

IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-2134

JOSE BETANCOURT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

**ON PETITION FOR DISCRETIONARY JURISDICTION FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT**

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Bureau Chief, Criminal Appeals
Assistant Attorney General
Florida Bar No. 0239437

KRISTINE KEATON
Assistant Attorney General
Florida Bar No. 0782602
Office of the Attorney General
The 110 Tower - S.E. 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4600 Fax: 712-4761

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INTRODUCTION

Petitioner, JOSE BETANCOURT, was the Defendant in the trial court and the Appellant in the District Court of Appeal of Florida, Third District. Respondent, THE STATE OF FLORIDA, was the prosecuting authority in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they appear before this Court. All references to the record on appeal will be denoted by "R" followed by a colon to indicate the appropriate page number.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Respondent, the State of Florida, hereby certifies this brief is printed in 12 point Courier New font, a font that is not proportionately spaced, as required by this Court's order of July 13, 1998.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the facts in so far as it is non-argumentative, with the following additions and/or corrections.

The Defendant was convicted by a jury of second degree murder, burglary of a structure with an assault, armed robbery, and armed kidnaping. (R:13-14). Petitioner's scoresheet indicated a

recommended sentencing range of 27-40 years and a permitted range of life. (R:21). The Petitioner was sentenced to life in prison. (R:19-20).

The Petitioner filed a *pro se* motion for post-conviction relief on three grounds: (R:22-33).

ARGUMENT I

The Petitioner argued that the offense of armed kidnaping had been incorrectly classified as a life felony. (R:26). The offense of kidnaping was improperly classified as the primary offense. (R:26). The Defendant asserted that the kidnaping charge could not be enhanced pursuant to §775.087, Fla. Stat. (1990), because he did not possess the firearm. (R:26-29).

ARGUMENT II

The Petitioner alleged that the additional offenses of second degree murder, armed burglary of a structure with an assault, and armed robbery should have been classified as first degree felonies without the punishable by life designation pursuant to the court's reasoning in *Eady v. State*, 604 So. 2d 559 (Fla. 1st DCA 1992). (R:29-30).

ARGUMENT III

The Petitioner also alleged that his prior conviction for armed robbery was incorrectly classified as a first degree felony punishable by life. (R:31-32).

The State submitted that the kidnaping offense, as well as the additional offenses, were properly classified as first degree felonies punishable by life. (R:35-40). However, the State's written response did concede that the kidnaping offense had been incorrectly enhanced pursuant to §775.087, Fla. Stat. (1989). (R:35). The record is devoid of any showing that the Petitioner

contested his prior conviction in case number 84-9488. (R. P.32).

At the hearing, defense counsel argued that while he could be charged with armed robbery as a principle, the offense could not be classified as a first degree felony punishable by life. (R:55-59). The court ruled that the robbery, as well as the other offenses, should be classified as a first degree felony punishable by life. (R:60).

The newly calculated scoresheet classified each of the offenses, and the prior offense, as first degree felonies punishable by life resulting in a recommended guideline range of 22-27 years and a permitted range of 27-40. (R:41). Based on the fact that the prior sentencing Judge had sentenced the petitioner at the highest end of the guidelines, the subsequent sentencing Judge sentenced the Petitioner accordingly to forty (40) years in state prison. (R:61).

Petitioner filed an appeal in the Third District Court of Appeal, DCA No. 99-3017 arguing that his offenses should be scored as first-degree felonies, not first-degree felonies punishable by life. Betancourt v. State, 767 So. 2d 557 (Fla. 3d DCA 2000). The Petitioner also claimed that his scoresheet contained a prior conviction for armed robbery which had never been proven. Petitioner's *verbatim* points on appeal were:

ARGUMENT I

EADY V. STATE, 604 SO. 2D 559 (FLA. 1ST DCA 1992), REQUIRES THAT THE APPELLANT'S CONVICTIONS FOR ARMED BURGLARY WITH AN ASSAULT, SECOND DEGREE MURDER, ARMED KIDNAPING, AND ARMED ROBBERY BE SCORED AS FIRST DEGREE FELONIES WITHOUT THE PUNISHABLE BY LIFE DESIGNATION.

