IN THE SUPREME COURT OF FLORIDA

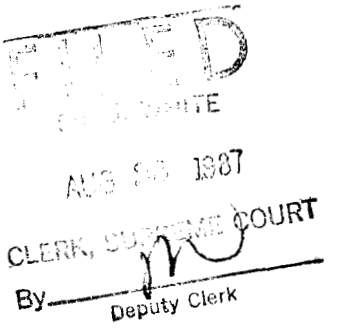
TERRY JOE WILKERSON,

Petitioner,

v. CASE NO. 68,181

STATE OF FLORIDA,

Respondent.



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

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PRELIMINARY STATEMENT

The respondent in this court, the State of Florida, was the prosecuting authority in the trial court, the appellee in the First District Court of Appeal and the respondent in the United States Supreme Court. The petitioner, Terry Joe Wilkerson, was the defendant, appellant and petitioner, respectively, in the aforementioned courts.

In this brief, the parties will be referred to as "petitioner" and "the state". The state has filed herewith appendixes consisting of the state's brief in opposition to petition for certiorari filed in the United States Supreme Court, that court's decision of June 15, 1987, and a copy of volume II of the trial record which consists of transcripts of petitioner's plea entered on October 30, 1984, and the sentencing hearing of January 8, 1985. The symbol A, B or C, followed by a page number, will refer to the appendixes.

SUMMARY OF ARGUMENT

The United States Supreme Court vacated judgment in the instant case based upon its holding in Miller v. Florida, 482 U.S. ____, 96 L.Ed.2d 351, 107 S.Ct. ____, (1987) that the application of the 1984 amended sentencing guidelines to petitioner, whose offense was committed prior to their effective date, violated the ex post facto prohibition of the Constitution of the United States. This was so because petitioner was disadvantaged by being placed in a higher presumptive sentencing range. Accordingly, this court should direct that petitioner be resentenced under the original guidelines, after preparation of a corrected scoresheet. The trial judge may choose to depart, but would have to enter an order stating clear and convincing reasons for so doing.

Other defendants in this situation might obtain relief pursuant to Fla.R.Crim.P. 3.800(a), as amended in State v. Whitfield, 487 So.2d 1047 (Fla. 1986). In the instant case, this court can be guided by the precedent of Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1980), wherein this court held that split sentence probation orders imposing more than one year's incarceration were invalid. In Villery, this 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 UNDER THE SENTENCING GUIDELINES IN EFFECT AT THE TIME OF HIS OFFENSE, WHICH WAS PRIOR TO JULY 1, 1984, BY APPLICATION TO THE TRIAL COURT FOR RELIEF. (Restated)

This court has, on remand from United States Supreme Court, directed the parties to file briefs. The remand was for the stated purpose of further consideration in light of the supreme court's opinion in Miller v. Florida, 482 U.S. ____, 96 L.Ed.2d 351, 107 S.Ct. ____ (1987) in which the court concluded that the amended guidelines could not be applied to petitioner, whose crime was committed prior to their effective date. Therefore, in this brief, the state will discuss the remedy that should be provided to this petitioner as well as the broader question of what the remedy should be for others similarily situated. The court ruled in Miller that to sentence a defendant in accordance with sentencing guidelines taking effect after the date of the crime and disadvantaging the defendant was an ex post facto application of the law.

Concerning petitioner, it would appear that the appropriate action is to vacate this court's prior decision and that of the First District Court of Appeal and to remand to the trial court either for resentencing under the guidelines in effect at the time of petitioner's crime or for consideration of a departure sentence based upon a heretofore scored but now unscoreable

juvenile conviction. This court held in Weems v. State, 469 So.2d 128, 130 (1985) that even a "stale" juvenile conviction could be considered by the trial court as reason for departing from the guidelines even though such conviction could not be scored because the deposition was "over three years old".[1] Thus, the trial court could still impose 5 1/2 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 occur, however, a new score sheet will have to be prepared, using the original pre-revision guidelines.

In essence, the "bottom line" impact of the United States Supreme Court's decision in both Miller and the matter sub judice is that petitioner was sentenced through use of 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 (Fla. 1st DCA 1986), a scoresheet was incorrect because the degree of the felony was not properly classified. The case was

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[1] In Weems, this court noted that "as presently written, Rule 3.701 reflects amendments adopted May 8, 1984. The prior version measured the three years from "the current conviction". The Florida Bar: Amendments to Rules of Criminal Procedure, 451 So.2d 824, 826 (Fla. 1984).

remanded for resentencing at which time the trial court was to have the benefit of an accurately prepared scoresheet. Likewise, in State v. Hutchenson, 501 So.2d 190 (Fla. 5th DCA 1987), an incorrect scoresheet was used because the subject offense was improperly scored under category seven when it should have been category nine. The court reversed and held that where the incorrect scoresheet would result in a higher recomended range, the case would be remanded for recalculation of the scoresheet and entry of a sentence within the range or else supported by written reason for departure. Thus, as to this petitioner, resentencing after preparation of a new scoresheet is the appropriate remedy. See also Brown v. State, 12 F.L.W. 1477 (Fla. 2d DCA June 10, 1987).

With regard to any person whose sentence may have been 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, supra at 1047. The state submits that relief under Rule 3.800(a) is the appropriate remedy in the present situation. The effect of

Miller is that persons who are disadvantaged by being sentenced under guidelines not enacted on the date of their offenses were sentenced through use of incorrect scoresheet. 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 or received sufficient gain time to render the issue moot. However, in the matter sub judice, a departure sentence is still quite possible in that the trial court alternatively departed from the guidelines for the reasons set out in the record of appellant's sentencing hearing, which was held on January 8, 1985, before the Honorable M. Russell Bower in Panama City, Florida, Case Number 86-7520. (Volume II, p.94.)

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, 360 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 (Fla. 4th DCA 1981) If

such application were 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)

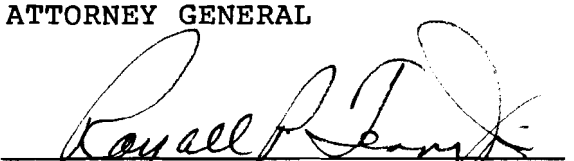
The Villery precedent should guide the effectuation of the law established by the United States Supreme Court in the Miller decision. A resentencing of this petitioner should be ordered. All others similarily situated who are disadvantaged by being sentenced pursuant to amended guidelines not in effect 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 respondent, the State of Florida, respectfully submits that the appropriate relief for the defendant is to vacate the lower court's disposition of the case, in which that court affirmed the trial court and remand for resentencing under the 1983 guidelines in effect on the date of petitioner's offense. The state further submits that this 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



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been furnished by hand delivery to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 25th day of August, 1987.

ROYALL P. TERRY, JR.
Assistant Attorney General