IN THE SUPREME COURT
OF FLORIDA

MICHAEL GISI,
Appellant/Petitioner,

v.

CASE #: SC07-319

STATE OF FLORIDA,
Appellee/Respondent.
_____/

APPELLANT'S REPLY BRIEF

On Appeal From: Certified Question, 2nd District Court of Appeals, *Gisi v. State*, Case #: 2D06-136
Appealing: *State v. Gisi*, Sixth Judicial Circuit, Pinellas County, Florida, Case #: CRC-98-21422 CFANO

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ISSUE I

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.

Appellee, State of Florida's assertion that the time served prior to a resentencing after appeal or new trial is the same as jail time awaiting initial sentencing is flawed. The Florida Legislature made the distinction it did in Fla. Stat. 921.161(1), because of the difference between the two, by stating:

> A sentence of imprisonment shall not begin to run before the date it is imposed...

See also *Jones v. State*, 633 So.2d 483 (Fla. 1 DCA 1994).

A sentence starts to run when it is orally pronounced, and continues to run until the defendant is released from prison via gain time or parole, expiration of sentence, or when the defendant is remanded for a new trial or resentencing.[1] Thus is why county jail, pre-sentence, credit is not considered part of the served sentence until it is applied at said initial sentencing.

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[1] Such is the reason, for instance, that a sentence cannot be changed via increase by the court upon conclusion of an initial sentencing proceeding without running afoul of double jeopardy principles. *Ashley v. State*, 850 So.2d 1265, 1267 (Fla. 2003)

When Gisi was sentenced concurrently at his initial sentencing on May 26, 2000 for counts 1, 2, and 4 (et. al.), he began serving, and receiving credit for, all of those counts. Only upon the reverse and remand of the original, illegally imposed, sentences for those counts did he stop serving, and receiving credit for, said sentences. If Gisi had received concurrent sentences again upon remand and resentencing, said credit for prison time served on counts 2 and 4 would have most assuredly been given. To do otherwise would have defeated the purpose of serving the initial sentences concurrently. Such is the case now, and failure to award credit for either concurrent and consecutive sentences would also violate the Double Jeopardy Clause of the fifth Amendment to the U.S. Constitution (and Art. I, Sect. 9 of the Florida Constitution); and *North Carolina v. Pearce*[2] and its progeny, which specifically states:

> We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense.

Id. 89 S.Ct. 2072, @ 2075.

Gisi had already served 5 + years for counts 1, 2, and 4 when concurrent, and thus said time should be subtracted from the now already partially served consecutive sentences of counts 2 and 4 pursuant to *Pearce*.

[2] 89 S.Ct. 2072 (1969)

This issue was also specifically addressed in *Barnishin v. State*, 927 So.2d 68, 71 (Fla. 1 DCA 2006), and *Drymon v. State*, 870 So.2d 438 (Fla. 1 DCA 2004) is right on point. The First District could not have ruled that Drymon was entitled to gain time already earned on his prior concurrent sentenced (when changed to run consecutively) unless he also received credit for the actual time served for each sentence.

As an additional point, Appellee, State of Florida's assertion that the appeal to the Second District and current affirmations are "counter intuitive" is incorrect. The same issue raised there is being raised here: Gisi only received credit for time served solely for count 1 because the Court's written judgment and sentence are worded to only give credit for count 1 (R: 49, 44); which was the result of the trial court specifically refusing to apply the credit for the prison, and previously awarded jail time, already served for counts 2 and 4 in its oral pronouncement. (R: 169)

Thus based on the argument and authorities presented, this issue should be granted, the certified question answered in the positive, and Gisi awarded credit for all previously served time applied to all sentences.

ISSUE II

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 SENTENCING.

The appellee, State of Florida's argument on this issue is flawed in at least two respects.

Firstly, although appellee is correct that Gisi's current aggregate sentence of 45-years is lower than the original concurrent 71-year sentence, the point is missed entirely. Stated in *Alabama v. Smith*, 490 U.S. 794 (1989), citing *Texas v. McCullough*, 475 U.S. 134, at 138 (1986), is the issue pertaining to Appellant's reliance on *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969) for this argument:

> "...the evil the [Pearce] court sought to prevent "was not the imposition of "enlarged sentences after a new trial" but "vindictiveness of a sentencing judge."

Alabama v. Smith, 490 U.S. at 799-800 (emphasis included)

To support the likelihood of possible vindictiveness on part of the trial judge at his resentencing for a substantially lesser amount of offenses and conduct; Gisi now submits the fact that not only did he receive consecutive statutory maximum sentences for the remaining three offenses, instead of concurrent Criminal

Punishment Code minimum sentences like for the original 12 offenses before, he also was put before the original trial judge who: completely disregarded and ignored the mitigating testimony of the victim (R: 133-138; 144-147); didn't want to even consider the possible mitigator of willing participant as authorized to do so by *State v. Rife*, 789 So.2d 288 (Fla. 2001)(R: 158, 159); refused to give the prison credit earned for counts 2 and 4; continually referenced the previously incorrectly scored penetration points of the old scoresheet (R: 112, 116-118); and even put herself in an adversarial position to the Appellant by reviewing her statements in the original May 26, 2000 sentencing to rebut the contention she intended for as low a sentence as legally possible for Gisi (R: 163, 167). This definitely evinces a possibility of vindictiveness.

