IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA
CASE NO: SC07-319

MICHAEL GISI,
APPELLANT/PETITIONER,

VS.

STATE OF FLORIDA,
APPELLEE/RESPONDENT.
_____/

APPEAL FROM: Certified Question, Second District Court of Appeals, **Gisi v. State**, Case No: 2D06-136

APPEALING: **State v. Gisi**, Sixth Judicial Circuit Court, Pinellas County, Florida, Case No: CRC-98-21422 CFANO

PRO-SE PETITIONER'S SUBSTITUTED AMENDED INITIAL BRIEF

Respectfully Submitted,

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PRELIMINARY STATEMENT

The Appellant / Petitioner, Michael Gisi, is pro-se and a layman to the law. He will be referred to by name, as Appellant, or Petitioner. The Appellee / Respondent is the State of Florida and will be referred to as such, the State Attorney, Prosecutor, or simply the State.

References to the available record of DCA case # 2D06-136 will be with the volume and the page number as such: (R:X), where "X" is the page in volume I to which the reference is made of the re-sentencing proceeding. All other papers will be referred to by name or "Appellate Exhibit" and the page, and are located in the Appendix with the opinion.

Gisi also humbly requests this Honorable Court recognize his pro-se status and overlook minor typographical, grammatical, and formatting errors.

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STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Throughout this Brief, to properly present the Appeal, it is necessary to present the original judgement and sentence which is referred to as App. Ex. I, meaning Appellate Exhibit I and the transcript of the original sentencing hearing of May 26, 2000, which is referred to as App. Ex. II, meaning Appellate Exhibit II. App. Ex. III is an article which was included in the original Appeal to the Second District Court of Appeals demonstrating the disparity in the sentence given to the Appellant when compared with similar offenses. App. Ex. IV is a scoresheet prepared by previous Appellate Counsel, Charles E. Lykes, Jr., Esq., incorporating the corrections which should have been made pursuant to the order of the Appeals Court prior to the re-sentencing. Additionally, App. Ex. V is an article from the St. Petersburg Times dated May 27, 2000, and concerns the original May 26, 2000 sentencing.

Following a series of Internet communications between the Appellant and the alleged victim the Appellant traveled to Pinellas County, Florida from his home in South Dakota and was alleged to have had a series of sexual liaisons with the victim each day between November 19, 1998 and November 21, 1998. For each of the days the Appellant was charged with at least one count of lewd and lascivious conduct and two counts of handling and fondling. (R. 8-13). He was additionally

charged in separate counts with enticing the victim from her parents and with using the Internet to establish these liaisons.

Appellant was arrested on December 19, 1998 (R-1). After two Amendments to the felony information (the last one of April 13, 2000 (R. 14-19) was dismissed during trial) the Appellant was brought to trial and convicted of four counts of a lewd and lascivious acts upon a child and eight counts of handling and fondling a child (all 2nd °. felonies), and other counts not relevant to this action, in April, 2000. On his sentencing scoresheet he was assessed with points for eight separate instances of sexual penetration, although none had been specifically charged nor established by the jury.

Appellant was originally sentenced on May 26, 2000. Relevant to the issues of this Appeal, Appellant was sentenced to terms of 71 years with respect to each of the 12 second degree felonies, (App. Ex. I) he also was awarded 525 days credit for time served prior to his sentence. He was sentenced concurrently to other counts which are not relevant to this Appeal.

The victim made a short statement in which she expressed her desire that the Appellant not be punished too severely. (App. Ex. II, p. 9-10). Her father indicated that he and his wife separated shortly after the offenses had occurred, that the victim had a period of a strained relationship with her mother, and that they were living separately (App. Ex. II, p. 10-12), but still stated excessive time as a

sentence was not necessary. (App. Ex. II, p. 13; App. Ex. V, p. 2-3). The State Attorney argued that the victim had suffered an indelible injury and would never be the same. (App. Ex. II, p. 5).

Shortly after this sentence the United States Supreme Court decided the case of **Apprendi v. New Jersey**, 530 U.S. 466 (2000), and Appellant was subsequently permitted an appeal. Based upon this new authority and also because of a discrepancy between the evidence and the time of one of the episodes as set forth in a statement of particulars, the sentence of Appellant was reversed and remanded for the purpose of preparing an amended scoresheet in which only three lewd and lascivious acts were scored and in which the sexual penetration points were removed. This was because only three of the transactions could be scored and the three separate offenses resulting from each sexual encounter needed to be merged into a single offense.

Appellant was re-sentenced on December 14, 2005, before the same Court which had imposed his original sentence 2027 days earlier. Although the Appellate Court opinion and order directed re-scoring the offenses, no amended scoresheet was made a part of the record. The State Attorney did apparently prepare one and the bottom of the guidelines on the corrected scoresheet was 153 months rather that the 71 years which was applied before.

The victim's father again testified that after the incident had occurred his family split up and he and the victim's mother divorced "which may or may not have happened for this reason, but it – this was definitely an extenuating circumstance in the separation and divorce, even though my ex-wife and I are good friends." (R. 127). This was substantially in accordance with his testimony at the first sentencing hearing.

