

SUPREME COURT OF FLORIDA

APR 15 1967
CLERK OF THE SUPREME COURT
By *JC*
Clerk

STATE OF FLORIDA,)
)
 Petitioner)
)
 v.)
)
 JAMES ERNEST MILLER,)
)
 Respondent.)
 _____)

CASE NO. 67,276

PETITIONER'S BRIEF ON REMAND
FROM THE UNITED STATES SUPREME COURT

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii-iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2-4
POINT ON APPEAL	5
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7-10
THE DEFENDANT IS ENTITLED TO BE RESENTENCED AFTER PREPARATION OF A SCORESHEET UNDER THE ORIGINAL GUIDELINES; OTHERS SIMILARLY SITUATED SHOULD APPLY TO THE TRIAL COURTS FOR RELIEF.	
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Brown v. State</u> , 12 FLW 1477 (2 DCA Fla. 6/10/87)	8
<u>Holland v. State</u> , 12 FLW 254 (Fla. May 28, 1987)	10
<u>Joyce v. State</u> , 404 So.2d 850 (4th DCA Fla. 1981)	10
<u>Miller v. State</u> , 468 So.2d 1018 (4th DCA Fla. 1985)	3
<u>State v. Chaplin</u> , 490 So.2d 52 (Fla. 1986)	9
<u>State v. Hutcheson</u> , 501 So.2d 190 (5th DCA Fla. 1987)	8
<u>State v. Jackson</u> , 478 So.2d 1054 (Fla. 1985)	3,4
<u>State v. Miller</u> , 488 So.2d 820 (Fla. 1986)	4,6,8 9,10
<u>State v. Scott</u> , 439 So.2d 219 (Fla. 1983)	10
<u>State v. Whitfield</u> , 487 So.2d 1045 (Fla. 1986)	6,9
<u>Villery v. Florida Parole and Commission</u> , 396 So.2d 1107 (Fla. 1980)	6,10
<u>Webster v. State</u> , 500 So.2d 285 (1 DCA Fla. 1986)	8
 <u>STATUTE</u>	 <u>PAGE</u>
<u>Fla.Stats.</u> (1983)	
§ 794.011(5)	2
810.02(1),(2),(a)	2
812.014(2)(c)	2

OTHER AUTHORITY

	<u>PAGE</u>
<u>Fla.R.Crim.P.</u>	
3.701(a)(3) (1983) and (1984)	3
3.800(a)	6,10,11

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, respectively, in the aforementioned Courts.

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

STATEMENT OF THE CASE AND FACTS

The Defendant was charged by information with the felony offenses of armed sexual battery, burglary with assault, and petit theft. These crimes were alleged to have been committed on April 25, 1984. (A. 2-3). A jury convicted the Defendant of the following offenses: (1) sexual battery using slight force, a second degree felony, punishable by up to fifteen years' imprisonment, § 794.011(5), Fla.Stat. (1983); and (2) burglary with an assault, a felony punishable by life imprisonment, § 810.02(1),(2)(a), Fla.Stat. (1983); and (3) petit theft, a misdemeanor, § 812.014 (2)(c), Fla.Stat. (1983).

The Defendant was sentenced on October 2, 1984. (A. 13-15). The sentencing scoresheet was prepared using the guidelines as amended effective July 1, 1984. Sexual battery was scored as the primary offense. Points were also scored for the additional offenses at conviction, the Defendant's prior record, and victim injury. The point total of 257 placed the Defendant in the five and one-half to seven year recommended sentencing range. (A. 12). Defense counsel argued that the original 1983 guidelines should be used. (A. 7). The prosecutor pointed out that if the 1983 guidelines applied, then burglary would be scored as the primary offense because the amendments changed the definition of the "primary" offense from the highest statutory degree of the crime to the offense in the category with

the severest punishment (A. 8-9); compare, Fla.R.Crim.P. 3.701(a)(3)(1983) and (1984). The prosecutor further argued that if the trial judge decided to apply the 1983 guidelines, he should depart upward from the recommended sentence and give the defendant a seven year sentence. (A. 9).

The trial court ruled the amended 1984 guidelines were applicable because the sentencing took place after their effective date, although the offenses occurred prior to it. (A. 10). The court stayed within the guidelines and the Defendant received concurrent seven year sentences for the sexual battery and burglary counts. (A. 10-11;12-15). Since the seven-year sentence was the amount of time the prosecutor had recommended, the court did not consider whether there should be a departure from the guidelines.

