So. 2d 330 (Fla. 4th DCA October 18, 2006) (example of affidavit with certification).

The preparation of these various forms of documentation evidence the fact that the documents do not come from a consistently maintained and formalized computer data base that is presently in existence and readily accessible to the public and consistently

printed out as a certified public record. Indeed, the variety of documents suggests that the documents are created for purposes of prosecution by a variety of individuals rather than solely FDOC, possibly including clerks at the prosecutor's office itself. This is further evidenced by the lack of a Legislative mandate to keep a public record of the actual release date. *Supra*.

Further, the facts surrounding the creation of any one of these printouts has not been determined in a court of law, based on testimony by the clerks and other individuals who appear to create them. There was never any testimony adduced as to the creation of this hearsay documentation. Indeed, without more, the prosecutor relied on a seal and stamped certification on the document as proof of its authenticity and accuracy, which was not a certified copy of a public record. (T 558-559). Furthermore, FDOC records should be available as part of a public records request, if that rule applies. *See State v. Coca-Cola Bottling Co. of Miami*, 582 So. 2d 1, 3 (Fla. 4th DCA 1990) (public records should be produced).

Petitioner submits that the First District court in *Gray*, properly applied the appropriate business records test as opposed to the public records exception. *See Gray*, 910 So. 2d at 869. In *Gray*, the prosecution attempted to establish the defendant's release date by submitting a typed or printed document on FDOC stationery purported to be a FDOC's employee's declaration or affirmation certifying that the seal in the letterhead was official and that the defendant was released on a certain date. *See Gray*, 910 So. 2d at 868. The First District specifically stated that it was not concerned with

duly authenticated FDOC time and crime reports. *See Gray*, 910 So. 2d at 869. The First District also noted that in appropriate circumstances a printout may be admissible as a properly certified copy of an official public record. *Id*. For a printout to be admissible, it must include a certification by a person authorized by statute that the copy is correct and the person has custody of the original, and it must be signed. *Id*. To meet the business records exception, the certification from the custodian of records must also certify or declare that the record was made at or near the time of the occurrence of the matters set forth, by a person with knowledge of those matters, kept in the course of the regularly conducted activity, and made as a regular practice in the course of the regularly conducted activity. *Id.;* section 90.902(11), *Fla. Stat*. (2005). Thus, without these statements the purported FDOC document could not be admitted, because it constituted inadmissible hearsay. *See Gray*, 910 So. 2d at 870.

In this case, the signature on the certification is that of staff assistant Judith Lawsanyu, not administrator Joyce Hobbs. (R 58-63). The document was apparently prepared before Petitioner was released on February 11, 2002, when it was signed. (R 58-63). The document does not include a certification by a person authorized by statute that the copy is correct and the person has custody of the original. (R 58-63). It does not meet the business records exception, because there is no certification from the custodian of records that certifies or declares that the record was made at or near the time of the occurrence of the matters set forth, by a person with knowledge of those matters, kept in the course of the regularly conducted activity, and made as a regular practice in the

course of the regularly conducted activity. (R 58-63). Therefore, the document was inadmissible hearsay.

Furthermore, defense counsel objected, as required, prior to the document's admission. (T 553-569). *See Bolen v. State*, 2006 WL 3207963 (Fla. 1st DCA November 8, 2006) (unpublished opinion). Though Petitioner would argue that this objection would be adequately preserved by a 3.800(b)(2) motion.

Additionally, quite significantly, this document differs from those in *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005), and in *Yisreal v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006). This Court should not accept the Fourth District's decision in this matter and instead should uphold the decision in *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005), requiring some testimony to support the admission of such documents to prove release date. The Fourth District receded from *Sutton v. State*, 929 So. 2d 1105 (Fla. 4th DCA May 10, 2006), in which defense counsel objected, based on hearsay and confrontation clause, to a FDOC letter, written by the FDOC administrator, certifying the seal and stating the release date, and the Fourth District relied on *Gray* reversing for resentencing. The Fourth District also receded from *Rivera v. State*, 877 So. 2d 787 (Fla. 4th DCA June 30, 2004), in which the trial court relied on a printout and affidavit, specifically applying the business records exception.