The victim again testified and verified that she had undergone 6 months to a year of counseling and had substantially recovered from this event. The victim was also confronted with a letter she had sent to the Appellant which actually offered the Appellant mitigative evidence. She stated that the experience had been happy and that she drove past the hotel they had used for rendezvous on frequent occasions (R. 133-138). Her testimony was also substantially the same as before except that neither the victim nor her father were asked to state an opinion as to what the sentence should be. Previously, they had both advocated a more lenient sentence as described above.

The maximum offense for each of the remaining three lewd and lascivious acts as second-degree felonies was 15 years. The State Attorney requested and argued that the Court should impose the maximum on each of these and run them consecutively so that his sentence would be a total of 45 years. Appellant argued

that such a sentence would be disproportional and greatly in excess of the bottom of the guidelines, to which the Appellant had previously been sentenced.

The Trial Court commented as follows (R. 167-168):

> "And the Court having reviewed the sentencing that took place in 2000 and taking into account the enticement of an educated person who was computer savvy and the devastating effect of his actions on a child of 13 years of age and the devastating and destructive effect that those actions had on her life and continues to have on her life and even on her family, the Court finds that you, Michael Gisi, should be sentenced to counts one, count two, and count four to 15 years on each count to be served consecutively for a total of 45 years from the date of the original sentence, which was May 26th of 2000, with credit for time served prior to that and credit for time served since the date of sentencing in the Department of Corrections."

Appellant requested that he be awarded credit for the time he had spent between the two sentencings against each of the three consecutive lewd and lascivious sentences. The Appellee requested that this credit only be applied against the first of the three consecutive sentences. The Trial Court ruled as follows (R. 169):

> "Yeah, well, that's what the Court is ordering, credit for time served, whatever is due. But I do not believe that he should have credit for five years on each of the counts."

Appellant timely filed a Notice of Appeal of this sentence.

B. STATEMENT OF THE CASE

The Appellant was originally convicted of 12 second degree felonies relating to four separate sexual encounters with the child victim together with a variety of lesser offenses. He was originally sentenced to a term of prison of 71 years on May 26, 2000, which was designated as a concurrent sentence for each of the counts. This sentence was achieved by substantial enhancement from scoring victim injury resulting from a determination by the Court that there had been sexual penetration which accompanied each of the sexual encounters.

This sentence was reversed on appeal for several reasons, most significantly in the wake of the **Apprendi** decision. This was because the matter of penetration had not been specifically alleged and was, accordingly, not submitted to the jury for determination of guilt beyond a reasonable doubt. Additionally, one of the four sexual encounters was found to have been not supported by evidence in light of the statement of particulars. Accordingly, Appellant's sentence was remanded to the Trial Court with instructions that his sentence be re-scored without enhancement for penetration and with only three sexual encounters rather than four. The Trial Court sentenced Appellant to three consecutive 15 year prison terms and awarded the Appellant credit for time served only against the first of the three consecutive terms of the sexual encounters.

Appellant appealed this sentence on several grounds, notably including the denial of credit for time served for two of the three consecutive 15 year terms. The Second District Court of Appeals, by opinion dated January 10, 2007, denied all relief to the Appellant but did certify the following question for review by this Honorable Court as follows:

"IS A DEFENDANT, ON RE-SENTENCING, ENTITLED TO CREDIT ON EACH NEWLY IMPOSED CONSECUTIVE SENTENCE FOR PRISON TIME ALREADY SERVED ON THE ORIGINAL CONCURRENT SENTENCES?"

C. POINTS ON APPEAL

I. In response to the certified question, Appellant should have been awarded credit for all time served, including pretrial time, because, prior to December 14, 2005, he had been serving his sentences against each of the lewd and lascivious counts concurrently and because he was awarded credit for the pretrial time served against each of the concurrent sentences.

Moreover, Appellant would ask this Honorable Court, pursuant to Fla. R. App. P. § 9.040 (a), Art. V § 3 (b) (4), Fla. Const., and **Caufield v. Cantele**, 837 So.2d 371, 377, n.5 (Fla. 2002), having taken jurisdiction over this matter, to consider other issues necessary to do complete justice in this case and has also offered argument and authorities with respect to the following issues:

II. It was, in this case, an abuse of discretion to impose the maximum sentence upon the Appellant because his sentence was a vindictively retaliatory attempt to continue to punish the Appellant for matters improperly considered at the original sentence.

III. It was, in this case, an abuse of discretion to impose the maximum sentence upon the Appellant because his sentence was grossly disproportionate to sentences imposed against female perpetrators of the same or similar offenses under conditions which were at least as aggravated as this one.