ARGUMENT II

THE APPELLANT'S SENTENCE MUST BE REMANDED WHERE THE APPELLANT CONTESTED THE VALIDITY OF A PRIOR CONVICTION AND THE STATE DID NOT PROVIDE PROOF CORROBORATING THE PRIOR RECORD.

The Third District rejected Petitioner's arguments and affirmed the decision of the trial court, certifying direct conflict with the First District's opinion in *Eady v. State*. (R:64-68). The mandate was issued on March 5, 1999. (R:69). Petitioner's petition for discretionary review followed.

QUESTION PRESENTED

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN *BETANCOURT V. STATE*, 767 So. 2d 557 (Fla. 3d DCA 2000), CONFLICTS WITH THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL IN *EADY V. STATE*, 604 So. 2d 559 (Fla. 1st 1992), WHERE FLORIDA STATUTES SPECIFICALLY PROVIDE THAT A FIRST DEGREE FELONY CAN CARRY A LIFE PENALTY WITHOUT CONVERTING IT INTO AN IMPERMISSIBLE LIFE FELONY?

SUMMARY OF THE ARGUMENT

The Third District correctly determined that the classification of the Petitioner's convictions for second degree murder, armed burglary with an assault, armed robbery and kidnaping were first-degree felonies punishable by life as authorized by Florida Statute.

There is no conflict between the Third District Court of Appeal and the First District Court of Appeal where Florida Statutes specifically provide for the imposition of a life sentence. Each of the Petitioner's offenses include the same statutory language: "a felony of the first degree, **punishable for a term of years not exceeding life**". (Emphasis added). This language has been interpreted by both the Third District Court of Appeal and the First District Court of Appeal to connote first degree felonies punishable by life. Brown v. State, 24 Fla. L. Weekly D 2753, 2754 (Fla. 1st DCA Dec. 8, 1999); Williams v. State, 731 So. 2d 99 (Fla. 3d DCA 1999); State v. Riveron, 723 So. 2d 845 (Fla. 3d DCA 1998); Dues v. State, 716 So. 2d 282 (Fla. 1st DCA 1998); Patterson v. State, 693 So. 2d 74 (Fla. 1st DCA 1997); Roberts v. State, 685 So. 2d 88 (Fla. 1st DCA 1997); Vaughan v. State, 658 So. 2d 1107 (Fla. 3d DCA 1995); Knickerbocker v. State, 619 So. 2d 18 (Fla. 1st DCA 1993).

ARGUMENT

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN *BETANCOURT V. STATE*, 767 So. 2d 557 (Fla. 3d DCA 2000), DOES NOT CONFLICT WITH THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL IN *EADY V. STATE*, 604 So. 2d 559 (Fla. 1st 1992), WHERE FLORIDA STATUTES SPECIFICALLY PROVIDE THAT A FIRST DEGREE FELONY CAN CARRY A LIFE PENALTY WITHOUT CONVERTING IT INTO AN IMPERMISSIBLE LIFE FELONY.

This case is before the Court for review of the issue certified by the Third District Court of Appeal regarding whether the Third District's opinion in *Betancourt v. State*, 767 So. 2d 557 (Fla. 3d DCA 2000), that a first degree felony can, where authorized by law, carry a life penalty without converting it into an impermissible life felony, directly conflicts with the opinion of the First District in *Eady v. State*, 604 So. 2d 559 (Fla. 1st DCA 1992).

Petitioner relies upon *Eady v. State*, 604 So. 2d 559 (Fla. 1st DCA 1992), in support of the contention that his convictions were improperly classified as first degree felonies punishable by life. In *Eady*, the court concluded that although the scoresheet error was harmless, the Petitioner's second degree murder conviction should have been scored as a first degree felony, without the punishable by life designation. The court opined that according to §775.081(1), Fla. Stat. (1989), scoring the second degree murder conviction as punishable by life was improper because it was designated by statute as a first degree felony. *Eady v. State*, 604

So. 2d 559, 560 (Fla. 1st DCA 1992). The court declined to consider the remainder of the statutory language which clearly states a first degree felony is punishable by a term of years not exceeding life.

