



TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENT	
A CONTEMPORANEOUS OBJECTION WAS NOT NECESSARY TO PRESERVE FOR APPELLATE REVIEW THE ERRONEOUS IMPOSITION ON THE SENTENCING GUIDELINES SCORESHEET OF VICTIM-INJURY POINTS FOR A SEXUAL BATTERY WHERE NO ACTUAL PHYSICAL TRAUMA WAS SUFFERED BY THE VICTIM; THEREFORE, THE DECISION OF THE DISTRICT COURT OF APPEAL HOLDING THAT THERE WAS A WAIVER OF APPELLATE REVIEW WAS ERROR.....	1
CONCLUSION.....	5
CERTIFICATE OF SERVICE.....	6

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<i>Hood v. State</i> 603 So.2d 642 (Fla. 5th DCA 1992).....	3-5
<i>Karchesky v. State</i> 591 So.2d 930 (Fla. 1992).....	1-5
<i>Kleparek v. State</i> 19 FLW 811 (Fla. 4th DCA 1994).....	3
<i>Kleshinski v. State</i> 620 So.2d 1303 (Fla. 2d DCA 1993).....	3
<i>Linkous v. State</i> 618 So.2d 294 (Fla. 2d DCA 1993).....	2, 3
<i>Mitchell v. State</i> 19 FLW 993 (Fla. 1st DCA May 3, 1994).....	4
<i>Morris v. State</i> 605 So.2d 511 (Fla. 2d DCA 1992).....	3
<i>Perryman v. State</i> 608 So.2d 528 (Fla. 1st DCA 1992).....	2-4
<i>Singleton v. State</i> 620 So.2d 1038 (Fla. 2d DCA 1993).....	3
<i>Weckerle v. State</i> 626 So.2d 1038 (Fla. 4th DCA 1993).....	3

STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted of three counts of armed burglary, three counts of armed robbery, armed sexual battery and armed kidnapping. He was sentenced to eight concurrent sentences of life imprisonment.

A number of sentencing issues were raised on appeal. In his primary argument, the Petitioner, relying on *Karchesky v. State*, 591 So.2d 930 (Fla. 1992), urged that his life sentences were erroneous because the trial court assessed 40 points for victim injury on the sentencing guidelines scoresheet in the absence of any ascertainable physical injury to the victim.

In its decision of October 12, 1993, the District Court of Appeal held that this issue was not preserved for appellate review because of trial counsel's failure to make an appropriate objection to the assessment of these victim injury points. The Petitioner's motion for rehearing was denied on November 23, 1993. This Court accepted jurisdiction by its order of March 23, 1994.

ARGUMENT

A CONTEMPORANEOUS OBJECTION WAS NOT NECESSARY TO PRESERVE FOR APPELLATE REVIEW THE ERRONEOUS IMPOSITION ON THE SENTENCING GUIDELINES SCORESHEET OF VICTIM-INJURY POINTS FOR A SEXUAL BATTERY WHERE NO ACTUAL PHYSICAL TRAUMA WAS SUFFERED BY THE VICTIM; THEREFORE, THE DECISION OF THE DISTRICT COURT OF APPEAL HOLDING THAT THERE WAS A WAIVER OF APPELLATE REVIEW WAS ERROR.

*Karchesky v. State*, 591 So.2d 930 (Fla. 1992), held that:

A penetration, which does not cause ascertainable physical injury, does not

result in victim injury as contemplated by the rule for which victim-injury points may be assessed.

*Karchesky v. State, supra*, at 932.

Because *Karchesky* was decided two months after the sentencing in this cause, neither the trial court or defense counsel had the benefit of the *Karchesky* decision, therefore, defense counsel did not and could not properly object to the imposition by the trial court of 40 points on the category II (sexual offenses) scoresheet under the category "Victim Injury (physical)" for "Penetration or Slight Injury".<sup>1</sup>

In finding a waiver of appellate review, the Third District Court of Appeal relied on *Perryman v. State*, 608 So.2d 528 (Fla. 1st DCA 1992). However, the Second, Fourth and Fifth District Courts of Appeal take the position contrary to *Perryman* and it appears that the First District Court of Appeal, by implication, may have receded from *Perryman*.