Separately, *Desue v. State*, 908 So. 2d 1116 (Fla. 1st DCA 2005) relies on the business records analysis for admission of a time and crime report, prepared by the FDOC custodian of records, testified to as an official document copied from FDOC

records and listing the release date, kept in the ordinary course of business. *Desue* analyzes a *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 177 (2004) objection, and finds that a business record is specifically excepted from Crawford as non-testimonial. *See Desue*, 908 So. 2d at 1118; *See Also Peterson v. State*, 911 So. 2d 184, 185 (Fla. 1st DCA 2005) (same); *And See Belvin v. State*, 922 So. 2d 1046 (Fla. 4th DCA March 8, 2006) (adopting this analysis to public records); *Sproule v. State*, 927 So. 2d 46 (Fla. 4th DCA May 17, 2006) (same).

Finally, the Fifth District rejected an *Apprendi v. New Jersey*, 530 U.S. 46, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) analysis, requiring proof beyond a reasonable doubt, including the admission of an affidavit under seal, produced by FDOC's Bureau Chief of Central Records, certifying that he is the records custodian, and the release date. *See Stabile v. State*, 790 So. 2d 1235, 1238 (Fla. 5th DCA 2001).

Therefore, based on the foregoing arguments, this Honorable Court should accept jurisdiction of this cause, approve the decision in *Gray*'s business records analysis as opposed to *Yisrael's* public records conclusion, or in the alternative, limit the definition of public record to one that is formalized, accurately maintained, verifiable, and certifiable, and reverse the instant decision of the Fourth District Court of Appeal, wherein it affirms the trial court's admission of the clemency letter and the informal time and crime printout to establish Petitioner's release date.

POINT II

THE TRIAL COURT ERRED DOUBLY RECLASSIFYING THE OFFENSE, BASED ON BOTH ATTEMPT AND THE HOOD/MASK, LEADING TO SENTENCING AS A FIRST DEGREE FELONY, PUNISHABLE BY THIRTY (30) YEARS IMPRISONMENT, AND NOT INCLUDING THE MAXIMUM POSSIBLE SENTENCE ON THE CRIMINAL PUNISHMENT CODE SCORESHEET.

Petitioner argues this Court should vacate the thirty (30) year sentence, based on the double reclassification on Count I, and resentence Petitioner to only fifteen (15) years imprisonment. *Supra*.

Petitioner was charged with Count I, Attempted Robbery with a Deadly Weapon (Firearm) and a hood or mask, and Count II, Possession of a Firearm by a Convicted Felon, committed on April 25, 2002, by way of an information, filed in St. Lucie County on June 5, 2002. (R 1-2). Petitioner was found guilty at trial on Count I, including possessing and carrying a firearm, and wearing a mask or device that concealed his identity. (R 27-28). Petitioner pled no contest to Count II. (R 37-39). Petitioner was sentenced on Count I, to 360 months or thirty (30) years imprisonment with a ten (10) year mandatory minimum, and on Count II, to 180 months or fifteen (15) years imprisonment with a three (3) year mandatory minimum, and 371 days credit, based on a Criminal Punishment Scoresheet, ranking the primary offense as a Level 9. (R 64-72, 75-79).

First, Robbery with a Deadly Weapon (Firearm) is a first degree felony, punishable

by life imprisonment, classified as a Level 9. *See Fla. Stat*. § 812.13(1) and (2)(a) (2002). Next, Attempted Robbery with a Deadly Weapon (Firearm) is reclassified to a second degree felony, punishable by fifteen (15) years imprisonment, classified as a Level 8. *See Fla. Stat*. § 777.04 (2002). *See Williams v. State*, 784 So. 2d 524, 525 (Fla. 4th DCA 2001). But then, the prosecution, in this case, **doubly reclassified the offense**, based on the hood or mask, up to a first degree felony, punishable by thirty (30) years, improperly reclassified to a Level 9. *See Fla. Stat*. § 775.0845 (2002). *See Duran v. State*, 738 So. 2d 371, 372 (Fla. 3d DCA 1999).

Back in 1993, Section 775.0845, *Florida Statutes,* enacted in 1981, was a penalty enhancement statute rather than a substantive reclassification statute. *See Cabal v. State*, 678 So. 2d 315, 317 (Fla. 1996) (earlier robbery case, but not an attempt and not with a firearm). The statute, amended in 1995, is now a substantive reclassification statute. *See Cabal*, 678 So. 2d at 317, FN3; *See Also Coney v. State*, 833 So. 2d 290 (Fla. 5th DCA 2002) (section applied to armed robbery and attempted armed robbery); *And See Sumpter v. State*, 838 So. 2d 624 (Fla. 4th DCA 2003) (later robbery case, but not an attempt and not with a firearm).[1]

