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**IN THE SUPREME COURT OF FLORIDA**

CASE NO. 87,238

**OTIS McCALISTER,**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent

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ON APPLICATION FOR DISCRETIONARY REVIEW  
CONFLICT JURISDICTION

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RESPONDENT'S BRIEF ON JURISDICTION

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**TABLE OF CONTENTS**

**TABLE OF CITATIONS** ..... iii

**INTRODUCTION** ..... 1

**STATEMENT OF THE CASE AND FACTS** ..... 1

**POINT ON APPEAL** ..... 3

**SUMMARY OF THE ARGUMENT** ..... 4

**ARGUMENT**

**I**

**THE DECISION BELOW EXPRESSLY AND DIRECTLY  
CONFLICTS WITH THE DECISION 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).** ..... 5

**CONCLUSION** ..... 8

**CERTIFICATE OF SERVICE** ..... 8

## INTRODUCTION

This is a petition for discretionary review of a decision of the Third District Court of Appeal which affirmed the trial court's denial of Petitioner's motion to correct illegal sentence. *McCalister v. State*, 21 Fla. L. Weekly D2 (Fla. 3rd DCA Dec. 20, 1995); (App. A). Petitioner, **OTIS McCALISTER**, was the Appellant below in the Third District Court of Appeal and the Defendant in the trial court. Respondent, **THE STATE OF FLORIDA**, was the Appellee in the court below and the prosecution in the trial court. In this brief, the parties will be referred to as they stand before this Honorable Court.

## STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of ten counts of sexual battery and one count of lewd assault. (App. A, p. 1). Petitioner's sentencing guidelines scoresheet assessed 400 points for "penetration or slight injury". (App. A, p. 2). Petitioner made no contemporaneous objection to the assessment of victim injury points, and was sentenced to consecutive sentences totaling 315 years.

Petitioner's convictions and sentences were affirmed on appeal. (App. A, p. 2). Petitioner's motion for post conviction relief pursuant to Rule 3.850 Florida Rules of Criminal Procedure was denied. (App. A, p. 2). Petitioner did not challenge the assessment of victim injury points on appeal or in his motion for post conviction relief. (App. A, p. 2).

On January 16, 1992, this Court, in *Karchesky v. State*, 591 So. 2d 930 (Fla. 1992), held that,

under the then-existing Florida Rule of Criminal Procedure 3.701(d)(7) (1985), victim injury points could not be assessed for victim penetration without some accompanying ascertainable physical injury or trauma. (App. A, p. 2). Relying on *Karchesky*, Petitioner filed a Rule 3.800 motion to correct sentence in the trial court. That court denied the motion and Petitioner appealed to the Third District Court of Appeal. (App. A, p. 2).

Relying on *Pinacle v. State*, 654 So. 2d 908 (Fla. 1995), and *Perryman v. State*, 608 So. 2d 528 (Fla. 1st DCA 1992), *review denied*, 621 So. 2d 432 (Fla. 1993), the District Court concluded that a contemporaneous objection was required in order to preserve the issue for appeal. That court found that since Petitioner made no contemporaneous objection to the assessment of victim injury points at trial, the issue was not preserved for review. (App. A, p. 2). Consequently, that court affirmed the denial of Petitioner's motion. The District Court, however, noted a contrary holding in *Montague v. State*, 656 So. 2d 508 (Fla. 2d DCA 1995), *review granted*, No. 86, 098 (Fla. Oct. 17, 1995). (App. A, p. 2). This petition for discretionary review followed.

**POINT ON APPEAL**

**WHETHER THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION 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.**

### SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal, that a contemporaneous objection is necessary to preserve the *Karchesky* issue for review, expressly and directly conflicts with the decision of the Second District Court of Appeal, in *Montague v. State*, 656 So. 2d 508 (Fla. 2nd DCA 1995), *rev. granted*, 662 So. 2d 933 (Fla. Oct. 17, 1995), that a contemporaneous objection is not necessary to preserve the *Karchesky* issue for review.

## ARGUMENT

**THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION 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).**

In *Karchesky v. State*, 591 So. 2d 930 (Fla. 1992), this Court held that, for sexual offenses, victim injury points could not be assessed on the sentencing guidelines scoresheet for victim penetration that did not cause ascertainable physical injury. Relying on *Karchesky*, Petitioner, by a motion to correct illegal sentence, challenged the assessment of victim injury points on his sentencing guidelines scoresheet. Relying on *Pinacle v. State*, 654 So. 2d 908 (Fla. 1995), and *Perryman v. State*, 608 So. 2d 528 (Fla. 1st DCA 1992), *review denied*, 621 So. 2d 432 (Fla. 1993), the Third District held that Petitioner did not preserve the issue for appeal since he did not make his objection at trial. The Third District, however, noted a holding to the contrary in *Montague v. State*, 656 So. 2d 508 (Fla. 2d DCA 1995), *review granted*, No. 86, 098 (Fla. Oct. 17, 1995).

