IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,468

STATE OF FLORIDA, :

Petitioner, :

vs. :

JORGE SUEIRO, :

Respondent. :

_____ :

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ON REVIEW FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

GITLITZ, KEEGAN & DITTMAR, P.A.
Suite 807, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 374-1600

By: JAMES D. KEEGAN
Special Assistant Public Defender

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INTRODUCTION

The parties hereto shall be referred to as they were in the Trial Court or by name. The Record on Appeal, as originally prepared by the Clerk of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, and as revised and transmitted to the Court by the Clerk of the District Court of Appeal of Florida, Third District, consists of the Court Reporter's Transcripts of the proceedings in this case which is in three (3) bound volumes and shall be referred to in the Brief as "T" followed by the page number corresponding to the Index to the Record prepared by the Clerk of the District Court of Appeal of Florida, Third District. A bound volume of the pleadings and other papers filed in this cause shall be referred to in the Brief as "R" followed by the page number corresponding to the Index to the Record prepared by the Clerk of the District Court of Appeal of Florida, Third District. All emphasis is supplied unless otherwise indicated.

QUESTION PRESENTED

WHETHER 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 OFFENSES WERE COMMITTED?

(RESTATED)

STATEMENT OF THE CASE AND FACTS

The Defendant accepts the Statement Of The Case And Facts set forth in the State's Brief On The Merits, except as to the following exceptions and as supplemented with the following facts.

The Record reflects that the crimes for which the Defendant was convicted occurred on February 14, 1984. R. 1-4A, T. 46, 78, 99. Sentence was imposed by the Trial Court on May 2, 1984. R. 19-23a, T. 252-253. It was not until the Trial Court began to calculate the sentencing score sheet that both the Attorney for the State and Defense Counsel learned of the Trial Court's intention to use unfamiliar sentencing guideline scoresheets. T. 247-248. The Trial Judge explained that she was using new changes which were then pending before this Court. T. 247-248. Amendments to the sentencing guidelines score sheets were indeed approved by this Court a week later, on May 8, 1984. The Florida Bar: Amendment to Rules Of Criminal Procedure, 451 So.2d 824, 836 (1984). It is not clear that the Trial Court correctly applied the proposed amendments to the sentencing guidelines score sheets since, as acknowledged by the State in their Brief On The Merits, at Page 2, fn. 1, the Trial Court's calculations in this case were inconsistent with what the correct calculations would be under the then pending amendments. T. 246-247. The Defense Counsel repeatedly objected to the use of the pending amendment,

pointing out to the Trial Court that neither the State Attorney nor he knew of the Trial Court's intention to use some other guideline score sheets; that, indeed, he and the State Attorney had, prior to trial, reviewed the guidelines score sheets they had separately prepared, both of which reflected the same result; that he had advised the Defendant prior to trial of these calculations and the potential sentence; and that, accordingly, the Trial Court's procedure was fundamentally unfair. T. 251-252.

Under the sentencing guidelines score sheet in effect at sentencing on May 2, 1984, the Defendant's total score would be one hundred four (104) points, which would provide for a recommended sentence range of three and one-half (3 1/2) to four (4) years.[1/] Under the new sentencing guidelines score

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[1/] Application of the sentencing guidelines for the offense for which the Defendant was sentenced on May 2, 1984, would provide for scoring as follows:

I.	Primary offense at conviction (2nd Degree Felony)	30 points
II.	Additional offenses at conviction (Misdemeanor)	1 point
III.	Prior record:	
	a. 2 second degree felonies	39 points
	b. 6 third degree felonies	30 points
	c. 7 misdemeanors	4 points
	Total Points	104 points

The appropriate matrix, for Category 5, would provide for a sentence within the recommended range of three and one-half (3 1/2) to four and one-half (4 1/2) years. Thus, the Trial Court imposed a sentence two and one-half (2 1/2) years greater than that which would be permissible upon a proper application of the then existing sentencing guidelines. In re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983).

sheet, which was, subsequent to May 2, 1984, approved by this Court, adopted by the Legislature and made effective on July 1, 1984, the Defendant's total points would be one hundred twenty-five (125) points, with a recommended sentence range of five and one-half (5 1/2) to seven (7) years.[2/] The Trial Court imposed a sentence of seven (7) years. T.V.II. 38, R. 21-23.