SUMMARY OF THE ARGUMENT

Appellant will first present argument and authorities in response to the certified question regarding the award of credit for time served. Appellant will show that there is clear law on the issue requiring that the credit be awarded to the Appellant with respect to each issue. Appellant will then demonstrate that the line of cases which has evolved since the case of **Daniels v. State**, 491 So.2d 543 (Fla. 1986) requires clarification as to the differences between pretrial jail time, post-sentencing prison time, and pre re-sentencing jail time credits pertaining to time served against each of the formerly concurrent and now consecutive sentences. This will be clear by both the decisions of this Honorable Court and also from recent cases from the First, Second, and Fifth Districts which are squarely on point with the present situation.

Appellant will next request that this Honorable Court exercise its jurisdiction over the entire case which exists once the matter has been brought to this Honorable Court and take the opportunity to reconsider the issues of abuse of discretion via a retaliatory sentencing resulting from moving from a low end guideline sentence to one in which the guidelines were hardly considered and the maximum sentence was imposed. In particular, both the Trial Court and the Appeals Court seemed to be profoundly guided by the decision rendered in **North Carolina v. Pearce**, 395 U.S. 711, at 725-26 (1969), in which it was alluded to that a sentence was not presumptively vindictive if the new sentence is not greater than the old sentence.

Appellant would respectfully submit that it is not fair to use only the **Pearce** analysis since the subject matter of the new sentence was substantially lesser than the subject matter of the original sentence. Accordingly, Appellant asks this Honorable Court develop a different standard for reviewing re-sentencing when the purpose for re-sentencing is not just a sentencing error, but includes a substantial change in the subject matter for which the sentence is to be imposed. Appellant will suggest such an analysis and will further suggest that it is more appropriate to consider what may be a "retaliatory" sentence rather than what may be a "vindictive" sentence.

Appellant will finally ask that this Honorable Court consider whether the sentence of the Appellant is an abuse of discretion and is disproportionate based upon either its comparison with similar crimes in which the victim and perpetrator genders are reversed or because of the sentence of the Appellant was improperly inflamed by purported consequences of his actions which were not supported by credible evidence.

ARGUMENT

The Appellant will now present authorities in support of the arguments he has made. As may be appropriate or necessary references to the record will be made in the same manner as above.

A. APPELLANT SHOULD HAVE BEEN AWARDED CREDIT FOR ALL TIME SERVED, INCLUDING PRETRIAL TIME, BECAUSE PRIOR TO DECEMBER 14, 2005, HE HAD BEEN SERVING HIS SENTENCES AGAINST EACH OF THE LEWD AND LASCIVIOUS COUNTS CONCURRENTLY AND BECAUSE HE WAS AWARDED CREDIT FOR ALL PRE-TRIAL TIME SERVED AGAINST EACH OF THE CONCURRENT SENTENCES.

Under two separate analyses the Appellant will be shown entitlement to an award of credit for both the 525 days awaiting trial and the 2028 days served between the original and new sentence against each of the three consecutive lewd and lascivious sentences which were then imposed. This is because it is clear from

the statute, case law, and both the Federal and State Constitutions that he is entitled to such credit.

> **1. Fla. Stat. Section 921.161 requires that credit be awarded.**
>
> Fla. Stat. Section 921.161, in relevant part, reads as follows:
>
> 1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the Court imposing a sentence shall allow a defendant credit for all of the time she or he spent in the County Jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

Accordingly, Appellant was entitled to be awarded credit for each of the sentences he had served. He was initially sentenced to 12 concurrent 71 year prison terms and was awarded 525 days credit against each of them. This Honorable Court so determined in **Daniels v. State**, 491 So.2d 543 (Fla. 1986). Appellant is aware of no case which has reversed this determination; and once this credit is given as credit for a sentence, a Trial Court cannot rescind said jail credit, even if improperly awarded, **Lebron v. State**, 870 So.2d 165 (Fla. 2nd DCA 2004); and to do so amounts to an enhancement of a Defendant's sentence for which there is no provision in the Florida Rules of Criminal Procedure. **Linton v. State**, 702 So.2d 236 (Fla. 2nd DCA 1997).

Credit for the time served since the original sentence must be awarded as a result of the Prohibition against double jeopardy from the Fifth Amendment to the

United States Constitution as well as Art. I, Section 9, of the Florida Constitution. The issue here is whether this credit is to be applied to each of the three new consecutive counts. Appellant respectfully submits that until December 14, 2005, Appellant was serving all of his sentences concurrently and should be awarded the credit following sentencing against each sentence as well.

The Appellant respectfully submits that the case law provides that this credit be given to the Appellant following a re-sentencing in which a sentence changed from a single concurrent term to more than one consecutive terms. This has recently been held in the case of **Barnishin v. State**, 927 So.2d 69 (Fla. 1st DCA 2006). In **Barnishin**, the Defendant had originally been sentenced concurrently to two split sentences including community control. After a series of violations he faced prison time. The ruling of the Court on appeal was that all time he had served prior to the pronouncement of the consecutive sentences had to be credited against each sentence.