The Defendant filed an appeal to the Fourth District Court of Appeal. The Court reversed the sentence, holding the guidelines in effect at the time of the offense rather than those at sentencing should have been used. In remanding for resentencing, the Court stated, "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 (4th DCA Fla. 1985). (A. 16-17).

The State then invoked this Court's discretionary jurisdiction. The case was accepted, and the decision of the Fourth District was reversed on the authority of State Jackson, 478 So.2d 1054 (Fla. 1985). State v. Miller, 488

So.2d 820 (Fla. 1986). In Jackson, this Court held that use of guidelines in effect at the time of sentencing was proper and did not violate the constitution ex post facto clause.

The Defendant filed a Petition for Certiorari in the United States Supreme Court and the petition was granted. On the merits, the United States Supreme Court reversed this Court's decision. (C.) It held the changes in the guidelines disadvantaged the Defendant due to the increase in points for sexual offenses which was purposely designed to punish sexual offenders more severely. The Court held the fact that the Defendant could have received the same sentence under the original guidelines, provided the trial judge decided to depart, did not alter the conclusion that there was an ex post facto violation. This is because to depart a judge must provide clear and convincing reasons in writing and the determination is reviewable on appeal, whereas if a sentence is within the guideline, no reasons are required and it is unreviewable.

Consequently, the Court concluded the amended guidelines were "void as applied to Petitioner, whose crime occurred before [their] effective date". (C. 12). The judgment of this Court was reversed and the case remanded for further proceedings.

POINT ON APPEAL

WHETHER THE DEFENDANT IS ENTITLED TO BE
RESENTENCED AFTER PREPARATION OF A
SCORESHEET UNDER THE ORIGINAL GUIDELINES; AND
OTHERS SIMILARLY SITUATED SHOULD APPLY
TO THE TRIAL COURTS FOR RELIEF?

SUMMARY OF THE ARGUMENT

The United States Supreme Court held in the present case that the application of the 1984 amended sentencing guidelines to the Defendant, whose offense was committed prior to their effective date, violated the ex post facto prohibition. This was so because the Defendant was disadvantaged by being placed in a higher presumptive sentencing range. Accordingly, this Court should direct that the Defendant be resentenced under the original guidelines, after preparation of a correct scoresheet. The trial judge may choose to depart, but would have to enter an order stating valid reasons for so doing.

Other defendants in this situation may obtain relief pursuant to Fla.R.Crim.P. 3.800(a), as amended in State v. Whitfield, 487 So.2d 1045 (Fla. 1986). In the present case, this Court can be guided by the precedent of Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980), wherein the Court held split sentence probation orders imposing more than one year's incarceration were invalid. In Villery, the Court declared persons who sought relief should apply to the trial court. The "bottom line" effect of Miller is that persons who were sentenced under amended guidelines contrary to the ex post facto clause had their presumptive sentences incorrectly calculated on the guidelines scoresheets. Since Rule. 3.800(a), is specifically tailored to address this matter, that is the proper avenue of relief.

ARGUMENT

THE DEFENDANT IS ENTITLED TO BE
RESENTENCED AFTER PREPARATION OF
A SCORESHEET UNDER THE ORIGINAL
GUIDELINES; OTHERS SIMILARLY
SITUATED SHOULD APPLY TO THE
TRIAL COURTS FOR RELIEF.

This Court has, on remand from the United States Supreme Court, directed the parties to file briefs. The remand was for the stated purpose of "further proceedings not inconsistent with [the Supreme Court's] opinion" (C. 12), in which the Court concluded the amended guidelines could not be applied to the Defendant, whose crime occurred prior to their effective date. Therefore, in this brief, the State will discuss the remedy that should be provided to this Defendant as well as the broader question of what the remedy should be for others similarly situated.¹

Concerning the Defendant, it would appear the appropriate action would be to vacate this Court's prior decision and affirm the decision of the Fourth District Court of Appeal. That decision provided that on remand, the trial court could still impose a seven year sentence but it would have to be a departure sentence, supported by clear and convincing reasons, and further, subject to appellate review. Before the resentencing can

¹Further discussion of the merits of the ex post facto claim is foreclosed; every argument advanced by the State (B), was considered and rejected by the Supreme Court (C).

occur, however, a new scoresheet will have to be prepared, using the original 1983 guidelines.

