

IN THE SUPREME COURT OF FLORIDA

CASE NO. 17238

3rd DCA NO: 93-1945

040  
**FILED**

SID J. WHITE

FEB 1 1996

CLERK, SUPREME COURT

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

**OTIS MCCALISTER,**

Petitioner,

vs.

**THE STATE OF FLORIDA,**

Respondent.

---

ON APPLICATION FOR DISCRETIONARY REVIEW  
CONFLICT JURISDICTION

---

---

**PETITIONER'S BRIEF ON JURISDICTION**

---

**BENNETT H. BRUMMER**  
Public Defender  
Eleventh Judicial Circuit  
of Florida  
1320 N.W. 14th Street  
Miami, Florida 33125  
(305) 545-1961

✓ **MARTI ROTHENBERG**  
Assistant Public Defender  
Florida Bar No. 320285

Counsel for Petitioner

TABLE OF CONTENTS

INTRODUCTION . . . . . 1  
STATEMENT OF THE CASE AND FACTS . . . . . 1  
SUMMARY OF ARGUMENT . . . . . 3  
ARGUMENT . . . . . 4

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT IN MONTAGUE V. STATE, 656 SO.2D 508 (FLA. 2D DCA 1995), REV. GRANTED, 662 SO.2D 933 (FLA. OCT. 17, 1995, CASE NO: 86.098); LINKOUS V. STATE, 618 SO.2D 294 (FLA. 2D DCA 1993); SINGLETON V. STATE, 620 SO.2D 1038 (FLA. 2D DCA 1993); AND MORRIS V. STATE, 605 SO.2D 511 (FLA. 2D DCA 1992); AND OF THE FIFTH DISTRICT IN HOOD V. STATE, 603 SO.2D 642 (FLA. 5TH DCA 1992).

CONCLUSION . . . . . 7  
CERTIFICATE OF SERVICE . . . . . 7

## TABLE OF CITATIONS

CASES	PAGES
<u>HOOD V. STATE,</u> 603 So.2d 642 (Fla. 5th DCA 1992) .....	3,4,5
<u>KARCHESKY V. STATE,</u> 591 So.2d 930 (Fla. 1992) .....	1,2,3,4,5
<u>LINKOUS V. STATE,</u> 618 So.2d 294 (Fla. 2d DCA 1993) .....	3,4,5
<u>MONTAGUE V. STATE,</u> 656 So.2d 508 (FLA. 2d DCA 1995), rev. granted, 662 So.2d 933 (Fla. Oct. 17, 1995, Case No: 86,098) .....	2,3,4,5,6
<u>MORRIS V. STATE,</u> 605 So.2d 511 (Fla. 2d DCA 1992) .....	3,4,5
<u>PERRYMAN V. STATE,</u> 608 So.2d 528 (Fla. 1st DCA 1992) .....	2,4,5
<u>PINACLE V. STATE,</u> 625 So.2d 1273 (Fla. 3d DCA 1993) .....	4
<u>PINACLE V. STATE,</u> 654 So.2d 908 (Fla. 1995) .....	2,5
<u>SINGLETON V. STATE,</u> 620 So. 2d 1038 (Fla. 2d DCA 1993) .....	3,4,5
<b>OTHER AUTHORITIES</b>	
FLORIDA RULES OF CRIMINAL PROCEDURE	
RULE 3.701(d)(7) .....	1
RULE 3.800 .....	1
RULE 3.850 .....	1,2,4

## INTRODUCTION

This is the brief of the petitioner/defendant Otis McCalister on petition for discretionary review based on conflict jurisdiction from the decision of the Third District Court of Appeal. Citations are to the Appendix attached hereto.

## STATEMENT OF THE CASE AND FACTS

The petitioner/defendant was convicted of ten counts of sexual battery and one count of lewd assault. (A: 1) A sentencing guidelines scoresheet was prepared on which the defendant received 400 points for victim injury for "penetration or slight injury." (A: 1-2) At his sentencing hearing, the defendant did not object to the assessing of victim injury points. (A: 2) The defendant received consecutive sentences totaling 315 years. (A: 2)

The defendant appealed his case to the Third District and the appellate court affirmed his convictions and sentences per curiam, without written opinion. (A: 2) The defendant did not raise the issue of victim injury points on appeal. (A: 2) The defendant filed a motion for post conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure and did not raise the issue of victim injury points. (A: 2)

On January 16, 1992, this Court handed down the decision of Karchesky v. State, 591 So.2d 930 (Fla. 1992), holding that based on then-existing Florida Rule of Criminal Procedure 3.701(d)(7) (1985), victim injury sentencing points could not be scored solely for victim penetration without some accompanying physical injury or trauma. (A: 2) The defendant then filed in the trial court a motion to correct sentence pursuant to Rule 3.800, Florida Rules of Criminal Procedure, alleging that under Karchesky, it was improper for the trial judge to assess points for victim injury penetration under that scoresheet when there was no ascertainable physical injury. (A: 2) The trial judge denied the defendant's motion to correct sentence and the

defendant appealed to the Third District. (A: 2)

The Third District observed that the defendant did not object to the assessing of victim injury points at trial, did not raise the issue on direct appeal, and did not raise the issue in the previously filed Rule 3.850 motion for post conviction relief.