The Third District Court of Appeals declined to accept the Petitioner's contention and the holding in *Eady*, citing Florida Statute, Section 775.082(3)(b) which provides:

"For a felony of the first degree, by a term of imprisonment not exceeding 30 years **or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment....**"

(R:64-68) (emphasis added). The Third District held that "[t]he fact that a first-degree felony can, where authorized by law, carry a life penalty does not convert it into an impermissible life felony". (R. P.66). The court further stated that "sentencing guidelines and scoresheets are themselves statutory, see, id. §921.0015, and provide specific scores for first-degree felonies". (R:66). *Betancourt v. State*, 767 So. 2d 557, 558 (Fla. 3d DCA 2000). The rules of statutory construction require penal statutes to be strictly construed. *Cabal v. State*, 678 So. 2d 315, 318 (Fla. 1996). The plain meaning of section 775.082(3)(b) dictates that a felony of the first degree is punishable by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, as is the case here, a felony of the first degree is **punishable by life**. This section is not susceptible to more than one meaning as

evidenced by current case law in both the Third and First Districts.

Eady is essentially no longer applicable law, especially where, as the Third District opined:

"[w]e doubt that the First District would follow the quoted portion of the *Eady* decision today. See *Brown v. State*, 24 Fla. L. Weekly D 2753, 2754 (Fla. 1st DCA Dec. 8, 1999); *Dues v. State*, 716 So. 2d 282, 283 (Fla. 1st DCA 1998); *Patterson v. State*, 693 So. 2d 74, 75 (Fla. 1st DCA 1997); *Roberts v. State*, 685 So. 2d 88, 89 (Fla. 1st DCA 1997); and *Knickerbocker v. State*, 619 So. 2d 18, 19 (Fla. 1st DCA 1993)."

A review of the cases cited above establish that the First District has retreated from their former position. *Brown v. State*, 24 Fla. L. Weekly D 2753, 2754 (Fla. 1st DCA Dec. 8, 1999) (holding that appellant convicted of armed burglary was legally sentenced to life imprisonment as a "felony punishable by life" includes both life felonies and first-degree felonies punishable by life); *Dues v. State*, 716 So. 2d 282, 283 (Fla. 1st DCA 1998) (holding that Petitioner convicted of armed robbery was mistaken as to claim that he should have been charged with a life-felony rather than a first-degree felony punishable by life); *Patterson v. State*, 693 So. 2d 74, 75 (Fla. 1st DCA 1997) (holding armed robbery is a felony of the first degree which is punishable by a term of years not exceeding life and thus his fifty-year sentence is legal); *Roberts v. State*, 685 So. 2d 88, 89 (Fla. 1st DCA 1997) (holding that both robbery with a firearm and second-degree murder are first-degree felonies which are punishable by a term of years not exceeding life imprisonment

and thus a sentence may be for a term of years greater than 30); and *Knickerbocker v. State*, 619 So. 2d 18, 19 (Fla. 1st DCA 1993) (holding that burglary with an assault, or while armed, and kidnaping are felonies of the first degree which are punishable by imprisonment not exceeding life).

Here, the Petitioner contends that based upon the proposition of law in *Eady v. State*, 604 So. 2d 559 (Fla. 1st DCA 1992), the Third District Court of Appeal improperly affirmed the classifications of his convictions for second degree murder, burglary with an assault, armed robbery and kidnaping as first degree felonies, punishable by life. However, where as here the statute specifically provides for a punishable by life sentence the State submits that the District Court was correct in affirming these convictions as first degree felonies punishable by life and sentencing the Petitioner to forty (40) years imprisonment.

The Petitioner was convicted of second degree murder pursuant to §782.04(2), Fla. Stat. (1990), which states:

The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years **not exceeding life** or as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added).

For purposes of classification, this statute provides that a

conviction for second degree murder is a first degree felony punishable by up to life in prison. *Bell v. State*, 765 So. 2d 83(Fla. 4th DCA 2000)(holding that agreed sentence of forty (40) years for second-degree murder, a first degree felony punishable by life, is legal). Therefore, the Petitioner's offense was correctly classified on the sentencing scoresheet as a first degree felony punishable by life. (R: 41).

