

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,468


STATE OF FLORIDA,

Petitioner,

vs.

JORGE SUEIRO,

Respondent.



\*\*\*\*\*

ON PETITION FOR DISCRETIONARY REVIEW  
REMAND FROM SUPREME COURT OF THE UNITED STATES

\*\*\*\*\*

RESPONDENT'S ANSWER BRIEF ON REMAND

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## INTRODUCTION

The instant Brief is filed pursuant to this Honorable Court's Order entered July 27, 1987, setting forth the briefing schedule on remand from the United States Supreme Court. In all other respects, the Respondent would adopt the introductions set forth and contained in the Respondent's Answer Brief On The Merits previously filed in this cause on or about February 17, 1986.

STATEMENT OF THE CASE AND FACTS

The Respondent would adopt the Statement of the Case And Facts contained in the Supplemental Brief Of Petitioner filed herein pursuant to this Court's July 27, 1987 Order On Remand From The United States Supreme Court, which was filed herein on or about August 20, 1987. In addition, the Respondent would rely upon the Statement Of The Case And Facts contained in Respondent's Answer Brief On The Merits previously filed in this cause on or about February 17, 1986.

QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT ERRED IN IMPOSING A SENTENCE UPON THE DEFENDANT PREDICATED UPON SENTENCING GUIDELINE WHICH WERE NEITHER IN EFFECT AT THE TIME THE SENTENCE WAS IMPOSED NOR AT THE TIME THAT THE OFFENSES WERE COMMITTED.

## ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE UPON THE DEFENDANT PREDICATED UPON SENTENCING GUIDELINES WHICH WERE NEITHER IN EFFECT AT THE TIME THE SENTENCE WAS IMPOSED NOR AT THE TIME THE OFFENSE WAS COMMITTED.

The Respondent would agree with the Petitioner's Argument, as contained in the Supplemental Brief Of Petitioner filed herein on or about August 20, 1987, pursuant to this Honorable Court's Order On Remand entered on or about July 27, 1987, that the proper remedy is for th Court to reinstate the District Court of Appeal's Opinion and remand the cause to the Trial Court for resentencing under the appropriate guidelines. The Decision of the United States Supreme Court in Miller v. Florida, \_\_\_ U.S. \_\_\_, 107 S.Ct.Rptr. 2446 (1987), unambiguously holds that sentencing guildeline amendments which increase a defendant's presumptive sentence, when applied retroactively, run afoul of the ex post facto prohibitions of Article I, Section 10 of the Constitution of the United States. Again, as conceded by the Petitioner, the State of Florida, the Miller decision clearly applies in the instant cause. In Miller, the Supreme Court required that the sentencing guildelines in effect at the time the offense was committed should be utilized in sentencing an accused after conviction, thus, expressly overturning this Court's decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985) and the cases following therefrom, including the instant cause. In the instant cause, the violation of the ex post facto

prohibitions of the United States Constitution, as well as those contained in Article 1, Section 10, of the Florida Constitution, is even more egregious, in that the Defendant herein was sentenced under guidelines not only not in effect at the time the offense was committed, but not even in effect at the time the sentence was imposed. To summarize briefly, the Trial Court sentenced the Defendant on May 2, 1984, utilizing amendments to the sentencing guidelines which were then only proposed changes and which were not approved by this Court until a week later, May 8, 1984. Those same guidelines were not adopted and made effective by the Florida Legislature until July 1, 1984. Furthermore, as clearly reflected in the Respondent's Answer Brief On The Merits filed in this cause, the change in the then proposed guidelines clearly resulted in an increased sentence range and an increase in the sentence ultimately imposed. Accordingly, the Respondent would agree with the position taken by the State in its Supplemental Brief Of Petitioner, that the proper remedy would be for this Honorable Court to reinstate the Opinion of the Court of Appeals, Third District, previously overturned by this Court; Sueiro v. State, 471 So.2d 1317 (Fla. 3d DCA 1985).

The Respondent would, however, take exception to one comment, apparently made in passing, in the State's Supplemental Brief Of Petitioner, wherein it states that it should be noted that the Trial Court should have the power to consider department




from the guidelines. The Respondent would respectfully submit that the above cited District Court of Appeal's Opinion should be reinstated without comment by this Honorable Court and that any decision about deviation from the guidelines should be left to the Trial Court on remand. Any such decision would thereafter be subject to appellate review according to law.

CONCLUSION

Based upon the foregoing, this Honorable Court's prior Opinion should be vacated, the District Court of Appeal, Third District's Opinion previously entered in this cause reinstated and this cause should be remanded for resentencing under the guidelines in effect at the time the offense was committed.

Respectfully submitted,

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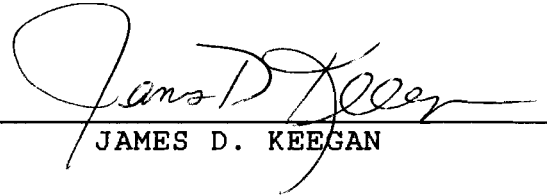
BY:   
JAMES D. KEEGAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Richard L. Polin, Esq., Assistant Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128 this 2 day of September, 1987.

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