The Florida Supreme Court explained that penal statutes, when in question, should

[1] Also, if applicable, this Court should consider subsequent interpretation of this area of statutory law. *See Barns v. State*, 768 So. 2d 529, 533 (Fla. 4th DCA 2000) (right and duty to consider subsequent legislation to arrive at meaning of prior statute); *See Also Gamble v. State*, 723 So.2d 905 (Fla. 5th DCA 1999) (also on interpretation of legislative intent).

be interpreted in favor of the accused:

> Rules of statutory construction require penal statutes to be strictly construed. *State v. Camp*, 596 So. 2d 1055 (Fla. 1992); *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991). Further, when a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. *Scates v. State*, 603 So. 2d 504 (Fla. 1992).

See Cabal, 678 So. 2d at 318.

In this vein, the Florida Supreme Court also urged, "Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute." *See Perkins*, 576 So. 2d at 1312.

Because Section 775.021(1), *Florida Statutes* (2002), the rule of lenity requires that the sentencing statutes be read in favor of the accused, the improper doubling of the reclassification must be corrected both in the Criminal Punishment Code scoresheet and in the sentence, which should be vacated.

Thus, Petitioner should be resentenced in the sentencing range between the fifteen (15) year maximum for a second degree felony and the corrected Criminal Punishment Code scoresheet, based on a Level 8 primary offense, leading to a minimum of 40.425 months imprisonment, to give consistent effect to the felony reclassification statutes. The firearm mandatory minimum sentence on this Count too need not be adjusted. (R 75-76). But the maximum should be listed on resentencing on the Criminal Punishment Code Scoresheet. (R 64-65; Supp. R, unnumbered pages, included in 3.800(b)(2) motion to correct sentencing error).

Thus, Petitioner requests that this Honorable Court further request these changes be made to ensure that Petitioner has a legal sentence.

POINT III

THE TRIAL COURT MISLED THE JURY INSTRUCTING THEM THAT ANYTHING MAKING IT DIFFICULT TO IDENTIFY PETITIONER AMOUNTED TO A DISGUISE.

The trial court misinstructed the jury. Because this is fundamental error, the judgment and sentence should be vacated on Count I, the attempted robbery, and this cause remanded for a new trial on this count, or in the alternative, to delete the references to a mask/disguise, and section 775.0845, *Florida Statutes* (2002), and hold a new sentencing hearing. *See Bartley v. State*, 817 So. 2d 1065 (Fla. 5th DCA 2002). (T 569).

Specifically, the trial court improperly instructed the jury on the law to apply regarding the mask/device, as follows, "If you find the Defendant wore a mask or device that concealed his identity in the course of committing the robbery, you should indicate that in your verdict by answering the interrogatory." (T 497). Defense counsel voiced no objection to this instruction. (T 528).

The prosecutor had drafted this instruction on his own the night before, as he explained:

> And then the next interrogatory - - because I believe the mask enhances every one of offenses if I'm not misreading that, the mask or device statute - - if you find the Defendant guilty of any of the above offenses, during the course of the offense, did the Defendant wear a mask or device that concealed his identity - - which I was tracking from the mask statute.

(T 365). Defense counsel voiced no objection to the prosecutor's explanation. (T 365).

The trial court did not look up or instruct the jury on the standard jury instruction, 3.05(e) *Aggravation of a Felony by Wearing a Hood, Mask or Other Device to Conceal Identity*, as follows:

> If you find that (defendant) committed (crime charged) and you also find that (defendant) was wearing a hood, mask or other device that concealed [his][her] identity, you should find (defendant) guilty of (crime charged) while wearing a device that concealed [his][her] identity.
>
> If you find only that the defendant committed (crime charged) but did not wear a hood, mask or other device that concealed [his][her] identity, then you should find the defendant guilty only of (crime charged).

See Standard Jury Instructions in Criminal Cases, 697 So. 2d 84 (Fla. 1997).

Not surprisingly, the first jury question submitted was, "Could you better define device for concealing identity?" (T 531). The second jury question asked, "Is it possible for the defendant to put coat on with collar up to visualize." (T 531).

The trial court looked up *Fletcher v. State*, 472 So. 2d 537 (Fla. 5th DCA 1985), and the definition of "conceal" in *Webster's Dictionary*. (T 532-33). Defense counsel objected that the jury did not ask for a definition of conceal, but rather the definition of device. (T 534). The trial court thought it through out loud, and concluded, "It's just going to simply be a device may be used to make the witnesses' identification of an individual difficult or to otherwise facilitate the commission of a crime." (T 536). Defense counsel did not express any further objection. (T 536).