(A: 2) The Third District concluded that this Court's decision in Pinacle v. State, 654 So.2d 908 (Fla. 1995) (citing Perryman v. State, 608 So.2d 528 (Fla. 1st DCA 1992), rev.den., 621 So.2d 432 (Fla. 1993)), required a contemporaneous objection to preserve a Karchesky issue. (A: 2) The Third District noted the contrary holding from the Second District in Montague v. State, 656 So.2d 508 (Fla. 2d DCA 1995), for which this Court granted review on October 17, 1995, as Case No: 86,098. (A: 2)

The Third District then followed Pinacle and Perryman and held that since the defendant failed to preserve his Karchesky issue, the order denying the motion to correct sentence would be affirmed. (A: 2) The Third District concluded that under the preservation reasoning, it need go no further in analyzing the defendant's remaining points on appeal. (A: 2-3)

The defendant now petitions this Court for discretionary review based on conflict jurisdiction.

### SUMMARY OF ARGUMENT

The petitioner/defendant submits the Third District's decision holding that a contemporaneous objection is necessary to preserve a Karchesky issue for review expressly and directly conflicts with the Second District in Montague v. State, 656 So.2d 508 (Fla. 2d DCA 1995), rev. granted, 662 So.2d 933 (Fla. Oct. 17, 1995, Case No: 86,098); Linkous v. State, 618 So.2d 294 (Fla. 2d DCA 1993); Singleton v. State, 620 So.2d 1038 (Fla. 2d DCA 1993); and Morris v. State, 605 So.2d 511 (Fla. 2d DCA 1992); and the Fifth District's decision in Hood v. State, 603 So.2d 642 (Fla. 5th DCA 1992), all of which hold that a contemporaneous objection is not necessary to preserve a Karchesky issue for review.

## ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT IN MONTAGUE V. STATE, 656 SO.2D 508 (FLA. 2D DCA 1995), REV. GRANTED, 662 SO.2D 933 (FLA. OCT. 17, 1995, CASE NO: 86,098); LINKOUS V. STATE, 618 SO.2D 294 (FLA. 2D DCA 1993); SINGLETON V. STATE, 620 SO.2D 1038 (FLA. 2D DCA 1993); AND MORRIS V. STATE, 605 SO.2D 511 (FLA. 2D DCA 1992); AND OF THE FIFTH DISTRICT IN HOOD V. STATE, 603 SO.2D 642 (FLA. 5TH DCA 1992).

The defendant submits the Third District's decision in the present case conflicts with the decisions from the Second District in Montague v. State, 656 So.2d 508 (Fla. 2d DCA 1995), rev. granted, 662 So.2d 933 (Fla. Oct. 17, 1995, Case No: 86,098); Linkous v. State, 618 So.2d 294 (Fla. 2d DCA 1993); Singleton v. State, 620 So.2d 1038 (Fla. 2d DCA 1993); and Morris v. State, 605 So.2d 511 (Fla. 2d DCA 1992); and the Fifth District's decision in Hood v. State, 603 So.2d 642 (Fla. 5th DCA 1992).

The underlying issue is whether a contemporaneous objection is necessary to preserve a Karchesky issue for review. In Karchesky v. State, 591 So.2d 930 (Fla. 1992), the defendant filed a Rule 3.800(a) motion to correct sentence claiming the victim injury points were incorrectly scored on his sentencing guidelines scoresheet. This Court held that 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. Id., at 932. This Court further held that points for a victim's physical injury cannot be scored on the sentencing guidelines scoresheet for penetration that did not cause physical injury. Id., at 932.

In Perryman v. State, 608 So.2d 528 (Fla. 1st DCA 1992), the First District held the Karchesky issue was not been preserved for appellate review when the defendant did not raise an objection to the victim injury for penetration scoring in the trial court. In Pinacle v. State, 625 So.2d 1273, 1274 (Fla. 3d DCA 1993), the

Third District relied on Perryman and also held that the Karchesky issue was not preserved for appellate review where the defendant never made a specific objection to the addition of points for victim injury penetration. However, at the time that Pinacle was decided, both the Second District and the Fifth District had held that a contemporaneous objection was not necessary to preserve a Karchesky issue for review. See Linkous v. State, 618 So.2d 294 (Fla. 2d DCA 1993); Singleton v. State, 620 So.2d 1038 (Fla. 2d DCA 1993); Morris v. State, 605 So.2d 511 (Fla. 2d DCA 1992); Hood v. State, 603 So.2d 642 (Fla. 5th DCA 1992).