The Second District Court of Appeals in the instant case misinterpreted **Barnishin's** language to deny the application of the previous prison credit earned when in fact Barnishin's denial was for the post-probation-violation-arrest-to-pre-re-sentence jail time being applied to the new consecutive sentences. Although mainly the jail time credit issue is addressed in **Barnishin**, the prison credit issue has been addressed and decided before in the First District in **Atkinson v. State**,

860 So.2d 982, 984 (Fla. 1st DCA 2003); the Second District in **Tillman v. State**, 693 So.2d 626, 628 (Fla. 2nd DCA 1997); and the Fifth District in **Colwell v. State**, 471 So.2d 1374 (Fla. 5th DCA 1985). Each provide direction and authority for the application of previous prison credit being applied to consecutive sentences at re-sentencing, even if initially run concurrent. Therefore, the Second District in the case at bar was mistaken in its assertion that "...there is little case law in this area and none exactly on point..." **Gisi v. State**, 948 So.2d 816, 820, and is actually in express and direct conflict with **Atkinson**, **Tillman**, and **Colwell**, respectively.

The aforementioned is also expounded upon by the case of **Drymon v. State**, 878 So.2d 438 (Fla. 1st DCA 2004). In **Drymon**, it was determined that the Appellant was not only entitled to credit for all prior time served on each of the new consecutive sentences but was even entitled to all un-forfeited gain time with respect to each of the new consecutive sentences.

2. Decisions of this Honorable Court (and others) establish a principle that Appellant is entitled to the credit.

The instant case's analysis as to the requirement for credit for time served should seem to follow **Tripp v. State**, 622 So.2d 941 (Fla. 1993) at first glance due to a single scoresheet being used for all offenses; but a later decision of this Honorable Court also affects Gisi's remaining three counts (1, 2, and 4), even when scored on a single scoresheet, because pursuant to that decision they are no

longer to be treated as an interrelated unit when it comes to awarding said previously served prison credit. See **Moore v. State**, 882 So.2d 977 (Fla. 2004) (holding that **Tripp** and its progeny are inapplicable to Criminal Punishment Code eligible offenses due to lack of a sentencing range via scoresheet as previously promulgated by the sentencing guidelines). The stated purpose of the **Tripp** decision was to keep faithful to the intent of the sentencing guidelines by avoiding exceeding the guideline maximum via denial of prison credit towards offenses when re-sentenced, regardless of initial concurrency or consecutiveness.

By distinguishing **Tripp** from those cases falling under the CPC, and declaring that the maximum is the statutory maximum for each offense under Fla. Stat. 775.082, this Honorable Court implied individual sentences are served, and earn, credit separately. Failure to award credit defeats the purpose of serving concurrent sentences; and subsequently run consecutive sentences at the statutory maximums without credit still require **Tripp's** rationale.

Using the above authorities in conjunction with the decision of **State v. Mancino**, 714 So.2d 429 (Fla. 1998), which states: "...a sentence that does not mandate credit for time served would be illegal since a Trial Court has no discretion to impose a sentence without crediting a Defendant with time served...", seems appropriately applicable since all previous time served and awarded would then have to be awarded for each consecutive sentence. This is especially true

when the statutory maximum is imposed upon re-sentencing and the Defendant was unable to bond out of jail pretrial / presentence. See **Gelis v. State**, 287 So.2d 368 (Fla. 2nd DCA 1973) citing **Hill v. Wainwright**, 465 F.2d 414 (5th Cir. 1972); **Wilson v. State**, 358 So.2d 31 (Fla. 4th DCA 1978); **Cooper v. State**, 379 So.2d 199 (Fla. 5th DCA 1980); and **Palmer v. Dugger**, 833 F.2d 253, 254-55 (11th Cir. 1987) (holding that a prisoner is entitled to credit for presentencing incarceration when: 1) he is being held for a bailable offense; 2) the prisoner was unable to make bond because of his indigence; and 3) upon conviction the prisoner was sentenced to the statutory maximum for an offense).

Failure to award said prison credit to Gisi in the instant case, when re-sentenced to the 15 year statutory maximums for counts 1, 2, and 4, violated the aforementioned authorities and the protection against double jeopardy and the Due Process clause of Article 1, Section 9 of the Florida Constitution and the 5th and 14th Amendments of the U.S. Constitution due to the fact Gisi would essentially be incarcerated over five years past the 15 year maximum for counts 2, and 4 as delineated in Fla. Stat. §775.082 (3) (c), without said credit.

Finally, there is also guidance from the United States Supreme Court. In **North Carolina v. Pearce**, 395 U.S. 711 at 717 (1969), it is expressly held that full credit must be awarded for past punishment in sentencing for the same crime. This would include both the pretrial time and the time since original sentencing

since this time clearly was served pursuant to concurrent sentences to each of the counts and, at his original sentencing, the credit award for time served awaiting trial seems to have been applied to each of the concurrent sentences to each of the counts.

Wherefore, based on the above authorities and argument, Gisi asserts that the certified question should be answered in the affirmative, the opinion of the Second District be quashed, and the instant case remanded for re-sentencing with credit for all prison and jail time awarded to each consecutive sentence. Moreover, this Honorable Court should distinguish or overrule **Daniels v. State**, 491 So.2d 543 (Fla. 1986) pertaining to jail time and differentiate between pretrial / presentence jail time prior to conviction, jail time awaiting re-sentencing, and jail time / prison time already served and awarded, as applied to consecutive sentences.