The Petitioner was convicted of burglary with an assault¹ pursuant to §810.02(2)(a), Fla. Stat. (1990), which states:

Burglary is a felony of the first degree, punishable by imprisonment for a term of years **not exceeding life** or as provided in s. 775.082, s. 775.083, or s. 775.084.

(a)Makes an assault or battery upon a person.

(Emphasis added).

For purposes of classification, this statute provides that a conviction for armed burglary with an assault is a first degree felony punishable by up to life in prison. *Williams v. State*, 731 So. 2d 99 (Fla. 3d DCA 1999)(holding that armed burglary is a felony of the first degree punishable by imprisonment for a term of years not exceeding life and thus will be classified as first degree felony punishable by life). Therefore, the Petitioner's offense was correctly classified on the sentencing scoresheet as a first degree

¹The Petitioner was also found guilty of burglary with a firearm pursuant to §810.02(2)(b).

felony, punishable by life. (R: 41).

The Petitioner was convicted of armed robbery pursuant to §812.13(2)(a), Fla. Stat. (1990), which states:

If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years **not exceeding life** or as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added).

For purposes of classification, this statute provides that a conviction for armed robbery is a first degree felony punishable by up to life in prison. *Vaughan v. State*, 658 So. 2d 1107 (Fla. 3d DCA 1995) (holding that armed robbery is a felony of the first degree punishable by imprisonment for a term of years not exceeding life and thus will be classified as first degree felony punishable by life). Therefore, the Petitioner's offense was correctly classified on the sentencing scoresheet as a first degree felony, punishable by life. (R: 41).

The Petitioner was convicted of kidnaping pursuant to §787.01(2), Fla. Stat. (1990), which states:

A person who kidnaps a person is guilty of a felony of the first degree, punishable by imprisonment for a term of years **not exceeding life** or as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added).

For purposes of classification, this statute provides that a

conviction for kidnaping is a first degree felony punishable by up to life in prison. *State v. Riveron*, 723 So. 2d 845 (Fla. 3d DCA 1998) (holding that kidnaping is a felony of the first degree punishable by imprisonment for a term of years not exceeding life and thus will be classified as a first degree felony punishable by life). Therefore, the Petitioner's offense was correctly classified on the sentencing score sheet as a first degree felony, punishable by life. (R: 41).

For the purposes of penalties, the above cited Sections, §782.04(2), §810.02(a)(a), §812.13(2)(a), and §787.01(2), refer us to Section 775.082(3)(b), Fla. Stat., which provides:

For a life felony committed prior to October 1, 1983, by a term of imprisonment for life or for a term of years not less than 30 and, for a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years.

The Petitioner's offenses, second degree murder, burglary with an assault, armed robbery and kidnaping, were all committed after October 1, 1983. Therefore, Petitioner's primary offense of second degree murder, a first degree felony punishable by life, was correctly calculated at 150 points. Rule 3.988(a) Fla.R.Crim.P. (1990). The Petitioner's additional offenses of armed robbery, burglary with an assault, and kidnaping, also first degree felonies punishable by life, were correctly calculated at 58 points. Rule 3.988(a) Fla.R.Crim.P. (1990). The Petitioner's prior offense of armed robbery, again a first degree felony punishable by life, was

correctly calculated at 40 points. Rule 3.988(a) Fla.R.Crim.P. (1990). The total score of 317 points indicated a recommended range of 22-27 years and a permitted range of 17-40. Rule 3.988(a) Fla.R.Crim.P. (1990). The Petitioner was properly sentenced to forty (40) years in state prison for each offense to run concurrent. (R: 61).

CONCLUSION

WHEREFORE, based upon the foregoing, the decision of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

ROBERT A BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Bureau Chief, Criminal Appeals
Assistant Attorney General
Florida Bar No. 0239437

KRISTINE KEATON
Assistant Attorney General
Florida Bar No. 0169846
Office of the Attorney General
The 110 Tower - S.E. 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4600 Fax: 712-4716

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **ROSA C. FIGAROLA**, Esquire, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this 6th day of December 2000.

KRISTINE KEATON
Assistant Attorney General

