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FILED 1990

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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

MARCUS KARCHESKY,

Petitioner,

v.

CASE NO. 76,907

STATE OF FLORIDA,

Respondent.

_____ /

MERITS BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

Victim injury, *i.e.*, penetration, is an element of carnal intercourse with an unmarried person under 18 years. §794.05, Fla. Stat. (1985). Under the rules in effect at the time of sentencing victim injury points were properly assessed because the defendant was convicted of offenses which included that type of physical contact.

ARGUMENT

VICTIM INJURY POINTS ARE PROPERLY
ASSESSED AGAINST A DEFENDANT WHO
STANDS CONVICTED OF CARNAL
INTERCOURSE WITH AN UNMARRIED PERSON
WHEN THE CRIME WAS COMMITTED BY
INSERTION OF THE DEFENDANT'S PENIS
INTO THE VICTIM'S VAGINA.

The defense advances no argument to support its assertion that the question certified by the court below should be answered in the negative. The question posed by the Fifth District Court of Appeal (D.C.A.) in this case is:

Whether points may be assessed for penetration under victim injury in calculating the sentencing guidelines scoresheet for "Category 2: Sexual Offenses" for a conviction of the offense of carnal intercourse with an unmarried person under the age of 18 years, Section 794.05, Florida Statutes [?]

Karchesky v. State, 568 So.2d 80, 82 (Fla. 5th DCA 1990).

The defense before this court "merely asserts that the better position is that advance[d] by the Second DCA in *Thompson* [*v. State*, 483 So.2d 1 (Fla. 2d DCA 1985)]." (B 6)¹. Although the Fifth D.C.A. wrote in the instant cause that it acknowledged conflict with *Thompson*, the cases actually do not conflict. While both *Thompson* and *Karchesky* stood convicted of unlawful carnal intercourse under §794.05, victim injury points were assessed against *Thompson* for "serious injury" *Id.*, 1. Under the facts of that case the *Thompson* court correctly held that

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The parties are referred to as the defendant and the state. References to the record are indicated "(R and page)"; those to the merits brief of the petitioner are denoted "(B and page)".

victim injury points were not proper because serious victim injury simply is not an element of unlawful carnal abuse of a minor. Therefore reliance on that case by the defense is misplaced. Karchesky, on the other hand, was assessed 120 victim injury points as a result of the penetration "necessarily require[d]" in the commission of the three offenses of unlawful carnal intercourse under §794.05, Fla. Stat. (1985). *Karchesky*, 82.

In 1985 victim injury points were mandated under Florida Rule of Criminal Procedure 3.701.d.7 if such injury was an element of the offenses at conviction. Further, the committee notes to the rule, which are part of the rule, provide that such points should be added "when the defendant is convicted of an offense (scored as either or additional offense) which includes physical impact or contact." *The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines)*, 451 So.2d 824, 828 (Fla. 1984); Ch. 84-328, §1; *The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988 - Sentencing Guidelines)*, 468 So.2d 220 (Fla. 1985).

Penetration is an element of the crimes for which the defendant was convicted. The statute provides:

Any person who has unlawful carnal intercourse with any unmarried person, of previous chaste character, who at the time of such intercourse is under the age of 18 years, shall be guilty of a felony of the second degree ...

§794.05(1), Fla. Stat. (1985).

The only element of the crime at issue in the instant case is unlawful "carnal intercourse". The appropriate inquiry is directed at the meaning of the term because it is not defined in the statute. "One well-established rule of construction is that when a statute does not specifically define words of common usage, such words are to be construed in accordance with their plain and ordinary meaning." *Simmons v. Schimmel*, 476 So.2d 1342, 1344 (Fla. 3d DCA 1985), citing *State v. Cormier*, 375 So.2d 853 (Fla. 1979); *State v. Stewart*, 374 So.2d 1381 (Fla. 1979); *Graham v. State*, 362 So.2d 924 (Fla. 1978). Coitus, i.e., "physical union of male and female genitalia accompanied by rhythmic movements leading to the ejaculation of semen from the penis into the female reproductive tract; also: intercourse", is the commonly understood meaning of carnal intercourse. *Webster's Third New International Dictionary*, p. 441 (1986). Furthermore, this court has held that "proof of penetration is an indispensable element ..." of the crime of unlawful carnal knowledge of a female child. *State v. Bowden*, 18 So.2d 478, 480 (Fla. 1944). Cf. *Green v. State*, 184 So. 504, 505 (Fla. 1938); *Deas v. State*, 161 So. 729, 730 (Fla. 1935).² "Carnal intercourse" has the same meaning as "sexual

² The Fourth District Court of Appeal recently considered the issue and decided, despite acknowledging the earlier contrary interpretations by this court, that "'carnal intercourse' requires neither sexual intercourse nor penetration of the victim". *Victor v. State*, 566 So.2d 354, 356 (Fla. 4th DCA 1990). With all due respect to that court, its analysis was flawed. It reasoned that because "'carnal knowledge' is broader than the act of sexual intercourse and does not require 'penetration' of the victim", therefore "'carnal intercourse' requires neither sexual intercourse nor penetration of the victim." *Id.*, 356 (emphases added). The mere fact that "carnal" is a word common to both "carnal knowledge" and "carnal intercourse" does not render them synonymous. The logical flaw of the opinion is apparent because

intercourse", i.e. "'actual contact of the sexual organs' of two persons and penetration of the body of another." *Lanier v. State*, 443 So.2d 178, 183 (Fla. 3d DCA 1983), citing *Wilson v. State*, 92 Fla. 125, 127, 109 So. 305, 306 (1926).

Further diminishing any doubt that penetration is required to prove that this crime has been committed is the manner in which the defendant was charged. He was accused of having committed three violations of §794.05, Fla. Stat. (1985), for having had "unlawful carnal intercourse ... by inserting his penis in the vagina of [the victim]." (R 528-529).

In sum, because §794.05, Fla. Stat. (1985), requires proof of penetration to establish the element of carnal knowledge, the assessment of victim injury points against the defendant for penetration was proper under the rules in effect at the time.

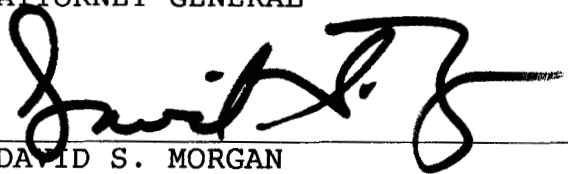
the court focused on the word "carnal" rather than "intercourse". Rather than comparing the common word, the court should have contrasted those words that differed. As the preceding emphasized words illustrate, the opinion used "sexual *intercourse*" to advance its position of what the court perceived "carnal *intercourse*" not to be.

CONCLUSION

The certified question should be answered affirmatively and the decision below approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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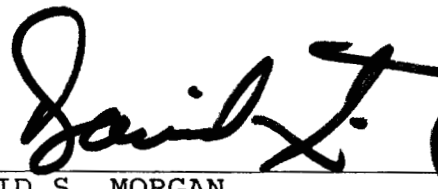


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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Daniel J. Schaefer, Assistant Public Defender, 112-A Orange Ave., Daytona Beach, FL 32114, by interoffice delivery on this 14th day of January, 1991.



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