B. IT WAS, IN THIS CASE, AN ABUSE OF DISCRETION TO IMPOSE THE MAXIMUM SENTENCE UPON THE APPELLANT BECAUSE THIS SENTENCE WAS A VINDICTIVELY RETALIATORY ATTEMPT TO CONTINUE TO PUNISH THE APPELLANT FOR MATTERS IMPROPERLY CONSIDERED AT THE ORIGINAL SENTENCE

The Appellant was originally sentenced on May 26, 2000, for 12 separate criminal sexual encounters, each amounting to second degree felonies. Appellant was not charged specifically nor found by the jury in any of these counts with

having sexually penetrated the victim. Following his trial he was sentenced by the Trial Court and the Trial Court determined that the appellant had sexually penetrated his victim and added substantial sentencing points as prescribed by the sentencing guidelines for victim injury due to her determination that the victim had been sexually penetrated. As a result of this scoring the bottom of the guidelines for the Appellant was 71 years, and the Trial Court imposed that sentence while further stating that he was sentenced to each of the counts concurrently. It should be noted that the victim and her father addressed the Trial Court upon sentencing and expressed a view that sentencing should not be severe. (App. Ex. II pg. 9-10, 13; App. Ex. V, pg. 2-3).

On appeal it was determined that the Appellant shouldn't have been scored for sexual penetration as victim injury since this fact had not been charged and had not been submitted to the jury for determination. Also, since the State could not prove that the two sexual encounters alleged to have occurred on the same day, as it was also decided, then one of his lewd and lascivious counts would be dismissed so that he could only be convicted and sentenced for three of the sexual encounters. Accordingly, Appellant's case was remanded to the Trial Court with a specific instruction that he be "re-sentenced without penetration points". (R: 64).

The re-sentencing occurred on December 14, 2005. He was re-sentenced by the same Trial Court which had conducted his original sentencing. The State of

Florida presented the testimony of the victim who testified that she had gone through a period of counseling but that she was presently doing well. She did allow that the incident had been harmful to her at the time and that it would always be with her but that she was improving and had already improved. On cross-examination, the victim was confronted with correspondence that she had sent to the Appellant in between the two sentencings which tended to mitigate the Appellant's offenses; she expressed that the experience has produced some beneficial and productive results. (R: 136-138). The State of Florida sought to exclude this testimony based upon a purported discovery violation who allowed the use of the letter for impeachment, but did not admit it.

The State of Florida also presented a letter from an agent of the Federal Bureau of Investigation detailing the expense involved in the investigation of the offenses and made reference to statements and comments which had been made by the parent of the victim at the original proceeding. Notably, they provided that the incident preceded their divorce and that the incident had placed some strain on their marriage but did not attribute this incident as the cause of their divorce.

No revised scoresheet was made part of the record of the proceeding. The State Attorney did report that, when properly scored, the offenses resulted in a sentence of approximately 153 months. The State Attorney's persistently argued that the offense had been a serious one with serious consequences and was worthy

of the maximum sentence available. They asked the Trial Court to impose three consecutive maximum sentences to each of the lewd and lascivious charges. Appellant's Trial Defense Counsel pointed out that if the matter was one sentenced at the low end of the guidelines the first time that such should be repeated. Appellant's Trial Defense Counsel also pointed out that the offenses were not subject to any particularly aggravating circumstances (other than the youth of the victim, which is an element of the crime) and that the State Attorney's attempt to aggravate the offenses had failed.

Notably, the State Attorney argued that the Trial Court was effectively immune from a charge of "vindictiveness" by virtue of the decision of the United States Supreme Court in **North Carolina v. Pearce**, 395 U.S. 711 (1969). This case held that if the sentence upon re-sentencing is no more severe than the original sentence there is less likely to be a presumption of vindictiveness. Accordingly, the Trial Court adopted the position of the State Attorney and imposed a sentence of three consecutive 15 year terms for each of the lewd and lascivious offenses. At no time did the Court describe to what extent a sentence at the low end (or even the middle) of the guidelines had been considered and rejected for any particular reason.

Accordingly, whereas the Appellant had previously been given the minimum sentences for the offenses for which he was found guilty, he was now given the

maximum sentence for the offenses and considerations which could be legally considered by the sentencing Court at the time of re-sentencing on December 14 , 2005. As there had been no meaningful conversation of discussion of the appropriateness of a sentence in the middle or lower part of the guidelines range there was also no meaningful conversation or discussion of why the Appellant, who had previously been given a minimum sentence, was now being given the maximum sentence allowed by law.

What is disturbing about this proceeding was that the order of the Second District Court of Appeal in reversing the sentence and remanding for re-sentencing specifically directed that the sentencing scoresheet be corrected. The record of the sentencing proceeding, as well as the record of court documents resulting from this proceeding, make it abundantly clear that this admonition was effectively disregarded as there was never serious consideration by the Trial Court of a guidelines disposition at the time of re-sentencing.