[2/] Application of the new sentencing guidelines, approved by this Court on May 8, 1984, and adopted by the Legislature effective July 1, 1984, would provide for scoring as follows:

I.	Primary offense at conviction (2nd Degree Felony)	30 points
II.	Additional offenses at conviction (Misdemeanor)	1 point
III.	Prior record:	
	a. 2 second degree felonies	39 points
	b. 4 third degree felonies	30 points
	c. 2 third degree felonies (2x9)	18 points
	d. 4 misdemeanors	4 points
	e. 3 misdemeanors (3x10)	3 points
Total Points		125 points

Under the Category 5 matrix, the recommended range for these number of points would be five and one-half (5 1/2) to seven (7) years. The Florida Bar: Amendment to Rules of Criminal Procedure, 451 So.2d 824 (Fla. 1984).

SUMMARY OF THE ARGUMENT

Under the facts and circumstances of this case, the Trial Court's incorrect utilizataion of proposed amendments to the sentencing guidelines, which had not yet been approved by this Court, had not yet been approved by the Legislature, and which upon subsequent approval, were expressly made effective by the Legislature sometime after the sentence imposed by the Trial Court, violated the ex post facto prohibitions of Article I, Section 10 of the Constitution of the United States and Article I, Section 10 of the Florida Constitution. The punishment imposed by the Trial Court was almost sixty (60%) percent greater than that which that Court could have imposed under the sentencing guidelines then in effect. The District Court of Appeal's decision in the case under review is clearly distinguishable on its facts from this Court's decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985). This Court's decision in Jackson involved a revocation of probation, whereas the case at bar deals with sentencing for an initial offense, and the implications of the retroactive application of the guidelines upon the Defendant in this case are substantially greater and manifest from the Record. Finally, the decision under review must be sustained in order for this Court to maintain the integrity of the laws of the State promulgated by the Legislature and this Court's supervisory authority over the lower courts of this State, as well as to protect the organic and fundamental rights of the Defendant.

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 THAT THE OFFENSES WERE COMMITTED.

Article I, Section 10 of the Constitution of the United States provides, in relevant portion:

> No State shall . . . pass any Bill of Attainder, ex post facto Law, . . .

Any law which inflicts a greater punishment than that which was provided by law when the crime was committed, or which alters the status of the situation of the accused to his disadvantage, violates this prohibition. Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798). The mere fact that the ultimate or maximum punishment available for the offense has not changed does not dispose of the ex post facto violation. As the Supreme Court stated in Lindsey v. Washington, 301 U.S. 395 (1937), in invalidating, on ex post facto grounds, a sentence imposed under a retroactively applied sentencing scheme which did not alter the maximum punishment which could be imposed:

> [i]t is true that petitioners might have been sentenced to fifteen years under the old statute. But the ex post facto clause looks to the standard of punishment proscribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. (Citations omitted).
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> 302 U.S. at 401.

Similarly, Article I, Section 10 of the Florida Constitution forbids any ex post facto law. The meaning of the ex post facto prohibition contained in the Florida Constitution by the courts of this State is identical to that given the Federal Constitutional prohibition by the Federal Courts. An ex post facto law is one which, in relationship to the offense or its consequences, alters the situation of a party to his disadvantage. Higginbotham v. State, 88 Fla. 26, 101 So. 233, 235 (1924); Wilensky v. Fields, 267 So.2d 1, 5 (Fla. 1972). The courts of this State have consistently and uniformly held that statutory changes affecting the nature and extent of punishment which a criminal defendant will be subjected to, applied retrospectively, violate the ex post facto prohibition of the Federal and State Constitutions. Wilson v. State, 414 So.2d 512 (Fla. 1982); Bilyou v. State, 404 So.2d 744 (Fla. 1981); Myles v. State, 399 So.2d 481 (Fla. 3d DCA 1981).

