IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,468

THE STATE OF FLORIDA, :

Petitioner, :

vs. :

JORGE SUEIRO, :

Respondent. :

_____ :



**********

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

**********

# REPLY BRIEF OF RESPONDENT

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By: JAMES D. KEEGAN
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82-1159

THE STATE OF FLORIDA, :

Petitioner, :

vs. :

JORGE SUEIRO, :

Respondent. :

_____ :


**********

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

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## TABLE OF AUTHORITIES

## INTRODUCTION

The parties hereto shall be referred to as they were in the Trial Court or by name. The symbol "App." followed by a number will constitute a page reference to the Appendix filed by the Respondent along with the instant Brief. All emphasis is supplied unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

The Defendant, Respondent herein, appealed his conviction and sentence for Burglary Of A Dwelling and Petty Theft to the Third District Court of Appeal raising, in part, the sentence of seven (7) years imposed by the Trial Court. The Petitioner, the State of Florida, seeks review by this Honorable Court of the Third District Court of Appeal's decision regarding the sentencing issue.

The relevant facts are succinctly set forth in the Opinion of the Third District Court of Appeal sought to be reviewed herein.

> Appellant's other point concerns the sentence of seven (7) years which the court imposed. It is contended that the trial judge erred in basing the sentence on guidelines which were not legally in effect at the time the offense was committed on February 14, 1984. We agree. It is conceded that the guidelines used by the court were not in effect at the time the offense was committed and did not become law until July 1, 1984, almost five months thereafter. Chapter 84.328, Laws of Florida. We therefore find error in the sentencing and vacate the sentence and remand the cause for the purpose of

resentencing appellant under the proper guidelines. Miller v. State, 10 F.L.W. 989 (Fla. 4th DCA Apr. 17, 1985).

Sueiro v. State, ___ So.2d ___ (Fla. 3d DCA, Case No. 84-1235; Opinion filed June 18, 1985), App. 2.

Subsequent to the rendition of the Third District Court of Appeal's Opinion, the Petitioner, the State of Florida, sought rehearing and clarification from the Court of Appeal, which was denied. The Petitioner thereafter sought discretionary review in the instant Court on the grounds that the decision in question expressly and directly conflicts with decisions of another District Court of Appeal or of the Supreme Court on the same question of law.

## SUMMARY OF ARGUMENT

The Petitioner, the State of Florida, asserts that Sueiro v. State, supra, is in conflict with this Court's Opinion in Dobbert v. State, 328 So.2d 433 (Fla. 1976) and State v. Strasser, 445 So.2d 322 (Fla. 1983), as well as the Opinions of the District Courts of Appeal in Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982) and Burney v. State, 402 So.2d 38 (Fla. 2d DCA 1981).

With respect to the alleged conflict with Dobbert v. State, supra, there is absolutely nothing in this Court's Opinion in that case which in any way remotely addresses the issues in this case sought to be reviewed by the Petitioner. The remaining decisions cited by the Petitioner concern revisions

in Florida's Standard Jury Instructions and the fact that current jury instructions would apply in any retrial, thus obviating the need for a retrial in those particular cases. The basis for the rule of law of nonretroactivity of changes in standard jury instructions is totally inapplicable to the issue herein presented and in no way presents sufficient conflict to invoke the jurisdiction of this Court.

Rather than presenting conflict with prior decisions of the Courts of this State, the Third District Court of Appeal's Opinion in Sueiro v. State, supra, is clearly consistent with the long line of decisions on identical or similar issues previously entered by the Appellate Courts of this State.

## ARGUMENT

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN NO WAY IN CONFLICT WITH THIS COURT'S DECISIONS IN DOBBERT v. STATE, 328 So.2d 433 (FLA. 1976); STATE v. STRASSER, 445 So.2d 322 (FLA. 1983), AND THE OPINIONS OF THE DISTRICT COURTS OF APPEAL IN BOSTON v. STATE, 411 So.2d 1345 (FLA. 1st DCA 1982) and BURNEY v. STATE, 402 So.2d 38 (FLA. 2d DCA 1981).

Although the State alleges that there exists conflict with this Court's Opinion in Dobbert v. State, supra, in reality, as reflected by its Brief, the basis of the alleged conflict is with the United State Supreme Court's Opinion in Dobbert v. Florida, 432 U.S. 282 (1977), which addresses the ex post facto issue dealing with Florida's new death penalty statute for the first time. This Court's Opinion in Dobbert v. State, supra never addressed that issue. Thus, ab initio, it is obvious that the jurisdictional requirements for conflict review by this Court do not exist. This is because there is no jurisdictional basis for review of a case purportedly in conflict with a decision of the United States Supreme Court. Notwithstanding this defect, no actual conflict exists.

In Dobbert v. Florida, supra, the United States Supreme Court did indeed rule that the death penalty statute under which the Defendant was sentenced, although not in effect at the time of the homicide, did not violate the ex post facto prohibitions of the State and Federal Constitutions. The basis for this determination was that:

> [t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed, and there was no change in the quantum of punishment attached to the crime.
>
> The new statute provides capital defendants with more, rather than less, judicial protection than the old statute.
>
> 432 U.S. at 283.

