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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**

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is Petitioner's reply brief on the merits. It addresses only those points in the Brief of Respondent (BR.) which were not adequately argued in the Initial Brief. In response to all other points, Petitioner relies on the arguments made and the cases cited in the Initial Brief.

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ARGUMENT

THE THIRD DISTRICT'S DECISION IN BETANCOURT V. STATE DOES CONFLICT WITH THE FIRST DISTRICT'S DECISION IN EADY V. STATE, DESPITE THE STATUTES CITED BY RESPONDENT, WHICH WERE IN EFFECT AT THE TIME EADY WAS DECIDED, AND DESPITE THE CASES CITED BY RESPONDENT, WHICH DID NOT DIRECTLY ADDRESS THE ISSUE DECIDED IN EADY AND THEREFORE COULD NOT "RETREAT" FROM EADY

A. The Statutes Cited by Respondent Do Not Resolve the Conflict

Citing Eadv v. State, 604 So.2d 559, Petitioner argued in the Initial Brief that his convictions must be scored as first degree felonies without the "punishable by life" designations. In its brief, Respondent asserts that "[t]he plain meaning of section 775.082(3)(b) dictates that . . . when specifically provided by statute, as is the case here, a felony of the first degree is punishable by life." (BR. 8) Therefore, Respondent concludes, Petitioner's offenses were correctly classified on the sentencing scoresheet as first degree felonies punishable by life. (BR. 10- 14, citing § 782.04(2), Fla. Stat. (1990) (second degree murder constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life); § 8 10.02(2)(a), Fla. Stat. (1990) (same punishment for burglary with an assault); § 8 12.13(2)(a), Fla. Stat. (1990) (same punishment for robbery with a firearm);

§ 787.01(2), Fla. Stat. (1990) (same punishment for kidnaping).

It should be noted, however, that sections 775.082(3)(b) and 782.04(2), cited by Respondent, were in effect at the time the Eady Court concluded that Eady's second degree murder conviction should have been scored as a first-degree felony, without the punishable by life designation. How can the result in Eady be explained?

Respondent assumes that the Eady Court simply "declined to consider" the statutory language of these sections, looking only at section 775.08 1. (BR. 8) Yet, in looking at what the Eady Court did, a reviewing court must indulge "all reasonable presumptions" in favor of the correctness of the judgment appealed from, Atlantic C.L.R. Co. v. Baynard, 15 1 So. 545 (Fla. 1933), including the presumption "that all things were done and rules observed which are necessary to impart verity and binding force to the judgment." Tanner v. Batson, 166 So. 545 (Fla. 1936).

A more reasonable assumption is that the Eady Court did consider these sections, but found them in conflict with section 775.08 I, which unambiguously classifies felonies into five discrete categories, not including a "hybrid" first degree punishable by life, and requires that a "capital felony and a life felony must be so designated by statute."

Another reasonable assumption is that the Eady Court knew -- to the extent section 775.082 and other sections conflict with the unambiguous classification requirement of section 775.08 1 -- the conflict must be resolved in favor of the accused. Cabal v. State, 678 So.2d 3 15, 3 18 (Fla. 1996); Scates v. State, 603 So.2d 504 (Fla. 1992).

B. The Cases Cited by Respondent Do Not Resolve the Conflict

Next, respondent asserts that "Eady is essentially no longer applicable law. . . . A review of the cases [decided in the First District since Eady] establish that the First District has retreated from their former position." (BR. 9-10, citing 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); Knickerbocker v. State, 619 So.2d 18, 19 (Fla. 1st DCA 1993)).

Petitioner concedes it is generally true that when an inconsistency exists between two decisions of the same court, the older case must be held to have been overruled by the later case, whether mentioned or commented on or not. 20 Am. Jur. 2d, Courts § 232. However, in order for a decision in one case to have the effect of overruling another decision, the same auestion must be involved, the cases must be

affected by a like state of facts, and a conclusion must be reached in the latter decision which is in “hopeless conflict” with one in the former case. State ex rel. Garland v. West Palm Beach, 193 So. 297 (Fla. 1940), appeal dismissed , 309 U.S. 639 (1940), reh’g denied, 310 U.S. 657 (1940).

None of the cases cited by Respondent involved the precise issue of whether section 775.08 1 requires that an offense which is designated as a felony of the first degree, “punishable by imprisonment for a term of years not exceeding life” should be scored as a first degree felony without the punishable by life designation. Instead, they involved questions about how such offenses are treated under the prison releasee reoffender statute (Brown); how such offenses are treated under the habitual offender statute (Patterson, Knickerbocker); and whether such offenses can be punished by imprisonment for more than 30 years (Dues, Roberts).

CONCLUSION

For these reasons, and for the reasons stated in the Initial Brief, 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 resentencing.

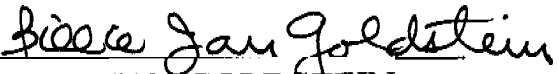
Respectfully submitted,

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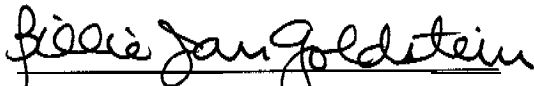
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Reply Brief of Petitioner on the Merits has been furnished by mail to Kristine Keaton, Assistant Attorney General, Office of the Attorney General, The 110 Tower, S.E. 6th Street, Fort Lauderdale, Florida 3330177, this 7th day of February 2001.


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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief was typed using 14-point proportionately spaced Times New Roman font, pursuant to Florida Rules of Appellate Procedure, Rules 9.100(1) and 9.210.


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