In *Dailey v. State*, 488 So. 2d 532 (Fla. 1986), this Court held that sentencing errors that require an evidentiary hearing may not be initially raised on appeal. *Id.* at 534. In *Perryman*, the First District Court of Appeal, relying on *Dailey*, held that the *Karchesky* issue cannot be initially raised on appeal without having been preserved in the trial court. In *Pinacle v. State*, 625 So. 2d 1273 (Fla. 3rd DCA 1993), the Third District, in declining from reaching the merits of the *Karchesky* claim, and relying on *Perryman*, held that the *Karchesky* issue had not been preserved by a contemporaneous objection at trial.

This Court accepted review of *Pinacle* based on direct conflict with decisions from the Second and Fifth District Courts. In *Linkous v. State*, 618 So. 2d 294 (Fla. 2nd DCA), *rev. denied*, 626 So. 2d 208 (Fla. 1993), the Second District Court recognized a conflict between *Perryman* and its prior holding in *Morris v. State*, 605 So. 2d 511 (Fla. 2nd DCA 1992), that the *Karchesky* issue is ascertainable from the face of the record because it involved a fundamentally flawed scoresheet, therefore, a contemporaneous objection was not required to preserve the issue. The Fifth District Court, in *Hood v. State*, 603 So. 2d 642 (Fla. 5th DCA 1992), held that the defendant's failure to object did not waive objection to the assessment of victim injury points because, at the time of sentencing, victim injury points could properly be assessed without a showing of ascertainable physical injury. *Id.* at 643.

Although this Court accepted review of *Pinacle* because of conflict with *Linkous* and *Hood*, this Court did not expressly address the issue as to whether a contemporaneous objection is necessary to preserve the *Karchesky* issue. Instead, this Court, while citing the Third District Court's reliance on *Perryman*, found that the defendant in that case had made a sufficient objection at trial to preserve the issue for review. *Pinacle v. State*, 654 So. 2d at 910. In the instant case, the Third District Court, relying on this Court's affirmation of *Perryman*, held that a contemporaneous objection is required to preserve the issue for review.

The Second District, however, in *Montague v. State*, *supra*, concluded that because this Court did not expressly overrule *Linkous* in *Perryman*, *Linkous* remains viable. Nevertheless, that court certified the question to this Court. This Court granted review on October 17, 1995; No. 86,098.

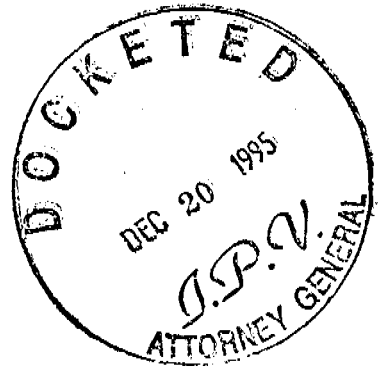


Consequently, the Third District Court recognized that its decision below is contrary to *Montague*.

Thus, the decision below directly and expressly conflicts with the decision in *Montague*.

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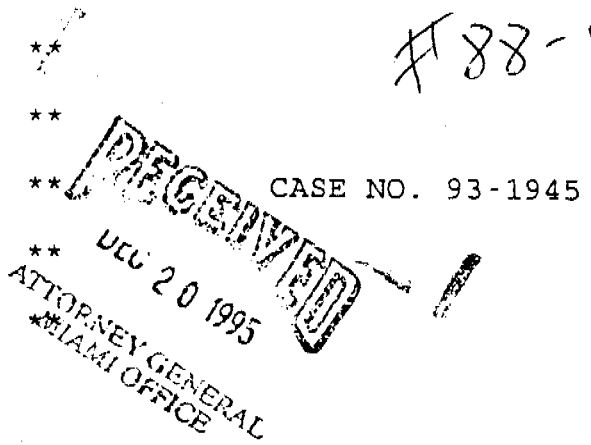
NOT FINAL UNTIL TIME EXPIRES  
TO FILE REHEARING MOTION  
AND, IF FILED, DISPOSED OF.



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

OTIS McCALISTER,  
Appellant,  
vs.  
THE STATE OF FLORIDA,  
Appellee.

#88-8896



CASE NO. 93-1945

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

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 Pinacle 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.