The second flaw is Appellee's belief that a scoresheet is unnecessary when the State requests and gets an approved sentence at the maximum allowed by statute, and that victim injury points are irrelevant to the point that the trial court can take into consideration conduct not scored, is simply ludicrous.

Pursuant to Fla. Stat. 921.0024(3) a single scoresheet shall be prepared for each defendant to determine the permissible range for the sentence that the court may impose, the scoresheet(s) must cover all the defendant's offenses pending before the court for sentencing, and the defendant's scoresheet(s) must be

approved and signed by the sentencing judge. See also Fla. R. Crim. P. 3.704(d)(1), (2), and (4).

Therefore, the statutes and rules of court appear to dictate otherwise. Additionally, *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000) and its progeny, in particular *Blakely v. Washington*, 542 U.S. 296 (2004), specifically prohibit the use of unproven-before-a-jury (and unscored) conduct for consideration at sentencing.

With the argument and authority presented this court can deem the trial court's actions as vindictively retaliatory and an abuse of discretion, thus requiring a resentencing before a different judge, and is respectfully requested to do so.

ISSUE 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.

Although Appellee is correct that a downward departure was requested at the resentencing hearing, it was rejected partially by the influence of the State Attorney's misrepresentation of extra-judicial "facts" from trial (R: 160-161), along with the State Attorney's misrepresentation of the law concerning the application of the "willing participant" mitigator of Fla. Stat. 921.0026(2)(f) (2005).

The trial court herself acknowledged at the original sentencing the victim's own state of mind and assertion that she consented to the acts (App. Exh. II, pg. 359-360). The trial court also applied the correct law at the time of the original May 26, 2000, sentencing, but failed to consider at resentencing the "willing participant" mitigator pursuant to the holding in *State v. Rife*, 789 So.2d 288, 296 (Fla. 2001), which states:

> ...in determining whether this mitigator applies when the victim is a minor, the trial court must consider the victim's age and maturity and the totality of the facts and circumstances of the relationship between the defendant and the victim.

What did happen was that the State Attorney influenced the trial court to ignore the above holding by its assertion at resentencing that the legislative intent of the crimes against a 13-year old victim that Gisi committed was for him, and those like him, to be severely punished, and thus intent precluded consideration of the victim's own declaration of consent and the willing participant mitigator.[3] This is contrary to the holding in *Rife*.

Even the Second District has addressed a case very similar to Gisi's in *Holland v. State*, 953 So.2d 19 (Fla. 2 DCA 2007) in which *Rife* is followed based on the trial court's uncertainty as to whether a downward departure was available for crimes committed against a 12-year old victim. The case was remanded back to the lower court by the Second District in part due to the fact that "...whether the child's participation in sexual acts during these secret meetings rendered him a 'willing participant' in the 'incident[s]' is an issue for resolution by the trial court." *Holland*, 953 So.2d at 22 (Stringer, J., concurring)(Emphasis included). If the trial court conclusively realized she had the discretion to sentence Gisi to a downward departure, the record is unclear.

[3] Just the very fact that the lewd and lascivious acts upon a child under 16 statute, Fla. Stat. 800.04 (1997) is separate from the actual sexual battery statute, Fla. Stat. 794.011 (1997)(which requires lack of consent on part of the victim as an element of the offense) implies that a victim between 12 and 16 can conceivably render consent.

As to the issue of disproportionality or disparity in sentencing between female offenders who commit similar crimes to the ones Gisi committed, one only needs to keep abreast of the prevalence of recent events involving said female offenders in the news, and in case law. See generally *Shuler v. State*, 947 So.2d 1259 (Fla. 5 DCA 2007) (holding that downward departure based on "willing participant" mitigator of 921.0026, F.S., as authorized by *State v. Rife*, was available to go below female offender's 66 month incarcerative sentence for sexual activity with 16 year old victim).

Therefore, Gisi's assertion that his 45-year aggregate sentence for "consensual" sexual activity with the victim is grossly disproportionate to his substantially reduced conduct available for sentencing is supported by the facts of his case, and not just some other case.[4] The disparity between the instant sentence and those of other similarly situated offenders is evident, and an abuse of discretion standard applies.

Thus this issue should be granted and Gisi remanded for resentencing with full consideration of available facts and conduct not only pertaining to the instant case, but similar cases prosecuted within this Honorable Court's jurisdiction, to avoid unnecessary disparity.

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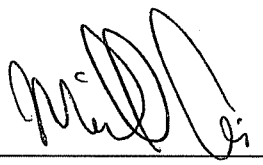
[4] This fact of the sexual activity between Gisi and his victim being consensual was even acknowledged by Judge Covington in her opinion in *Gisi v. State*, 848 So.2d 1278 (Fla. 2 DCA 2003)(R: 56).

CONCLUSION

Based on the argument and authorities provided, this Honorable Court should reverse and remand the instant case for resentencing before a different judge with the consideration as delineated via said arguments herein.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant, was served upon: Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Ste. 200, Tampa, FL 33607 by placing in the hands of prison officials via U.S. Postal Service on this 28 day of December, 2007.



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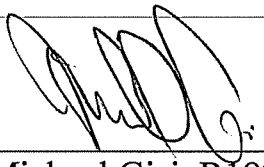
I HEREBY CERTIFY that the foregoing Brief has been printed in proportional Times New-Roman 14-point type and that except for quotations and footnotes, the entire document in double-spaced.



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