The jury then was instructed:

> Ladies and gentlemen, you've asked the question could you better define device for concealing identity.
>
> I will tell you the device may be used to make witnesses' identification of an individual difficult or to otherwise facilitate the commission of a crime.
>
> The second question you said: Is it possible for a Defendant to put - - is it possible for Defendant to put coat on with collar up to visualize?
>
> No. That's not possible. You must rely upon the evidence as presented in trial, the argument of counsel, and the instructions of law as I gave it to you.

(T 538-39). This was error.

And the jury returned with a verdict of guilty as charged on the attempted robbery with a deadly weapon, specifically answering in the affirmative to the following: "Was the weapon a firearm?"; "During the course of the offense, did the defendant actually possess a firearm?"; "During the course of the offense, did the defendant carry, display, use, threaten to use or attempt to use a firearm?"; and, "During the course of the offense, did the defendant wear a mask or device that concealed his identity?" (R 27-28; T 541).

In *Moore v. State*, 903 So. 2d 341, 342 (Fla. 1st DCA 2005), the First District began by noting, "In a criminal case, the trial judge bears the responsibility of ensuring that the jury is fully and correctly instructed as to the applicable law." When the jury is not properly instructed, the conviction should not stand. *Id*. Failing to instruct the jury properly, in this case, results in a one degree enhancement upon conviction. *See* § 775.0845, *Fla. Stat*. (2002); *Sumpter v. State*, 838 So. 2d 624 (Fla. 4th DCA 2003).

Although the trial court attempted to instruct the jury, the trial court misled the jury because the phrasing suggests that wearing simply a wool hat, like a baseball cap, might make identification difficult, and that would be sufficient to reclassify the offense upward by one degree. (T 497, 538). The instruction as read amounts to fundamental error, where the standard instruction makes clear that the mask or device must conceal the perpetrator's identity, not merely make it difficult for the witness to identify the person with the crime charged, in order for the enhancement to apply. *See Standard Jury Instructions in Criminal Cases*, 3.05(e), (2002); *And See People v. Jackson*, 262 Mich. App. 669 (2004) (a different state, limiting the definition of disguise, to not include giving a false name or changing a shirt, because such acts do not conceal one's true identity); *See Also Arrison v. State*, 643 So. 2d 93 (Fla. 3d DCA 1994) (changing one's shirt is not a disguise, because "it does not change one's overall general appearance").

No contemporaneous objection was required to preserve this error. *See Moore*, 903 So. 2d at 343. The question of whether the wool hat constituted a mask/disguise was very much in dispute. *See Blunt v. State*, 831 So. 2d 770, 771 (Fla. 4th DCA 2002). (T 338, 343, 444-45, 531).

The trial court mistakenly relied on *Fletcher v. State*, 472 So. 2d 537, 539 (Fla. 5th DCA 1985), in which a transvestite asserted his identity as a woman was well known to police and was not a disguise because it was his true identity. Even in that case, Judge Dauksh dissented arguing that the defendant's identity was not concealed. *See Fletcher*, 472 So. 2d at 540 (dissenting opinion).

Because this misinstruction of the jury was fundamental error, the judgment and sentence should be vacated on Count I, the attempted robbery, and this cause remanded for a new trial on this count, or in the alternative, to delete the references to a mask/disguise, and section 775.0845, *Florida Statutes* (2002), and hold a new sentencing hearing. *See Bartley v. State*, 817 So. 2d 1065 (Fla. 5th DCA 2002). (T 569).

CONCLUSION

Petitioner prays this Honorable Court will exercise its discretion to review the instant decision of the district court which is certified to be in conflict with *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005), as it had in *Yisreal v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006).

This Honorable Court should reverse the decision of the Fourth District Court of Appeal in *Corker v. State*, wherein it affirms the judgment and sentence, despite the error in the instructions (Issue 3), and also as to the length of the sentence based on the double reclassification to a first degree felony (Issue 2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Brief on the Merits been furnished to: DANIEL P. HYNDMAN, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of November, 2006.

_____
Attorney for Ronald Corker

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY has been prepared with 14 point Times New Roman type, in compliance with a *Fla. R. App. P*. 9.210(a)(2), this _____ day of November, 2006.

_____
ELISABETH PORTER
Assistant Public Defender