

047

**FILED**

SID. J WHITE

JUL 1 1994

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

CASE NO. 82,945

DEWAYNE JERMAINE PINACLE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

-----  
DISCRETIONARY REVIEW FROM THE DISTRICT  
COURT OF APPEAL OF THE STATE OF  
FLORIDA, THIRD DISTRICT  
-----

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida

✓

ROBERTA G. MANDEL  
Florida Bar No. 0435953  
Assistant Attorney General  
Department of Legal Affairs  
401 N. W. 2nd Avenue, Suite N921  
P.O. Box 013241  
Miami, Florida 33101  
(305) 377-5441

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	2
QUESTION PRESENTED.....	3
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT	
A CONTEMPORANEOUS OBJECTION WAS NECESSARY IN ORDER TO PRESERVE FOR APPELLATE REVIEW THE IMPOSITION OF POINTS FOR VICTIM-INJURY IN A SEXUAL BATTERY CASE.....	5
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	9

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Dailey v. State,</u> 488 So. 2d 532 (Fla. 1986).....	4,6,7,8
<u>Hood v. State,</u> 603 So. 2d 642 (Fla. 5th DCA 1992).....	5,6,7
<u>Karchesky v. State,</u> 591 So. 2d (Fla. 1992).....	5
<u>Linkous v. State,</u> 618 So. 2d 294 (Fla. 2d DCA 1993).....	5,6
<u>Morris v. State,</u> 605 So. 2d 511 (Fla. 2d DCA 1992).....	6,7
<u>Perryman v. State,</u> 608 So. 2d 528 (Fla. 1st DCA 1992) <u>rev. denied,</u> 621 So. 2d 432 (Fla. 1993).....	5,8

PRELIMINARY STATEMENT

The Petitioner, Dewayne Jermaine Pinacle, was the defendant in the Circuit Court for the Eleventh Judicial Circuit in and for Dade County Florida.

In this brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State. Respondent may also be referred to as the Defendant. The symbols "R" and "T" will be used to refer to the portions of the record on appeal filed in each case. The letter "A" will be used to refer to the Appendix to the defendant's brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged with and convicted of armed burglary of an occupied dwelling; armed burglary of an automobile; armed robbery; armed sexual battery; armed kidnapping; and petit theft.) (A. 2).

Petitioner was sentenced to eight concurrent life sentences on the first eight counts which sentences were to include two consecutive minimum mandatory three year sentences for counts III and VII. The Petitioner appealed raising several sentencing issues. (A. 2).

Petitioner's primary argument on appeal was that the trial court erred in sentencing guidelines score sheet where the victim in the sexual battery case did not suffer any ascertainable physical injury, apart from the sexual penetration itself. (A. 3).

The Third District Court of Appeal issued a per curiam opinion on October 12, 1993. The court held that the instant issue was not preserved for appellate review because trial counsel did not make a special objection to the addition of any points for victim injury (A.3).

Petitioner's motion for rehearing was denied on November 23, 1993. This Court accepted jurisdiction on March 23, 1994.

QUESTION PRESENTED

WHETHER A CONTEMPORANEOUS OBJECTION  
WAS NECESSARY IN ORDER TO PRESERVE FOR  
APPELLATE REVIEW THE IMPOSITION OF  
POINTS FOR VICTIM-INJURY IN A SEXUAL  
BATTERY CASE?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal correctly found that the Petitioner never made a specific objection to the addition of any points for victim injury. As such, the Court properly maintained that the issue had not been preserved for appellate review. The instant case involved an issue as to the sufficiency of the evidence to support an assessment of points for victim injury. The appellant's failure to make a specific timely objection to this factual determination waives the matter on appeal using this Court's reasoning in Dailey v. State, 488 So. 2d 532 (Fla. 1986).

## ARGUMENT

### A CONTEMPORANEOUS OBJECTION WAS NECESSARY IN ORDER TO PRESERVE FOR APPELLATE REVIEW THE IMPOSITION OF POINTS FOR VICTIM-INJURY IN A SEXUAL BATTERY CASE

The defendant relying on Karchesky v. State, 591 So. 2d (Fla. 1992) argued on appeal that the trial court erred in assessing forty points for victim injury on the sentencing guidelines score sheet where the victim in the sexual battery case did not suffer any ascertainable physical injury, apart from the sexual penetration itself. The Third District Court of Appeal correctly found that the defendant never made a specific objection to the addition of any points for victim injury. As such the Court maintained that the issue had not been preserved for appellate review citing Perryman v. State, 608 So. 2d 528 (Fla. 1st DCA 1992) rev. denied, 621 So. 2d 432 (Fla. 1993).