It is disconcerting that the case law seems to require that one must allege and demonstrate that the Trial Court has behaved in a "vindictive" manner in order to address what should be addressed as a clear abuse of discretion. In the present case the Appellant was not merely being "re-sentenced". Instead, the Appellant was to have had his sentence corrected so that he would not be sentenced for offenses he did not commit and for aggravating factors with which were improperly applied to

his sentence. Accordingly, to simply say that the sentence cannot be considered "vindictive" because the new sentence was well under the old sentence is an unsatisfactory and ineffective way of analyzing what actually occurred upon re-sentencing.

Therefore, Gisi would respectfully submit that, whereas the **Pearce** case is properly applicable to this case with respect to the double jeopardy violation described above, its use with respect to the "vindictiveness" of the present sentence is either improper or at least subject to attenuation. This is because this is not the same situation as that described in **Pearce**. In **Pearce**, and most of the cases in which **Pearce** is cited, the re-sentencing was for the same or nearly the same set of offenses as the original sentencing. That is not the case here. Since no corrected scoresheet was made part of the record one is attached hereto at Appellate Exhibit IV. Appellant's sentencing points are reduced by nearly 80% from before. The number of second-degree felonies for which Appellant was re-sentenced are three instead of 12. Victim injury points are hundreds of points less. It is simply not rational to consider that Appellant received a lesser sentence simply because the amount of time in prison was reduced. The reality is he was sentenced much more harshly because he went from the lowest guidelines sentence to the maximum sentence allowed by law.

The Second District asserted that the new 45 year aggravated sentences were not an increase from the original concurrent 71 year sentences and that **Pearce's** vindictiveness presumption is not implicated at all when the combined years of consecutive sentences do not exceed the longest original concurrent sentence, citing **Blackshear v. State**, 531 So.2d 956, 958 (Fla. 1998). They also conceded that **Pearce**, at its core prohibits vindictive sentencing, not an increase per se. Stated then was the fact that **Pearce's** presumption of vindictiveness applies only where there is a "reasonable likelihood" of actual vindictiveness. See **Alabama v. Smith**, 490 U.S. 794, 799 (1989). Appellant asserts that not only was a presumption of vindictiveness present on part of the Trial Judge, but actual vindictiveness can be inferred from both the original sentencing transcripts and new sentencing transcripts, and the instant case is distinguishable from **Blackshear**.

In this case, and in any case in which the new sentencing proceeding results from exclusion of substantial sentencing matter from the previous proceeding (either from dismissed or reversed counts of conviction or because of consideration of improper aggravating matters), it is both wrong and unfair to simply compare the lengths of sentence without consideration to why the Defendant is to be re-sentenced. If the re-sentencing is for fewer or less serious crimes then it is more appropriate to consider that the "same sentence" would be one which was at or

near the same point within the applicable sentencing range. In other words, if a sentence was near the lowest range of permissible sentences and, upon re-sentencing, was administered at the upper range of permissible sentences then this should constitute a basis for considering that the Trial Court was either "vindictive" or may have abused its discretion.

For instance, in the case of **Somerville v. State**, 626 So.2d 1070 (Fla. 1st DCA 1993), it was noted that this Honorable Court had, in **Wemmett v. State**, 567 So.2d 882 (Fla. 1990) decided that the re-sentencing by the same Court may give rise to a possible motive of self-vindication. Accordingly, in **Somerville**, this presumption was not overcome by any new conduct or new basis for increasing the sentence, and the changing of his sentence from concurrent to consecutive was reversed.

Concerning the presumption of vindictiveness issue further, as part of the Second District's denial of the instant case it attempted to distinguish its prior opinion in **Williams v. State**, 686 So.2d 615 (Fla. 2nd DCA 1996) from the case at bar. In **Williams** the Defendant was originally sentenced to a life sentence for count 1 (a first degree felony) and a concurrent 30 year sentence for count 2 (a second degree felony) as a habitual violent felony offender. Upon remand on appeal Williams was re-sentenced 30 years for count 1 consecutive to 30 years count 2. The Second District deemed the 60 year aggregate sentence as an

impermissible increase, that the harsher consecutive sentences raised a presumption of vindictiveness because the basis for the life sentence no longer existed, and that the Trial Judge had no justifiable reason to vindicate the original goal of a life sentence, thus, violating Williams' right to Due Process of law. Notably, as an element of distinction between **Williams** and the instant case, the Second District cited Fla. Stat. 775.081 (1) (1991) as partial reason for the reversal of Williams' case, **Gisi v. State**, 948 So.2d 816, 818 (Fla. 2nd DCA 2007). This is irrelevant in that the statute was misstated because the 25 year parole eligibility only applied to capital offenses; nor is it mentioned in **Williams**.

Williams is indistinguishable from the case at bar because the 60 year sentence in **Williams** is still less than the original concurrent life and 30 year sentences, just as the instant 45 year aggregate sentences are less than the original concurrent 71 year sentences.

