IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-2134

JOSE BETANCOURT,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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JOSE BETANCOURT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

INTRODUCTION

This is the Petitioner's brief on the merits requesting that this Court quash the decision below. Petitioner, Jose Betancourt, was the defendant in the trial court and the appellant in the Third District Court of Appeal; the Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondent. In this brief, the symbol "R" indicates the record on appeal.

STATEMENT OF THE CASE AND FACTS

Jose Betancourt was convicted by a jury of second degree murder, armed robbery, armed kidnaping, and armed burglary of a structure with an assault. (R. 13-

4). The information alleged that Mr. Betancourt's co-defendant possessed the firearm. (R. 1-6). The computed sentencing scoresheet indicated a recommended guideline sentence of 27 to 40 years and a permitted range of life. (R. 21). The trial court sentenced Mr. Betancourt to life imprisonment. (R. 19-20).

Mr. Betancourt filed a pro se motion for post-conviction relief on the grounds that his sentence had been based upon an incorrectly computed sentencing scoresheet. (R. 22-33). The motion alleged that the offenses were incorrectly designated and scored as first degree felonies punishable by life, and that there was no proof of his prior conviction for armed robbery which was also incorrectly scored as a first degree felony punishable by life.

The motion asserted that the offense of armed kidnaping, which was scored as the primary offense on the scoresheet, had been incorrectly scored as a life felony. (R. 26). Instead, the kidnaping charge should have been scored as a first degree felony because it could not be enhanced to a life felony pursuant to section 775.087 Fla.Stat. (1989) since Betancourt did not possess the firearm. (R. 26-9).

Secondly, the motion alleged that the additional offenses of second degree murder, armed burglary of a structure with an assault, and armed robbery, as well as the kidnaping, should have been scored as first degree felonies without the punishable

by life designation pursuant to *Eady v. State,* 604 So. 2d 559 (Fla. 1st DCA 1992). (R. 29-30).

Thirdly, the motion alleged that the scoresheet had incorrectly calculated his prior record because a prior conviction for armed robbery had been incorrectly designated a first degree felony punishable by life. (R. 32).

The state filed a response acknowledging that the charge of kidnaping had been incorrectly enhanced to a life felony pursuant to section 775.087 Fla.Stat. (1989). (R. 35). The state maintained however, that the kidnaping, as well as the other three counts, were properly designated first degree felonies punishable by life. (R. 35).

The state's position during a subsequent hearing was consistent with its position in the written motion. (T. 50-54). However, the argument centered on whether the robbery could or could not be enhanced to an armed robbery. (T. 50-54). The state maintained that it could because Betancourt was a principal. The defense maintained that Betancourt could be convicted of armed robbery as a principal but that the armed robbery could not be scored as a first degree punishable by life on the scoresheet. (T. 55-59). The defense also objected to the computed score sheet. (T. 60).

The trial court ruled that the armed robbery was properly scored as a first degree felony punishable by life and sentenced Mr. Betancourt to a term of forty years

incarceration pursuant to a newly calculated scoresheet. The revised scoresheet scored the four convictions arising from this case as first degree felonies punishable by life. The scoresheet also scored the prior conviction as a first degree punishable by life. (R. 41, 42-44).

Mr. Betancourt raised two issues on appeal to the Third District Court of Appeal. First, Betancourt claimed that the decision of the First District Court of Appeal in *Eady v. State,* 604 So. 2d 559 (Fla. 1st DCA 1992), required that his 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. Secondly, Betancourt argued that his sentence must be remanded to the trial court in any event because he had contested the existence of a prior conviction and the state had failed to provide proof corroborating the conviction.

The Third District Court of Appeal denied relief ruling that the convictions had been properly scored as first degree felonies punishable by life and recognized a conflict with the First District Court of Appeal's decision in *Eady.* The Third District also ruled that Mr. Betancourt's pro se motion for post-conviction relief did not contest the existence of the prior but merely sought that it be scored as a first degree felony without the punishable by life designation

SUMMARY OF THE ARGUMENT

The rationale employed by the First District Court of Appeal in *Eady v. State,* 604 So. 2d 559 (Fla. 1st DCA 1992), supports the Petitioner's position that his convictions for second degree murder, armed kidnaping, armed burglary with an assault, and armed robbery should be scored as first degree felonies, not first degree felonies punishable by life. Section 775.08 1(1) Fla.Stat.(1989) clearly states that life felonies must be designated as such and the Petitioner's convictions are not designated life felonies by statute.

ARGUMENT

EADY v. STATE, 604 So. 2d 559 (Fla. I st 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 LTFE DESIGNATIONS.