In *Linkous v. State*, 618 So.2d 294 (Fla. 2d DCA 1993) the defendant was convicted of a sexual offense and sentenced pursuant to a sentencing guidelines scoresheet assessing victim injury points although no actual physical trauma was suffered by the victim. The defendant filed in the trial court a motion to correct his sentence arguing that *Karchesky* prohibits the assessment of such victim injury points. The trial court denied the motion on the identical authority cited by the Third District

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<sup>1/</sup> These 40 points brought the Petitioner's point total to an amount just sufficient to bring him to a permitted range under the sentencing guidelines to 22 years to life imprisonment.

Court of Appeal in the present case, *Perryman v. State*, *supra*, finding that a contemporaneous objection was necessary to preserve the *Karchesky* issue for appellate review. The Second District Court of Appeal held that such an objection was not required in light of the holding of the Second District Court of Appeal in *Morris v. State*, 605 So.2d 511 (Fla. 2d DCA 1992). *Morris* held that the *Karchesky* issue may be raised in any case where a "fundamentally flawed" category two scoresheet form was used to calculate the sentence. *Linkous* acknowledged specific conflict between *Morris* and *Perryman*. *Accord Singleton v. State*, 620 So.2d 1038 (Fla. 2d DCA 1993); *Kleshinski v. State*, 620 So.2d 1303 (Fla. 2d DCA 1993).

In *Weckerle v. State*, 626 So.2d 1038 (Fla. 4th DCA 1993) the Fourth District Court of Appeal held that post-judgment relief was available to a defendant challenging his pre-*Karchesky* sentence, notwithstanding the absence of a contemporaneous objection. *See also Kleparek v. State*, 19 FLW 811 (Fla. 4th DCA 1994).

In *Hood v. State*, 603 So.2d 642 (Fla. 5th DCA 1992) the Fifth District Court of Appeal dealt directly with the issue raised by the Petitioner here that *Karchesky*, decided in January, 1992, was simply not the law at the time of sentencing. Hood, prior to the *Karchesky* decision, entered guilty pleas to a number of charges of lewd and lascivious acts upon a child. Victim injury points were assessed which affected Hood's sentence. The state, as in the present case, contended that any objection to

Hood's scoresheet was waived because the defendant made no objection at the time of sentencing. The court rejected this contention because Hood, like this Petitioner, was sentenced in accordance with then existing law. The court stated:

Therefore Hood had no basis for an objection at that time. Hood cannot be required to foresee changes in the law occurring while his appeal was pending.

*Hood, supra*, at 643.

*Perryman, supra*, relied on by the Third District Court of Appeal to find waiver of appellate review here, is not only in conflict with the holdings of three other districts, but also silent on the question (answered in *Hood, supra*) of how any defendant can be required to make an objection having no basis in law at the time the objection would have to be made.

Furthermore, it appears that the First District Court of Appeal may now have adopted a position on the *Karchesky* issue inconsistent with its *Perryman* decision and in line with the holdings of the Second, Fourth and Fifth District Courts of Appeal and the Petitioner here.

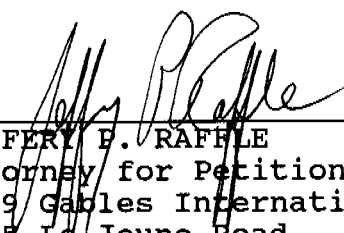
In *Mitchell v. State*, 19 FLW 993 (Fla. 1st DCA May 3, 1994) the defendant was convicted of sexual battery and assessed 40 points on the sentencing guidelines scoresheet for victim injury based solely on penetration. As in the present case, *Karchesky* was decided after sentencing during the pendency of the defendant's appeal. Though this case involved a different issue, i.e., whether the victim injury rule in effect at the time of the defendant's resentencing or the time of the offense applied (the

court held that the rule at the time of the offense was operative) and did not discuss whether or not the defendant had, in fact, objected at sentencing to the imposition of victim injury points, the court appears to have adopted, by implication, the essential principal discussed in *Hood, supra*, and argued here by the petitioner. It is simply illogical and inconsistent with the legal principals established by the Second, Fourth and Fifth District Courts of Appeal to require an objection on *Karchesky* grounds to the imposition of victim injury points when *Karchesky* had not yet been decided.

CONCLUSION

Based on the foregoing citations of authority, the Petitioner requests this Court to reverse the decision of the Third District Court of appeal and direct the court to remand this cause to the trial court for resentencing which shall be imposed pursuant to a sentencing guideline scoresheet consistent with the decision of this Court in *Karchesky v. State, supra*.


Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail on this 16 day of June, 1994, to Roberta Mandel, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128 and to Dewayne Jermaine Pinnacle, Belle Glade Correctional Institute.

  
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JEFFERY P. RAFFLE