

IN THE SUPREME COURT OF FLORIDA

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AUG 24 1987

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CASE NO. 67,468

THE STATE OF FLORIDA,

Petitioner

vs.

JORGE SUEIRO,

Respondent.

\*\*\*\*\*

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

\*\*\*\*\*

SUPPLEMENTAL BRIEF OF PETITIONER

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STATEMENT OF CASE AND FACTS

The opinion of the Third District Court of Appeal, of June 18, 1985, concluded that an amendment to the sentencing guidelines had been improperly applied retroactively. That portion of the Third District's opinion was quashed by this Court's opinion of May 8, 1986, relying on Jackson v. State, 478 So.2d 1054 (Fla. 1985). Sueiro then filed a petition for writ of certiorari in the United States Supreme Court, which, pursuant to Miller v. Florida, 96 L.Ed.2d 351 (1987), vacated this Court's opinion and remanded for further proceedings. In all other respects, Petitioner relies on the statement of the case and facts presented in its prior brief.

QUESTION PRESENTED

WHETHER THE SENTENCING GUIDELINES AMEND-  
MENT WAS IMPROPERLY APPLIED RETROACTIVELY?

## ARGUMENT

THE SENTENCING GUIDELINES AMENDMENT WAS  
IMPROPERLY APPLIED RETROACTIVELY.

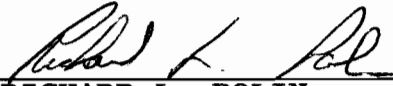
Miller v. Florida, 96 L.Ed.2d 351 (1987), held that sentencing guidelines amendments which increase a defendant's presumptive sentence cannot be applied retroactively, as such retroactive application violates the ex post facto clause of the United States Constitution. Miller applies to the instant case. The proper remedy should be to reinstate the Third District's opinion and have the case sent back to the trial court for resentencing under the appropriate guidelines. It should be noted that on such resentencing, the trial judge should have the power to consider departing from the guidelines. The amendment in question added points for prior offenses in excess of the fourth for any particular category. Prior to the amendment, prior offenses in excess of the fourth constituted a legitimate reason for departing. Russell v. State, 458 So.2d 422 (Fla. 2d DCA 1984), approved, 472 So.2d 466 (Fla. 1985); Ward v. State, 492 So.2d 472 (Fla. 3d DCA 1986) (citing Russell).

CONCLUSION

Based on the foregoing, this Court's prior opinion should be vacated, the Third District's opinion reinstated, and the case remanded for resentencing under the guidelines in effect at the time of the offense.

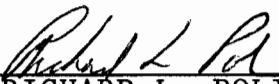
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF PETITIONER was furnished by mail to JORGE SUEIRO, #040522, Union Correctional Institution, P. O. Box 221, Raiford, Florida 32083; and JAMES KEEGAN, ESQ., Gitlitz, Keegan & Dittmar, P.A., Suite 807, 19 West Flagler Street, Miami, Florida 33130, on this 20th day of August, 1987.

  
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RICHARD L. POLIN

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