The inapplicability of that holding to the case at bar is manifest. The effect of the error committed by the Trial Court in this case did address the quantum of punishment and provided the Defendant less judicial protection. Notwithstanding that the facts and law between these two (2) cases are obviously distinguishable, the holding itself logically supports the decision of the Third District Court of Appeal in the instant case as opposed to the position now being asserted by the Respondent, the State of Florida. This is because the United States Supreme Court in Dobbert, in effect, held that when the quantum of punishment is increased and/or the protection afforded a defendant is lessened, the ex post facto provisions of the State and Federal Constitutions are offended. To accept the position taken by the State in the instant case would be to create conflict with the United States Supreme Court's decision in Dobbert v. Florida, supra.

The decisions in State v. Strasser, supra; Boston v. State, supra; and Burney v. State, supra, all address situations where a change in the Standard Jury Instructions eliminated the need to give a jury instruction which had been requested prior to

their effective date, but which would have been in effect at the time of retrial. Again, the distinction factually and legally with the case at bar is manifest. Jury instructions represent an explanation by the Court to the triers of fact of the applicable law upon which they are to base their decision in a given case. Revisions in jury instructions reflect the evolving nature of the law. That is, although the legal essence of a given charge remains the same, the Supreme Court, in promulgating Standard Jury Instructions, reshapes and redefines how the basic and underlying law should be explained to the triers of fact, the jury. In the case at bar, we are dealing with the punishment to be imposed by a court after a conviction.

Rather than presenting conflict with prior decisions of this State, the Third District Court of Appeal's Opinion in Sueiro v. State, supra, is consistent with prior decisions of the Courts of this State. As cited in the Opinion under review, the Fourth District Court of Appeal, in Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985), addressd the precise issue at bar:

> We vacate the sentence because the trial court erroneously applied a stifffening of the sentencing guidelines pertaining to sexual offenders, contained in the Florida Rules of Criminal Procedure, that did not become effective until after the 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 that rule change. See

> Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); State v. Williams, 397 So.2d 663, 665 (Fla. 1981); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984); Arnold v. State, 429 So.2d 819 (Fla. 2d DCA 1983).
>
> 468 So.2d at 1018.

The precise issue addressed in the instant case by the District Court of Appeal and also addressed in Miller has been addressed in several other recent decisions of the various Courts of Appeal of this State. In each of those decisions, the District Courts of Appeal have uniformly held that where a defendant is sentenced under guidelines not in effect, the sentence must be vacated and the cause remanded to the trial court to impose a sentence consistent with guidelines in effect at the time of the original sentencing. Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985); Fletcher v. State, 468 So.2d 428 (Fla. 4th DCA 1985); Bibby v. State, 465 So.2d 670 (Fla. 4th DCA 1985); Burke v. State, 460 So.2d 1022 (Fla. 2d DCA 1984).

It is extremely well-settled in this State that a rule change which inures to the disadvantage of an offender cannot be applied retroactively. Arnett v. State, 471 So.2d 547, 548-49 (Fla. 4th DCA 1985) citing Weaver v. Graham, 450 U.S. 24 (1981) and Hayes v. State, 452 So.2d 656 (Fla. 2d DCA 1984); Arnold v. State, 429 So.2d 819, 820 (Fla. 2d DCA 1983). To give retroactive effect to a change in the law which acts to the detriment or disadvantage of a defendant offends the ex post facto prohibitions of the United States and Florida

Constitutions. Bilyou v. State, 404 So.2d 744, 746 (Fla. 1981); State v. Williams, 397 So.2d 663 (Fla. 1981); Reid v. State, 440 So.2d 651 (Fla. 2d DCA 1983); Dickerson v. State, 427 So.2d 205 (Fla. 2d DCA 1983); Cunningham v. State, 423 So.2d 580, 582 (Fla. 2d DCA 1982); Dixon v. State, 415 So.2d 78, 79 (Fla. 4th DCA 1982); Stroemer v. State, 410 So.2d 1350 (Fla. 2d DCA 1981); Dominguez v. State, 405 So.2d 736, 737 (Fla. 2d DCA 1981).

This Honorable Court, in order to exercise its conflict jurisdiction, has uniformly required that the facts and the conflicting authorities be essentially identical. Florida Power and Light v. Bell, 113 So.2d 697, 698 (Fla. 1959). Since the cases alleged to be in conflict by the Petitioner can be distinguished factually and legally, no conflict jurisdiction lies in this cause. The Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983); Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). Further, this Court, in exercising conflict jurisdiction, is concerned with the precedential value of an opinion and whether it would create inconsistency with other established law. Kincaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963); Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). In the case at bar, there are at least five (5) prior decisions of this State which, as cited infra, have addressed the precise issue in question in the case sub judice and each of those decisions is consistent with the opinion of the Third District Court of Appeal in Sueiro v. State, supra. Thus, not only is

there no conflict with prior decisions of this Court or other Courts of Appeal, but rather, had the Court of Appeals ruled as the State sought, obvious facial and compelling conflict would have been created. Accordingly, this Court has no jurisdiction to grant discretionary review as requested by the Petitioner.

## CONCLUSION

Based upon the foregoing reasons, facts, authorities and argument, the Respondent respectfully submits that this Honorable Court not accept jurisdiction to review the decision of the Third District Court of Appeal in Sueiro v. State, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Richard L. Polin, Esq., Assistant Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128 this 3rd day of September, 1985.

Respectfully submitted,

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