In this Court's recent opinion in State v. Jackson, 478 So.2d 1054 (Fla. 1985), the Court concludes that because presumptive sentences established by the guidelines do not change the statutory limits of a sentence that can be imposed for a particular offense, modifications in sentencing guideline procedure are merely procedural changes and, accordingly, their retroactive application does not offend the ex post facto prohibitions of the Federal and State Constitutions. It is respectively submitted, however, that Justice Ehrlich's analysis of this issue, in his dissent in Jackson, is correct. The fact that a change in the law is framed in a procedural

context, such as a change in a rule of criminal procedure which concerns the determination of a sentence, as in the case at bar, is not determinative of whether it affects the substantial right of the accused and would therefore be deemed ex post facto when applied retroactively. Weaver v. Graham, 450 U.S. 24, 29 (1981); Thompson v. Utah, 170 U.S. 343, 354-355 (1898); Kring v. Missouri, 107 U.S. 221, 229 (1883). Rather, the gravamen for this determination is whether the change increases any penalty provision which could possibly be imposed to the detriment of the accused. Lee v. State, 294 So.2d 305, 307 (Fla. 1974).

As Justice Ehrlich points out in his dissent in Jackson, the Florida Legislature, in the first paragraph of the legislation creating the sentencing guidelines, expressly states that the establishment of criminal penalties and the limitations upon their application is predominantly substantive law and a matter for legislative determination. State v. Jackson, supra, 478 So.2d at 1057. The dissent in Jackson clearly demonstrates that retroactive application of amendments to the sentencing guidelines satisfies each and every criteria for finding a violation of the State and Federal ex post facto prohibitions announced by the United States Supreme Court in Weaver v. Graham, supra.

It is respectively submitted that the majority's conclusion, in Jackson, that the guidelines amendments are procedural because the presumptive sentences established by the guidelines do not change the statutory limits of the sentence

which could be imposed, is misplaced. The guideline legislation without specifically altering any enumerated sentence contained in the statute book, radically and profoundly altered the substantive criminal sentencing law of this State by eliminating the parole system for all those sentenced under the legislation. Florida Statutes § 921.001(a). The Florida Legislature thereby created a revolutionary sentencing scheme. By eliminating the parole system, the Legislature determined that the period of incarceration an individual must serve shall be determined initially at the time of his conviction, predicated upon consistent pre-determined guidelines subject only to being shortened, in a prescribed manner, by a defendant's conduct while incarcerated. Under this scheme, the single most important factor in determining the length of incarceration is not the minimum or maximum sentences prescribed by the Legislature, or the discretion of the trial judge or any other administrative agency, but, rather, the existing, pre-determined, consistently applied mathematical formulae of the sentencing guideline score sheets. Deviation from this mathematical formulae is only permitted when a trial court scrupulously follows the statutory requirements for deviation, and that deviation is subject to the scrutiny of appellate review.[3/]

[3/] Indeed, this point was reiterated by this Court in State v. Jackson, supra, when it held, categorically, that oral pronouncements by a trial court in deviating from the guidelines do not satisfy the strict requirements of Florida Statutes § 921.001(6) unless they are reduced to written form.

This Court has clearly delineated the distinction between procedural and substantive law. A law which prescribes punishment for a criminal offense is substantive in this context. State v. Garcia, 229 So.2d 236, 238 (Fla. 1969). In the case at bar, the law in effect at the time that the offense was committed and at the time that sentence was imposed provided for a recommended sentencing range of three and one-half (3 1/2) to four and one-half (4 1/2) years. The Trial Court imposed a sentence of seven (7) years predicated upon law which had not yet become effective. The Trial Court attempted to use amended guidelines which had not yet been approved by this Court nor by the Legislature.

Each of the District Courts of Appeal of this State, in analyzing the retroactive applicability of the sentencing guidelines, in light of established precedent, have come to the same conclusion; that to so apply the law is to offend the constitutional prohibitions against ex post facto enactments. DISTRICT COURT OF APPEAL, FIRST DISTRICT: Ennis v. State, 475 So.2d 713 (Fla. 1st DCA 1985); Schmidt v. State, 475 So.2d 278 (Fla. 1st DCA 1985); Dougherty v. State, 474 So.2d 11 (Fla. 1st DCA 1985); Beggs v. State, 473 So.2d 9 (Fla. 1st DCA 1985); Richardson v. State, 472 So.2d 1278 (Fla. 1st DCA 1985); Dewberry v. State. 472 So.2d 792 (Fla. 1st DCA 1985); Stubbs v. State, 470 So.2d 768 (Fla. 1st DCA 1985); Scott v. State, 469 So.2d 865 (Fla. 1st DCA 1985); Dubose v. State, 468 So.2d 517 (Fla. 1st DCA 1985); Oldfield v. State, 468 So.2d 446 (Fla. 1st