What should have occurred in this case was that the Trial Court should have obeyed the guidance of the Appeals Court at the re-sentencing, corrected the scoresheet, and then engaged in some serious debate and consideration regarding where within the guideline range Appellant should be sentenced or whether there were any lawful bases for departure. What happened instead was that the State Attorney simply tried to replicate the original sentence to the best of their ability by imposing the maximum sentence and by depriving Gisi of as much credit for his

prior time in prison as they could. While they engaged in the charade of presenting a new sentencing case, the new sentencing case, if anything weakened their case for a stiff sentence. Fortunately, the victim had substantially overcome any trauma from the event and was steadily improving. Her parents, like nearly half of the marriages in the United States, had divorced and were unable to blame this incident as the cause.

Appellant would respectfully submit that some test other than such a literal interpretation of **Pearce** should be used in order to determine whether or not a re-sentenced Defendant has suffered from either "vindictiveness" or, perhaps more appropriately, retaliation or an abuse of discretion. This should particularly be required when the re-sentencing is for substantially reduced criminal sentencing subject matter, such as was the case here. To fail to do this simply increases the likelihood that the Appellant will continue to be deprived of the Constitutional right requiring the re-sentencing procedure or to continue to be punished for the sentencing error of some other kind which required the re-sentencing procedure.

Such an analysis should examine such factors as what was or was not considered by the re-sentencing Court, whether any other factors or circumstances had been overlooked, and whether or not the same factors that were considered upon the rendering of the original sentence are being considered in a substantially or materially different manner upon re-sentencing. For instance, this Appellant

pled not guilty to his charges and required the State to prove his guilt beyond a reasonable doubt before a jury, requiring his victim to testify, and put the State of Florida through the expense of a Trial. In spite of these same issues the sentencing Court then determined that Gisi was adequately punished by the minimum possible non-departure sentence. Other than retaliation or an abuse of discretion, there exists no reason Gisi was sentenced to the maximum possible sentence when none of the evidence presented served to aggravate the offense beyond any aggravation that was available upon the original sentence.

While fully recognizing that a sentencing Court is now intended to have broad discretion to sentence all the way to the maximum upon a re-sentencing for either fewer counts or for less severe offenses or some combination, some justification should be required for such a drastic move with respect to the guidelines as from the minimum to the maximum. The only explanation available in this case is that both the State of Florida and the Trial Court were desirous of sentencing Gisi for the subject matter which had been determined improper in the original sentencing, as per the Trial Court's "original intention".

This requires comparison to this Court's decision in **Blackshear v. State**, 531 So.2d 956 (Fla. 1988). In that case the originally imposed 65 year sentences were still available at re-sentencing via aggregate consecutive sentences; but this Honorable Court directed that the previously imposed life sentences were not. The

Judge's original intention of 65 years could have been met because the conduct and offenses Blackshear was originally sentenced to were the exact same as that in his original sentencing. In the case at bar the 71 year sentences are no longer available to the Court for its "original intention", the number of offenses and conduct is considerably less than before, and the Court's "original intention" is confusing at best due to its contradictory nature in comparison to the subsequent view shown at re-sentencing. Some examples are: the Trial Court's attitude of sadness at the original sentencing at having to impose either 71 year guideline sentences or life, her repeated comments of 71 years being the minimum she could give Gisi, and that the minimum was generous compared to the life sentence faced (App. Ex. II, pg. 359-362). This was contradicted at the re-sentencing by her categorizing the crimes as "horrendous" and that these actions continued to have a devastating and destructive effect on the victim (this was refuted by the victim's own testimony) (R: 168), the Trial Court's absolute refusal to hear or consider mitigating circumstances such as the willing participant mitigator and disproportionality of like crimes perpetrated by women (R: 158-159), and that the imposition of the current 45 year aggregate sentence is still being generous (thus, insinuating a greater sentence would have been imposed if available), (R: 168).

Accordingly, to allow the present sentencing to stand, even after correcting the credit for time served problem, would be to permit the Trial Court to continue

to punish Gisi for those things deemed beyond the limits of the Constitutions before. Re-sentencing before a different Judge is required.

C. IT WAS, IN THIS CASE, AN ABUSE OF DISCRETION TO IMPOSE THE MAXIMUM SENTENCE UPON THE APPELLANT BECAUSE HIS SENTENCE WAS GROSSLY DISPROPORTIONATE TO SENTENCES IMPOSED AGAINST FEMALE PERPETRATORS OF THE SAME OR SIMILAR OFFENSES UNDER CONDITIONS WHICH WERE AT LEAST AS AGGRAVATED AS THIS ONE.