In *Eady v. State,* 604 So. 2d 559 (Fla. 1st DCA 1992), the First District Court of Appeal held that a conviction for second degree murder should be scored as a first degree felony without the punishable by life designation on the defendant's scoresheet. The court relied upon section 775.08 1(1) Fla.Stat. (1989)' and reasoned that because

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[1]The petitioner's offense occurred in 1990. (R. 1-6).

a capital felony and a life felony must be designated by statute pursuant to section 775.081(1) Fla.Stat.(1989), and because second degree murder was designated by statute as a felony of the first degree punishable by imprisonment for a term of years, the "the second degree murder conviction should have been scored as a first-degree felony, without the punishable by life designation." *Eady v. State, 604 So.* 2d at 560.

Section 775.08 l(l) provides that:

> Felonies are classified, for the purpose of sentence and for any other purpose specifically provided by statute, into the following categories:
>
> (a) Capital felony;
> (b) Life felony;
> (c) Felony of the first degree;
> (d) Felony of the second degree; and
> (e) Felony of the third degree.
>
> **A capital felony and a life felony must be so designated by statute. Other felonies are of the particular degree designated by statute,** Any crime declared by statute to be a felony without specification of degree is of the third degree, except that this provision shall not affect felonies punishable by life imprisonment for the first offense.

(Emphasis added). It is thus apparent that the *court* in *Eady* implicitly held that the first degree punishable by life designation is tantamount to a life felony but that because the offense has not been designated as a life felony by statute, it cannot be scored using a "first punishable by life" designation. The Third District Court of

Appeal has ruled contrary to *Eady* and certified conflict to this Court.

In its decision, the Third District noted that section 775.082(3) Fla.Stat.(1989) provides for punishment of a felony of the first degree by a term of imprisonment not to exceed 30 years or, when provided by statute, by a term of years not exceeding life imprisonment. The court reasoned that the "fact that a first-degree felony can, where authorized by law, carry a life penalty does not convert it into an impermissible life felony. The sentencing guidelines and scoresheets are themselves statutory, see, id. $921.0015, and provide specific scores for first-degree felonies punishable by life imprisonment." (R. *66). Betancourt v. State,* 767 So. 2d 557,558 (Fla. 3d DCA 2000). The Third District's reasoning is misplaced.

It is well established that rules of statutory construction require penal statutes to be strictly construed. *Cabal v. State,* 678 So. 2d 3 15, 3 18 (Fla. *1996); State v. Camp,* 596 So.2d 1055 (Fla. 1992); *Perkins v. State,* 576 So.2d 13 10 (Fla. 1991). Moreover, a statute susceptible to more than one meaning must be construed in favor of the accused. *Cabal v. State, 678 So.* 2d at *3* 18; *Scates v. State,* 603 So.2d 504 (Fla. 1992). The plain meaning of section 775.081 requires that a felony which carries life as its penalty be designated as such. The fact that section 775.082, relied upon by the Third District, provides for a first degree felony punishable by life creates a conflict which,

pursuant to established rules of statutory construction, must be resolved in favor of the accused.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court quash the lower court's opinion in *Betancourt v. State,* 767 So. 2d 557, 558 (Fla. 3d DCA 2000), and remand for re-sentencing.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand-delivered to Roberta Mandel, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida, this 17th day of November, 2000.

Rosa C Figarola
ROSA FIGAROLA
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

Rosa C Figarola

ROSA C. FIGAROLA
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 00-2 134

JOSE BETANCOURT,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee,

APPENDIX

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 99-3017

JOSE BETANCOURT,

Appellee/Petitioner,

-vs-

THE STATE OF FLORIDA,

Appellant/Respondent.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS HEREBY GIVEN that JOSE BETANCOURT, the Appellee/Petitioner, invokes the discretionary jurisdiction of the Supreme Court of Florida to review the decision of this court rendered August 30, 2000.

The decision has been certified to be in direct conflict with decisions of other district courts of appeal.

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33 13 1, on September 22, 2000.

Respectfully submitted,

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2000

JOSE BETANCOURT, **

Appellant, **

vs. ** CASE NO. 3D99-3017

THE STATE OF FLORIDA, **

Appellee. ** LOWER TRIBUNAL NO. 90-24993

Opinion filed August 30, 2000.

An appeal from the Circuit Court for Dade County, Michael A. Genden, Judge.

Bennett H. Brummer, Public Defender, and Rosa C. Figarola, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Kristine Keaton, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and COPE and RAMIREZ, JJ.

COPE, J.

Jose Betancourt appeals an order denying, in part, his motion for correction of illegal sentence. Relying on Eady v. State, 604 So. 2d 559 (Fla. 1st DCA 1992), he contends that his sentences exceed the legal maximum, and that there are facial errors on the

scoresheet. We believe that Eady is wrongly decided and affirm the trial court's order denying relief.

