

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67, 468

THE STATE OF FLORIDA,

Petitioner,

[Handwritten signature and stamp]

vs.

JORGE SUEIRO,

Respondent,

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE CASE AND FACTS.....	1
QUESTION PRESENTED.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	6
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	9

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982).....	7
Burney v. State, 402 So.2d 38 (Fla. 2nd DCA 1981).....	7
<u>The Florida Bar: Amendment to Rules of Criminal Procedure</u> , 451 So.2d 824, 836 (1984).....	1
Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984).....	7
State v. Jackson, So. _____ (Fla. 1985) 10 F.L.W. 564 (Case No. 65,857, opinion filed October 17, 1985).....	5-6
State v. Strasser, 445 So.2d 322 (Fla. 1984).....	7

OTHER AUTHORITIES

Laws of Florida, Chapter 83-328, Section 3.....	1
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STATEMENT OF CASE AND FACTS

Jorge Sueiro, the Defendant in the trial court, was charged by information with burglary of a structure, while armed, grand theft, and possession of cannabis. (R. 1). Prior to trial, the State dismissed the charge of possession of cannabis. (R. 12). After a trial by jury, the Defendant was found guilty of burglary of a dwelling and petit theft, both lesser included offenses. (R. 19).

The offenses occurred on February 14, 1984. (T. 77-79 et seq.). The Defendant was sentenced on May 2, 1984. (T. 216, 246 et seq.). At the sentencing hearing, the trial judge applied an amendment to the sentencing guidelines scoresheets, which permitted additional points to be added for prior offenses in excess of four in any particular category. (T. 246-249). That amendment did not become effective until July 1, 1984. Laws of Florida, Chapter 83-328, section 3. The amendment had previously been approved by this court on May 8, 1984. The Florida Bar: Amendment to Rules of Criminal Procedure, 451 So.2d 824, 836 (1984). At the time that the trial judge applied the amendment, the judge was aware that the Sentencing Commission had recommended the change and that the matter was then pending before this court (T. 247-248). The sentencing guideline score-sheet was calculated on the basis of the amendment, resulting in a score of 128 points and a recommended sentence of 5½ -7 years.

(R. 24).¹ This included points for six prior third degree felonies and seven prior misdemeanors. (T. 248-250, R. 24). If the scoresheet had been calculated based on the pre-amendment rules, the total would have been 104 points, as it would only include four prior third degree felonies and four misdemeanors. (R. 24).

The opinion of the Third District Court of Appeal affirmed the judgment of conviction and reversed the sentence. As to the sentence, the opinion stated:

" It is contended that the trial judge erred in basing the sentencing 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

1. The court's calculation of 128 points under the amendment did contain an error. Six third degree felonies were scored as 51 points (R. 24, T. 248-250), however, under the amendment, six third degree felonies should result in 48 points. 451 So.2d at 836. (30 points for the first four and 18 points for the additional two). Thus, the correct total score under the amendment would be 125 points, which results in the same recommended sentence. 451 So.2d at 837.

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 re-sentencing appellant under the proper guidelines."

The State's motion for rehearing was denied and the State then filed a Notice to Invoke Discretionary Jurisdiction, commencing this proceeding.

QUESTION PRESENTED

WHETHER SENTENCING GUIDELINES
AMENDMENTS OPERATE RETROACTIVELY

SUMMARY OF ARGUMENT

The District Court of Appeal, Third District held that the trial court used the wrong sentencing guidelines and that on resentencing, the guidelines in effect at the time of the offense should be used. This conclusion is directly contrary to the recent decision of this Court in State v. Jackson, _____ So. _____ (Fla. 1985), 10 F.L.W. 564 (Case No. 65,857, opinion filed October 17, 1985). Jackson is fully dispositive of the issue presented herein.

ARGUMENT

SENTENCING GUIDELINES AMENDMENTS OPERATE RETROACTIVELY

This Court's recent opinion in State v. Jackson, ___ So.2d _____, (Fla. 1985), 10 FLW 564 (Case No. 65, 857, opinion filed October 17, 1985), is dispositive of the issue presented in this case. Jackson held that on resentencing, the current guidelines must be used:

" We agree with the State that the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense. We conclude that a modification in the sentencing guidelines procedure, which changes how a probation violation should be counted in determining a presumptive sentence, is merely a procedural change, not requiring the application of the ex post facto doctrine. In Dobbert v. Florida, 432 U.S. 282 (1977), the United States Supreme Court upheld the imposition of a death sentence under a procedure adopted after the defendant committed the crime, reasoning that the procedure by which the penalty was being implemented, not the penalty itself, was changed." Id.

The effect of the amendment pertaining to prior offenses in excess of four is no different than the effect of the amendment pertaining to probation violation. Both result in additional

on the scoresheet, and neither changes the statutory limits of the sentence imposed for the particular offense. Thus, the amendment in the instant case must be deemed procedural.

As the amendment in the instant case must be deemed procedural, the Third District Court of Appeal's direction to apply the pre-amendment guidelines on remand is incorrect. The guidelines in effect at the time of re-sentencing would be applicable. However, as the post-amendment guidelines were already applied by the trial judge, the State maintains that such a remand would be pointless and that the original sentence should therefore be reinstated, without any further resentencing.

Similar conclusions have been reached in other cases. Paschal v. Wainwright, 738 F.2d 1173 (11th Cir. 1984); Burney v. State, 402 So.2d 38 (Fla. 2nd DCA 1981); Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982); and State v. Strasser, 445 So.2d 322 (Fla. 1984).

CONCLUSION

On the basis of the foregoing, the portion of the District Court of Appeal's decision pertaining to the sentence should be quashed and it should be concluded that either the current guidelines should apply on resentencing or that the original sentence is deemed proper.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to JAMES D. KEEGAN, ESQ., Gitlitz, Keegan, & Dittmar, P.A. Suite 807, 19 West Flagler Street, Miami, Florida 33130, on this 2nd day of January, 1985.


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