DCA 1985); Barnes v. State, 461 So.2d 216 (Fla. 1st DCA 1984), pet. for rev. denied, 467 So.2d 1006 (Fla. 1985); Saunders v. State, 459 So.2d 1119 (Fla. 1st DCA 1984), pet. for rev. denied, 469 So.2d 750 (Fla. 1985); Cf. Randolf v. State, 458 So.2d 64 (Fla. 1st DCA 1984) and Dorman v. State, 457 So.2d 503 (Fla. 1st DCA 1984). DISTRICT COURT OF APPEALS, SECOND DISTRICT: Wahl v. State, 474 So.2d 328 (Fla. 2d DCA 1985); Hopper v. State. 465 So.2d 1269 (Fla. 2d DCA 1985); pet. for rev. denied, 475 So.2d 696 (Fla. 1983); Whiteman v. State, 465 So.2d 591 (Fla. 2d DCA 1985); Frazier v. State, 463 So.2d 458 (Fla. 2d DCA), pet. for rev. denied, 472 So.2d 1182 (Fla. 1985); Burke v. State, 460 So.2d 1022 (Fla. 2d DCA 1984); Tackett v. State, 458 So.2d 368 (Fla. 2d DCA 1984); Stroemer v. State, 410 So.2d 1350 (Fla. 2d DCA 1981); Cf. Dominguez v. State, 405 So.2d 736 (Fla. 2d DCA 1981), pet. for rev. denied, 412 So.2d 464 (Fla. 1982). DISTRICT COURT OF APPEAL, THIRD DISTRICT: Pisarski v. State, 471 So.2d 679 (Fla. 3d DCA 1985); Sueiro v. State, 471 So.2d 1317 (Fla. 3d DCA 1985). DISTRICT COURT OF APPEAL, FOURTH DISTRICT: Perkins v. State, 472 So.2d 889 (Fla. 4th DCA 1985); Arnett v. State, 471 So.2d 547 (Fla. 4th DCA 1985); Cote v. State, 468 So.2d 1019 (Fla. 4th DCA 1985); Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985); Taft v. State, 468 So.2d 472 (Fla. 4th DCA 1985); Fletcher v. State, 468 So.2d 428 (Fla. 4th DCA 1985); Stoute v. State, 467 So.2d 1096 (Fla. 4th DCA 1985); Garner v. State, 465 So.2d 671 (Fla. 4th DCA 1985); Bibby v. State, 465 So.2d 670 (Fla. 4th DCA 1985); Pettis v. State, 462 So.2d 870 (Fla. 4th

DCA 1985); O'Malley v. State, 462 So.2d 868 (Fla. 4th DCA 1985); Kelly v. State, 461 So.2d 192 (Fla. 4th DCA 1984); Cf. Hanabury v. State, 459 So.2d 1113 (Fla. 4th DCA 1984), pet. for rev. denied, 469 So.2d 750 (Fla. 1985). DISTRICT COURT OF APPEAL, FIFTH DISTRICT: Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985); Taylor v. State, 474 So.2d 285 (Fla. 5th DCA 1985); Hurst v. State, 474 So.2d 280 (Fla. 5th DCA 1985); Logsdon v. State, 473 So.2d 29 (Fla. 5th DCA 1985); Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985); Mott v. State, 469 So.2d 946 (Fla. 5th DCA 1985); Joyce v. State, 466 So.2d 433 (Fla. 5th DCA 1985); Browning v. State, 465 So.2d 1357 (Fla. 5th DCA 1985); Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984); Carter v. State, 452 So.2d 953 (Fla. 5th DCA 1984).

It is respectively submitted that if this Court is inclined not to recede from its decision in Jackson v. State, supra, there is sufficient distinction in the case at bar to sustain the opinion under review herein. Jackson concerns the sentencing decision upon revocation of probation and the fact that probation revocation itself may be a factor in determining the sentence to be imposed. Under the amended Florida Rule of Criminal Procedure 3.701(d)(14), which would be applicable pursuant to this Court's remand in Jackson, the fact of the probation revocation itself is sufficient to permit a trial court to use the next higher cell in the recommended range of sentences without an articulation by that court of why it is

deviating from the sentencing guidelines. The law existing in this State before this amendment allowed the fact of a violation of probation to itself serve as a basis for departure from the guidelines. Stubbs v. State, supra; Frazier v. State, supra; Saunders v. State, supra; Carter v. State, supra. Thus, the effect of the change in the guidelines, which this Court determined in Jackson to be merely procedural, was not to change the ultimate sentence which could be imposed, but the technical procedure which must be followed by a trial court in imposing essentially the same penalty.