The State would agree that Perryman does, in fact, expressly and directly conflict with the holdings of the Second District Court of Appeal in Linkous v. State, 618 So. 2d 294 (Fla. 2d DCA 1993) and of the Fifth District Court of Appeal in Hood v. State, 603 So. 2d 642 (Fla. 5th DCA 1992).

A review of the Perryman decision indicates that the appellant there argued that points should also not have been assessed for victim injury. As in the instant case, the appellant did not raise such an objection or otherwise preserve the issue below. The First District Court of Appeal citing this



Court's decision in Dailey v. State, 488 So. 2d 532 (Fla. 1986) held that the issue had not been preserved for appellate review. The court acknowledged that its' application of Dailey was inconsistent with Hood v. State, 603 So. 2d 642 (Fla. 5th DCA 1992) and Morris v. State,<sup>1</sup> 605 So. 2d 511 (Fla. 2d DCA 1992). The court, however maintained as follows:

...Neither Hood nor Morris discusses Dailey, when, like the present case, involved an issue as to the sufficiency of the evidence to support an assessment of points for victim injury. In a different context the Supreme Court recently stressed the continuing vitality of Dailey with regard to factual matters which may not be apparent from the record. See Taylor v. State, 601 So. 2d 540 (Fla. 1992).

608 So. 2d at 528-529.

In Dailey v. State, the court accepted jurisdiction to answer the following question of great public interest:

DOES THE CONTEMPORANEOUS OBJECTION  
RULE APPLY TO PRECLUDE APPELLATE  
REVIEW OF AN ALLEGED SENTENCING ERROR  
UNDER THE GUIDELINES WHERE THE ERROR  
CLAIMED INVOLVES FACTUAL MATTERS THAT  
ARE NOT APPARENT OR DETERMINABLE FROM  
THE RECORD ON APPEAL.?

Dailey v. State, 471 So.2d 1349, 1351 (Fla. 1st DCA 1985).

---

<sup>1</sup> The Second District Court of Appeal in Linkous v. State, relied upon Morris v. State in finding that a contemporaneous objection was not necessary.

On Appeal, Dailey argued that points were improperly added to the guidelines form because he was not under legal constraint at the time of the original offense and because there was no supporting evidence for the victim injury scoring. This Court answered the certified question in the affirmative and approved the decision of the district court on the issue.

The defendant, here, argued on appeal, that penetration was made by both defendants but no evidence was presented that she was otherwise physically injured. The defendant conceded on appeal that the sole objection made as to the assessment of victim injury points related to the claim that since penetration was not alleged points for it could not be assessed. No objection was made to the issue raised on appeal. (The trial court erred in assessing forty points for victim injury). The defendant's failure to make a specific timely objection to this factual determination therefore waives the matter on appeal using this Court's reasoning in Dailey v. State. The defendant in fact admitted on appeal that he did not object to the addition of any points for victim injury, his alleged sole complaint was related to the number of points.

The State would respectfully submit that the principals discussed in Hood and Morris and those later cases which relied upon the analysis presented in those cases are completely distinguishable from the case at hand. Since the Third District

Court of Appeal's decision is well reasoned and consistent with this Court's decision Dailey and the First District Court of Appeal's decision in Perryman which is still good law, this Court should affirm the appellate court's decision.

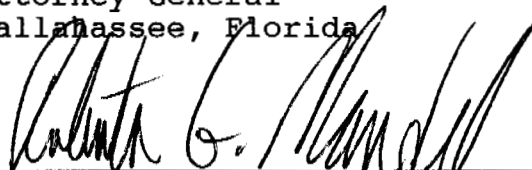
CONCLUSION

WHEREFORE, based on the foregoing argument and citations of authority the State respectfully requests this Court to affirm the decision of the Third District Court of Appeal, finding that the issue was not preserved for appellate review.

Respectfully submitted,

**ROBERT A. BUTTERWORTH**

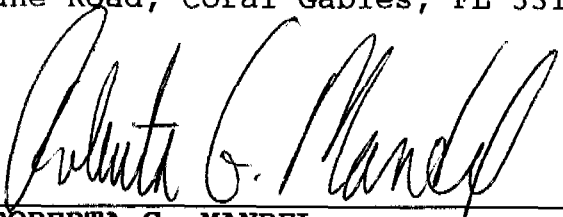
Attorney General  
Tallahassee, Florida



**ROBERTA G. MANDEL**  
Florida Bar No. 0435953  
Assistant Attorney General  
Department of Legal Affairs  
P.O. Box 013241  
Miami, Florida 33101  
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS was furnished by mail to JEFFERY P. RAFFLE, Attorney for Petitioner, 1109 Gables International Plaza, 2655 LeJeune Road, Coral Gables, FL 33134 on this 29<sup>th</sup> day of June 1994.

  
\_\_\_\_\_  
ROBERTA G. MANDEL  
Assistant Attorney General

/9P