In response to defendant's motion to correct illegal sentence, the State conceded that there was a classification error on the kidnapping count which was clear from the face of the record.[1] The kidnapping count was reclassified from a life felony to a first-degree felony punishable by life imprisonment. A recalculated scoresheet was prepared and the trial court resentenced the defendant to forty year concurrent terms on each of the four counts of which he was convicted.[2]

Defendant objected that under the Eadv decision, a first-degree felony punishable by life imprisonment must be treated as an

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[1] Defendant's conviction on count 4, kidnapping, was enhanced to a life felony because of the use of a firearm during the crime. See §§ 787.01, 775.087(1), Fla. Stat. (1989). The State acknowledged that only the codefendant personally possessed the firearm during the crime. Since the enhancement statute is applicable only to someone who personally possesses a weapon or firearm, see State v. Rodrisuez, 602 So. 2d 1270 (Fla. 1992), the State conceded that the conviction on this count should not have been enhanced to a life felony. This concession was presumably based on the view that defendant was entitled to relief because the issue was clear on the face of the record. See State v. Mancino, 714 So. 2d 429 (Fla. 1998). The State agreed with defendant that he was entitled to correction of this error and recalculation of the scoresheet. Without the enhancement, the kidnapping count became a first-degree felony punishable by life imprisonment. See § 787.01(2), Fla. Stat. (1989).

[2] The defendant's four offenses at conviction were all treated as first-degree felonies punishable by life: count 1, second degree murder, see § 782.04(2), Fla. Stat. (1989); count 2, armed robbery, see id. § 812.13(2)(a), Fla. Stat.; count 3, burglary of an occupied structure with a firearm and assault, see id. § 810.02(2); count 4, kidnapping, see id. § 787.01(2).

ordinary first-degree felony. Defendant presses that claim here, arguing that as a matter of law, he is entitled to have his scoresheet recalculated, and that his forty-year sentences exceed the legal maximum.

In Eadv, the First District stated:

> Turning to the scoresheet challenge, appellant correctly asserted that assessment of 150 points under the category of first degree felony punishable by life was improper. "A capital felony and a life felony must be so designated by statute." Sec. 775.081(1), Fla. Stat'. (1989). Second-degree murder, appellant's convicted offense, is designated by statute **as** "a felony of the first degree, punishable by imprisonment for a term of years not exceeding life . . ." Sec. 782.04(2), Fla. Stat. (1989). In view of the statutory designation, the second-degree murder conviction should have been scored as a first-degree felony, without the punishable by life designation. Nevertheless, the scoresheet error in this case was harmless, because deletion of the excess points places appellant in the same guidelines recommended sentencing **range.**

604 So. 2d at 560 (citation omitted).

We respectfully disagree with Eadv. The Florida Statutes authorize punishment for a first-degree felony as follows: "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 . . . ." Id.** § 775.082(3)(b) (emphasis added). The fact that a first-degree felony can, where authorized by law, carry a life penalty does not convert it into an impermissible life felony. The sentencing guidelines and scoresheets are themselves statutory, see id. § 921.0015, and provide specific scores for first-degree felonies

punishable by life imprisonment. See Fla. R. Civ. P. 3.988 (1990).[3] The defendant's first-degree felonies punishable by life were all properly scored as such, and the forty-year sentences are within the legal maximum. See Burdick v. State, 594 So. 2d 267, 268-69 (Fla. 1992).

In his motion the defendant also argued, based on Eadv, that his prior felony of one count of armed robbery should have been scored as a first-degree felony, not a first-degree felony punishable by life. We reject that. argument as well, for the reasons already stated.

On this appeal, defendant contends that he also raised a challenge to the existence of his prior conviction for armed robbery. To the contrary, we read the defendant's motion to acknowledge the existence of the prior conviction, contending only that under Eadv it should have been scored as a first-degree felony, rather than a first-degree felony punishable by life imprisonment.

We doubt that the First District would follow the quoted portion of the Eadv 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 1996); Knickerbocker v. State, 619 So. 2d 18, 19

[3] The defendant's offense date was June 18, 1990.

(Fla. 1st DCA 1993). We have, however, been unable to find that the First District has receded from it, so we are obliged to certify direct conflict.

Although the defendant has not requested this relief, .we note that the life classification on the judgment for the kidnapping offense should be changed and remand for that purpose. Defendant need not be present.

Affirmed; direct conflict certified; remanded for correction of judgment.[4]

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[4] The defendant states that there is no written order which specifically denies his Eady claim. While it is true that there is no written order which specifically discusses Eadv,' we think that the trial court's resentencing order in substance disposes of all of the defendant's claims, and is therefore an appealable order for purposes of appellate review. By entering the order resentencing the defendant to concurrent terms of forty-years imprisonment, the trial court necessarily rejected the Eadv claim. The transcript makes clear that the issue was presented to, and rejected on the merits by, the trial judge.