This Court then accepted review of Pinacle based on conflict with Linkous and Hood. In Pinacle v. State, 654 So.2d 908, 910 (Fla. 1995), this Court stated that Pinacle did make a sufficient objection to the addition of points for victim injury, and that although the objection was not as specific as it might have been, it was nonetheless sufficient to preserve the Karchesky issue for review.

The district courts of appeal have interpreted the preservation issue in this Court's Pinacle decision in conflicting ways. In Montague v. State, 656 So.2d 508, 510 (Fla. 2d DCA 1995), rev. granted, 662 So.2d 933 (Fla. Oct. 17, 1995, Case No: 86,098), the Second District held that since Pinacle did not overrule Linkous, the law is that a contemporaneous objection is not necessary to preserve a Karchesky issue for appellate review. In express contrast, the Third District in the present case held that Pinacle requires a contemporaneous objection to preserve a Karchesky issue for review. (A: 2) The Third District noted in its decision that its holding was in contrast with the holding in Montague. (A: 2)

Therefore, the decision of the Third District here is in express and direct conflict with the Second District in Montague, as well as the Second District's decisions in Linkous v. State, 618 So.2d 294 (Fla. 2d DCA 1993); Singleton v. State, 620 So.2d 1038 (Fla. 2d DCA 1993); and Morris v. State, 605 So.2d 511 (Fla. 2d DCA 1992); and the Fifth District's decision in Hood v. State, 603 So.2d



642 (Fla. 5th DCA 1992).

Moreover, jurisdiction in this Court is established in that this same issue is now pending in this Court in Montague v. State, Case No: 86,098, on certified question.

CONCLUSION

For the foregoing reasons, the defendant requests that this Court exercise its conflict jurisdiction and take discretionary review of this case.

Respectfully submitted,

BENNETT H. BRUMMER  
Public Defender  
Eleventh Judicial Circuit  
of Florida  
1320 NW 14 Street  
Miami, Florida 33125  
(305) 545-1961

By: Marti Rothenberg  
MARTI ROTHENBERG #320285  
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, P.O. Box 013241, Miami, Florida 33101, this 29<sup>th</sup> day of January, 1996.

By: Marti Rothenberg  
MARTI ROTHENBERG #320285  
Assistant Public Defender

NOT FINAL UNTIL TIME EXPIRES  
TO FILE REHEARING MOTION  
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, A.D. 1995

OTIS McCALISTER,

\*\*

Appellant,

\*\*

vs.

\*\*

CASE NO. 93-1945

THE STATE OF FLORIDA,

\*\*

Appellee.

\*\*

21 FLW D-2

Opinion filed December 20, 1995.

An appeal from the Circuit Court for Dade County, Barbara S. Levenson, Judge.

Bennett H. Brummer, Public Defender and Marti Rothenberg, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Paulette R. Taylor, Assistant Attorney General, for appellee.

Before NESBITT, COPE, and LEVY, JJ.

PER CURIAM.

The defendant was convicted of ten counts of sexual battery and one count of lewd assault. A sentencing scoresheet was

APPENDIX : 1

prepared on which the defendant received 400 points in the category of victim impact for "penetration or slight injury." See Fla. R. Crim. P. 3.988(b). The defendant received consecutive sentences totaling 315 years. He appealed to this court, and we affirmed his convictions and sentences per curiam, without written opinion. McCalister v. State, 557 So. 2d 56 (Fla. 3d DCA 1989).

On January 16, 1992, the Florida Supreme Court handed down Karchesky v. State, 591 So. 2d 930 (Fla. 1992), holding that based on then-existing Florida Rule of Criminal Procedure 3.701(d)(7) (1985), sentencing points could not be scored solely for victim penetration without some accompanying physical injury or trauma. Relying on Karchesky, the defendant filed a motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800. That motion was denied, and the defendant now appeals.

The defendant here failed to object to the assessing of victim injury points at trial, failed to raise the issue on direct appeal, and failed to raise the issue in a previously denied Rule 3.850 motion. Because we conclude that Pinnacle v. State, 654 So. 2d 908 (Fla. 1995) (citing Perryman v. State, 608 So. 2d 528 (Fla. 1st DCA 1992), review denied, 621 So. 2d 432 (Fla. 1993)), requires a contemporaneous objection to preserve a Karchesky issue, we affirm the order under review. Contra Montague v. State, 656 So. 2d 508 (Fla. 2d DCA), review granted, No. 86,098 (Fla. Oct. 17, 1995). Under this reasoning, we need go no further in analyzing

defendant's remaining arguments to conclude that the trial court's denial of the motion was proper.

Affirmed.