In essence, the "bottom line" impact of the United States Supreme Court's decision is that the Defendant was sentenced using an incorrect scoresheet. In other appellate cases where an incorrect scoresheet has been used, the Courts have remanded for resentencing with the benefit of an accurately prepared scoresheet. For example, in Webster v. State, 500 So.2d 285 (1 DCA Fla. 1986), a scoresheet was incorrect because the degree of the felony was not properly classified. The case was remanded for resentencing at which time the trial court was to have the benefit of an accurately prepared scoresheet. Likewise, in State v. Hutcheson, 501 So.2d 190 (5th DCA Fla. 1987), an incorrect scoresheet was used because the subject offense was improperly scored under category 7 when it should have been category 9. The Court reversed and held that where the correct scoresheet would result in a higher recommended range, the case would be remanded for recalculation of the scoresheet and entry of a sentence within the range or else supported by written reasons for departure. Thus, as to this Defendant, resentencing after preparation of a new scoresheet is the appropriate remedy. See also, Brown v. State, 12 FLW 1477 (2 DCA Fla. 6/10/87).

With regard to other persons whose sentences may also be affected by the Miller decision, this Court has

already designed a mechanism for obtaining relief. In State v. Whitfield, 487 So.2d 1045 (Fla. 1986), this Court amended Fla.R.Crim.P. 3.800(a) to read as follows:

A Court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guidelines scoresheet.

The amendment was designed to "facilitate correction of such errors at the trial court level." Whitfield at 1047. The State submits relief under Rule 3.800(a) is the appropriate remedy for the present situation. The effect of Miller is that persons who were disadvantaged by being sentenced under guidelines not enacted on the date of their offenses were sentenced using incorrect scoresheets. Rule 3.800(a) is specifically designed to address this problem. State v. Chaplin, 490 So.2d 52 (Fla. 1986).

It is highly probable that many of the defendants who raised this issue on appeal have by now served their sentences so that the issue is moot. Likewise, there may be persons who were sentenced under amended guidelines but were not disadvantaged, e.g., the point totals did not change for their offense category or if they did, that the recommended range remained the same.² There may also be persons whose scoresheets were incorrectly calculated but who would prefer not to be resentenced. For example, if

²In Miller, the Supreme Court found the defendant was disadvantaged because the presumptive sentence was increased, and for that reason, he was entitled to resentencing.

a sentence resulted from a plea bargain, the defendant may prefer to let it stand rather than have the plea withdrawn and go to trial, or the plea agreement itself may be a valid reason for a departure. See, Holland v. State, 12 FLW 254 (Fla. May 28, 1987).

Several years ago, this Court was faced with a situation similar to the present one when it held that orders placing persons on probation with more than one year's incarceration as a special condition were illegal. Villery v. Florida Parole and Probation Commission, 363 So.2d 1107 (Fla. 1980). In Villery, the Court declared that anyone who had such a sentence was entitled, upon application to the trial court, to have it corrected. After Villery was decided, it was recognized that the defendant should have the option of whether to apply for relief in the trial court. Joyce v. State, 404 So.2d 850 (4th DCA Fla. 1981). If such application was made, then the trial court was obligated to have a new sentencing hearing with the defendant present. State v. Scott 439 So.2d 219 (Fla. 1983).


The Villery precedent should guide the effectuation of the law established by the United States Supreme Court in the present Miller decision. A resentencing of this Defendant should be ordered; all others similarly situated who were disadvantaged by being sentenced pursuant to amended guidelines not in effect on the date their offenses were committed should seek relief in the trial court pursuant to Fla.R.Crim.P. 3.800(a).

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Petitioner, the State of Florida, respectfully submits that the appropriate relief for the defendant is to affirm the Fourth District Court of Appeal's previous disposition of the case, in which that Court reversed for resentencing under the 1983 guidelines in effect on date of the Defendant's offenses. The State further submits that the Court declare all others who wish to pursue an ex post facto claim on this ground apply for relief pursuant to Fla.R.Crim.P. 3.800(a).

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

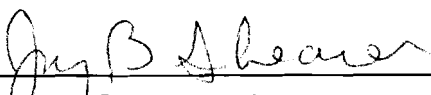


JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to ANTHONY CALVELLO, Assistant Public Defender, The Governmental Center/9th Floor, 301 N. Olive Ave., West Palm Beach, FL 33401 this 30th day of July, 1987.



Of Counsel