

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JAMES ERNEST MILLER,

Respondent.

CASE NO. 67,276

FILED

SID J. WHITE

AUG 10 1987

CLERK, SUPREME COURT

By

RESPONDENT'S BRIEF ON ~~REMAND~~ <sup>Remand</sup> ~~Docket~~  
FROM THE UNITED STATES SUPREME COURT

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PRELIMINARY STATEMENT

The Petitioner in this Court, the State of Florida, was the prosecution in the trial court, the Appellee in the Fourth District Court of Appeal, and the Respondent in the United States Supreme Court. The Respondent, James Ernest Miller, was the defendant, Appellant and Petitioner, respective in the aforementioned Courts.

In the brief, the parties will be referred to as they appear in the trial court, State and Defendant and as herein. Respondent has filed herewith two Appendices, consisting of the Joint Appendix filed in the United States Supreme Court (Appendix A) and the United States Supreme Court's decision of June 9, 1987 (Appendix B). The symbol A, B, followed by the page number will refer to the appendices.

### STATEMENT OF THE CASE AND FACTS

Respondent, James Ernest Miller, accepts Petitioner's, State's Statement of the Case and Facts with the following additions and clarifications:

Respondent was sentenced on October 2, 1984 for offenses alleged to have been committed on April 25, 1984 pursuant to the Fla.R.Crim.P. 3.701 sentencing guidelines. The sexual battery offense for which Respondent was convicted fits in the "Sexual Offenses" guidelines category. See Fla.R.Crim.P. 3.701(c). On May 8, 1984, this Court approved amendments to the sentencing guidelines that were intended to and did increase the length of imprisonment for those convicted of sexual offenses. The Florida Bar: Amendments to Rules of Criminal Procedure, 451 So.2d 824 (Fla. 1984). One of the principle purposes of the amendments was to "increase [] rates and length of incarceration for sexual offenders." Id. at 824 n. The Florida Legislature approved these amendments which went into effect on July 1, 1984. Ch. 84-328, Laws of Florida (1984). The amended guidelines increased the points scored for Mr. Miller's "primary offense" by twenty-six points which translated into a two "cell" jump: an additional two years minimum presumptive sentence, and an additional two and one-half years imprisonment authorized at the top of his sentencing guidelines range.

During the sentencing hearing, Respondent-Defendant argued that the guidelines in effect at the time of the offense should be applied to determine his sentence, not the later-enacted increased guidelines. A 6-7. Respondent's counsel argued the original guidelines called for a presumptive sentence range of three and one-half to four and one-half years imprisonment. A 7. The Assistant State Attorney requested the trial judge to sentence Respondent pursuant to the amended guidelines which had not become effective until July 1, 1984. A 8-9.

The prosecutor also filed a motion to aggravate the presumptive sentence, which contained his suggested reasons for departure from the presumptive guidelines sentence range. A 8-10. Respondent objected to those grounds and opposed any departure sentence. A 7-10. The prosecutor's motion to depart was denied. A 10.

However, over defense counsel's objection, the trial judge sentenced Respondent under the amended sentencing guidelines, which specified an increased range of between 5 1/2 to 7 years in prison. A 10, 12. The resulting sentences were for concurrent seven (7) years in prison with credit for time served. A 13-15. The trial judge made no finding there were clear and convincing reasons justifying a departure from the presumptive guidelines sentencing range.

An appeal was taken to the Fourth District Court of Appeal. That court, relying upon Weaver v. Graham, 450 U.S. 24 (1981), vacated Respondent's sentence "because the trial court erroneously applied a stiffening of the sentencing guidelines pertaining to sex offenders, contained in the Florida Rules of Criminal Procedure, that did not become effective until after Appellant committed the instant offense. A rule change that has a disadvantageous effect on an offender does not apply to crimes committed before the effective date of the rule change." Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985). It ordered "resentencing in accordance with the sentencing guidelines in effect at the time the offense was committed." Id. at 1018. This Honorable Court granted the State's petition for discretionary review.

This Honorable Court in a summary opinion reversed the Fourth District. This Court concluded that its decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985) controlled and the guidelines in effect on the date of sentencing should control. State v. Miller, 488 So.2d 820 (Fla. 1986).

The United States Supreme Court granted certiorari, reversed the decision of this Honorable Court and remanded the case for further proceedings not inconsistent with its opinion. Miller v. Florida, 482 U.S. \_\_\_, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); (See Appendix B). The United States Supreme Court issued its mandate on July 10, 1987.