The facts in the case at bar are totally inopposite. The Trial Court avowedly utilized amendments to the guidelines which not only postdated the commission of the offense, but which had neither been ratified by this Court nor approved and made effective by the Legislature at the time that they were used. The Third District Court of Appeal's decision in the case under review is entirely consistent with the decisions of the Florida District Courts of Appeal on this issue. Scott v. State, supra; Oldfield v. State, supra; Browning v. State, supra; Hopper v. State, supra; Bibby v. State, supra; Frazier v. State, supra; Pettis v. State, supra; O'Malley v. State, supra; Barnes v. State, supra; Kelly v. State, supra; Saunders v. State, supra; Tackett v. State, supra; Carter v. State, supra; Stroemer v. State, supra. Furthermore, the effect upon the Defendant was to permit the Trial Court, ostensibly, without deviating from the sentencing guidelines, to enhance

the Defendant's sentence by almost sixty (60%) percent, or increase the Defendant's sentence from a maximum permissible four and one-half (4 1/2) years under the appropriate guidelines, to the sentence imposed of seven (7) years.

The facts of the instant case, when analyzed by the two-fold test announced by this Court in State v. Williams, 397 So.2d 663, 665 (Fla. 1981), clearly reflect that the Trial Court's application of ineffective guidelines violated the ex post facto prohibitions. Specifically, the Trial Court utilized a change in legislation and law, not in effect on the date of the offense and not even in effect at the time it was used by that Court, in a manner which was manifestly disadvantageous to the Defendant. Accordingly, under the facts of this case, the proposed amendment to the sentencing guidelines was not procedural because it affected the substantive rights of the Defendant and, accordingly, the decision of the District Court of Appeal under review must be affirmed.

The State concedes, in its Brief On The Merits, that the sentencing guidelines score sheets used by the Trial Court had not been ratified by this Court nor approved by the Legislature, and that the legislation approving same specifically provided that they would not become effective until two (2) months after sentence was imposed in the case below. Notwithstanding this, the State argues that, by virtue of this Court's decision in Jackson, those same score sheets

would be used at resentencing and, accordingly, a remand would be pointless. The State then requests that this Court reinstate the original sentence imposed without further resentencing. (State's Brief at Page 7). The State is asking this Honorable Court to countenance a trial court's refusal to follow the express dictates of the State Legislature and the Orders of this Court contained in the Rules of Criminal Procedure. It is respectfully submitted that this Court's acquiescence to the State's request, in this regard, would be tantamount to an abandonement of the Court's supervisory responsibilities over the lower courts. The effect of the State's suggested disposition of the accused is that he must suffer incarceration for a period of seven (7) years rather than five and one-half (5 1/2) years, as required by the law in effect at the time of his sentence. The effect on the administration of justice in this State by such a result would be to grant a license to the trial courts to ignore the laws established by the Legislature and the Rules of Procedure established by this Court. Finally, and most significantly, to sustain the Trial Court's sentence, as suggested by the State, would effectively destroy the uniform sentencing policy established by the Florida Legislature's enactment of Florida Statutes § 921.001 et seq. As the United States Court of Appeals for the Fifth Circuit has observed, appellate courts should not be in the business of excusing, after-the-fact, non-compliance with the law for the reason that it will not

make any difference. Rather, appellate courts are in the business of insuring compliance with the law. United States v. Opager, 589 F.2d 799, 805 (5th Cir. 1979).

CONCLUSION

Based upon the foregoing facts, reasons and authorities, the District Court of Appeal's decision under review should be affirmed and/or the Respondent should be granted such other and further relief as is appropriate.

Respectfully submitted,

GITLITZ, KEEGAN & DITTMAR, P.A.
Suite 807, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 374-1600

By: _____
JAMES D. KEEGAN
Special Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128 this 14th day of February, 1986.

Respectfully submitted,

GITLITZ, KEEGAN & DITTMAR, P.A.
Suite 807, Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 374-1600

By: 
JAMES D. KEEGAN
Special Assistant Public Defender