Although it would appear that Gisi requests this Honorable Court to deem his offenses less serious than those perpetrated by female offenders with the same crime, such is not the case. Gisi seeks justice and punishment commensurate with victim injury as attested to by the victim herself; and proportional to offenders with like crimes, as such:

In addition to the fact that Gisi's sentence was actually more harsh than before, it is also true that his sentence is grossly disproportionate to his conduct. Certainly, the conduct described in the offense is serious. The Appellant had several sexual liaisons with a girl, who was not yet 14 years old, over a single weekend. Having said that, however, it should also be noted that Gisi had no position of trust or authority over the victim, that he never used physical force on the victim, that the victim (while not of the age capable of giving legal consent)

never resisted the advances of Gisi, that Gisi did not physically injure the victim or any other person, and treated the victim with respect. He was honest with her about his background and situation.

It should also be considered that the victim herself has indicated that she did not favor a harsh sentence. (App. Ex. II. Pg. 9-10). At the re-sentencing she allowed that she had undergone a reasonable period of counseling and was recovering well (R: 134-136). She does not harbor ill will or anger towards the Appellant and, while her family broke apart, neither she nor her father was able to blame this incident on that situation; and the mother was silent. Where she had openly advocated a lenient sentence at the original sentencing, she seemed reluctant to provide input as to an appropriate sentence upon re-sentencing, possibly due to the Trial Court's disregarding of her wishes at the original sentencing (R: 135).

Her father also did not openly request a severe sentence at the original sentencing (App. Ex. II, pg 13) and deemed the 71 years as a "long time" (App. Ex. V, pg. 2-3). While he had allowed that this incident had strained the relationships of his family he was unable to case the blame of the divorce between his wife and himself on this incident at either time. He also was not asked to express an opinion with respect to an appropriate sentence and there is no reason to believe that he would have advocated for the maximum.

One can only wonder if the pronouncement of the State Attorney at the original sentencing that this victim would have an "indelible imprint" as a result of this incident did her more harm that anything achieved by the Appellant. If the law is that the wishes and participation of the victim are to be considered at sentencing then such should apply with equal force when the victim makes a genuine and uncoerced statement for leniency. Accordingly, it is not unreasonable to say that when an offense is accomplished with no force, no physical injury, no breach of a position of trust, and the victim genuinely requests leniency that to sentence such a Defendant to the maximum sentence allowed by law is disproportionate. It is also possible that the victim herself is uncomfortable and disappointed with such a harsh sentence.

In this case the maximum sentence was applied to three transactions occurring within a relatively short period of time and then they were applied consecutively. Gisi would respectfully submit that this kind of sentence should be a sentence reserved for the "worst of the worst". It is not herein argued that this offense is one which should ever be taken lightly by this Honorable Court, but by the same token, it should also be clear that Gisi was far from the "worst of the worst".

As a matter of fact, Appellant's Trial Counsel pointed out that similar cases within adjacent counties had been handled with significantly less penalties, which

the Court absolutely refused to even consider (R: 158-59). Counsel was attempting to liken the instant case to those of female teachers who received lenient sentences; in particular, Debra Lafave in Hillsborough County, among others (App. Ex. III). The Trial Court evidently perceived Gisi's sex offenses as more severe than theirs.

CONCLUSION

Appellant successfully challenged nine of his 12 second degree felony convictions and successfully excluded punishment based upon "sexual penetration" as an element of victim injury. This reduced his sentencing points to only a small fraction of what they had been upon his original sentencing: Even so, the Trial Court increased his sentence from the minimum guidelines sentence to the maximum possible sentence. In so doing, his three remaining counts were switched from concurrent to consecutive and he was denied credit for time served on two of the sentences.

Appellant submits that the denial of the credit was improper and that the imposition of the maximum possible sentence was retaliatory and an abuse of discretion. Moreover, such maximum sentence is disproportional to the severity of the offense, as is clear from the evidence, the statements of the victim, and comparison with similar offenses.

Accordingly, Appellant requests that his case be remanded again for re-sentencing before a different Judge and with directions that such re-sentencing be

accompanied with findings warranting any substantial change from the earlier determination that the minimum guidelines sentence was appropriate.

PRAYER FOR RELIEF

Wherefore, Appellant prays this Honorable Court remand the case to the Trial Court with directions to transfer the case to a different Judge, reconsider the sentence of the Appellant, and, if consecutive sentences re-imposed to direct that credit for all time served (including all time from arrest) be applied to each consecutive sentence, or any and all relief deemed mete and proper.

Respectfully Submitted,

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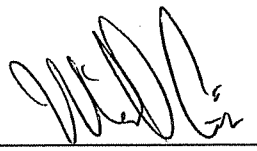
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant, was served upon:

Office of Attorney General
Concourse Center #4
3507 E. Frontage Rd., Ste. 200
Tampa, Florida 33607

By placing in the hands of prison officials for mailing via U.S. Postal Service on this 29 day of August, 2007.



Michael Gisi # R19764, pro-se

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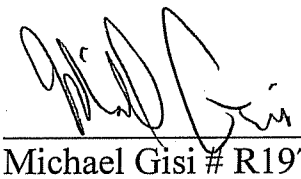
I HEREBY CERTIFY that the foregoing Brief has been printed in proportional Times New Roman, 14-point type and that except for quotations, the entire document is double-spaced.



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