POINT ON APPEAL

WHETHER THE DEFENDANT IS ENTITLED TO BE RESENTENCED AFTER PREPARATION OF A SENTENCING GUIDELINE SCORESHEET UTILIZING THE ORIGINAL SENTENCING GUIDELINES?



### SUMMARY OF ARGUMENT

The United States Supreme Court held in the present case that retroactive application of a 1984 amendment to the sentencing guidelines to Respondent-Defendant whose offense was committed prior to its effective date violated the ex post facto clause. The retroactive application of this amendment to the sentencing guidelines substantially disadvantaged Respondent by increasing his presumptive guidelines sentencing range.

This Honorable Court should comply with the mandate of the United States Supreme Court. Accordingly, Respondent's sentence must be vacated and this cause remanded to the trial court for resentencing. Respondent's guidelines scoresheet should be calculated under the sentencing guidelines in effect on the date of his offense in conformity with the United States Supreme Court's mandate.

ARGUMENT

THE DEFENDANT IS ENTITLED TO BE RESENTENCED  
AFTER PREPARATION OF A SENTENCING SCORESHEET  
UTILIZING THE ORIGINAL SENTENCING GUIDELINES

This Honorable Court has, on remand from the United States Supreme Court, directed the parties to file briefs. The remand from the United States Supreme Court was for the stated purpose of "further proceedings not inconsistent with [the Supreme's Court's] opinion" (App. B), in which the Court concluded that the specific amendment to the sentencing guidelines could not be applied to Respondent-Defendant, whose crimes occurred prior to its effective date. Therefore, in this brief, Respondent will discuss the remedy that should be provided to him on remand.<sup>1</sup> Concerning Respondent-Defendant, the appropriate action would be to vacate this Court's prior decision and affirm the decision of the Fourth District Court of Appeal, vacate Respondent's present sentences and remand for resentencing.

It is the duty of this Honorable Court to enforce the mandate of the United States Supreme Court. Generally, a mandate of the United States Supreme Court is transmitted to the subordinate court and where directions contained in the mandate are precise and unambiguous it is the duty of the lower court to

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<sup>1</sup> Respondent agrees with Petitioner that further discussion of the merits of the ex post facto claim is foreclosed. Every argument advanced by the State was considered and rejected by the United States Supreme Court. See Miller v. Florida, supra. In addition, Respondent will restrict his brief solely to his situation and not to those similarly situated because that is beyond the scope of any potential issue on remand.

carry it into execution. Cook v. Burnley, 78 U.S. (11 Wall.) 672, 20 L.Ed. 84, 85 (1871). In O.P. Corporation v. Village of North Palm Beach, 302 So.2d 130 (Fla. 1974) this Honorable Court held: "It is well settled that the judgment of an appellate court, where it issues a mandate, is a final judgment in the cause and compliance therewith by the lower court is a purely ministerial act requiring the consent of the reviewing court permitting presentation of a new matter affecting the cause." Id. at 131.

At bar, Respondent submits that this Court should fully comply with the mandate of the United States Supreme Court. In Miller v. Florida, supra, the United States Supreme Court unanimously reversed the judgment of this Court and held that retroactive application of the applicable amendment to the Florida sentencing guidelines law to Respondent violated the ex post facto clause. Justice O'Connor writing for the Court stated:

Accordingly, we find that Florida's revised guidelines law, 1984 Fla. Laws Ch. 84-328, is void as applied to petitioner, whose crime occurred before the law's effective date. We reverse the judgment of the Supreme Court of Florida, and remand the case for further proceedings not inconsistent with this opinion.

107 S.Ct. at 2454, 96 L.Ed.2d at 363.

Therefore, Respondent-Defendant's present concurrent sentences of seven (7) years in prison must be vacated and the cause remanded to the trial court for a resentencing hearing.

Respondent's guidelines scoresheet should be calculated under the sentencing guidelines in effect on the date of his offense in conformity with the United States Supreme Court's mandate. In addition, Respondent submits that since the trial judge declined to depart from Respondent's presumptive sentence range (A 7-15), on remand, the trial judge should be directed to sentence Respondent within the recalculated presumptive guidelines sentence range. However Respondent does acknowledge that the Fourth District in remanding for resentencing noted: "We observe that the same sentence is possible if clear and convincing reasons for departure from the then applicable guidelines are stated in writing." Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985).

CONCLUSION

This Honorable Court should comply with the Mandate of the United States Supreme Court, reverse the judgment of this Honorable Court, vacate Respondent's present sentence and remand the cause for resentencing in conformity with the decision of the United States Supreme Court in Miller v. Florida, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOY B. SHEARER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 5th day of August, 1987.



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Of Counsel